



Causes of Dispute

Time bars, Termination and Set-off

Johnathan Glinatsis | Associate Director
Kreisson
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Part 1: Context



Risk Shifting

A survey completed by the Australian Constructors Association (ACA) in **1998** found:

"[T]he traditional risk management strategy adopted by clients has been to transfer as much of this risk as possible to others [and further] clients often try to transfer risks to designers and contractors that are more within the control of the client."

2024 ACA survey found that:

*"**71%** of Australian contractors agree that current contracts do not adequately and fairly allocate risk between contracting parties."*



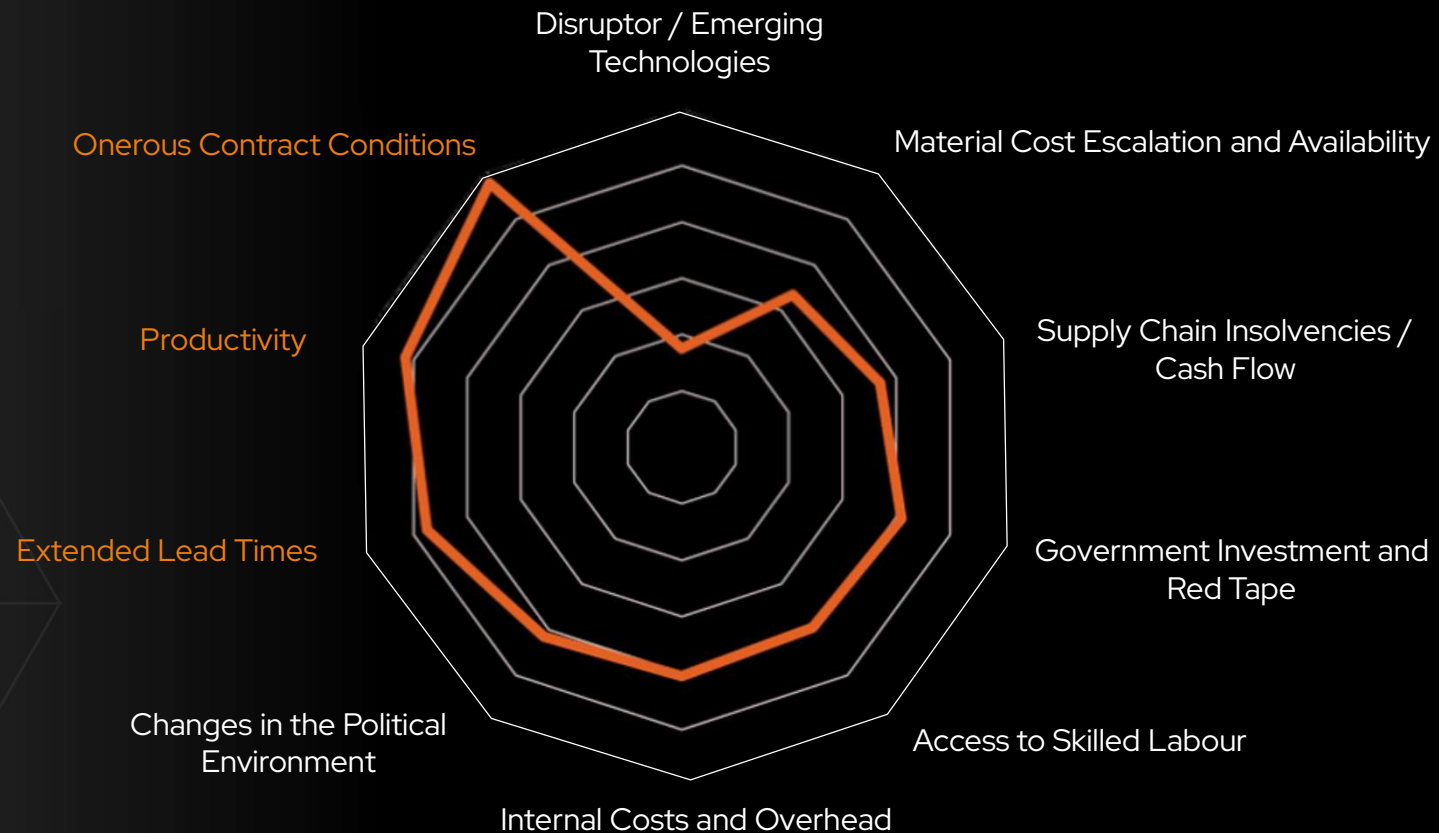
Risk Shifting

2025 ACA “Market Sentiment” survey found that:

More than 62% of respondents agree that the allocation of contractual risk has declined since the last survey. This paints a worsening picture from 2024 and continues to demonstrate that there has been no real movement in terms of improvement to contractual arrangements.

“Pipeline of work both in NSW and VIC is diminishing from their historic levels. Both NSW and VIC are turning to less collaborative more risk transfer contractual models, with NSW being the least favourable jurisdiction in terms of a collaborative environment...”

Business Impact in 2025



<https://www.constructors.com.au/advocacy/reports/construction-market-sentiment-survey/>

Causes of Dispute

	Arcadis Global Construction Disputes Report 2016 https://www.arcadis.com/-/media/project/arcadiscom/com/perspectives/global/2020/global-construction-disputes-2020/global-construction-disputes-report-2016.pdf	Arcadis Global Construction Disputes Report 2022 https://www.arcadis.com/en-au/insights/perspectives/global/global-construction-disputes-report#:~:text=From%202020%20to%202021%2C%20the%20steadily%20declining%20for%20three%20years.
Dispute causes	1. <u>Failure to properly administer the contract</u> 2. <u>Poorly drafted or incomplete and unsubstantiated claims...</u>	1. <u>Poorly drafted or incomplete and unsubstantiated claims;</u> 2. <u>Errors and/or omissions in the contract document...</u>
How to avoid	<i>"The most important activities in helping to avoid a dispute were considered the following:</i> 1. <u>Proper contract administration</u> 2. <u>Fair and appropriate risk and balances in contract</u> 3. <u>Accurate contract documents"</u>	<i>"...dispute avoidance is still the best choice and construction actors believe <u>proper contract administration</u>, with balanced risks, is the best way to do so."</i>





Part 2: Case Studies



Termination for Cause

39.2 Contractor's default

[Example only]

If the Contractor commits a substantial breach of contract, the Principal may give the Contractor a written notice to show cause. Substantial breaches include:

(a) failing to:

- (i) provide Security;
- (ii) provide evidence of insurance;
- (iii) comply with a Direction of the Superintendent under clause 29.3; or
- (iv) use the materials or standards of Work required by the Contract;

(b) wrongful suspension of Work;

(c) substantial departure from a Program without reasonable cause or the Superintendent's approval;

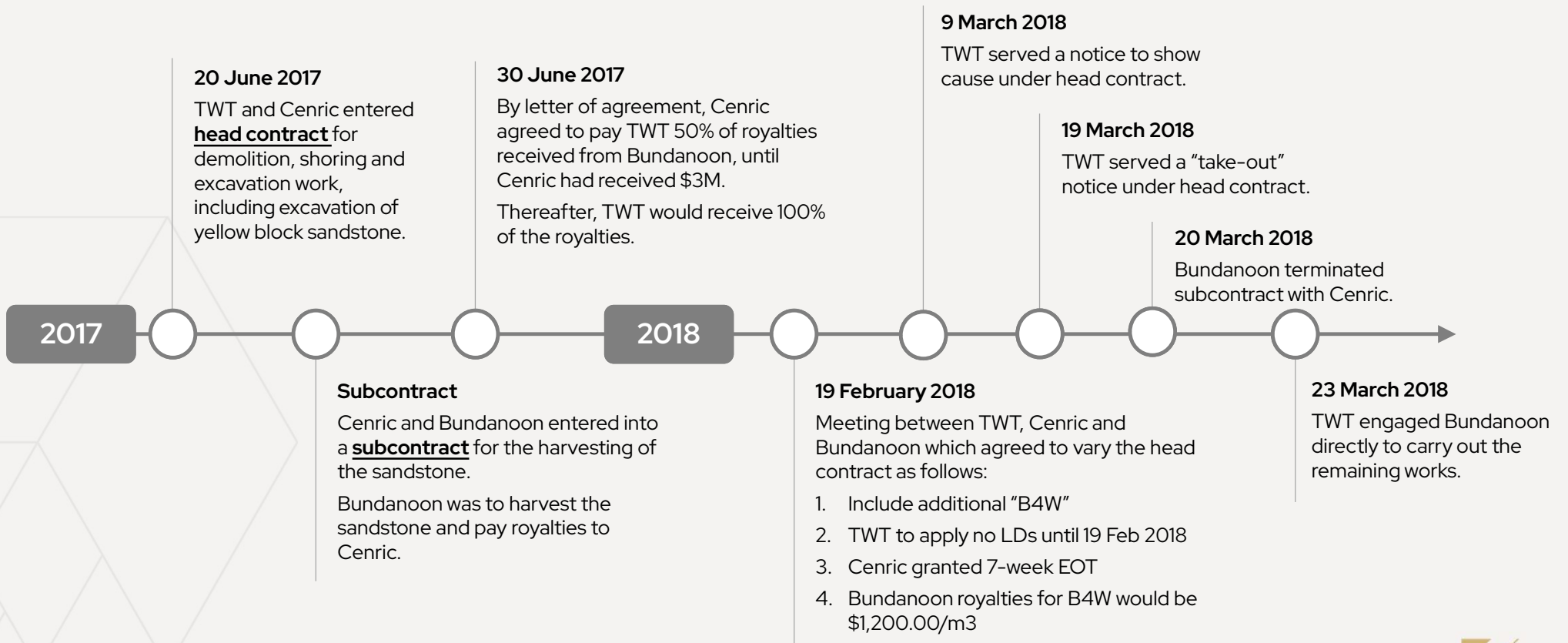
(d) if there is no Program, failing to proceed with due expedition and without delay; and

(e) in respect of clause 38.1, knowingly provide Documents containing an untrue statement.



Termination for Cause

Cenric Group v TWT Property Group [2018] NSWSC 1570



Termination for Cause

Cenric Group v TWT Property Group [2018] NSWSC 1570

Primary Judge

112 *"In short, TWT, through Mr Zhang, had closed its mind on the subject. It was not prepared to accept as valid any cause that Cenric might show. It was determined to take the work out of Cenric's hands regardless. TWT's attitude is redolent of **bad faith**."*

114 *"...it was issued for an ulterior purpose. That purpose was identified as being the wish to contract direct with Bundanoon for the level 4 works, and to receive the whole of the royalty payable by Bundanoon for itself. In my view, that analysis is correct."*

115 *"The inference that I would draw from the whole of the evidence, were it necessary to do so, is that **TWT regretted the bargain it had made with Cenric on 19 February 2018. It decided, instead, to get entirely for itself the benefit of royalties in respect of the level 4 sandstone.** That was the true motivation..."*



Termination for Cause

Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd; TWT Property Group Pty Limited v Cenric Group Pty Limited
[2019] NSWCA 87

On Appeal

- TWT's show cause notice and termination of the head contract were invalid because the parties had formed a binding oral contract to vary the head contract to **extend the time for completion** [150].
- There was no error in the primary judge's additional conclusion that TWT had **breached an implied term of good faith** and reasonableness in the head contract in **closing its mind** on the subject and determining to terminate the head contract regardless of any cause that Cenric might show [154]-[160].



Termination for Cause

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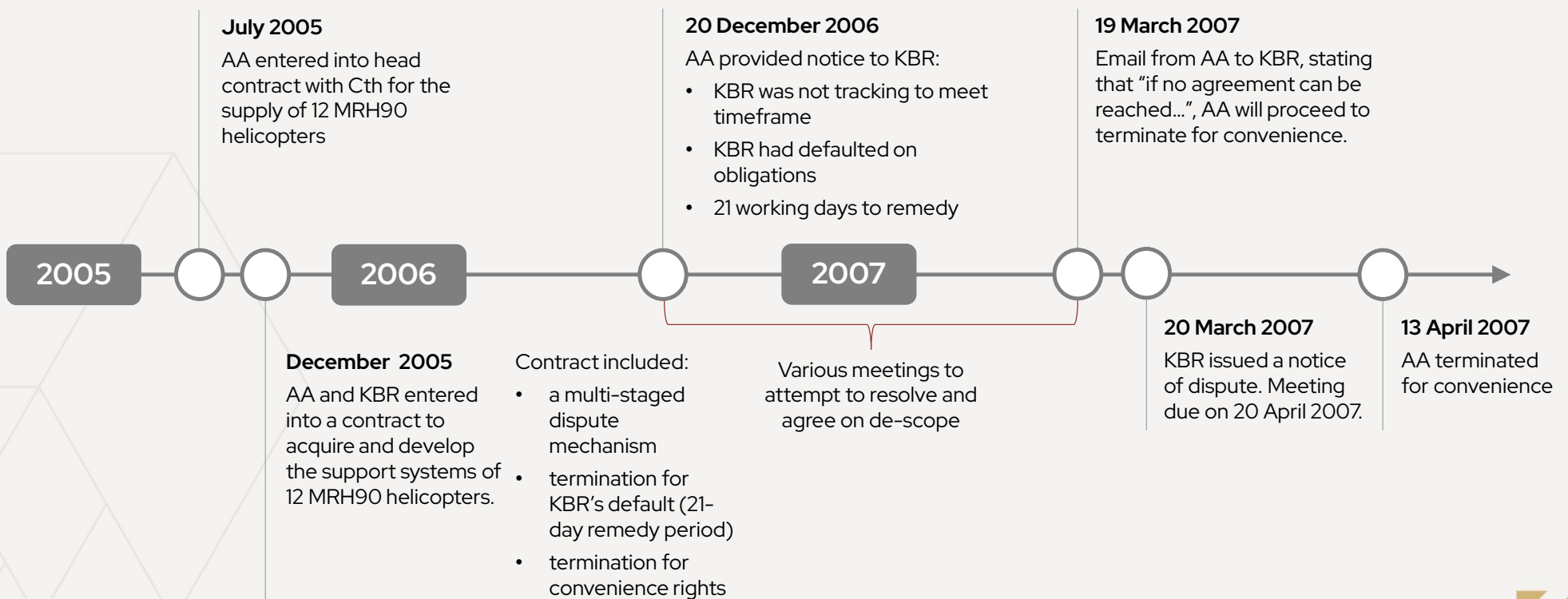
Key Take-Aways

- ❑ Assume that termination for cause is subject to a “**good faith test**”. That involves acting honestly and not capriciously, arbitrarily or for an ulterior purpose.
- ❑ Termination for cause should strictly follow the contractual process. Any response to a show cause should be considered and dealt with.
- ❑ If a party to a construction contract terminates the contract following an invalid notice to show cause, such wrongful termination will give the other party its own right to terminate and pursue damages.
- ❑ There are significant risks associated with using a contractual termination power under a contract. Seek legal advice before terminating.



Termination for Convenience

Kellogg Brown & Root Pty Ltd v Australia Aerospace [2007] VSC 200



Termination for Convenience

39.12 Termination for convenience

[Example only]

The Principal may terminate the Contract for any reason by giving the Contractor written notice, after which the Contract is ended, and the Principal, subject to the Contractor's compliance with this clause, shall pay to the Contractor:

- (a) the ***amount due to the Contractor shown in any unpaid progress certificate***;
- (b) the ***amount certified by the Superintendent for WUC carried out to the date the Contract is ended***, evidencing the amount not otherwise included in the progress certificate which would have been payable had the Contract not been ended and had the Contractor been entitled to and made a claim for payment on the date the Contract is ended;
- (c) the ***cost of materials reasonably ordered by the Contractor*** for WUC or work, which the Contractor cannot return, or which order cannot be cancelled, but only if the materials become the property of the Principal upon payment; and
- (d) the amount certified by the Superintendent on account of ***reasonable demobilisation costs***.

The Contractor is not entitled to any other claim, including any claim for loss of profits, costs, losses, damages or expenses suffered or incurred, other than those amounts payable under this subclause 39.12.



Set-off

Contractual example

24.4 Set-off

- (a) The Contractor may **set-off or deduct** from any amounts due from the Contractor to the Subcontractor under this Subcontract:
- (i) any debt or other monies due from the Subcontractor to the Contractor; and
 - (ii) any **bona fide claim** to money which **the Contractor makes in good faith** against the Subcontractor whether for damages or otherwise and whether or not the amount is disputed,





Part 3: Take-Aways

Golden Rules



01

Act quickly



02

Know the building contract



03

Be **meticulous** with your paperwork



04

Keep proper site records



05

Upskill and administer contracts properly



06

Manage your risk



07

Seek legal advice





Level 37, 25 Martin Place, Sydney NSW 2000
+61 2 8239 6500 | excellence@kreisson.com.au
kreisson.com.au

Thank You

Johnathan Glinatsis | Associate Director
johnathan.glinatsis@kreisson.com.au
(02) 8239 6505