

Adjudicator's Decision
Pursuant to the *Building and Construction Industry*
Payments Act (QLD) 2004

FRANKIPILE AUSTRALIA PTY LTD (Claimant)

and

NORTASK PTY LTD (Respondent)

I, Warren David FISCHER, as the Adjudicator for this Adjudicator's Decision pursuant to the *Building and Construction Industry Payments Act 2004* (the Act), for the reasons set out in this decision, decide that:

- a. the adjudicated amount in respect of the adjudication application dated 6 May 2005 is \$87,199.50 (excluding GST); and**
- b. the date on which the adjudicated amount became payable is 26 April 2005;
and**
- c. the applicable rate of interest payable on the adjudicated amount is 18% per annum; and**
- d. the adjudicator's fees and expenses are to be paid by the Respondent.**

BACKGROUND

- 1 This adjudication arises from a disputed Payment Claim made by Frankipile Australia Pty Ltd (referred to in this decision as "the Claimant", "the Sub-Contractor" and "Franki") on Nortask Pty Ltd (referred to in this decision as "the Respondent", "the Contractor" and "Nortask"). The subject matter of the claim centres upon pile driving work associated with the construction of the "Banana Bridge" on the Brigalow-Kogan Road near Chinchilla in south west Queensland. A written contract for the subject work was entered into on 23 November 2004. The work commenced on site on 20 January 2005 and was completed on 9 February 2005. Numerous payments have been claimed, however no payment has been made.

APPOINTMENT OF ADJUDICATOR

- 2 The Claimant lodged an Adjudication Application, dated 6 May 2005, with the Institute of Arbitrators and Mediators Australia on 6 May 2005.
- 3 By letter, dated 6 May 2005, the Institute of Arbitrators and Mediators Australia referred the Adjudication Application to me. The Institute of Arbitrators and Mediators Australia is an Authorised Nominating Authority under the Act, Registration Number N1057859.
- 4 By letter, dated 9 May 2005, addressed to the Claimant and to the Respondent I accepted the Adjudication Application and thereby became the appointed Adjudicator. I am a Registered Adjudicator under the Act, Registration Number J1055362.

SCOPE OF THIS DECISION

- 5 The Act at Section 26(1) requires that I am to decide:
- 5.1 the amount of the progress payment (if any) to be paid by the Respondent to the Claimant (the adjudicated amount);
 - 5.2 the date on which any such amount became or becomes payable; and
 - 5.3 the rate of interest payable on any such amount.
- 6 The Act at Section 34(3)(b) gives me the discretion to decide the proportion of the contribution to be made by the Claimant and by the Respondent to the authorised nominating authorities fees. I will consider the exercise of that discretion after dealing with the substantive issues.
- 7 The Act at Section 35(3) gives me the discretion to decide the proportion of the contribution to be made by the Claimant and by the Respondent to the adjudicator's fees and expenses. I will consider the exercise of that discretion after dealing with the substantive issues.

Matters regarded in making the Decision

- 8 Section 26(2) restricts the matters which I may consider in deciding an Adjudication Application. Section 26(2) provides:

"In deciding an adjudication application, the adjudicator is to consider the following matters only:

- (a) the provisions of this Act and, to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;*
- (b) the provisions of the construction contract from which the application arose;*
- (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;*
- (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;*
- (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates".*

- 9 In making this decision I have had regard to the following:
- (i) The provisions of the *Building and Construction Industry Payments Act 2004*;
 - (ii) To the extent they are relevant the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
 - (iii) The provisions of the contract which have been provided by the Claimant from which the Adjudication Application arose;
 - (iv) The Payment Claim dated 29 March 2005 to which the application relates;
 - (v) The Notice to the Respondent dated 27 April 2005;
 - (vi) The Payment Schedule dated 5 May 2005 and enclosed documents;
 - (vii) The Adjudication Application dated 6 May 2005 and enclosed documents and submissions.
- 10 While within the adjudicator's discretion, by Section 25(4) of the Act, no further written submissions, conference or inspection were requested or conducted.

THE CONTRACT AND THE APPLICATION OF THE ACT

Parties

11 The contract submitted by the Claimant identifies the parties to the contract as:

Main Contractor: Nortask Pty Ltd
ABN 64 077 690 852
20-24 Enterprise Road
Mount Isa QLD 4825

Subcontractor: Frankipile Australia Pty Ltd
ACN 000 842 240
PO Box 1312
Eagle Farm Business Centre
Eagle Farm QLD 4009

Is the contract within the jurisdiction of the Act

12 The Adjudication Application included a written submission by the Claimant and copies of several documents including invoices and correspondence from the Respondent and a copy of the contract.

13 The Claimant submits that the contract documents include:

- (a) The Claimant's tender dated 19th November 2004 (Reference BB/JK Q/3968); and
- (b) AS 4903 – 2000, general conditions of sub-contract for design and construct; and
- (c) The Respondent's Purchase Order 8066 dated 23 November 2004 *"to bore and drive 36 piles at Banana Bridge as x discussions with Hermes of Nortask and Bruce of Frankipile and your quotation dated 19th of November 2004"*.

14 The Respondent has made no rebuttal of the Claimant's submission and I therefore accept that those documents constitute the contract documents and I have relied upon them for the purposes of this adjudication.

15 It is my decision therefore that there is a written contract in place, between the parties, governing the work the subject of the Payment Claim.

16 Furthermore, it is my decision that the date of the contract between the parties is 23 November 2004, being the date that the Respondent issued the Purchase Order for the work.

17 Schedule 2 to the Act provides that a

*“**construction contract** means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.”*

18 Section 10(1)(a) of the Act provides:

“(1) “Construction work” means any of the following work—

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;”

19 It is my decision that the work the subject of the contract, being the driving of piles for a bridge, is construction work within the meaning of the Act and therefore that the subject contract is a construction contract within the meaning of the Act.

20 Section 3(1) of the Act provides:

“(1) Subject to this section, this Act applies to construction contracts entered into after the commencement of parts 2 and 3—

(a) whether written or oral, or partly written and partly oral; and

(b) whether expressed to be governed by the law of Queensland or a jurisdiction other than Queensland.”

21 Subordinate Legislation 2004 No. 091 provides, inter alia:

“1. The following provisions commence 1 July 2004—

- section 9*
- parts 4 and 5*
- sections 104 to 106*
- sections 108 to 113*
- schedule 1 to the extent it amends the Commercial and Consumer Tribunal Act 2003*
- schedule 2.*

2. *The provisions that are not in force and not otherwise commenced under this proclamation commence 1 October 2004.*”

22 It is my decision that Section 3(1) of the Act has been satisfied as the adjudication application relates to a payment claim the subject of construction work for which there exists a construction contract entered into after 1 October 2004.

23 Section 3(2) of the Act provides:

“(2) This Act does not apply to—

(a) a construction contract to the extent that it forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes—

(i) to lend an amount or to repay an amount lent; or

(ii) to guarantee payment of an amount owing or repayment of an amount lent; or

(iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract; or

(b) a construction contract for the carrying out of domestic building work if a resident owner is a party to the contract, to the extent the contract relates to a building or part of a building where the resident owner resides or intends to reside; or

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated other than by reference to the value of the work carried out or the value of the goods and services supplied.”

24 There is no indication within the construction contract that it forms part of a loan agreement. The construction contract is to drive piles for a bridge, not domestic building work. The construction contract contains no provision for the consideration payable to be other than by reference to the value of the work carried out. Neither party has made any submissions in respect of any such provisions.

25 In the absence of any submissions to the contrary, it is my decision that there is nothing in the contract that prevents the application of the Act by virtue of Section 3(2).

26 Section 3(3) of the Act provides:

“(3) This Act does not apply to a construction contract to the extent it contains—

- (a) provisions under which a party undertakes to carry out construction work, or supply related goods and services in relation to construction work, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or*
- (b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services in relation to construction work, as a condition of a loan agreement with a recognised financial institution; or*
- (c) provisions under which a party undertakes—*
 - (i) to lend an amount or to repay an amount lent; or*
 - (ii) to guarantee payment of an amount owing or repayment of an amount lent; or*
 - (iii) to provide an indemnity relating to construction work carried out, or related goods and services supplied, under the construction contract.”*

27 The construction contract is between parties that are both proprietary limited companies for the provision of pile driving services, it is not an personnel employment contract. The contract contains no provision pertaining to an undertaking to carry out work as a condition of a loan agreement. There are no provisions in the contract that provide an undertaking to lend or repay lent money, guaranteeing payment of an amount owing or provide an indemnity relating to the construction work carried out. Neither party has made any submissions in respect of any such provisions.

28 In the absence of any submissions to the contrary, it is my decision that there is nothing in the contract that falls foul of the Act by virtue of Section 3(3).

29 Section 3(4) of the Act provides:

“(4) This Act does not apply to a construction contract to the extent it deals with construction work carried out outside Queensland or related goods and services supplied for construction work carried out outside Queensland.”

30 The contract is for the installation of piles for the Banana Bridge on the Brigalow-Kogan Road near Chinchilla.

31 It is within my knowledge that Brigalow-Kogan Road near Chinchilla is in south western Queensland and I therefore infer that the works the subject of the Contract were carried out inside Queensland, in satisfaction of Section 3(4) of the Act.

32 Neither party has made any submission in respect of the work being the subject of a notice of claim of charge under the *Subcontractors' Charges Act 1974*. Therefore Section 4 of the Act is not currently applicable to this adjudication.

33 It is my decision that the construction contract is within the jurisdiction of the Act.

Reference date

34 Section 12 of the Act provides:

“From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.”

35 Schedule 2 of the Act provides:

“reference date, under a construction contract, means—

(a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or

(b) if the contract does not provide for the matter—

(i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and

(ii) the last day of each later named month.”

36 The Claimants' written submission includes the statement "*Pursuant to these subcontract conditions, progress claims were to be made on the 25th day of each month for work under the subcontract done to the last day of that month*".

37 Clause 37.1 of the contract provides:

"The subcontractor shall claim payment progressively in accordance with Item 37.

An early progress claim shall be deemed to be made on the date for making that claim.

Each progress claim shall be given in writing to the Subcontract Superintendent and shall include details of the value of WUS done and may include details of other moneys then due to the Subcontractor pursuant to the provisions of the Subcontract."

38 Item 37(a) of the annexure to the contract provides:

"Times for progress claims 25th day of each month for work under the subcontract done to the last day of that month."

39 Based on the Claimant's submission and provisions of the contract, it is my decision that the contract does contain a provision as to the date on which a claim for a progress claim may be made and that provision, which prevails over the implied provision in the Act, is the 25th day of each month.

40 For the Payment Claim the subject of this adjudication application it is my decision that the reference date is therefore 25 March 2005.

Amount of a progress payment

41 Section 13 of the Act provides:

"The amount of a progress payment to which a person is entitled in relation to a construction contract is—

- (a) the amount calculated under the contract; or*
- (b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract."*

42 Clause 37 of the contract provides, inter alia:

“37.1 Progress Claims

The subcontractor shall claim payment progressively in accordance with Item 37.

An early progress claim shall be deemed to be made on the date for making that claim.

Each progress claim shall be given in writing to the Subcontract Superintendent and shall include details of the value of WUS done and may include details of other moneys then due to the Subcontractor pursuant to the provisions of the Subcontract.

37.2 Certificates

The Subcontract Superintendent shall, within 21 days after receiving such a progress claim, issue to the Main Contractor and the Subcontractor

- a) a progress certificate evidencing the Subcontract Superintendent's opinion of the moneys due from the Main Contractor to the Subcontractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and*
- b) a certificate evidencing the Subcontract Superintendent's assessment of retention moneys and moneys due from the Subcontractor to the Main Contractor pursuant to the Subcontract.*

If the Subcontractor does not make a progress claim in accordance with Item 37, the Subcontract Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).

If the Subcontract Superintendent does not issue the progress certificate within 21 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.

The Main Contractor shall within 7 days after receiving both such certificates, or within 28 days after the Subcontract Superintendent receives the progress claim, pay to the Subcontractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Main Contractor elects to set off. If that setting off produces a negative balance, the Subcontractor shall pay that balance to the Main Contractor within 7 days of receiving written notice thereof.

Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUS has been carried out satisfactorily. Payment other than final payment shall be payment on account only.”

- 43 Neither party has made a submission in respect of the method of calculation of the amount of a progress payment, however based on the above provisions of the contract, it is my decision that the contract does provide a method of calculation of the amount of a progress payment and therefore those provisions prevail over the implied provisions of the Act.

Valuation of construction work

- 44 Section 14 of the Act provides, inter alia:

“Construction work carried out or undertaken to be carried out under a construction contract is to be valued—

- (a) under the contract; or*
- (b) if the contract does not provide for the matter, having regard to—*
 - (i) the contract price for the work; and*
 - (ii) any other rates or prices stated in the contract; and*
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and*
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.”*

- 45 Clause 37(1) of the contract provides:

“37.1 Progress Claims

The subcontractor shall claim payment progressively in accordance with Item 37.

An early progress claim shall be deemed to be made on the date for making that claim.

Each progress claim shall be given in writing to the Subcontract Superintendent and shall include details of the value of WUS done and may include details of other

moneys then due to the Subcontractor pursuant to the provisions of the Subcontract.”

46 Neither party has made a submission in respect of the valuation of work under the contract, however based on the above provisions of the contract, it is my decision that the contract does provide a method of valuation of work and therefore Section 14(1)(a) of the Act prevails.

Due date for payment

47 Section 15(1) of the Act provides:

“(1) A progress payment under a construction contract becomes payable—

(a) if the contract contains a provision about the matter that is not void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W—on the day on which the payment becomes payable under the provision; or

(b) if the contract does not contain a provision about the matter or contains a provision that is void under section 16 or under the Queensland Building Services Authority Act 1991, section 67U or 67W—10 business days after a payment claim for the progress payment is made under part 3.”

48 Neither party has made a submission that the contract is subject to the provisions of the *Queensland Building Services Authority Act 1991*.

49 The Claimants' written submission includes the statement *“The payment terms of the Offer were twenty-eight (28) days from the date of invoice”*

50 Clause 37.2 of the contract provides, inter alia:

“The Main Contractor shall within 7 days after receiving both such certificates, or within 28 days after the Subcontract Superintendent receives the progress claim, pay to the Subcontractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Main Contractor elects to set off. If that setting off produces a negative balance, the Subcontractor shall pay that balance to the Main Contractor within 7 days of receiving written notice thereof.”

51 Based on the Claimant's submission and provisions of the contract, it is my decision that the contract does contain a provision about when a progress payment

becomes payable and that provision, which prevails over the implied provision in the Act, is 28 days after receipt by the Respondent of the payment claim.

Interest

52 Section 15(2) and Section 15(3) of the Act provide:

"(2) Subject to subsection (3), interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—

(a) the rate prescribed under the Supreme Court Act 1995, section 48(1) for debts under a judgment or order;

(b) the rate specified under the contract.

(3) For a construction contract to which Queensland Building Services Authority Act 1991, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section".

53 The rate prescribed under the Supreme Court Act 1995, Section 48(1) for debts under a judgment or order is currently 10%.

54 The Claimants' written submission includes the statement "*Interest on the Payment Claim is claimed in accordance with s15(2)(b) of the BCIPA at the rate of 18% per annum as described in Clause 37.5 of the Subcontract*".

55 Clause 37.5 of the contract provides:

"Interest in Item 39 shall be due and payable after the date of default in payment."

56 Item 39 of the annexure to the contract provides:

"Interest rate on overdue payments (subclause 37.5) 18 % per annum"

57 Based on the Claimant's submission and provisions of the contract, it is my decision that the contract does contain a provision as to the rate of interest payable on the unpaid amount of a progress payment of 18% per annum.

58 Neither party has made a submission that the contract is subject to the provisions of the *Queensland Building Services Authority Act 1991*.

59 Section 15(2) of the Act provides that the *greater* of the subsequent provisions prevail. In this instance the greater of 10% and 18%.

60 It is my decision that the prevailing provision as to the rate of interest payable on the unpaid amount of a progress payment is Section 15(2)(b), namely 18% per annum.

Payment Claim

61 Section 17(1) of the Act provides:

“A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the respondent).”

62 The Claimant submits that *“On 29 March 2005, Frankipile served a Payment Claim under the BCIPA to Nortask Pty Ltd by facsimile to Nortask’s place of business.”*

63 The copy of the Payment Claim I have been provided bears both facsimile imprint and a fax stamp bearing date 29 March 2005.

64 The Respondent has not disputed the date of service of the Payment Claim.

65 I therefore accept that the Payment Claim was served on the Respondent on 29 March 2005 and I have relied upon that for the purposes of this adjudication.

66 It is therefore my decision that, in satisfaction of Section 17(1) of the Act, the Claimant has served a payment claim on the person who, under the contract concerned, is or may become liable to make the payment and that, in satisfaction of Section 12, the payment claim was served from a reference date.

67 Section 17(2) of the Act provides:

“A payment claim—

(a) must identify the construction work or related goods and services to which the progress payment relates; and

(b) must state the amount of the progress payment that the claimant claims to be payable (the claimed amount); and

(c) must state that it is made under this Act.”

68 The Payment Claim reference number 4/1468/F3/BCIPA, dated 29 March 2005, is made up as set out in the following table:

BANANA BRIDGE - BRIGALOW

For:

i) Work performed in accordance with the subcontract between Nortask and Frankipile (which incorporates the offer from Frankipile dated 19th November 2004, subcontract conditions AS4903 and Purchase Order no.8066 from Nortask dated 23rd November 2004), in particular, the pre-drill and drive of 36no. precast PSC piles as part of the Banana Bridge project.	\$75,412.00
ii) Installation of 6no. permanent liners supplied by client to Abutment B (drilling rig: 6 hrs @ \$250.00/hr, plus piling crew: 3 men x 6 hrs x \$75.00/hr each)	2,850.00
iii) No craneage available on site all day on Fri. 21/01/05, driving rig and crew idle (C108: 8 hrs @ \$250.00/hr, plus piling crew and supervisor: 3 men x 8 hrs x \$75.00/hr each)	3,800.00
iv) No craneage available on site Sat. 22/01/05 0700-1300 hrs (C108 and crew idle: 6 hrs @ \$250.00/hr, plus 3 men x 6 hrs x \$75.00/hr each)	2,850.00
v) Sat. 22/01/05: Frankipile rig driver, W. Johnston, had to operate mobile crane Kato 45t due to lack of operator (2 hrs x \$75.00/hr)	150.00
vi) No craneage Tues. 25/01/05 0700-0830 hrs (C108 and crew idle: 1.5 hrs x \$250.00, plus 3 men x 1.5 hrs x \$75.00/hr each)	712.50
vii) Standing time Thurs. 27/01/05: completed driving all available piles, waited for Nortask to complete piling platform access to get onto remaining Pile No. 21 on Pier 2: 0830-1130 hrs (C108: 3 hrs x \$250.00/hr, plus 3 men x 3 hrs x \$75.00/hr each)	1,425.00
	\$87,199.50
Value of this claim (excluding GST)	\$87,199.50
add: GST on this claim	\$8,719.95
Value of this claim (including GST)	\$95,919.45

69 The Payment Claim reference number 4/1468/F3/BCIPA, dated 29 March 2005, clearly identifies the construction work to which it relates.

70 The Payment Claim reference number 4/1468/F3/BCIPA, dated 29 March 2005, identifies the amount of the progress payment that the claimant claims to be payable as \$95,919.45 (including GST)”

71 The Payment Claim reference number 4/1468/F3/BCIPA, dated 29 March 2005, was endorsed “*This is a Payment Claim made under the Building and Construction Industry Payments Act 2004*”.

72 It is my decision that the payment claim to which the adjudication application relates (invoice reference number 4/1468/F3/BCIPA, dated 29 March 2005), satisfies the requirements of Section 17(2) the Act.

73 Section 17(4) of the Act provides:

“A payment claim may be served only within the later of—

(a) the period worked out under the construction contract; or

(b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.”

74 Therefore, irrespective of any provision in the construction contract, a payment claim may be served within a minimum period of 12 months after the construction work to which the claim relates was last carried out.

75 The Claimant submitted that “*(t)he Subcontract works commenced on 20 January 2005. All Subcontract works have been completed.*” The Respondent did not contest that submission.

76 It follows that the Payment Claim, submitted 29 March 2005, has been issued within 12 months of completion of the work the subject of the claim.

77 It is my decision that the payment claim has been served within the period permitted by Section 17(4) of the Act.

Division 1 Payment Schedule

78 Section 18(4) of the Act requires that a respondent serve a payment schedule within the earlier of:

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the payment claim is served.

79 Clause 37.2 of the contract provides, inter alia:

“The Subcontract Superintendent shall, within 21 days after receiving such a progress claim, issue to the Main Contractor and the Subcontractor

a) a progress certificate evidencing the Subcontract Superintendent's opinion of the moneys due from the Main Contractor to the Subcontractor pursuant to the progress claim and reasons for any difference ('progress certificate');”

80 It is my decision that the prevailing provision as to the time for service of a division 1 payment schedule is Section 18(4)(ii), namely within 10 business days after the payment claim is served.

81 Therefore for the Payment Claim served on 29 March 2005, the time for service of a Division 1 Payment Schedule is by 12 April 2005.

82 The Claimant submits that:

“Nortask did not provide a Payment Schedule to Frankipile within ten (10) business days, that is, by 12 April 2005.

Nortask purport to assert that it did send a Payment Schedule by,

- *sending to Frankipile a bundle of seven (7) invoices numbered 468 to 474 and all dated 4 March 2005 (pre-dating the Payment Claim),*
- *an invoice number 532 dated 11 April 2005 which attached a document entitled “Report, Piling Pier 2 Banana Bridge Road for Nortask Pty Ltd”.*

Neither of these documents is a Payment Schedule in accordance with the requirement of ss18(2) and (3) of the BCIPA, in that the documents:

- *do not identify the Payment Claim to which they relate, and*
- *do not state the amount of the payment, if any, that Nortask propose to make, and*
- *do not state Nortask’s reasons for withholding payment.*

Therefore, in accordance with ss18(4) and (5) of the BCIPA, Nortask is now liable to pay the claimed amount to Frankipile.”

83 The adjudication application includes a copy of Nortask's invoice numbers 468 to 474 all dated 4 March 2005. An inspection of these documents reveals that:

- they pre-date the Payment Claim the subject of this adjudication application; and
- no reference is made to any Payment Claim; and
- no amount is stated for payment in respect of Franki's Payment Claim; and
- no reasons are provided for withholding payment of any of the amounts claimed in Franki's Payment Claim.

84 The adjudication application includes a copy of a Nortask facsimile transmission (Ref: HSA:50054) totalling 5 pages dated, and bearing facsimile imprint and fax stamp of, 15 April 2005. This transmission includes the cover page, Nortask invoice number 532 dated 11 April 2005 and a Brandon & Associates Pty Ltd "Report – Piling Pier 2 Banana Bridge" dated 8 April 2005. An inspection of these documents reveals that:

- the facsimile post-dates the due date for service of a Payment Schedule; and
- no reference is made to any Payment Claim; and
- no amount is stated for payment in respect of Franki's Payment Claim; and
- no reasons are provided for withholding payment of any of the amounts claimed in Franki's Payment Claim.

85 Section 18(2) and 18(3) of the Act provide:

"(2) A payment schedule—

- (a) must identify the payment claim to which it relates; and*
- (b) must state the amount of the payment, if any, that the respondent proposes to make (the scheduled amount).*

(3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the

respondent is withholding payment for any reason, the respondent's reasons for withholding payment."

86 It is therefore my decision that none of Nortask's invoice numbers 468 to 474 or Nortask facsimile transmission (Ref: HSA:50054) satisfy the provisions of Sections 18(2) and 18(3) of the Act.

87 It is therefore my decision that a Payment Schedule was not issued by 12 April 2005, and therefore that the Respondent has failed to serve a Payment Schedule on the Claimant under Division 1 of the Act.

Division 2 Payment Schedule

88 The adjudication application includes a copy of facsimile sent to Franki by Murdoch Lawyers dated, and bearing facsimile imprint, 5 May 2005. Adam Brown of Murdoch Lawyers claims to represent Nortask and has included in the facsimile a Payment Schedule signed by himself for and on behalf of Nortask.

89 Whilst there may be some question as to the validity of a payment schedule signed and served by other than the Respondent (Ref: *Taylor Projects Group Pty Limited v Brick Dept Pty Limited & Ors [2005] NSWSC 439* at paras 37-39), as the point has not been taken by the Claimant, for the purpose of this adjudication I will treat this facsimile as a division 2 payment schedule.

90 The Claimant submits that:

"Nortask failed to deliver a Payment Schedule in response to the Payment Claim by 12 April 2005. Delivery of a Payment Schedule on 5 May 2005 does not remedy this failure by Nortask."

91 The Claimant also submits that:

"in accordance with ss18(4) and (5) of the BCIPA, Nortask is now liable to pay the claimed amount to Frankipile."

92 Sections 18 (4) and (5) of the Act provide:

"(4) Subsection (5) applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not serve a payment schedule on the claimant within the earlier of—

- (i) *the time the relevant required by construction contract; or*
- (ii) *10 business days after the payment claim is served.*

(5) *The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.”*

- 93 It is apparent that the Act anticipates two alternatives with respect to payment schedules, namely those served under “Division 1” and those served under “Division 2” (Ref: *Amflo Constructions Pty Limited v Anthony Jefferies [2003] NSWSC 856* at paras 39-40).
- 94 I have earlier decided that no Payment Schedule was issued on the Claimant by 12 April 2005, being 10 business days after the payment claim was served.
- 95 I do not consider that Section 18(5) of the Act provides any discretion; however, I also consider it clear that any liability must be restricted to matters to which the Act applies.
- 96 Therefore, notwithstanding the provisions of Section 18(5), a division 2 payment schedule may contain relevant submissions, for example issues of jurisdiction (s3, s10 etc) or timeliness (s12, s21(2), s21(3)(c) etc), as to why the Act should not apply to all or part of a payment claim.
- 97 The Respondents submissions are that:
- “(t)he work performed by the claimant is grossly defective and required the respondent to undertake extensive rectification work ”; and*
- “(t)he claimants negligence caused the respondent to incur the cost of remedial work ”; and*
- “(t)he claimant failed and/or neglected to carry out the Contract Works in a timely manner ”*
- “(t)he losses sustained by the respondent outweigh the quantum of the claimants claim ”*
- 98 None of these submissions provide any basis for me to find that the work is outside the ambit of the Act.

- 99 It is therefore my decision that there is nothing in the Payment Schedule that prevents the operation of Section 18(5) of the Act. It is my decision that it follows that the Respondent is liable to pay those amounts claimed, that are subject to the Act, to the Claimant on the due date for the progress payment to which the payment claim relates.
- 100 If I am wrong in that decision then, in any event, the submissions contained in the Payment Schedule do not identify any contractual entitlement for the deduction of money the Respondent claims to be owing to it from the Claimant.
- 101 To the contrary the Contract provides at Clause 16A that the Respondent *“shall ensure that there is in force a policy of insurance in relation to loss or damage to WUS in the terms of the policy or proposed policy included in the documents on which the Subcontractor tendered...”*
- 102 The Claimants tender provided: *“This Offer excludes any provision for Contract Works insurance, and is based on the premise that Contract Works insurance is provided by the main contractor / builder and that we, as the Piling Subcontractor, are specified as an insured party under that policy.”*
- 103 As neither party has addressed any contractual basis for the Respondent's claim it is difficult, and in the circumstances unnecessary, to decide this matter. It is however correct to say that the Respondent would fail on the information contained in its payment schedule as that document does not identify any contractual entitlement for the deduction of the money it claims.

Adjudication Application

- 104 Section 21(1)(b) of the Act provides that a Claimant may apply for adjudication of a payment claim (an “adjudication application”) if:
- “the respondent fails to serve a payment schedule on the claimant under division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.”*
- 105 I have already decided that these are the circumstances that apply in the present case.
- 106 Section 21(2) of the Act provides that:
- “An adjudication application to which subsection (1)(b) applies can not be made unless—*

- (a) *the claimant gives the respondent notice, within 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and*
- (b) *the notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant's notice."*

107 The Payment Claim was served on 29 March 2005, therefore the due date for payment was 26 April 2005.

108 Making due allowance for public holidays, the notice to the Respondent of the Claimant's intention to apply for adjudication of the payment claim and notice that the Respondent may serve a payment schedule is therefore required to be issued between 27 April 2005 and 26 May 2005.

109 By facsimile dated 27 April 2005, the Claimant served notice on the Respondent of the Claimant's intention to apply for adjudication of the payment claim and stating that the Respondent may serve a payment schedule within five business days after receiving the notice.

110 Making due allowance for public holidays, the period for the Respondent to provide a payment schedule in response to that notice is between 28 April 2005 and 5 May 2005.

111 It is my decision that the Claimant has fulfilled the requirements of Section 21(2) of the Act in respect to giving notice of its intention to make an adjudication application and the opportunity for the Respondent to serve a Payment Schedule.

112 Section 21(3) of the Act provides:

"An adjudication application—

- (a) *must be in writing; and*
- (b) *must be made to an authorised nominating authority chosen by the claimant; and*
- (c) *must be made within the following times—*

.....

- (iii) *for an application under subsection (1)(b)—within 10 business days after the end of the 5 day period referred to in subsection (2)(b); and*

- (d) *must identify the payment claim and the payment schedule, if any, to which it relates; and*
- (e) *must be accompanied by the application fee, if any, decided by the authorised nominating authority; and*
- (f) *may contain the submissions relevant to the application the claimant chooses to include.”*

113 By Section 21(3)(c)(iii) the earliest date the Claimant may apply for adjudication of the payment claim is therefore 6 May 2005 being the business day immediately following the expiry of the 5 business days during which the Respondent could serve a Division 2 payment schedule.

114 On 6 May 2005, the Claimant lodged a written adjudication application with the Institute of Arbitrators and Mediators Australia, an Authorised Nominating Authority (ANA).

115 The Adjudication Application identifies the payment claim being the Payment Claim dated 29 March 2005 and the payment schedule being the Payment Schedule dated 5 May 2005. The relevant ANA does not charge an application fee for an application of this value. The Adjudication Application included submissions from the Claimant.

116 It is my decision that the Claimant has fulfilled the requirements of Section 21(3) of the Act.

Adjudication Response

117 Section 24 (1) of the Act provides:

Subject to subsection (3), the respondent may give the adjudicator a response to the claimant’s adjudication application (the adjudication response) at any time within the later of the following to end —

- (a) *5 business days after receiving a copy of the application;*
- (b) *2 business days after receiving notice of an adjudicator’s acceptance of the application.*

118 The Claimant lodged its adjudication application on 6 May 2005 and I served my notice of acceptance on 9 May 2005.

- 119 On 9 May 2005, the Respondent's lawyers advised by facsimile: *"My client has forwarded me a copy of your correspondence dated 9 May 2005 ... I look forward to receiving a copy of the adjudication application so that my client can provide you with an adjudication response. An adjudication response will be provided within the time allowed under section 24 of the BCIPA."*
- 120 As Section 24(1) provides the time for giving an adjudication response is governed by the later of the two provisions given, the Respondent's time for delivery of its adjudication response on this occasion is within the period ending 5 business days following its receipt of the adjudication application.
- 121 The Claimant's adjudication application, dated 6 May 2005, provides: *"We have today served this Adjudication Application on the Respondent, Nortask Pty Ltd, by sending a copy of the above documents by express post to the Head Office of Nortask at "Cascina" Warrego Highway, PO Box 431, Dalby, Qld 4005 (sic) and to the address of the Respondent described in the subcontract between the parties at 20-24 Enterprise Road, Mt Isa, Qld, 4825."*
- 122 I note that there is an error in the Dalby postcode. The Nortask letterhead shows this postcode as 4405. I do not know if the Claimant has simply made a typographical error in its cover letter or if it so addressed the express post.
- 123 Australia Post advises the following with respect to delivery times for Express Post:

Next Business Day Delivery Networks

The national next business day network operates between all capital cities (except Darwin and in Perth CBD only) and a number of other important centres.

In each State an additional next business day delivery network is available between a number of places not included in the national network.

Beyond these networks, the fastest possible delivery is provided on a non-guaranteed basis.

To see details of the networks that applies in the State of posting, click on the appropriate link below

Queensland State Network

Next business day delivery between the places listed below.

Location:	Postcode Range/s
Brisbane and Suburbs	4000-4209
Gold Coast	4210-4299; 2484-2490; 9726; 9728; 9729
Goodna/Booval/Ipswich/ Boonah/Lockyer Valley	4300-4349
Toowoomba Area**	4350-4383; 4385-4428; 4486-4487;
Strathpine/Caboolture/Sunshine Coast	4494-4498; 4602-4618 4500-4601
Maryborough/Bundaberg	
Gladstone	4619-4676***
Rockhampton/Yeppoon	4680*
Mackay	4700; 4701; 4702**; 4703
Townsville/Bluewater	4740*
Cairns	4810-4815; 4817; 4818*
Casino	4870*
	2468; 2470*

- * Service guaranteed in townships only in these postcodes
 ** Service guaranteed to Mail Centre Post Office Boxes only
 *** Next day delivery to remote townships is not guaranteed.
 For details please ask post office staff.

- 124 Therefore, if properly addressed, the Respondent should have received, in the ordinary course of post, a copy of the adjudication application at its Dalby PO Box on Monday 9 May 2005 and, I anticipate, at its Mt Isa address on Tuesday 10 May 2005.
- 125 For the purposes of this adjudication decision, and bearing in mind the possible postcode error in the Dalby address, I give the Respondent the benefit of the later delivery, at which time I anticipate that the adjudication application would have been received at both addresses, namely on Tuesday 10 May 2005.
- 126 Based on that receipt date, the Respondent could give an adjudication response until the end of 17 May 2005.
- 127 At the time of publishing this decision I have not received an adjudication response.
- 128 Section 25 (2) of the Act provides:
- “An adjudicator must not consider an adjudication response unless it was made before the end of the period within which the respondent may give a response to the adjudicator.”*
- 129 It is therefore my decision that, in accordance with Section 25(2) of the Act, I am now unable to consider an adjudication response for the Respondent.

130 Section 25 (1) of the Act provides:

“An adjudicator must not decide an adjudication application until after the end of the period within which the respondent may give an adjudication response to the adjudicator.”

131 It is therefore my decision that, in accordance with Section 25(1) of the Act, I am now able to decide the adjudication application.

TENDERED WORK

Claimed: \$75,412.00

Paid: \$0.00

- 132 When discussing the Division 2 Payment Schedule, I have already found that the Respondent is liable to pay the claimed amount by virtue of the application of Section 18(5) unless the Act does not apply to the work claimed.
- 133 When considering whether the contract is within the jurisdiction of the Act I have, in the instance of the work the subject of the original offer and purchase order, already determined that the Act applies.
- 134 From the parties submissions it is clear that it is common ground that the tendered work has been carried out.
- 135 Therefore with respect to the tendered work, it is my decision that the Claimant has made good its submission that *"in accordance with ss18(4) and (5) of the BCIPA, Nortask is now liable to pay the claimed amount to Frankipile"* and that the Claimant is entitled to payment of its claim in the amount of \$75,412.00 (excl GST).
- 136 **To collection: \$75,412.00**

ADDITIONAL WORK**Claimed: \$11,787.50****Paid: \$0.00**

- 137 The work in question is identified as items ii to vii in the Claimant's Payment Claim. Those items identify the 'work' to which the claim relates, provide the basis of calculation and a total amount claimed for each item as follows:

ii) Installation of 6no. permanent liners supplied by client to Abutment B (drilling rig: 6 hrs @ \$250.00/hr, plus piling crew: 3 men x 6 hrs x \$75.00/hr each)	2,850.00
iii) No craneage available on site all day on Fri. 21/01/05, driving rig and crew idle (C108: 8 hrs @ \$250.00/hr, plus piling crew and supervisor: 3 men x 8 hrs x \$75.00/hr each)	3,800.00
iv) No craneage available on site Sat. 22/01/05 0700-1300 hrs (C108 and crew idle: 6 hrs @ \$250.00/hr, plus 3 men x 6 hrs x \$75.00/hr each)	2,850.00
v) Sat. 22/01/05: Frankipile rig driver, W. Johnston, had to operate mobile crane Kato 45t due to lack of operator (2 hrs x \$75.00/hr)	150.00
vi) No craneage Tues. 25/01/05 0700-0830 hrs (C108 and crew idle: 1.5 hrs x \$250.00, plus 3 men x 1.5 hrs x \$75.00/hr each)	712.50
vii) Standing time Thurs. 27/01/05: completed driving all available piles, waited for Nortask to complete piling platform access to get onto remaining Pile No. 21 on Pier 2: 0830-1130 hrs (C108: 3 hrs x \$250.00/hr, plus 3 men x 3 hrs x \$75.00/hr each)	1,425.00

- 138 The Claimant submitted that the amounts claimed are additional to the original subcontract sum of \$75,412.00 and represent costs incurred by the Claimant as a result of:

- “(i) Latent conditions*
- (ii) Nortask's failure to provide craneage to pitch piles, and*
- (iii) Nortask's failure to provide access for the piling rig between piers”*

- 139 I infer that:

item ii of the Payment Claim, in the Claimant's view, is attributable to *”Latent conditions”*, and

items iii to vi of the Payment Claim, in the Claimant's view, are attributable to *“Nortask's failure to provide craneage to pitch piles”*, and

item vii of the Payment Claim, in the Claimant's view, is attributable to "*Nortask's failure to provide access for the piling rig between piers*".

140 Claimant's letter of offer provides, inter alia:

"Offer:

For the installation of:

12 number 500 mm octagonal piles, and

24 number 550 mm octagonal piles

....

This Offer is subject to the following Conditions:

...

The following services will be provided by others, at no charge to us:

a) *The pitching of octagonal prestressed concrete piles into pre-drilled holes;*

...

Should our progress be delayed by the Principal, our client, or any other parties controlled by them, or by encountering obstructions above or below ground, we will require to be reimbursed at cost +15% for external works and at the following delay rates:

Piling rig, etc: ... \$250.00/hour

Drilling rig, etc: ... \$250.00/hour

Labour: ... \$75.00/man-hour"

141 With regard to item ii; Clause 25 of the Contract is headed "Latent conditions" and provides for circumstances in which the Claimant is able to claim for latent conditions and that, in those circumstances, the latent conditions shall be a deemed variation.

142 With regard to items iii to vii; Clause 34 of the Contract is headed "Time and progress" and provides for circumstances in which the Claimant is able to claim for extension of time and that, in some of those circumstances, the Claimant is entitled to "Delay damages" under Clause 41.

- 143 It is my decision that the Contract does make provision for circumstances in which the Claimant is able to claim for additional costs incurred arising out of matters of the nature of those submitted and claimed by the Claimant.
- 144 All of costs associated with items ii to vii of the Payment Claim arise from a combination of the provision of “related goods”, which are defined in Section 11(1)(a) of the Act to include *“plant ... for use in connection with the carrying out of construction work”* and the provision of “related services”, which are defined in Section 11(1)(b) of the Act to include *“the provision of labour to carry out construction work”* [Ref: *Co-ordinated Construction Co Pty Limited v Climatech (Canberra) Pty Ltd [2005] NSWSC 312* at paras 35 to 39].
- 145 The Contract in this case required the Claimant to provide these related goods and services, and permitted payment for the provision of these goods and services even when there was no construction work to actually carry out.
- 146 Therefore it is my decision that the Act does apply to the additional ‘work’ claimed in items ii to vii of the Payment Claim and that the Contract includes provisions for payment for that additional work.
- 147 When discussing the Division 2 Payment Schedule, I have already found that the Respondent is liable to pay the claimed amount by virtue of the application of Section 18(5) unless the Act does not apply to the work claimed.
- 148 Therefore with respect to the additional work, it is my decision that the Claimant has made good its submission that *“in accordance with ss18(4) and (5) of the BCIPA, Nortask is now liable to pay the claimed amount to Frankipile”* and that the Claimant is entitled to payment of its claim in the amount of \$11,787.50 (excl GST).
- 149 **To collection: \$11,787.50**

THE ADJUDICATED AMOUNT

150 Section 26(1)(a) requires that I am to decide the amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the adjudicated amount).

151 It is my decision that the adjudicated amount payable to Franki in this progress payment is \$87,199.50 (excluding GST).

152 The calculation of the adjudicated amount is set out in the Collection below:

Collection (all amounts excluding GST)

Payable to Franki in this progress payment

Tendered Work	\$75,412.00
Additional Work	\$11,787.50
Progress payment due to Franki	\$87,199.50

DUE DATE FOR PAYMENT

153 Section 26(1)(b) requires that I am to decide the date on which any amount became or becomes payable.

154 When considering whether the provisions of the contract I have already determined that the contract does contain a provision about when a progress payment becomes payable and that provision, which prevails over the implied provision in the Act, is 28 days after receipt by the Respondent of the payment claim.

155 The Payment Claim is dated, and was served on, 29 March 2005. The date falling 28 days after 29 March 2005 is 26 April 2005.

156 For the Payment Claim the subject of this adjudication application it is my decision that the due date for payment is 26 April 2005, being 28 days after 29 March 2005.

RATE OF INTEREST

- 157 Section 26(1)(c) requires that I am to decide the rate of interest payable on any amount.
- 158 When considering whether the provisions of the contract I have already determined that the contract does contain a provision about the interest rate payable on the unpaid amount of a progress payment and that provision, which prevails over the implied provision in the Act, per annum.
- 159 For the Payment Claim the subject of this adjudication application it is my decision that the rate of interest payable on the amount due is 18% per annum.

AUTHORISED NOMINATING AUTHORITY'S FEES

- 160 Section 34(3)(b) of the Act provides that the Claimant and Respondent are each liable to contribute to the payment of any Authorised Nominating Authority fee in equal proportions or in the proportions the adjudicator to whom the Adjudication Application is referred may decide.
- 161 The Authorised Nominating Authority does not currently charge an application fee for applications of this value, it is therefore unnecessary to consider my discretion for this application.

ADJUDICATOR'S FEES

- 162 Section 35(3) of the Act provides that the Claimant and Respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in the proportions the adjudicator decides.
- 163 The Claimant has been entirely successful in its claims in this adjudication and the Respondent's defence and submission were unmeritorious.
- 164 I therefore exercise my discretion and decide that the Respondent is liable for the adjudicator's fees and expenses.

DECISION

165 For the reasons set out above, I decide that:

- a. the adjudicated amount in respect of the adjudication application dated 6 May 2005 is \$87,199.50 (excluding GST); and
- b. the date on which the adjudicated amount became payable is 26 April 2005; and
- c. the applicable rate of interest payable on the adjudicated amount is 18% per annum; and
- d. the adjudicator's fees and expenses are to be paid by the Respondent.

Signed



Warren Fischer

Registered Adjudicator J1055362

18 May 2005

Witnessed



Jan Fletcher

From: DL QLD Customer Service - Web Mail [QldCustomerService@auspost.com.au]
Sent: Wednesday, 18 May 2005 3:04 PM
To: 'warren@adrs.com.au'
Subject: Customer Service Centre - QLD

18/05/05

Mr Warren Fischer
warren@adrs.com.au

Dear Mr Fischer

Thank you for your e-mail enquiry regarding the delivery of an Express Post article.

Please be advised that Express Post sent from Brisbane to Mount Isa is not within the next day Express Post delivery network. The usual delivery should be two working days.

Express Post sent from Brisbane to Dalby should be delivered before 5pm the next working day.

We trust this information assists your enquiry.

Yours sincerely

Andrew
Customer Relations Centre QLD
Australia Post

Australia Post is committed to providing our customers with excellent service. If we can assist you in any way please telephone 13 13 18 or visit our website www.auspost.com.au.

From: Bruce Boundy [b.boundy@franki.com.au]
Sent: Wednesday, 18 May 2005 11:49 AM
To: Warren Fischer; NortaskDalby@bigpond.com; NortaskMtIsa@bigpond.com
Cc: Institute of Arbitrators & Mediators, Australia
Attachments: BB.pdf

Dear Mr Fischer,

Thank you for your email to Damien Low today. Mr Low is not in the office today.

The statement you refer to in your email is correct.

Please find attached a scanned copy of the letter which attached the adjudication application and was sent to Nortask on 6 May 2005 .

You will note that the letter has the Australia Post stickers bearing the reference number for the deliveries to the Dalby and Mt Isa offices of Nortask.

We have today confirmed the following with Australia Post :

1. Adjudication Application delivered to PO Box 431 Dalby Qld by Express Post Service of Australia Post (Ref No BQ1268303)

Confirmation of delivery on 9/5/05 by Leanne at Dalby Post Office

2. Adjudication Application delivered to 20-24 Enterprise Rd Mt Isa by Express Post Service of Australia Post (Ref No BQ1268302)

Confirmation of delivery on 9/5/05 by Skye at Australia Post Electronically Ph 131318

Bruce Boundy
Manager Nth. Division
Ph: 07 3260 1131
Fax: 07 3260 1136
email: bruce@franki.com.au