

## The meaning of “Construction” is pretty simple... isn't it?

### Construction Update

Many “construction” contracts are covered by the Construction Contracts Act. In most scenarios, parties can quickly work out whether or not their contract is covered by the Act and it is important to know whether it is. The Act has important consequences – it implies certain terms into construction contracts; prohibits or modifies other provisions and provides a means for the swift resolution of payment disputes.

So let's remind ourselves of some items not covered under the definition of a construction contract.

A construction contract refers to a contract to carry out “construction work”. “Construction work” is very widely defined but there are some important exemptions, in particular:

1. drilling for the purposes of discovering or extracting oil or natural gas; and
2. constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance (commonly known as the “mining exemption”. The meaning of this mining exemption was recently considered in the State Administrative Tribunal (SAT).

The case concerns the construction of a desalination plant in WA for a mining project. Upon initial reference to adjudication, the adjudicator ruled that the construction of this plant should be regarded as part of “*mining plant*” and therefore excluded from the definition of construction work under s.4(3)(c) of the Act. The adjudicator reasoned that water from the desalination plant was used at a later stage for mining purposes and the desalination plant was therefore part of mining plant.

This decision went to appeal at the SAT who did not agree. SAT did not consider that the desalination plant was part of the mining process. However instead

#### Who does this affect?

- Building companies
- Sub-contractors
- Mining companies
- Arbitrators

#### Article Highlights

- Some mining operations “construction” will not be covered by the *Construction Contracts Act*.
- It is important for mining operators to understand which construction types are classified as “mining exempt” under the Act.



they said the plant itself processed a mineral bearing substance (saline water) in order to obtain desalinated water. On that basis, the construction of this plant was covered by the mining exemption under s.4(3)(c) of the *Act* because the **desalination plant itself** had the purpose of extracting or processing a mineral bearing substance.

In conclusion, SAT decided that s.4(3)(c) applies more broadly than just to mining and some plant involved in mining is not exempt from the *Act* unless **that plant has a purpose** that applies to the mining exemption. Whereas contracts for the installation of apparatus or plant associated with pipelines for water or sewerage are not exempt (and are therefore covered by the *Act*), contracts to build a plant to process mineral bearing substances are exempt and not covered by the *Act*. The important factor to consider is the "process" to be carried out within the specific plant.

Given the current scale of mining projects within Western Australia, it is important to know whether the *Act* and its provisions apply to your contract. The operation of the mining exemption is not as clear cut as one might think.

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