Security of Payment

Latest updates, reform issues and possible trends

Association of Independent Insolvency Practitioners

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20 March 2018
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PART 1  Introduction
PART 2  Overview of SOPA Landscape
PART 3  How does SOPA work?
PART 4  Key 2014 Amendments
PART 5  Current reviews
Part 1  Introduction

- Nature of construction industry
- Correcting misnomers and myths
- A lesson from *Walters Construction*
Part 1 Introduction

The Nature of the Construction Industry

- Nature of construction insolvencies
- Survival of the fittest does not recognise realities of contractual chain vulnerability
- Approach taken by Australian Parliaments
Coggins – Construction Industry in Australia (2016)

- the pyramidal contracting chains on construction projects;
- a predominance of trade credit throughout the construction industry;
- the unsecured creditor status of building contractors and suppliers for work done and/or goods supplied;

- poor payment practices;
- underbidding leading to the prevalence of tight, or even zero, profit margins
- illegal phoenixing activity;
- undercapitalised firms, which are not financially resilient; and
- poor strategic business management skills of many, particularly smaller, contractors
Pyramidal contracting chains

- Tier 1 – head contractors
- Tier 2 – typically medium to large trade contractors
- Tier 3 – smaller trades
- failure in the contractual chain can cause a domino effect

Figure 1: Contractual chains on a construction project (Coggins et al 2016: 36)
Part 1 Introduction

Predominance of trade credit
pressure to extend trade credit terms to principals is passed on down the contractual chains

Unsecured Creditor Status
Most of the building contractors and suppliers are unsecured creditors.

Poor payment practices
Undervalued, withheld and/or non-payment of contractors

Underbidding
In times of economic downturn, competition intensifies even further as a result of “bidding war[s] for the shrinking pool of work which leaves scarcely any profit margin

Under capitalised
Typically construction companies are under capitalised; requiring credit and borrowed capital.

Poor business practices
lack of appreciation of true business costs, a failure to understand contractual risks and terms resulting in inability to recover unexpected losses, and poor cash flow management
CORRECTING MISNOMERS AND MYTHS

- "Security" is a misnomer - no guaranteed outcome
- "Adjudication" is a misleading term
- Although not final, a result under SOPL could become final by design or default
- SOPL is more than just about "cash flow"
  - Its about risk management and Contract administration
  - Dispute resolution
- "Spotlights" your business practices
CORRECTING MISNOMERS AND MYTHS

- **Substance** and **merit** is just as important as process.

- SOPL creates **opportunity** but will also create **challenge** and **risk**.

- SOPL can **re configure** existing contractual risk profiles.

- **Not** always cheap; not always rapid especially if there are challenges to determinations.

- "**Rough justice**" and not always "**fair**".

- Not a neutral process. Can **hurt** relationships.
Position Prior to the Act

- contractual dispute resolution, e.g. arbitration, litigation
- costs of arbitration and litigation resulted in write offs of outstanding claims in the hope of future work
Get cash flowing in contract claim

Core provisions:

- Prohibition of pay when paid clauses
- Default right to progress payments if contract is silent
- Right to refer disputes to Adjudication
PART 2  Overview of SOPA Landscape

➢ The purpose of SOPA
➢ Key elements
➢ Some statistics
Security of Payment Problem

“…..consistent failure in the building and construction industry to ensure that participants are paid in full and on time for the work they have done, even though they have a contractual right to be paid”

(source: Commonwealth Government 2002).
Purpose of SOPA

“As construction contracts in New South Wales have been “notorious” for their extremely tight profit margins… it is essential for the financial survival of many contractors and subcontractors that payment for services rendered be promptly paid and not unreasonably withheld…..”

Justice McDougall
Supreme Court of New South Wales
What is the Security of Payments Act NSW?
Section 3: Object of Act

(1) To recover, progress payments

(2) statutory entitlement to such a payment

(3) the referral of disputed claims to an Adjudicator
Part 2 Overview of SOPA Landscape

Statutory Payment Claim and Payment Schedule

- Statutory Right
  - Payment Dispute
  - Pay now
  - Statutory Adjudication

Contractual Payment mechanism – Payment Claim and Payment Schedule

- Contractual Rights
  - Payment Dispute
  - Argue later
  - Arbitration or litigation
This dual payment system was described as a “dual railroad track system”

by Macready AJ in Transgrid v Siemens & Anor [2004] NSWSC 87 at [56].
Part 2  Overview of SOPA Landscape

• Variations
• Set offs
• Preconditions to valid payment claims
• Time bars
• Defects
• Status of Contractual preconditions to payment claims
West Coast Model:
- Evaluative
- Based on contractual rights
- WA model under review

East Coast Model:
- Default system
- Statutory rights
- NSW model under review

Statutory Adjudication Regime – Australia

Part 2: Overview of SOPA Landscape
Part 2  Overview of SOPA Landscape

Owner

- Engineer
  - Structural Engineer
  - Electrical Engineer

- Building Surveyor

- Architect
  - Draftsperson

- Head Contractor
  - Subcontractors
    - Sub-subcontractors
    - Suppliers

Cashflow
Part 2  Overview of SOPA Landscape
Part 2 Overview of SOPA Landscape

NSW

Step 1 Payment Claim
Step 2 Payment Schedule
Step 3 Adjudication
Step 4 Determination
Step 5 Enforcement

35 days
Part 2 Overview of SOPA Landscape

Time frames

- Tight deadlines
- Delays are disastrous
- Need for good administration
Part 2  Overview of SOPA Landscape

Key elements of the Act

- Statutory right to “cash flow”; pay now argue later regime
- **Dual track** and theoretically runs in parallel to the Act but there are inescapable points of **convergence** between the Act and Contract
- On account resolutions
- Rough and tumble “**high pressure cooker environment**” with high risks
- **Rough justice**
Part 2 Overview of SOPA Landscape

Dispute Resolution Continuum

Cost of Resolution
- DRBs
- Mediation
- Project Neutral
- Negotiation

Degree of hostility
- Litigation
- Binding Arbitration
- Admin. Board
- Mini Trial
- Adjudication

MORE CONTROL OF OUTCOME LESS
- Parties decide for themselves
- Third Party Imposes Decision

Figure 5.2: Dispute Resolution Continuum
Some Statistics 2015/16: Claimed Amount

Table A: Status and number of adjudication applications

<table>
<thead>
<tr>
<th>Status</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FY 2015/16</td>
</tr>
<tr>
<td>Application lodged</td>
<td>794</td>
</tr>
<tr>
<td>Determinations released</td>
<td>532</td>
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<tr>
<td>Determinations pending release</td>
<td>49</td>
</tr>
<tr>
<td>Completed but not determined†</td>
<td>213</td>
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</table>

NSW Finance and Service Annual Adjudication Report 2015/16
Part 2 Overview of SOPA Landscape

Fig. 3: Number of adjudication applications by payment claim value range 2015/16

<table>
<thead>
<tr>
<th>Range of Claim Values ($)</th>
<th>Number of Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;5,000</td>
<td>67</td>
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<tr>
<td>5,000-9,999</td>
<td>65</td>
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<tr>
<td>10,000-24,999</td>
<td>95</td>
</tr>
<tr>
<td>25,000-39,999</td>
<td>65</td>
</tr>
<tr>
<td>40,000-99,999</td>
<td>82</td>
</tr>
<tr>
<td>100,000-249,999</td>
<td>78</td>
</tr>
<tr>
<td>250,000-499,999</td>
<td>34</td>
</tr>
<tr>
<td>500,000-749,999</td>
<td>9</td>
</tr>
<tr>
<td>750,000-999,999</td>
<td>6</td>
</tr>
<tr>
<td>≥1,000,000</td>
<td>31</td>
</tr>
</tbody>
</table>

Average: 53.2
Part 2 Overview of SOPA Landscape

Some Statistics - Claimed versus Adjudicated Amounts

2014/15

Fig. 4: Total claimed and adjudicated amounts 2014/15

- Total Claimed Amount (Determination released): $122,064,731
- Total Adjudicated Amount (Determination released): $54,204,209

2015/16

Fig. 4: Total claimed and adjudicated amounts 2015/16

- Total Claimed Amount (Determination released): $104,380,579
- Total Adjudicated Amount (Determination released): $60,229,433

Key Activity Data

- The total value of claimed amounts was in the order of $165.9 million.
- The highest and lowest claimed amounts for the period was $4.2 million and $149 respectively (based on determinations released only).
- Adjudication is being used predominately by claimants making small to medium-value payment claims up to $250,000. Within this range, applications are most frequently lodged for claimed amounts of $10,000 to less than $25,000.
- The total value of progress payments returned to claimants via the adjudication process was $50.2 million.
- Overall, claimants were awarded about 48% of the claimed amount.

NSW Finance and Service Annual Adjudication Activity Report 2014/15
NSW Finance and Service Annual Adjudication Activity Report 2015/16 p4
Part 2 Overview of SOPA Landscape

Statistics: Application by Claim Type

Fig. 5a: Claimant Type 2014/15

- 10.4% Head Contractor
- 2.1% Consultant
- 4.4% Other
- 68.0% Contractor
- 2.0% Supplier

Fig. 5a: Claimant Type 2015/16

- 6.0% Head Contractor
- 1.3% Consultant
- 4.5% Other
- 71.8% Contractor
- 3.4% Supplier

Key Activity Data

- Claimants are most commonly Contractors and Subcontractors.
Part 2  Overview of SOPA Landscape

Statistics: Application by Respondent Type

Fig. 5b: Respondent Type 2014/15
- 58.6% Head Contractor
- 21.9% Client
- 2.1% Subcontractor
- 6.6% Other
- 1.5% Supplier
- 0.2% Consultant

Fig. 5b: Respondent Type 2015/16
- 61.9% Head Contractor
- 19.8% Client
- 1.8% Subcontractor
- 6.2% Other
- 0.5% Supplier
- 0.2% Consultant

Key Activity Data
- Respondents are most commonly Head Contractors and Clients
Some Problems with the Australian SOPA

- **DESTROYED**: 25
- ** DAMAGED**: 7
- **ENHANCED**: 0
- **SAME**: 0
Part 2  Overview of SOPA Landscape

![Graph showing primary issue most adjudicated]

- **EOT**: 17 responses
- **Contract Sum**: 2 responses
- **Costs**: 2 responses
- **Delay**: 8 responses
- **Disputed Payment**: 1 response
- **Variations**: 17 responses

Society of Construction Law Report on Security of Payment June 2014 page 47
Part 2  Overview of SOPA Landscape

- 2000
  - NSW legislation commences

- 2003
  - The Cole Royal Commission into the Building and Construction Industry

- 2004
  - Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport [2004] NSWCA 394

- 2011
  - Commencement of 2010 Amendments for Withholding Requests

- 2014
  - Commencement of Retention Trust Regulations on 1 May 2015
  - Consultation Survey by Department of Fair Trading - survey closed on 28 Sep 2015
  - Commitment by NSW Government to review the Act - later in 2015
  - Senate inquiry into insolvency into Construction Industry.

- 2015
  - Commencement of 2014 amendments on 21 April 2014; SOCLA Report

- 2017
  - NSW Review [pending]
  - Murray Review [pending]
Fig. 1. Major causes of construction insolvency in 2011/2012 (data from ASIC 2012)
### Table 12: Initial external administrators’ reports - Causes of construction industry insolvencies (2009-10 to 2013-14)

<table>
<thead>
<tr>
<th>Causes of failure</th>
<th>2013/14</th>
<th>2012/13</th>
<th>2011/12</th>
<th>2010/11</th>
<th>2009/10</th>
<th>Total</th>
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<tbody>
<tr>
<td>Under capitalisation</td>
<td>435</td>
<td>473</td>
<td>508</td>
<td>426</td>
<td>428</td>
<td>2270</td>
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<td>Poor financial control including lack of records</td>
<td>660</td>
<td>679</td>
<td>676</td>
<td>582</td>
<td>672</td>
<td>3269</td>
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<td>Poor management of accounts receivable</td>
<td>336</td>
<td>385</td>
<td>358</td>
<td>318</td>
<td>323</td>
<td>1720</td>
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<td>Poor strategic management of business</td>
<td>892</td>
<td>959</td>
<td>914</td>
<td>775</td>
<td>839</td>
<td>4379</td>
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<tr>
<td>Inadequate cash flow or high cash use</td>
<td>1000</td>
<td>964</td>
<td>900</td>
<td>783</td>
<td>736</td>
<td>4383</td>
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<td>Poor economic conditions</td>
<td>558</td>
<td>722</td>
<td>724</td>
<td>559</td>
<td>503</td>
<td>3066</td>
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<td>Natural disaster</td>
<td>17</td>
<td>25</td>
<td>26</td>
<td>4</td>
<td>10</td>
<td>82</td>
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<tr>
<td>Fraud</td>
<td>30</td>
<td>19</td>
<td>31</td>
<td>23</td>
<td>24</td>
<td>127</td>
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<tr>
<td>DOCA failed</td>
<td>35</td>
<td>18</td>
<td>16</td>
<td>11</td>
<td>7</td>
<td>87</td>
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<tr>
<td>Dispute among directors</td>
<td>52</td>
<td>42</td>
<td>58</td>
<td>44</td>
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<td>257</td>
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<td>Trading losses</td>
<td>698</td>
<td>704</td>
<td>675</td>
<td>525</td>
<td>510</td>
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<td>Industry restructuring</td>
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<td>34</td>
<td>23</td>
<td>21</td>
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<td>138</td>
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<tr>
<td>Other</td>
<td>611</td>
<td>664</td>
<td>588</td>
<td>482</td>
<td>466</td>
<td>2811</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>5,374</strong></td>
<td><strong>5,688</strong></td>
<td><strong>5,497</strong></td>
<td><strong>4,553</strong></td>
<td><strong>4,589</strong></td>
<td><strong>25701</strong></td>
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<tr>
<td><strong>Number of Reports lodged</strong></td>
<td><strong>2,153</strong></td>
<td><strong>2,245</strong></td>
<td><strong>2,229</strong></td>
<td><strong>1,862</strong></td>
<td><strong>1,905</strong></td>
<td><strong>10394</strong></td>
</tr>
</tbody>
</table>
questions
PART 3 How SOPA works

• Step 1 - the Payment Claim
• Step 2 - the Payment Schedule
• Step 3 - the Adjudication Application
• Step 4 – Determination
• Step 5 - Enforcement
Part 3  How SOPA works?

Adjudication

- Parties required to follow payment mechanics under the contract
- Unpaid party may follow statutory regime
- Unpaid party may serve a payment claim on non paying party who will have 10 days to serve a payment response
- Either party may then refer the matter to adjudication
- Adjudicator must then carry out the adjudication in accordance with broad investigative powers
- The adjudication determination is confidential
Part 3  How SOPA works?

Payment Claim
- On and from each reference date
- Reference date is prescribed by Contract
- If silent - last business day of month

Adjudication Application
- Lodge with ANA and within 10 business days of payment schedule;

Adjudicators Determination
- within 10 working days of notification of acceptance appointment or such further time as agreed by the parties

Payment Schedule
- Must be served within 10 business days of Payment Claim
- Identify ‘reasons” for withholding payment

Adjudication Response
- Within 5 working days from Payment schedule
- Contains response to Adjudication Application
- Must not include new reasons for withholding payment

Enforcement of decision
- Enter judgment
- Enforcement options
What is a valid Payment Claim

Must be entitled to a Progress Payment

Must be Construction Contract work or related goods and services

Must have a Reference date s8(1)

PAYMENT CLAIM
Step 1: The Payment Claim

### Section 8 - Reference Date

<table>
<thead>
<tr>
<th>PC1</th>
<th>PC2</th>
<th>PC3</th>
</tr>
</thead>
<tbody>
<tr>
<td>24th Reference Date</td>
<td>24th April Reference Date</td>
<td>24th Reference Date</td>
</tr>
<tr>
<td>30 days</td>
<td>30 days</td>
<td>30 days</td>
</tr>
</tbody>
</table>

- **Head Contract**
  - Payment Claim
  - Payment Claim
  - Payment Claim

- **Subcontract**
  - Payment Claim
  - Payment Claim
  - Payment Claim
  - Payment Claim
**Step 1: The Payment Claim**

**Section 8 - Reference Date**

Contractual date for Progress Payment

- **Section 8 Reference Date**
- If contract silent, last day of month

**Some key points**
- One claim under the Act for each reference date [s13(5)]
- Claim can only be served within 12 months after works were last carried out [s13(4)]
- Payment Claim may still be valid if no new work since last reference date [Broadview decision]
- A payment claim may not be valid if issued after termination of a contract [Patrick Stevedores decision]
- Act entitles parties to limit reference dates in contracts [s8]
- The existence of reference date is now jurisdictional (Lawrence Constructions)
Step 1: The Payment Claim

- Must identify construction work or related goods and services.
- Must indicate the claimed amount.
- Contracts entered into prior to 21 April 2014 must state that it is made under the Act.
- Contracts entered after 21 April 2014 DO NOT need to state that it is made under the Act.
Step 1: The Payment Claim

- Can include earlier claims
- Only one Payment Claim per reference date
- Must be made within 12 months of last work
- Must be served
What can be claimed in a Payment Claim?

- construction work done;
- Variation claims
- construction materials or plant provided;
- consulting services;
- Time related costs if permitted under the contract;
- interest on overdue progress payments;
- losses and additional expenses due to work deleted from contract and while work is suspended under of the Act;
- retention monies; and
- the final payment at the end of contract
What information should be included with a payment claim?

- all information necessary for a respondent to both identify the work and how the sum claimed is calculated.

- To avoid the risk of an adjudicator deciding that amount claimed in the payment claim could not be valued; Payment Claims should include the following attachments where available:

  - statements detailing the extent of the work completed;
  - completion certificates;
  - delivery dockets;
  - photographs;
  - other contract documentation as may be required by contract.
Step 1: The Payment Claim

Common problems with Payment Claims:

- Name of Respondent is wrong
- Claim is too early
- Prior to 22 April 2014 No use of "magic" words
- No Supporting Statement
- No description of works
- Amount claimed not specified
- Claim not served correctly
- Not Properly Substantiated
How do you effect service under the Act?

**Section 31**

(1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:

- (a) by delivering it to the person **personally**, or
- (b) by lodging it during **normal office hours** at the person's **ordinary place of business**, or
- (c) by **sending it by post** addressed to the person's ordinary place of business, or
- (d) by **email to an email address** specified by the person for the service of notices of that kind, or
- (d1) by any **other method** authorised by the regulations for the service of notices of that kind, or
- (e) in such other manner as may be provided under the **construction contract** concerned.
Common questions in relation to Service

• What happens when you serve multiple copies of a document?

• What if there are multiple places of business?

• Is service on a solicitor effective?

• Can you serve a document at a registered office after normal office hours?

• What if the document does not fit wholly within the recipients office – is that good service?

• Can you validly serve documents using Dropbox

• Can you serve by USB?

• What does normal office hours mean?

• Can a payment claim be served during the course of litigation?

• What does service by facsimile take effect?

• Can I serve a document by email?

• Does an email need to be opened or read to effect service?
Step 2: The Payment Schedule

- Reply to the Payment Claim
- Required if the Payment Claim is disputed
- Total claim is automatically payable if no Payment Schedule
- Must be served within 10 Business days of Payment Claim
Step 2: The Payment Schedule

SOPA

- must identify the Payment Claim to which it relates
- must identify the amount that will be paid
- must indicate the reasons if monies are being withheld

Risks

RISK 1 – failing to provide a payment schedule in time

RISK 2

“If the Respondent does not state its case with the **requisite degree of precision and particularity**, it may not be able to rely on the issue in its Adjudication Response (s20(2B)). If the issue has not been adequately raised in its Payment Schedule then it cannot complain if the adjudicator does not consider it…”

Step 2: The Payment Schedule

Essential Requirements

- Use proper reasons
- State all reasons
- Details of reasons need to be sufficient
Typical set off clause:

“The Builder **may deduct from moneys** due to the Sub-contractor any money due from the Sub-contractor to the Builder and if those moneys are insufficient, the Builder may have **recourse to Retention moneys** under Clause 5 of this Subcontract and, if they are insufficient, to any security under this Subcontract and any balance owing **shall be a debt due and payable to the Builder** and may be adjusted against any payment drawn including moneys owed to another Subcontract related to a different Project for the Builder.”
Step 2: The Payment Schedule

Claimant’s options where the Payment Schedule is less than the payment amount:

1. OPTION 1 – claimant accepts scheduled amount
2. OPTION 2 – claimants proceeds to Adjudication
Step 2: The Payment Schedule

Claimant’s options where no Payment Schedule claimed amount not paid in full

1. **OPTION 1** - apply for Summary Judgment in Court
   - Payment Claim → No PAYMENT SCHEDULE → claimed amount not paid in full
   - Max 10 bd

2. **OPTION 2** - claimant proceeds to Adjudication
   - s17(2) Notice → 2nd chance Payment Schedule → Adjudication Application
   - within 20 bd of the due date
   - Max 5 bd → Max 10 bd
If Claimant opts to proceed to Adjudication

Step 3: The Adjudication Application

**ADJUDICATION APPLICATION**

**NSW**

- Must be in writing
- Must be lodged with ANA within 10 business days after receiving the Payment Schedule
**Step 3: The Adjudication Application**

**ADJUDICATION RESPONSE**

**NSW**

- Short response period of 5 business days or 2 business days after notice of adjudicators acceptance
- Short response period
- Section 20(2B) restriction
Step 3: The Adjudication Application

NSW

Section 20(2B) of the Act states:
Respondent cannot include in the Adjudication Response any reasons for withholding payment unless those reasons have already been included in the Payment Schedule provided to the claimant…
Step 4: The Determination

- How much?
- Date payable?
- Interest?
- Must be in writing
- Must set out reasons
Assume

- Reference date 24th of each month for previous months works
- Payment claim issued on 24 August 2017
- Payment Schedule served on time
- Adjudicator does not ask for more time
- Public holiday – 2 October 2017
Can a determination of an Adjudicator be set aside?

**yes for Jurisdictional errors:**

1. adjudication determination fails to comply with the *'basic and essential requirements'* of a valid determination; or

2. a substantial denial of natural justice or failure to apply procedural fairness has occurred; or

3. there has not been a *bona fide* 'good faith' attempt by an adjudicator to perform his or her appointed function.
1. The claimant has received a valid payment schedule but the respondent fails to pay the scheduled amount by the due date for payment; or

2. A payment schedule was not served within time and the respondent fails to pay the whole claimed amount by the due date for payment; or

3. The adjudicated amount is not paid within 5 business days after an adjudication determination is received by the respondent.

1. The claimant is not liable for any loss or expense suffered by the respondent as a consequence of a valid suspension of work under the Act.

2. If the Respondent removes any work from the claimant's contract, the respondent is liable for any loss and expense suffered by the claimant as a result of the Respondent's action.

3. 2 days prior notice of Claimant's intention to suspend must be given

4. Work must resume within 3 business days of payment

5. If suspension is invalid; claimant risks repudiating the Contract
**Step 5: Enforcement**

**How does a Withholding Request work?**

**Security of Payment:**

**Payment Withholding Request—How to get the Money**

It is well known that the Building and Construction Industry Security of Payment Act 1999 (the “SOP Act”) makes pay when paid clauses unenforceable. In reality, however, a Claimant may be at risk of recovering an adjudicated amount because a Respondent has not been paid by a Principal.

To address this risk, Division 2A of the SOP Act creates the opportunity for a Claimant subcontractor to require a Principal to withhold the amount of money claimed in a Payment Claim from any money that the Principal owes to the Respondent contractor.

What is perhaps not well understood is how a Claimant...

**Diagram:**

- **Principal contractor**
  - **Payment withholding request**
  - **Contractor**
  - **Subcontractor**
  - **Adjudication Application**
What if Contractor has not been paid by the Principal?

1. **Notice of Claim**
2. **Adjudicator / Determination**
3. **File Certificate in Court**
4. **Judgment + apply for Debt certificate**
5. **Enforcement of Determination**

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**The SOPA Act**

**Contractors Debts Act**
Step 5: Enforcement

Assume
- Reference date 24\textsuperscript{th} of each month for previous months works
- Assume payment claim served 24 August 2017
- Payment Schedule served on time
- Adjudicator does not ask for more time

- Withholding Request served on Principal contractor on same date as Adjudication Application lodge
questions
PART 4   Key 2014 Amendments
Part 4: Amendments to SOPA

The Collins Inquiry

- Independent Inquiry into Construction Industry Insolvency.
- Focused on the protection of subcontractors
- Resulted in 2014 Amendments
Part 4: Amendments to SOPA

Amendments to the legislation – 21 April 2014

1. No endorsement required for payment claim: s13(2)
2. Head Contractors to serve supporting statements with payment claims: s13(7)-(9)
3. Due dates for payment have been changed: s11
   - by Principal (15 business days or less per Contract)
   - by Head Contractor or subcontractor (30 business days or less as per Contract)
4. Retention Trusts
Amendment No 1 - Removal of Magic Words

➢ This is a payment claim made pursuant to the Building & Construction Industry Security of Payment Act 1999 (NSW).
### First 2014 Amendment: Removal of Magic Words

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Identify the construction work/related goods and services</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Indicate amount of Payment Claim</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>State that it is made under the Act</td>
<td>✓</td>
<td>✗</td>
<td>✓</td>
</tr>
</tbody>
</table>
Part 4: Amendments to SOPA

2014 Amendment 3: Stakeholders: s13(7) – (9)

- Principal
- Main contract
- Head Contractor
- Subcontractor
- Subcontractor
- Subcontractor

There is no head contractor when the principal contracts directly with subcontractors.
Second 2014 Amendment: Supporting Statements
New Offences

Service of Payment Claim without Supporting Statement → $22,000 Fine

Statement is False or Misleading → $22,000 or 3 months imprisonment
Part 4 Amendments to SOPA

2014 Amendment 3: Stakeholders: s13(7) – (9)

- **Principal**
  - **Head Contractor**
    - **Main contract**
    - **Subcontractor**
    - **Subcontractor**
    - **Subcontractor**

- **Supporting Statement**
  - 15 business days payment
  - 30 business days payment

There is no head contractor when the principal contracts directly with subcontractors
Part 4  Amendments to SOPA

PC1

24th Reference Date

30 days

Head Contract

Payment Claim

10 days

Payment Schedule

15 days

Due Date

Subcontract

Payment Claim

10 days

Payment Schedule

30 days

Due Date

PC2

24th April Reference Date

30 days

Payment Claim

10 days

Payment Schedule

15 days

Due Date

4 June

PC3

24th Reference Date

30 days

Payment Claim

10 days

Payment Schedule

15 days

Due Date

4 June

Supporting Statement PC1

Supporting Statement PC2
Amendment No 4 Retention Trust Account

12A Trust account requirements for retention money

(1) The regulations may make provision for or with respect to requiring retention money to be held in trust for the subcontractor entitled to the money and requiring the head contractor who holds retention money to pay the money into a trust account (a "retention money trust account") established and operated in accordance with the regulations.

.....

(5) "retention money" means money retained by a head contractor out of money payable by the head contractor to a subcontractor under a construction contract, as security for the performance of obligations of the subcontractor under the contract.
Part 4: Amendments to SOPA

- 15 business day payment
- Supporting Statement
- Main contract
- Principal
- Head Contractor
- Retention Trust Account where project is $20M
- Subcontractor
- Subcontractor
- Subcontractor

There is no head contractor when the principal contracts directly with subcontractors
Part 4: Amendments to SOPA

Fourth 2014 Amendment: Trust Account Regulation

- Regulation apply to contracts entered into after 1 May 2015
- Retention Trust Account requires for project values - $20 Million
- $22,000 per offence
PART 5  Current Reviews
NSW Review

- In December 2015 a Discussion Paper was released by the NSW Government

- called for responses to various questions about the security of payment law and its operation;

- Submissions as to the Discussion Paper (closed on 26 February 2016);

- Further targeted consultation and research as necessary; and

- Report to the NSW Government.
"We want to hear people’s views on how the security of payment laws are operating in this state before a full evaluation of the Security of Payment Act is carried out later this year,"

“The purpose of this survey is to find out what areas of the Act are of interest to industry groups and their members and will include topics such as recovery of progress payments and adjudication of disputes.”

….. “Following the survey, a full evaluation of the security of payment laws will offer the industry an opportunity to have their say on these laws in more detail.”
1. A subcontractor’s right to progress payments always applies. It cannot be overridden by a contract stating otherwise or by any provision that the head contractor be paid first from up the construction chain.

Does the Act help subcontractors to be paid promptly for completed work?

- Yes
- Often
- Sometimes
- No
1. Payment ‘due dates’ vary from 10 to 30 days depending on the parties involved. Do these due dates allow enough time?

2. Are supporting statements effective in ensuring subcontractors are paid on time?

3. Subcontractors have up until 12 months after work was last carried out to claim payment from a head contractor. Is this period too long or too short?

4. Is the Adjudication process an effective way to settle most disputes over payment?
1. Should a compulsory mediation or similar process be required before adjudication is needed?

2. Should there be different deadlines for adjudicating simple and complex matters?

3. Should direct liability for company directors be introduced?

4. Are payment withholding requests an effective tool for subcontractors to receive their money?

5. Should there be new measures to deal with unconscionable conduct or predatory behaviour?

6. Should the Act state that contractors aren’t bound to vary their contractual obligations unless the contractor and the principal first agree on any variations and payment as a result?
SUBMISSION ON THE SECURITY OF PAYMENT ACT REVIEW

KREISSON
FEBRUARY 2016

Issue 1–who does the Act deal with?
Issue 2–Enforcement of the Act
Issue 3–who is entitled to progress payments?
Issue 4–Payment schedules
Issue 5–Suspension of works
Issue 8–West Coast Model v East Coast Model
Issue 10–Payment withholding requests
Issue 13–supporting statements
Part 5  Current reviews and issues

- **Murray Review**
  - 21 December 2016 Commonwealth Government announced that it had appointed John Murray AM to conduct a review of the SOPL throughout Australia;
  - 30 September 2017, a progress report as to the Review was provided to the Minister for Employment;
  - A final report due 31 December 2017.
A two-tier system under the one legislation;
Differences in timeframes on key process steps;
The process of appointment of adjudicators;
Quality of adjudication decisions;
Exclusion of claims;
Claims after termination of contract;

Impact of contract time-bars;
Endorsement of payment claim;
Exclusion of claims;
Claims after termination of contract;
Impact of contract time-bars;
Endorsement of payment claim;
Publication of adjudicators’ determination;
Court’s power to sever and remit;
Statutory trusts to further protect subcontractors;
Adjudication for domestic construction;
Special mechanism for small business; and
Acts of intimidation and retribution.
On 22 August 2017 the Queensland Government introduced the Building Industry Fairness (Security of Payment) Bill 2017 (Bill),

The reform repeals and replaces
- the Building and Construction Industry Payments Act 2004 (Qld) (BCIPA),
- the Subcontractors' Charges Act 1974 (Qld) (SCA). and
- amends other related legislation

- Introduction of Project Bank Accounts
- modernising and simplifying the provisions for making a subcontractor's charge
- increasing the ease of access to the payment claim and adjudication process;
- greater powers to the Queensland Building and Construction Commission (QBCC) to provide regulatory oversight to the building and construction industry; and
- tougher penalties, including imprisonment
Part 5  Current reviews and issues

https://queenslandbuildingplan.engagementhq.com/23620/documents/47323
**What are key subcontract clauses?**

<table>
<thead>
<tr>
<th>Reference date</th>
<th>Claims and Payment</th>
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<tbody>
<tr>
<td>Set off</td>
<td>• condition precedent – return of signed contract;</td>
</tr>
<tr>
<td>Security and Retention Monies</td>
<td>• condition precedent – statutory declarations</td>
</tr>
<tr>
<td>Liquidated damages</td>
<td>• set off</td>
</tr>
<tr>
<td>Rectification of defects [see section 10 of the SOPA]</td>
<td>Take out of works</td>
</tr>
</tbody>
</table>
Conclusion
THINK. SOLUTIONS
CREATE. INNOVATION
BUILD. OPPORTUNITY

We welcome the opportunity to discuss ways in which we can work with you.

For more information, please contact Kreisson on +61 2 8239 6500

kreon.com.au