

Following years of review and industry discussion, the Parliament of Western Australia has passed the Building and Construction Industry (Security of Payment) Act 2021 (WA) (SOP Act). In a move to a more harmonised national approach, the SOP Act will see Western Australia largely adopt the East Coast Model, and, in particular, similar legislation in New South Wales.

The SOP Act marks a drastic departure from the Construction Contracts Act 2004 (WA) (CCA), which will continue to apply to construction contracts entered into before the commencement of the SOP Act.

Payment Claims and the Introduction of Payment Schedules

Critically, the SOP Act introduces a statutory payment process that will operate independently of the underlying construction contract. This process reduces the maximum statutory time for payment, and is now dependent on the parties' position in the contracting chain. For example, unless the contract prescribes an earlier date, payment will be due within:

- 20 business days after a payment claim is made by a head contractor to a principal
- 25 business days after a payment claim is made by a subcontractor

Payment claims may be made on or after the last day of each month during the project (unless the contract provides for earlier timing), and can only (subject to any early date in the contract) be made within six months after the works subject to that claim were carried out.

Payment claims for final payment can be made after the later of the completion of all work (within six months), the defects liability period has expired (within 28 days) and the date under the contract.

Unlike the CCA, the SOP Act does not permit payment claims and "reverse" adjudications to be made by principals to head contractors, or head contractors to their subcontractors.

The SOP Act will also necessitate the use of payment schedules for respondents who seek to dispute any part of a payment claim. The payment schedule must be in writing, and, if the respondent seeks to certify less than the claimed amount, it must identify the amount to be paid and the reasons for disputing the amounts within the payment claim.

While not mandatory, if a respondent fails to provide a payment schedule within 15 business days of receiving a payment claim, it will become liable to pay the claimed amount on the date for payment and will be barred from providing a response to any future adjudication application (subject to the further opportunity addressed below).

Adjudicating Claims

If a respondent provides a payment schedule, but has not paid the claimed amount in full or the certified amount is less than the claimed amount:

- The claimant may make an application for adjudication within 20 business days of becoming entitled to make the application
- The respondent will have 10 business days to provide a response, which is limited to the reasons provided in its payment schedule
- The adjudicator must provide a determination within 10 business days of receiving the response

If a respondent does not provide a payment schedule and has not paid the claimed amount in full by the date of payment:

- The claimant must, if the claimant wishes to adjudicate, within 20 business days of the date for payment, provide the respondent with a written notice of their intention to adjudicate
- The respondent then has a "second chance" to provide a payment schedule within five business days of receipt of the notice (if the respondent fails to provide a payment schedule within the additional time, it will be unable to file a response in any subsequent adjudication)
- The claimant may make an application for adjudication, which must be within a further 20 business days
- The adjudicator must provide a determination within 10 business days of the response, or within 10 business days of their appointment if the respondent is not entitled to give a response

Given the significant consequences of failing to provide a timely payment schedule, or providing a schedule that does not adequately identify the respondent's reasons for withholding sums, we anticipate that parties receiving a payment claim will engage substantial resources, sometimes including legal advice, at the payment schedule stage. This is to ensure that they will not be precluded from substantiating their case should the matter proceed to adjudication or court proceedings.

Although this may result in increased costs for a respondent, it is important to make the distinction between reasons and evidence. That is, a respondent only has to provide the essence of its reasons for withholding payment (including set-offs, e.g. for liquidated damages) and not a fully particularised evidentiary response. It will then be up to an adjudicator to determine whether the reasons provided in an adjudication response were sufficiently present in a payment schedule. An adjudicator's failure to consider reasons present in the payment schedule, or, alternatively, the consideration of reasons not present in the payment schedule, may result in a jurisdictional error.

Importantly for potential respondents, the SOP Act does not allow respondents to raise, in an adjudication, reasons for non-payment that are outside the payment schedule (similarly, claimants will be unable to raise new issues in an adjudication application that were not raised in the payment claim). This prohibition extends to jurisdictional arguments, although we note that even in the absence of an adjudication response, an adjudicator must still satisfy themselves that they have jurisdiction to determine the application. As well, the SOP Act does not afford adjudicators the discretion to consider late adjudication responses.

Claimants, on the other hand, should be aware of the overhaul in the adjudication process, and the subsequent reduction in time from 90 business days to 20 business days for bringing an adjudication application.

Recourse to the Courts

If a claimant makes a payment claim and the respondent does not pay the claimed or payment schedule amount in full, on or before the date for payment, the claimant may, as an alternative to seeking adjudication, recover the unpaid portion as a debt due in a court of competent jurisdiction. While claimants will need to consider the likely length of time required to obtain a court judgment in deciding whether to adjudicate or take the matter to court, East Coast experience is that most claimants will seek summary judgment in a court rather than run the risk of an unsuccessful adjudication application.

Adjudication Review

The SOP Act replaces the claimant's right of review to the State Administrative Tribunals under the CCA with a limited right of review by a senior adjudicator for certain types of determinations. The parties will only have recourse to this adjudication review process in circumstances where:

- The adjudicated amount is less than the claimed amount and the difference exceeds the minimum amount prescribed by the regulations
- The adjudicator determined that they did not have jurisdiction to determine the application and the claimed amount exceeds the minimum amount prescribed by the regulations

- The respondent has provided a payment schedule and an adjudication response and the adjudicated amount is more than the schedule amount, and the amount of that difference exceeds the minimum amount prescribed in the regulations

Any review application must be made within five business days after receipt of the adjudicator's determination and will be treated as an adjudication application anew. The respondent will then have 10 business days to respond to the review application, with a determination on the review application to be made within 10 business days of the response.

Parties relying on immediate cash flow should be aware that an adjudicated amount in dispute must be paid into a trust account before the respondent can make an adjudication review application.

Mining Exemption Narrowed

The "mining exemption", previously unique to WA under the CCA, namely, the "fabricating, or assembling items of plant used for extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance", will no longer apply. Given WA's reliance on the energy and natural resources industry, we anticipate this will result in more payment disputes, previously precluded from the ambit of the CCA, being adjudicated.

Unfair Time-based Notices

Adjudicators (including review adjudicators), the court and arbitrators can now declare a time-based notice provision within a construction contract to be unfair. A notice-based time bar provision of a construction contract will be declared unfair and of no effect if compliance with the provision in that particular case is not reasonably possible or would be unreasonably onerous. We anticipate that the application of this provision will be contentious given its uncertainty in any given circumstance and the considerable scope for a value judgment.

Retention to Be Held on Trust

In order to better protect contractors and subcontractors further down the contracting chain, the SOP Act introduces a trust scheme, which requires that cash retention and security be held on trust by the party to the contract who retains the security.

The retention money trust must be established within 10 business days after the parties enter into the construction contract, and once in place, parties will have limited recourse to draw upon the trust amount. Failure to comply with these requirements is an offence under the SOP Act, and could result in a significant fine.

Businesses will need to educate themselves on the strict requirements of trust management and accounting. This additional cost and administrative burden will be at the trustee's expense.

Other Considerations

- The Building Commission and Building Services Board now have broader powers to prevent entities (including their officers) with a history of insolvency, not paying adjudication debts or engaging in “phoenixing” from registering as a building contractor. As a result, entities and their officers may be required to show cause as to why they should be registered to perform construction works.
- Parties to adjudication are not entitled to claim their legal costs incurred in the adjudication.
- Previously, without express words to the contrary, the payment provisions of a construction contract did not survive termination. However, the SOP Act now prescribes that a payment claim may be made after the date of termination of the construction contract.
- Parties may only make a single adjudication application for each payment claim. On that basis, the SOP Act will further align Western Australia with the East Coast Model in respect of adjudication estoppel.

Key Takeaways

Some of the key takeaways are:

- The SOP Act has introduced a statutory payment regime that drastically alters parties’ rights to make payment claims and respond to payment claims, and the timeframes for doing both.
- Parties should review their construction contracts that will be governed by the SOP Act for compliance with the new regime and consider:
 - Whether changes to payment and notice protocols are needed
 - Whether amendments are required to ensure responses to payment claims meet the requirements of a payment schedule under the new Act
 - If other contractual risk management strategies should be included in their contracts.
- Respondents to payment claims must provide claimants with a payment schedule identifying their reasons for withholding part or all of a claimed amount, and they will be limited to those reasons in any adjudication.
- The SOP Act has further narrowed the exceptions to the extent that considerably more types of construction work will fall within the ambit of security of payment legislation.
- Time-based notices may be found to be unfair and of no effect if they are unreasonably onerous or not possible to comply with.
- Cash retention and security in the vast majority of construction contracts are required to be held on trust. Failure to comply with this requirement will result in significant fines and penalties.

If you would like further information on how the SOP Act may affect your business or industry, please contact a member of our team.

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