



Key Changes to Security of Payment Regime in Western Australia

The Western Australian Government's long-awaited response to review of the *Construction Contracts Act 2004* (WA) ("CCA") was recently released amid further scrutiny on government-managed construction projects and contractor insolvencies. Professor Evans's report on the operation of the CCA made 28 recommendations for the improvement of the CCA and the adjudication process. A brief summary of the key recommendations and the potential reforms to the security of payment regime in Western Australia is below.

Government Projects

Project Bank Accounts: From 30 September 2016.

The Government has indicated that it will mandate the use of project bank accounts ("PBAs") on public projects valued between \$1.5 million and \$100 million from 30 September 2016. The wider use of PBAs may introduce further regulatory headaches for government contractors and their financiers.

Statutory Retention Trusts: To Be Evaluated. In addition to the use of PBAs for WA government projects, the Building Commission is evaluating the use of

statutory retention trusts for public and private projects following the trial of the retention trust scheme in NSW.

Code of Conduct and Sanctions: To Be Implemented.

In light of recent issues on certain public projects, the Government is developing a code of conduct for the construction sector. The code will be used to assess a contractor's eligibility to bid on government projects and may contain sanctions for businesses that fail in their payment obligations or seek to impose unfair contract terms on small businesses.

CCA Amendments

The 'Mining Exclusion': Here to Stay ... For Now. Despite recommendations in the Evans Report to do so, the Government is unwilling to repeal the 'mining and process plant exclusions'. However, the Government has indicated that it will clarify the scope of the exclusions, which could result in a broader exclusion.

Maximum Payment Terms: 30 Business Days. Although the Evans Report did not directly deal with prohibition on

payment terms exceeding 50 calendar days, the Government has indicated that it will reduce the maximum permitted payment term of 50 calendar days to 30 business days.

Time Limit for Adjudication Applications: Extended. Despite the Evans Report recommendations, the Government has stated its intention to increase the time limit for adjudication applications from 28 calendar days to 90 business days. Surprisingly, the Government also flagged a removal of the prohibition on 'recycled claims' which may see an end to absolute time limits for adjudication applications altogether.

Other Time Limits: Minor Amendments. Despite changes to the timing of adjudication applications, the current time limits for adjudication responses and determinations look likely to remain, other than for a welcome shift from calendar to business days and a moratorium in the holiday season from 24 December to 7 January.

Offences and Penalty Provisions: Introduced. The Government has indicated that it will consider imposing penalties on businesses that include prohibited terms in construction contracts. This could unwittingly affect a range of principals and contractors given the present uncertainty as to the scope of the mining and process plant exclusions.

Deeming Provisions: To Remain. No change to implied terms in the CCA. Respondents to payment claims should continue to be wary of the 'deeming provisions' and the potentially significant consequences of failing to formally respond to or dispute a payment claim within 14 days.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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