

GREENWAY CHAMBERS

The *Building and Construction Industry Security of Payment Act*: What to look for following the 2019 amendments

Introduction

1. On 21 November 2018, the New South Wales Parliament passed the *Building and Construction Industry Security of Payment Amendment Bill 2018* (the **SoP Amendment Act**), which makes a series of changes to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the **Security of Payment Act**).
2. The amendments are to commence on 21 October 2019 and apply to construction contracts entered into after that date.¹
3. Many of the changes come from recommendations in John Murray's December 2017 *Review of Security of Payment Laws* (the **Murray Report**) which considered the laws from each Australian jurisdiction.
4. This paper and presentation is intended to offer some observations as to what lawyers should consider when dealing with a claim that has been made under the *Security of Payment Act*.

No more reference dates

5. The single most significant change made by the *SoP Amendment Act* is the removal of the concept of reference date from s8 and s13(5).
6. Since the High Court decision in *Southern Han v Lewence* ((2016) 260 CLR 340), the statutory rights and entitlements of a party who has undertaken to do construction work to a progress payment was fundamentally founded on the existence and identification of a reference date. This has generally led to a consideration of two scenarios:
 - (a) first, whether a payment claim was served prematurely or before a reference date had arisen; or
 - (b) secondly, whether there was no available reference date because of the termination of the contract.
7. Upon the amendments made, s8 of the *Security of Payment Act* now grants a right to a progress payment as follows:

¹ SOP Amendment Act, Schedule 1, [38].

“A person who, under a construction contract, has undertaken to carry out construction work, or to supply related goods and services is entitled to receive a progress payment.”

8. However, the timing of or for a payment claim is now governed by the s13. These new provisions are as follows:
 - (1A) *A payment claim may be served on and from the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and on and from the last day of each subsequent named month.*
 - (1B) *However, if the construction contract concerned makes provision for an earlier date for the serving of a payment claim in any particular named month, the claim may be served on and from that date instead of on and from the last day of that month.*
 - (1C) *In the case of a construction contract that has been terminated, a payment claim may be served on and from the date of termination.*
9. The clearest change is the introduction of a statutory right to make a payment claim following termination of a contract. However, it should be noted that there are other contract mechanisms that might be employed which may not be affected by the amendments.
10. In *Southern Han*, there were two possible hypotheses as to what had occurred:
 - (a) the developer had validly exercised its right to take the works out of the hands of the builder, but the contract remained on foot;
 - (b) the developer had not validly exercised its right to take the works out of the hands of the builder, and the contract had been terminated by the builder accepting the repudiation of the developer.
11. In each case, the High Court concluded that there was no longer any right to seek a progress payment.
12. The High Court held, on the first hypothesis:
 - (a) the contract operated expressly to suspend payment until completion of works and valuation by the Superintendent;
 - (b) the commercial purpose of the suspension was to provide a form of security to the developer;
 - (c) the commercial purpose would be undermined if the suspension was only in respect of payment for the work taken out of the contractor’s hands.
13. As such, it was held that the suspension of payment was a suspension of the totality of the rights conferred and obligations imposed in relation to payment by the contract. This

included the suspension of the right to make a progress claim for work carried out up to the time of the work being taken out of its hands.²

14. One of the issues that is likely to arise is whether a contractual right to suspend payments can impact the right to a progress payment under the new s8 and the process under the new parts of s13. While the question is open, in my view such a contractual regime or mechanism would not impact the statutory rights and process.
15. The changes to s8 and s13 are such that a contractual mechanism which purported to “suspend” or preclude any right to a progress payment would fall foul of s34 of the *Security of Payment Act*. This precludes contracting out of the *Security of Payment Act* and provides:
 - (a) the provisions of this Act have effect despite any provision to the contrary in any contract; and
 - (b) a provision of any agreement (whether in writing or not) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or that may reasonably be construed as an attempt to deter a person from taking action under this Act, is void.
16. Turning to the revisions to s13, claimant may submit a payment claim *on and from* a date identified by s13(1A), (1B) or (1C). Leaving aside s13(1C), which is concerned with termination, an obvious question arises as to whether a payment claim is invalid if it is served prematurely – i.e. earlier than:
 - (a) the last day of the named month in which the construction work was first carried out;
 - (b) the last day of each subsequent named month
17. In *Chase Oyster Bar v Hamo Industries* ((2010) 78 NSWLR 393), McDougall J said at [209]:

The *Security of Payment Act* gives very valuable, and commercially important, advantages to builders and subcontractors. At each stage of the regime for enforcement of the statutory right to progress payments, the *Security of Payment Act* lays down clear specifications of time and other requirements to be observed. It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation.
18. Further, in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289, Leeming and Payne JJA, with whom White JA relevantly agreed said at [34]:

...the service of a payment claim under s13(1) is an essential precondition to taking subsequent steps in the procedure set out in Pt3 of the Act. In *Southern Han Breakfast Point* at [44] the High Court said:

“There is no dispute between the parties that service of a payment claim under s13(1) of the Act is an essential precondition to taking subsequent steps in the procedure set out in Pt3 of the Act. There is accordingly no dispute that, unless a

² Paragraphs 74 to 81.

payment claim answering that description is served, there can be no adjudication application and hence no adjudication within the jurisdiction conferred by s22 of the Act . That shared understanding of the relationship between s13(1) and s22 is undoubtedly correct.”

19. The case of *All Seasons Air* concerned a claim which had been served before the agreed reference date in the context of a contract which stated that an early progress claim shall be deemed to have been made on the date for making that claim. The Court of Appeal held that while this deeming provision could apply to the position of the parties under the contract, it could not operate with respect to the separate statutory rights.
20. Having regard to these decisions, in my view it is reasonably arguable that if a payment claim is served before the date specified under the new regime of s13(1A) it will not be a valid payment claim for the purposes of the Act.
21. In addition, it should be noted that the other limits under s13 still apply. In this regard:
 - (a) s13(5) has been revised so as to remove the reference to a reference date, and simply states that a claimant may only serve one payment claim in any particular named month for construction work carried out or undertaken to be carried out in that month; and
 - (b) s13(6) has also been revised, and it provides that s13(5) does not prevent a claimant from:
 - (i) serving a single payment claim in respect of more than one progress payment,
 - (ii) including in a payment claim an amount that has been the subject of a previous claim, or
 - (iii) serving a payment claim in a particular named month for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in a previous named month.
22. Therefore, while the amendments deal with the issue of a reference date under s8, it will still be necessary to consider whether a payment claim is valid by reference to the date on which it was served and the works performed.

Requirement to state that a payment claim made under the Act

23. The *SoP Amendment Act* reinstates a requirement removed from the *Security of Payment Act* in 2014 that a payment claim must state that it is made under the *Security of Payment Act*. This is an obvious matter to look for and confirm.

Making an adjudication application

24. No changes have been made to s17 of the *Security of Payment Act*. Therefore, all of the well-known requirements remain, including the need to give notice if a claimant wants to refer a payment claim to adjudication where no payment schedule has been issued.

25. Further, there are express timeframes for the making of an adjudication application set out in s.17(3). These are likely to become significant given the amendment made to allow for withdrawal of an adjudication application.

Express power to withdraw

26. The *SoP Amendment Act* introduces s17A, after s17, which provides that a claimant may withdraw an adjudication application after it has been submitted.
27. However, that right is not unqualified. If an adjudicator has been appointed to determine the adjudication application and the respondent objects to the withdrawal, then the withdrawal does not have effect if, in the opinion of the adjudicator, it is in the interests of justice to uphold the objection.
28. This right to withdraw is somewhat problematic, particularly where it is sought to be exercised after a respondent has submitted an adjudication response. There is potential for a claimant to “pull” the adjudication application having seen a detailed response from a respondent in order to address the criticisms or answers raised by a respondent that might result in a determination in favour of the respondent or less favourable to a claimant.
29. Further, there is no indication as to what may or might constitute an objection by a respondent. There is no indication as to whether:
- (a) the objection might contain detailed reasons;
 - (b) a respondent may object with evidence – e.g. as to the costs incurred in dealing with the payment claim and the adjudication application;
 - (c) the objection has to be communicated to the claimant; and
 - (d) the claimant has a right of response.
30. In this regard, if an adjudicator was to refuse to allow a withdrawal following objection and without having given the claimant a right to be heard or make submissions, is there a denial of natural justice?
31. The issue of what is meant by the term “*interests of justice*” and whether an adjudicator’s decision in this regard is open to challenge are likely to be tested at an early stage after the amendments commence to have effect within the construction industry.
32. Moreover, care would need to be exercised in withdrawing an adjudication application, as it may not be possible to lodge a further adjudication application in respect of the payment claim. It is to be noted:
- (a) while s17A allows for the withdrawal of an adjudication application, no provision is made for a further adjudication application to be submitted;
 - (b) the timeframes for the submission of an adjudication application under s17(3)(c), (d) and (e) are not modified or excluded under s17A.

33. The position under s17A is to be contrasted with s26, which expressly allows a claimant to withdraw an adjudication application and make a new application under s17 if:
- (a) the claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or
 - (b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by s21(3) (being 10 days subject to extension).
34. By s26(3), it expressly states that a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under s26(2) despite s17(3)(c), (d) and (e).
35. Therefore, it is reasonably arguable that withdrawal of an adjudication under s17A precludes a new adjudication application being made in respect . Of course, this will not prevent an adjudication application being made in respect of a later payment claim.

Service

36. There are certain amendments to s31 with respect to service. This is often a key issue in proceedings, particularly where a claim is made for a statutory debt on the basis that no payment schedule has been served.
37. The relevant provisions as to service shall read as follows once the amendments take effect:
- (1) Any document that by or under this Act is authorised or required to be served on a person may be served on the person:
 - (a) by delivering it to the person personally, or
 - (b) by lodging it during normal office hours at the person's ordinary place of business, or
 - (c) by sending it by post addressed to the person's ordinary place of business, or
 - (d) by email to an email address specified by the person for the service of documents of that kind, or
 - (d1) by any other method authorised by the regulations for the service of documents of that kind, or
 - (e) in the case of service by a party to a construction contract on another party to the construction contract -- in the manner that may be provided under the construction contract.
 - (2) Service of a document that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected when the document is received at that place.
 - (3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of documents.

(4) In this section:

"document" includes written notice or determination.

"serve" includes give, send or otherwise provide.

38. The manner of service can be very important, given the common use of emails to communicate. While convenient and practical, it may be delivery by email is not proper service under s31.
39. The use of email may be governed by s31(1)(d) or s31(1)(e).
40. Under s31(1)(d) it is necessary to show that the documents were emailed to the email address "specified by the person for service of documents of that kind". Evidence will be required to demonstrate that "the person" with responsibility for dealing with payment claims specified the email address used for delivery of the payment claim.
41. Under s31(1)(e), the contract may state that service by email is accepted and identify an email address for service. Again, it will be necessary to show that the documents were emailed to the specified email address or that there was some written direction to use a different email address.
42. Difficulties can arise when, as is often the case, an informal practice arises or the use of a particular email address is said to have been directed verbally. It may then be necessary to adduce detailed evidence as to past discussions and a history of communications (particularly service of payment claims) to the email address relied upon.
43. An alternate path is where one can show that the payment claim was actually received by the relevant person on particular date. In *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259, Hodgson JA (with whom Handley JA and Hunt AJA relevantly agreed), said at [58]:
- ... in my opinion it is clear that if a document has actually been received and come to the attention of a person to be served or provided with the document, or of a person with authority to deal with such a document on behalf of a person or corporation to be served or provided with the document, it does not matter whether or not any facultative regime has been complied with: see *Howship Holdings Pty. Limited v Leslie* (1996) 41 NSWLR 542; *Mohamed v Farah* [2004] NSWSC 482 at [42]- [44]. In such a case, there has been service, provision and receipt.
44. Therefore, a matter which remains one for careful consideration is service of a payment claim.

Other matters

45. Other matters to note with respect to the amendments are:
- (a) an adjudication determination may be set aside in part where only part is affected by jurisdictional error;

- (b) a company in liquidation may not serve a payment claim or enforce a payment claim or an adjudication application, however this prohibition does extend to external administration generally;
- (c) The maximum time for the payment of payment claims of a subcontractor under a head contract is reduced from 30 business days to 20 business days.

Conclusion

46. The amendments to the *Security of Payment Act* make significant changes to the operation and application of the statutory “*pay now argue later*” regime. However, many of the elemental matters of enquiry remain and care should be taken in considering the prospects of advancing or defending any claim made under the *Security of Payment Act*.

Frank Hicks SC
Greenway Chambers
19 September 2019