

# WESTERN AUSTRALIA SET FOR COMMENCEMENT OF NEW PROGRESS PAYMENT REGIME UNDER THE BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) ACT 2021 (WA)

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## Australia Real Estate and Construction Alert

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Commencing from 1 August 2022, Western Australia will adopt a new statutory progress payment regime under the *Building and Construction Industry (Security of Payment Act) 2021 (WA)* (WA SOP Act).

The WA SOP Act will change the statutory progress payment regime in Western Australia to adopt a model more similar to those in other States. It will be important for those involved in contract administration to ensure that they are familiar with the changes and update their systems and processes accordingly. In particular, failure to comply with the requirements relating to payment schedules, which must be provided within time if a respondent wishes to dispute a claim, can have serious consequences on projects.

Some key takeaways:

- The new regime is mandatory and cannot be excluded by contract. It applies to construction contracts entered into on or after 1 August 2022.
- The WA SOP Act will apply to a wider range of mining activities than the previous regime under the *Construction Contracts Act 2004 (WA)* (CCA).
- The WA SOP Act creates a statutory entitlement to a progress payment with a right to make a payment claim under the Act once per month.
- A party receiving a payment claim will need to provide a payment schedule within 15 business days (or earlier if required by the contract) if it wishes to dispute the claim.
- Failure to provide a valid payment schedule within time gives rise to a statutory debt for the entire claimed amount.
- Adjudication timeframes are shorter than under the CCA.
- Those responding to an adjudication application will only be entitled to raise reasons for withholding payment that are raised in the payment schedule.
- A review adjudication process is available under the WA SOP Act.
- Adjudication determinations give rise to a right to an interim payment which can be enforced through the Courts.

The new security of payment provisions of the WA SOP Act apply to construction contracts entered into from 1 August 2022. The WA SOP Act will phase out the CCA which will continue to apply to construction contracts entered into prior to 1 August 2022.

The new regime is mandatory and cannot be excluded by contracts. There are strict requirements for responding to claims, with harsh consequences for non-compliance. This alert highlights key features of the progress payment regime as summarised below.

## **APPLICATION OF THE WA SOP ACT AND NARROWING OF MINING EXCLUSION**

The WA SOP Act, similar to the CCA, applies to a range of construction activities, encompassing not only arrangements with contractors and subcontractors, but also to the supply of goods and construction related services.

Additionally, the WA SOP Act applies to a wider scope of construction activities in the oil and gas and mining industries, including downstream processes. In particular, the exclusion under the CCA for *"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"* has not been incorporated into the new legislation.

However, construction work for *"drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not"* and *"constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral or other substance"* will continue to be excluded from the regime under the new WA SOP Act.

The narrowing of the mining exclusion recognises that late payments and cash flow issues are also present in the mining industry. Due to these issues, the policy review leading to the legislative changes recommended that the WA SOP Act have a mining exclusion modelled on the New South Wales security of payment legislation (although the final form in the WA SOP Act exclusion is not exactly the same).

## **PAYMENT CLAIMS**

The WA SOP Act creates a statutory entitlement to a progress payment separate and additional to any entitlement under construction contracts (for construction work or related goods and services).

The WA SOP Act permits a party who does construction work or who supplies related goods and services under a construction contract (claimant) to serve a payment claim on or after the last day of the month or on or after any earlier date provided by the construction contract. There is also a right to serve a payment claim upon termination of the construction contract.

Unlike the CCA, there is no right for the party *receiving* construction work or related goods and services to make a payment claim under a contract (such as a claim for liquidated damages for delay).

To invoke the mechanisms under the WA SOP Act, the payment claim must:

- Be in writing;
- Indicate the amount of the progress payment claimed;
- Describe the items and quantities of construction work or related goods and services to which the payment relates; and

- State that it is made under the WA SOP Act.

A payment claim can take a variety of forms, including invoices provided as payment claims. There is no prescribed form under the current regulations.

Payment claims may also include claims for the release of performance security, about which a determination can be sought in an adjudication.

## **PAYMENT SCHEDULE**

Under the WA SOP Act, a party that receives a payment claim (respondent) may respond to a payment claim by providing a payment schedule within 15 business days of receipt of the payment claim or any lesser time prescribed by the construction contract.

There are no extensions of time and the consequences of failure to provide a valid payment schedule within time are significant.

For a payment schedule to be valid, it must be in writing, identify the payment claim to which it relates and indicate the amount of payment (or no payment) that the respondent proposes to make (the "scheduled amount"). If the scheduled amount is less than the claimed amount, the payment schedule must indicate reasons why the amount is less and why the respondent is withholding payment.

There is presently no prescribed form for payment schedules.

## **CONSEQUENCES OF FAILURE TO PROVIDE ADEQUATE PAYMENT SCHEDULE**

If the respondent does not provide a payment schedule within time, the full amount of the payment claim becomes a statutory debt and the claimant is entitled to payment in full. There are no exceptions, even if the respondent has genuine reasons for withholding payment or why it failed to provide a payment schedule (which could include oversights or administrative errors).

If a payment schedule is not provided and payment is not made, the claimant may:

- Suspend the works or the supply of related goods and services; and
- Either:
  - commence legal proceedings in a Court to recover the statutory debt; or
  - proceed to adjudication upon giving the requisite notice.

If legal proceedings are commenced, the respondent is not entitled to raise any defence or cross-claim in relation to matters arising under the construction contract. For example, a respondent cannot defend the proceedings on the basis that not all of the works for which payment is claimed were actually carried out or that it is entitled to set off costs for rectification of defects, liquidated damages or other amounts

A respondent must also ensure that it includes all reasons for withholding payment in its payment schedule. If it does not include a reason for withholding payment, it will not be entitled to raise that reason in any subsequent adjudication.

## ADJUDICATION

Under the CCA, any party could apply for adjudication where there was a payment dispute (that is, where a payment claim was disputed or not paid in full). Under the WA SOP Act, only a claimant may apply for adjudication of a payment claim if:

- There is no valid payment schedule and the claimed amount has not been paid;
- There is a valid payment schedule and:
  - The scheduled amount (if any) is not paid; or
  - The scheduled amount is less than the claimed amount.

There are strict time requirements for making an adjudication application under the WA SOP Act, which are much shorter than the time allowed for an adjudication under the CCA.

The claimant will have 20 business days to make an adjudication application from the date of receipt of a payment schedule which disputes the claimed amount (compared to the previous 90 business days from when a payment dispute arises under the CCA).

Where there is no payment schedule the claimant may not make an adjudication application unless, within 20 business days of the due date for payment, it gives notice of its intention to apply for an adjudication. The respondent will have a second opportunity to submit a payment schedule within five business days of receipt of the notice.

A respondent may only submit a response to the adjudication application if it has given the claimant a payment schedule within time. If entitled to do so, the respondent has 10 business days to provide an adjudication response from the date when the application is received by the respondent (the same time as under the CCA). As noted above, any reasons for withholding payment not provided in the payment schedule, cannot be raised in the adjudication response.

The adjudicator also has powers to request further submissions and set deadlines for those submissions, call conferences of the parties, arrange inspections and tests (with consent of the occupier of the premises) and appoint an expert to investigate and report on any matter to which the payment claims relates (unless all parties object).

If an adjudication response is provided, the adjudicator is required to issue a determination within 10 business days or by an extended time agreed to by the claimant and respondent provided the total extension does not exceed 20 business days (although noting an adjudicator's determination is not invalid merely because it was not made within this time).

Given the short timeframes, parties should seek advice early where payment claims are disputed in order to prepare for potential adjudication.

## REVIEW ADJUDICATION

The WA SOP Act provides a process where an application for review can be made. The circumstances where applications may be made for adjudication review are prescribed by the Act and regulations for claimants and respondents respectively (with differing limitations on applying for review of the adjudication between the two).

The application must be made within five business days after the applicant received the adjudication determination. The other party may then give a response within 10 business days after receiving a copy of the adjudication review application.

Any reasons not raised in the adjudication cannot be raised in the review adjudication.

## **CONSEQUENCES OF ADJUDICATION DETERMINATION**

An adjudication determination is a statutory debt entitling the claimant to payment. The respondent must pay the adjudicated amount (or amount determined by a review adjudicator) by the due date. The due date for payment is 20 business days after the payment claim is made for payments from a principal to head contractor and 25 business days for payments to a subcontractor or where there is no head contract and the person undertaking the work is engaged directly by the principal (with the date being determined by the adjudicator).

If payment is not made, the claimant may enforce the determination as a monetary judgment through the Courts (with the judgment being an interim debt payable "on account" as described below).

Additionally, where payment is not made and there is no review application, the claimant may suspend the work or supply upon providing two business days' written notice of its intention to suspend under the Act.

## **INTERIM PAYMENTS**

Any amounts required to be paid under the WA SOP Act are payments "on account" and subject to any later final determination of the parties' rights under the construction contract. This means that while payment of the statutory debt must be made by the respondent, it can later seek to recover the amount paid through litigation, arbitration or other mechanisms (if applicable under the contract) if the claimant's entitlement to those amounts under the construction contract is disputed.

This may not provide comfort to all respondents given that it can be months or years to obtain a final determination of the parties' rights through these processes. It is important for respondents to be vigilant in compliance with time frames for payment schedules and adjudication responses.

## **OTHER PROVISIONS**

The WA SOP Act also contains other provisions directed at facilitating cash flow and protecting those further down the "contractual chain" in the construction industry, which are not addressed in this publication. This includes provisions concerning the form and content of construction contracts, unfair time bars, recourse to performance security, prohibitions on threatening or intimidating behaviour and a retention money trust scheme (not all of which come into effect on 1 August 2022).

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