HERBERT SMITH FREEHILLS

AUSTRALIAN CONSTRUCTION DISPUTE RESOLUTION NEWSLETTER

IN THIS ISSUE

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WELCOME

Welcome to this issue of Herbert Smith Freehills' Australian Construction Dispute Resolution Newsletter.

This newsletter updates you on legal developments relevant to your industry by featuring Australian court decisions and legislative developments of particular interest.

In this issue, we look at:

- a recent decision of the High Court of Australia considering whether a bank fee was a penalty and unenforceable and reiterating the significant hurdles a party will face in order to prove that a provision, such as one providing for liquidated damages payable for delayed completion of construction work, is a penalty.
- two developments which provide welcome guidance towards a more settled approach to the often complex issue of concurrent delay.
- the long awaited Evans Report into the operation and effectiveness of the *Construction Contracts Act 2004* (WA) (**Act**). The Report makes 28 recommendations which include proposed amendments to the Act which, if adopted, will have a significant impact on both principals and contractors.

We trust that you will enjoy this issue of the Australian Construction Dispute Resolution Newsletter.

ABOUT HERBERT SMITH FREEHILLS

Herbert Smith Freehills offers clients involved in engineering and construction projects a track record of providing innovative and commercially astute advice across a range of industries and legal issues.

The practice is diversified and balanced between contentious and non-contentious work in many jurisdictions around the world. Our team has advised clients on many of the world's largest and most complex engineering and construction projects.

Our contentious work encompasses a broad mix of complex, high value disputes which are resolved in a variety of jurisdictions, applying such processes as litigation, arbitration, adjudication (including adjudication boards), expert determination, early neutral evaluation and mediation.

LIQUIDATED DAMAGES AND PENALTIES: AN UPDATE

Construction contracts typically include 'liquidated damages' provisions providing for payment of a specified amount to one party by the other if it fails to meet certain obligations. It is common, for instance, for construction contracts of all kinds to specify a daily amount payable by a contractor who fails to complete its scope of work by the date for completion. Where, for example, the contractor is engaged to provide specialised design or engineering expertise, and deliver an operational asset at completion, such as a power plant or a wind farm, the contract may well specify an amount payable if the asset fails to meet specified performance levels.

It is therefore also common for a contractor facing exposure to pay liquidated damages to allege, in an effort to avoid paying the specified amount, that the liquidated damages provision is a penalty and unenforceable as a result.

The High Court in *Paciocco v Australia and New Zealand Banking Group Limited* recently considered an appeal by a customer of the Australia and New Zealand Banking Group Limited (**ANZ**) against the decision of the Full Court of the Federal Court that a late payment fee was not a penalty. As a result, the High Court's decision helpfully examines the rule against penalties and how it is applied in Australia.

The High Court's application of the rule against penalties to a bank fee should not hide the obvious interest of the decision to the construction industry given the ubiquity of liquidated damages provisions in construction contracts and the efforts to characterise them as penalties in order to challenge them.

The High Court's decision highlights the significant difficulties faced by a party seeking to prove that a liquidated damages provision is a penalty and should not be enforced by a court.

Summary

In a much anticipated decision from the High Court on penalties, Mr Paciocco (**the Appellant**), who led the class-action appellants, was unsuccessful in a claim for the recovery of the late-payment fees he paid pursuant to the terms of contracts between him and ANZ in relation to two consumer-credit-card accounts. ANZ unilaterally determined the amount of the late-payment fees and admitted that this determination was not made by reference to the amount which would have been recoverable as damages at law.

The Appellant supported the first instance decision that the late-payment fees were extravagant when compared with the greatest loss ANZ could recover by way of damages at law, and as such unenforceable as penalties.

In opposing the High Court appeal, ANZ supported the Full Federal Court's decision that the late-payment fees were not extravagant or exorbitant when regard was had to the legitimate interests of ANZ in the performance of the obligation and, as such, were not unenforceable penalties.

The High Court accepted that the late-payment fees were not shown to be penalties but were, rather, a valid protection of ANZ's interests and accordingly dismissed this aspect of the appeal.

The Appellant also challenged the fees for reasons other than that they were penalties, but those arguments and findings are outside the scope of this article. It suffices to say, for now, that those challenges by the Appellant also failed.

Background

The Appellant held two credit card accounts with ANZ (one opened in June 2006, the other in July 2009) pursuant to which he incurred a number of late-payment fees.

The ANZ Credit Card Conditions of Use provided for ANZ to issue monthly statements of account. The account holder was required to make the minimum monthly payment shown on each statement by the due date shown on the statement (**Minimum Monthly Payment**). The Minimum Monthly Payment was ordinarily to be the greater of $10 or 2% of the closing balance shown on the statement, but to be the full closing balance if the closing balance was less than $10.

ANZ had the right to charge a late-payment fee to the account if the Minimum Monthly Payment was not paid by the due date (the amount of the fee being set by ANZ, as altered from time-to-time). Until December 2009, ANZ set the late-payment fee at $35; thereafter, ANZ set it at $20. ANZ did not determine the amount of the late-payment fee by reference to a sum that would have been recoverable as damages.

The ANZ Credit Card Conditions of Use permitted the account holder to close the credit-card account at any time by giving notice to ANZ, and for ANZ to change any term or condition by giving notice to the account holder.

The Appellant brought a claim for recovery of the fees, alleging that the fees were unenforceable as they contravened, amongst other things, the common law and equitable prohibitions of penalty clauses.

Proceedings below

Federal Court decision

At trial, the Appellant sought to identify the damage actually suffered by ANZ as a result of the late payments and the amounts needed to restore ANZ to the position it would have occupied had the late payments not occurred. The Appellant's expert witness calculated the 'operational costs', being costs involved by ANZ's Collections Business Unit and other administrative costs, and estimated the average cost per default to have been $2.50, with a range from 50c to $5.50.

By contrast, ANZ's expert identified potential costs to the ANZ from late payments which impacted its financial position. He considered the maximum amount of cost that ANZ could conceivably have incurred and included not only the 'operational costs'[1] associated with the activities of ANZ's Collections Business Unit, as identified by the Appellant, but also other costs to ANZ's financial interest such as 'provisioning costs' and 'regulatory capital costs'[2]. He estimated that average collection costs attributable to late payment exceeded $5 and the total average cost incurred by ANZ as in excess of $50 per late payment.

The primary judge's approach was to limit ANZ's 'costs' to actual damage incurred (which would have been recoverable as damages at law) and calculated the cost upon default at $3.00. Her Honour then contrasted this amount to the fees in question and found them to be extravagant and unconscionable, and therefore penalties at common law and in equity.

The Full Court of the Federal Court

ANZ appealed the first instance finding that the fees were a penalty.

The Full Court of the Federal Court allowed the appeal.

Allsop CJ delivered the principal reasons for judgment. In short, his Honour held that instead of undertaking an ex post inquiry of actual damage in assessing whether the fee was a penalty, as the primary judge had done,[3] the correct approach was 'to look at the greatest possible loss on a forward looking basis' and to assess that loss by reference to the 'economic interests to be protected.'[4] As such, the Full Court held that ANZ's expert evidence should have been considered and displayed precisely the sorts of interests which ought to be taken into account when considering the question of penalties.[5]

Allsop CJ concluded that when those interests were taken into account, the fees were not demonstrated to be extravagant, exorbitant or unconscionable, and were not penalties. ANZ's appeal on this issue succeeded.

High Court decision

The Appellant appealed the Full Federal Court finding that the fees were not penalties to the High Court.

The High Court accordingly framed the question for decision narrowly as 'whether the contractual stipulation for the late payment fee was unenforceable as a penalty at *common law*' (emphasis added).[6]

To start with, the Court confirmed that the governing principles in terms of whether the late-payment fee was unenforceable as a penalty at common law were to be found in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[7] and the recent High Court decision of *Andrews v Australia and New Zealand Banking Group Limited*.[8]

In traversing the governing principles, the majority (French CJ, Kiefel, Gageler and Keane JJ) noted the following considerations:

- A claimant contending that a sum is a penalty bears the onus of proving that the sum is in fact a penalty and faces a 'high hurdle'.[9]
- A penalty, by nature, *punishes* a party.[10] In the context of a contract, the term 'penalty' refers to a punishment, consisting of the imposition of an additional or different contractual liability, for non-observance of a 'primary' contractual stipulation.[11]
- A breach of contract is not required for the penalties doctrine to operate. A requirement to pay or do some other act may be a penalty, notwithstanding the fact that the obligation to pay is not enlivened by a breach.[12]
- Even if no pre-estimate of loss is made at the time the contract is entered into, a sum stipulated will not necessarily be a penalty.[13] A sum reflecting, or attempting to reflect, other kinds of loss or damage to a party's interests beyond those directly caused by breach will not, of itself, amount to a penalty.[14]
- Whether or not a stipulated sum is unconscionable or extravagant can only be gauged against the identified interests of the party in whose favour the stipulation is made.[15] This is not limited to a comparison of the stipulated amount and the amount of damages flowing directly from the breach and recoverable at law.[16] In particular, 'for a party to stipulate for a more ample remedy than is available at law is not to visit a punishment of the other party.'[17]
- Crucially, the character of the alleged penalty is referable to the interests which the parties seek to protect. The question is whether the sum agreed is 'commensurate with the interest protected by the bargain'.[18] To be a penalty, a provision for the payment of a sum of money on default must be out of all proportion to the interests it purports to protect. A sum which is merely disproportionate to the loss suffered would not qualify as penal.[19] It is insufficient that it should be 'lacking in proportion'; rather, it must be 'out of all proportion'.[20]

The majority accepted that ANZ's interests extended beyond the recovery of compensation for loss and that it was legitimate for it to seek to protect those interests.[21] This being so, the relevant question to be applied, then, was whether the late-payment fees were out of all proportion to ANZ's interests in receiving timeous payment of the Minimum Monthly Payment. The majority held that even if ANZ's expert evidence were ignored, the Appellant had failed to establish that the late-payment fees were out of all proportion and so penalties.[22] Accordingly, the appeal failed.

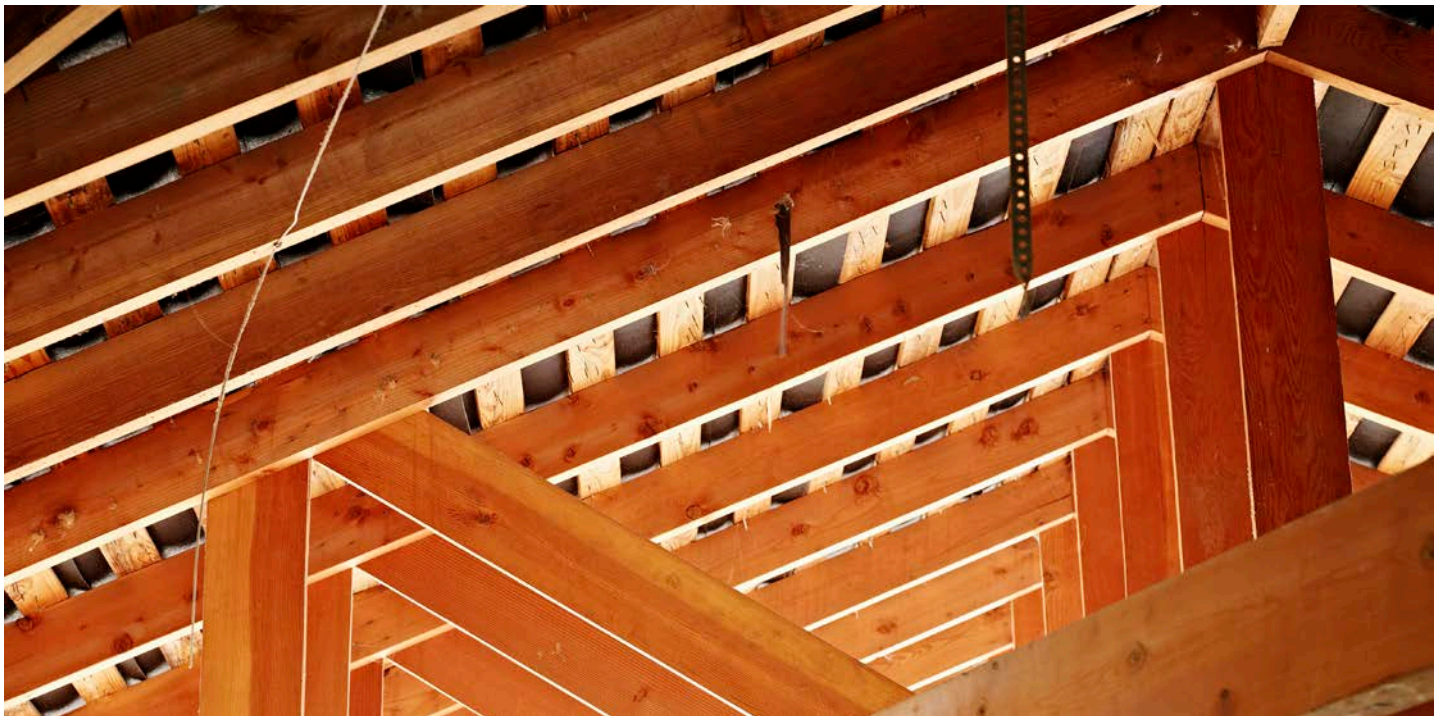
What the decision means for you

Agreeing the amount payable in the event of a failure to comply with an obligation can be extremely useful and, unless challenged, will allow the innocent party to avoid the uncertainty and expense of litigation to prove its loss. This is an obvious reason for the widespread use of liquidated damages provisions by the commercial construction industry.

The High Court decision recognises that the parties themselves are in the best position to assess their risk and interests requiring protection when contracting, and that it is legitimate for a party to seek to protect its interests.

The decision also confirms that a party alleging that a contractual burden imposed upon it is a penalty is required to prove it and faces a high hurdle in so proving.

It will not be sufficient that a sum stipulated is more, or even considerably more, than the amount which would be recoverable by the innocent party had it sought to claim damages at law. Instead, the courts will only intervene when the burden imposed is so extravagant when compared to the interests which are sought to be protected that it serves no purpose other than to punish.[23]



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1. Provisioning costs being expenses which ANZ recognised in its profit and loss account representing reductions in the value of customer accounts attributable to risk of default.
2. Regulatory capital costs being costs which ANZ incurred in funding capital which ANZ was required by applicable prudential standards to hold as a buffer against unexpected losses: and so was money ANZ could not divert to other profit making pursuits.
3. *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, [117].
4. *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, [169].
5. *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, [167].
6. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [74] per Gageler J.
7. [1914] UKHL 1; [1915] AC 79.
8. [2012] HCA 30; (2012) 247 CLR 205.
9. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [53].
10. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [118], [127].
11. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [22], [118].
12. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [4]. On this point, French CJ emphasised that, the position in Australia is at odds with that in the UK. There, the Full Bench of the Supreme Court, in *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, held that the doctrine of penalties is confined to cases arising out of contractual breach.
13. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [30].
14. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [30].
15. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [52].
16. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [33], [161].
17. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [283].
18. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [270].
19. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [54].
20. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [54].
21. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [68].
22. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [69].
23. *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28, per Gageler [165] – [167].

CONCURRENT DELAY: RECENT DEVELOPMENTS

There are few areas of construction law that have caused as many headaches as the issue of concurrent delay.

Two recent developments have provided guidance towards a more settled approach in this area:

- the publication of the Consultation Draft for the 2nd edition of the Society of Construction Law Delay and Disruption Protocol (the **Protocol**); and
- the English decision of *Saga Cruises BDF Ltd & Anor v Fincantieri SPA*.[1]

Background

Often during the life of a project several overlapping events occur that are said to cause delay, for which different parties are said to be responsible. Correct analysis of concurrent delays is significant because it often determines whether the Principal is entitled to liquidated damages on the one hand, and whether the Contractor is entitled to an extension of time (EOT), and thereby avoid the application of liquidated damages, on the other. These outcomes depend on the allocation of responsibility under the contract for the delay. The recent developments outlined above go some way to solving this problem.

'Concurrent delay' is a term that may have a number of different meanings when used in the construction context, and this has plagued the area with a cloud of obscurity. As noted judicially, 'One of the problems in using such expressions as "concurrent delay" or "concurrent delaying events" is that they refer to a number of different situations.'[2] In order to understand the developments, it is important to distinguish between two concepts:

- *True Concurrent Delay* describes two or more delay events occurring at the same time, one a Principal-Risk Event, the other a Contractor-Risk Event, and the effects of which are felt at the same time. This can occur, for example, at the commencement date when the Principal fails to give access to the site, but the Contractor does not have sufficient resources to carry out any work.
- *Sequential Delays* describes the situation where two or more delay events arise at different times, but the effects of them are felt at the same time. In our experience, the majority of delay events that are said to be 'concurrent' on projects can be categorised as Sequential Delays.

True Concurrent Delay

With respect to True Concurrent Delay, whether the Contractor is entitled to an EOT is fairly well settled: in the absence of an express provision in the contract, the Contractor will be entitled to an EOT for a delay caused by a Principal-Risk Event, even if that delay runs concurrently with a delay caused by a Contractor-Risk Event[3], provided that each event has at least equal 'causative potency'.[4]

This approach is reflected in Core Principle 9 of the Protocol (also in the first edition): 'Where Contractor Delay to Completion occurs concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due.'

It should be noted that an alternative, and somewhat novel, approach has been adopted in Scotland, which involves 'apportioning' the delay between the two events.[4] This approach, however, has been expressly rejected in England.[5] The New South Wales Court of Appeal has also recently rejected an arguably analogous apportionment approach when considering global claims.[6]

Sequential Delays – towards a narrow approach?

The Protocol illustrates the different approaches to Sequential Delays by describing the following situation:

> A Contractor Risk Event will result in five weeks Delay to Completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Risk Event, would result in Delay to Completion from 6 February to 20 February.[7]

On one view, the correct approach would be to simply ask whether the variation issued by the Employer would have delayed completion in the absence of the Contractor-Risk Event. Adoption of this approach would entitle the Contractor to an EOT for the period between 6 February and 20 February.

The Protocol does not adopt this approach. Instead it reasons that the variation issued by the Employer does not *in fact* result in the works being delayed because the works were already going to be delayed by a greater period as a result of the Contractor-Risk Event. Therefore there is no entitlement to an EOT.

Such an approach was recently adopted in the English case of *Saga Cruises BDF Ltd & Anor v Fincantieri SPA*.[8] In *Saga*, the owner of a cruise ship contracted with a shipyard to refurbish the ship, such works to be completed by 2 March 2012. Completion was not achieved until 16 March 2012 and the owner sought to recover liquidated damages for the delay.

The shipyard argued that it had been delayed by various events for which the owner was responsible. In reliance on previous cases,[9] the Court rejected this argument, reasoning that any of the events for which the owner was responsible did not cause delay because they occurred during a period when completion was already going to be delayed as a result of a delay for which the yard was responsible:

> If completion of the project was already delayed for reasons for which the Yard was responsible, then delays to completion of particular activities by the Owners are not examples of concurrent delay and do not give rise to any entitlement to an extension of time by the Yard. That is because they do not in fact cause any delay to completion.[10]

1. [2016] EWHC 1875 (Comm).
2. *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68.
3. *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* 70 Con. L.R, 32.
4. *Keating on Construction Contracts* (10th edition, 2016), 8-026.
5. *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68.
6. *Walter Lilly & Co Ltd v Giles Mackay and DMW Developments Ltd* [2012] EWHC 1773.
7. Mainteck Services Pty Ltd v Stein Heurtey SA [2014] NSWCA 184, [197] – [206].
8. Guidance Note 3.10.7.
9. [2016] EWHC 1875 (Comm).

There may be a certain attraction in the simplicity of this approach for the courts. By limiting the characterisation of concurrent delay to True Concurrent Delay, depending on the facts, it opens the door to simply disregarding the second event in a situation of Sequential Delay.

This approach gives priority to whichever of the Contractor-Risk Event or Principal-Risk Event occurs first. Provided each event is of at least 'causative potency', the principles can be summarised as follows:

- Contractor-Risk Events occurring during a delay caused by a Principal-Risk Event will not reduce the Contractor's entitlement to an EOT for the delay;
- Principal-Risk Events occurring during a delay caused by a Contractor-Risk Event will not reduce the Principal's entitlement to liquidated damages; and
- if the second event extends the delay caused by the first event, the additional delay is subject to either an EOT or liquidated damages (depending on which scenario above applies).

On the other hand, the approach can be viewed as overly simplistic as it does not take into account the combined effect of multiple overlapping events. It is fair to say that its application may be limited to the very narrow circumstances where each event is of at least equal 'causative potency', and would have occurred for the same duration in the absence of other event.

Application to Australian Standard Form AS-2124

Parties contracting under Australian standard forms should be aware that publishers have attempted to prescribe procedures for the assessment of concurrent delays through drafting. Of particular concern to clients is the fifth paragraph of Clause 35.5 of form AS 2124-1992 which provides:

> Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause referred to in the preceding paragraph, then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion.

Unhelpfully, AS 2124-1992 does not define '*concurrent delays*'. The intention of this clause appears to be to deprive the Contractor of an entitlement to an EOT in the case of True Concurrent Delay, by reversing the common law position (whether it achieves this intention is arguable).[12]

What impact does it have on Sequential Delays?

If one were to adopt the approach suggested in the Protocol and *Saga*, this paragraph should not affect the common law position for Sequential Delays outlined above. This is because when one carries out the factual analysis required, and determines that the second event did not actually (as opposed to hypothetically) cause a delay, then the situation is not one where "more than one event causes concurrent delays". Having said that, it is not difficult to foresee circumstances in which a court would find the approach insufficient to properly determine the contractual entitlements in more complex scenarios.

KEY TAKEAWAYS

1. When analysing delays to a project and the issue of concurrency is raised, carefully consider whether the situation is one of True Concurrent Delay or Sequential Delay.
2. Always check the contract to see if terms such as 'concurrent delays' are defined.
3. Consider whether the circumstances permit an argument to be made that a standard concurrent delay clause (such as in AS 2124-1992) does not apply to the situation, but is limited only to True Concurrent Delays.

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10. *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), *Royal Brompton Hospital NHS Trust v Hammond (No 7)* (2001) 76 Con LR 148.
11. *Saga Cruises BDF Ltd & Anor v Fincantieri SPA* [2016] EWHC 1875 (Comm), [244].
12. *Turner Corp Ltd v Coordinated Industries Pty Ltd* 19(1995) 11 BCL 202.
13. See Paul Tobin, 'Concurrent and Sequential Causes of Delay', (2008) 24 *Building and Construction Law Journal* 10, 11.

WILL THE WA GOVERNMENT'S SCRUTINY ON CONSTRUCTION CONTRACTS LEAD TO AN INDUSTRY SHAKE-UP?

A much anticipated report on Western Australia's Construction Contracts Act has been made public and the State Government's quickly released response suggests that the sector is headed for its biggest shake up in 10 years.

The *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)* indicates that certain unscrupulous practices, largely driven by a tightening market, will lead to industry changes designed to address a perceived imbalance in a sub-contractor unfriendly market.

Unlike previous reviews of security of payment legislation undertaken in other states, the Report casts the *Construction Contracts Act 2004* (WA) (**Act**) in a generally favourable light, as an uncomplicated statutory scheme for the evaluation of payment claims, through a rapid dispute resolution process.

Whilst the Report makes 28 recommendations, there is no indication that the Act will undergo any major structural amendments; rather the recommendations are directed at improving the operation and effectiveness of the Act, while also keeping the legislation simple, for ease of use.

Government's Response to the Report

The Report identified insolvency of head contractors as a key challenge to the construction industry, with inadequate cash flow and high cash use touted as the main contributors to higher insolvency rates. This highlighted the importance of security of payment legislation and explains the Government's support for the recommendations which improve the security of payment within the construction industry.

In this regard, the Government has committed to making a series of amendments to the Act to improve the rapid adjudication process and will consider the viability of using statutory retention trusts and Project Bank Accounts to hold retention moneys on trust for contractors and sub-contractors. It is also likely that the Government will set up a reference group to better protect sub-contractors on State Government projects.

Recommendations the Government supports

The most significant amendments to the Act, which the Government supports include:

a) a likely significant increase (likely to be 90 business days) to the time in which adjudication applications can be made;

b) altering time periods from calendar days to business days and excluding the Christmas holiday period;

c) permitting recycled claims;

d) removal of the obligation to dismiss applications for technical deficiencies;

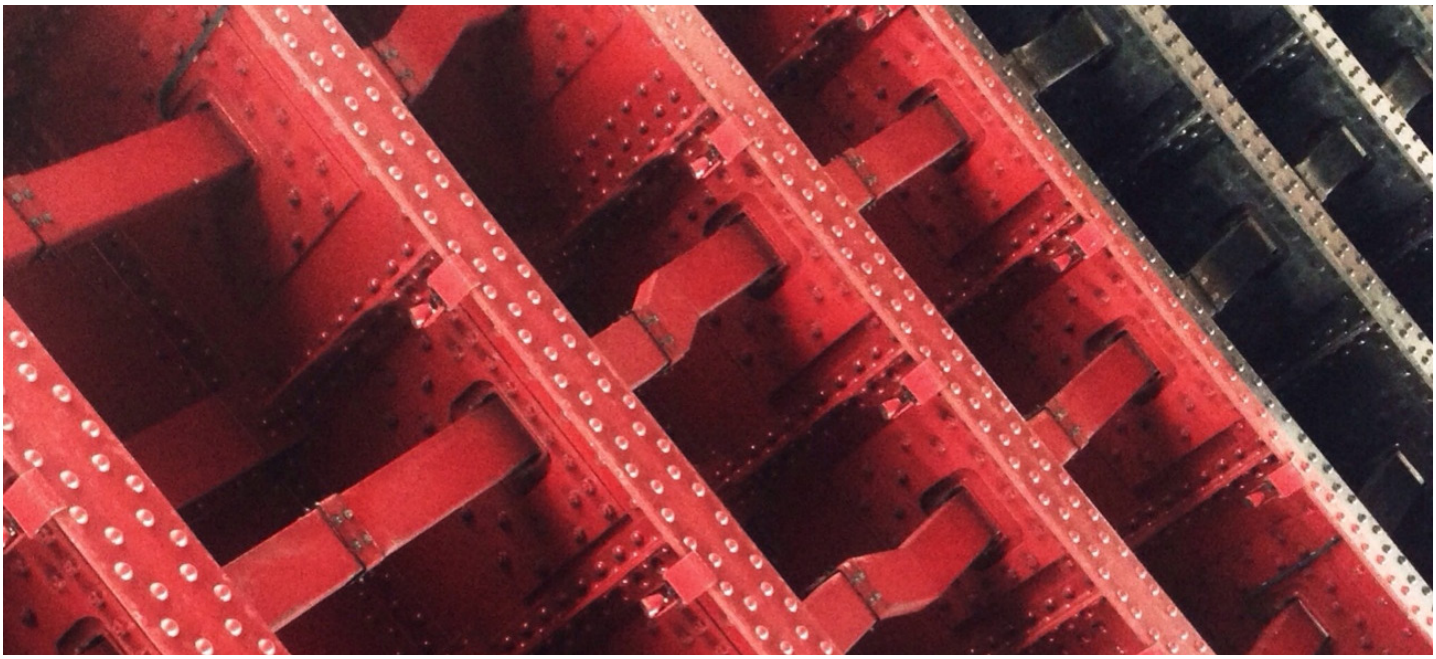
e) additional and ongoing registration and renewal process for adjudicators; and

f) penalties for failure to comply with prohibited terms.

The Government will legislate to permit the publication of certain adjudication determinations and adjudicators' experience and expertise.

The Government also agrees that the Act should not be amended to exclude liquidated damages or allow parties to contract out of the Act. The implied terms provisions will also remain as part of the Act.

The 'softer' recommendations supported by Government involve the Building Commission, as the industry regulator, working to increase and enhance the information and resources available about the Act and its processes. It seems this will be done through advertising, industry awareness sessions and the publication of online information.



What's been deferred

Government has opted to defer its position on some of the recommendations, subject to further consideration and industry consultation. For example, at this stage the 'mining exclusion' in the Act will stay (contrary to the recommendation in the Report).

The Report also recommends that consideration should be given to amending the Act to ensure that trust money is held by an independent third party, rather than by the principal. The Government is reluctant to support this as a wholesale change and will also refer consideration of this recommendation to the Building Commission. Further consideration will be given to using Project Bank Accounts. The Government has conducted a trial using Project Bank Accounts for high value projects and is finalising the results of this trial.

What's ruled out

While the Government supports a majority of the recommendations made in the Report, or will at least consider them further, it does not accept:

a) amending the Act to require that construction contracts be in writing; and

b) requiring Australian Standard forms of contract to apply where the State Government is the principal (or the contract administrator).

Details ahead

The Government's Response is clearly directed to addressing two main features of the current construction market in this State – unscrupulous and insolvent contractors. The industry can expect an emphasis on measures to assist smaller and exposed sub-contractors. The industry awaits the detail.

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