LEGISLATIVE CORROSION OF TIME BARS IN CONSTRUCTION CONTRACTS

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Principals, contractors, and other building industry participants should take the opportunity in early 2023 to review contracts and procurement practices, specifically with respect to time bars in standard form contracts.

Enforceability of a time bar clause, and the autonomy of parties to agree to terms in commercial contracts, has been corroded by recent changes to legislation:

- From November 2016, the unfair contract terms regime under the *Australian Consumer Law* (ACL)[1] began to apply to "small business contracts" (including in the construction industry), rendering an "unfair" clause in those contracts as void.
- In Western Australia, changes in August 2022 to the *Building and Construction Industry (Security of Payment) Act 2021* (WA) (WA SOP Act) enable a dispute decision maker to determine that a time bar clause is unfair and unenforceable in particular circumstances.
- More broadly and across the whole of Australia, application of the unfair contract terms regime under the ACL in November 2023 will expand so that many more supply, service and other contracts in the construction industry will be affected. There will also be substantial civil penalties (fines) for proposing, using or relying upon an unfair clause in these contracts, including unfair time bars.

This publication outlines the risks relating to the use, application and enforcement of time bars under these changes to the security of payment and consumer law regimes. It is important to note that the unfair contract terms regime will apply to all terms of a contract, not only time bars.

WHAT IS A TIME BAR?

A sophisticated well-drafted construction contract is a code that provides rules of engagement for the parties during a construction project, to the exclusion of inconsistent common law rights and remedies.[2]

A time bar is a term of a contract that requires a party (claiming party) to submit a notice, make a claim, or take other action within a specified time. If the claiming party fails to comply with these time requirements, the claiming party will lose its entitlement to make the claim and the claim will be “barred."

Time bars are usually imposed upon claims for extension of time, variations, or other claims by a contractor who performs the work or supplies the services under a contract. Disputes involving time bars will invariably arise when there is a failure by one or both of the contracting parties to administer the contract in accordance with its terms.

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Whilst the consequences of a time bar may be harsh, there may be legitimate commercial reasons why time bars are imposed. In a construction project, timely notice can be critical for the receiving party to take steps to avoid or mitigate loss. Where the parties become aware of matters promptly, they will also be in a better position to investigate, resolve any issue that has arisen, and assess the claim.

Time bars may also discourage a party from bundling claims into one final claim, which leads to reduced transparency and more complexity in dispute resolution.

ARE TIME BARS ENFORCEABLE?

At common law, enforceability of a time bar is determined by a court according to ordinary principles of contract interpretation. Where the language of a time bar clause is clear and unambiguous, it will generally be enforceable even if it results in harsh consequences or an imbalance of power between the parties.[3]

The following factors may affect enforceability of a time bar clause:

- Whether the notice requirement for a claim is expressed to be a condition precedent to an entitlement, rather than merely a contractual obligation;[4]
- The time bar will be construed strictly, and is enforceable according to its terms unless the application of those terms leads to an absurdity or defeats the main object of the contract;[5] and
- Whether compliance with the relevant notice requirement is mandatory.[6]

The more express the time bar, the more likely it will be enforceable. For example, a time bar clause more likely to be enforceable would clearly state that if a party does not submit a notice by the required date, the claim is time barred and the party failing to give notice will lose its entitlement to make a claim. In contrast, a clause that obliges a party to give notice but does not specify the consequences of failure to do so is unlikely to be a time bar.

In our experience, enforcing a time bar can be less certain in security of payment adjudications, where adjudicators may (incorrectly) apply common law principles such as waiver and estoppel to determine an amount payable to the claimant.

Given that courts will generally enforce a properly drafted time bar clause in a construction contract, concerns have been raised regarding the consequences on smaller participants in the building industry, such as subcontractors and suppliers at the bottom of the contractual hierarchy.[7] Those parties may not have sufficient resources to comply with notice-based time bars, or have the bargaining strength to negotiate removal of the time bar from the relevant contract.

UNFAIR TIME BARS UNDER 2022 SECURITY OF PAYMENT REFORM IN WESTERN AUSTRALIA

Recently in Western Australia, the *WA SOP Act* introduced statutory provisions that apply specifically to notice-based time bars in the construction industry. The *WA SOP Act* will affect all construction contracts, including contracts for work and the supply of goods and services, for projects in Western Australia where the contract is entered into on or after 1 August 2022.

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Under section 16 of the *WA SOP Act*, noticed-based time bars can be declared to be "unfair" if compliance with the relevant contract provision in the particular circumstance:

- Is not reasonably possible; or
- Would be unreasonably onerous.

A declaration can be made by an adjudicator (in a security of payment determination) or a court, as well as an arbitrator or an expert appointed under the dispute resolution provisions of a construction contract. Where a time bar is declared unfair, it has no effect in the case of the particular entitlement the subject of the proceeding in which it was declared unfair. The time bar continues to have effect in other circumstances arising under the same or a related contract. An example could be if a time bar is declared unfair for circumstances relating to a particular extension of time claim, but continues to apply to separate claims where the time bar is not unfair due to different circumstances.

In determining whether the notice-based time bar is unfair, the decision-maker must take the following into account:

- When the party required to give notice would reasonably have become aware of the relevant event or circumstance, having regard to the last day on which notice could have been given;
- When and how notice was required to be given;
- The relative bargaining power of each party in entering into the construction contract;
- The irrebuttable presumption that the parties have read and understood the terms of the construction contract;
- The rebuttable presumption that the party required to give notice possesses the commercial and technical competence of a reasonably competent contractor; and
- If compliance with the provision is alleged to be unreasonably onerous - whether the matters set out in the notice are final and binding.

Similar provisions have not yet been proposed for security of payment legislation in other Australian jurisdictions. However, the upcoming expansion of the ACL unfair contracts regime may circumvent such changes under security of payment.

UNFAIR CONTRACTS REGIME MAY BE APPLY TO TIME BAR CLAUSES

Commencing from November 2016, provisions of the ACL took effect to make certain contractual terms (including in construction contracts) automatically void where:

- The term is unfair; and
- The contract is a standard form contract.

The ACL unfair contracts regime does not apply to all contracts. Currently, it applies to standard form contracts or subcontracts which are a small business contract. A *small business contract* is a contract that satisfies the following criteria:

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- 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:

The upfront price payable under the contract does not exceed AU$300,000; or

The contract has a duration of more than 12 months and the upfront price payable is AU$1,000,000 or less.

From 10 November 2023, a *small business contract* will no longer be defined by reference to the value of the contract. The unfair contract terms regime will apply to an expanded class of contracts where at least one party to the contract either:

- Is a business that employs fewer than 100 persons; or
- Has turnover of less than AU$10,000,000 for that party's last income year.

As a result, the unfair terms regime will have more far-reaching effects in the construction industry. The changes place the onus on principals and contractors to know who they are contracting with and to ensure appropriate contract terms are used for small business subcontractors, suppliers, and consultants.

For a time bar contractual term to be unfair, all of the following must apply:

- It would cause a significant imbalance in the parties' rights and obligations under the contract;
- It is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the time bar; and
- It would cause detriment (whether financial or otherwise) if the time bar were to be applied or relied upon.

The exact manner in which these principles will be applied to time bar provisions is yet to be seen, and will be subject to the particular circumstances of the case. However, given the strict application and harsh consequences of time bar clauses, the unfair contracts regime could be relied upon by parties seeking to avoid the application of time bars, creating a risk that the relevant clause may be declared void.

The relatively small values for eligible contracts mean that the ACL is unlikely to apply in larger projects. However, principals and contractors should be aware of the potential for the unfair contracts regime to apply to supply, service, hire, consultant, and other minor works contracts and subcontracts.

POTENTIAL PENALTIES FOR UNFAIR TIME BAR CLAUSES

The changes to the ACL commencing in November 2023 will also go further, including:

- Prohibiting the proposal of, use of, application of, or reliance on, an unfair terms in a small business contract;
- Imposing new civil penalties for breach of the prohibition; and
- Empowering a court to make orders affecting a whole contract or collateral arrangement, including to void, vary or refuse to enforce the contract if this is appropriate to prevent loss or damage likely to be caused.

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The maximum penalty for a corporation that contravenes the prohibition on use of an unfair time bar in a small business contract is the greater of the following amounts:

- AU$50,000,000;
- If the court can determine the value of the benefit that the body corporate (or a related body corporate) has obtained directly or indirectly and that is reasonably attributable to the act or omission - three times the value of that benefit; or
- If the court cannot determine the value of that benefit - 30% of the company's adjusted turnover during the "breach turnover period".

A maximum monetary penalty of AU$2,500,000 applies to individuals who contravene the prohibition on unfair time bars in small business contracts.

CONCLUSION

It is imperative that principals and contractors review procurement policies and standard form supply and subcontract agreements to address unfair contract terms risks. Project managers and contract administrators should also be made aware of the potential for contravention of the new unfair terms legislation when assessing claims.

Please contact us for assistance to identify and assess risks of unfair time bar clauses and for review of existing terms in small business contracts.

FOOTNOTES

[1] Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

[2] *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378

[3] *CMA Assets Pty Ltd v John Holland Pty Ltd [No 6]* [2015] WASC 217 at [375]; *AGC Industries Pty Ltd v Karara Mining Ltd* [2019] WASC 140 at [774]

[4] *Great Elephant Corporation v Trafigura Beheer BV (Great Elephant)* [2012] 2 Lloyd's Rep 503, 524-525

[5] *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231

[6] *Australian Development Corporation Pty Limited v White Constructions (ACT) Pty Limited* (1996) 12 BLC 317, 340

[7] J Murray AM, *Review of Security of Payment Laws December 2017,* page 276; Explanatory Memorandum, *Treasury Laws Amendment (More Competition, Better Prices) Bill 2022* (Cth), page 26

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