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Resolving Building and Construction Disputes

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Adjudicate Today response to the exposure draft of the Building and Construction Industry Security of Payment Amendment Bill 2018

We commend and thank the NSW Government for these initiatives towards reform of the Building and Construction Industry Security of Payment Act (SOPA). This opportunity to comment on the draft Bill (the Bill) is appreciated.

In this response, we adopt the numbering convention of the Bill. Where there is no comment on a numbered section, we agree and endorse the Bill's provision.

General Comment: The Bill does not contain transitional provisions. There are many changes to timeframes in the Bill (including reference dates, due date for payment, time for an adjudicator to make a determination). Industry parties and adjudicators must have certainty. We propose timeframe amendments apply only to new contracts made after the commencement of the Act.

[3] **Section 8 Rights to progress payments**

Sections (2) (b) and (3) (b)

Absence of the term 'related' before 'goods and services' is assumed a stylistic drafting preference.

The Murray review recommends that the term "reference date" be abandoned and the legislation provide that a person who has undertaken to carry out construction work (or who has undertaken to supply related goods and services) under a construction contract is able to make a payment claim for every named month, or more frequently if so provided under the contract (Recommendation 14).

We endorse this recommendation as we endorse the Murray recommendations 15, 16 and 17 which are also applicable to this issue.

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Confusion between parties over applicable reference dates is one of the most common queries to our staff. Numerous applications have not proceeded to determination, or been struck down by a court, because of reference date confusion. And yet, and as the Murray review recommends, reference dates are not necessary to the successful operation of SOPA. The Murray recommendations are simple and will result in less confusion and less applications not proceeding due to technical error.

Both sections (2) (b) and (3) (b) limit the creation of a reference date to a period in a named month in which the work is carried out or the goods and services are provided. SOPA does not limit the creation of a reference date to a named month in which the work is carried out or the goods and services are provided.

Section 13 (5) of SOPA provides a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract. If, as proposed by the Bill, a reference date is limited to a named month in which the work is carried out or the goods and services are provided, new reference dates after the reference date on completion of work or services provided cannot be created.

As there can only be one payment claim in respect of each reference date, the amendment frustrates the intention of Section 13 (4) of SOPA which allows payment claims to be made within a period of at least 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied).

The amendment to the reference date prevents the making of more than one payment claim after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied). Surely the Department does not intend to place such a restriction on the capacity of a claimant to make a payment claim? Subcontractors will be most unhappy. The amendment results in an unintended consequence. In a practical sense, many mid-size projects, and of course larger projects, following completion are subject to a reconciliation of all accounts. Additionally, often the potential claimant may be awaiting invoices for work. This process may cause the issue of a payment claim during what is usually the defect liability period and not the month in which work has been undertaken. As we understand the current draft, such payment claims would be excluded and invalid for want of a reference date.

This unintended consequence provides an immediate illustration of the confusion reigning over reference dates and their ever-increasing complexity. Industry parties have little chance of keeping abreast of these complexities. The Murray review recommendation to abandon the term reference date should be implemented now and not left for a later time.

Continuing use of the term reference date is totally unnecessary for the success of the Act and is a major contributor for otherwise valid adjudication applications being voided through technical error. However, should government continue with reference dates, as expressed in the Bill, we make these recommendations to amend sections (2) (b), (3) (b) and sections 4, 5 and 6.

Amend sections (2) (b) and (3) (b) by

a) deletion of the words: '*in which the work is carried out or the goods and services are supplied';* and

b) insertion of the word 'related' before 'goods and services'.

Section (4)

In relation to a single or one-off payment, omit 'immediately following the day"' so it will read:

> 'The **reference date**, in the case of a single or one-off payment, is the day on which the construction work was last carried out, or the related goods and services were last supplied, under the contract.'

Reason: In the majority of cases, a single or one-off payment is made at the conclusion of a small contract and the tradesperson will leave his invoice (payment claim) with the contractor when leaving the job. e.g. Adjudicate Today contracts with the air conditioning mechanic to clean our system. The tradesman will leave his invoice with us when departing the job. As drafted, and without the amendment, many payment claims will be rendered invalid. Additionally, as noted above, should that occur toward the end of the month, a real argument exists as to the validity of a claim for payment issued early in the following month as no reference date would be created as no work would have been undertaken in that named month.

As drafted, the same unintended consequence as identified in Sections (2) (b) and 3 (b) is created. Only one reference date is available under the amendment while SOPA permits them at least monthly for at least 12 months after construction work was last carried out or related goods and services supplied.

Section (5)

Omit 'immediately following the day'.

Reason: Consistency with Section (4) above.

As drafted, the same unintended consequence as identified in Sections (2) (b), 3 (b) and (4) is created. Only one reference date is available under the amendment while SOPA permits them at least monthly for at least 12 months after construction work was last carried out or related goods and services supplied.

Section (6)

Omit 'immediately following the day'.

Reason: Consistency with Sections (4) and (5) above.

We take this opportunity of reiterating our serious concern with the exposure draft's proposal to not only retain the term 'reference date' but create new definitions for it. We do not wish our comments about the practical problems and unintended consequences of the wording (above) to be mistaken as support for the proposal.

We currently have confusion and multiple judicial interpretations across jurisdictions. Increasing the capacity for argument and uncertainty by unnecessarily enlarging the scope of the term 'reference date' creates the perfect scenario for industry participant nightmare, lawyer's paradise and many more invalid adjudication applications.

[4] **Section 11 Due date for payment and**

[5] **Section 11 (1B) (a)**

Murray recommendation 19 provides:

"The legislation should provide that the due date for when a progress payment is to be paid is:

a) the date provided for under the terms of the contract, subject to the payment term not exceeding 25 business days after the payment claim has been made, or

b) if the contract makes no express provision with respect to the matter, 10 business days after the payment claim has been made."

We believe the Murray approach is simpler, provides better ability for the parties to maintain flexibility of their contract and ensures that, in the absence of contractual provision, the default previously in the SOPA is inserted.

Regardless, Adjudicate Today strongly supports the previous 10 business day default being reinstated. In the absence of the default, the parties may dispute the nature of their contractual relationship. Given time elapsed from the due date for payment triggers the commencement of times for the claimant's right to:

a) serve a section 17(2) notice,
b) commence an adjudication application; and
c) suspend work on giving 2 business days' notice

it is essential that the due date for payment is identified with certainty. The absence of a statutory maximum timeframe creates uncertainty as to which duration starts to engage section 34[1]. Mr Murray has proposed an appropriate maximum payment term. That maximum term is also reflected in sections 67U and 67W of the Queensland Building and Construction Commission Act.

Section 13 (2) (c)

We strongly endorse reinserting the statement that a payment claim must state that it is a payment claim under the Act to commence adjudication proceedings (the endorsement).

The endorsement was removed because the Collins Inquiry was concerned that this requirement had led to under utilisation of the Act by subcontractors because of fear of possible intimidation.

Reinserting the provision does not address the issue of possible intimidation and will be viewed by some as removing an impediment to intimidation. The removal was, in any event, ineffective as the requirement to identify the Act remained for the purposes of section 17(2).

The South Australian Government has legislated to make it an offence to directly or indirectly assault, threaten or intimidate, or attempt to assault, threaten or intimidate, a person in relation to an entitlement to, or claim for, a progress payment under its Act [Section 32A].

[1] See for example The Minister for Commerce (formerly Public Works & Services) v. Contrax Plumbing (NSW) Pty. Ltd. & Ors. [2005] NSWCA 142, where entitlement to payment by operation of a dispute resolution clause was found to offend section 34.

The Senate Economic Reference Refer Committee recommended it be made a criminal offence to intimidate subcontractors from exercising their statutory rights. The Murray review at recommendation 76 says:

> "The legislation should make it an offence to use coercive and threatening conduct, whether directly or indirectly, in relation to a person's statutory rights to, or claim for, a progress payment under the legislation.
>
> Section 32A of the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) provides a suitable model."

Inclusion of a similar provision is suitable given the introduction of penalties for infringement and development of the investigative powers in the draft legislation.

Further we have endorsed the Government's proposal, at **[6] Section 12A Trust account requirements for retention money,** to permit a subcontractor to inspect retention trust account records and note, in relation to statutory trusts, a right for subcontractors to inspect trust account records.

Conferring these important rights on subcontractors broadens the potential areas which may trigger intimidation or coercive or threatening conduct.

Given reinsertion of the endorsement, we recommend government implement the Murray review recommendation 76 immediately.

[14] **Section 17A**

Providing a claimant with an unfettered right to withdraw an adjudication application is not supported. This provision will:

a) Encourage a claimant to submit an adjudication application to an ANA and, if it is not happy with the adjudicator, withdraw and resubmit to the same or another ANA in order to receive a different adjudicator. Permitting the practice of "adjudicator shopping" is most unfair on respondents who will have spent considerable resources in preparing their adjudication response.

b) The provision would also encourage 'fishing expeditions' as the respondent is compelled to provide all arguments and evidence to overcome a claim in its adjudication response which would then allow the claimant to withdraw the adjudication application and press its new adjudication application on a different basis.

c) Leave the respondent statutorily responsible for 50% of the adjudication fees incurred, as there will be no adjudication determination to apportion the fees.

A plaintiff in court must receive the consent of the defendant or the court to discontinue proceedings. Generally, the plaintiff will be responsible for 100% of the costs. There appears little benefit in providing a different process for adjudication. We propose the amendment provide that a claimant and respondent may, upon payment of any adjudication costs incurred to date, jointly agree to withdraw an adjudication application and, unless agreed differently with the respondent, the claimant be responsible for 100% of adjudication fees.

[19] **Section 22 Adjudicator's determination**

The amendment means that service by a claimant on a respondent of an adjudication determination will have no effect. Service on respondents can be most difficult, particularly if they don't want to be served and actively avoid service to not meet an obligation to pay an adjudicated amount. The amendment places an unnecessary burden on adjudicators and, in the absence of a capacity to serve, will result in great financial hardship for claimants. The likely consequence is that the determination will be of no effect until such service is achieved. Further, that obligation is assigned to the adjudicator, who may be resident in Newcastle while the parties may be in Wagga Wagga. To effect service, particularly on a recalcitrant respondent, the adjudicator may need to engage a process server. This event which could not be reasonably anticipated at the time of the issue of the fees notice.

We consider the amendment is unnecessary. However, if government proceeds, we propose the words 'unless the parties request otherwise' be added, so it will read:

(c) 'unless the parties request otherwise, be served by the adjudicator on the claimant and the respondent'.

Reason: From time to time parties, particularly in large matters, request issuance of the adjudication determination be deferred pending the outcome of continuing settlement negotiations. Release of a determination during settlement negotiations will obviously prejudice the outcome of the negotiations. Commonly, in such circumstances and where an agreement is reached, the parties request the file be sealed and the determination not be released. The proposed amendment, without our proposed qualification, will prevent this perfectly reasonable practice.

[22] **Section 26B Obligation of principal contractor to retain money owed to respondent**

There is a huge omission in subsection 26B (3) of SOPA. That section states:

'(3) The obligation to retain money under this section remains in force only until whichever of the following happens first:

(a) the adjudication application for the payment claim is withdrawn,

(b) the respondent pays to the claimant the amount claimed to be due under the payment claim,

(c) the claimant serves a notice of claim on the principal contractor for the purposes of section 6 of the Contractors Debts Act 1997 in respect of the payment claim,

(d) a period of 20 business days elapses after a copy of the adjudicator's determination of the adjudication application is served on the principal contractor.'

The section requires that a principal contractor retain money unless one of the circumstances described arise. However, another real-life circumstances may arise for which the section makes no provision.

Where an adjudication application is timed out by the adjudicator (perhaps through lack of jurisdiction to proceed or for personal reasons) and the claimant does not withdraw the adjudication application, the principal contractor is not permitted by the section to pay the withheld money and the contractor (respondent) suffers significant financial loss.

The Office of Fair Trading is currently dealing with one such example.

A possible solution would be to add a new 26B (3)(e) as follows:

> *(e) a period of 10 business days elapses after a copy of the adjudicator's notice to the parties that no determination has been made."*

We recommend this opportunity be taken to remedy the omission. The 10 business day period allows for the current interpretation of section 26 (2) to be applied and for a claimant to elect to withdraw its adjudication application and make a new application.

[30] **Sections 32A and 32B**

Section 32A (1) (b) allows a court to make an order remitting a matter to the adjudicator for redetermination, in whole or in part, in accordance with any directions of the court.

We note that Murray does not recommend remittal and courts will generally be reluctant to remit. Refer Murray at Chapter 13.10. Our preference is not to empower remittal. If a determination is found to be incorrect in a minor matter which does not affect the validity of the remainder of the determination, that part should be able to be excised. If the court finds a jurisdictional fact has not been present and the application declared void, remittal would serve no purpose.

However, if the view of the Department is that remittal is an essential tool for the Supreme Court, noting it has not been used in NSW in 20 years and has been the subject of adverse judicial comment[2], provision must be made for an adjudication process which answers these questions:

1. Should remittance go to the same adjudicator or the ANA responsible for the nomination? When a court remits, it remits to the court not the judge who made the original decision. That judge may be unavailable through leave, sickness, commitment to another matter or retirement. The same applies to the adjudicator. Additionally, the matters being remitted may involve complex argument or matters of law for which the original adjudicator may be poorly equipped. The adjudicator may have been a party to the original court application and may be perceived to be conflicted. It would better serve the interest of the parties for the matter to be remitted to the original nominating ANA which has the option of nominating a more senior and potentially legally qualified adjudicator to redetermine the matter.

2. May the parties make submissions to the adjudicator on the matter being remitted? If so, there needs to be an obligation for the parties to serve those submissions on each other.

3. What are the time frames for the claimant and respondent submissions in the instance point 2 above is affirmative?

4. What is the timeframe for the adjudicator's redetermination?

5. Can a remitted determination be subject of an adjudication certificate?

6. Who pays the fees of the adjudicator and ANA?

7. Can the new determination be withheld until the fees are paid?

[2] Richard Crookes Constructions Pty Ltd v CES Projects (Aust) Pty Ltd [2016] NSWSC 1119

These process questions are answered by the Bill providing that a court remittal is for all purposes a new adjudication application, as provided by section 17 (3) of SOPA. Therefore, the timeframes for the referral of the adjudication application to an adjudicator, time for an adjudication response and time for making the redetermination, would follow the same timeframes as currently stipulated in SOPA for the originating adjudication application. The adjudicator would be able to seek an extension of time from the parties to make his/her determination.

This approach does not address the time in which the claimant should provide its adjudication application submission to the adjudicator and respondent in compliance with the court remittal.

Currently, s.26 (3) requires the claimant to make a new adjudication application within 5 business days from when it becomes entitled to withdraw its adjudication application. However additional time should be allowed in which to digest and understand the court remittal orders.

We recommend the claimant be allowed 10 business days from the date of the delivery of the court judgment within which to prepare and submit its revised adjudication submission. The respondent should not have to wait an inordinate amount of time to have the matter redetermined and finalised.

32B Application of Part to a claimant in liquidation

Section 32B (2) needs to provide for payment of the adjudication fees to the day on which the corporation is placed in liquidation. We note that government has released a separate consultation paper on a proposal for "deemed" statutory trusts. Adjudicate Today will make a separate submission regarding this paper.

We would also encourage government to bring forward consideration of the Murray review Chapter 16 'Unfair contract terms' and resultant recommendation 84:

> 'The legislation should void a contractual term that purports to make a right to claim or receive payment, or a right to claim an extension of time, conditional upon giving notice where compliance with the notice requirements would:
>
> a) not be reasonably possible; or
> b) be reasonably unreasonably onerous; or
> c) serve no commercial purpose.'

We consider the issues raised by Mr Murray are pressing and should not be left for another time.

Finally, we comment on some questions proposed by government at the industry roundtable on 18th July 2017 and which are omitted from the consultation paper.

a) Facilitating electronic transfer of documents

Recent changes to the SOPA regarding email and fax submissions are supported. However, we consider further amendments are desirable.

In Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd [2017] NSWSC 194 (7th March 2017), the NSW Supreme Court decided that the standalone delivery of a USB stick does not constitute valid service under the SOPA.

More parties are making use of 'Drop Box' file facilities. There is scope for legal uncertainty, particularly as to time of receipt, when the 'Drop Box' being utilised is in the public domain and not owned and fully controlled by the recipient of the files. Adjudicate Today went to huge time and expense to write software for our 'Lockbox' which we own and control to avoid this uncertainty. Given the strict timeframes of the SOPA, we wished to ensure that the time of receipt was when the files where accepted into our server and not at some later date when opened by our staff.

The details of our Lockbox are described at www.adjudicate.com.au – click on bottom of the page under 'Resources'. While we are confident with our system, we are not so certain in relation to the practices of other ANAs and the new system under consideration by the Queensland Adjudication Registry.

We recommend the use of USB and 'Drop Box' facilities for the transfer of electronic files be specifically recognised by the SOPA and the time of receipt be defined as the time either the USB was physically delivered or electronic transmission of the file (whether by email or "Drop Box") was competed, whichever appropriate.

b) Removing the owner occupier (owner builder) exemption

We support this proposal. If an owner builder is going to act like a building professional and reap the rewards of being 'the builder', the subcontractors that work on the project should have the same protection and access to the Act as if they were working for a 'builder'.

Some other States do not have this exemption and Adjudicate Today has not encountered the problems that may be thought could arise.

However, the matter should be taken further. The Murray review in recommendations 12 and 13 proposes that the legislation apply to the residential housing sector so as to enable a residential contractor/builder to make a progress payment claim against an owner-occupier.

At the industry round table on 12th September 2018, these recommendations were briefly discussed. There was no opposition – a rare unanimity within the industry.

We support extension of SOPA to the residential sector for the reasons detailed by the Murray review at Section 10.3.

c) Requirement copies of supporting statements served on the principal to be served on subcontractors as well

We consider this an excellent "fresh" idea designed to ensure subcontractors are notified when the contractor advises they have been paid. However, without an effective enforcement regime, it will be ignored by many industry participants.

Adjudicate Today recommends the scheme operates along the following lines. Where:

i) an invoice is issued, (note that we are deliberately not using the term "payment claim"), and the invoice has not been paid in full by the due date of payment, either under the Act or the contractual provision, whichever appropriate; and

ii) no payment schedule or written explanation has been provided to the claimant; and

iii) the contractor has made a supporting statement that a subcontractor has been paid which the subcontractor believes to be incorrect;

a new right to make an application for adjudication by a subcontractor is created.

The application should be made to an ANA, with copy to the respondent, within 10 business days of the claimant's receipt of the supporting statement. There is no need for the claimant to provide an equivalent to the section 17(2) notice. The respondent will have the opportunity of providing an adjudication response which together with other adjudication processes, including the application for any applicable adjudication certificate, will be as provided by SOPA.

The adjudicator must firstly determine whether the supporting statement was correctly or incorrectly made.

If:

i) the supporting statement is determined to be correctly made, the application for adjudication is invalid. However, nothing would prevent a further adjudication application being made under existing provisions.

ii) the supporting statement is determined to be incorrectly made, the application for adjudication is valid and can proceed.

iii) Any adjudication determination under this new right must be provided to such authority as specified by Government within three business days of it being provided to the parties.

Our proposal enlivens the enforcement of incorrect supporting statements, allows government grounds on which to consider prosecution of repeat offenders and creates a new ground on which an application for adjudication may be founded. We submit that this approach provides effective enforcement and allows government to decide whether to prosecute at minimal cost to the taxpayer.

Adjudicate Today is available to discuss these and any related issues with government.

Yours sincerely

Bob Gaussen
Owner