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STATUTORY REVIEW OF THE CONSTRUCTION CONTRACTS ACT 2004 (WA)

PHIL EVANS*

Abstract

The *Construction Contracts Act 2004* provides for security of payment in the construction industry through the use of rapid adjudication processes to determine payment disputes. It further prohibits or modifies certain ‘unfair’ provisions in construction contracts and implies provisions in construction contracts about certain matters if there are no written provisions about these matters in the contract. In 2015 the Minister for Commerce commissioned a review of the Act to determine whether it is meeting the needs of industry and whether amendment was required. This paper provides a background to the construction industry in Western Australia and the essential provisions of the Act together with the principal findings from the review. The recurring issue throughout the review was the critical need for widespread education and publicity regarding the existence of, and the provisions of the Act. Unless this occurs as a matter of urgency and priority, the Act will not fully achieve its objectives for the benefit of all sections of the construction industry.

I INTRODUCTION

The *Construction Contracts Act 2004* (WA) (the Act) came into operation on 1 January 2005. It provides for security of payment in the construction industry through the use of rapid adjudication processes to determine payment disputes. As indicated in the Second Reading speech, the legislative intent of State Parliament for the Act was ‘...to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex issues. The process is kept simple, and therefore cheap and accessible, even for small claims. In most cases the parties will be satisfied by an independent determination and will get on with the job.’¹ The Act prohibits or modifies certain provisions in construction contracts. It also implies provisions in construction contracts about certain matters if there are no written provisions about these matters in the contract.

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¹ Western Australia, *Second Reading Speech*, Legislative Council, 8 April 2004, 1934b-1935a (The Hon Alannah McTiernan)

Although similar to security of payment legislation in the Northern Territory, the Act is fundamentally different from security of payment legislation in all the other states and the Australian Capital Territory.² In Western Australia and Northern Territory the legislation largely operates by reference to the parties' own contractual arrangements whereas in the Eastern States legislation attempts to provide a claimant with statutory rights. The West Australian Act gives primacy to the parties' own contractual terms relating to payment.

A Review Background

Section 56(1) of the Act requires the Minister for Commerce to review the operation and effectiveness of the Act as soon as practicable after the fifth anniversary of its commencement and prepare a report about the review. The review became due on 1 January 2010 but was held over until the passage and implementation of a suite of new building legislation, including the *Building Services (Complaint Resolution and Administration) Act 2011*.

The implementation of the Act preceded implementation of this new suite of legislation and its provisions have not yet been integrated with the building regulation reforms. On 10 June 2014, the Building Commissioner, Mr Peter Gow announced that Professor Philip Evans had been appointed to review the Act. Professor Evans completed the review in September 2015 and his report was tabled in state parliament on 16 August 2016.

1 Purpose of Review

The review was required to meet the periodic statutory requirement to examine the operation and effectiveness of the Act and for the Minister for Commerce to present the report findings to Parliament. The State Government will then be able to respond to the findings and indicate its position on any recommendations for legislative amendment or other action.

² *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).

The review provided a timely opportunity for key stakeholders to examine the provisions of the Act and to determine whether they are meeting the needs of industry and whether there is room for improvement and modification. The review specifically provided stakeholders with an opportunity to provide written and verbal submissions as to their concerns for the attention and deliberation of the Reviewer. Several hearings were conducted during the Review process.

2 *Building Regulation Reform in Western Australia*

Recent building industry regulation reform in Western Australia sought to promote innovation and productivity, whilst minimising unnecessary red tape by developing a more risk-based focus.³ Performance building standards are now backed by a rigorous but flexible certification process through a new *Building Act 2011* (WA). A rigorous registration system under the new *Building Services (Registration) Act 2011* (WA) ensures that practitioners are competent and take out professional indemnity insurance. Practitioners are free to apply their skills, subject to audit by the Building Commission, which ensures the maintenance of standards and consumer protection.

The *Building Services (Complaint Resolution and Administration) Act 2011* (WA) empowers the Building Commissioner to oversee industry through inspections, auditing and enforcement of compliance with building laws. Under this legislation, anyone adversely affected by services provided by the industry can make complaints to the Commissioner and seek orders to remedy work or pay compensation. The Building Commissioner can deal with straightforward complaints quickly and informally, and can see that more complex disputes are dealt with formally by the State Administrative Tribunal (SAT).

In March 2013, the Small Business Commissioner, Mr David Eaton, delivered a final report⁴ into an investigation into the non-payment of sub-contractors on construction projects administered by the State Government between October 2008 and October 2012. Mr Eaton recommended a review of the dispute resolution mechanisms available to small businesses in the Western Australian construction industry and suggested the possibility that mechanisms

³ Philip Evans, 'Discussion Paper on the Statutory Review of the *Construction Contracts Act 2004*' (October 2014) <www.commerce.wa.gov.au/sites/default/files/.../constructionactdiscusspaper_0.pdf>

⁴ David Eaton, 'Final Report Construction Subcontractor Investigation' (March 2013) <[http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3910419a4fc775cd3efcd51d48257b9600408d5f/\\$file/419.pdf](http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3910419a4fc775cd3efcd51d48257b9600408d5f/$file/419.pdf)>.

under the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) could be utilised to resolve disputes in the construction industry and which could also involve conciliation or referral to the SAT. This matter is a related consideration for this Review, and has thus been accommodated within the Review's Terms of Reference.

Within his investigation the Small Business Commissioner received submissions from stakeholders that indicated small business concerns about:

- The attractiveness of utilising the rapid adjudication process to resolve payment disputes as set out in the *Construction Contracts Act 2004* for small claims; and
- Difficulties entailed with the Act's requirement of having to make a claim within 28 days of a dispute arising.

3 *Terms of Reference*

The review considered the operation and effectiveness of the *Construction Contracts Act 2004* (WA) in terms of:

1. The context in which the Act now operates;
2. Issues related to how the Act operates, including (but not exclusively):
 - (a) Scope of the Act;
 - (b) The mechanisms in the Act;
 - (c) Court rulings and interpretation;
 - (d) Adjudicators;
 - (e) Prescribed Appointors; and
 - (f) Other issues identified during stakeholder consultations.
3. Whether amendments to it or other related Acts are needed to improve its effectiveness and efficiency; and
4. Any negative impact or additional regulatory burden that may be foreseen with proposed amendments that may be subject to Regulatory Impact Assessment at a later date.

4 *Initial Consultation with Key Stakeholders*

The review involved liaising with relevant key stakeholder groups, including:

- All Prescribed Appointors pursuant to the Act and Regulations
- Government agencies with an interest in the Act's operation, including:
 - Small Business Development Corporation, and
 - Building Management and Works (BMW) Division of the Department of Finance
- Key building and housing construction organisations, including:
 - Housing Industry Association, and
 - Master Builders Association (WA)
- Legal institutions and professional societies, including:
 - The Society of Construction Law Australia
 - The West Australian Courts and the State Administrative Tribunal
 - The Law Society of western Australia
 - The Institute of Arbitrators and mediators Australia (IAMA)
 - The Australian Institute of Building
- Organisations representing contractor interests, and
- Registered Adjudicators.

B Industry Background

The importance of the Act is premised on the fact that the building and construction industry is a major driver of the Australian economy. The sector makes a significant contribution in terms of the creation of national wealth and well-being of the community, particularly through the provision of shelter.

The construction sector added a record \$118.3 billion to the Australian economy in the year to March 2014. This was up two per cent from the previous year as the resources sector also remained strong.⁵ The pivotal role of the Western Australian resources sector in sustaining wealth creation and providing flow-on benefits has ensured that construction and engineering continues to make up a greater proportion of the West Australian economy than in other states. While population growth and infrastructure spending fuelled by resources activity has

⁵ BIS Shrapnel, 'Long Term Forecast 2014-29', September 2014.

been winding back, housing, unit and renovation construction activity is becoming a source of growth on its own.

For example, construction of apartment complexes remains strong with the recent commencement of 66 apartment buildings that are expected to deliver 3,500 apartments by mid-2016. There are a much larger number of projects in the planning pipeline.⁶ In this environment, it is important that the subcontracting industry remains vibrant and is not adversely hampered by persistent security of payment issues. Government has a role in assisting industry with appropriate and workable security of payment mechanisms.

1 *Industry Snapshot*

The construction industry contributes almost 12 per cent of Western Australia's Gross State Product and employs 10.6 per cent of the state workforce.

Key statistics currently paint a healthy picture of the local industry:⁷

- An annualised average of 141,450 were employed in the industry (May 2013 - May 2014);
- Compared to the previous twelve months, employment increased 8.4 per cent to May 2014;
- 40 per cent of the State's apprentices were employed by the industry;
- Approximately 27,000 construction workers are working on resource industry infrastructure construction projects;
- The value of residential and non-residential construction work, excluding heavy engineering, in the year to March 2014 increased by 3.8 per cent compared to the year to March 2013;⁸
- Seasonally adjusted, dwelling commencements increased by 12.1 per cent in the quarter to March 2014; and⁹
- On an annualised basis compared to March 2013, dwelling commencements increased by 28.9 per cent.¹⁰

⁶ Marissa Lague, 'It's a high rise in apartments', *The West Australian* 10 September 2014, 16.

⁷ Construction Industry Snapshot' (Construction industry Training Fund, 22 July 2014) <https://bcitf.org/upload/documents/research_reports/SNAPSHOTWAJuly2014v20140722final.pdf>.

⁸ Australian Bureau of Statistics, *8755.0 - Construction Work Done, Australia, Preliminary, Jun 2016* (24 August 2016) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8755.0>>; Australian Bureau of Statistics *8762.0 - Engineering Construction Activity, Australia, Jun 2016* (28 October 2016) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8762.0>>.

⁹ Above n 5

¹⁰ Ibid.

In 2009-10, 97.9 per cent of the businesses in the State's construction industry were small businesses.¹¹ The industry has the highest number of contractors of any industry.¹²

2 *Challenges Facing the Construction Industry*

There are some perennial challenges confronting the construction industry that go to the very heart of how the industry is structured and the cyclical economic environment in which it operates.

In most construction projects, many of the onsite building practitioners typically have no direct contractual relationship with the client. There are subcontractors engaged by the head contractor, subcontractors are engaged by the subcontractors and so on. A given project can often have a lengthy and complex contracting chain.¹³

Unfair risk transfer from stronger parties to weaker parties is endemic. The principal invariably attempts to transfer risk to the contractor, and contractors are left in the position of having to accept an unfair risk allocation or lose work to competitors who are prepared to take on these risks. The actual outcome may often not be as cost effective and efficient as it otherwise could be but the practice persists and is widespread.¹⁴

The industry consistently records the highest level of insolvencies amongst all industries. Key nominated causes of business failure are inadequate cash flow or high cash use; poor strategic management of the business; poor financial control, including lack of records; and under capitalisation, in that order.¹⁵

¹¹ Australian Bureau of Statistics *8165.0 Counts of Australian Businesses, including Entries and Exits, June 2009 to June 2013* (26 February 2016) Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8165.0> (Accessed 12 November 2016)

¹² Australian Bureau of Statistics, *6359.0 -Forms of Employment Survey, November 2011, Summary of Findings* (20 April 2012) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6359.0Main%20Features3November%202011?opendocument&tabname=Summary&prodno=6359.0&issue=November%202011&num=&view=>>>.

¹³ New South Wales, Independent Inquiry into Construction Industry Insolvency in NSW, *Final Report* (2012).

¹⁴ Ashurst, Australian Constructors Association, Infrastructure Partnerships Australia, *Scope for Improvement 2014 - Project Pressure Points - Where Industry Stands* (2014) Ashurst <https://www.ashurst.com/resource/lib/PUB_Scope_for_Improvement_2014.pdf?pdf=Scope-for-improvement-2014>, 53-54. (Accessed 12 November 2016)

¹⁵ Australian Securities and Investments Commission, 'REP 412 Insolvency Statistics: External Administrators' Reports' (Report, ASIC, 29 September 2014) <<http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-412-insolvency-statistics-external-administrators-reports/>>.

Evidence from recent insolvency investigations in Western Australia¹⁶ and New South Wales¹⁷ suggest that existing measures by governments to provide for security of payment in the industry do not sufficiently ameliorate these structural factors and impacts.

Also, many forecasts for engineering construction investment are gloomy. For example, Deloitte Access Economics sees a decline to five per cent of Gross Domestic Product (GDP) by 2015, falling below 4 per cent by 2020.¹⁸ According to Deloitte, Federal Treasury is predicting a sharp fall in investment in both 2015-16 and 2016-17 and projections from ANZ Bank see mining investment fall to as low as two per cent of GDP by 2016.¹⁹ Domestic building is not expected to be enough to fill the gap.

As a consequence, competition for some construction work may be expected to tighten considerably in coming years, exacerbated by a persistence of higher construction costs that have been a result of the mining boom.²⁰

3 *Security of Payment Issues*

As noted above the construction industry is one of the most dynamic sectors of the economy. The response of the industry to trends and fluctuations in market demand is significant. In time of high construction activity, legal claims arise from hasty contract formation, inadequate documentation, poor workmanship and claims for extensions of time and extras²¹. In times of low demand, legal claims arise in situations where contractors attempt to recover low profits through claims of latent site conditions, variations and extras under the contract²².

The resolution of construction disputes, especially those relating to payment, are notoriously time-consuming and expensive. These disputes are often founded in or exacerbated by misunderstandings between the parties as to their respective rights and obligations. There is also often a significant power imbalance between owner and contractor or contractor and sub-contractor.

¹⁶ Eaton, above n 5.

¹⁷ Above n 11.

¹⁸ Deloitte Access Economics, *Major Infrastructure Projects; Costs and Productivity Issues* (7 March 2014) Deloitte <<http://www2.deloitte.com/au/en/pages/economics/articles/major-infrastructure-projects.html>>.

¹⁹ Ibid.

²⁰ Ibid.

²¹ *Avoidance of construction disputes through legal knowledge*, Queensland Roads Ed 12, Department of Transport and Main Roads, October 2012

²² Ibid.

Security of payment issues has been the subject of a number of academic commentators in recent years.²³ In terms of state security of payment reviews, in May 2013, Mr. Andrew Wallace (a barrister with Construction Industry experience and an Adjudicator) submitted a report (Final Report of the Review of the Discussion Paper – Payment dispute resolution in the Queensland building and construction industry - the Wallace Report)²⁴ to the Queensland Minister for Housing and Public works following his review of the Building and Construction Industry Payment Act ('BCIPA'). A similar review was conducted in South Australia by retired District Court judge Alan Moss.²⁵ In Western Australia the issue of payment protection in the construction industry was considered and reported in the 1998 Law Reform Commission of Western Australia's WALRC 82 'Financial Protection in the Building and Construction Industry' discussion paper and its final report which recommended the implementation of a trust scheme.²⁶ The recommendation was not adopted due to difficulties in implementation and the inflexibility that would have been imposed on a builder's business operations.

Subsequently in 2001, a State Government-initiated Security of Payment Taskforce delivered a report on options for security of payment legislation. A *Construction Contracts Bill* was approved by State Cabinet for drafting in 2002. The purpose of the Bill was to legislate for security of payment in the building and construction industry by:

- Prohibiting payment provisions in contracts that slow or stop the movement of funds through the contracting chain;
- Implying fair and reasonable payment terms into contracts that are not in writing;
- Clarifying the right to deal in unfixed materials when a party to the contract becomes insolvent; and

²³ For example, P Davenport 'Security of payment now Australia wide' (2010) 131 *Australian Construction Law Newsletter* 36; T Zhang 'Why national legislation is required for the effective operation of the security of payment scheme' (2009) 25 *BCL* 376; J Coggins, R Elliott & M Bell 'Towards Harmonisation of Construction Industry Payment Legislation' (2010) 10(3) *Australian Journal of Construction Economics and Building*.

²⁴ Andrew Wallace, 'Payment Dispute Resolution in the Queensland Building and Construction Industry Final Report' (24 May 2013) <https://www.qbcc.qld.gov.au/sites/default/files/Final_Report_-_Discussion_Paper_-_Payment_dispute_resolution_in_the_Queensland_building_and_construction_industry_PDF.pdf>.

²⁵ Alan Moss, *Review of Building and Construction Industry Security of Payments Act 2009 (SA)* <http://www.sasbc.sa.gov.au/files/542_review_of_building_and_construction_industry_security_of_payments_act_2009_prepared_by_alan_moss.pdf>.

²⁶ Law Reform Commission of Western Australia, 'Financial Protection in the Building and Construction Industry' (2002) <http://www.lrc.justice.wa.gov.au/_files/P82.pdf>.

- Providing an effective rapid adjudication process for payment disputes arising under construction contracts, whether they are written or oral.

The Bill received Royal Assent on 8 July 2004 and became the Act that is now undergoing its first statutory review.

4 *The Role of the Construction Contracts Act 2004*

Prior to the introduction of the Act, when there has been a dispute over payment for work done or materials supplied the person who has done the work or supplied the materials has been at a distinct disadvantage. They were faced with the prospect of a lengthy and time-consuming task in attempting to obtain payment for work for which they were legitimately entitled.

The implementation of the Act has significantly altered the rights of parties seeking payment for work performed or materials supplied in connection with construction work by providing a quick, informal and less expensive procedure for the resolution of payment disputes.

Additionally, the Act enables an adjudication to be commenced either before or during arbitration or litigation in order to ‘keep the money flowing’. The Act also abolished ‘pay when paid’ provisions in construction contracts and prohibits lengthy times for payment by the owner or principal.

5 *Divergence in Approach Compared to Other States*

There is no uniformity with respect to security of payment legislation amongst the states and territories and one of the purposes of the review will be to consider the need for, and the possibilities of uniformity. Each state and territory has developed its own legislative pathway and there are now both significant and many minor differences in the operation of legislation in each jurisdiction even though the objectives of the respective legislative regimes are identical. The difficulty for Western Australia is that its model is considered by some legal academics to be largely better in practical operation than all other states. It is believed that little will be gained by adopting the majority legislative model as this is viewed as inferior in practice.²⁷

National consistency may require all states and territories to concede that their legislative pathways are deficient in some way and to agree that inconsistencies in approach across the

²⁷ Australian Legislation Reform Sub-Committee of Society of Construction Law Australia, *Security of Payment and Adjudication in the Australian Construction Industry*, Report (2014) <<http://www.scl.org.au/news.php/14/report-on-security-of-payment-and-adjudication-in-the-australian-construction-industry>>

nation are detrimental to the economy as a whole. Engagement between the states and territories would have to be initiated and an agreement struck as to a means that would satisfy requirements in all states and territories. Commonwealth legislation could be enacted to achieve uniformity. This was one of the recommendations of the Cole Royal Commission.²⁸ Alternatively, there could be the adoption of a set of principles by all states and territories by which all jurisdictions agree to amend their respective legislation.²⁹ All this is highly unlikely at this point in time but it is, nevertheless, within the realm of possibilities. Legal academics refer to the *Construction Contracts Act 2004* (WA) and its near equivalent in the Northern Territory as the ‘West Coast’ model of security of payment legislation. All other states and the Australian Capital Territory have adopted a different legislative approach often referred to by these academics as the ‘East Coast’ model. While both models allow for an adjudication scheme that determines payment claims as an immediate fast-track remedy, there are significant differences in terms of the provisions for adjudicator appointments, submissions which an adjudicator is permitted to consider and the way an adjudicator needs to adopt to arrive at his or her decision.

In view of the significant differences between the various security of payment legislation it is not possible to be definitive in this article. However a detailed comparison of the provisions may be found in; Minter Ellison: Security of Payment Part II: An overview of the Acts in each Australian jurisdiction, 8 August 2016.³⁰

Consequently recommendations for national uniformity in security of payment legislation have been made by the Cole Royal Commission,³¹ the Society of Construction Law Australia (SOCLA)³² and Master Builders Australia.³³

²⁸ The final report of the Cole Royal Commission made 211 recommendations and was presented to Federal Parliament on 24 February 2003, proposed that a new Act be created; the Building and Construction Industry Improvement Act, *The Cole Royal Commission Delivers its Final Report* FindLaw Australia <www.findlaw.com.au/articles/1465/the-cole-royal-commission-delivers-its-final-repor.aspx>

²⁹ Master Builders Australia, ‘Submission to APCC on Security of Payment in the Building and Construction Industry’, (31 July 2012) <<http://www.masterbuilders.com.au/information sheets/submission-to-apcc-on-security-of-payment>>

³⁰ *Ready Reckoner for In-House Counsel Security of Payment Act* Minter Ellison <<http://www.minterellison.com/files/Uploads/Documents/Publications/Articles/Ready%20reckoner%20-%20Security%20of%20Payment%20Act%20-%202016.pdf>>

³¹ Royal Commission into the Building and Construction Industry, “Security of Payments in the Building and Construction Industry”, Discussion Paper 12, 2002

³² ‘Report on Security of Payment and Adjudication in the Australian Construction Industry’, Australian Legislation Reform Sub-Committee of the Society of Construction Law Australia, February 2014

³³ Above n 28.

II BACKGROUND INFORMATION: THE CONSTRUCTION CONTRACTS ACT 2004

A Provisions of the Act

This section outlines the core provisions of the Act and Regulations. The Act applies to all contracts for construction work undertaken in Western Australia. Construction work includes site preparation, actual construction, repair, renovation and design, drafting and management.³⁴ Where the contract is silent with respect to terms regarding payment provisions the Act will imply terms regarding the contractor's entitlement to be paid.³⁵

Not all construction work is included in the Act. Work in discovering or extracting oil or natural gas is excluded as well as the mining for minerals and the constructing of plants for the purpose of extracting oil or minerals and wholly artistic work.³⁶ There is also exclusion for watercraft.³⁷

The provisions relating to the rapid adjudication process reflect a compromise between expediency on one hand and legal formality on the other. The principal aim of the Act is to keep the money flowing in the contractual chain by ensuring timely payment for work completed and avoiding complex protracted litigation.

The process is determined by registered adjudicators with a background in construction contract management and dispute resolution. The role of the adjudicator is to review the claim made under the construction contract and the response and, if satisfied that the claim is justified, make a binding determination on the issues.

1 The Application of the Act

(a) Construction work

What constitutes construction work is very broadly defined in the Act. It includes all of the activities associated with civil works such as roads railways, waterways, harbours ports and marinas, pipelines for water, gas, oil or sewerage. Additionally, it includes activities associated with the repair restoration, demolition and installation of plant and machinery

³⁴ See *Construction Contracts Act 2004* (WA) ss 4(1)-(2).

³⁵ *Ibid* Division 2.

³⁶ *Ibid* s 4(3)

³⁷ *Ibid* s 4(4).

associated with construction works, and activities such as cleaning, painting, decorating, site restoration and landscaping.³⁸

2 *Goods and Services Related to Construction Work*

Contracts relating to the supply of plant and materials used in construction work are also subject to the Act.³⁹ Further contracts for services that are provided by a profession that are related to construction work are subject to the Act. The services include surveying, planning, architectural design, plan drafting, engineering, quantity surveying and project management services.⁴⁰

3 *Work Not Designated as Construction Work*

The Act excludes a number of activities which one might normally associate with construction work,⁴¹ in particular, work associated with mining and mineral exploration and extraction. For example:

- Drilling for the purposes of discovering or extracting oil or natural gas;
- Constructing a shaft pit or quarry for the purposes of discovering or extracting any mineral bearing or other substance; and
- Constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas.

Other work excluded under the Act is any work associated with wholly artistic works such as sculptures and murals⁴² and constructing the whole or any part of watercraft.⁴³ A number of services are excluded from the provisions of the Act. For example, accounting, financial and legal services are excluded because they are not considered services that relate to construction work.⁴⁴

³⁸ Ibid ss 4(2)(a)-(g).

³⁹ Ibid s 5.

⁴⁰ Ibid s 5(2)(a)(i).

⁴¹ Ibid ss 4(3)(a)-(e).

⁴² Ibid s 4(3)(d).

⁴³ Ibid s 4(4).

⁴⁴ Ibid s 5(2)(b).

4 *Payment Dispute*

The Act only applies to a payment dispute arising out of a contract for construction work.⁴⁵ A payment dispute will arise if, by the time when:

- the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed;
- any money retained by a party under the contract, the money has not been paid if due to be released; or
- any security held by a party under the contract is due to be returned under the contract, the security has not been returned.⁴⁶

The phrase ‘due to be paid’ is significant. This presupposes that time for payment is expressly included in the contract. However, not all contracts may contain an express term with respect to time for payment. In these cases the Act requires that the time for payment will be 28 days from receipt of the payment claim.⁴⁷

The reference to money retained on security held relates to terms commonly found in construction contracts where there is provision for retention sums to be held by the principal for the purpose of ensuring the proper performance by the contractor or subcontractor of the contract.⁴⁸

5 *Construction Contracts to which the Act Applies*

Again, the Act construes the definition of a construction contract broadly. Construction contracts are defined to mean a contract or other agreement, whether or not in writing, under which a person has an obligation to carry out construction work, to supply goods that are related to this construction work or to provide the professional services related to the construction work.⁴⁹

In this respect, the form of the contract differs from that required under the *Home Building Contracts Act 1991* (WA) which requires that for a contract for home building work to be enforceable, it must be in writing.⁵⁰

⁴⁵ Ibid s 6.

⁴⁶ Ibid ss 6(a), (b),(c).

⁴⁷ Ibid sch 1 div 5 s 7.

⁴⁸ For example, see General Conditions of Contract (AS 2124-1992), Clause 5.

⁴⁹ *Construction Contracts Act 2004* (WA) s 3(a)-(c).

⁵⁰ Ibid s4 (1)(a).

6 *Prohibited Provisions*

Section 9 of the Act prohibits ‘pay if paid’ or ‘pay when paid’ provisions in construction contracts. These provisions provide for the liability of a party to pay money under the contract to the other party contingent on the first party being paid by another person. The typical situation is where a term of the contract states that a subcontractor will not be paid until the main contractor has been paid by the principal or the owner.

7 *Time for Payment*

The Act further prohibits terms in construction contracts which require a payment to be made more than 50 days after the payment is claimed. Such terms are now to be read as being amended to require the payment to be made within 50 days after it is claimed.⁵¹

8 *Implied Provisions*

Where a construction contract does not contain written provisions with respect to matters such as variations, payment entitlement, progress payments or the mode and manner of making payment claims, Part 2, Division 2 of the Act Schedule 1 will imply terms in these situations.

9 *Variations*

There are a large number of expressions in building contracts dealing with additions or alterations to the work. These include extras, alterations, additions, changes and substitutions. The most common expression which covers all of these is the term ‘variation’.⁵² Section 1 of Schedule 1 of the Act provides that the contractor is not bound to perform any variation of its obligations under the contract unless the contractor and the principal have agreed upon the nature and extent of the variation of those obligations and the amount, or a means of calculating the amount to be paid for the variations. This provision prevents principals issuing variation orders to the contractor for additional works which may fall outside the scope of the original obligations.

⁵¹ *Ibid* s 10.

⁵² See John Dorter, ‘Variations’ (1990) 6 *Building and Construction Law* 156.

10 *Entitlement to Claim a Progress Payment*

A progress payment claim in the absence of an express contrary intention, entitles the contractor to be paid for work done and materials supplied even though the whole work is not yet complete. Where a construction contract under the Act does not have a written provision regarding whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed, the provisions of Schedule 1 Division 3 entitle the contractor to make one or more claims for a progress payment in relation to those obligations.⁵³

11 *Making Claims for Payment*

Where a contract does not have a written provision about how a party is to make a claim to another party for payment, Schedule 1 Division 4 of the Act provides for the contractor to make a claim at any time after the contractor has performed any of its obligations.⁵⁴ A payment claim is defined in section 3 of the Act and means a claim:

- (a) *by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or*
- (b) *by the principal to the contractor for payment of an amount in relation to the performance or nonperformance by the contractor of its obligations under this contract.*

The payment claim must be in writing, addressed to the party to which the claim is made, and itemised with a description of the obligations performed by the party making the claim and the amount of the claim.⁵⁵

12 *Responding to Claims for Payment*

Where the written contract is silent on this issue, and where a party receives a payment claim and believes the claim should be rejected or disputes the whole or part of the quantum of the claim, the receiving party must within 14 days of the receipt of the claim give the claimant a notice of dispute. This notice of dispute must also be in writing and include the reasons for the belief that the claim has not been made in accordance with the contract.⁵⁶

⁵³ *Construction Contracts Act 2004* (WA) s 15.

⁵⁴ *Ibid* s 16.

⁵⁵ *Ibid* sch 1 div 4 s 5(2).

⁵⁶ *Ibid* sch 1 div 5, s 7.

13 *Time for Payment*

Where the construction contract does not have a written provision regarding the time when a payment must be made payment terms are deemed. Within 28 days of receipt of a payment claim the party must pay the whole amount of the claim. In the event of a dispute about the claim, they must pay the amount of the claim that is not disputed.⁵⁷

14 *Interest on Overdue Payment*

The Act provides that interest will be payable on any payment that is not made at the time required by the contract.⁵⁸ The rate of interest is the amount prescribed under section 8 of the *Civil Judgments Enforcement Act 2004* (WA).

15 *Ownership of Goods*

In the past, the issue of whether a subcontractor or supplier could recover materials previously delivered to site, and not subsequently paid for by the recipient, involved a legal consideration of when property passes⁵⁹ At common law the property in materials brought to a site passed to the builder or building owner only when those materials were fixed into the construction.⁶⁰

Under the Act, ownership of the goods which are supplied by the contractor will not pass from the contractor until the contractor is paid for the goods or until the goods become fixtures.⁶¹

16 *Duties as to Unfixed Goods on Insolvency*

At common law, where a builder becomes insolvent and the subcontractor has delivered materials under a supply and installation of materials subcontract but has not yet received payment, a proprietor does not have ownership of the materials until the materials are installed. Contracts will often contain retention of goods clauses and may prevent the passing to the builder, and limit rights to materials supplied on site.

⁵⁷ *Ibid* sch 1 div 5 s 7(3).

⁵⁸ *Ibid* s 19.

⁵⁹ *Hewith v Court* (1983) 149 CLR 639 at 65.

⁶⁰ *RJ Grills Pty Ltd v Dellias* [1988] VR 136 (12 March 1987), 139.

⁶¹ *Construction Contracts Act 2004* (WA) sch 1 div 7 s 9.

Where a construction contract does not have a written provision about what is to happen to unfixed goods, if either the principal or the person for whom the principal is performing construction work becomes insolvent then the provisions of the Act imply that the principal or the other person must not during the insolvency allow the goods to become fixtures or to fall into the possession of any other person other than the contractor. Secondly, the principal must allow the contractor a reasonable opportunity to repossess the goods.⁶²

17 *Retention Money*

Many standard-form subcontracts provide for the principal to deduct from payments otherwise due to the contractor a specified amount as security for proper performance of the contract.⁶³ The effect of such a provision is to oblige the principal to set aside these retention moneys in a trust fund for the contractor, subject to the principal's entitlement to access these funds in the event of any nonperformance of the contractor's obligations. Where a contract does not have a written provision concerning the status of money retained by the principal for the performance by the contractor of its obligations, the Act prescribes that the principal is to hold the money on trust for the contractor until the happening of a number of specified events.⁶⁴ For example, the money is paid to the contractor or the contractor agrees in writing to give up the claim to the money.

18 *Adjudication of Disputes*

The Act provides for what may be described as a rapid adjudication procedure for payment disputes, by registered adjudicators.⁶⁵ Adjudicators must have a degree in a building or construction discipline such as Architecture, Building, Engineering, Quantity Surveying or Building Surveying and at least five years' experience in the administration of construction contracts or dispute resolution relating to construction contracts. Additionally, the adjudicator must have successfully completed an appropriate training course.⁶⁶

⁶² Ibid sch 1 div 8 s 10.

⁶³ For example, see General Conditions of Contract (AS 2124-1992), Clause 42.3.

⁶⁴ *Construction Contracts Act 2004* (WA) sch 1 div 9 s 11.

⁶⁵ *Construction Contracts Act 2004* (WA) s 48.

⁶⁶ *Construction Contracts Regulations 2004* (WA) s 9.

19 *Commencing an Adjudication*

The adjudication process commences by the lodging of an application by either party to the payment dispute.⁶⁷ However, a party cannot apply if an application for an adjudication has already been made or the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.⁶⁸

20 *Applying for Adjudication*

Within 28 days after the dispute arises, a party to the contract must prepare a written application for adjudication and serve it on each other party to the contract and the adjudicator if the parties have appointed an adjudicator.⁶⁹ This application must set out all the information, documentation and the submissions on which the party making the application (the Applicant) relies.⁷⁰

21 *Responding to an Application*

Within 14 days after service of the application, the recipient (the Respondent) must prepare a written response to the application and serve it on the applicant and the adjudicator.⁷¹ This response must set out the details of the rejection of the dispute and include all the information and documentation on which the respondent will rely.⁷²

It is important that both the applicant and respondent fully detail their submissions, as the adjudication will be based on the documents only.⁷³ However, there is provision in the Act for the adjudicator, in order to obtain sufficient information to make a determination, to request a party to make further written submissions or request the parties to attend a conference with the adjudicator.⁷⁴

⁶⁷ *Construction Contracts Act 2004* (WA) s 26.

⁶⁸ *Ibid* s 25.

⁶⁹ *Ibid* s 26(1).

⁷⁰ *Ibid* s 26(2).

⁷¹ *Ibid* s 27(1).

⁷² *Ibid* s 27(2).

⁷³ *Ibid* s 26

⁷⁴ *Ibid* s 32(2).

22 *Appointment of an Adjudicator*

The parties may agree to the appointment of an adjudicator or a party may serve an application for adjudication upon a prescribed appointor.⁷⁵ A prescribed appointor is a body registered by the Registrar and prescribed in the regulations as having authorisation to appoint an adjudicator for the adjudication of the payment dispute.⁷⁶

The following organisations are approved as prescribed appointors: RICS Australasia Pty Ltd (Dispute Resolution Service), Australian Institute of Building, Master Builders Association of Western Australia (Union of Employers), National Electrical and Communications Association (Western Australia) and Institute of Arbitrators and Mediators Australia.⁷⁷ Within five days of being served with an application for adjudication the prescribed appointor must appoint a registered adjudicator to adjudicate the payment dispute, send the application to the adjudicator and notify the parties accordingly.⁷⁸

23 *Conflicts of Interest*

The aim of an adjudication of a payment dispute is to determine the dispute as fairly, quickly and inexpensively as possible.⁷⁹ Concepts of fairness not only involve each party being given the opportunity to prepare its submission and respond to the claim, but also require the adjudication to be conducted by an independent, impartial third party. Put simply, not only must justice be done, it must be seen to be done. Consequently, an appointed adjudicator who has a material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen, will be disqualified from adjudicating the dispute.⁸⁰

24 *The Adjudication Procedure*

The Act requires that the adjudicator must act informally and where possible make the determination on the documents.⁸¹ Secondly, the adjudicator is not bound by the rules of

⁷⁵ Ibid s 26 (1)(c)(ii).

⁷⁶ Ibid s 55.

⁷⁷ See *Find an Appointer* Building Commission <<http://www.commerce.wa.gov.au/building-commission/find-appointor>>.

⁷⁸ *Construction Contracts Act 2004* (WA) s 28.

⁷⁹ Ibid s 30.

⁸⁰ Ibid s 29.

⁸¹ Ibid s 32(1)(a).

evidence and may inform himself or herself in any way he or she thinks fit.⁸² These provisions should, however, be applied with caution. While the Act provides that the dispute is to be determined informally, there will be situations where the rules of evidence will apply. For example, where a written contract purports to contain all of the terms of a contract, the parole evidence rule will prevent extrinsic evidence being led to contradict or vary the written terms of the contract.⁸³

The adjudicator may also, in order to obtain sufficient information, request the parties to make further written submissions and request the parties to attend a conference.⁸⁴ An adjudicator may also inspect any work or thing to which the payment dispute relates, arrange for things to which the payment dispute relates to be tested, or engage an expert to investigate and report on any matter relevant to the payment dispute, unless all the parties object.⁸⁵

25 Prescribed Time

The Act requires the adjudicator to determine the dispute as quickly as possible and prescribes maximum periods for the determination.⁸⁶ Within 14 days of the service of the response to the application or, if a response is not served, within 14 days after the last date on which a response is required to be served, the adjudicator must either dismiss the application or otherwise determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment.⁸⁷

There are a number of situations where the adjudicator must dismiss the application without making a determination of its merits.⁸⁸ For example, if the contract concerned is not a construction contract or there has already been an order made on the matter in dispute by an arbitrator, court or other person. The adjudicator may also dismiss the application if satisfied that it is not possible to make a determination within the prescribed time because of the complexity of the matter.

⁸² Ibid s 32 (1)(b).

⁸³ *Mercantile Bank of Sydney v Taylor* (1891) 12 LR (NSW) 252.

⁸⁴ *Construction Contracts Act 2004* (WA) s 32(2)(a)-(b).

⁸⁵ Ibid s 32(2)(c).

⁸⁶ Ibid s 31(1).

⁸⁷ Ibid ss 31(1)(a), 31(1)(b).

⁸⁸ Ibid s 31(2)(a).

26 *Extension of Time*

Where the adjudicator considers it is not possible to determine the application within the prescribed time, the adjudicator may, with the consent of the parties, extend the time for making a determination.⁸⁹

27 *Payment of Interest*

Having determined that a party to the dispute is liable to make a payment, the adjudicator may determine that interest be paid. Where the payment is overdue under the construction contract, the rate of interest will be that specified in the contract.⁹⁰ Otherwise the rate shall not be greater than that prescribed in the Civil Judgments Enforcement Act 2004 (WA).⁹¹

28 *The Parties' Cost*

The usual rule in litigation is that the successful party is entitled to its costs. This is described as 'costs follow the event'. However the starting point with costs of adjudication under the Act is that the parties to a payment dispute will bear their own costs in relation to the adjudication.

The term 'costs of an adjudication' is described in the Act as the entitlement of the appointed adjudicator and the costs of any testing done or expert engaged by the adjudicator.⁹² However, where the adjudicator is satisfied that a party to the dispute incurred costs of the adjudication because of unfounded claims or frivolous or vexatious conduct by the other party, the adjudicator may decide that the other party must pay some or all of the costs.⁹³ Consequently, the Act provides that, where the adjudicator makes an order with respect to costs, he or she must decide the amount of the costs, give reasons for the decision and communicate those reasons in writing to the parties.⁹⁴

29 *Form and Content of the Adjudicator's Determination*

Section 36 of the Act prescribes the form and content of the adjudicator's decision. The adjudicator's decision must:

⁸⁹ Ibid s 32(3)(a).

⁹⁰ Ibid s 33(1)(a).

⁹¹ Ibid s 8(1)(a) (Currently 6% pa).

⁹² Ibid ss 44 (1)(a)-(b).

⁹³ Ibid s 34(2).

⁹⁴ Ibid s 34(3)(c).

- be in writing;
- state the amount to be paid and the date on or before it is to be paid; and
- give reasons for the determination.
-

The decision must also identify any confidential information which is not suitable for publication by the Registrar.⁹⁵ The decision must then be given to the parties to the adjudication and to the Registrar.⁹⁶

Consequently the Act provides that, where the adjudicator makes an order with respect to costs, he or she must decide the amount of the costs, give reasons for the decision and communicate those reasons in writing to the parties.⁹⁷

30 *Effect of Determinations*

The fact that an adjudication application has been made with respect to the payment dispute does not prevent the parties commencing proceedings on other issues arising out of the dispute before an arbitrator or court. However, the adjudicator's determination of the payment dispute is binding on the parties.⁹⁸

The adjudicator's determination is also final and the adjudicator cannot, without the consent of the parties, amend or cancel the determination⁹⁹ unless there has been some accidental slip or omission, arithmetic error or material mistake in the description of any person or thing.¹⁰⁰

31 *Contractor May Suspend Its Obligations*

At common law, a contractor is unable to suspend the performance of its obligations where the other party has not paid a progress payment on time unless the contract includes an express right to suspend work for non-payment.¹⁰¹ This is consistent with the principle that unless there is a breach of a condition, the breach does not discharge the innocent party from performance of its unperformed obligations. However, the Act provides a right to the

⁹⁵ Ibid s 36(a).

⁹⁶ Ibid ss 36(f), 36(g).

⁹⁷ Ibid s 34(3)(c).

⁹⁸ Ibid s 38.

⁹⁹ Ibid s 41(1).

¹⁰⁰ Ibid s 41(2).

¹⁰¹ See Anthony May (ed), *Keating on Building Contracts* (Sweet & Maxwell 5th ed, 1991) 157.

contractor to suspend work if the other party does not pay in accordance with the determination, subject to the issuing of a notice in writing to suspend performance of its obligations.¹⁰²

The Act further provides that a contractor who suspends the performance of its obligations in accordance with the above is not liable for any loss or damage suffered by the principal or any other person claiming through the principal and the contractor retains its rights under the contract.¹⁰³

32 Determinations May Be Enforced As Judgments

An adjudicator's determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court.¹⁰⁴ A court of competent jurisdiction in relation to a determination is defined in section 43(1) as a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.

33 The Adjudicator's Costs

The costs of adjudication are essentially the costs of the adjudicator at a rate previously agreed between the adjudicator and the parties and the costs of any testing done or expert engaged.¹⁰⁵ The Building Commission's website contains a list of registered adjudicators.¹⁰⁶

As noted above, the parties involved are liable to pay the costs of an adjudication in equal shares and the parties are jointly and severally liable to pay the costs of the adjudication.¹⁰⁷ The costs of the adjudication may be recovered from a person liable to pay the costs in a court of competent jurisdiction as if the costs were a debt to the adjudicator.¹⁰⁸

¹⁰² *Construction Contracts Act 2004* (WA) s 42(2).

¹⁰³ *Ibid* ss 42 (5)(a), 42(5)(b).

¹⁰⁴ *Ibid* s 43(2).

¹⁰⁵ *Ibid* s 44(1).

¹⁰⁶ *Find an Adjudicator* (5 March 2014) Department of Commerce Western Australia <<http://www.commerce.wa.gov.au/building-commission/find-adjudicator>>.

¹⁰⁷ Above, n 90 ss 44(5), 44(6).

¹⁰⁸ *Ibid* s 44 (12).

34 *Concurrent Proceedings*

Concurrent proceedings are proceedings in a court, tribunal or arbitration dealing with a dispute or other matter arising under the contract between the parties. The Act provides that adjudication under the *Act* will not affect concurrent proceedings.¹⁰⁹ These proceedings can continue at the same time as the adjudication, unless all the parties, in writing, require the adjudicator to discontinue the adjudication.¹¹⁰

Consequently, if litigation or arbitration of the dispute has already commenced, the applicant is still entitled to pursue payment under the Act. The Act provides that an arbitrator or court must take into account any amount determined under the Act.¹¹¹ Where proceedings have commenced in a court, tribunal or arbitration before the time of the adjudication, the adjudicator may still continue with the adjudication. However, the adjudicator cannot have regard to those proceedings. Similarly, anything said or done in an adjudication is not admissible before an arbitrator or any other body.¹¹² Where a party is dissatisfied with the amount, if any, determined by the adjudicator, the party may still commence proceedings before an arbitrator or other person.¹¹³

35 *Review of Adjudicator's Determinations*

Grounds for a review of an adjudicator's decision are limited.¹¹⁴ A person who is aggrieved by a decision made under s 31(2)(a) of the Act may apply to the State Administrative Tribunal (SAT) for a review of the decision. The SAT came into operation on 1 January 2005 and amalgamated most of the review, civil and disciplinary functions of nearly 50 industry and public sector boards and tribunals and a number of courts. SAT matters are divided into four streams that are appropriate to the matter under review. The forum which considers reviews of decisions of adjudicators is the Commercial and Civil stream which deals with strata title and retirement village disputes, commercial and personal matters. Details regarding the operation of the SAT can be found on the Tribunal's website.¹¹⁵

¹⁰⁹ Ibid s 45(1).

¹¹⁰ Ibid s 45(2).

¹¹¹ Ibid s 45(4).

¹¹² Ibid s 45(3).

¹¹³ Ibid s 45(1).

¹¹⁴ Ibid s 46.

¹¹⁵ *State Administrative Tribunal (SAT)* <<http://www.sat.justice.wa.gov.au/>>.

36 *Circumstances Where an Adjudication May Be Set Aside*

The Act sets out the circumstances where an adjudication may be set aside by SAT. These are:

- the contract is not a ‘construction’ contract;
- the application has not been served in accordance with the provisions of the Act;
- an order has already been made by another person (court or arbitrator) about the matter which is the subject of the application; and
- the adjudicator fails to make a decision within the time prescribed.

Further, where the adjudicator decides incorrectly that he or she has jurisdiction to hear a dispute, the determination may be subject to review by the Supreme Court on the basis of a jurisdictional error. This ground for review will also apply where the adjudicator decides that he or she has no jurisdiction to determine the matter when in fact they do. Put simply, a jurisdictional error occurs when a person or tribunal exercises jurisdiction to decide a matter that has not been entrusted to it by statute.

However it is considered that the court will not set aside an adjudicator’s decision where the adjudicator has made a non-jurisdictional error, for example, in applying the law or in the interpretation of the contract. The court may set aside an adjudicator’s decision if the adjudicator has not acted honestly or has breached the requirements of natural justice.¹¹⁶ In other words, the observance of natural justice requires the decision maker to be unbiased and that each party must have the opportunity to prepare and present its case and respond to any allegations.

Where there is an appeal arising from an adjudicator’s determination, the adjudicator should not become involved in the appeal. If they do, the adjudicator may end up paying the costs of the review.¹¹⁷

¹¹⁶ For a discussion of the requirements of natural justice see *Ridge v Baldwin* (above n 51) and *Najjar v Haines* (1991) 25 NSWLR 224.

¹¹⁷ *Najjar v Haines* (1991) 25 NSWLR 224, 248.

37 *Administration of the Act*

Part 4 of the Act details a number of administrative provisions. In particular, matters such as the appointment and functions of the registrar, the registration of adjudicators and the publication of adjudicators' decisions.¹¹⁸

38 *Miscellaneous Provisions*

Part 5 of the Act contains a number of miscellaneous provisions. These include no contracting out, immunity from tortious liability, regulations and review of the Act.

39 *No Contracting Out*

Section 53 prohibits terms in a construction contract that purport to exclude, modify or restrict the operation of the Act. The effect of this provision is that any agreement to modify or exclude rights under the Act will be void. Similarly, an adjudicator cannot by agreement vary his or her statutory obligations.

40 *Immunity from Tortious Liability*

Section 54 provides adjudicators with immunity against an action in tort for anything done in good faith in the performance of a function under the Act. However if an adjudicator attempts to act outside the provisions of the Act, then the adjudicator will leave himself or herself subject to personal liability. The difficulty with this section is the lack of consensus or authority with respect to what exactly is meant by good faith.¹¹⁹

B *The Findings from the Review*

1 *Amendments to the Act*

In consideration of the responses to the issues raised in both the Discussion Paper and in the broad terms of reference for the review, it was considered that no significant structural amendments to the Act are required. However the reviewer made a number of recommendations for changes which he considered will assist in improvement to the operation and effectiveness of the Act in achieving its stated objectives.

¹¹⁸ *Construction Contracts Act 2004* (WA) s 47-52.

¹¹⁹ See *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *Perini Corporation v Commonwealth* (1969) 2 NSWLR 530; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

Where amendments were suggested, they were provided on the premise that a primary purpose is to keep the provisions of the Act as simple as possible so that the effectiveness of the Act is not impeded by complex legislation.¹²⁰

2 *Lack of awareness of the Act's provisions*

Throughout the review it was noted that many issues affecting stakeholders did not result principally from significant deficiencies in the Act's provisions but from a lack of awareness of the Act and especially its primary objectives. These are:

- to prohibit or modify certain provisions in construction contracts; and
- to imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts;
- to provide a means for adjudicating payment disputes arising under construction contracts, and for related purposes.

There was a lack of understanding that adjudication determinations are interim in nature and do not affect the parties' rights under the common law of contract. These rights are preserved allowing subsequent arbitration or litigation. The emphasis on the *Construction Contracts Act 2004* (WA) is on maintaining cash flow. It is in effect a system of pay now, where there is a legitimate entitlement, and argue later.

Additionally many issues raised related to a general lack of understanding of the basic principles of contractual rights and obligations. There needs to be widespread education and training by all sections of the construction industry as well as additional efforts by the Building Commission to ensure awareness and compliance with the provisions of the Act¹²¹.

3 *Adjudicator training and knowledge*

The majority of adjudication applications and responses appear to involve legal counsel or claims consultants. This has resulted on occasions in an additional legal complexity which

¹²⁰ The Review report and the government's response to the Review recommendations may be found at *Subcontractor Publications* Department of Commerce <<http://www.commerce.wa.gov.au/building-commission/subcontractor-publications>>.

¹²¹ Following the receipt of the review report, the Building Commission has introduced awareness and compliance training sessions.

was not anticipated during the planning of the training courses, which were designed to provide adjudicators with the skills necessary to determine payment disputes rapidly. It was considered that the content of approved training courses should be expanded to include an overview of the law of contract and the laws relating to building and construction, analysis of building contracts, analysis of costs and claims in the industry, and detailed analysis of building and construction claims and contractor entitlements.

4 *Current commercial practices in the construction industry*

In a number of meetings and submissions, issues were raised which at first sight would appear to fall outside the terms of reference regarding the operation and effectiveness of the Act. At the same time they are clearly collateral to the review and whilst no recommendations were specifically made with respect to amendments to the Act with respect to the allegations made or specific conduct complained of, it is nevertheless incumbent upon the reviewer to raise them in this report for any future action or enquiry which may be deemed appropriate by the Building Commission or Minister for Commerce.

At the lower level of the contracting chain it was evident, it was noted that there was a basic lack of understanding of contractual principles and rights and obligations under the contract apart from any issues of inequality of bargaining power or economic duress. There was a general misunderstanding that the Act was there to provide some overall commercial protection to smaller parties in the contracting chain. This was nevertheless a serious issue, but once again reference should be made to the Minister for Planning and Infrastructure's Second Reading Speech which, in part, states:

The Bill supports good payment practices in the building and construction industry by prohibiting payment provisions in contracts that slow or stop the movement of funds through the contracting chain; implying fair and reasonable payment terms into contracts that are not in writing; clarifying the right to deal in unfixed materials when a party to the contract becomes insolvent.

This Bill cannot remedy every security of payment issue. Insolvency can be addressed only by Commonwealth legislation. Participants in the industry still have to look after their own commercial interests.

Referring to this statement again is in no way meant to be dismissive of an important issue affecting smaller parties. There is an urgent need to address the lack of education regarding the objectives, existence and application of processes for dealing with payment disputes The

role of authorities in correcting this lack of knowledge is to be considered at the appropriate level but it is clearly incumbent upon all of the professional and trade associations to take an active part in assisting parties to develop appropriate contract administration knowledge and skills. There is helpful information on the Building Commission website but many persons appeared to be unaware of this information.

With respect to what might be described as ‘unfair’ practices in the construction industry, a number of parties provided details of practices which appear to be unethical and in some cases perhaps unlawful. These examples appear to be in breach of any implied common law requirement of good faith in contractual dealing.¹²² Some of these practices were also referred to in the confidential submissions, one of which stated:

It is a common reality that some larger well established businesses take advantage of their small subcontractors by deferring payment beyond the agreed terms of trade. These businesses are aware that their small subcontractors depend on them for their livelihood and are not usually in a position to bargain with them effectively or threaten to withdraw their labour.

In the section above dealing with the enforcement of the provisions of the Act, there is reference to the powers of the Building Commissioner with respect to specific breaches relating to the inclusion of the prohibited terms in construction contracts. Unfortunately, Western Australia does not have the equivalent of the *Contracts Review Act 1980* (NSW) which confers upon the Supreme, District and Local Courts, powers to review contracts that are ‘unjust’ (defined in s 4 to include harsh, oppressive or unconscionable conduct).¹²³

However, many of the examples given in the review submissions clearly fall within the jurisdiction or provisions of the *Australian Consumer Law* (the ACL). The ACL, which forms part of the *Competition and Consumer Act 2010* (Cth), sets out a number of rights and responsibilities that serve to guide businesses in their day-to-day dealings with consumers

¹²² The implementation of terms into contractual agreements requiring the parties to act in good faith is controversial and uncertain and a discussion is beyond the terms of reference of this Review. The issue is considered in detail in Elisabeth Peden, ‘Good Faith in the Performance of Contracts’ (2003) 24 *Bond Law Review* 186.

¹²³ The *Misrepresentation Act 1972* (SA) provides criminal sanctions against misrepresentation in certain commercial transactions, to expand the remedies available at common law and in equity for misrepresentation, and for other purposes.

and in particular with other businesses. Among other things, the ACL prohibits unconscionable conduct.¹²⁴

The Australian Competition and Consumer Corporation (ACCC) website also contains a helpful publication, *Business Snapshot*.¹²⁵ This provides practical tips for businesses to minimise the risk of becoming a victim of unconscionable conduct or to avoid engaging in such conduct towards other businesses or consumers. It also explains unconscionable conduct using actual examples.

The specific provision of the ACL with respect to small business transactions is:

22. Unconscionable conduct in business transactions

(1) A person must not, in trade or commerce, in connection with:

- (a) the supply or possible supply of goods or services to another person (other than a listed public company); or
- (b) the acquisition or possible acquisition of goods or services from another person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

To understand the extent of the conduct which is prohibited it is helpful to reproduce from s 22(1) of the ACL the matters which a court may take into account when determining whether conduct in connection with small business is unconscionable:

- (a) the relative strengths of the bargaining positions of the supplier and the business consumer; and
- (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- (c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a

¹²⁴ Unconscionable conduct provisions also exist in the *Australian Securities and Investments Commission Act 2001* (Cth), which applies to transactions involving financial products and services.

¹²⁵ *Business Snapshot* (12 September 2012) Australian Competition and Consumer Commission <<https://www.accc.gov.au/publications/business-snapshot>>.

- person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and
 - (f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and
 - (g) the requirements of any applicable industry code; and
 - (h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and
 - (i) the extent to which the supplier unreasonably failed to disclose to the business consumer:
 - (i) any intended conduct of the supplier that might affect the interests of the business consumer; and
 - (ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and
 - (j) if there is a contract between the supplier and the business consumer for the supply of the goods or services:
 - (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the business consumer; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the supplier and the business consumer in complying with the terms and conditions of the contract; and
 - (iv) any conduct that the supplier or the business consumer engaged in, in connection with their commercial relationship, after they entered into the contract; and
 - (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and
 - (l) the extent to which the supplier and the business consumer acted in good faith.

A number of the practices complained of in the submissions are specifically referred to, particularly (a), (c), (d), (k) and (l). These provisions in the ACL have been included to prevent the conduct complained of but it was apparent that many of the smaller stakeholders were unaware of the protection provided by the ACL.

There was some limited awareness of the existence of the unfair contract terms provisions of the ACL but the protection does not currently assist small business.¹²⁶ The provision currently only applies to ‘consumer’ contracts:

23. Unfair terms of consumer contracts

- (1) A term of a consumer contract is void if:
 - (a) the term is unfair; and
 - (b) the contract is a standard form contract.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
- (3) A *consumer contract* is a contract for:
 - (a) a supply of goods or services; or
 - (b) a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

At the time of writing reforms were proposed to the *Competition and Consumer Act*.¹²⁷ A number of submissions to the Harper Review have suggested reforms which would assist small business in particular. One of these is to extend the unfair contract term provision to contracts involving small business. This was also the subject of separate review by the Commonwealth government.¹²⁸

These reviews resulted in the drafting of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* which was read for the second time on 17 August 2015. The proposal is to amend the *Competition and Consumer Act 2010* (Cth) to extend the unfair contract terms protections to a business with less than 20 employees agreeing to standard form contracts valued at less than \$100,000 or \$250,000 if the duration of the contract is more than 12 months.¹²⁹ On 12 November 2015 these amendments were passed and it is considered that the new provisions will significantly address some of the

¹²⁶ *Competition and Consumer Act 2010* (Cth) sch 2 s 23.

¹²⁷ Ian Harper, Peter Anderson, Su McCluskey and Martin O’Byrne, ‘Competition Policy Review Final Report’ (‘The Harper Review’) (Commonwealth of Australia, 2015) <<http://competitionpolicyreview.gov.au/final-report/>>.

¹²⁸ ‘Extending Unfair Contract Term Protection to Small Businesses’ (Consultation Paper, The Treasury, 23 May 2014) <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms>>.

¹²⁹ *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* (Cwth).

concerns raised by small business operators particularly when faced with unilateral contract provisions or changes by larger organisations.

An important consideration with respect to this issue is whether changes should be made to the Act to prevent the alleged unfair conduct from occurring? The question that arises is should issues of complexity be introduced into an Act which objectively has been considered generally by stakeholders as being successful in providing a rapid determination of payment disputes?

Should these practices be common in the industry, one possibility is to expand the prohibitions currently listed in Part 2 div 1 of the Act. However the scope and coverage of the Act is now well settled and any changes by way of introducing provisions in the Act dealing with unconscionable conduct or unfair terms would potentially add legal complexity and hinder the principal objectives of the Act.

If the unfair conduct complained of is common then the state government should consider the introduction of contract review legislation similar to the *Contracts Review Act 1980* (NSW).

In summary, a significant number of the issues raised originated from a lack of knowledge of contractual rights and obligations rather than specific failures of the Act (CCA) to address all of the commercial issues which arise in contracts. The existing provisions of the *Australian Consumer Law* (ACL) directly apply to many of the issues referred to as ‘unfair’ or specifically prohibited by the ACL. Additionally it was considered that the small business amendments to the ACL will assist small contracting business in particular.

Finally whilst it is accepted that government should be reluctant or wary to intervene in the affairs of two commercial parties who have entered into contracts at arm’s length, at the same time government has a public policy obligation even in commercial contracts where the behaviour of some parties has the effect of seriously damaging the rights of others. The measure of intervention is to be left to government.

5 *Insolvency*

The issue of insolvency in the construction industry and its effect on subcontractors is a serious issue. One option is for the Western Australian Government to consider the creation

of a separate taskforce of major public sector construction agencies to address concerns about the consequences of insolvencies on major public sector projects. However since the submission of the review report *The Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* passed through parliament on 27 October 2015. The Bill, yet to receive Royal Assent, will extend the unfair terms protections for consumers in the *Competition and Consumer Act 2010* and *Australian Securities and Investments Commission Act 2001* to those businesses with less than 20 employees. The protections relate to the terms of standard form contracts valued at less than a prescribed threshold.

Prior to passing through parliament, proposed amendments by the Australian Greens to increase the prescribed thresholds for a standard form contract to come within the definition of a ‘small business contract’ were adopted. In accordance with these amendments, a contract will now be a small business contract if:

- At the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
- Either of the following applies:
 - The upfront price payable under the contract does not exceed \$300,000 – previously proposed to be \$100,000; and
 - The contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000 – previously proposed to be \$250,000.

6 *Harmonisation of security of payment legislation*

Industry consensus does not support legislative ‘harmonisation’ of security of payment legislation. There was strong preference for the *Construction Contracts Act 2004* (WA) to be the basis for any uniform legislation in the future. The research conducted as part of the review indicated serious issues with respect to the East Coast models of security of payment legislation with the academic writers proposing that any future uniform legislation should be based on the *Construction Contracts Act 2004* (WA).

III CONCLUSION

There was clear consensus between all stakeholders that the *Construction Contracts Act 2004* (WA) was an extremely important item of legislation which had radically improved the traditional risk allocation between parties contracting in the construction industries; providing

contractors, suppliers and consultants with rights and protection which were not previously available under the common law. Consequently the Act has had a very positive influence on payment practices and associated issues in the construction industry.

The review has indicated that the Act has been successful both as a statutory scheme for the evaluation of payment claims and in providing a quick and uncomplicated dispute resolution process. Additionally the Act has clearly facilitated meaningful dialogue between the parties in dispute over payment, which on numerous occasions has resulted in settlement of the dispute. This has been one of the great benefits of the Act. There was anecdotal evidence to suggest that following the introduction of the Act, the larger construction companies developed more efficient contract administration and business practices to deal with payment issues and disputes. Unfortunately this does not appear to be the case with many parties at the lower end of the contracting chain.

Unlike the Wallace Review¹³⁰ of the Queensland security of payment legislation, this Review did not find that the Act had any polarising effect on the industry participants; that is, those who have benefited from the provisions of the Act and those who felt they had been disadvantaged by the Act. All sections of the construction industry acknowledged the overall benefits of the Act, albeit with suggestions for modification.

The recurring issue throughout this review was the critical need for widespread education and publicity regarding the existence of, and the provisions of the Act. Unless this occurs as a matter of urgency and priority, the Act will not fully achieve its objectives for the benefit of all sections of the construction industry.¹³¹

¹³⁰ Andrew Wallace, *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry* (Building Services Authority, 2013).

¹³¹ On 15 December 2016 the WA parliament incorporated the above amendments proposed in the *Construction Contracts Amendment Bill 2016* (Bill No. 215-1).