New Security of Payment Laws

Thanks to the team at Squire Patton Boggs for their work on this comprehensive seven page exploration of the new security of payment laws.

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Overview of the New Security of Payment Laws in WA

By Melissa Koo, Rachel Pachacz, Joseph Perkins, Zayna Abu-Geras

Background

Following years of review, the WA Parliament passed the *Building and Construction Industry (Security of Payment) Act 2021* (WA) (SOPA) on 22 June 2021. The Minister for Commerce/Attorney-General categorized SOPA as part of the WA Government's 'bold' reform agenda, a 'game changer' for security of payment.[1] SOPA received Royal Assent on 25 June 2021.

SOPA adopts many of the recommendations of the 2018 *Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry* (Fiocco Review),[2] which in turn followed many of the recommendations of the Commonwealth Government's national review in 2017 – *Review of Security of Payment Laws: Building Trust and Harmony* (Murray Report).[3]

The object of SOPA is to provide an effective and fair process for securing payments to parties who carry out construction work, or supply related goods and services, in the Western Australian building and construction industry. SOPA seeks to achieve that object by:

1. giving those persons a statutory entitlement to progress payments;
2. establishing an expedited procedure for making claims for progress payments, for responding to those claims and for the adjudication of disputed claims;
3. ensuring money is held on trust if it has been retained to secure the performance of the contractual obligations of those persons; and
4. giving those persons other statutory entitlements, including the right to suspend work or supply if not paid and to access retained money by substituting a performance bond.

Under SOPA, a 'construction contract' is referred to as any contract, agreement or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party, within Western Australia.[4] The term has been broadly defined to ensure the laws apply to most contracts entered into the construction industry.

State Government's Action for Reform

The State Government's action plan outlines the major changes in SOPA and introduces a three-stage phased implementation roadmap for commencement of its operative parts. On 25 June 2021, sections in Parts 1 and 5 of SOPA came into effect. The remaining operative provisions are staged.[5] The stages are:

1. Stage 1 with effect from 1 August 2022, dealing with unfair terms and introducing the new statutory payment regime and changes to the adjudication process;
2. Stage 2 will come into effect on 1 February 2023, introducing a retention trust scheme for construction contracts over $1 million; and
3. Stage 3 will come into effect on 1 February 2024 and will expand the scope of the retention trust scheme to include construction contracts over $20,000 and further introduce offences for persons who contravene certain requirements of the retention trust scheme.

Stage 1

Stage 1 of SOPA will apply to any construction contract entered into after 1 August 2022. The *Construction Contracts Act 2004* (WA) (CCA) will continue to apply to construction contracts entered into before 1 August 2022.[6]

Unfair time bars voided

SOPA empowers adjudicators (including review adjudicators), the court, arbitrators and expert determiners[7] to declare a notice-based time bar provision within a construction contract unfair, and therefore void in regard to a particular entitlement in the proceedings, if compliance with the provision in that particular case is not reasonably possible[8] or would be unreasonably onerous.[9] A separate article outlines this power in more detail.

New Statutory Payment Regime

SOPA introduces a new statutory payment regime that provides for an entitlement to progress payments, which operates separately and additionally to any entitlement to payment under the contract. SOPA also sets new time limits on being paid, responding to payment claims and applying for adjudication.

Payment claims may be made on or after the last day of each month during the project, unless the contract provides for earlier timing. A new requirement is that the payment claim must state it is made under SOPA.[11]

A respondent may respond to a payment claim by giving a payment schedule.[12] The payment schedule must identify the amount to be paid and the reasons for disputing the claim.[13] While issuing a payment schedule is not mandatory, if a respondent fails to provide a payment schedule within 15 business days of receiving a payment claim, it will become liable to pay the claimed amount on the date for payment.[14] A payment schedule is a condition precedent to the respondent's ability to respond to any application for adjudication.[15] The respondent's adjudication response is limited to the reasons set out in its payment schedule.[16]

Unless the contract prescribes an earlier date, payment will be due within 20 business days after a payment claim is made by a head contractor to a principal and 25 business days after a payment claim is made by a subcontractor.[17]

Further, SOPA prohibits a party to a construction contract from having recourse to performance security under the contract unless that party has given the other party 5 business days' written notice of its intention of have recourse.[18]

SOPA also expands the prohibition on pay when paid provisions.[19]

'Mining exclusion' narrowed

The 'mining exclusion' has been narrowed under SOPA to now capture contracts which had previously been excluded under the CCA. Specifically, the fabrication and assembly 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 (excluded under the CCA) is not excluded from the definition of construction work.[20]

Changes to adjudication

Under SOPA, there are substantial changes to adjudication timeframes and a new review adjudication process. These changes are the subject of a separate article.

Further, adjudication documents may be served by email or electronic lock box.[21] Those documents will be taken to be received:

- in the case of an email – in accordance with section 14 of the *Electronic Transactions Act 2011* (WA); and
- in the case of an electronic lock box – when the document is uploaded to the electronic lock box.

New prohibition on dispute resolution precondition

A provision of a contract cannot require a person to engage in a dispute resolution process as a precondition to making a payment claim or making an adjudication application or exercising any other right under SOPA.[22]

Stage 2

First Phase of the Retention Trust Scheme

The scheme is designed to ring-fence retention monies so that they are available to creditors if the other party to the construction contract becomes insolvent.

The holder of retention monies or cash security (the 'trustee') will be obliged to hold the monies or cash security in a dedicated trust account with a recognised financial institution for the benefit of the party who provided the money (the "beneficiary"). Withdrawals can only be made when there is a contractual entitlement to do so. Trustees are subject to fairly onerous account keeping obligations. General law remedies are available to beneficiaries should a trustee fail to fulfil their duties.

Building contractors with a history of insolvency or not paying court-ordered or adjudication debts could be dealt with under new governmental powers involving disciplinary action and removal of registration.

Stage 3

Second Phase of the Retention Trust Scheme

Stage 3 will extend the scope of the retention trust scheme to include construction contracts over $20,000.

Persons who contravene certain requirements of the retention trust scheme could be liable to significant fines and penalties. A principal or contractor could seek to manage this risk by removing from the contract the option for the contractor or subcontractor to provide security in the form of retention monies.

Drafting Implications

Some of the drafting implications that arise from SOPA are covered in a separate article.

Concluding Observations

WA's security of payment law has been made more consistent with the east coast model, which is based on New South Wales legislation. Greater national legal consistency should result in greater certainty. For lawyers practising in WA, existing east coast case law should assist in advising on SOPA.

However, WA has yet again done it in its own way. There are some significant and important differences between SOPA and the east coast model. Care needs to be taken in too readily applying east coast experience to SOPA. ■

End Notes

1 Western Australia, Parliamentary Debates, Legislative Assembly, 23 September 2020 (John Quigley, Minister for Commerce 6353.

2 https://www.commerce.wa.gov.au/sites/default/files/atoms/files/final_report_-_security_of_payment_reform_in_the_wa_building_and_construction_industry.pdf

3 https://www.ag.gov.au/sites/default/files/2020-03/review_of_security_of_payment_laws_-_final_report_published.pdf

4 Section 5 of *Building and Construction Industry (Security of Payment) Act 2021* (WA) (SOPA).

5 Section 2 SOPA.

6 Section 9(1) SOPA.

7 Section 16 SOPA.

8 Section 16(2)(a) SOPA.

9 Section 16(2)(b) SOPA.

10 Section 23 SOPA.

11 Section 24(1)(d) SOPA.

12 Section 25(1) SOPA.

13 Section 25(2) SOPA.

14 Section 27(1) (a) SOPA.

15 Section 34(1) SOPA.

16 Section 27 SOPA.

17 Section 20 SOPA.

18 Section 28(2)(b) SOPA.

19 Section 14 SOPA.

20 Section 6(3) SOPA.

21 Regs 22 and 23 Regulations.

22 Section 27(2) SOPA; Regulation 5 of the *Building and Construction Industry (Security of Payment) Regulations 2022* (Regulations).

The following pages expand further on aspects of SOPA including unfair time bars voided, changes to the adjudication process and drafting implications.

Unfair Time Bars Voided

By Greg Steinepreis, Donna Charlesworth, Tenille Kearney & Zayna Abu-Geras

Overview

Disputes concerning notice-based time bars in construction contracts may be set for a sharp increase and the drafting of such bars may come under greater scrutiny due to the *Building and Construction Industry (Security of Payment) Act 2021* (WA) (SOPA).

Under the SOPA, adjudicators, arbitrators, expert determiners and courts will have the power to make a notice-based time bar effectively inoperative in a particular case.[1]

By section 16, a notice-based time bar provision of a construction contract entered into after 1 August 2022 may be declared unfair in circumstances where compliance with the provision in that case:

(a) is not reasonably possible;[2] or

(b) would be unreasonably onerous.[3]

A notice-based time bar that is declared to be unfair has no effect in the case of the particular entitlement that is the subject of the proceedings.[4] But the provision continues to have effect in other circumstances or challenges arising out of the same or a related contract.[5]

This is not just new to Western Australia, it is also novel nationally as a similar section does not exist in any other security of payment legislation in Australia.

Notice-based Time Bars

Notice-based time bar provisions are common in construction contracts. They typically require a party to serve detailed notice of an event within a strict timeframe following its occurrence, as a precondition to claiming an entitlement to time or payment. The objective of a time bar is to ensure the contracting parties and the superintendent are aware of any issues and potential cost and time impacts on the project as soon as practicable, so the issues can be investigated and steps can be taken to mitigate their impact on the project.

However, sometimes notice-based time bars are not only used as a risk management tool, but as a 'weapon' in the arsenals of principals and head contractors to defeat claims from head contractors and subcontractors. Notice-based time bars have been strictly enforced by courts, even if they appear to be harsh or onerous, where strict compliance has been clearly expressed in the contract.[6]

The effectiveness of notice-based time bars is set to change by reason of section 16 of the SOPA.

Background to Section 16

Section 16 of the SOPA appears to have been introduced in response to the Federal Government's *Review of Security of Payment Laws in 2017* (Murray Report)[9] and the *2018 Review on Security of Payment Reform in the WA Building and Construction Industry* (Fiocco Review).[10]

The Murray Report recommended that time bar clauses affecting the right to claim or receive payment or claim an extension of time be declared void where compliance with the notice requirements would:

a) not be reasonably possible; or

b) be unreasonably onerous; or

c) serve no useful commercial purpose.[11]

The stated need for this recommendation was the increasingly unequal bargaining power of the parties down the pyramidal contracting chain, resulting in unfairly onerous back-to-back terms that severely affect the entitlement to claim payment or extension of time.[12] The Murray Report considered it was necessary to balance freedom of contract with the need to protect a vulnerable party from unfair contract terms.

The Murray Report noted that a contract clause that required a party to give notice as a precondition to making a payment claim was held not to have contravened the 'no contracting out' provision of the applicable security of payment legislation.[13]

It appears the invalidity criteria a) to c) above recommended by the Murray Report were derived in part from cases that considered the operation of the 'no contracting out' provisions of East Coast security of payment legislation.[14]

The Murray Report acknowledged that the issue whether a notice-based time bar was unfair and should be void would depend on the circumstances of each case. However, the report contained the following statement to illustrate what would be unreasonable and unduly onerous:

> *Clearly a provision requiring a party to give notice within 3 business days of an event happening together with full details of the cost and time implications would not only not be reasonably possible, but be regarded as unduly onerous. However, a longer time period, of say 30 days, might be reasonable and not unduly onerous. Clearly much will depend on the circumstances relating to a particular event but, for the main, most fair-minded people would agree that a party should not be deprived of its significant rights merely because of its failure to provide notice within a tight timeframe, or where the timeframe was both not reasonably possible to comply with and where little detriment has been suffered by the other party.*[15]

The Murray Report acknowledged existing statutory restrictions on unfair contract terms. It was noted that Australian Consumer Law[16] and the *Australian Securities and Investment Commission Act 2001* (Cth) enabled small businesses to challenge a term which is unfair. However, the protection was too limited in scope (given the ambit of a 'small business') and would not have wide application to the construction industry, and it was 'far from clear' that an adjudicator would have jurisdiction to make the declarations.[17]

The Fiocco Review stated in section 6.11.2:

> *Due to the significant level of stakeholder support for the proposal, I recommend that legislation prohibits unreasonable time bar clauses in WA. … If one accepts that parties higher in the contractual chain present contracts to subcontractors on a 'take it or leave it' basis, then government intervention is warranted to "protect the weak from the strong".*

However, the Fiocco Review did not recommend the adoption of the third criteria or 'test', recommended by the Murray Report, of 'serving no commercial purpose' on the basis that the test would involve unnecessary complexity. Instead, the Fiocco Review recommended adoption of the Murray Report recommendation, with element c) amended to 'non-compliance would result in prejudice to the other party'. This substituted element was to 'provide a higher level of certainty as to when the prohibition on such terms should be enlivened'.[18]

In the end result, the Government adopted the recommendations of the Murray Report and the Fiocco Review omitting element (c) of each

recommendation.

In the Explanatory Memorandum to the 2020 SOPA Bill, there is little elaboration on section 16 and no reason is given for not adopting element (c) of each recommendation. However, reference is made to the general purpose of section 16:

> *The purpose of clause 16 is to ensure a better balance is struck between upholding the contractual rights and interests of the relevant parties to the contract, but at the same time not permitting one party to use its position to deny an entitlement under the contract on the basis of an unreasonably short, or otherwise unnecessarily onerous (in form or effect) notice requirement.*

The reference to the form of the notice requirement as unnecessarily onerous, not just its effect, is noteworthy.

The Second Reading speech does not further elucidate on section 16.

Key features of section 16

As mentioned above, by section 16 a notice-based time bar provision of a construction contract may be declared unfair in circumstances where compliance is not reasonably possible or would be unreasonably onerous, and such a declaration would render the provision of no effect in respect of the entitlement in the relevant proceedings.

The onus of establishing that a notice-based time bar provision is unfair lies on the party alleging unfairness.[19]

The decision-maker (adjudicator, arbitrator, expert or Court) must consider the following factors before declaring a notice-based time bar unfair:[20]

1. 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;
2. when and how notice was required to be given;
3. the relative bargaining power of each party in entering into the construction contract;
4. the irrebuttable presumption that the parties have read and understood the terms of the construction contract;
5. the rebuttable presumption that the party required to give notice possesses the commercial and technical competence of a reasonably competent contractor;
6. if compliance with the provision is alleged to be unreasonably onerous — whether the matters set out in the notice are final and binding;
7. any matter prescribed by the Regulations.[21]

The decision-maker cannot take into account the provisions of any 'related contract' or 'the things that happened' under any related contract, in deciding to declare a notice-based time bar unfair.[22] While there is no definition of 'related contract', this restriction may make it difficult for a head contractor to defend a notice-based time bar in a subcontract on the sole basis that it is subject to a similar notice-based time bar imposed on it under the head contract.

It is unclear whether any factors other than the above mandatory factors (such as detriment or prejudice) may be taken into account by the decision-maker in determining whether a notice-based time bar is unfair.

There is also no guidance as to what weight is to be attributed to the above factors. It seems that the issue of weight is one for the decision-maker.

It is possible to envisage situations where the same notice-based time bar provision is declared unfair in one contract by one decision-maker, but upheld as fair when challenged in like circumstances under another contract by a different decision-maker. The legislative intention is to allow for declarations of unfairness on a case by case basis, but the industry would no doubt welcome some general guidance.

Accordingly, we expect many construction industry participants will be eagerly awaiting Court decisions under or regarding section 16 of the SOPA to understand how this section will operate in practice, and what sorts of notice-based time bars will generally be considered unfair or fair. As a body of jurisprudence grows in relation to unfair contract terms under other legislation, this may assist in considering the operation of section 16 of the SOPA. Additionally, it may assist to examine existing case law regarding what is 'not reasonably possible' and 'unreasonably onerous', some of which is referred to in the discussion of void contractual terms in the Murray Report.[23]

Conclusion

Section 16 of the SOPA is a new and novel feature of the SOPA legislation. Time will tell what impact this will have on the construction industry and construction contracts entered into in Western Australia from 1 August 2022.

In the meantime, it is suggested that construction industry participants should review, and if necessary, consider amending any notice-based time bar provisions that they suspect may be susceptible to being challenged and declared as unfair. ■

End Notes

1 Sections 16(3) and 16(4) SOPA.

2 Section 16(2)(a) SOPA.

3 Section 16(2)(b) SOPA.

4 Section 16(4) SOPA.

5 Section 16(4) SOPA.

6 *CMA Assets Pty Ltd Formerly Known as CMA Contracting Pty Ltd v John Holland Pty Ltd [No 6]* [2015] WASC 217, at [272] and [375].

7 Sections 16(2) and 16(3) SOPA.

8 Section 16(4) SOPA.

9 https://www.ag.gov.au/sites/default/files/2020-03/review_of_security_of_payment_laws_-_final_report_published.pdf

10 https://www.commerce.wa.gov.au/sites/default/files/atoms/files/final_report_-_security_of_payment_reform_in_the_wa_building_and_construction_industry.pdf

11 *Review of Security of Payment Laws 2017* (Murray Report) recommendation 84 chapter 16.

12 Murray Report [16.1].

13 *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* [2006] NSWSC 798, although His Honour left open the question whether he would have arrived at a different conclusion if the clause could not possibly or reasonably be complied with (at [83]).

14 The other part appears to be industry submissions to the Murray enquiry.

15 Murray Report 288-289.

16 Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

17 Murray Report [16.4].

18 Fiocco Review [6.11.2].

19 Section 16(5) SOPA.

20 Section 16(6) SOPA.

21 The current Regulations under the Act have not prescribed any other matter.

22 Section 16(7) SOPA.

23 Murray Report [16.5].

Changes to the Adjudication Process

By Greg Steinepreis

Introduction

There are some changes to the process of adjudication under the ***Building and Construction Industry (Security of Payment Act) 2021*** (WA) (SOPA), although the process is similar to that under the ***Construction Contracts Act 2004*** (WA) (CCA). The fundamentals and basic structure of the adjudication process remain: the process is rapid and essentially documents only, with a binding but not final determination by an independent adjudicator. However, there are new timeframes and a new review process.

Timeframe and procedural changes

Making an application

The most significant timeframe change is the time for making adjudication applications and there is a new procedural step where a payment schedule is not provided in response to a payment claim.

If a payment schedule has been provided, in place of the CCA's 90 business day period (from the date of the payment dispute) for the making of the adjudication application, the new period is 20 business days from the time the claimant first becomes entitled to apply.[1] A claimant will be entitled to apply from the due date of payment or receipt of the payment schedule (as relevant).[2]

If a payment schedule has not been provided, the claimant may opt to adjudicate (rather than seek summary judgement in a court).[3] Where the claimant opts to adjudicate, the claimant must give a notice, within 20 business days after the due date for payment, of intention to apply.[4] The respondent then has a 5 business day 'further opportunity' to supply a payment schedule.[5] The claimant has 20 business days to make an application after becoming entitled to do so.[6]

The application must be made to the person nominated in the contract as adjudicator (if there is one), but need not be made to the nominating body in the contract (if there is one).[7]

It seems a claimant is not entitled to raise new issues in the adjudication application, but can rely on new evidence.[8]

Adjudication response

The latest time for a response is 10 business days from service of the application.[9] There is an express prohibition on a respondent raising any reasons not included in a payment schedule.[10] Supplemental submissions based on the original reasons and additional evidence consistent with the original reasons likely can be provided in the response.

Adjudication determination

The adjudicator has 10 business days to make a determination.[11] The parties can agree to extend that period up to an aggregate maximum of 20 business days.[12]

The adjudicator may give an earlier determination (even before the response) if satisfied there is no jurisdiction or the application is frivolous or vexatious or too complex in the timeframe.[13]

An adjudicator has no general discretion (as under the CCA) to allow additional material.

Issue estoppel and abuse of process will apply to the adjudication process.[14]

New Adjudication Review Process

There is a new process of review – by a 'senior' adjudicator.[15] This process was recommended by the Murray Review.[16] There is no right of a claimant to apply to the State Administrative Tribunal as exists under the CCA.

It is for the application to be considered anew by the review adjudicator, but based on the material before the original adjudicator, plus some supplementary submissions (but no new reasons).[17]

The application must be made quickly – within 5 business days.[18] The applicant for review can choose the nominating authority.[19] Both applicants and respondents to the original application can seek adjudication review, subject to limitations.[20] However, a respondent cannot seek review unless it gave a payment schedule and an adjudication response in time.[21]

Not all adjudications can be the subject of this process. A respondent to the original application cannot seek a review of a determination that there was jurisdiction.[22] There are also monetary thresholds.[23]

A respondent cannot make an adjudication review application unless it has paid the undisputed amount to the claimant and the adjudicated amount that is disputed into trust.[24]

Court alternative

A claimant has an alternative to seeking adjudication for its payment dispute where no payment schedule is given or the scheduled amount is unpaid. The unpaid portion of the claimed or scheduled amount is a debt due to the claimant and the claimant can go to court to seek summary judgement.[25]

However, a claimant cannot go to court on this basis if no payment is proposed in a payment schedule.[26]

Judicial review remains although a respondent seeking review must pay the adjudicated amount into court.[27]

End Notes

1 Section 28(4).

2 Section 27(2), 28(1).

3 Section 27(2).

4 Section 28(2).

5 Section 28(3).

6 Section 28(2) and (3).

7 Section 29.

8 *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823; *Leighton v Arogen* [2012] NSWSC 1323.

9 Section 37.

10 Section 34(3).

11 Section 37(2). The period is from the date of the response or when the response could have been properly given, or where no payment schedule was provided then the date of appointment of the adjudicator.

12 Section 37(3).

13 Section 37(6).

14 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWSC 69. Adjudication estoppel applies to the current legislation (the CCA): *Salini-Impregilo SPA v Francis* [2020] WASC 72.

15 Sections 39-48. It seems this is based on the process in Singapore. The qualifications of a review adjudicator/'senior' adjudicator are set out in the *Building and Construction Industry (Security of Payment) Regulations 2022*.

16 https://www.ag.gov.au/sites/default/files/2020-03/review_of_security_of_payment_laws_-_final_report_published.pdf at Chapter 13, section 13.5.

17 Section 42.

18 Section 39(5).

19 Section 41.

20 Section 39(1), (2) and (3).

21 Section 39(3).

22 Section 39(3).

23 Regulation 8, *Building and Construction Industry (Security of Payment) Regulations 2022*. In general, the thresholds are a minimum of $200,000 difference in outcomes, and $50,000 where jurisdiction only is under review.

24 Section 40(1).

25 Section 27(2).

26 Section 27(2) Note 2.

27 Section 54(6).

Drafting Implications of The New Security of Payment Laws

By Donna Charlesworth, Robert O'Brien, Alix Poole

1. Overview

The *Building and Construction Industry (Security of Payment) Act 2021* (WA) (SOPA) has introduced a statutory payment regime that significantly alters parties' rights to make payment claims, respond to payment claims and the timeframes for doing both.

Principals and contractors should review their construction contracts to identify whether the contract terms are consistent with the new statutory regime and, if not, consider whether:

- inconsistent construction contract terms should be amended to align with the SOPA;
- changes to payment and notice protocols are required;
- amendments are required to ensure responses to payment claims meet the requirements of a payment schedule under the SOPA; and
- other contractual risk management mechanisms should be included in their contracts.

2. Should Inconsistent Construction Contract Terms Be Amended To Align With The SOPA?

A threshold question for principals and contractors to consider is whether, in circumstances where there are inconsistencies between the contract terms and the statutory entitlement to progress payments under the SOPA, the contract should be:

- amended for consistency with the SOPA; or
- not amended, so that contract terms that are more favorable than the SOPA provisions can be relied on in the event the statutory regime is not enforced by the other party.

The introduction of the SOPA means there are now two parallel payment regimes in play under which different rules concerning what is claimable and when it may be claimed may apply. The interrelationship between the contractual and statutory progress payment claim regimes was discussed by the High Court in *Probuild Constructions*.[1] In that case, the Court considered the *Building and Construction Industry Security of Payment Act 1999* (NSW), and in particular section 34 of that Act which prohibits 'contracting out' of that Act. As the plurality put it,

> *The statutory entitlement to a progress payment and the procedure for recovery of a progress payment are separate from, and in addition to, a contractor's entitlement under a construction contract to receive payment for completed work. The statutory entitlement is predicated upon the existence of a construction contract, but the entitlement and the means available for its enforcement stand apart from the parties' rights under the contract. Indeed, the Security of Payment Act has effect despite any contractual provision to the contrary: any purported derogation is void.*[2]

Similar to the NSW legislation, section 111 of the SOPA also provides that a provision of any contract is void to the extent that it is inconsistent with the SOPA, or purports to exclude, modify or restrict the operation of the SOPA.

For principals and contractors operating nationally, it may be considered 'efficient' to not amend template construction contracts to align with the SOPA for work being performed in WA. However, this invites disaster as the parties to the contract may unwittingly (until the contract moves into dispute resolution or adjudication) be operating in accordance with contract terms that are void by operation of the SOPA. Accordingly, it would be prudent for principals and contractors alike to ensure that their construction contract templates do align with the SOPA. This provides certainty to both parties and their contract managers that they are operating under valid and enforceable contract terms.

3. Some Drafting Implications

3.1 Payment claim content and time for issue

Under section 24 of the SOPA, payment claims:

- must be in writing and in the approved form;
- may only be made on or after the last day of each month during the project, unless the contract expressly provides for earlier timing;
- must "describe the items and quantities of construction work or related goods and services";
- must state that they are a 'payment claim' made under the SOPA. This is a new requirement that was not a requirement of the Construction Contracts Act WA (2004) (CCA).

None of these provisions necessarily require amendment to the construction contract, however:

- a principal or head contractor may want to consider including its requirements for an approved form of payment claim as many of the requirements of section 24 of the CCA do not apply under the SOPA. For example, a requirement that the payment claim:
  - be addressed to the party to which the claim is made;
  - state the name of the claimant and the date of the claim; and
  - be given to the party to whom the claim is made, and
- it is essential for contractors and subcontractors to ensure payment claim forms include words to the effect that "This is a payment claim made pursuant to the *Building and Construction Industry (Security of Payment) Act 2021*". Otherwise, the payment claim will not be a valid payment claim under the SOPA and the claimant will not be able to avail itself of the rights and remedies under the SOPA. At a practical level, a SOPA endorsement on a payment claim serves to alert a principal or head contractor that it must serve a payment schedule within 15 business days or be liable for the full amount claimed, and that the payment schedule must set out all reasons for non-payment of any amount provided in the payment claim.

3.2 Time to provide payment schedule

Under section 25 of the SOPA, the respondent to a payment claim must give a payment schedule to the claimant within 15 business days after the payment claim is made (unless an earlier time is provided in the contract). This is longer than the 14 days to respond to a payment claim required under the implied terms in Division 5 clause 7 of the CCA and, therefore a contract that complied with this requirement of the CCA will not fall foul of the time to respond under the SOPA. ▶

Contracts should also be reviewed and if necessary amended to reflect the new statutory timeframes to avoid the following repercussions:

- if a contract provides for longer time to provide a payment schedule, the principal will become liable to pay the claimed amount on the date for payment and will be barred from providing a response to any future adjudication; and
- a respondent is limited in any adjudication response to the matters raised by it in the payment schedule, as the reason for withholding payment.

It is imperative that a payment schedule complies with the requirements of section 25 and 'indicates':

- the payment claim to which it relates;
- the amount of the proposed payment; and
- why the scheduled amount is less than the amount 'proposed' by the contractor.

3.3 Payment times

Under section 20 of the SOPA, the maximum time for payment of a payment claim is:

(a) 20 business days after a payment claim is made by a head contractor to a principal; or

(b) 25 business days after a payment claim is made by a subcontractor.

This is likely to be one of the key areas where amendment of template contracts will be required, as under the CCA the maximum time for payment of a payment claim was 42 days.

3.4 Notice of intention to make a call on security

Section 57 of the SOPA provides that a party is not entitled to have recourse to performance security unless it has given at least 5 business days' notice to the other party that it intends to have recourse.

The intent of this provision is to give the contractor time to take steps to remedy the alleged breach which has given rise to the right to call on the security. However, in reality it is likely to provide a contractor with the opportunity to seek an injunction to put a stop to the call on security.

Any provisions in a contract that state the principal is not required to give notice before having recourse to the security will be in conflict with this provision of the SOPA.

3.5 Prohibition on unfair time bars

SOPA empowers adjudicators (including review adjudicators), the court, arbitrators and expert determiners to declare a notice-based time bar provision within a construction contract unfair, and therefore void in regard to a particular entitlement in the proceedings, if compliance with the provision in a particular case is not reasonably possible or would be unreasonably onerous. A separate article outlines this power in more detail.

Contract drafters should review construction contracts for time bars and consider whether that time bar is at risk of being considered unfair, taking into account the circumstances set out in section 16(6) of the SOPA. A more generous notice-based time bar provision may be preferable to none at all.

3.6 Prohibition on dispute resolution as a condition precedent to making a SOPA claim

Contract drafters should review construction contracts to ensure they do not offend Regulation 5 of the *Building and Construction Industry (Security of Payment) Regulations 2022*, which prohibits any terms in a construction contract that require a party to engage in a dispute resolution process as a precondition to making any of the following claims pursuant to the SOPA:

- the making of a payment claim by the person;
- the making of an adjudication application or an adjudication review application; or
- the exercise of any other right or discharge of any obligation under the SOPA.

4. Conclusion

Principals and contractors should review their construction contracts to avoid provisions that will be void or open to challenge under the SOPA. In parallel to considering the drafting implications, it is suggested that parties encourage the education of suppliers and contractors, and ensure the necessary internal administration adjustments are made to ensure payment claims are made and responded to in compliance with the new legislation. ■

End Notes

1 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 (Probuild).

2 Probuild,16 [38] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).