

Security of Payment Reform

Murray Review: Have Your Say

Below is a summary document outlining the 86 recommendations of the Murray Review into National security of payment legislation.

Please send your feedback to <mailto:policyandprojects@ccfnsw.com> by COB on 13 June 2018.

#	Recommendation	Agree	Disagree	Unsure	Comment
1	Security of payment legislation should seek to promote prompt payment so as to maintain a contractor's cash flow. Such an outcome is more effectively achieved through adoption of a legislative regime broadly based on the East Coast Model.	✓			
2	The legislation should be drafted and structured as simply as possible and not provide for a two-tier / composite system of 'complex' and 'standard' claims, as is the case under the Queensland legislation. However, the legislation should enable a respondent, in appropriate circumstances, to make a request to the adjudicator for additional time to respond to a claimant's adjudication application.	✓			<p>The value of a claim is no indication of its technical or legal complexity. We suggest the legislation list the factors guiding the exercise of the adjudicator's discretion (for example, (a) the volume and complexity of material in support of the adjudication application</p> <p>(b) the number and technical complexity of the assertions made in the adjudication application or payment schedule</p> <p>(c) the extent of the investigation needed to establish or disprove those assertions</p> <p>(d) whether expert opinion will assist the adjudicator in the determination of the claim</p> <p>(d) any delay in bringing the payment claim or adjudication application</p> <p>(e) whether the additional time causes disproportionate hardship to either party</p> <p>(f) any factor that the adjudicator thinks appropriate)</p>

Security of Payment Reform

Murray Review: Have Your Say

3	<p>The objects of the legislation should be to provide a party who has undertaken construction work (or supplied related goods and services) under a construction contract with:</p> <ul style="list-style-type: none"> a) a statutory right to progress payments for that work (or for the supply of related goods and services), and b) a procedure whereby they can enforce their statutory right to progress payments. <p>The 'object' provision set out in Section 3 of the <i>Building and Construction Industry Security of Payment Act 1999</i> (NSW) (the NSW Act) provides a suitable model.</p>	✓			
4	<p>The legislation should include a definition of 'construction work', which should be drafted in the broadest terms.</p> <p>The definition of 'construction work' in section 5 of the NSW Act provides a suitable model.</p>	✓			
5	<p>The legislation should include the definition of 'related goods and services', which should be drafted in the broadest terms.</p> <p>The definition of 'related goods and services' in section 6 of the NSW Act provides a suitable model.</p>	✓			
6	<p>The legislation should include a definition of 'construction contract' which is drafted in broad terms.</p> <p>The definition of 'construction contract' in section 4 of the NSW Act provides a suitable model.</p>	✓			

Security of Payment Reform

Murray Review: Have Your Say

7	<p>The definition of ‘construction contract’ should also clarify that a claimant contractor who undertakes to carry out construction work under a ‘construction contract’ must hold the requisite licence to carry out such construction work.</p>	✓		✓	There are other substantial penalties prescribed by legislation for unlicensed building work.
8	<p>The legislation should include a definition of ‘business day’ which excludes:</p> <ul style="list-style-type: none"> a) Saturday and Sunday b) public holidays, and c) the period between 22 December and 10 January inclusive. <p>The definition of ‘business day’ as set out in section 4 of the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) provides a suitable model.</p>	✓			
9	<p>The legislation should apply to any construction contract, whether written or oral, or partly both, but should not include construction contracts that form part of a loan agreement, a contract of guarantee or a contract of insurance or where the work is to be undertaken by an employee of the party for which the work is being done.</p> <p>The ‘application’ provision in section 7 of the NSW Act provides a suitable model, other than the exception set out in section 7(2)(b) should not be included.</p>	✓			Contracts that form part of lease of land (such as a covenant to build improvements or to repair) also be excluded.
10	<p>The legislation should not apply to a claimant corporation in liquidation.</p>	✓			

Security of Payment Reform

Murray Review: Have Your Say

11	The legislation should not include the carve-out of amounts that a person is entitled to under a construction contract.	✓			An adjudicator should have power to extend time for serving an adjudication response to a complex adjudication application
12	The legislation should apply to the residential housing sector so as to enable a residential contractor/builder to make a progress payment claim against an owner-occupier.	✓			Implementation should be delayed so that the Department of Fair Trading can undertake a public information programme
13	The legislation should prescribe that whenever a residential contractor/builder serves a payment claim on an owner-occupier, the payment claim must include: a) information on how the owner-occupier respondent can reply to the payment claim, and b) the time period within which the reply/payment schedule must be given.	✓			The prescribed notice should also inform the homeowner about the consequences of delay.
14	To avoid confusion within industry the use of the expression 'reference date' should be abandoned. The legislation should 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.		✓		
15	The legislation should include specific provisions dealing with single (one-off)/milestone payments in circumstances where a construction contract makes no express provision in relation to these matters. Section 9(2)(c) of the <i>Building and Construction Industry Security of Payment Act 2002</i> (Vic) (the Victorian Act) provides a suitable model.	✓			
16	The legislation should set out the manner in which the date relating to the making of a final payment claim can be identified.	✓			

Security of Payment Reform

Murray Review: Have Your Say

	Section 9(2)(d) of the Victorian Act provides a suitable model.				
17	<p>The legislation should enable a claimant, where a construction contract has been terminated, to make a payment claim for construction work carried out (or related goods and services supplied) up to the date of termination.</p> <p>Section 67(2) of the Building Industry Fairness (Security of Payment) Bill 2017 (Qld) provides a suitable model.</p>	✓			
18	The legislation should prohibit ‘pay-when-paid’ clauses in construction contracts. Section 12 of the NSW Act provides a suitable model.	✓			
19	<p>The legislation should provide that the due date for when a progress payment is to be paid is:</p> <p>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</p> <p>b) if the contract makes no express provision with respect to the matter, 10 business days after the payment claim has been made.</p>			✓	The proposed 25 business days maximum limit is poorly correlated to the 30-days industry standard.
20	<p>The legislation should provide that the amount of a progress payment is to be calculated:</p> <p>a) in accordance with the terms of the contract, or</p> <p>b) if the contract does not make any such provision, on the basis of an assessment of the value of the construction work carried out, or goods and services provided.</p> <p>Section 9 of the NSW Act provides a suitable model.</p>	✓			

Security of Payment Reform

Murray Review: Have Your Say

21	<p>The legislation should provide that construction work and related goods and services is to be valued:</p> <ul style="list-style-type: none"> a) in accordance with the terms of the contract, or b) if the contract does not make an express provision with respect to the matter, then having regard to: <ul style="list-style-type: none"> (i) the contract price for the work/goods and services (ii) any other rates or prices set out in the contract (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and (iv) if any of the work/goods is defective, the estimated costs of rectifying the defect. <p>Section 10 of the NSW Act provides a suitable model.</p>	✓			
22	<p>The legislation should require a claimant to identify in its payment claim:</p> <ul style="list-style-type: none"> a) the contract (or arrangement) on which the claim is based, and b) a breakdown of the items claimed, including: <ul style="list-style-type: none"> (i) a description of the item (ii) quantification of the item, and (iii) an outline as to how the claimed amount has been assessed <p>Clause 5(2) of the Singaporean <i>Building and Construction Industry Security of Payment Regulations 2006</i> provides a suitable model.</p>	✓			

Security of Payment Reform

Murray Review: Have Your Say

23	<p>The legislation should expressly require a payment claim to:</p> <ul style="list-style-type: none"> a) state that it is a payment claim made under the Act, b) provide the period for which a payment schedule is to be provided, and c) the potential consequences for failing to provide a payment schedule. 	✓			<p>The East Coast Model requires some differentiation between statutory and contractual claims. The 2014 amendment (removing the requirement for the endorsement) was described by McDougal J as “unwise” <i>Kitchen Xchange v Formacon Building Services</i> [2014] NSWSC 1602. However, there remains a strong argument that all payment claims (regardless of form) should attract the protection of the Act.</p>
24	<p>The legislation should require that, unless the construction contract provides for a longer period, a progress payment claim must be made within 6 months after the construction work was last carried out or the related goods and services were supplied.</p>		✓		<p>In our view, 12 months is an appropriate timeframe for lodgement of a claim.</p>
25	<p>The legislation should provide that where a payment claim relates to a final payment (including recovery of retention, or the return of alternative security) the claim must be made:</p> <ul style="list-style-type: none"> a) within the period specified in the construction contract, or b) if the construction contract does not so provide, the later of: <ul style="list-style-type: none"> (i) 28 days after the end of the defects liability period, or (ii) 6 months after completion of all construction work had been carried out or related goods and services were supplied. <p>Sections 17A(3) and (4) of the Queensland Act provide a suitable model.</p>	✓			
26	<p>The legislation should require a payment schedule to identify:</p> <ul style="list-style-type: none"> a) the payment claim to which it relates 	✓			

Security of Payment Reform

Murray Review: Have Your Say

	<p>b) the amount that the respondent proposes to pay (schedule amount), and</p> <p>c) if the schedule amount is less than the claimed amount, the respondent's reasons for withholding payment.</p>				
27	<p>The legislation should provide the Regulator with powers to prescribe:</p> <p>a) the form that a payment schedule must take, and</p> <p>b) additional information requirements.</p>		✓		<p>Substance should prevail over form. The prescription of a form of payment schedule is bureaucratic. A respondent, in framing its payment schedule, should have no less flexibility as the claimant has in drafting its claim.</p>
28	<p>The legislation should require a payment schedule to be served by the respondent on the claimant within the earlier of:</p> <p>a) the time required by the relevant construction contract, or</p> <p>b) 10 business days after the payment claim was served.</p>	✓			
29	<p>The legislation should provide that when a respondent fails to provide a payment schedule within the prescribed timeframe or fails to pay the whole or part of the claimed amount by the due date of payment, the claimant may:</p> <p>a) make an application for adjudication, or</p> <p>b) recover the unpaid portion of the claimed amount as a debt from the courts.</p> <p>Section 15 of the NSW Act provides a suitable model.</p>	✓			
30	<p>The legislation should provide that where a claimant elects to recover the unpaid portion of a claimed amount as a debt from the courts, the respondent is not entitled to:</p> <p>a) bring a cross claim against the claimant, or</p>	✓			

Security of Payment Reform

Murray Review: Have Your Say

	<p>b) raise any defence in relation to matters arising under the construction contract.</p> <p>Section 15 of the NSW Act provides a suitable model.</p>				
31	<p>The legislation should provide that where a respondent has provided a payment schedule within the prescribed time period, but fails to pay the whole or part of the scheduled amount by the due date of payment, the claimant may:</p> <p>a) make an application for adjudication, or</p> <p>b) recover the unpaid portion of the claimed amount as a debt from the courts.</p> <p>Section 16 of the NSW Act provides a suitable model.</p>	✓			
32	<p>The legislation should include a requirement for a ‘supporting statement’ to be included in any payment claims submitted by a head contractor to the principal, and that a copy of the supporting statement be provided to each of the subcontractors whose work has been included in the head contractor’s payment claim.</p>			✓	
33	<p>A ‘supporting statement’ should include a declaration that all subcontractors have been paid the amounts due and payable to them for construction work done.</p> <p>Sections 13(7)–(9) of the NSW Act, and Regulation 19 of the NSW Regulations provide suitable models.</p>			✓	
34	<p>The legislation should provide that making a false or misleading ‘supporting statement’ constitutes an offence.</p>	✓			<p>We are not aware of any prosecution brought in the 4 years since the requirement was legislated.</p>

Security of Payment Reform

Murray Review: Have Your Say

35	<p>The legislation should provide the following timelines for lodging an adjudication application:</p> <p>a) Where the amount set out in the payment schedule is less than the claimed amount, the adjudication application must be lodged within 10 business days after the claimant received the payment schedule, or</p> <p>b) Where the respondent, having provided a payment schedule, has nonetheless failed to pay the whole or part of the scheduled amount by the due date for payment, the adjudication application must be lodged within 20 business days after the due date for payment, or</p> <p>c) Where:</p> <p style="margin-left: 20px;">(i) a respondent has failed to provide a payment schedule, and</p> <p style="margin-left: 20px;">(ii) a respondent has failed to pay the whole or part of the claimed amount, and</p> <p style="margin-left: 20px;">(iii) the claimant has notified the respondent of their intention to apply for adjudication,</p> <p style="margin-left: 20px;">the adjudication application must be lodged within 10 business days after the end of the 5 business day period referred to in the claimant’s notice.</p> <p>Sections 17(3)(c), (d) and (e) of the NSW Act provide suitable models.</p>	✓			
36	<p>The legislation should provide that a function of the Regulator is to appoint adjudicators (whether nominated by the authorised nominating authority, or otherwise) to determine an adjudication application.</p>	✓			

Security of Payment Reform

Murray Review: Have Your Say

37	The legislation should provide for authorised nominating authorities to make nominations of accredited adjudicators to the Regulator for appointment to determine an adjudication application.		✓		It's unnecessarily complicated to apply to an ANA who in turn refers the decision to Regulator
38	The legislation should provide that the parties to a payment dispute may agree on an accredited adjudicator, but such agreement may only be made: <ul style="list-style-type: none"> a) at the time when the dispute arises b) within 2 business days of the claimant serving a notice of adjudication and a copy of the adjudication application on the respondent, and c) where the dispute relates to a payment claim of more than \$250 000. 	✓			
39	The legislation should require a respondent to provide an adjudication response within the later of: <ul style="list-style-type: none"> a) 5 business days after the respondent receives a copy of the claimant's adjudication application, or b) 2 business days after the respondent receives a copy of the adjudicator's acceptance of the claimant's adjudication application. 		✓		In the interests of fairness, a respondent should have at least 10 business days to respond, especially where a claimant has worked up a complex and well-documented claim over a much longer period. By way of comparison, a claimant has up to ten business days to prepare an adjudication application after service of the payment schedule.
40	The legislation should provide that a respondent may make a written application to the adjudicator to request an extension of time of up to 10 business days for giving an adjudication response, subject to that application: <ul style="list-style-type: none"> a) being made within 2 business days of the respondent having received a copy of the claimant's adjudication application, and b) setting out the respondent's reasons for requesting the extension. 		✓		The adjudicator should not be limited in its discretion to allow as much time as is needed in all the circumstances to prepare an adequate adjudication response.

Security of Payment Reform

Murray Review: Have Your Say

41	The legislation should prohibit a respondent from including in its adjudication response any reasons for withholding payment unless those reasons have already been included in a payment schedule provided to the claimant.	✓			Respondents don't have adequate time to take expert advice about complex payment claims. This further limitation exacerbates the inequity of requiring a quick and perhaps ill-considered response to a complex and well-documented claim that may have been worked up of a much longer period.
42	The legislation should provide that the timeframe for an adjudicator to make an adjudication decision is: a) 10 business days after the respondent has lodged an adjudication response, or b) such further time as agreed to by the parties, subject to the total timeframe for the adjudicator to make a decision being not more than 30 business days.	✓			
43	The legislation should provide that a party to an adjudication is entitled to make an application to the Regulator for a review of an adjudication decision if: a) the adjudicated amount is: (i) equal to or greater than \$100 000 of the scheduled amount, or (ii) lower than \$100 000 of the claimed amount, or b) the adjudicator has rejected the adjudication application.	✓			
44	In making an application for adjudication review the legislation should provide that:	✓			

Security of Payment Reform

Murray Review: Have Your Say

	<p>a) the application must be made in writing to the Regulator within 5 business days of the adjudication decision being released to the disputing parties, and</p> <p>b) a copy of the application is to be provided to the other party within 1 business day of being lodged with the Regulator.</p>				
45	The legislation should provide that a party to an adjudication is not entitled to make an application for a review of the adjudication decision if the parties had agreed the adjudicator in accordance with Recommendation 38.		✓		The injustice to the parties is the same whether or not they agreed on the identity of the adjudicator.
46	<p>The legislation should further provide that, in relation to an application for adjudication review, a respondent:</p> <p>a) is not entitled to apply for an adjudication review unless it has lodged a payment schedule</p> <p>b) cannot include in its application for adjudication review reasons as to why payment is being withheld, unless those reasons have been included in the payment schedule, and</p> <p>c) must, when making an application for adjudication review, lodge with the Regulator’s trust account any amount the respondent is required to pay to the claimant as a consequence of the adjudicator’s decision.</p>	✓			There should be provision for the reviewer to order a stay of the obligation to pay in any situation where justice demands it.
47	The legislation should set out the relevant procedure for the conduct of an adjudication review. A suggested procedure is provided in Section 13.5 of this Report.	✓			
48	The legislation should require the Regulator to appoint the most senior registered adjudicator available to conduct the adjudication review.	✓			

Security of Payment Reform

Murray Review: Have Your Say

49	<p>The legislation should provide that (except in case of an adjudication review) where an adjudicator has determined that the respondent is to pay an amount to the claimant, the respondent must pay that amount:</p> <p>a) within 5 business days after the adjudication decision is served on the respondent, or</p> <p>b) by the date at which the adjudicated amount is determined by the adjudicator to be payable.</p>	✓			There's not much point to this provision if the adjudication determination can be enforced immediately as if it were a judgement debt.
50	<p>The legislation should provide that where an application for review of an adjudicator decision is made and the adjudication review decision differs from the original adjudicator decision, the party required to make payment as a result of the adjudication review decision must pay that amount:</p> <p>a) within 5 business days after the adjudication decision is served on that party, or</p> <p>b) if the review adjudicator has decided that payment may be made on a later date, then on or before that date.</p>	✓			See comment above
51	<p>The legislation should provide that a claimant may suspend construction work (or the supply of related goods and services) for the respondent in certain circumstances, and subject to the provision of notice to the respondent of its intention to suspend work.</p> <p>Section 27 of the NSW Act provides a suitable model.</p>	✓			
52	<p>The legislation should provide that where the parties have the right to apply for an adjudication review, a claimant's notice of intention to suspend work (or the supply of related goods and services) can only be made:</p>			✓	

Security of Payment Reform

Murray Review: Have Your Say

	<p>a) after the end of the period allowed for completion of an application for adjudication review (i.e. 5 business days after a copy of the adjudication decision is served on the respondent), or</p> <p>b) if an adjudicator’s decision has been referred for an adjudication review and the respondent has not paid the amount determined by the review adjudicator by the due date, after the due date for payment has passed.</p>				
53	<p>Absent implementation of a statutory trust (see Recommendation 85), the legislation should provide that:</p> <p>a) a claimant may serve a payment withholding request on the ‘principal contractor’ to require it to withhold sufficient money from payment that is, or becomes, payable by the principal contractor to the respondent to cover the claimed amount, and</p> <p>b) a principal contractor who fails to comply with such a request will become jointly and severally liable with the head contractor.</p> <p>Sections 26A–26F of the NSW Act provide a suitable model.</p>			✓	An adjudication determination can be enforced as a judgement debt. There is no reason to supplement garnishee proceedings.
54	<p>The legislation should provide that a claimant may withdraw its adjudication application and make a new application if:</p> <p>a) the claimant has not received notice that an adjudicator has accepted its application within 4 business days after the application was lodged, or</p> <p>b) an adjudicator has accepted the claimant’s application but failed to decide the application within the prescribed timeframe, or</p> <p>c) the adjudicator has given notice of their withdrawal from the adjudication.</p> <p>Section 26 of the SA Act provides a suitable model.</p>	✓			

Security of Payment Reform

Murray Review: Have Your Say

55	The legislation should specifically provide that an adjudicator who has accepted an adjudication application may withdraw from the adjudication by giving notice to the parties.	✓			
56	<p>The legislation should provide that a claimant is taken to have withdrawn its application if:</p> <p>a) it serves a notice of discontinuance on the adjudicator and the respondent, or</p> <p>b) the respondent pays the claimed amount, which is the subject of the adjudication application, to the claimant.</p> <p>Section 35B of the Queensland Act provides a suitable model.</p>	✓			Provision should also be made for the wasted cost of adjudication (both the adjudicators fees and the counterparty's expenses) in both cases
57	<p>The legislation should expressly provide that, where an adjudicator has committed jurisdictional error of law in a part of the adjudication decision which does not affect the whole of the decision, a court with the power to sever that affected part of the decision may do so and allow the remainder of the decision to be enforceable.</p> <p>Section 100(4) of the Queensland Act provides a suitable model.</p>	✓			
58	<p>The legislation should provide that where a claim is made under the security of payment legislation, a party's contractual and other civil rights under the construction contract are preserved.</p> <p>Section 32 of the NSW Act provides a suitable model.</p>	✓			
59	The legislation should provide that if an authorised nominating authority or Regulator issues an adjudication certificate, the claimant can file the certificate as a judgement debt in any court of competent jurisdiction.	✓			Given the range of enforcement remedies available under the UCPR and the Corporations Act, there is no need to supplement them.

Security of Payment Reform

Murray Review: Have Your Say

	Section 25 of the NSW legislation offers a suitable model.				
60	<p>The legislation should contain provisions regulating the oversight of authorised nominating authorities, including in relation to:</p> <ul style="list-style-type: none"> a) granting, renewing and withdrawing of authorisations b) the appeals process regarding decisions in respect of the granting, renewal and withdrawal of authorisation c) the functions of authorised nominating authorities d) requiring authorised nominating authorities to provide information to the Regulator in relation to its activities e) authorising the fees that authorised nominating authorities may charge, and f) statutory indemnity of authorised nominating authorities. 	✓			
61	<p>In determining an adjudication application, the legislation should include provisions setting out:</p> <ul style="list-style-type: none"> a) the procedures an adjudicator may follow in proceedings b) what an adjudicator is to determine c) the matters the adjudicator is to consider d) the format and information that the determination is to include, and e) that the adjudicator may, on their own initiative, correct errors, defects etc. in the determination. <p>Sections 21(4) and (4A), and sections 22(1)–(5) of the NSW Act offer a suitable model.</p>	✓			

Security of Payment Reform

Murray Review: Have Your Say

62	The legislation should include specific provisions dealing with an adjudicator’s disqualification due to conflict of interest. A suggested provision is provided in Section 14.2 of this Report.	✓			The concept of conflict of interest is well known and should not be limited by regulations. It should address all the continuing obligations of loyalty and confidentiality owed to a current or former employer or principal.
63	The legislation should include specific provisions requiring an adjudicator to decide jurisdiction.	✓			
64	The legislation should provide that an adjudicator’s function (other than in respect to minor clerical tasks) is personal and non-delegable.	✓			
65	<p>Legislation should provide for:</p> <p>a) the registration and renewal of adjudicators and for the suspension, cancellation or amendment of adjudicators’ registrations, and</p> <p>b) a process for reviewing decisions associated with adjudicators’ registrations.</p> <p>The provisions relating to the regulation of adjudicators as set out in Part 4, Divisions 3, 4, 5 and 6, and Part 5 of the Queensland Act and clause 3 of the Queensland Regulation provide a suitable model.</p>			✓	There is no registration requirement in the case of other alternative dispute resolution mechanisms, such as arbitration or mediation or expert determination, which often involve more complex issues and much larger sums of money. It will be inappropriate where the parties agree on a suitably skilled adjudicator.
66	Adjudicators should be registered and graded by the Regulator.			✓	
67	Where an adjudicator has been found, by a court in Australia, to have made technical errors in performing adjudications, an ANA must not nominate the adjudicator unless it is satisfied that the cause of the error has been resolved.			✓	

Security of Payment Reform

Murray Review: Have Your Say

68	Where an adjudicator has been found by a court in Australia to have acted not in good faith twice or more within the last 5 years in relation to adjudication duties, an authorised nominating authority must not nominate the adjudicator for adjudication and the Regulator must not appoint such person as an adjudicator.	✓			
69	The legislation should provide that in the case of adjudication applications involving payment claims of up to and including \$25 000 , the fees that an adjudicator may charge should be fixed at a rate prescribed by the Regulator.	✓			
70	The legislation should provide that in the case of adjudication applications involving payment claims over \$25 000 , the fees that an adjudicator may charge should not exceed a capped rate prescribed by the Regulator, unless otherwise agreed by the parties.			✓	
71	The legislation should provide that in the case of applications for adjudication review, the fees that a review adjudicator may charge should be prescribed and published by the Regulator.			✓	
72	The legislation should provide that a claimant and respondent are equally liable for payment of the adjudicators fees, unless the adjudicator determines otherwise, and set out the matters an adjudicator may consider when deciding the apportionment of their fees and expenses. Section 35A of the Queensland Act provides a suitable model.	✓			
73	The legislation should not require adjudicators' decisions to be published.	✓			Anecdotal evidence is that some contractors refuse to engage subcontractors known to take advantage of the SOPA.

Security of Payment Reform

Murray Review: Have Your Say

74	<p>The legislation should provide protection from liability for adjudicators.</p> <p>The protections set out in section 46 of the Victorian Act provide a suitable model.</p>	✓			
75	<p>The legislation should provide for a notice to be served on a person by:</p> <ul style="list-style-type: none"> a) personal delivery b) post c) facsimile d) email, or e) any other method as provided in the construction contract or by regulations. <p>Section 31 of the NSW Act provides a suitable model.</p>			✓	<p>Facsimile is an obsolete technology. Service in accordance with the construction contract should be allowed. That will commonly include service via collaboration platforms (like Aconex) should be considered.</p>
76	<p>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.</p> <p>Clause 32A of the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) provides a suitable model.</p>	✓			<p>Cf Crimes Act 1900 s.249K</p>
77	<p>The legislation should require ANAs/adjudicators to provide the Regulator with such information as reasonably requested to enable the Regulator to monitor the operation of the legislation and activities of ANAs/adjudicators.</p> <p>Section 43B of the Victorian Act provides a suitable model.</p>	✓			

Security of Payment Reform

Murray Review: Have Your Say

78	The legislation should require the Regulator to publish an annual report on the operation and effectiveness of the legislation.	✓			
79	The jurisdictions should cooperate to develop a consistent set of standards for reporting data collected from authorised nominating authorities/adjudicators about the use of security of payment legislation. The reporting of such information should be based on the NSW format and published annually.	✓			
80	There should not be a separate mechanism besides the security of payment legislation to specifically deal with the enforcement of disputed progress payment claims.	✓			
81	The legislation should provide that all cash retentions are to be held on trust: a) In the case of a principal, the cash retentions should be held on trust for the head contractor. b) In the case of a head contractor, cash retentions should be held on trust for the subcontractors. c) In the case of a subcontractor, the cash retentions should be held on trust for the sub-subcontractor.		✓		
82	The legislation should expressly provide for an adjudicator to be able to decide whether a retention amount and/or security is to be returned, and the date on which it is to be returned.	✓			
83	Trade credit insurance should not be made a legislative requirement. It is noted that while trade credit insurance can provide useful additional protection it is not a viable alternative to security of payment laws.	✓			

Security of Payment Reform

Murray Review: Have Your Say

84	<p>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:</p> <ul style="list-style-type: none"> a) not be reasonably possible; or b) be unreasonably onerous; or c) serve no commercial purpose. 	✓	<p>The legislative proposal would make time bars void for all purposes in the listed events.</p> <p>Mr Murray acknowledges that a principal or head contractor has a valid commercial interest in receiving timely notice of potential claims, so it can make its own investigations about the factual basis as well as the cost and time ramifications.</p> <p>His consultations unearthed a broad range of opinions about time bars. Nobody thought the time bars should be banned entirely. There was little enthusiasm for prescriptive interferences with contractual freedom. No one came up with a sensible formulation for reasonable notice.</p> <p>The Australian Consumer Law and the Fair Trading Act already contain extensive prohibitions against unconscionable conduct and unfair contracts. The ACL s. 24 defines an 'unfair' provision as one that causes significant detriment to one party without advancing or protecting the legitimate interests of the other.</p>
85	<p>A deemed statutory trust model should apply to all parts of the contractual payment chain for construction projects over \$1 million. The deemed statutory trust model outlined in the Collins Inquiry provides a suitable basis.</p>	✓	<p>Contractors will be exposed to the following costs and obligations by virtue of the creation of a statutory trust, eg</p> <ul style="list-style-type: none"> - trust money cannot be carried as an asset of the principal, potentially putting in breach of its banking covenants

Security of Payment Reform

Murray Review: Have Your Say

				<ul style="list-style-type: none"> - The obligation to bear the additional administrative cost of keeping separate ledger accounts for every contractor and subcontractor employed on the project, - A positive duty enforceable by the beneficiaries to “get in” the assets of the trust - A duty not to intermingle trust money with its own funds - A duty of care to invest trust money with the degree of care that is expected of prudent business person - A duty to account for trust money and to open trust records for inspection by beneficiaries - A duty to act impartially between beneficiaries - If there is any deficiency in the fund, to share the shortfall rateably amongst all beneficiaries <p>Trust law is complex. The proposal overlooks many of the complexities. For example, it overlooks the complexity of tracing trust money that falls into the hands of third parties. It ignores the rule in <i>Loftus v McDonald</i> [1974] 3 ALR 404. The proposal doesn’t require a principal or head contractor to open a separate bank account to hold money on trust. To that extent, subcontractor payment are intermixed with the principals’ or head contractors own</p>
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Security of Payment Reform

Murray Review: Have Your Say

				<p>funds. In that case, the subcontractors cannot claim more than the lowest intermediate balance credited to the trustee’s bank account in the period between the mixing of the money and the tracing claim. If, for example, the account has a nil balance at any time, the subcontractors will be unable to trace any money into the hands of others. Tracing claims are difficult and may lead to unintended consequences where unpaid subcontractors on one project seek to recover money diverted to subcontractors working on another project.</p> <p>It’s not clear why contractors and suppliers involved in a project should have a better claim in insolvency than any other creditor. Why is a carpenter more meritorious than a stationery supplier?</p> <p>Sole traders who subcontract their services may be considered to be in the same positions as employees. In that case, consideration should be given to amendment of the <i>Corporations Act 2001</i> s.566 to afford them equal priority as employees in insolvency</p> <p>Mr Murray recommends that directors and officers should be strictly liable for a breach of a statutory deemed trust. They should only have personal liability to the extent</p>
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Security of Payment Reform

Murray Review: Have Your Say

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86	<p>The Australian Government should take a lead role in working with the states and territories and key industry stakeholders towards the establishment of a nationally consistent deemed statutory trust model. The establishment and implementation of such a model should be accompanied by a program of industry-wide education and training.</p>				