

Australia: Recent reforms proposed to the Security of Payment Act in Victoria will further benefit unpaid subcontractors

In brief

If recently recommended amendments to the Security of Payment Act in Victoria come into effect, there will be changes in the nature of claims that can be brought, allowing variation, latent conditions and time-related claims to be made in adjudications. Accordingly, it is anticipated there will be an increase in the number and size of claims. Changes will likely also be required to construction contracts, including mandatory 25 business day maximum payment terms and reconsideration of potentially onerous time bar and other clauses.

On 28 November 2023, the Victorian Government's Legislative Assembly Environment and Planning Committee (**Committee**) tabled a report; *Employers and contractors who refuse to pay their subcontractors for completed works* (**Report**). The Report highlighted research into construction sector payment practices and how payment problems have led to financial and emotional stress experienced by contractors, and the negative flow-on effects to Victoria's economy.

The Report recommends changes to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SOP Act**) to improve certainty and simplicity for subcontractors when claiming payment and greater consistency with equivalent Security of Payment legislation in other states and makes broader recommendations regarding the ability to invalidate unreasonable time bars and to prohibit unfair contractual terms. We summarise below the key proposed changes to allow early consideration regarding commercial implications and changes to contracting practices, noting that most of the changes will already be familiar to stakeholders working in other jurisdictions.

The Victorian Government has six months from the date the Report was tabled to provide its response so we must wait until June 2024 to see which of the Report's recommendations are to be implemented, following which amendment legislation will need to be enacted. Amendments to Victorian Legislation may therefore still be one to two years away.

The Report's recommendations if implemented would require those in the construction industry to make adjustments to their contracts and ways of operating.

Required changes include ensuring payment terms are no more than 25 business days and preparing to make and receive a wider range of claims for determination by Security of Payment and the consequential increase in the likely size of amounts payable under Adjudication Determinations. In addition, giving careful consideration to contractual provisions such as time bars to ensure they are reasonable and not commercially onerous.

Depending on a construction entity's usual customers and suppliers, amendments for contract terms should already be under review in light of changes to the Australian Consumer Law effective after 9 November 2023 which prohibits businesses from using or relying on unfair contract terms in standard form contracts with consumers and small businesses.

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Key Recommendations

The Report makes 28 recommendations, 17 of these being amendments to the SOP Act.

These recommendations include:

- Simplifying claims for progress payments by removing the concept of 'excluded amounts' which are not claimable currently under the SOP Act and by removing restrictions on claims for contract variations. (Recommendations 2, 19). The extensive scope of "excluded amounts", and the impact of the proposed changes, is discussed further below
- Removing the concept of 'reference dates' (Recommendation 3)
- Changing the definition of a 'business day' to make it consistent with other states (Recommendation 4)
- allowing time-bar notice clauses to be assessed by an adjudicator, court, arbitrator or other appointed expert and potentially declared unfair (Recommendation 5). This change reflects a provision so far found only in the Western Australian security of payment legislation and indicates an increasing willingness to review the effect of time bar / notification clauses
- Making regulations to prohibit unfair contract terms (Recommendation 6);
- Extending the time available to make a progress or final payment claim from 3 months after the relevant reference date to 6 months for progress payments (or later if specified in contract) after the relevant construction work. This will be the same for final payment claim unless 28 days after the end of the last defects period is later, then this date is used. (Recommendation 7)
- Restricting the time that can be specified within a contract for when payment claims become due and payable from any period agreed upon in the contract to a maximum of 25 business days (Recommendation 8)
- Providing an explicit entitlement to claim retention money using the security of payment regime (Recommendation 9)
- Changing systems surrounding the adjudication of a payment claim, such as minimum time required for the respondent to provide a payment schedule, reasons given outside of the payment schedule and when a determination by an adjudicator must be made (Recommendations 15-17)
- Modernising notices authorised or required under the Act (Recommendation 20)

Updating provisions concerning adjudication certificates, to allow for certificates to become an enforceable judgment for debt (Recommendations 25-26).

Potential impacts

The unique restrictions on 'excluded claims' and on the making of variation claims in the Victorian SOP Act have historically hobbled the effectiveness of the SOP Act for Victorian contractor claimants. The proposed changes will 'tilt the playing field' significantly in favour of claimants and bring the Victorian SOP Act into line with its interstate equivalents.

The removal of 'excluded amounts' and non-claimable variations to align with other State jurisdictions allows contractors to make much larger payment claims (e.g. claims for costs due to latent conditions and delay-related costs) as well as reduce cost and time spent on adjudication and the review of adjudication decisions regarding payment claims with excluded amounts. Conversely, Head Contractors and Principals will be entitled to set off liquidated damages (currently excluded as time-related claims) from amounts claimed against them.

Whilst significant in a Victorian context, stakeholders working across other jurisdictions are already used to the proposed changes which are largely non-contentious in those jurisdictions. The 'bolder' changes which allow for 'unfair' time bars to be disregarded by an adjudicator and unfair contract clauses to be prohibited take up innovations adopted so far only in Western Australia.

To identify how these recommendations compare with the other States' security of payment regimes, the table below aligns the recommended amendments to the Act against the respective provisions from New South Wales, Queensland and Western

Australia statutes: *Building and Construction Industry Security of Payment Act 1999 No 46* (NSW) (**NSW Act**), *Building Industry Fairness (Security of Payment) Act 2017* (QLD) (**QLD Act**) and *Building and Construction Industry (Security of Payment) Act 2021* (WA) (**WA Act**).

Summary of key recommendations		
Rec. no.	Description of proposed recommendation	Effect of recommendation
2, 19	Simplify the calculation of progress payments, by removing 'excluded amounts' and non-claimable variations. In addition removing the review of adjudication determination under div 2A for excluded amounts. Reflects the position in all other jurisdictions	Contractors can claim amounts for: latent conditions, time related costs, changes in regulatory requirements, damages for breach of contract, or arising from claims outside the contract.
3	Remove reference dates and rather provide explicit statutory mechanism where at least one payment claim to be made per month. Where the contract specifies any period longer than the act, it will be overridden. Modelled on NSW Act.	Remove concept of a reference date and provide certainty on when payment claims can be made. Remove the ability for legitimate payment claims to be unfairly neglected.
4	Update the definition of a "business day" Modelled on WA and QLD Acts.	Excluding the period between 22 December and 10 January inclusive from the definition of business day.
5	Notice based time-bar clauses can be declared unfair by an adjudicator, court, arbitrator or other appointed expert. Modelled on WA Act. Not adopted yet in any other jurisdiction.	Clauses will be unfair if it was not reasonably possible or unreasonably onerous to comply with. Clauses found to be unfair will be treated as of no effect on the particular payment claim. Unfair clause may still otherwise have effect. Note that this ability to strike down time bar clauses extends beyond adjudication and may be utilised in litigation, arbitration and expert Determination.
6	Prohibition on unfair contract terms. Modelled on WA Act. Not adopted yet in any other jurisdiction.	New provision to empower regulations under the Act to prohibit unfair contract clauses and nullify their effect. This recommendation also extends beyond the scope of adjudication.
7	Extension of the time within which a progress or final payment claim may be made. Reflects more generous time periods in other jurisdictions (although still shorter than the 12 month period applying in NSW).	Progress payment claim can be made within 6 months (up from 3 months) after the relevant construction work was completed or later if provided in the contract. Final payment claim before the latest of: (1) 6 months after completion of works or supply of goods, (2) 28 days after the end of the last defects liability period; or (3) the date provided for in the contract.

Summary of key recommendations		
Rec. no.	Description of proposed recommendation	Effect of recommendation
8	<p>Mandatory maximum contractual payment duration of 25 days.</p> <p>Parallels maximum payment terms found in NSW and QLD Acts.</p>	<p>Will restrict the payment period if a date is set under the contract to a maximum of 25 business days, as the Act does not currently limit payment terms in a construction contract. Eliminating terms which may allow up to 120 days for head contractors to repay subcontractors.</p>
9	<p>Entitlement to claim retention money via Security of Payment.</p>	<p>Provides an entitlement to claim retention money, which is otherwise seen as the most unpaid part of the contract and empowers an adjudicator to decide whether, when and what proportion of the money must be returned.</p>
15-17	<p>Changed Adjudication procedures, allowing longer times for compliance</p> <p>Timing for adjudication response modelled on WA Act.</p>	<p>Prohibit respondents who failed to provide reasons in a payment schedule, doing so in adjudication as previously allowed.</p> <p>Extend time from 2 to 5 days for respondents to provide a payment schedule in response to an adjudication notice.</p> <p>Require an adjudication determination be made within 10 business days after the respondent provides a valid adjudication response, instead of 10 business days after acceptance of the application by the adjudicator. Otherwise (if response not provided) after the response becomes due, or (if no response allowed) after the adjudicator's acceptance of adjudication application. Can be extended to 20 business days on agreement.</p>

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