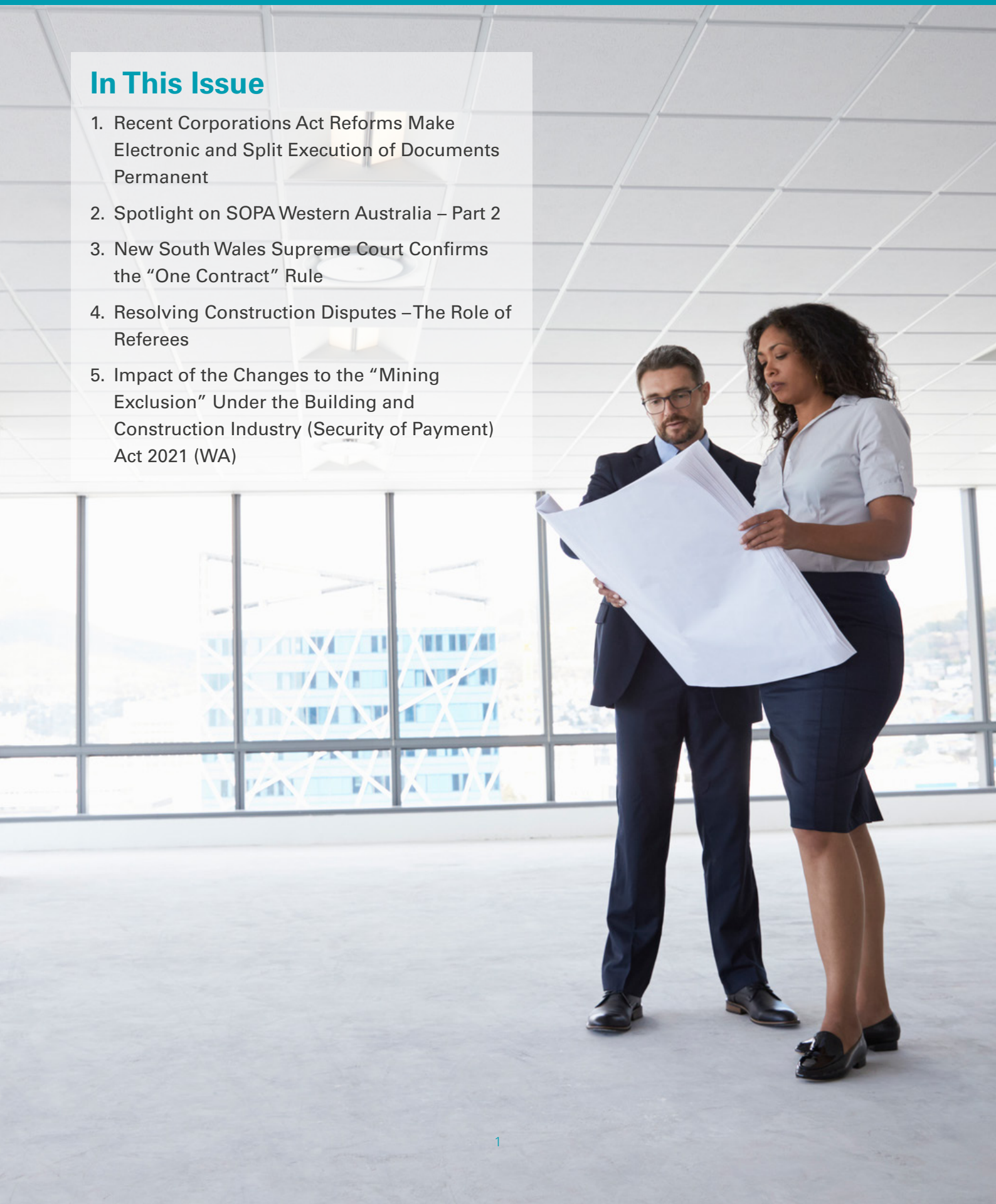
SQUIRE PATTON BOGGS

Construction Matters

April 2022

In This Issue



Recent Corporations Act Reforms Make Electronic and Split Execution of Documents Permanent

Author: Brent Henderson, Hao Zhou

Background

In the past two years, the federal government has introduced a series of temporary measures in response to the COVID-19 pandemic and the move to work from home. The Treasury Laws Amendment (2021 Measures No 1) Act 2021, was introduced on 14 August 2021, which temporarily amends the Corporations Act 2001 (Cth) to allow electronic execution of documents until 31 March 2022.

Those temporary measures are now permanent. On 23 February 2022, the Corporations Amendment (Meetings and Documents) Act 2022 (**Act**) came into force, permanently amending the Act to allow companies to execute documents (including deeds) by electronic means.

Key Amendments

Key amendments relating to electronic execution include:

- A person may sign a document (including a deed) under s126 or s127 in a physical form by hand or electronic form using electronic means (see s110A(1))
- A method of signing must identify the person and indicate that person's intention in respect of the information recorded in the document (see s110A(2))
- A person is not required to sign the same form of the document as another person, sign the same page as another person or use the same method as another person (see s110A(4))
- A person may sign a document in multiple capacities by signing the document only once if the document makes it clear the person is signing in multiple capacities (see s110A(5))
- An agent of a company may make, vary, ratify or discharge contracts and execute documents (including deeds), and does not need to be appointed by a deed in order to execute the documents (see s126)
- Where an agent has executed a deed on behalf of a company, people are able to rely on the assumption in s129(3) of the Act (see s126)
- A sole director of a proprietary company that has no company secretary may execute documents and allow outsiders to make a statutory assumption about the valid execution of the document by the company (see ss127(1)(c) and (2)(c))
- A document executed as a deed under s126 or s127 does not need to be witnessed and does not need to be delivered to be validly executed as a deed (see ss127(3A) and (3B))
- ASIC now must not refuse to accept a form that has been validly electronically signed (see s110B))

In addition to electronic execution, the Act permanently allows corporations to hold virtual meetings and distribute meeting-related materials electronically.

These amendments will apply in relation to the signing or execution of documents from 23 February 2022.

Key Takeaways

- Companies can now execute documents (including deeds) electronically and rely on the assumptions under s129 of the Corporations Act
- Agents of companies can now make, vary, ratify or discharge contracts and execute documents (including deeds)
- Documents can be executed by counterparts, notwithstanding that a counterparts clause has not been included in the document

Spotlight on SOPA Western Australia – Part 2

Authors: Donna Charlesworth, Robert O'Brien and Tenille Kearney

What You Need to Know

On 1 August 2022, the way that principals and head contractors respond to payment claims will change significantly and become more onerous than under previous legislation. Stage one of the reforms brought about by the new Building and Construction Industry (Security of Payment) Act 2021 (WA) (**SOPA**) will come into force, and principals and head contractors need to be aware of the implications and risks for their business.

Payment schedules are a new requirement in SOPA, as they were not previously a feature of the Construction Contracts Act 2004 (WA). As a result, construction participants will need to ensure they are familiar with the requirements for payment schedules under the SOPA and, if necessary, they have amended their internal processes and procedures to ensure they will be able to issue compliant payment schedules when required.

We previously reported on the new payment timeframes. We now consider what constitutes a valid payment schedule for the purposes of the SOPA, and what the consequences are for not issuing one in time.

Issue 2: Payment Schedules

SOPA Requirements

The SOPA prescribes that a payment schedule must:

(a) Expressly state that it is a payment schedule under the Building and Construction Industry (Security of Payment) Act 2021 (WA)

(b) Be given in writing and be in the approved form (if any)

(c) Identify the payment claim to which it relates

(d) Indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount)

(e) If the respondent does not propose to make any payment, indicate that

(f) If no payment is proposed or the scheduled amount is less than the amount claimed state:

  (i) Why the scheduled amount is less or no payment is proposed

  (ii) If the reason is that the respondent is withholding payment, the reason why the respondent is withholding payment

It is extremely important that a payment schedule articulates why the scheduled amount is less than the amount claimed, or why no payment is proposed to be made. This is because a respondent is limited in any adjudication response to the matters raised by it in the schedule, as the reason for withholding payment.

In addition to the information above, payment schedules should include any details required under the relevant construction contract. Respondents may also consider attaching the following sorts of supporting documents to their payment schedule:

(a) Correspondence detailing and relevant to amounts that are not certified

(b) Schedules

(c) Relevant photographs

When Does the Payment Schedule Have to Be Issued?

If the respondent intends to issue a payment schedule, it must do so before the earlier of:

(a) The time required by the construction contract

(b) 15 business days after the payment claim is made

What Are the Consequences if a Payment Schedule Is Not Issued on Time?

While responding to a payment claim with a payment schedule is optional, failure to do so can have major implications for a respondent.

If a respondent does not issue a payment schedule within the time prescribed in the SOPA, the respondent becomes liable to pay the claimed amount on the due date. If the respondent fails to pay on the due date, the claimant can then seek to recover the claimed amount from the respondent as a debt due to the claimant in court, or by making an adjudication application.

If the matter proceeds to court, the failure to issue a payment schedule means the respondent is not entitled to bring any cross-claim against the claimant or raise any defence in relation to matters arising under the construction contract.

Alternatively, if the claimant elects to proceed to adjudication, before the claimant can bring its adjudication application, the claimant must:

(a) Give written notice to the respondent of its intention to apply for adjudication of the payment claim

(b) Give the respondent an opportunity to provide a payment schedule within five business days after receiving the claimant's notice

If after the claimant's notice, the respondent still fails to issue a payment schedule, the respondent is unable to issue a response to any adjudication application that is made in respect of the payment claim. Effectively, this means the respondent is denied the opportunity to put its case forward in the adjudication.

Key Takeaways

Principals and head contractors must take action now to ensure:

- Template payment schedules comply with the formal requirements under the SOPA
- Processes are in place so that a payment schedule is issued on time, every time
- The payment schedule articulates each and every reason for paying less than the amount claimed

New South Wales Supreme Court Confirms the "One Contract" Rule

Authors: Melissa Koo and Joseph Perkins

What You Need to Know

In the recent case of *Ventia Australia Pty Ltd v BSA Advanced Property Solutions (Fire) Pty Ltd* [2021] NSWSC 1534, the New South Wales Supreme Court confirmed that under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act), payment claims made in respect of multiple work orders are likely to be invalid, confirming the "one contract" rule – that a payment claim must be made in respect of one construction contract, not multiple contracts.

BSA Advanced Property Solutions (Fire) Pty Ltd's (BSA or subcontractor) entered into a subcontract with Ventia Australia Pty Ltd (Ventia or head contractor) to perform fire services pursuant to work orders issued by Ventia to BSA. The subcontract stipulated that a separate contract would come into existence each time Ventia issued a work order, governed by the terms of the overarching subcontract agreement.

BSA issued a payment claim in relation to work performed under 1,860 work orders. A payment dispute arose from the payment claim, and BSA obtained an adjudication determination under the SOP Act for AU$2.69 million. Ventia sought judicial review of the adjudicator's determination on the basis that the payment claim was made in respect of multiple construction contracts.

The central issue for the court was whether a payment claim served under section 13 of the SOP Act could seek a progress payment in respect of more than one construction contract and, further, whether it would be a jurisdictional issue or one that may be finally resolved by an adjudicator.

In quashing the adjudicator's determination, her Honour confirmed the "one contract" rule and held that this was a jurisdictional issue incapable of being finally resolved by an adjudicator.

Her Honour Rees J confirmed the terms of the subcontract were such that each work order gave rise to a separate contract under which payment claims were to be made. The creation of a new contract for each work order did not circumvent the remit of the SOP Act, as it did not prevent the claimant from exercising its rights under the SOP Act. In coming to this decision, her Honour rejected BSA's alternative argument that the subcontract fell within the meaning of "other arrangement" under the SOP Act, as there was a clear contractual regime in place.

Notably, her Honour's findings reject the obiter observations in *Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd* [2021] QCA 223, that a jurisdictional argument based on the "one contract" rule ought to have been raised in the payment schedule prior to the adjudication response.

This decision clarifies the operation of the "one contract" rule in New South Wales, and it follows that claimants will incur additional administrative costs like multiple filing fees in recovering monies owed by way of separate payment claims in adjudications. The case serves as a timely reminder to parties reliant on standing order contracts to carefully review their terms to understand whether the effect of work orders is to create separate contracts or whether the work can be said to be performed under one contract, to avoid any jurisdictional hurdles in an adjudication.

Resolving Construction Disputes – The Role of Referees

Authors: Donna Charlesworth, Tenille Kearney and Zayna Abu-Geras

It is no secret that construction disputes can be complex, time consuming and costly. The recent decision of *DM Drainage & Constructions Pty Ltd v Karara Mining Ltd* [No 6] [2021] WASC 410, which we reported on previously, is a reminder to all parties to consider utilising referees in the resolution of construction disputes in the Supreme Court of Western Australia (SCWA).

Referees may be appointed by the SCWA, either on their own motion or upon application of a party, to: [1]

(a) Determine a dispute[2]

(b) Determine any question or issue of fact in a dispute

(c) Inquire or report on any question or issue of fact in a dispute[3]

This article provides a brief introduction as to the use and role of referees in SCWA proceedings.

Referees

Referees are useful where the subject matter of a dispute is particularly technical or complex, as is often the case in many construction disputes. In *Dalgety Farmers Ltd v Westpac Banking Corporation,* the court explained:

- "Experts in the particular field, be they builders, engineers, accountants, scientists of various descriptions, are regularly appointed as referees to report to the Court on the myriad of technical questions regularly thrown up for decision. This is done basically for two reasons.
- First, it is believed that an expert in the particular field under investigation is able to resolve the questions more speedily, inexpensively, and indeed, accurately than would a judge. This is simply by reason of the fact that the expert does not have to be tutored in the particular science, or matter of expertise, as a judge would require to be.
- Second, there are simply not sufficient judges available to determine matters which, strictly speaking, do not call for the application of such commercial expertise as judges of the Commercial Division are assumed to have."[4]

1. Special Referees to Determine a Dispute or a Question or Issue of Fact in a Dispute

The court can appoint a special referee to determine a dispute or a question or issue of fact in a dispute where:

(a) All the parties consent

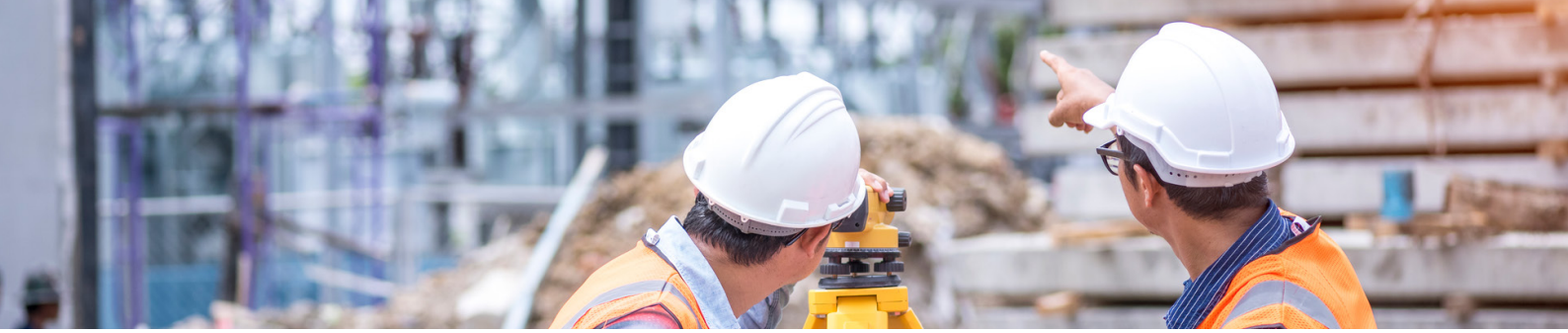
(b) The dispute requires prolonged examination of documents or scientific or local investigation, which in the opinion of the judge cannot conveniently be conducted by the court

(c) The question in dispute consists wholly or in part of matters of account[5]

The court can also appoint a special referee without the parties' consent. However, this would only be done in exceptional cases. In *Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd* (1998) 19 WAR 281, the court stated, "It is only in exceptional circumstances that a court will refer a task ordinarily performed by it to some outside person who would require the parties to pay fees for services which the court would be expected to render free of charge."[6]

Where a party is seeking to appoint a special referee, the party should identify a potential referee, establish that referee's availability and establish what the cost of employing a referee would involve. These details are important, as a court will enquire whether the appointment of a special referee will shorten the expected length of proceedings or have the effect of reducing the costs to the parties. However, the mere possibility that a referee might dispose of a matter more expeditiously than a court has been found to be insufficient a reason to refer a matter to a referee.[7]

1 *Rules of the Supreme Court 1971* (WA) ords 4A r 9, 35 (RSC); *Supreme Court Act 1935* (WA) ss 50, 51 (SCA).
2 Other than a criminal proceeding.
3 Other than a criminal proceeding.
4 *Dalgety Farmers Ltd v Westpac Banking Corporation* (1991) (unreported) BC9102323 at 9.
5 SCA, s 51.
6 *Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd* (1998) 19 WAR 281, 285.
7 *Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd* (1998) 19 WAR 281, 285.



If a special referee is appointed to determine a dispute or a question or issue of fact in a dispute, the special referee is deemed an officer of the court and has such authority and can conduct the reference in such manner as the court or a judge may direct.[8] The procedure and trial to determine the dispute will largely reflect that of a trial before a judge.[9] Evidence will be taken before the referee (either orally or in writing, and if required by the referee, on oath or affirmation),[10] the attendance of witnesses at the trial may be enforced by subpoena,[11] and the referee has the same authority as a judge with respect to discovery and production of documents.[12] The referee can hold the trial at any place deemed most convenient, and can have any inspection or viewing that the referee considers expedient for the better disposal of the dispute.[13] Ultimately, the referee's findings on an issue of fact will be given the same effect as if they had been found by a jury in open court,[14] and the referee can direct that judgment be entered for any or either party.[15] The special referee's judgment or award is equivalent to the verdict of a jury. The referee also has the power to exercise the same discretions as the court as to costs.[16]

The remuneration paid to a special referee is determined by the court or a judge,[17] and the court can direct how, when and by whom the whole or any part of the referee's fees are paid.[18]

2. Referees to Issue a Report

As is the case for referees to determine a dispute or a question or issue of fact in a dispute, the court can refer a question for report whether or not the parties consent. If a referee is appointed to deliver a report, the referee does not dispose of the dispute or determine any matter in issue between the parties. Instead, the referee's role is to find the materials on which the court is to act.[19]

The referee's report is the report of an expert and not the judgment of a court.[20] Accordingly, the report may be wholly or partially adopted by the court, and if it is adopted, it may be enforced as a judgment or order to the same effect.[21] Some of the matters a court will consider in deciding whether to adopt the report of the referee include:

(a) Whether the report shows a thorough and analytical approach[22]

(b) Whether the report logically and cohesively leads to the opinion expressed in the report[23]

With this in mind, a referee's report should set out the reasons for the referee's opinions. These reasons should allow the parties and the court to see that the conclusion in the report is not arbitrary, or influenced by improper considerations.[24] A more detail discussion of the principles and circumstances the court will consider in deciding whether to adopt a report, and what impact it has on the proceedings, is set out in *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* [2009] VSCA 191.

A court is unlikely to adopt the report where:

(a) The referee has misapplied the law

(b) There was some error of principle in the report

(c) There is some absence or excess of jurisdiction

(d) There is some patent misapprehension of the evidence

(e) There is some perversity or manifest unreasonableness[25]

Conclusion

It is not yet common in Western Australia for referees to be involved in the resolution of construction disputes in the SCWA. This may change in light of the commentary in *DM Drainage & Constructions Pty Ltd v Karara Mining Ltd* [No 6] [2021] WASC 410.

If you need assistance with your construction dispute, please contact a member of our team.

8 *SCA*, s 52.
9 *RSC*, O 35 r 3.
10 *RSC*, O 4A r 9.
11 *RSC*, O 35 r 3.
12 *RSC*, O 35 r 4.
13 *RSC*, O 35 r 2.
14 *Cooke v Newcastle and Gateshead Water Co.* (1882) 10 QBD 332.
15 *RSC*, O 35 r 4.
16 *RSC*, O 35 r 10.
17 *SCA*, s 52.
18 *RSC*, O 4A r 9.
19 *Badische Anilin & Soda Fabrik v Levinstein* (1883) 24 Ch D 156, 167.
20 *Wenco Industrial Pty Ltd v WW Industries Pty Ltd* (2009) 25 VR 119, 137 at [47] *(Wenco)*.
21 *SCA*, s 50.
22 *Chocolate Factory Apartments Limited v Westpoint Finance Pty Ltd* [2005] NSWSC 784 at [7] *(Chocolate Factory)*.
23 *Wenco* at [36].
24 *Chocolate Factory* at [7]; *Wenco* 137 at [47].
25 *Super Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549, 555, 562- 565.

Impact of the Changes to the "Mining Exclusion" Under the Building and Construction Industry (Security of Payment) Act 2021 (WA)

Authors: Alix Poole, Joseph Perkins and Donna Charlesworth

The Building and Construction Industry (Security of Payment) Act 2021 (WA) (SOP Act) will replace the Construction Contracts Act 2004 (WA) (CCA) from 1 August 2022.

The CCA and the SOP Act apply to "construction contracts" that relate to "construction work", as those terms are defined. Under both acts, "construction work" does not include certain work commonly referred to as the "mining exclusion" on a site in Western Australia.

The mining exception differs substantially between the two acts. For ease of comparison, the two subsections are extracted below with the differences shown in red.

Mining Exclusion Under s 4(3) of the CCA	Mining Exclusion Under s 6(3) of the SOP Act
(a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;	(a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not; or
(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;	(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral or other substance; or
(c) fabricating or assembling items of plant used for extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance;	(c) constructing or fitting out the whole or any part of a watercraft; or
(d) [deleted]	(d) work prescribed by the regulations not to be construction work for the purposes of this Act.
(e) work prescribed by the regulations not to be construction work for the purposes of this Act.	

The SOP Act has, essentially, removed fabricating or assembling items of plant used to extract oil gas, their derivatives or any other substance. This is a fundamental change, which means processing plants for the extraction or processing of oil and gas, as well as any other minerals, will now be within the remit of the SOP Act and, by extension, the SOP Act's adjudication regime.

Offshore oil and gas operators and contractors will also be potentially within the remit of the SOP Act, pursuant to sections 10(6) and 10(7) of the SOP Act. These provisions state the SOP Act does not apply to construction contracts for work outside Western Australia, but then extends Western Australia to include water adjacent to Western Australia:

(a) That is within the territorial limits of the state

(b) That is outside the territorial limits of the state if the construction contract is governed by the law of the state

This expanded interpretation of Western Australia, in conjunction with the narrowing of the mining exclusion identified above, will potentially capture construction work (including goods and services supplied for construction work) of certain items, including floating offshore processing facilities and subsea pipelines, which were not previously captured by the CCA.

Noting that the SOP Act largely adopts equivalent legislation in New South Wales, the Western Australia industry should be aware that the decision *Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd* [2020] NSWSC 1588 suggests that it is likely the Western Australia courts will prefer a narrow interpretation of the "mining exclusion" in order to give full operation to the remedial and/or beneficial provisions of the SOP Act.

In light of the above, principals, developers, contractors and subcontractors in all industries that require works potentially related to "construction works" should review their contracts, with a specific focus on their progress claim assessment and procedures to ensure they are compliant with the SOP Act ahead of 1 August 2022.

Key Contacts

Donna Charlesworth
Partner, Perth
T +61 8 9429 7465
E donna.charlesworth@squirepb.com

Melissa Koo
Senior Associate, Perth
T +61 8 9429 7568
E melissa.koo@squirepb.com

Cris Cureton
Partner, Sydney
T +61 2 8248 7846
E cris.cureton@squirepb.com

David Starkoff
Partner, Sydney
T +61 2 8248 7833
E david.starkoff@squirepb.com

Brent Henderson
Partner, Sydney
T +61 2 8248 7810
E brent.henderson@squirepb.com

Greg Steinepreis
Partner, Perth
T +61 8 9429 7505
E greg.steinepreis@squirepb.com