

AMENDMENTS TO THE *CONSTRUCTION CONTRACTS ACT* 2004 (WA) COME INTO EFFECT

If you are a keen student of infrastructure and construction, this December 15 you will be celebrating the 100th anniversary of the opening of the Great Northern, Piccadilly and Brompton Railway in London. It is hard to imagine it now but at the time the line was a flop; in its first twelve months of operation it carried just half of the projected passengers. Of course, construction industry participants in Perth, Western Australia probably won't get excited about the centenary of a failed railway tunnel on the other side of the planet this December. But they might get excited about the latest local development; the operation of the amendments to the *Construction Contracts Act 2004 (WA) (Act)*.

After an extensive review of the operation of the Act by Professor Phil Evans, the government has passed a suite of amendments to the Act which give effect to a subset of his recommendations.

The amendments also tidy up some drafting peculiarities which, in the hands of increasingly cash strapped contractors have been the subject of furious debate in the Western Australian courts.¹

The amendments which, in our view, are likely to have the most impact on industry are:

- The insertion of a “blackout period” over the Christmas/New Year break and other public holidays via the insertion of a definition of “Business Day” which excludes those periods.² While this appears to be a move calculated to avoid contractors blindsiding principals on Christmas Eve with a cheeky adjudication application it may have the unintended consequence of giving contractors an additional two weeks to prepare and polish an adjudication application.

¹ *Construction Contracts Amendment Act 2016 (WA)* s 6(1).

² *Construction Contracts Amendment Act 2016 (WA)* s 4.



■ The apparent permission to allow so called “recycled claims”³ brought about by a change to the definition of “payment claim” so that it “includes a payment claim that includes matters covered by a previous payment claim”.⁴ Although the permission does not extend to claims that have been adjudicated.⁵ Exactly how this will play out remains to be seen but it is clear from the Bill’s explanatory memorandum that it ought to be open to a Court to interpret the amended section as permitting recycled claims.

■ The extension of the period after a dispute arises by which a party must bring the adjudication application from 28 days to 90 business days. When this amendment is combined with the blackout period over Christmas one can see how the scales have been tilted in the applicant’s favour. At the maximum an applicant would have about 20 weeks between the dispute coming into existence and the deadline for making an application. Whereas the respondent still has just two weeks to prepare its response.⁶

■ The adjudicator has been given power to make consent findings.⁷ This is significant because it means that lodging an adjudication application does not mean that the negotiation between the parties needs to stop until the adjudicator has made his or her determination



Together with the introduction of project bank accounts¹² they are part of a suite of measures intended to fix the “crisis” of subcontractor underpayments that is being experienced in the Western Australian construction industry. Whether these changes will have that effect remains to be seen.

DAVID ULBRICK, SPECIAL COUNSEL

but the parties can continue to negotiate and try to find a way to settle their differences.

■ Significantly, the enforcement process has been simplified so that a successful party no longer needs to apply to the Court for leave to enforce the determination in a contested hearing. Rather a successful party merely needs to file the determination with the Court in order for it to be taken as an order of the Court and enforced accordingly.⁸ This process is similar to the enforcement model under the equivalent New South Wales legislation.⁹ A consequence of this is that unsuccessful parties should move quickly to bring judicial review proceedings if they consider

the adjudicator has fallen into jurisdictional error¹⁰ or that there is some other reason to oppose the enforcement of the adjudication determination.¹¹

The Government has made much of the significance of the amendments. Together with the introduction of project bank accounts¹² they are part of a suite of measures intended to fix the “crisis” of subcontractor underpayments that is being experienced in the Western Australian construction industry. Whether these changes will have that effect remains to be seen. However, one thing is certain. To the extent that the amendments raise new questions you can be sure that the Court will be asked to answer them.

3 See e.g. *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* (2013) 29 BCL 498, 518-23 [108]-[144] (Corboy J).

4 *Construction Contracts Amendment Act 2016* (WA) s 4.

5 *Construction Contracts Amendment Act 2016* (WA) s 6(2).

6 *Construction Contracts Amendment Act 2016* (WA) s 9.

7 *Construction Contracts Amendment Act 2016* (WA) s 12.

8 *Construction Contracts Amendment Act 2016* (WA) s 17.

9 *Building and Construction Industry Security of Payment Act 1999* (NSW) s 25(1); cf *Building and Construction Industry Security of Payment Act 2002* (Vic) s 28R(4).

10 Cf *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* (2011) 43 WAR 319, 339 [92] (Murphy JA); *RNR Contracting Pty Ltd v Highway Constructions Pty Ltd* [2013] WASC 423 (26 November 2013) [15]-[17] (Master Sanderson).

11 See further: *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130 (21 July 2016) [137]-[143] (Martin CJ).

12 <https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/09/WA-leads-the-way-with-project-bank-accounts.aspx>.



For more information, please contact the author of this briefing:

David Ulbrick

Special Counsel, Perth
T: +61 (0)8 9422 4701
E: david.ulbrick@hfw.com

HFW has over 450 lawyers working in offices across Australia, Asia, the Middle East, Europe and South America. For further information about construction issues in other jurisdictions, please contact:

Matthew Blycha

Partner, Perth
T: +61 (0)8 9422 4703
E: matthew.blycha@hfw.com

Carolyn Chudleigh

Partner, Sydney
T: +61 (0)2 9320 4620
E: carolyn.chudleigh@hfw.com

Nick Watts

Partner, Sydney
T: +61 (0)2 9320 4619
E: nick.watts@hfw.com

Richard Abbott

Partner, Sydney
T: +61 (0)2 9320 4621
E: richard.abbott@hfw.com

Nick Longley

Partner, Melbourne/Hong Kong
T: +61 (0)3 8601 4585/
+852 3983 7680
E: nick.longley@hfw.com

Martin Downey

Partner, Hong Kong
T: +852 3983 7684
E: martin.downey@hfw.com

Robert Blundell

Partner, Dubai
T: +971 4 423 0571
E: robert.blundell@hfw.com

Hugues de La Forge

Partner, Paris
T: +33 1 44 94 40 50
E: hugues.delaforge@hfw.com

Michael Sergeant

Partner, London
T: +44 (0)20 7264 8034
E: michael.sergeant@hfw.com

Max Wieliczko

Partner, London
T: +44 (0)20 7264 8036
E: max.wieliczko@hfw.com

Lawyers for international commerce

hfw.com

© 2016 Holman Fenwick Willan. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com

São Paulo London Paris Brussels Geneva Piraeus Beirut Riyadh Kuwait Dubai
Singapore Hong Kong Shanghai Perth Melbourne Sydney