

## SECURITY OF PAYMENT ACT IN AUSTRALIA



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The Security of Payment Act (SOP Act) has been implemented by various states in Australia to ensure that contractors (including subcontractors) in the construction industry are paid promptly and efficiently. The intention of the SOP Act is to promote cash flow and reduce disputes over payment in the construction industry.

The Australian government has introduced specific legislation to assist contractors in the construction industry to receive prompt payments:

- New South Wales [NSW]- Building and Construction Industry Security of Payment Act 1999
- Northern Territory [NT] - Security of Payment Act 2004
- Queensland [QLD] - Building Industry Fairness (Security of Payment) Act 2017
- Victoria [VIC] - Building and Construction Industry Security of Payment Act 2002
- Western Australia [WA] - Building and Construction Industry (Security of Payment) Act 2021<sup>i</sup>
- Tasmania [TAS] - Building and Construction Industry Security of Payment Act 2009
- Australian Capital Territory [ACT] - Building and Construction Industry (Security of Payment) Act 2009
- Southern Australia [SA] - Building and Construction Security of Payment 2009

### SOP ACT - UNIFORMITY ISSUE

The SOP Acts were developed to prevent principals (employer / client) and contractors from delaying or reducing payment amounts and using cash owed to their subcontractors and

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<sup>i</sup> The Building and Construction Industry (Security of Payment Act) 2021 applies to contracts entered into on or after 1 August 2022) and the Construction Contracts Act 2004 applies to contracts entered into before 1 August 2022

suppliers for other purposes. The challenge faced by nationwide contractors is the existence of eight different SOP Acts across the Australian states, making it challenging for them to understand and navigate the varying legislation.

These eight SOP Acts can be grouped into two models, the East Coast Model and the West Coast Model,, which creates an additional layer of complexity. The East Coast Model, which is modelled after the NSW Building and Construction Industry Security of Payment Act 1999 and adopted by jurisdictions such as Queensland, Victoria, South Australia, Tasmania, and the ACT, establishes a separate statutory right to payment and uses a rapid adjudication process to resolve disputes. The West Coast Model, adopted by Western Australian and Northern Territory legislature, focuses on providing a rapid adjudication process that enables either party to enforce their contractual rights, with payment being just one potential dispute that can be resolved. Table 1 presents a comparison between the West Coast model and East Coast model.

Timeframe for Payment Claims
The Party that may apply for an adjudication application under the Act
The definition of payment dispute
Timeframe for serving an adjudication application
Project Bank Account (PBAs) or statutory Trusts
Is there construction work that is excluded
Can a respondent argue new reasons for non-payment in the adjudication response?
<b>Table 1 : Key Differences Between The WCM and E</b>

WCM LEGISLATION	ECM LEGISLATION
Within the period determined under the construction contract. WCM Acts largely preserve rather than override, the parties contractual interim payment regimes.	The ECM Acts provide a detailed statutory payments regime to govern the parties' relationship overriding any inconsistent contractual provisions.
The WCM Acts allow for payment claims both up and down the contractual chain". A principal can submit claim to a contractor for an amount in relation to the performance or non-performance of the contractor's obligations under the contract and subsequently apply to have the payment dispute adjudicated.	The ECM Acts only allow for payment claims to be made up the "contractual chain", the claimant only (i.e. subcontractor against a head contractor or head contractor against its principal)
The WCM Acts include a broad definition of "payment dispute" meaning that a large variety of claims can be adjudicated, including claims for payment of contractual entitlements such as variations, delay costs and disruption.	Section 10A and 10B of the Vic Act provide for certain matters to be "excluded amounts", including, amongst other things, variations (other than 'claimable variations'), claims for damages for breach of contract, time-related costs, and claims for latent conditions.
Under the current WA Act, a party has 90 days from the date of a payment dispute to make an application for adjudication. This time frame is significantly longer than what is provided in the ECM Acts and provides claimant time to prepare detailed and well substantiated adjudication application	Under the ECM Acts, the timeframe varies between the Acts and depends on the nature of the application. However, the timeframe is typically within 20 business days from the due date for payment
The WCM Acts do not prescribe the principal to retain money to cover value of a claimant's adjudication application, nor are there provisions establishing a statutory trust model in WA	The ECM effectively uses PBAs and trust accounts
Under the WCM "construction work" excludes: drilling for the purposes of extracting minerals, oil or natural gas; constructing, fabricating, installation, and maintaining of plants related to mining of oil and gas (often referred to as the "mining exception"). The only other jurisdiction with a similar concept is Queensland.	In the NSW and Vic Acts, the following does not qualify as construction work" : - drilling for and extracting oil or natural gas; or - extraction of minerals, including tunnelling, bring or constructing underground work for that purpose
Under WCM Acts, a respondent is permitted to argue new reasons in its adjudication response for non-payment of amounts within the payment claim	Under the ECM, a respondent is limited to reasons already included in the payment schedule.
CM Legislation	

## SOP ACT – KEY PROVISIONS ACROSS AUSTRALIAN STATES

Table 2 below shows a comparative analysis of key provisions in the SOP Acts across the various Australian states.

	WEST COAST MODEL		EAST COST MODEL					
	NT	WA	NSW	QLD	VIC	SA	TAS	ACT
	SOPA Section (s.)	SOPA Section (s.)	SOPA Section (s.)	SOPA Section (s.)	SOPA Section (s.)	SOPA Section (s.)	SOPA Section (s.)	SOPA Section (s.)
<b>Preserving cash flow</b>								
Rights to progress payments	s.18	s.17	s.8	s.70	s.9	s.8	s.12	s.10
Due date for payment	s.13	s.20	s.11	s.73	s.12	s.11	s.15	s.13
Pay when paid prohibited	s.12	s.14	s.12	s.74	s.13	s.12	s.16	s.14
<b>Procedure to recovering progress payments</b>								
payments Claims	s.19	s.22	s.13	s.75	s.14	s.13	s.17	s.15
Payment schedules	s.20	s.25	s.14	s.76	s.15	s.14	s.18	s.16
Consequence of failure to provide Payment Schedule	s.20	s.26	s.14(4)	s.77	s.15	s.14	s.19	s.16(4)
Consequence of failure to make Payment following failure to provide payment schedule	Not stated	s.27	s.15	s.78	s.16	s.15	s.20	s.17
Consequence of failure to make Payment in accordance with payment schedule	Not stated	s.27	s.16	s.78	s.17	s.16	s.20	s.18
<b>The adjudication process</b>								
Notification of commencing the adjudication process	s.28	s.26	s.17	s.79	s.18	s.17	s.21	s.19
Time to deliver the adjudication application	s.28	s.26	s.17	s.79	s.18	s.17	s.21	s.19
Forwarding the adjudication application	s.28	s.26	s.17	s.79	s.18	s.17 & 29	s.22	s.19 & 31
Responding to the adjudication application	s.29	s.27	s.20	s.81 & 82	s.21	s.20	s.23	s.22
<b>Table 2 : Security of Payment Act sections - comparison</b>								

The following examples further demonstrate the inconsistencies of the SOP Acts across the various states within Australia:

- a) In terms of terminology, the NT SOP Act uses the phrase “working day” while the SOP Acts in other states use “business day” to refer to the same concept. The lack of consistency in terminology across the different acts, may lead to confusion for those interpreting and implementing the laws.
- b) In regard to payment terms, the NSW, ACT and VIC SOP Acts state that progress payments are due as per the contract or within ten business days after a payment claim is submitted, while the WA SOP Act specifies a default position of 28 days, unless specified otherwise in the contract, and if the contract specifies more than 42 days, then the payment will be due on the 42nd day.
- c) In terms of the initial steps for the adjudication process, the NSW, ACT and NT SOP Acts provide that if no payment schedule was provided, claimants must notify the respondent within 20 business days following the due date for payment and provide them with an opportunity to provide a Payment Schedule within 5 business days after receipt of notice. Whereas, the NT SOP Act requires that any party to a payment dispute must apply within 65 working days after the dispute arises. And the WA SOP Act provides that any party to a dispute may apply within 90 days after the dispute arises.

The inconsistencies in terms of terminology and different procedural requirements across the different states and territories can cause difficulties and confusion for those navigating the laws, making it challenging to understand and comply with the requirements. As such, the Australian Government appointed John Murray AM (specialist in building contract disputations and security of payment legislation) to review the security of payment laws in the building and construction industry.

The review focuses on three main considerations:

- a) Preserving cash flow by ensuring prompt payment of progress claims, providing a quick and efficient adjudication process, and protecting progress payments for those who are rightfully due;
- b) An appropriate balance should be struck between the speed of the adjudication process and ensuring procedural fairness; and
- c) The need for greater protection for subcontractors in the payment process and suggests that payments should be passed promptly down the contractual chain.

In his report, Murray (2017)<sup>ii</sup> presented eighty-six (86) recommendations. Among these recommendations are:

- The implementation of uniformity in Security of Payment laws across the Australian states to ensure consistency and ease of understanding. This would involve harmonising the various state and territory- based security of payment laws to reduce confusion and make it easier for business to navigate the system.
- Simplifying the Act and the procedural process to make it more accessible and less cumbersome for those who need to use it.
- A requirement for progress payment claims to be made in a timely manner after the completion of construction work or supply of related goods and services and a legislative scheme that ensures the recipient of a progress payment claim will provide a prompt response, in order to preserve the cash flow of contractors.
- A clear process for responding to payment claims, including specifying the time period within which the recipient must provide a response.
- An adjudication process that is rapid and transparent

## SUMMARY

In conclusion, the payment structure in construction contracts is a complex issue that can lead to a significant impact on the success of a project.

The SOP Act plays a vital role in ensuring that contractors are paid for the work performed on a construction project in a timely manner. The SOP Acts provide a mechanism for contractors to claim payment for work that has been completed and provides for a dispute resolution process to resolve any payment disputes and ensure that contractors are not disadvantaged by payment delays. The prohibition of the “pay when paid” clause in the contract also ensures that the contractors are not put at risk of not being paid for their work, even if the work has been completed. The SOP Act helps to protect the financial stability of the contractor and ensures that the project is completed on time.

To date, the Murray recommendations, in his review of the various security of payment Acts, has not yet been implemented. This has led to ongoing challenges for builders and subcontractors as financial difficulties in the industry have significantly worsened in recent years due to inflated costs.

Now, more than ever, the need for the Murray Report recommendations to be implemented by the government could not be more evident.

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ii Murray, J. (2017). Review of security of payment laws : building trust and harmony. [Canberra, Australian Capital Territory]: Department of Jobs and Small Business.

## DGA GROUP CONTACT INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at [DGAGroup@dga-group.com](mailto:DGAGroup@dga-group.com)

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