



WHITE PAPER

August 2020

Western Australia Proposes Building and Construction Industry (Security of Payment) Bill 2020

The Western Australian government has sought industry comment on a suite of significant proposed reforms to the WA security of payment regime (“SOP”). If passed, the Bill represents the most significant reform to the regulation of payments in the construction industry since the enactment of the Construction Contracts Act 2004 (“CCA”) more than a decade ago, and will make WA the first jurisdiction to adopt significant recommendations of the [Murray](#) and [Fiocco](#) Reviews. This *White Paper* introduces the proposed amendments and their potential impact on construction projects in Western Australia.

Many of the contractor/applicant-friendly amendments in the Bill are understandable given the objectives of SOP legislation. However, some of the changes that seek to redress perceived unfairness or inequity of bargaining positions in the construction sector (including those concerning unfair time bars) may have unintended consequences, including a potential spike in litigation over what constitutes an unfair time bar, which would appear to be contrary to the original intent of these reforms. In our view, the reforms foreshadowed by the Bill will not be a panacea to the harm that SOP laws seek to redress, but may be a step in the journey to providing tools for contractors and applicants to improve their cash flow position.

TABLE OF CONTENTS

INTRODUCTION	1
PROHIBITION ON “UNFAIR” TIME BARS	1
AMENDMENT TO THE ADJUDICATION PROCEDURE	2
A SECOND ROLL OF THE DICE? THE RIGHT TO APPEAL TO A SENIOR ADJUDICATOR	2
A MANDATORY HEADS-UP: NOTICE OF INTENTION TO MAKE A CALL ON SECURITY	3
FURTHER PROHIBITIONS ON “PHOENIXING” ACTIVITY	3
CONCLUSION AND THE WAY FORWARD	3
LAWYER CONTACTS	4
Authors	4
Additional Contacts	4
ENDNOTES	5

INTRODUCTION

In the current economic climate, businesses must ensure they are up to date with the multitude of bespoke security of payment regimes applying in the jurisdictions in which they operate. In the very near future, we see a confluence of factors combining to form what could be a “perfect storm” for adjudications convened under those regimes.

The COVID-19 pandemic continues to negatively impact global supply chains and cash flow for contractors already operating on low margins on Australian and overseas construction projects.¹ With huge amounts of public and private money being funnelled into developing and upgrading public infrastructure as part of the state and federal governments’ stimulus spending (in addition to the extant “infrastructure boom” on the Australian East Coast), the risk of industry participants falling into dispute is heightened. Where the risk of disputes is elevated, culminating in non-payment, greater recourse by contractors to security of payment legislation can be expected.

The Building and Construction Industry (Security of Payment) Bill 2020 introduces significant reform to the process for adjudication in Western Australia, bringing it more into line with the “East Coast Model”—particularly the regime in New South Wales. The drafters’ efforts to reform the “West Coast Model” in line with the *Murray Review* may indicate that fully harmonised security of payment legislation is still somewhere over the rainbow.

The most significant changes proposed by the Bill are briefly explained below. While there is still a long way to traverse over the yellow brick road before these changes become law, the proposed amendments represent significant change to the regime in WA, and will no doubt draw the attention of the other states and territories that are contemplating amendments to their own security of payment regimes. If given the force of law, the amendments could serve as an early litmus test of the success or otherwise of key recommendations of the *Murray Review*.

PROHIBITION ON “UNFAIR” TIME BARS

It is typical for a construction dispute to involve a debate as to whether a claimant bringing a claim under a construction contract (whether that is a claim for a variation, extension of

time or otherwise) has complied with or was required to comply with a pre-agreed regime under that contract for the giving of notices. Recent cases in Western Australia, such as *CMA Assets*,² highlight the commercial purpose served by contractual time bars and confirm that courts will strictly enforce them, even where the outcome of non-compliance (usually a barred claim) is harsh.³ This has, not surprisingly, led to calls for legislative intervention, usually by subcontractors, and a relaxation to the strict approach to notice-based time bars.

The introduction of a legislative prohibition on “unfair” contract terms including time bars aligns with recommendations 84 and 21 of the *Murray Review* and *Fiocco Review* respectively. If passed, this prohibition will extend to time bars that apply to payment for construction work performed (e.g., variations) and for extensions of time. The intention behind these amendments is to strike a balance between a principal’s right to receive notice of claims it may face (i.e. the “commercial purpose”) with a contractor’s right to payment or an extension of time in the event of a variation to its scope or qualifying cause of delay. The proposed amendments are intended to prohibit time bars that do not serve a legitimate commercial purpose and by doing so, strengthen the enforceability of legitimate notice periods and time bars.

Under the Bill, an adjudicator, judge, or arbitrator tasked with considering a payment claim or the correct operation of a construction contract will be empowered to declare an “unfair” time bar as void. A time bar may be declared unfair and thus void if compliance with the provision is “not reasonably possible” or is “unreasonably onerous”. The decision maker may have regard to almost any matter they consider relevant when assessing the (un)fairness of a time bar, including, for example, the “commercial and technical competence” of the claimant.

The intention behind the amendment is to provide claimants with relief against excessively onerous notice provisions and to remedy a perceived power imbalance in the construction contracting industry. But, the amendments are likely to manifest in other problems. Certainty has a commercial benefit for all participants, and broadening the decision maker’s task of considering whether a time bar is “unfair” is likely to lead to greater uncertainty as to the enforceability of contractual time bars. This is at least until there is some guidance from the Courts on the types of time bars that may or may not be considered “unfair”.

In the meantime this amendment, if passed in its current form, may prompt a review of standard form construction contracts and could lead to the addition of terms by which contractors are to agree that the notice provisions are not “unfair”, in a similar manner to standard liquidated damages provisions in which the contractor agrees that the rate of liquidated damages are a genuine pre-estimate of loss. Whether such provisions will have the desired effect remains to be seen. Until there is certainty, the proposed amendments may also lead to behavioural change in the assessment of claims which may be contractually barred on a strict view of the contract, but which are otherwise meritorious.

AMENDMENT TO THE ADJUDICATION PROCEDURE

As recommended by the *Fiocco Review*, the Bill proposes a number of claimant-friendly amendments to the adjudication procedure, bringing it further into line with the modified “East Coast Model” endorsed by the Murray Review. Even though commentators may disagree on the strengths and weaknesses of the “East Coast” and “West Coast” SOP models, almost all would agree that any step toward harmonisation of security of payment legislation across Australia is a welcome development. The amendments to the payment claim and adjudication process in the Bill include (amongst others):

- A substantial narrowing of the mining exclusion (unique to WA and Queensland) which excludes construction contracts for the fabrication and installation of processing equipment from security of payment legislation;
- A reduction in the maximum timeframes for making payment to a contractor, submitting a payment schedule in response to a payment claim, and applying for adjudication;
- A requirement that a payment schedule include reasons for certifying an amount less than the amount claimed, and a prohibition on introducing new reasons for non-payment in a subsequent adjudication response;
- A requirement to indorse payment claims as having been made under the legislation;

- An immediate right to recover amounts claimed in a payment claim as a debt due if no payment schedule is submitted;
- An express right of an adjudicator to engage an expert directly to investigate and report on any matter to which the claim relates;
- A legislative right to make a final payment claim within six months after construction work was last carried out; and
- Confirmation that companies in liquidation may not avail themselves of some of the key protections under the Act, including the right to make a payment claim under the Act, or take any action to enforce a payment claim (including through adjudication), or to enforce an adjudication determination.

A SECOND ROLL OF THE DICE? THE RIGHT TO APPEAL TO A SENIOR ADJUDICATOR

In addition to the above changes, the Bill also adopts recommendation 43 of the *Murray Review* and introduces a procedure whereby a claimant may seek to have an adjudication determination reviewed by a “senior adjudicator” where the amount determined was more than \$200,000 under the amount claimed in the adjudication application or, in the case of a respondent, where the amount determined was \$200,000 or more than the amount assessed by the respondent in its payment schedule.

Unlike the role of the courts in a judicial review proceeding, the role of the senior adjudicator will be to either confirm the earlier determination or quash the earlier determination *and* make a new determination. In practice, this will introduce a second adjudication process for most, if not all, complex adjudications where the amount in dispute is \$250,000 and above. In 2018-19 almost one third of all adjudications commenced under the CCA had an amount in dispute of \$250,000 or more.⁴

The intention behind this amendment is to replace the under-utilised SAT appeal process, and to weed out serious errors of law or fact by adjudicators which are usually immune from

judicial review but which nonetheless can lead to aggrieved parties seeking relief from the Courts. This amendment may have the effect of increasing the time and cost of the adjudication process, a process which has affordability and expediency as core objectives. A secondary decision maker may also broaden the scope for judicial review, particularly if there is confusion or uncertainty as to the scope of the reviewing adjudicator's powers under the legislation.

A MANDATORY HEADS-UP: NOTICE OF INTENTION TO MAKE A CALL ON SECURITY

If passed, the Bill will require parties to construction contracts to give the other party 5 business days' notice of an intention to have recourse to performance security provided under the contract (regardless of whether a notice is otherwise required under the contract). Although it is not unusual for parties to agree on contractual terms to a similar effect, this amendment would imply such a requirement into every construction contract and provide for a minimum notice period of five business days. The notice will also require a party to disclose, in writing, the provisions of the contract that party relies on in having recourse to the security and the circumstances that entitle the party to have recourse.

The legislative intent behind this amendment is to provide contractors with a short period of time to take steps to remedy the alleged breach which is said to have given rise to the right to call on security (if possible) or to negotiate with their employer to reach an agreement that avoids a call on security.

In reality, the legislated window provides contractors (those subject to the call on security) with the opportunity to seek an injunction from the court to put a stop to the call.

A feature of most major construction cases (both in litigation and arbitration, and across the states and territories) is where one or more proceedings are brought in relation to actual or threatened calls on substantial amounts of performance security. A right to notice of a call on security provides contractors with a crucial window to consider whether it will seek injunctive relief from a court enjoining the counterparty from making a call on performance security (particularly where the amount of security is substantial). A notice period is crucial

because the ability to seek injunctive relief after security has been encashed is significantly impeded.

The mandatory notice regime will also allow contractors and courts (in the event of injunction proceedings) to interrogate the reasons given by a party seeking recourse to performance security, and whether there is a bona fide belief in a party's entitlement to call on the security, as is often required under standard form contracts.

It remains to be seen what legal consequences may follow a party having recourse to an on-demand performance security without notice (i.e. in compliance with the contract but not in accordance with the Act).

FURTHER PROHIBITIONS ON "PHOENIXING" ACTIVITY

In order to combat illegal 'phoenixing'⁵ in the construction industry, the WA Government has sought to confer greater powers on the WA Building Services Board to exclude individuals in the building industry with a history of "insolvency events" from registering as a building service provider. This exclusion may take effect for three years or permanently in the event of repeated insolvency events. A building services provider's failure to pay a 'building service debt' (including adjudication determinations or judgment debts) may also trigger disciplinary action.

CONCLUSION AND THE WAY FORWARD

In this paper we have focused on certain significant amendments but there are other proposed reforms including to protect bank accounts, retention money trusts, and statutory rights to substitute performance security) which will have an impact on participants in the WA construction sector.

There is undoubtedly a long road before the Bill is passed by the WA Parliament, in one form or another. The Bill was released for industry comment in mid-2020 and it remains to be seen what perspectives the industry consultation process brings, particularly with respect to some of the more significant and contentious amendments.

One area of debate may lie in the application and scope of the mining exclusion. A 2015 review of the CCA recommended the removal of the mining exclusion which has been an issue fiercely litigated in the WA Courts and is not prone to clarity. This recommendation was met with opposition from at least one major resources company⁶ citing the risk that those in the industry would be exposed to significant and complex adjudications. The previous Barnett Government was not convinced that the expansion of security of payment legislation to the mining industry was worthwhile, at least not without appropriate consultation with contractors and principals in the mining industry. This is not to say that contractors on major WA resources projects have been immune from the adjudication procedure under the CCA. The precise application and scope of the mining exclusion remains an area of uncertainty in Western Australia, and is due for clarification, if not reassessment altogether.

The onset of the COVID-19 pandemic may mean that the WA Government's priorities are reorganised in favour of the health and economic response, pushing payment reform in the construction industry down the pecking order. Conversely, it may be considered a key pillar of support to the home building grants and the increased public infrastructure spend aimed at assisting the WA economy recover from the COVID-19 pandemic.

Western Australia is not the only Australian jurisdiction to consider security of payment reform and the recommendations of the *Murray Review*, nor is WA the only state which has placed infrastructure spend at the forefront of economic recovery from the COVID-19 pandemic. We expect many of the other Australian states and territories to turn their mind to these issues. We will of course look forward to updating you on those amendments in the coming months.

For further insight on the impact of COVID-19 on construction projects and disputes around the world, see Jones Day's three part White Paper titled, "Construction Projects and Disputes: Beyond the COVID-19 Lockdown".

LAWYER CONTACTS

Authors

Kenneth P. Hickman

Perth
+61.8.6214.5742
khickman@jonesday.com

Simon Bellas

Singapore
+65.6233.6455
sbellas@jonesday.com

Lucas Wilk

Perth
+61.8.6214.5737
lwilk@jonesday.com

Additional Contacts

John Cooper

Brisbane/Sydney
+61.7.3085.7010/+61.2.8272.0718
johncooper@jonesday.com

Annie Leeks

Brisbane
+61.7.3085.7023
aleeks@jonesday.com

James Ebert

Sydney
+61.2.8272.0588
jebert@jonesday.com

Steven Fleming

Sydney
+61.2.8272.0538
sfleming@jonesday.com

Benjamin I. Holloway, an associate in the Melbourne Office, and Katie E. Mead, an associate in the Perth Office, assisted in the preparation of this White Paper.

ENDNOTES

- 1 See Jones Day's *White Paper*, "Construction Projects and Disputes: A Look Beyond the Lockdown".
- 2 *CMA Assets Pty Ltd v John Holland Pty Ltd (No. 6)* [2015] WASC 217.
- 3 *CMA Assets*, [375]: "There is ... no doubt that a strict application of [the time bar provisions] is harsh. But I am not satisfied that it is without purpose and absurd..."
- 4 Department of Mines, Industry Regulation and Safety, *Report of the Building Commissioner for the Financial Year to 30 June 2019: Construction Contracts Act 2004*, 2019, page 7.
- 5 Phoenixing occurs when an entity fails (often with outstanding debts) and its director(s) establish a new entity in the same industry and avoids paying unsecured creditors.
- 6 Professor Evans, *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*, August 2015, Recommendation 10, pp 48-52. The removal of the mining exclusion was supported by submissions from the Law Society of WA, the Australian Institute of Building, IAMA, and the Master Builders Association.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.