



## CHANGES IN THE CONSTRUCTION INDUSTRY IN WA? NEW SECURITY OF PAYMENT LEGISLATION INTRODUCED INTO PARLIAMENT

### PART 3

As noted in our previous briefings,<sup>1,2</sup> the Building and Construction Industry (Security of Payment) Bill 2020 Consultation Draft (Consultation Draft) was released for comment earlier this year. If enacted, this legislation will replace WA's current *Construction Contracts Act 2004 (WA)* and will overhaul Western Australia's adjudication process.

<sup>1</sup> <https://www.hfw.com/Changes-to-Adjudication-in-WA-The-Building-and-Construction-Industry-Security-of-Payment-Bill-2020-Part-1>

<sup>2</sup> <https://www.hfw.com/Changes-to-Construction-Contracts-in-WA-The-Building-and-Construction-Industry-Security-of-Payment-Bill-2020-Part-2>

A slightly amended form of the Building and Construction Industry (Security of Payment) Bill 2020 (the Bill) was introduced into the WA Parliament on 23 September 2020 and is currently at the second reading stage.

Below we outline the key amendments.

### **Due date for progress payments**

The Consultation Draft stated that a progress payment made to a subcontractor would become payable 30 business days after a payment claim is made.

The Bill has shortened this timing to 25 business days.

### **Requirements of adjudication application**

The Consultation Draft set out the manner in which an application for adjudication is to be made. An additional requirement has been included in the Bill, which requires the claimant to attach a copy of the construction contract or relevant provisions of the construction contract to an application.

### **Adjudication procedure**

The Bill states that an adjudicator and a review adjudicator is not bound by the rules of evidence. This was not previously included in the Consultation Draft.

### **Adjudicator's determination**

The Consultation Draft prescribed the matters that the adjudicator must consider in determining the application. Additional considerations have been included in the Bill. The adjudicator can also consider any further submissions of the claimant or respondent (including accompanying documents) and the outcome of any conference of the parties called by the adjudicator.

### **Review of a determination**

The circumstances in which parties can apply for a review of the adjudicator's determination by seeking appeal to a "review adjudicator" have been amended in the Bill.

Under the Consultation Draft a claimant could only apply for a review of the adjudicator's determination if the claimed amount exceeded a minimum threshold and the adjudicator determined that no amount was payable, or alternatively, the adjudicator determined that no amount was payable because the application was frivolous or vexatious.

This has been replaced in the Bill. Under the Bill, a claimant may apply for review if, provided the claimed amount exceeds the minimum threshold, the adjudicator decided that he or she did not have jurisdiction to determine the application.

An additional provision has been included in the Bill which prohibits a respondent from seeking appeal to a review adjudicator on the basis that the initial adjudicator did not have jurisdiction to determine an adjudication application. (This means respondents must resort to the Supreme Court if seeking to challenge a determination on a jurisdictional basis.)

### **Effect on civil proceedings**

Finally, the Bill includes an additional provision which states that evidence of anything lawfully said or done in the course of an adjudication or adjudication review will be inadmissible in any civil proceedings arising under a construction contract.

We will continue to track progress of the Bill and provide updates on developments.

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