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Show Me The Money: Western Australia's Security of Payment Act 2021

On 1 August 2022, stage 1 of the new Building and Construction Industry (Security of Payment) Act 2021 ("SOPA") is planned to come into effect in Western Australia ("WA"). The new security of payment legislation will take effect for contracts entered into on or after that date, with existing contracts remaining under the current scheme in the Construction Contracts Act 2004 (WA) ("CCA").¹

Background

The security of payment reforms have been informed by the recommendations of two significant reviews comprising:²

- a national review by the Commonwealth Government; and
- a State review by John Fiocco and the Hon. Matthew Swinbourn MLC.

Industry and community consultation also took place on a Green Bill. The Act received Royal Assent on 25 June 2021.³

The aim of the SOPA is to introduce reform in four areas. Whilst the reforms include the introduction of a retention scheme and expanding the powers of the Building Services Board, this article focusses on the following two:

- **New security of payment laws** that are more consistent with those in the rest of Australia to create more structure and transparency to payment rights

under contracts and a more effective means for contractors to recover payments owed.⁴

- **Fairer contracting practices** to rebalance the allocating of contractual risk in the industry.⁵

Whilst the move to a more harmonised national approach is likely to be warmly received by the industry in general, practically, it is the new payment laws themselves that may cause the biggest impact to principals/owners, contractors, and/or sub-contractors in WA that do not have experience with the 'East Coast Model', or the similar legislation in New South Wales.

The Payment Reforms

From a commercial management and/or contract administration perspective, the key changes to the new security of payment laws that principals/owners, contractors, and subcontractors need to be aware of are discussed in more detail below.

¹ Action Plan for Reform; Better Payment Protections for Contractors in the WA Building and Construction Industry dated September 2021; pages 5 and 7 of 11 (published by the Government of Western Australia Department of Mines, Industry Regulation and Safety).

² Ibid; page 4 of 11.

³ Ibid.

⁴ Ibid; page 3 of 11.

⁵ Ibid.

Key Change 1: Payment Claims and the Introduction of Payment Schedules

In a bid to speed up payment times and provide a more robust rapid dispute resolution process, principals/owners, contractors, and subcontractors will need to comply with the new payment regime in the SOPA which, amongst other things, reduces the maximum timeframe for making payment.⁶ It also stipulates the timeframe for submitting a payment schedule in response to a payment claim, which is now required for respondents that intend to dispute/withhold any amounts claimed.

The relevant timeframes are as follows:

- **Payment claim:** A claim for a progress payment must be made on or after the last day of each month during the project unless the construction contract provides for a payment claim to be made on or after an earlier date.⁷
- **Response to claim, payment schedule:** The payment schedule must identify the amount of payment and include reasons why the amount is disputed, or reasons why a withholding payment is being made.⁸ It is not mandatory to issue a payment schedule, but if a respondent fails to do so within 15 business days of receiving a payment claim, it will become liable to pay the claimed amount on the date for payment.⁹
- **Due date for payment:** Unless the contract prescribes an earlier date, a progress payment will be due:
 - from a principal to a head contractor, within 20 business days after a payment claim is made; and
 - to a subcontractor, within 25 business days after a payment claim is made.¹⁰

Given cash flow is the lifeblood of the construction industry, the maximum payment timescales mandated by the SOPA are clearly intended to ensure payment flows through the contracting chain with minimum disruption. This move underpins the old adage “cash is king”, particularly in an industry characterised by low margins, delays, disruption and ill-considered risk allocation.

Key Change 2 - Adjudicating Payment Claims

Pursuant to the SOPA:

- if a respondent does not respond to a payment claim by providing a payment schedule within the time allowed for the response (the “Claimed Amount”); or
- if a respondent does respond to the payment claim by providing a payment schedule within the time allowed for the response and the payment schedule indicates the amount that the respondent proposes to pay to the claimant (the “Scheduled Amount”);¹¹

a claimant may apply for adjudication of the payment claim (“Adjudication Application”) if:

- the respondent has not paid the Claimed Amount or Scheduled Amount owed to the claimant in its entirety on or before the due date for the progress payment; or
- the Scheduled Amount is less than the claimed amount or no payment is proposed in the payment schedule provided by the respondent.¹²



⁶ Ibid; pages 5 and 6 of 11.

⁷ Building and Construction Industry (Security of Payment) Act 2021 Part 3; Division 1 – Payment claims and schedules; s. 23.

⁸ Building and Construction Industry (Security of Payment) Act 2021 Part 3; Division 1 – Payment claims and schedules; s. 25

⁹ Building and Construction Industry (Security of Payment) Act 2021 Part 3; Division 1 – Payment claims and schedules; s. 26.

¹⁰ Building and Construction Industry (Security of Payment) Act 2021 Part 2; Division 2 – Right to progress payments; s. 20.

¹¹ Building and Construction Industry (Security of Payment) Act 2021; Part 3; Division 1 – Payment claims and schedules; s. 27.

¹² Building and Construction Industry (Security of Payment) Act 2021; Part 3; Division 2 – Adjudication of payment disputes; s. 28.

Significantly, however, if a respondent does not provide a payment schedule and has not paid the Claimed Amount in its entirety by the due date for payment, an Adjudication Application cannot be made unless:

- within 20 business days after the due date for the progress payment, the claimant has provided written notice to the respondent of its intention to apply for adjudication of the payment claim; and
- the respondent has been afforded an opportunity to give a payment schedule to the claimant within 5 business days after receiving the claimant's notice.¹³

The respondent is, therefore, effectively given a 'second bite of the cherry'. It is likely that this is because of the severity of the consequences if no payment schedule is given in the time allowed which, pursuant to Division 2 of the SOPA, prevents the respondent from:¹⁴

- making an adjudication response to an Adjudication Application; and
- including in an adjudication response, reasons for withholding payment that were not identified in the payment schedule.

Further, pursuant to Division 3 of the SOPA,¹⁵ if the respondent fails to provide a payment schedule, it is not entitled to make an adjudication review application.¹⁶

Considering the above, the importance of providing a payment schedule that identifies the reasons why the Scheduled Amount is less than the Claimed Amount, or reasons for withholding payment, cannot be overlooked by principals/owners, contractors and/or subcontractors that do not want to become liable to pay the Claimed Amount in full on the due date for payment.¹⁷

It is, however, worth noting that "a respondent only has to provide the essence of its reasons for withholding payment (including setoffs, e.g., for liquidated damages) and not a fully particularised evidentiary response."¹⁸

Key Change 3 – Suspension of Work

In addition to the right to apply for adjudication if a respondent does not pay a Claimed Amount or Scheduled Amount in full on or before the due date for payment, a claimant may also suspend carrying out any construction

work or supplying related goods and services under a construction contract, subject to written notice. The right to suspend work or supply related goods and services may continue until three business days have passed since the claimant received the amount payable by the respondent.¹⁹

Furthermore, if a claimant, in exercising a right to suspend, incurs a loss because the respondent removes any part of the work or supply from the construction contract (whether pursuant to a right conferred by the contract or otherwise), the respondent is liable to pay the claimant the amount of the loss. The claimant may then recover the amount of that loss as if it were an amount owing under the construction contract. Most significantly, a claimant is not liable for any loss suffered by the respondent during the period of suspension.²⁰

Given the significant impact that suspension of work (or supply) typically has on the progress and/or outturn cost of a construction project, a claimant's rights in relation to suspension are likely to deter respondents from attempting to 'run the gauntlet' by withholding amounts without providing sufficiently detailed reasons in a payment schedule.

Key Change 4 – The Alternative to Adjudication

As an alternative to adjudicating a payment claim under the SOPA, if a respondent does not pay the Claimed Amount or Scheduled Amount owed to the claimant in full on or before the due date for payment, a claimant can recover from the respondent the unpaid portion of the Claimed Amount or Scheduled Amount owed as a debt due to the claimant in a court of competent jurisdiction.²¹

Key Change 5 – A Narrowing of the Mining Exclusion

Like the CCA, the SOPA applies to "construction work" carried out under a "construction contract". However, the definition of "construction work" has now been narrowed to capture work that was previously excluded under what is commonly referred to as the CCA's 'mining exclusion'.²²

Given the volume of mining and oil and gas related construction projects typically undertaken in WA, this is a potential game changer insofar as payment disputes relating to processing plants for the extraction or processing of oil, natural gas, or any derivative of natural gas, as well

¹³ Ibid.

¹⁴ Building and Construction Industry (Security of Payment) Act 2021; Part 3; Division 1 – Payment claims and schedules; s. 25 (Notes for this section #2).

¹⁵ Building and Construction Industry (Security of Payment) Act 2021; Part 3; Division 1 – Payment claims and schedules; s. 25 (Notes for this section #3).

¹⁶ A claimant or respondent may apply for a review of an adjudicator's determination of any Adjudication Application if authorised to do so under Division 3 of the SOPA.

¹⁷ Building and Construction Industry (Security of Payment) Act 2021; Part 3; Division 1 – Payment claims and schedules; s. 26.

¹⁸ Security of Payment Reform in Western Australia – What to Expect and What You Will Need to Do Differently (July 2021) by Squire Patton Boggs.

¹⁹ Building and Construction Industry (Security of Payment) Act 2021; Part 3; Division 7 – Claimant's right to suspend work or supply; s. 62.

²⁰ Building and Construction Industry (Security of Payment) Act 2021; Part 3; Division 7 – Claimant's right to suspend work or supply; s. 63.

²¹ Building and Construction Industry (Security of Payment) Act 2021; Part 3; Division 1 – Payment claims and schedules; s. 27.

²² Building and Construction Industry (Security of Payment) Act 2021; Part 1; Division 2 – Interpretation; s. 6.

as other mineral bearing substances,²³ are likely to be captured by the new regime.

Additionally, whilst the SOPA does not apply to construction contracts for work undertaken outside WA, it includes a provision that widens its application to include any area of water adjacent to WA that is within the territorial limits of the State, or that is outside the territorial limits of the State if the construction contract is governed by the law of the State.²⁴ Combined with the narrowing of the mining exclusion, this means construction of items such as offshore wind farms, subsea equipment, pipelines and offshore processing/production platforms (excluding any drilling for the purpose of discovering or extracting any minerals or other substance) are all likely to fall under the new legislation.

Notably, the SOPA does, however, exclude work associated with the construction or fitting out the whole or any part of a watercraft and will not, therefore, apply to WA's shipbuilding industry.²⁵

Key Change 6 – Unfair Time-based Notice Provisions

In a bold move to help rebalance the allocation of contractual risk in the industry, the SOPA also introduces new legal rights that enables unfair notice-based time bars to be challenged if they are not reasonably possible or are unreasonably onerous to comply with. The party in any proceedings who alleges that a notice-based time bar provision is unfair does, however, bear the onus of establishing that it is unfair.²⁶

Relevantly, to determine if a notice-based time bar provision is unfair, the adjudicator, review adjudicator, court or arbitrator must take certain factors into account, including but not limited to:

- "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;
- the relative bargaining power of each party in entering into the construction contract;
- the rebuttable presumption that the party required to give notice possesses the commercial and technical competence of a reasonably competent contractor; and
- if compliance with the provision is alleged to be unreasonably onerous — whether the matters set out in

the notice are final and binding."²⁷

Notwithstanding the factors that must be considered, there appears to be a consensus in the industry that adjudicators determinations in this regard may prove to be contentious, which will no doubt be compounded by the fact that the application of this provision is a unique concept that has not been tested under security of payment legislation in any other States.

Conclusion

The most notable change to the legislation that principals/ owners, contractors, and/or subcontractors will need to attend to is the requirement to provide a payment schedule in response to a payment claim. WA based respondents particularly, with no experience of the 'East Coast Model' may find this transition more difficult if they do not already have commercial procedures in place that require reasons to be provided to claimants in support of withholding amounts in response to payment claims. Whilst administratively this is burdensome, more effort is undoubtedly going to be required after 1 August 2022, and with respect to amounts not being certified, this will likely require:

- the quantification of specific measured work items/ activities;
- the quantification and valuation of materials on or off-site, to the extent relevant;
- detailed assessments of any variations and/or extension of time claims (which may require quantum and/or delay evidence in support of the same);
- copies of any relevant contemporaneous contractual claims' correspondence;
- progress photographs and/or time-lapse information;
- an assessment of drawings, specifications and/or performance related information if there are any design obligations under the contract that are tied to payment; and
- any other relevant substantiation required under the respective construction contract.

Post 1 August 2022, it is also highly likely certain organisations will be administering both the CCA and the SOPA regimes in WA on different projects and, therefore,

²³ Under subsection s 4(3) of Part 1 of the Construction Contracts Act 2004 (CCA), "construction work" does not include fabricating or assembling items of plant for the extraction or processing of oil, natural gas or any derivative of natural gas or any mineral bearing or other substance.

²⁴ Building and Construction Industry (Security of Payment) Act 2021; Part 1; Division 3 — Application of Act; s. 10.

²⁵ Building and Construction Industry (Security of Payment) Act 2021; Part 1; Division 2 — Interpretation; s. 6(3)(c).

²⁶ Building and Construction Industry (Security of Payment) Act 2021; Part 2; Division 1 — Form and content of construction contract; s. 16.

²⁷ Ibid.

some commercial upskilling is likely to be necessary to ensure a heightened level of awareness of the differences between the two.

Organisations that work specifically in the WA oil and gas and mining sectors will also need to be up to speed with SOPA generally given that most projects in this space have previously enjoyed the 'mining exclusion' under the old legislation.

Additional time and effort will also be required to substantiate and/or challenge any unfair notice-based time-bar claims, particularly on larger resource projects where significant sums of money might be at risk. Accordingly, certain organisations may look to engage

external legal and/or consulting services to assist in the preparation of payment claims and/or payment schedules to ensure that they will not be prevented from supporting their claim should the matter proceed to adjudication or court.

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