Better contracting: Changes arising from the review of the *Construction Contracts Act 2004* (WA)

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Abstract

Following the statutory review of the operation of the *Construction Contracts Act 2004* (WA), (**CCA**) the majority of the report recommendations relating to amendments of the CCA were accepted by the government and the *Construction Contracts Amendment Act 2016* (WA) was assented to on 29 November 2016. However three significant recommendations were excluded from the amended CCA. These were: the removal of the mining exclusions, subcontracts agreements should be in writing, and the Australian Standard suite of General Conditions of Contract should be used on state projects. The rationale for the proposed amendments is discussed in this article.

Introduction

The review report was tabled in the Western Australian Parliament on 16 August 2016 by the then Minister for Commerce.[141] Subsequently the *Construction Contracts Amendment Act 2016* (WA) came into operation on 29 November 2016.[142] The review report contained 28 recommendations relating to both amendments to the CCA and additionally the introduction of policies and guidelines which would assist in the more efficient and equitable conduct of construction contracting in Western Australia.

Twenty-five of the recommendations were accepted in total or part and these have now been incorporated into the amended CCA or introduced through a number of new government policies and initiatives. However three important recommendations were not accepted by the government. It was considered by the reviewer that these recommendations would both ensure a more equitable application of the CCA and to also ensure that both Western Australian government agencies and the building industry generally would conduct themselves in a reputable, equitable and responsible manner within the industry. The three recommendations not accepted are discussed in this paper. They were:

(a) the mining exclusions in the CCA should be removed;

(b) subcontracts should be in writing; and

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[141] The minister at the time of submission of the review report was the Honourable Michael Mischin LLB (Hons) BJuris (Hons) MLC.

[142] The review was conducted by the author. JJ Steensma, PhD candidate at Curtin University assisted with research undertaken as part of the review. This article is based on sections of the review report. The report may be found at <https://www.commerce.wa.gov.au/building- commission/subcontractor-publications>.

(c) the Australian Standard Suite of General Conditions of Contract should be used on state government projects.

The review also identified matters in the Western Australian construction industry involving unconscionable conduct, economic duress and unfair contract terms. As a consequence in conjunction with the amendments to the CCA, on 5 December 2016 the *Western Australian Building and Construction Industry Code of Conduct 2016* was introduced. The code applies from 1 January 2017 to new tendering processes for State projects with a value in excess of $10 million. The issues relating to the implication of the Code will not be discussed in this article.

The Objectives of the *Construction Contracts Act 2004* (WA)

The objectives of the CCA are described in its long title:

(a) to prohibit or modify certain provisions in construction contracts;

(b) to imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts; and

(c) to provide a means for adjudicating payment disputes arising under construction contracts, and for related purposes.

Since its introduction, the CCA has provided greater security of payment for both contractors and principals in an industry which has historically functioned under a hierarchical chain of contracts entered into by parties often where there were significant inequalities in bargaining power and inequitable allocation of risk.

At the same time it was never the intention of Parliament to provide comprehensive protection to parties unable to look after their own commercial interests. As noted, in part, by the Hon Alannah MacTiernan, the then Minister for Planning and Infrastructure, in the Second Reading Speech of the *Construction Contracts Bill 2004* (WA):

> *'Apart from these specific unfair practices, the Bill does not unduly restrict the normal commercial operation of the industry. Parties to a construction contract remain free to strike whatever bargains they wish between themselves, as long as they put the payment provisions in writing and do not include the prohibited terms… Participants in the industry still have to look after their own commercial interests. This Bill will provide the industry with simple and effective tools to clarify rights to be paid and to enforce those rights.'*[143]

Conduct of the Review

Initially, a detailed Discussion Paper was prepared for circulation to all relevant stakeholders. It provided details regarding the purpose of the Review and was written in a form as to assist in the understanding of the operation of the CCA for all stakeholders.[144]

The Discussion Paper identified a range of issues arising from the operation of the CCA over the period 2005 to 2013. These issues were identified from the Annual Reports of the Construction Contracts Act Registrar (now the Building Commissioner), that had been published at the time of the review,

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[143] Western Australia, *Parliamentary Debates*, Legislative Council, 8 April 2004, 1934b-1935a (Alannah MacTiernan).

[144] Phil Evans, *Statutory Review of the Construction Contracts Act 2001 (WA)*, Discussion Paper (2014).

researching the academic literature on security of payment issues and perusal of all applications for review of adjudication determinations in Western Australia since the introduction of the CCA. The issues were not exclusive and stakeholders were invited to comment on any matter relating to or incidental to the application of the CCA.

The Discussion Paper was circulated to all business entities listed in the Building Commission's main email database and included all of the state's building surveyors, painters, plumbers. builders, relevant industry and professional associations, local government authorities, statutory bodies and registered adjudicators, together with the Law Society of WA, President of the State Administrative Tribunal and the Chief Judge of the Western Australian District Court and the Chief Justice of the Supreme Court.

The Discussion Paper also indicated that the reviewer would be willing to meet with both individuals and representatives from interested organisations and a number of meetings and public forums were held. Additionally the reviewer made presentations to a number of law firms and their major clients as well as to the Society of Construction Law Australia (**SOCLA**), professional and trade associations and the Construction Law Group of the Law Council of Australia during the conduct of the Review.

Subsequently 51 written submissions were received[145] from Members of Parliament, consumers, legal practitioners, adjudicators, contracting groups, individuals and associations including the Law Society of WA, SOCLA, the then Institute of Arbitrators and Mediators Australia (**IAMA**) (now the Resolution Institute), the Australian Institute of Building (**AIB**), the Small Business Commission, the Property Council of Australia and the Housing Industry Association. As expected, not all submissions were confined to the issues identified in the Discussion Paper and a number related to issues involving commercial contract practices and contract administration. These included allegations of economic duress, intimidation, unfair contract terms and unconscionable conduct. It was considered that these issues were clearly collateral to the CCA and they were considered in the final report recommendations.

As expected in a review of this nature, involving a diverse range of interests and parties, many of the submissions were contrasting. Also the submissions to the review were untested. Evidence was not given under oath and the reviewer had no powers of compulsion. Consequently in many instances the information in the submissions reflected opinion or allegations. Additionally as noted above a number of submissions were marked confidential.

Tabling of the Report

The final report was submitted to the Minister for Commerce (also the Attorney General) on 2 October 2015. The report contained 28 recommendations which related to both amendments to the CCA and the introduction of policies that were considered would result in a more efficient and equitable conduct of building and construction contracting in Western Australia. The report and the government's response were tabled in Parliament on 16 August 2016 by the Minister.

The Minister commented in part that the reviewer concluded that in its 10 years of operation, the CCA has provided a very useful scheme for resolving payment disputes and continues to provide contractors, subcontractors and suppliers with a rapid low-cost method of resolving payment disputes, albeit with a number of recommended changes.

[145] A number of submissions were expressly marked confidential.

Main changes arising from the recommendations

The main changes to the CCA and the introduction of new policies included:

(a) the use of project bank account (**PBAs**) on government-funded projects under the management of the Department of Finance - Building Management and Works;

(b) the reduction of the maximum contractual payment terms permitted under the CCA to 30 business days to ensure prompt payment and increase cash flow in the industry;

(c) increasing the time limit in the CCA for lodging an application for adjudication to 90 business days and enabling 'claims recycling' so parties to a contract have a greater time frame and increased flexibility in seeking rapid adjudication of a payment dispute;

(d) introducing legislation to make it an offence to intimidate, coerce or threaten a person or business in their access to remedies available under the CCA;

(e) working with the industry to develop express statutory trust arrangements for retention money on high-value construction projects, which will protect retention moneys during insolvency events and ensure they are not unreasonably withheld from subcontractors;

(f) improving the use of the *Building Services (Registration) Act 2011* (WA) as a means of investigating and disciplining registered building contractors who have engaged in unfair behaviour or systematic non-payment of subcontractors; and

(g) introducing a code of conduct for tenderers on state government–funded construction projects in order to reduce unacceptable behaviour on building sites, poor payment practices and anti-competitive behaviour.

Harmonisation of Security of Payment Legislation

An issue identified in the Discussion Paper was whether there was a need for 'harmonisation' of security of payment legislation. The divergence in the approaches adopted in what are generally described as the 'East Code Model' and the 'West Coast Model' have been the subject of considerable academic debate and federal government concern in view of the significant differences between the various security of payment Acts. It is not possible to be definitive in this article, however of the submissions received in the review only one favoured national legislation. The majority of submissions favoured the retention of the CCA.

On 4 December 2014, the Commonwealth Senate referred an inquiry into insolvency in the Australian construction industry to the Senate Economics References Committee for inquiry and report. The Committee report of 3 December 2015 made a number of recommendations regarding the relationship between security of payment legislation and insolvency.[146] One of the recommendations was that uniform security of payment legislation (or 'harmonisation') be introduced to replace the current non-uniform state legislation[147.] Subsequently on 21 December 2016, the federal government announced a national

[146] Senate Economics References Committee, Western Australia, *Insolvency in the Australian construction industry* (2015).

[147] See *Building and Construction Industry Security of Payment Act 1999* (NSW); *Building and Construction Industry Security of Payment Act 2002* (Vic); *Building and Construction Industry Payments Act 2004* (Qld); *Construction Contracts (Security of Payments) Act 2004* (NT); *Building and Construction Industry (Security of Payment) Act 2009* (SA)*; Building and Construction Industry Security of Payment Act 2009* (ACT); *Building and Construction Industry Security of Payment Act 2009* (Tas); *Construction Contracts Amendment Act 2016* (WA).

review into security of payment legislation in the building and construction industry particularly to examine security of payment legislation of all jurisdictions to identify areas of best practice for the construction industry.[148]

The Mining Exclusions

An important aspect of the review was whether the current exclusions relating to certain mining operations should be excluded for the provisions of the CCA and was considered in detail in the review report. The review recommendation that the mining exclusions be removed from the CCA was rejected by the government. The following details the information on the issue as taken from the review report.

Section 4(3) of the CCA excluded the operation of the CCA with respect to what are described as the 'mining exclusions' as follows:

> *'(3) Despite subsection (2) construction work does not include any of the following work on a site in WA —*
>
> *(a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;*
>
> *(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;*
>
> *(c) constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance.'*

The majority of the submissions favoured the removal of the mining exclusion. In support of the removal of the mining exclusions, the submissions from the major organisations (the Law Society of WA, the AIB, IAMA, and the MBA) were in agreement that the construction work associated with the activities listed in section 4(3) is not fundamentally different from construction work in other contexts and the CCA should be amended to reflect this.

A submission in support of maintaining current exclusion came from a major resource company. However the submission noted in part that section 4(3)(c) is unclear and has led to significant debate over the application of the CCA. A submission from another resources company referred to the *Second Reading of the Construction Contracts Bill 2004* (WA) where it was stated that the mining industry has been specifically excluded from the CCA. However the submission continued by saying that the CCA excludes activities that are commonly associated with mining, but it does not prevent its terms operating in respect of some aspects that may be incidental to mining such as construction of work other than those set out in the exclusion.

The submission referred to the decisions in *Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd*[149] *and Re Graham Anstee-Brook; Ex Parte Kara Mining Ltd*[150] and commented that these interpretations do not reflect the intention of the CCA to exclude the mining industry [underlining added] or activities commonly associated with mining. (These two decisions are discussed further below.)

The submission stated that section 4(3) of the CCA should be reviewed both to clarify and expand the mining exclusion beyond its current narrow interpretation. The resource company's submission appears

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[148] Mr John Murray AM has been appointed to conduct a review of security of payment laws in the Australian building and construction industry.

[149] [2012] WASAT 13.

[150] [2012] WASC 120.

to be based on the notion that it was the intention of the framers of the legislation to totally exclude the mining industry and suggested that section 4(3) of the CCA be reworded as follows:

> *'Constructing **projects for** any plant, **infrastructure or buildings, and related equipment,** for the purpose of, **necessary or incidental** to the extraction, processing, **or transport** of oil, natural gas, any mineral bearing or other substance, or any of their derivatives.'*

The proposed additions are shown in bold text. The submission continued that reading the intention of the framers of the CCA to totally exclude all mining activities, the current wording of the exemption has a potential economic impact on mining and resources projects. Rather than paraphrase or summarise the conclusion is reproduced in total as follows:

> *'Without this clarification and with the multitude and diversity of work on any mining site or project, owners and operators of mining and resource projects are potentially exposed to significant and complex adjudications, from multiple contractors and over consecutive months. Such activity has the ability to cripple the industry, delay and impede a project, and significantly increase tactical claims as sophisticated contractors continue to litigate around the application of the exception within the mining projects.'*

The research associated with the preparation of the Discussion Paper and for the review could not objectively determine the legislative basis for the exclusion and in particular whether the intention was for a total exclusion. The rationale for the exclusion appears to be apparent in the submission of the Queensland Resources Council (which refers to the Western Australian mining exclusion) in its submission to the Wallace Review[151] of the *Building and Construction Industry Payments Act 2004* (Qld) which stated:

> *'The current BCIP Act acts as a surcharge on projects in Queensland, a cost that both the companies producing wealth and the state can ill afford as resource project investment across Australia as well as in Queensland now battles to achieve major cost reductions in the entrenched economic paradigm of collapsed commodity prices. Major companies are entitled to evaluate the total legislative regime in Queensland in their investment risks assessments. The BCIP is a sovereign risk[152] factor. Amending s 10(3) of the BCIP Act so as to align with the WA mining exemption would only be adopting the best legislative standard presently in force in Australia. It would only level the playing field for project investment in Queensland tackling investment leakage to WA head-on. Significantly it is not a total exemption and nor would its adoption put Queensland projects ahead of WA on the risk curve.'*

The competitive reference to Western Australia is further noted in the Wallace Report where it was stated:

> *'The Queensland Resources Council in its written submissions to the review encouraged the Queensland Government to expand upon the exclusionary provisions contained in s 4(3) of the WA*

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[151] Andrew Wallace, *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry* (24 May 2013) 41 ('Wallace Review').

[152] Page 28 of the Wallace Review refers to the principles associated with project risks and quotes the Australian Corporate Finance Law as follows*: 'Each project will have a unique set of risks and circumstances for the financier to consider. Part 3 of this chapter discusses the most significant risks that arise in project financing. In this context it is important to note that not all risks demand the same level of importance for each project, for instance, sovereign risk is largely considered to be of minimal concern in a country such as Australia but it may be of paramount importance for a project in more volatile parts of the world like West Africa.'* Citing Lexis Nexis, *Australian Corporate Finance Law*, (at March 2013) 4 [4.080].

> *Act to strategically position Queensland as being more attractive to investment than the WA resources sector."*[153]

Wallace did not accept that the BCIPA constitutes an unreasonable sovereign risk to the state of Queensland and concluded that there was little justification to restrict the operation of the BCIPA. Consequently, no recommendation was made concerning the expansion of the BCIPA exclusionary provisions with respect to mining.[154]

Wallace commented that if the proposed review of the Western Australian CCA recommended an amendment to include claiming for the construction of plant and equipment, then the 'Queensland Government may consider consulting with the Western Australian Government on this issue to arrive at an appropriate and consistent exclusionary provision for the extraction of oil, gas and minerals'.[155]

In order to assist in determining this issue, the review considered the provisions of the East Coast and West Coast (WA and NT) security of payment legislation and a number of judicial decisions relating to the mining exclusion. The provisions are detailed above but may be generalised as follows.

As noted above the Western Australian CCA provides that:

> *'construction work does not include any of the following work on a site in WA —*
>
> *(a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not; [or]*
>
> *(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance.'* [156]

The Northern Territory exclusions are written in similar terms.[157]

These exclusions have been the subject of limited judicial consideration in both Western Australia and the Northern Territory.[158] It appears, as submitted by a major resource company, that the courts have taken a narrow view of what constitutes 'mining' activity. It has been suggested that the second *exclusion 'will certainly exclude… contracts to construct mine shafts, quarries and processing plants, as well as*

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[153] Wallace, above n 16, 43.

[154] Ibid.

[155] Ibid.

[156] See *Construction Contracts Act 2004* (WA) ss 4(3)(a)-(b); see generally Carine Cruse, 'Interpreting the "Mining Exclusion" under the *Construction Contracts Act* (WA)' (2012) 23(10) *Australian Construction Law Bulletin* 150.

[157] See *Construction Contracts (Security of Payments) Act 2004* (NT) s 6(2).

[158] Since 2005, the four WA cases pertaining to mining, oil and gas and processing are: *Pilbara Iron Ore Pty Ltd v Derek Noel Ammon* [2008] WASCA 202; *Silent Vector Pty Ltd t/as Sizer Builders and Squarcini* [2008] WASAT 3; *Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd* [2012] WASAT 13; and *Re Graham Anstee-Brooke; Ex parte Karara Mining Ltd* [2012] WASC 129.

professional services contracts for the design of the same.'[159] Perhaps surprisingly, the West Coast provisions do not expressly exclude the extraction of minerals or tunnelling or boring for that purpose.[160]

The East Coast exclusions are expressed in different terms. Specifically:

> *'(a) construction work does not include any of the following work:*
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> *i. the drilling for, or extraction of, oil or natural gas; [or]*
>
> *ii. the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose.'*[161]

In some respects the exclusions under the East Coast Acts are narrower than those in the West Coast legislation. While the West Coast provisions refer to drilling for the purposes of *discovery* or extraction, the East Coast provisions are limited to extraction.[162] However, the East Coast provisions exclude the extraction of minerals, while the West Coast Acts do not.

The East Coast exclusion relating to oil or natural gas has not been generally subject to extensive judicial consideration. However, the exclusion for the extraction of minerals has been narrowly interpreted in Queensland. In the *Thiess* case,[163] the Queensland Court of Appeal held that this exclusion was not to be given a broad construction, given the 'beneficial purpose' of the Act in ensuring the quick interim payment of claims.[164]

The exclusion was for the extraction of minerals, not work associated with the extraction of minerals. A broader meaning would have required broader language.[165] While the definition of extraction expressly included 'tunnelling or boring, or constructing underground works', it did not expressly refer to 'equivalent surface works'.[166] If Parliament had intended the exclusion to extend to activities that were

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[159] Simon Davis, 'Pay up or Else! The New Reality in Resource Projects' (2004) *Australian Mining and Petroleum Law Association Yearbook* ,157 [164].

[160] Jeremy Coggins, Robert Fenwick Elliott and Matthew Bell, 'Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia' (2010) 10(3) *Australasian Journal of Construction Economics and Building* 14, 18.

[161] *Building and Construction Industry Security of Payment Act 1999* (NSW) s 5(2);see also *Building and Construction Industry (Security of Payment) Act 2009* (ACT) s 7(h); *Building and Construction Industry Payments Act 2004* (Qld) s 10(3); *Building and Construction Industry Security of Payment Act 2009* (SA) s 5(2); *Building and Construction Industry Security of Payment Act 2009* (Tas) s 5(2); *Building and Construction Industry Security of Payment Act 2002* (Vic) s 5(2).

[162] Coggins, Elliott and Bell, above n 26.

[163] *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2013] 2 Qd R 75.

[164] Ibid [62].

[165] Ibid [63].

[166] Ibid [66].

necessary for mineral extraction, it would have been a simple matter to include express words to that effect.[167] The construction of dams and drains thus did not fall within the exclusion.[168]

In *HM Hire*,[169] the appellant hired dump trucks and a loader from the respondent.[170] Under a subcontract with another party the appellant was obliged to carry out clearing and grubbing, topsoil stripping and placement at a coal mine.[171] The appellant did not undertake any excavation of coal.[172] Applying its ruling in the *Thiess* case, the Queensland Court of Appeal held that the preparatory earthworks performed by the appellant were not an extraction of minerals.[173]

In *J & D Rigging* ,[174] the appellant had undertaken to dismantle and remove a mineral treatment plant that was bolted onto concrete footings on land that was subject to mining leases.[175] The Queensland Court of Appeal held that the security of payment legislation applies to construction work carried out on land that is subject to a mining lease except in the narrow area where the mining exclusion applies.[176] The High Court refused special leave to appeal this decision, indicating that there were insufficient prospects for its success.[177]

In summary, as can be seen from the above the current wording of the mining exclusion has created considerable debate and uncertainty where provisions in the CCA apply to a number of (but not all) construction contracts for work on mining sites in Western Australia.[178] Due to the resources exclusions, the resources industry has operated independently from the security of payment legislation in many respects. For example, the CCA prohibited contractual payment periods of over 50 days.[179] However, comments were made during the Review that such terms are commonplace in the resources sector.

Whilst it is acknowledged (as noted in one of the submissions) that the removal of the mining exclusions in the current security of payment legislation may involve a major adjustment to longstanding practices, nevertheless when viewed objectively, construction work involves common issues and risks whether it be for a multi-storey commercial building or a mining construction. Provided the construction work falls within the provisions as set out in sections 4(1) and 4(2) of the CCA, and overall the review indicated that the mining and resources sector should not be considered so different as to fall outside the provisions of the CCA. The submissions, with the exception of the two discussed above, stated that the commercial pressures being felt by the mining industry, apart from those generated by the size of the projects, are no

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[167] Ibid [68].

[168] Ibid [69].

[169] *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2013] QCA 6.

[170] Ibid [2].

[171] Ibid [11].

[172] Ibid [8].

[173] Ibid [9].

[174] *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2013] QCA 406.

[175] Ibid [2]–[3], [45].

[176] Ibid [47]–[53].

[177] *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2014] HCATrans 106, 10, line 338.

[178] Davis, above n 25, 163–164.

[179] *Construction Contracts Act 2004* (WA) s 10.

different to those experienced by other sectors of the construction industry and there can be no justification for legislation discriminating against a party because of the size of the work.

As was noted in a number of the submissions, large claims are not necessarily more complex than smaller claims. Whilst acknowledging the economic benefits to the state as a consequence of the mining and resource sector,[180] it could not be objectively concluded that contracting parties in this sector should be treated differently to other parties in all other sectors of the building and construction industry.

The wording relating to the mining exemption in section 4(3) was subsequently amended in the *Construction Contracts Amendment Act* 2016 (WA) as shown below. However it essentially maintains the intention of the exemption despite what are considered to be cogent reasons for its removal.

> *'(a) fabricating or assembling items of plant used for ~~constructing any plant for the purposes of~~ extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance;'*

The interpretation of the words 'for the purposes of' by both the State Administrative Tribunal and the Supreme Court of Western Australia have suggested a broad interpretation which limited the scope of the exclusion in practice. Hopefully the amendment to section 4(3)(c) removing the words 'constructing any plant for the purposes of' has responded in part to the difficulties of interpretation. However whilst acknowledging the economic benefits to the state as a consequence of the mining and resource sector, which conjecturally appears to be a significant factor with respect to the rejection of the review recommendation, it could not be objectively concluded that contracting parties in this sector should be treated differently to other parties in all other sectors of the building and construction industry in Western Australia.

Subcontracts should be in writing

The review report also recommended that construction contracts for the purpose of the CCA should be in writing. Further there should be a pecuniary penalty for noncompliance and the contract should be voidable at the option of the aggrieved party for failure to comply with the writing requirement. No recommendation was made regarding any monetary limits with respect to the writing requirement. It was noted that these should be determined by the state government. This recommendation was not accepted apparently on the basis that the implied terms provisions in the CCA[181] were appropriate where oral agreements were entered into.

Examples were given during a number of stakeholder meetings of difficulties experienced by smaller parties who have entered into wholly oral contracts. A number of examples were also given of large projects where the agreement was constituted by a simple purchase order giving a brief description of the work and a lump sum amount. The CCA provides that there is no requirement for writing for a construction contract.[182] Section 3 of the CCA provides [underlining added]:[183]

> ***'3. Interpretation***

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[180] P Downes, K Hanslow, P Tulip, 'The Effect of the Mining Boom on the Australian Economy' (Research Discussion Paper 2014-08, Reserve Bank of Australia, 2014).

[181] *Construction Contracts Act* 2004(WA) Div 2.

[182] In *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [2012] WADC 27 an oral agreement entered into by telephone was held to be a construction contract for the purposes of the Act.

[183] *Construction Contracts Act 2004* (WA) s 3.

> ***construction contract*** *means a contract or other agreement, whether in writing or not, under which a person (the* ***contractor****) has one or more of these obligations —'*

The provision acknowledges the widespread practice, particularly at the lower end of the contracting chain that numerous contracts for the supply of goods and services are entered into on an oral basis. Where written evidence of a contract is required, this will be due to the operation of statute.[184]

The reference to 'or other agreement' in the definition is relevant. Put simply, for the purposes of the CCA a 'construction contract' is something less than a formal contract. This would appear to include an arrangement which is not legally binding.[185] In *Machkevitch v Andrew Building Constructions*[186] it was held:

> *There must be something more than a mere undertaking; or something which can be said to give rise to an engagement, although not a legally enforceable engagement, between two parties; or a state of affairs under which one party undertakes to the other to do something; or an arrangement between parties to like effect.*[187]

By way of comparison, section 4 of the *Home Building Contracts Act* 1991 (WA) does contain a writing requirement for home building construction work currently valued between $7,500 and $500,000. The provision requires that contracts must be in writing setting out all of the terms conditions and provisions of the contract.

Whilst it is acknowledged that many oral contracts do run smoothly, nevertheless it is considered that construction contracts for the purpose of the CCA should be in writing to avoid evidentiary problems and uncertainty and reduce the problems arising from the incorporation of implied terms. It is difficult to comprehend why a contract for home building works costing up to $500,000 is required to be in writing whilst other construction contracts for works of similar amounts may be by way of oral agreement.

In rejecting this recommendation it appears, albeit conjecturally, that the government considers that the provisions dealing with implied terms in the CCA are sufficient to for the protection of parties where the agreement is oral.

The use of AS Standard Form Contracts

There has been widespread publicity given to issues relating to sub contractors entering into ad hoc or bespoke contracts which contain terms which might be generally described as 'unfair' or 'onerous'.[188] In a confidential submission the reviewer was handed a contract which he was informed has been used in a number of large subcontracts in Western Australia. In this instance it had been used on a project where

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184 See, eg, *Home Building Contracts Act 1991* (WA); *Property Law Act 1969* (WA); *Insurance Contracts Act 1984* (Cth).

185 *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546; *IWD No 2 Pty Ltd v Level Orange Pty Ltd* [2012] NSWSC 1439. See also Andrew Chen and Shaun Bailey, *Construction Contracts – A Wider Net Than You Think* (3 December 2012) Corrs Chambers Westgarth <http://www.corrs.com.au/publications/corrs-in-brief/construction-contracts-a-wider-net-than-you-think/>.

186 [2012] NSWSC 546.

187 Ibid [29].

188 See 'Subbies reform crawls along', *The West Australian,* (Perth) 17-18 September 2016, 47; and 'Subbies squeezed from both sides of building sites', *The West Australian* (Perth) 26 January 2017, 10.

the state government department was the principal. It was not a standard form contract[189] and was not balanced in terms of allocation of risk as would be found for example in the Australian Standard suite of contracts.[190] There were a number of exclusion clauses and a termination for convenience clause, which prompts one to wonder why a party would enter into such a contract. The response by stakeholders when questioned during the meetings regarding this issue was that it simply reflects the commercial realities in the construction industry. Unfortunately, under common law, harshness alone is not an invalidating factor as held in *South Australian Railways Commissioner v Egan.*[191]

The advantages of the use of standard form contracts in the Australian construction industry have been well documented. As far back as 1990 it was noted that standard forms of contract are preferred by the industry to contracts that are individually drafted for each project, if for no other reason than that as both parties are more likely to be fully familiar with the obligations assumed by each party using a Standard form they will thereby reduce incidents of dispute caused by concealing obligations in unfamiliar documents.[192]

More recently, the benefits of standard form contracts have been noted in the research report by the Melbourne University School of Law.[193] The report states, in part, that 68% of contracts reported on are based upon standard form contracts and the dominating factor identified by participants was the familiarity with the forms. Their widespread use over time and familiarity enables participants to clearly understand the meaning of terms and their rights and obligations under the contract. The dispute resolution procedures used in these standard forms are well understood. The forms have been prepared after long consultation with relevant stakeholders and interested parties and are subject to review and revision from time to time. A significant benefit in their use is that the risk is balanced between the contracting parties.

Whilst it is acknowledged that the state government may be reluctant to interfere with the commercial agreements between two commercial parties who have entered into contracts at arm's length, nevertheless it is considered that state government has a public policy obligation to assist (subject to law) even in commercial contracts where the behaviour of a party (particularly the stronger party) has the effect of seriously damaging the rights of the other.

Conclusion

The review and the subsequent amendments to the CCA have been described as the sectors 'biggest shakeup' in a decade.[194] Additionally the introduction of *Western Australian Building and Construction Industry Code of Conduct 2016 hopefully will* ensure that all Western Australian government agencies,

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[189] A list of the standard form contracts used in the building and construction industry may be found in J Sharkey, M Bell, W Jocic and R Marginean, 'Standard Form Contracts in the Australian Construction Industry' (Research Report University of Melbourne, 2014).

[190] The Standards Australia (SA) Technical Committee MB-010, General Conditions of Contract, has deferred the revision of the suite of standards related to the general conditions of contract, AS2124-1992 and AS4000-1997. It had been proposed that the two Standards should be merged into a new Standard, AS11000: General Conditions of Contract.

[191] (1973) 130 CLR 506.

[192] NPWC/NBCC Joint Working Party, 'No Dispute – Strategies for the Improvement in the Australian Building and Construction Industry', (Report, National Public Works Conference, May 1990).

[193] Sharkey, Bell, Jocic and Marginean above n 55.

[194] Beth Cubitt, Glen Warwick and Luke Carbon, *Amendments to the Western Australian Construction Contracts Act Unveiled,* (27 October 2016) Clyde and Co <http://www.clydeco.com/insight/article/amendments-to-the-western-australian-construction-contracts-act-unveiled>.

when expending public funds, contract with building contractors that conduct themselves in a reputable, fair, safe and responsible manner, both in dealings with the State of Western Australia and within the building and construction industry more broadly. Whilst the state government acted positively and quickly with respect to the majority of the review recommendations it is difficult to comprehend on balance the reasons for the rejection of the recommendations relating to the mining exclusions, the need for written contracts and the use of Australian Standards General Conditions of Contract.

With respect to the mining exclusions the interpretation of the words 'for the purposes of' by both the State Administrative Tribunal and the Supreme Court of Western Australia have suggested a broad interpretation which limited the scope of the exclusion in practice. Hopefully the amendment to section 4(3)(c) removing the words 'constructing any plant for the purposes of' has responded in part to the difficulties of interpretation. However whilst acknowledging the economic benefits to the state as a consequence of the mining and resource sector, which seems anecdotally to be a significant factor with respect to the rejection of the review recommendation, it could not be objectively concluded that contracting parties in this sector should be treated differently to other parties in all other sectors of the building and construction industry in Western Australia.

It is considered that a requirement that subcontracts under the CCA be evidenced in writing would clearly assist in the application of the CCA through the avoidance of the problems associated with the enforcement of oral terms and problematic implied terms.

The problems associated with the use on ad hoc or bespoke contracts in the Western Australian construction industry are well known. Objectively there are strong reasons for the adoption of the Australian Standard suite of general conditions of contract on government projects. As noted above, while the state government may be reluctant to interfere in the freedom of parties to choose or select the types of contract they wish to be bound by, government intervention is clearly necessary to assist where the behaviour of a party has the effect of seriously damaging the rights of others through the use of what we might describe in the vernacular as 'take it or leave it' or unbalanced contracts.[195]

[195] In August 2015 the *Competition and Consumer Act 2010* (Cth) was amended to extend the unfair contract terms protection provisions to businesses with less than 20 employees where 'standard form' contracts valued at less than $100,000 or $250,000 or if the duration of the contract is more than 12 months are used. See *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* (Cth).