

## Article Information

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Service: Construction Litigation, Projects & Construction

Sector: Infrastructure

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## Payment Schedules: beware the own goal!

**Late or inadequate payment schedules attract harsh consequences.**

**In a busy project office with competing time demands, it's remarkably easy to suffer those consequences.**

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It's also remarkably easy to set your team up for an own goal - before you have even broken ground.

This is illustrated by a recent decision of the Queensland Court of Appeal (*Allencon v Carruthers*)<sup>[1]</sup>, where, Carruthers's subcontract (seemingly unwittingly) reduced the time for Carruthers to deliver payment schedules.

### *Payment Certificates v Payment Schedules*

BIFA<sup>[2]</sup> requires that payment schedules be given in response to payment claims by whichever is the earliest of:

- 15 business days after the payment claim is given to the respondent; and
- any agreed date for giving payment schedules.

Failure to respond to a payment claim within this period gives the claimant an entitlement to be paid the full amount of the payment claim.<sup>[3]</sup> Penalties may also be imposed.<sup>[4]</sup>

Separately and simultaneously, most Australian standard form contracts provide mechanisms by which third party assessors (ie: superintendents or other representatives) will:

- assess claims for progress payments made by contractors and subcontractors; and
- communicate the assessment in the form of 'payment certificates' issued within agreed timeframes.

As security of payment legislation requires **the respondent** to issue payment schedules, arguments that contractual (ie: third party issued) payment certificates are automatically payment schedules invariably fail. Spectacular awards of summary judgment have followed.<sup>[5]</sup>

This has triggered inclusion of special conditions in many standard form contracts that authorise the assessing third party to accept and issue payment claims on behalf of the respondent, and also issue payment schedules.

However, if care is not taken when your contract is prepared, these amendments can become traps: potentially resulting in heartbreaking own goals.

### *business day v calendar day*

The trap is set when parties fail to align:

- the period within which a BIFA payment schedule is required; and
- the period within which the contractual payment certificate is required.

Frequently, contracts require that steps be taken or periods be defined with reference to 'days' or 'calendar days'. Indeed, this is the default position under many different and frequently used standard form construction contracts .

However, BIFA (mostly) operates with reference to '*business days*', which exclude:

- Saturdays and Sundays;
- public holidays, special holidays and bank holidays where any relevant act is to be or may be done; and
- the whole period from 22 December to 10 January, each year.

### **How did Carruthers score the own goal?**

The subcontract between Allencon and Carruthers was an amended AS2545, requiring that Carruthers's representative issue contractual progress certificates in response to contractual progress claims within 21 calendar days.

By a special condition inserted into its subcontract, Carruthers appointed its representative as its agent to accept service of payment claims, assess payment claims and issue payment schedules.

The subcontract also required that payment claims be submitted on the 24<sup>th</sup> day of each month.

On 24 December 2021, Allencon submitted a payment claim.

Carruthers' representative responded to the payment claim by issuing a progress certificate on 28 January 2022.

The period of *15 business days* (ie: the period referred to in s76(1)(b) of BIFA) did not end until after 28 January 2022, given the intervening Christmas closedown period.

However, the period of *21 calendar days* from 24 December 2021 ended on 14 January 2022.

The Court of Appeal considered whether the AS2545 agreement to issue a payment certificate within 21 calendar days was also the agreed period for delivery of payment schedules.

While the requirements of payment schedules and payment certificates were not identical, everything which was required for a payment schedule was also required for a payment certificate.<sup>[6]</sup>

The effect of Carruthers' special condition was that Carruthers had agreed that its representative would issue BIFA payment schedules within 21 calendar days.<sup>[7]</sup>

As Carruthers representative failed to respond to the 24 December 2021 payment claim by 14 January 2022, Allencon was entitled to judgment against Carruthers for the full amount of the payment claim, plus interest.

Piper Alderman acted on behalf of the Appellant, Allencon Pty Ltd, in this matter.

<sup>[1]</sup> *Allencon Pty Ltd-V-Palmgrove Holdings Pty Ltd (trading as Carruthers Contracting)* [2023] QCA 6.

<sup>[2]</sup> See section 76(1).

<sup>[3]</sup> See ss.77(2) and 78(2)(a) of BIFA.

<sup>[4]</sup> See s 76(1), which imposes a penalty of \$14,375 for individuals or \$71,875 for corporations.

<sup>[5]</sup> See, for example, *Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited* [2003] NSWSC 1103

<sup>[6]</sup> At [34]

<sup>[7]</sup> At [38]