

The Building and Construction Industry Security of Payment Act – the 2018 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**).
2. As its name suggests, the SOP Amendment Act details a host of changes to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the **SOP Act**). Many of the changes are derived from the recommendations in John Murray's December 2017 Review of Security of Payment Laws (the **Murray Report**) which considered the laws from each Australian jurisdiction.
3. Subject to anything to the contrary in the regulations, the changes imposed by the SOP Amendment Act will only apply to construction contracts entered into after the commencement of the amendments.¹ That date has not yet occurred and will be set by proclamation.
4. While the SOP Amendment Act will introduce a raft of changes to the operation and effect of the construction industry “*pay now argue later*” legislation, a summary of the more important changes are set out below.

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 sections 8 and 13(5). In the Murray Report, the change was recommended and said to have been necessitated due to confusion in the construction industry with regard to the concept of reference date.²
6. The SOP Act, as amended, now grants a right to a progress payment to:

“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.”
7. Much of what was previously section 8 has now been replaced by new subsections in section 13. 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.*

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

² Murray Report, p130; Recommendation 14.

8. These legislative amendments are designed to provide simplicity and certainty as to when a payment claim may be submitted. It remains to be considered whether a payment claim served outside the parameters set by s13(1A) and s13(1B) is void or capable of being the subject of adjudication.
9. As was also recommended in the Murray Report,³ the SOP Act (as amended) will now include an express right to serve a payment claim on and from the date of termination.⁴

Requirement to state that a payment claim made under the Act

10. The SOP Amendment Act reinstates a requirement removed from the SOP Act in 2014 that a payment claim must state that it is made under the SOP Act.⁵
11. The reason given for the change in the Murray Report is that the statutory endorsement distinguishes a payment claim made under the SOP Act from other documents, thus avoiding the 'administrative nightmare' of businesses having to issue a payment schedule in response to any and every invoice or communication about payment received, including draft schedules that are intended to form the basis of commercial discussions.⁶

New offences and increased penalties

12. One of the most expansive changes included in the SOP Amendment Act is the insertion of Part 3A relating to investigation and enforcement. In particular, the new Part gives employees of the Department of Finance, Services and Innovations or an appointed investigator an ability to investigate compliance with the Act.
13. The powers granted to the investigators are broad, and include the ability to demand the provision of information or records, as well as the ability to enter non-residential premises at any reasonable time with or without the authority of a search warrant. During such an inspection, an authorised officer is entitled to:
 - (a) make examinations and inquiries that they consider necessary;
 - (b) direct a person to produce records for inspection; and
 - (c) examine, inspect, copy and / or seize records.
14. The new Part also makes it an offence for a person to refuse or fail to comply with a requirement under Part 3A without reasonable excuse, and for delaying, hindering or obstructing an investigation. Contravention of these provisions will result in fines of up to 40 penalty units (being \$4,400) for corporations or 20 penalty units (\$2,200) for individuals.
15. In addition, other penalties have also increased substantially. For example, the penalty for the failure of a corporate head contractor to serve a supporting statement with a payment claim or serving a supporting statement knowing that it is false or misleading in a material particular has increased five-fold from 200 to 1,000 penalty units (being up to \$110,000).⁷

³ Murray Report, Recommendation 17.

⁴ SOP Act (as amended), s13(1C).

⁵ Murray Report, Recommendation 23.

⁶ Murray Report, p145.

⁷ SOP Act (as amended), s13(7) and (8).

Express power to withdraw

16. Unlike in other jurisdictions, the NSW SOP Act does not grant the parties an express right to withdraw an adjudication. The SOP Amendment Act now provides a claimant with an express right to withdrawal an adjudication application after it was been submitted.⁸ However, that right is not unqualified. If the respondent objects to the withdrawal, and it is the opinion of the adjudicator that it is in the interests of justice to uphold the objection, the withdrawal does not have effect.
17. 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.
18. The issues 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.

Code of practice for adjudicators

19. The SOP Amendment Act also permits the Minister to publish an order requiring authorised nominating authorities to comply with a code of practice. Such an order has not yet been published, but will likely be in a similar form to the existing 2015 Code of Practice.⁹ The changes also give the Minister the ability to withdraw an ANA’s ability to nominate adjudicator if satisfied that it has contravened the code of practice.

Ability to set aside part of a determination

20. With the support of an ‘overwhelming number of stakeholders’, the Murray Report recommended that a Court be permitted to sever only the affected part of an adjudication determination in circumstances where an adjudicator has committed jurisdictional error.¹⁰ This change is reflected in the new s32A.

Liquidation

21. In adopting the recommendation of the Murray Report¹¹ and codifying existing case law,¹² a new section (s32B) is inserted into the SOP Act by the SOP Amendment Act which provides that a corporation in liquidation may not serve a payment claim or enforce a payment claim or an adjudication application.

⁸ SOP Act (as amended), s17A.

⁹ https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0005/371336/Authorised_Nominating_Authority_Code_of_Conduct.pdf

¹⁰ Murray Report, p216; Recommendation 57.

¹¹ Murray Report, Recommendation 10.

¹² Such as the Victorian Court of Appeal in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247.

Payment Terms

22. In going further than the recommendations of the Murray Report, the SOP Amendment Act reduces the maximum time for the payment of payment claims under a head contract from 30 business days to 20 business days.¹³

Conclusion

23. The amendments to the SOP Act have significant effect in terms of its operation and application for future construction contracts. All participants in the industry and their legal representatives will need to be fully aware of these changes in 2019.

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11 December 2018**

¹³ Murray Report, Recommendation 19; Section 11(1B)(a) as amended.