With a couple of surprises, the State Government has introduced the *Construction Contracts Amendment Bill 2016 (WA)* into State Parliament as part of its initial reforms in the light of the Evans’ Report into the *Construction Contracts Act*.

**IN BRIEF**

- On Thursday, 22 September 2016, the State Government introduced the *Construction Contracts Amendment Bill 2016 (WA)* (*Bill*) into State Parliament, to amend the *Construction Contracts Act 2004 (WA)* (*Act*).

- The Bill seeks to introduce some initial measures outlined in the Government’s response to Professor Philip Evans’ Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA) (*Response*), to improve the operation of the Act and the rapid adjudication process. A ‘second raft of reforms’ will be introduced at a later time.

- The amended Act will be complemented by, among other things, a Code of Conduct for contractors, the establishment of a compliance unit within the Department of Commerce and an increased role of the Small Business Commissioner.³
AMENDMENTS TO THE ACT

Apart from 3 changes, the proposed amendments are largely reflective of the Response.

Amendments set out in the Response

The following amendments, contained in the Bill, are reflective of the proposed changes identified in the Response:

- a significant increase to the time in which adjudications applications can be made, from 28 days to 90 business days;
- altering the time periods from calendar days to business days and excluding the dates 25 December to 7 January inclusive;
- permitting recycled claims; and
- removal of the obligation to dismiss applications for technical deficiencies, leaving this at the discretion of the adjudicator.

Notably, the Bill does not contain any amendments in relation to the following changes proposed in the Response:

- additional and ongoing registration and renewal process for adjudicators; and
- penalties for failure to comply with prohibited terms.

Additional amendments

1. The ‘mining exclusion’: Although its operation is unclear, the Bill proposes an amendment to section 4(3)(c) that appears, consistent with the tenor of Professor Evans’ Report, to restrict the reach of the ‘mining exclusion’ (i.e. ‘constructing plant’ for the purposes of extracting or processing resources will now potentially be caught by the Act).
2. **When a ‘payment dispute’ arises:** Somewhat unexpectedly, and perhaps coincidentally with the Court of Appeal decision in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130 delivered on 21 July 2016, the Bill proposes an amendment to clarify when a payment dispute arises and clear up the confusion identified in several recent decisions.²

3. **Enforcement of determinations:** The Response indicated that the Government would consider a change to facilitate speedy registration of adjudication determinations by court order. The Bill identifies the proposed method for doing so.

The amendment removes the requirement for the leave of the court to be obtained in order for a party to enforce a determination. The party entitled to payment may, if the Bill is passed, obtain an order from the Court and, accordingly, enforce the order by simply filing at court:

- a certified (by the Building Commissioner) copy of the determination; and
- an affidavit of the unpaid amount under the determination.

**CONCLUSION**

The amendments are aimed at addressing industry issues such as unscrupulous and insolvent contractors, and assisting smaller and exposed subcontractors.

Currently, the Bill is at the second reading stage in the Legislative Assembly. We will track the Bill’s progress through Parliament, but if the dates in the Bill are any guide, the passage of the Bill will be swift.

A copy of the Bill is available [here](#).

**ENDNOTES**

1. Media Statement – [Construction Contracts Act amendments introduced](#), Thursday 22 September 2016 (Hon Sean L’Estrange MLA Minister for Mines and Petroleum; Finance; Small Business and Hon Michael Mischin MLC Attorney General; Minister for Commerce).

2. *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* [2009] WASAT 133; *Fuel Tank & Pipe Pty Ltd and Decmil Australia Pty Ltd* [2010] WASAT 165;
Northern Territory v Urban and Rural Contracting Pty Ltd [2012] NTSC 22; Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd [2012] WASC 304; Alliance Contracting Pty Ltd v James [2014] WASC 212; Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd [2015] WASC 60; Laing O’Rourke Australia Construction Pty Ltd v Samsung C&T Corporation [2015] WASC 237; Laing O’Rourke Australia Construction Pty Ltd v Samsung C&T Corporation [2016] WASCA 130.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

DAN DRAGOVIC
PARTNER, PERTH

+61 8 9211 7600
Dan.Dragovic@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2020