

EXPLANATORY MEMORANDUM

***CONSTRUCTION CONTRACTS AMENDMENT
BILL 2016***

INTRODUCTION

The Construction Contracts Amendment Bill 2016 (the Bill) makes a number of amendments to the *Construction Contracts Act 2004* (the Act) to improve the operation of, and access to, the rapid adjudication process for resolving payment disputes under construction contracts.

The Bill is the first package of reforms to address the recommendations from the statutory review of the Act completed in 2015¹ and the State Government's measures to improve security of payment in the building and construction industry.

Briefly, the Bill:

- increases the time limit for applying for adjudication of a payment dispute to 90 business days;
- decreases the maximum payment terms permitted in construction contracts to 42 calendar days;
- clarifies that for the purposes of the Act a payment claim made under a construction contract can include matters in a previous payment claim, meaning if the claim is disputed the time limit for applying for adjudication commences from the latest dispute;
- amends the Act to express all time limits related to adjudicating a payment dispute to be in 'business days', and defines business days to exclude weekends, public holidays and the traditional industry shut-down period between 25 December and 7 January;
- refines section 4(3)(c) of the Act to make it clear that only the fabricating and assembling of items of plant used for extracting or processing oil, natural gas or other minerals is excluded from the definition of 'construction work', and not normal construction work on a processing facility;
- provides that the construction of wholly artistic work is no longer excluded from the definition of 'construction work' for the purposes of the Act;
- clarifies when a payment dispute commences for the purposes of section 6(1) of the Act to make it clear to the parties when an application for adjudication of the dispute should be made;
- inserts a requirement for an adjudicator to dismiss an application for adjudication if the applicant gives written notice of their intention to withdraw;
- inserts an express power where the parties to a dispute have reached a settlement, for the adjudicator to issue a determination giving effect to the terms of that settlement;
- ensures a greater focus on the 'substance over form' of adjudication applications by giving the adjudicator jurisdiction to continue to determine a payment dispute where satisfied the application sufficiently complies with the information required under section 26(2)(a) of the Act;
- removes the requirement for a party entitled to be paid an amount under a determination to seek leave before filing an adjudicator's determination with a court of competent jurisdiction; and
- provides appropriate transitional provisions.

¹ P.Evans. (August 2015). *Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA).

Abbreviations List

Building Commission.....	Department of Commerce (Building Commission Division)
The Act.....	<i>Construction Contracts Act 2004</i> (WA)
The Bill.....	Construction Contracts Amendment Bill 2016
The Review.....	Report on the Operation and Effectiveness of the <i>Constructions Contracts Act 2004</i>

CLAUSE NOTES

Clause 1 Short title

Pursuant to this clause, when this Bill is passed and receives Royal Assent, it will be known as the *Construction Contracts Amendment Act 2016*.

Clause 2 Commencement

Pursuant to this clause, when this Bill is passed and receives Royal Assent, sections 1 and 2 will commence on the day of Assent. The other sections will commence operation on certain fixed dates.

All sections, other than sections 7 and 20, will commence operation on 15 December 2016. This is necessary to enable the Building Commission to provide notification to the building and construction industry of the amendments. It also ensures the amendments in clause 4 of the Bill to insert a definition of business day, which, inter alia, excludes a day between the period of 25 December and 7 January, commence as intended.

Sections 7 and 20 will commence operation on 3 April 2017. This is to allow businesses sufficient opportunity to alter contractual terms of trade to give effect to the amendments that will prohibit provisions in construction contracts that purport to require payment to be made more than 42 days after it is claimed. Such clauses will be read as requiring payment to be made within 42 days after it is claimed.

Clause 3 Act amended

This clause specifies that once this Bill is passed and receives Royal Assent it will amend the Act.

Clause 4 Section 3 amended

The Act currently provides that certain time periods for doing things is measured in 'days'. In the absence of a definition in the Act for the term days, it is computed in accordance with section 61 of the *Interpretation Act 1984* (WA) and measured as calendar days.

The Review recommended that time limits in the Act for doing things related to the adjudication of a payment dispute should be measured in 'business days'.

Clause 4 gives effect to this recommendation by inserting a new definition in section 3 of the Act of 'business day', which is defined to mean a day other than a Saturday, Sunday, public holiday or day beginning on 25 December one year and ending 7 January the next.

The specific exclusion in the definition of the days in the period beginning on 25 December and ending 7 January will exclude from the counting of time, the traditional shut down period for the building and construction industry over the Christmas and New Year period. The definition of business day inserted by this clause applies to the amendments made to the Act by clauses 8, 9, 10, 11, 12(1), 14, 16 and 18 that provide for the time for doing certain things in the Act to be measured in business days.

This clause also removes the current definition of payment claim in section 3 of the Act and inserts a new definition for payment claim.

Parts (a)(i) and (ii) of this new definition of payment claim are the same as the current definition, however part (b) provides that a payment claim made under a construction contract includes where the payment claim includes matters covered by a previous payment claim. This new definition of payment claim in the Act captures the provisions in construction contracts, where payment claims can be made at certain intervals prescribed by the contract, and at each of the prescribed intervals a payment claim will include all amounts due for the obligations performed up to that time. This means a payment claim made at one prescribed interval may include amounts claimed at a previous interval that were not paid in full or in part.

This new definition of payment claim in the Act will operate in conjunction with the definition of a 'payment dispute' in section 6 of the Act, and the amendments made by clause 6 of the Bill. Together they will provide that if a payment claim made under a construction contract includes matters in a previous payment claim, and this latest payment claim is rejected, wholly or partly disputed, or not paid in full by the time payment was due, then for the purposes of the Act a payment dispute arises. Colloquially, this is referred to as "recycling" or "re-submitting" payment claims.

This clause will ensure that even if the matters in the previous payment claim were rejected, wholly or partly disputed, or not paid in full by the time payment was due, then for the purposes of section 26(1) of the Act, the time after which an application for adjudication may be made commences from when the latest payment claim is disputed.

Clause 5 Section 4 amended

Sections 4(3)(a) to (e) excludes certain types of work from the definition of "construction work" for the purposes of the Act. Where the type of work is excluded under section 4(3) the provisions of the Act do not apply to a contract for the carrying out of that work on site in Western Australia.

This clause amends section 4(3)(c) of the Act to remove the words "constructing any plant for the purpose of" and inserts "fabricating or assembling items of plant used for". The purpose of this amendment is to provide that construction work does not include the fabricating or assembling of items of plant used for extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance, but that

other construction work on a facility containing items of plant is not excluded from the operation of the Act.

The clause also removes section 4(3)(d) of the Act. This section excludes work related to the construction of wholly artistic works, including sculptures, installations and murals from the definition of construction work.

It is becoming an increasingly common requirement for the approval of commercial and mixed residential building developments to have certain thresholds set aside for the inclusion of artistic works and sculptures. In many instances, these artistic works are incorporated into the building or constructed as part of a separate feature.

The Review recommended that the exclusion in section 4(3)(d) should be removed so that contracts for the construction of artistic works are covered by the Act, and the rapid adjudication process is available to resolve any payment disputes. This clause gives effect to that recommendation.

Clause 6 Section 6 amended

Section 6 defines when a 'payment dispute' arises for the purposes of the Act. Once a payment dispute arises a party may, under section 26(1) of the Act, apply to have the dispute adjudicated.

This clause inserts a new section 6(1)(aa) and amends subsection (1)(a) to specify when a payment dispute is taken to arise for the purposes of the Act. A payment dispute will arise if:

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

In the past there has been some uncertainty on the proper construction to be given to the current section 6(1) of the Act and whether a party has to wait until when a payment claim due had not been paid in full, even if a notice had been issued under the contract disputing the whole or part of the payment claim, before applying for adjudication of the dispute. This clause inserts a new section 6(3) which clarifies that a payment dispute arises on the earliest of either occurrence.

This clause also inserts a new section 6(2) in the Act, which provides that a payment dispute does not arise to the extent to which a payment claim includes matters that were the subject of an application for adjudication that has been dismissed or determined under section 31(2).

The new section 6(2) makes it clear that where a payment claim includes matters covered in a previous payment claim, and the payment claim is

disputed, then for the purposes of the Act a payment dispute arises, but not if the matters in the previous payment claim have been the subject of an application for adjudication that has been dismissed or determined.

The exclusion inserted by the new section 6(2) prevents the potential for 'adjudicator shopping' that could arise from allowing the adjudication of disputes over payment claims that include matters previously disputed and adjudicated upon.

The new section 6(2) will operate in conjunction with the requirement in section 31(2)(a)(iii) that the adjudicator must dismiss an application for adjudication if an arbitrator, court, other person or body has already made an order, judgement or other finding about the dispute that is the subject of the application.

Clause 7 Section 10 amended

Section 10 of the Act prohibits provisions in construction contracts that require payment to be made more than 50 days after the payment is claimed by providing that any such provision in a contract shall be amended as requiring payment within 50 days after it is claimed.

This clause removes 50 days and replaces it with 42 days. This will improve the movement of funds in the building and construction industry by further reducing the maximum payment terms in construction contracts.

Clause 8 Section 26 amended

Section 26(1) of the Act provides that a party to a construction contract may make an application to have a payment dispute adjudicated within 28 days after the dispute arises, or within the time provided for by section 37(2)(b). The party must prepare a written application for adjudication and serve it on each other party to the contract, and, if the parties have appointed a registered adjudicator or prescribed appointor, that registered adjudicator or prescribed appointor, or otherwise serve the application on a prescribed appointor of the party's choice.

This clause removes the reference in section 26(1) to 28 days and inserts 90 business days. This will increase the time period a party to a construction contract has for making the application to have a payment dispute adjudicated and serving it on the other parties.

Clause 9 Section 27 amended

Section 27(1) of the Act provides that a party to a construction contract that is served with an application for adjudication, must, within 14 days after being served with the application, prepare a written response and serve it on the applicant and the appointed adjudicator, or if there is no appointed adjudicator then on the prescribed appointor on which the application was originally served.

Under section 32(5) of the Act, if a written response to an application for adjudication is not served in 14 days this does not prevent the adjudicator determining the payment dispute.

This clause removes 14 days in section 27(1) and inserts 10 business days. This gives effect to the recommendation made by the Review that time periods in the Act for doing certain things related to the adjudication of payment disputes should be expressed in business days.

Clause 10 Section 28 amended

Section 28 of the Act provides that where the parties to a construction contract have not appointed an adjudicator and instead the application for adjudication of the payment dispute has been served on a prescribed appointor, the prescribed appointor, must, within 5 days, appoint a registered adjudicator. The prescribed appointor must then send all relevant documents to the adjudicator, and notify all parties and the Building Commissioner of the appointment.

If the prescribed appointor fails to appoint an adjudicator within 5 days, then the Building Commissioner may appoint a registered adjudicator instead.

This clause removes 5 days in section 28(1) and inserts 5 business days.

Clause 11 Section 29 amended

Section 29(1) of the Act provides that where the adjudicator appointed to adjudicate the payment dispute has a material personal interest in the payment dispute, or the particular construction contract, or a party to the contract, the adjudicator is disqualified from adjudicating the dispute. Where an adjudicator is disqualified they must notify the parties in writing.

Subsection (2)(b) provides that unless, within 5 days of receiving this notice, the parties authorise the adjudicator to continue adjudicating the dispute, the adjudicator's appointment automatically ceases. Once this occurs a party may again apply for adjudication in accordance with section 26(1) of the Act.

This clause removes 5 days in section 29(2)(b) and inserts 5 business days.

Clause 12 Section 31 amended

Once an application for adjudication has been made and the adjudicator has been appointed, the adjudicator is required to carry out certain functions in respect to adjudicating the payment dispute between the parties.

Section 31(2) of the Act requires that within the 'prescribed time', or any extension of it made under section 32(3)(a), the adjudication must either –

- dismiss the application without making a determination of its merits, if satisfied that any of the circumstances prescribed in subsections (2)(a)(i) to (iv) exist which prevent the adjudicator from making a determination; or
- otherwise, determine on the balance of probabilities whether any party is liable to make a payment, or return security, and, if so, the

amount and the date on which it must be paid or security returned, and any interest payable.

Sections 31(1)(a) and (b) prescribe the time in which the adjudicator must carry out their functions under section 31(2) to be either –

- 14 days after being served with a response under section 27(1); or
- 14 days after the last date on which a response was required to be served under section 27(1).

This clause removes the reference to 14 days in sections 31(1)(a) and (b) and inserts 10 business days.

The clause also inserts a new section 31(2)(a)(ia). This section provides that the adjudicator must dismiss the application without making a determination of its merits where the applicant gives written notice to the adjudicator, and the other party, that it wishes to withdraw the application for adjudication.

The applicant may decide to withdraw the application for a number of reasons, the most common being where payment of the claim has occurred before determination of the dispute. Once the applicant gives written notice that it wishes to withdraw the application prior to the prescribed time in section 31(1)(a) and (b), the adjudicator will be required to dismiss the application under the new section 31(2)(a)(ia). Any costs incurred by the adjudicator in adjudicating the dispute up to the time of the notice of withdrawal will be dealt in accordance with section 44 of the Act.

This clause removes the reference in section 31(2)(a)(ii) to section 26 and inserts 26(1), (2)(b) and (c). It also inserts a new section 31(2)(a)(iia) to provide that an adjudicator must dismiss an application without determining its merits if the application has not been prepared in accordance section 26(2)(a), unless satisfied that the application complies with the section sufficiently for the adjudicator to commence adjudicating the dispute.

Section 26(2)(a) of the Act provides that the application for adjudication must be prepared in accordance with, and contain the information prescribed by, the regulations. Regulation 5 of the *Construction Contracts Regulations 2004* requires that the application must, in addition to the other information required by section 26(2) of the Act, contain –

- the name and contact details of the appointed adjudicator, or prescribed appointor;
- the applicant's name and contact details; and
- the respondent's name and contact details.

In *Marine & Civil Pty Ltd v WQube Port of Dampier Pty Ltd* [2014] WASAT 167, the State Administrative Tribunal (SAT) found that the failure of the applicant to include the Australian Business Number of the prescribed appointor was sufficient grounds for the adjudicator to find that requirements of regulation 5 had not been met, and dismiss the application under section 31(2)(a)(ii) of the Act.

Inserting the new section 31(2)(a)(iia) will ensure the substance of an application prevails over the form, to the extent to which it complies

sufficiently with the requirements in section 26(2)(a) for the adjudicator to commence adjudicating the dispute.

If the application for adjudication does not comply with the requirements in sections 26(1), (2)(b) and (c), the clause amends section 31(2)(a)(ii) to provide that the adjudicator must dismiss the application without determining its merits.

The clause also inserts a new subsection 31(2A), which allows the adjudicator, with the consent of the parties, to prepare a determination under section 31(2)(b) in terms agreed to by the parties. This new section will provide a mechanism that facilitates a settlement between the parties to a payment dispute.

Clause 13 Section 32 amended

Section 32 of the Act prescribes the procedure for adjudicating payment disputes. The section provides, inter alia, that the adjudicator must act informally and is not bound by the rules of evidence and may inform themselves as they think fit.

Section 32(3)(c) of the Act also provides that the adjudicator may with the consent of all parties adjudicate a payment dispute simultaneously with another payment dispute.

The Review recommended that in the interests of determining payment disputes fairly and as quickly, informally and inexpensively as possible, the adjudicator should have the discretion to determine whether two payment disputes should be adjudicated simultaneously.

This clause gives effect to the recommendation by amending section 32(3)(c) to provide that an adjudicator may adjudicate a payment dispute simultaneously with one or more other payment disputes if satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the disputes in accordance with section 30.

Clause 14 Section 37 amended

Section 37(2)(b) of the Act provides that where an application for adjudication is taken to be dismissed under section 31(3) then a further application must be made within 28 days of the dismissal.

An application for adjudication is taken to be dismissed under section 31(3), where the application has not been dismissed or determined under section 31(2) within the prescribed time, or any extension of it made under section 32(3)(a).

This clause removes 28 days in section 37(2)(b) and inserts 20 business days.

Clause 15 Section 39 amended

Section 39(1) of the Act provides that where a party is liable to pay an amount under a determination it must do so before the specified date in the determination. Subsection (2) further provides that where the party fails to pay the amount by the specified date then interest, either as provided under the determination, or in accordance with the rate prescribed under section 142 of the *Supreme Court Act 1935*, begins to accrue.

If a party has failed to pay the amount due under a determination by the specified date, then the other party may, under section 43 of the Act, apply to a court of competent jurisdiction for leave to enforce the determination and any accrued interest as a judgement or order of the court.

Section 39(4) provides that interest ceases accruing on the unpaid amount under the determination once a judgement is entered by the court of competent jurisdiction in the terms of the determination.

This clause amends section 39(4) to account for the amendments in clause 17 of the Bill, which will remove the requirement in section 43 of the Act to seek leave of a court of competent jurisdiction. Clause 17 of the Bill will insert a new section 43(2), which requires that a party entitled to be paid an amount under a determination may enforce the determination by filing;

- a certified copy of the determination; and
- an affidavit as to the amount not paid,

in a court of competent jurisdiction. This clause makes a corresponding amendment to section 39(4) to provide that interest on the determination ceases to accrue under section 39(2) once the copy of the determination is filed in a court of competent jurisdiction.

Clause 16 Section 42 amended

Where a determination of a payment dispute has been made by an adjudicator and the principal is required to pay a contractor an amount, and the principal then fails to do so, section 42 of the Act provides that the contractor may give notice to the principal of its intention to suspend the performance of the contractors obligations under the contract.

Section 42(2) of the Act specifies that the notice given by the contractor to the principal of the contractor's intention to suspend performance of its obligations must contain certain information and be given to the principal at least 3 days before the contractor intends to suspend performance.

If, after the contractor has given notice to the principal under section 42(2) of the Act and suspending performance of its obligation, the principal pays the contractor the amount owed under the determination, section 42(3) requires the contractor to resume performance of its obligations no longer than 3 days after the principal has paid the amount.

This clause removes the reference in sections 42(2)(d) and (3) to 3 days and inserts 3 business days.

Clause 17 Section 43 amended

Section 43(2) of the Act provides that where an amount due under a determination made by an adjudicator has not been paid, a party may, with leave of a court of competent jurisdiction, enforce the determination in the same manner as a judgement or order of the court to the same effect. Where leave is given, the court may enter judgment in the terms of the determination.

Section 43(1) defines the term court of competent jurisdiction to mean the court with the jurisdiction to deal with the amount that is payable under the determination.

The Review recommended that section 43 of the Act should be amended to remove the requirement for leave of the court to enforce a determination and provide a faster and more efficient process for the registration of the determination.

This clause gives effect to the recommendation by inserting a new process for the registration of determinations that is similar to the registration process provided by section 50 of the *Building Services (Complaint Resolution and Administration) Act 2011*. Section 50 of this Act provides a speedy process for building remedy and HWBC orders made by the Building Commissioner, or the SAT, to be filed with the courts and enforced as an order.

This clause deletes sections 43(2) and (3) of the Act and replaces it with new subsections (2) and (3), which provide that a party entitled to be paid an amount under a determination may enforce the determination by filing in a court of competent jurisdiction both a copy of the determination that the Building Commissioner has certified to be a true copy, and an affidavit as to the amount not paid under the determination. Once the documents are filed with the court the determination is taken to be an order of the court.

Clause 18 Section 46 amended

Once a payment dispute has been adjudicated, sections 38 and 41 of the Act provide that any determination is final and binding on the parties and payment of the amount due under the determination must be made.

However, section 46 of the Act provides a limited right for a person aggrieved by a determination to seek a review of the adjudicator's decision by the SAT. This right of review is only available where the adjudicator has dismissed the application under section 31(2)(a) without determining the merits. Where the adjudicator has made a determination under section 31(2)(b) on the merits of the payment dispute the adjudicator's decision is not reviewable by the SAT. Only the Supreme Court has the power to review the adjudicator's determination under section 31(2)(b), and this review is limited to jurisdictional grounds.

Where a person who is aggrieved by the adjudicator's decision to dismiss the application for adjudication under section 31(2)(a) applies to the SAT for a review, section 46(2) of the Act provides that if the adjudicator's decision is set aside by the SAT and reversed, the adjudicator must, within 14 days of the SAT's decision, make a determination under section 31(2)(b).

This clause amends section 46(2) of the Act to remove 14 days and insert 10 business days.

Clause 19 Part 6 inserted

This clause inserts a number of transitional provisions in the Act to accommodate for the commencement of the amendments to sections 6, 26(1), 28(1), 29(2)(b) and 42(2)(b). The transitional provisions are intended to deal with the changes to the relevant time limits that will occur upon on the commencement of the amendments in this Bill.

Section 57 is inserted in the Act to provide that references in the new section 6(2) to an adjudication that has been dismissed or determined under section 31(2) include references to an adjudication that was dismissed or determined under section 31(2) before 15 December 2016. This section is intended to make it clear that if a payment dispute has been dismissed or determined prior to 15 December 2016, then it is still captured by the exclusion in the definition of a payment dispute that is provided in the new section 6(2).

Section 58 is inserted in the Act to provide that where the time for doing a thing that could be done, or was required to be done, under sections 26(1), 28(1) and 29(2)(b) was not done within the period required by those sections, and the period as extended by the amendments contained in clauses 8, 10 and 11 of this Bill, expires on or after 15 December 2016, the thing may be done within the period as extended.

The principal purpose of this new section is to provide that if a payment dispute arises and an application for adjudication was not made under section 26(1) before 15 December 2016, then after this date the applicant will have 90 business days from when the dispute arose to make an application for adjudication.

Section 59 is inserted in the Act to provide that a notice given by a contractor to a principal for the purposes of section 42(1) on or after 15 December 2016 and before 1 January 2017, but which was not given in compliance with section 42(2)(d) (as amended), is taken to be as valid and effective as if it had been given under section 42(2)(d) (not amended). This clause provides transitional arrangements for the amendments in clause 16 that insert 3 business days in sections 42(2)(d) and (3) to account for the Saturday and Sunday after 15 December 2016.

Clause 20 Section 60 inserted

This clause inserts a new section 60 in the Act to provide transitional arrangements for the amendments to section 10 of the Act contained in clause 7 of this Bill. The new section 60 provides that where a construction contract is entered into before 3 April 2017, the prohibition on payment provisions greater than 50 days continues to apply to that contract. Any construction contracts entered into after 3 April 2017 will be subject to the requirements of section 10 of the Act as amended by clause 7 of the Bill.