



NEW SECURITY OF PAYMENT LEGISLATION TO PROVIDE SOME RELIEF TO CONTRACTORS AND SUBCONTRACTORS IN WA CONSTRUCTION INDUSTRY

On 25 June 2021, Western Australia's parliament enacted the new *Building and Construction Industry (Security of Payment) Act 2021* (WA) (**SOPA**). The SOPA has a staged implementation process, with operative provisions applying to construction contracts entered into from 1 August 2022. The existing *Construction Contracts Act 2004* (WA) (**CCA**) will continue to apply to contracts for 'construction work' entered before 1 August 2022.

The SOPA has emerged following years of review¹ and introduces some much needed protections for contractors and subcontractors in the construction industry in Western Australia.

Operative provisions of the SOPA will be implemented in three stages, with Stage 1 coming into effect on 1 August 2022. Stages 2 and 3 will come into effect as follows:

- Stage 2 comes into effect on 1 February 2023 and will introduce a security retention trust scheme for contracts over \$1 million; and
- Stage 3 comes into effect on 1 February 2024 will expand the retention trust scheme to contracts over \$20,000 and introduce offences for persons who contravene the trust scheme requirements.

"Construction Contracts" under the SOPA – narrowing the mining exclusion

Under the SOPA, a construction contract is 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. Under the CCA, fabricating and assembling any plant used for extracting or processing oil, natural gas or other mineral bearing substance was *excluded* from the definition of 'construction work' and consequently was not covered under the CCA.

¹ The reforms implemented under the SOPA have been largely based on the recommendations from the 2018 *Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry* ("Fiocco Report")¹ and the 2017 *Review of Security of Payment Laws: Building Trust and Harmony* ("Murray Report").



The expanded definition of 'construction contract' in the SOPA now means that parties to mining contracts should consider the Act and whether it applies, when preparing their contractual documents for new projects in Western Australia from 1 August 2022.

Stage 1 – Unfair Time Bars, Statutory Payment and Adjudication Time Limits

Payment Claims and Payment Schedules – Statutory Time Frames for Payment

Under the SOPA a contract can no longer require that a person to take part in dispute resolution as a precondition to making a payment claim, adjudication application or any other right under the SOPA.

A claim for a progress payment must be made on or after the last day of each month during a project, unless the contract provides for a payment to be made on or after an earlier date.

The principal must make payment of the payment claim within 20 business days after a payment claim has been made by a head contractor. A head contractor must make payment of payment claims within 25 days if a subcontractor makes a payment claim. Under the CCA the maximum time for payment of a payment claim is 42 days.

Under the SOPA, if a payment claim is disputed, the respondent must provide their response in the form of a payment schedule within 15 business days of receiving a payment claim (or such other time as allowed under the contract).

It is critical that the payment schedule includes all the reasons that payment is being withheld as the respondent will not be able to provide additional reasons in any response required as part of the adjudication process.

If no payment schedule is provided in response to a payment claim then the respondent will be liable to pay the amount claimed in the payment claim.

If a claimant makes a payment claim, and the respondent does not provide a payment schedule or pay the claimed or scheduled amount owed to the claimant in full, by the due date, then the claimant has 20 business days from the due date for payment to elect to either:

- (a) Commence court proceedings to recover from the respondent the unpaid portion of the claimed or scheduled amount as a debt due; or
- (b) Make an adjudication application in respect of the payment claim.

If the claimant elects to apply for adjudication, if the respondent did not previously provide a payment schedule, the respondent will have 5 business days from the notice of election to provide the claimant with a payment schedule. The claimant will then have 20 business days to make an application.

Upon receiving an adjudication application, the adjudicator has 10 business days to make a determination. This time can be extended to a total of 20 business days.

Review Process

The SOPA also provides for a new review process which replaces the right to apply to the State Administrative Tribunal under the CCA. Either the applicant or respondent can apply for review, however the respondent's entitlement to apply is conditional upon:

- (a) the respondent having provided a payment schedule and adjudication response on time;

- (b) the respondent paying the undisputed amount to the claimant, and the disputed amount the subject of adjudication into trust; and
- (c) the application not including an application for review of a determination that there was no jurisdiction.

There are also monetary thresholds for applying for review, that is at least \$200,000 in difference between outcomes, and a minimum of at least \$50,000 difference if the appeal relates to a jurisdictional matter.

Unfair Time Bars Void

Under section 16 of the SOPA, a provision including a notice-based time bar can be declared unfair and therefore void if a party's compliance with the provision, would not be reasonably possible, or would be unreasonably onerous.

The matters which are to be taken into account when determining if provision including a time bar is unfair include (without limitation):

- if a party required to give notice would reasonably have become aware of the relevant event or circumstance by the time that notice was required to be given;
- when and how notice is required to be given;
- the relative bargaining powers of each party under the contract; and
- an irrebuttable presumption that the parties have read and understood the terms of the contract.

Interestingly, when determining if a notice-based time bar provision is unfair, the requirements under any related contract or the happening of any event under a related contract are irrelevant.

Stages 2 and 3 – Retention Trust Scheme

Under the second phase of the SOPA, if a construction contract requires security by way of retention, then the retention monies will be obliged to hold the retention monies in a dedicated trust account, for the benefit of the party who has provided the security.

The retention monies will not be available for withdrawal, except where there is a contractual entitlement to do so.

Stage 2 introduces the retention trust scheme for contracts exceeding \$1 million.

Under Stage 3, we will see the retention trust scheme expanded to include contracts exceeding \$200,000, as well as penalties and fines being enforced against persons who contravene the retention trust requires.

Summary

The above provides a brief overview of only some of the changes which will come into place under the SOPA. We recommend that all principals and contractors review the provisions of their construction contracts to ensure that provisions are compliant with the SOPA. It is important that all parties are familiar with the new rules, and how they impact each parties' obligations in respect of construction contracts entered into after 1 August 2022.

If you would like more information about the sweeping reforms under the SOPA, please contact us on [+61 8 9388 3100](tel:+61893883100) or by email at reception@murfett.com.au .



Note: The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

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