

SOPA REFORM BILL BREAKING NEWS

SOPA Bill - Some Key Changes

After an extensive review and consultation process which commenced in 2015; the NSW Government introduced the Building and Construction Industry Security of Payment Amendment Bill 2018 of 24 October 2018.

According to the second reading speech, the Bill seeks to increase cashflow and transparency protections in the contracting chain and *“to simplify and clarify the entitlement to and the process for recovering a progress payment”*.

The Bill adopts reforms foreshadowed by the Consultation Draft released by the Government in August 2018.

The Bill also includes some reforms which depart from the Consultation draft.

KEY AMENDMENTS

As foreshadowed by the consultation draft, the Bill:

1. permits regulations allowing a contractor to inspect trust account records for the retention money;
2. permits a payment claim after a contract has been terminated;
3. requires a head contractor to pay its subcontractors within 20 business days of receipt of a progress claim instead of 30 business days
4. increases the penalty for a corporation not providing a supporting statement or knowingly providing a false supporting statement to \$110,000 (although the penalty for an individual is unchanged at \$22,000 or 3 months gaol);
5. allows an applicant to withdraw an adjudication application;
6. allows an adjudicator 10 days from the date of lodgement of an adjudication response to provide a determination or, where the respondent did not provide a payment schedule, 10 days from acceptance of the application;
7. requires an adjudication determination to be served on the applicant and respondent;
8. requires a principal who is no longer held to a head contract to advise a subcontractor within 10 business days of receipt of a withholding request;
9. increases penalties to \$5,500 for corporations and \$1,100 for individuals for
 - a) failing to provide the adjudication determination to the principal contractor,
 - b) failing to notify the principal contractor about the withdrawal of the application or
 - c) providing incorrect information to the principal contractor;

10. allows regulations to promulgate a Code of Practice for ANAs;
 11. allows notices under the Act to be served in any way allowed by the construction contract;
 12. authorises the Supreme Court to set aside just part of the adjudication determination affected by jurisdictional error, rather than the whole;
 13. prevents a contractor in liquidation serving a payment claim under the Act;
 14. authorises NSW Fair Trading officers to question people, demand records, demand entry to premises, seize records and other things under pain of substantial penalties;
 15. permits offences to be prosecuted within two years (up from 6 months);
 16. allows investigators may issue on-the-spot fines;
 17. exposes directors who are actively involved in offences by corporations to prosecution for those offences and
 18. also exposes directors who fail to take reasonable steps to prevent corporate offences to prosecution.
5. The Bill does not change the time allowed for payment by principals. A principal must pay a progress payment within 15 days of receipt of the progress claim by a head contractor. (The consultation draft had proposed 10 business days.)
 6. A withholding request expires when an adjudication application is not renewed following its withdrawal or the adjudicator fails to make a timely determination.
 7. An ANA's authorisation may be given subject on conditions.
 8. An investigating officer can question people and demand records even if they are outside NSW.
 9. The Government may make regulations prescribing information to be provided to a subcontractor when a subcontract is entered into.

Please click here below for more information about SOPA reforms:

- [SOPA Reform Bill Released on 24 October 2018](#)
- [Personal Liability for Directors and managers of Corporations Under Security of Payment Reforms](#)
- [Hot Off The Press: Draft Security of Payment Amendment Bill 2018 Released for Public Comment](#)

Please click below for the Kreisson Submissions:

- [Security of Payment: Consultation Paper](#)
- [Considered Opinions about the SOPA Bill](#)
- [Murray Review of SOPA](#)

John Hodgkinson is Special Counsel on the Kreisson Construction team.

For more information, contact us at excellence@kreisson.com.au or on 02 8239 6500.

This communication is sent by Kreisson Legal Pty Limited (ACN 113 986 824). This communication has been prepared for the general information of clients and professional associates of Kreisson Legal. You should not rely on the contents. It is not legal advice and should not be regarded as a substitute for legal advice. The contents may contain copyright.

DIFFERENCES WITH THE CONSULTATION DRAFT

The Bill **departs** from the consultation draft in the following ways.

1. The Bill does not specifically contemplate contractual "milestone payments" or one-off lump sum payments.
2. The Bill allows regulations to exclude other contracts from the operation of the Act as well as residential construction contracts.
3. The Bill does away entirely with "reference dates" and requires all progress claims to be served on or after the last day of the month.
4. A payment claim may relate to work done in that month or in any previous named months (for example, a payment claim for work done in October may be served on or after 31 October).