



SOP Legislation In Australia

There are eight states and territories in Australia, each with its own security of payment (SOP) legislation. This causes challenges for contractors, lawyers, consultants, and the like that work across the different jurisdictions, because each SOP legislation differs.

The first jurisdiction to introduce SOP legislation in Australia was New South Wales (NSW) in 1999. In the early 2000s SOP legislation was introduced in other Australian Jurisdictions. The NSW legislation formed the basis of the model used for the East Coast of Australia, and Western Australia (WA) and Northern Territory (NT) Acts more closely aligned with the construction industry payment legislation in the UK and New Zealand (NZ).

The Australian Acts create a statutory dispute resolution process (Adjudication) that allows a party (the Applicant) alleging they are owed monies under a construction contract to promptly obtain payment from another party (the Respondent), based on an assessment of the merits of the claim by an appropriately qualified and independent adjudicator.

The current SOP legislation in force in the Australian jurisdictions includes the following:

- Building and Construction Industry Security of Payment Act 1999 (the NSW Act).¹
- Building and Construction Industry Security of Payment Act 2002 (the Vic Act).

- Building Industry Fairness (Security of Payment) Act 2017 (the QLD Act).
- Construction Contracts Act 2004, as amended by the Construction Contracts Amendment Bill 2016 (the WA Act).
- Construction Contracts (Security of Payments) Act 2004 (the NT Act).
- Building and Construction Industry (Security of Payment) Act 2009 (the SA Act).
- Building and Construction Industry (Security of Payment) Act 2009 (the ACT Act)
- Building and Construction Industry (Security of Payment) Act 2009 (the Tasmanian Act)

The consequence of the piecemeal, jurisdiction by jurisdiction, approach to enacting the SOP legislation in Australia is diversity and inconsistency between the various Acts. There is a clear delineation between the approach taken by the WA and NT Acts versus the remaining States and Territories. To this end, the Acts are often categorised into the following models:

¹ Substantial amendments were made to the NSW Act on 21st October 2019.

- West Coast Model (WCM) legislation – the WA and NT Acts.
- East Coast Model (ECM) legislation – the other Australian Acts (i.e. NSW, Victoria, Queensland, etc.).

This article provides an overview of the WCM legislation, the key differences between the WCM and ECM, and recent legislative developments to the WCM to align more closely to the ECM.

The WCM Legislation

The WCM (which is largely replicated in the Northern Territory) is based on the WA Act. The purpose of the legislation as set out in the recital of the WA Act is to:

- Prohibit or modify certain provisions in construction contracts;
- Imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts, specifically practices with regards to payment; and,
- Provide a means for adjudicating payment disputes arising under construction contracts.

Despite being based on the WA Act, the NT Act is expressed in a slightly different manner:²

- The object of the Act is to promote security of payments under construction contracts.
- The object of the Act is to be achieved by:
 - (a) facilitating timely payments between the parties to construction contracts;
 - b) providing for the rapid resolution of payment disputes arising under construction contracts; and
 - c) providing mechanisms for the rapid recovery of payments under construction contracts.

In 2014, the WA government engaged Professor Philip Evans to review the operation of the WA Act (Evans Review).³ Following the Evans Review, the Construction Contracts Amendment Bill 2016 (2016 Bill) was enacted.⁴ The 2016 Bill made several amendments to the WA Act

*“to improve the operation of, and access to, the rapid adjudication process for resolving payment disputes under construction contracts”.*⁵

The 2016 Bill is the first package of reforms to address recommendations from various statutory reviews⁶ to improve SOP in the building and construction industry. The WCM contains an interim payment regime providing a fast track adjudication process. Some of the key features of the WCM legislation include the following:

- The WCM preserves the construction contract in relation to the timing for serving a payment claim and serving a response. If, however, the contract does not include a written provision about how a party is to claim payment, the implied provisions provided by the Act apply. Likewise, if the contract does not include a written provision about how a party is to respond to a payment claim, the implied provisions provided by the Act apply. Under the WA Act, the responding party must serve a notice of dispute within 14 days, and under the NT Act, ten working days if it disputes all or any part of the payment claim. In addition, the maximum payment terms permitted in construction contracts under the WCM Act is 42 calendar days.
- Under the WCM, any party to a construction contract may apply for adjudication up and down the contractual chain. The time limit for applying for adjudication of a payment dispute is 90 business days under the WA Act and 65 working days under the NT Act. A ‘business day’ means a day other than a Saturday, Sunday or public holiday, and the traditional industry shut-down period between 25th December and 7th January.
- The timeframe for serving an adjudication response is ten business days after being served with an application under the WA Act and within 15 working days after being served with an application under the NT Act.

² Section 3, Division 1 of the NT Act.

³ Professor Philip Evans. “Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)”, August 2015.

⁴ Construction Contracts Amendment Act 2016 – Western Australia (www.legislation.wa.gov.au).

⁵ Explanatory Memorandum, Construction Contracts Amendment Bill 2016 (www.parliament.wa.gov.au/Parliament/Bills)

⁶ Introduction to “Explanatory Memorandum - Construction Contracts Amendment Act 2016” (www.commerce.wa.gov.au).

— A party in a payment claim can claim payment for “construction work” or the supply of related goods and services under a construction contract. However, under the WCM legislation, certain works on a site do not qualify as “construction work”, and this is often referred to as the “Mining exclusion”. These works include:

- a) drilling for and extracting oil or natural gas;
- b) constructing a shaft, pit or quarry, or drilling, for the purpose of discovering or extracting any mineral bearing or other substance; and,
- c) fabricating or assembling items of plant used to extract or process oil, natural gas or any mineral bearing or other substance.

— When making a payment claim, the WCM legislation does not require the payment claim to be endorsed as a claim under the Act.

— Under the WCM, a party can make claims for amounts in relation to the performance and non-performance of obligations under a construction contract. This could include a claim for progress payments and claims for variations, damages for breach of contract, delay and disruption claims.

— Under the WCM, the adjudicator must be appointed by the appointing authority within five business days after service of an adjudication application.

— A party submitting an adjudication application under the WCM legislation is permitted to recycle claims by including matters in a payment claim which may have been covered in a previous payment claim.

Key Differences Between The WCM and ECM Legislation

Construction activity in WA is, with the exception of Queensland, significantly different from the East Coast. A large percentage of construction activity is concentrated on mining, oil and gas activities, as opposed to infrastructure, commercial and residential activities on the East Coast.⁷ Accordingly, the WCM legislation differs in significant ways from the SOP legislation in other Australian jurisdictions. Some of the key characteristics unique to the WCM Acts include the following:

	WCM LEGISLATION	ECM LEGISLATION
Timeframe for Payment Claims	Within the period determined under the construction contract. WCM Acts largely preserve, rather than override, the parties’ contractual interim payment regimes.	The ECM Acts provide a detailed statutory payments regime to govern the parties’ relationship overriding any inconsistent contractual provisions.
The Party that may apply for an adjudication application under the Act	The WCM Acts allow for payment claims both up and down the “contractual chain”. A principal can submit a payment claim to a contractor for an amount in relation to the performance or non-performance of the contractor’s obligations under the contract and subsequently apply to have the payment dispute adjudicated.	The ECM Acts only allow for payment claims to be made up the “contractual chain”, the Claimant only (i.e. subcontractor against a head contractor or head contractor against its principal)
The definition of “payment dispute”	The WCM Acts include a broad definition of “payment dispute” meaning that a large variety of claims can be adjudicated, including claims for payment of contractual entitlements such as variations, delay costs, and disruption.	Sections 10A and 10B of the Vic Act provide for certain matters to be “excluded amounts”, including, amongst other things, variations (other than “claimable variations”), claims for damages for breach of contract, time-related costs, and claims for latent conditions.
Timeframe for serving an adjudication application	Under the current WA Act, a party has 90 days from the date of a payment dispute to make an application for adjudication. This time frame is significantly longer than what is provided in the ECM Acts and provides claimants time to prepare detailed and well-substantiated adjudication application.	Under the ECM Acts, the timeframes varies between the Acts and depends on the nature of the application. However, the timeframe is typically within 20 business days from the due date for payment.
Project Bank Account (PBAs) or Statutory Trusts	The WCM Acts do not prescribe the principal to retain money to cover the value of a claimant’s adjudication application, nor are there provisions establishing a statutory trust model in WA.	The ECM effectively uses PBAs and trust accounts.
Is there construction work that is excluded	Under the WCM “construction work” excludes: drilling for the purposes of extracting minerals, oil or natural gas; constructing, fabricating, installation, and maintaining of plants related to mining or oil and gas (often referred to as the “mining exception”). The only other jurisdiction with a similar concept is Queensland.	In the NSW and Vic Acts, the following does not qualify as “construction work”: <ul style="list-style-type: none"> — drilling for and extracting oil or natural gas; or — extraction of minerals, including tunnelling, bring or constructing underground work for that purpose.
Can a respondent argue new reasons for non-payment in the adjudication response?	Under the WCM Acts, a respondent is permitted to argue new reasons in its adjudication response for non-payment of amounts within the payment claim.	Under the ECM, a respondent is limited to reasons already included in the payment schedule.

⁷ Australian Bureau of Statistics – The Construction industry in Western Australia (<https://www.abs.gov.au/AUSSTATS>).

Legislative Developments

There have been calls from several quarters that the SOP legislation should be harmonised into a uniform national approach for the benefit of industry, particularly given that many major industry participants operate across all jurisdictions. In December 2016, on the back of a recommendation from the Australian Senate Economics References Committee report into insolvency in the Australian construction industry⁸, the Australian Turnbull Government appointed John Murray AM to conduct a national review of the SOP legislation (Murray Review).⁹

On 23rd February 2018, the WA Minister for Commerce and Industrial Relations established the Industry Advisory Group, and appointed Mr John Fiocco as chair to consult with key industry stakeholders to make recommendations to improve SOP legislation for subcontractors in the WA building and construction industry (Fiocco Review).¹⁰

A summary of the key recommendations in the Murray and Fiocco Reviews are set out below.

Murray Review

On 22nd December 2017, Mr Murray presented his final report on the national review of SOP laws in Australia, making 86 recommendations on matters that he considered “to not only be legislative best practice, but also balance the competing interests of all stakeholders.” In the cover letter to the Murray Review, Mr Murray states his key recommendation as

“... the use of a legislative model which is based on what is commonly known as the East Coast model of security of payment laws, most notably that existing in the state of NSW, and the establishment of a system of statutory trusts to apply throughout the contractual payment chain and to certain construction projects and monies.”¹¹

In addition to the ECM being recommended as a best practice model, some of the further recommendations set out in the Murray Review comprise the following:

- Right to progress payments – to avoid confusion within the industry the use of the expression ‘reference date’ should be abandoned. The legislation should

provide that a person who has undertaken to carry out construction work under a contract is able to make a payment claim every month, or more frequently if so provided. The legislation should provide that the due date for payment should not exceed 25 business days after the payment claim has been made.

- Process for recovering progress payments – the legislation should expressly require a payment claim to state that it is a payment made under the Act. The legislation should require a payment schedule to identify the payment claim for which it relates, the amount the respondent proposes to pay, and if the schedule is less than the claimed amount, the respondent’s reasons for withholding payment.
- Unfair contract terms – the legislation should void a contractual term that purports to make a right to claim payment, or a right to claim an extension of time, conditional upon giving notice if compliance would not be reasonably possible, be unreasonably onerous, or serve no commercial purpose.
- Statutory trusts – a statutory trust model should apply to all parts of the contractual payment chain for construction projects over \$1 million.
- The review recommended that the only way to achieve a nationally consistent and effective set of SOP laws is with Federal Government involvement, which will require the relevant Australian Government, state and territory Ministers to work together.

Fiocco Review

On 31st October 2018, Mr Fiocco submitted his report and recommendations to improve the SOP for subcontractors in WA’s building and construction industry. This was the first time SOP legislation was considered in such a comprehensive manner in WA since 2001.¹² In his report cover letter, Mr Fiocco noted the following:

“While the problem of security of payment in the building and construction industry is not a new phenomenon... despite the passage of 18 years the problem continues to exist today, confirming a need for further government action.”

⁸ Senate Economics Reference Committee, “I just want to be paid – Insolvency in the Australian construction industry”, Commonwealth of Australia, December 2015.

⁹ John Murray AM. “Review of Security of Payment Laws, Building Trust and Harmony”, December 2017.

¹⁰ John Fiocco. “Final Report to the Minister for Commerce, Security of Payment Reform in the WA Building and Construction Industry”, October 2018.

¹¹ Murray Review - <https://www.minister.industry.gov.au/ministers/laundy/media-releases/national-review-security-payment-laws-final-report-released>

¹² Transmittal letter of the Fiocco Review to Minister for Commerce and Industrial Relations refers.

In arriving at the recommendations in the Fiocco Review, Mr Fiocco was informed by the findings made in numerous reviews into SOP across various jurisdictions, including the Murray Review. The main recommendations set out in the Fiocco Review include the following:

- Registration framework for building service providers – the Government should consider amending the Building Services (Registration) Act 2011 (BSR Act) to allow the building services board (BSB) to record demerit points against building service providers who demonstrate poor payment practices and contractual deficiencies. The Government should consult with industry stakeholders to develop an education program on understanding the relevant laws and contractual obligations.
- Measures to provide fairer contracting practices in the industry – the Government should introduce legislation to provide an express term into all construction contracts that any security withheld under the contract is to be returned no later than 12 months after practical completion.
- Reforms to SOP laws – the Government should adopt a significant number of the 86 recommendations in the Murray Review. The Fiocco Review lists the specific recommendations to be adopted from the Murray Review, including the adoption of various sections from the NSW Act that are considered the preferred model
- Project Trusts – the Government should introduce legislation to establish a retention trust scheme such that any party that holds retention money pursuant to the terms of a construction contract is deemed to hold the money on trust. Legislation should also be introduced to establish a statutory trust scheme such that whenever a party receives payment under a construction contract on account of work performed by another party, the payment is deemed to be held in trust for the benefit of the party who performed the work.

The Fiocco Review represented a targeted consultation process for reform that will deliver on the WA Government’s election commitment to improve protections for subcontractors.¹³

Proposed Legislative Changes to the WA Act

Based on some of the significant recommendations of the Murray and Fiocco Reviews, the Western Australian government has sought industry comment on a suite of significant proposed reforms to the WA Act. The proposed “Building and Construction Industry (Security of Payment) Bill 2020” (WA Bill) includes the following key amendments to the adjudication procedure:

- Time Bars – the WA Bill attempts to reform the use of time bars by tasking referees (adjudicator, arbitrator, or judge) considering a payment claim to declare a time-bar provision “unfair” if compliance with the provision is “not reasonably possible” or is “unreasonably onerous”.
- Mining Exclusion – the WA Bill proposes an amendment that substantially narrows the mining exclusion. The Bill proposes the removal of “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” from the exclusion. Therefore, contractors involved in the construction of plant for mining, oil, and natural gas projects in WA could apply for adjudication of payment claim disputes under the proposed amendments.
- Payment Schedule – the WA Bill proposes the requirement of a payment schedule which will include reasons for certifying an amount less than the amount claimed, in line with the ECM, and a prohibition on introducing new reasons for non-payment in a subsequent adjudication response.
- Timeframes – reductions to the time limits in the Bill for making payment to a contractor or subcontractor, the submitting of a payment schedule in response to a payment claim, and the time for applying for adjudication.
- Right to recover – the WA Bill proposes an immediate right to recover amounts claimed in a payment claim as a debt due if the respondent submits no payment schedule.

¹³ WA Labour Policy, Protections for Subcontractors, August 2016.

- Adjudicator’s rights – the WA Bill proposes a right for an adjudicator to engage an expert directly to investigate and provide an opinion on a matter to which the claim relates.
- Senior Adjudicator review – the Bill introduces a procedure whereby a claimant may seek to have an adjudication determination reviewed by a “senior adjudicator” where the amount determined was more than \$200,000 under the amount claimed in the adjudication application. Conversely, a respondent can also seek a review where the amount determined was \$200,000 or more than the amount assessed by the respondent in its payment schedule.
- Performance Bonds – a new proposal that requires a party to a construction contract to give the other party five business days’ notice of an intention to call on a performance security. This amendment intends to provide a contractor with a short period of time to take steps to remedy the alleged breach.

Although the WA Bill was released for comment during 2020, it is unlikely to be at the forefront of the WA Government’s priorities at the moment, given the continuing risk of COVID-19 and the economic response. However, with one of WA’s largest construction companies recently placed into administration, it is likely to move up the pecking order once again.

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