

Security of Payment & Contracts: An Update

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Today's Topics

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- ▲ Security of Payment Update – QLD
- ▲ Security of Payment Update – NSW
- ▲ Recent SOP Case law
- ▲ Consequential Loss v Indirect Loss
- ▲ Termination for Convenience
- ▲ Contract Preparation & Administration
- ▲ Dispute Resolution – an overview
- ▲ Questions ?



Security of Payment Qld

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- ▲ **December 2014 – BCIPA Amended**
 - ▲ New amendments apply to all contracts entered into after 15 December 2014
 - ▲ However all contracts affected by the abolition of ANAs with those functions being transferred to the registry
 - ▲ Introduced to overcome concerns regarding insufficient time under the Act for Respondents for large claims
 - ▲ Also concerns regarding conflicts of interest with ANAs and also adjudication fees



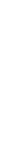
Security of Payment Qld - cont

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▲ Key Amendments – Dual Model

- ▲ Act now has dual model to handle ‘complex’ and ‘standard’ claims with different timeframes
- ▲ Complex claim is:
 - ▲ a claim for > \$750,000
 - ▲ a claim for a latent condition
 - ▲ a claim for a time-related cost
- ▲ A standard claim is something that is not ‘complex’
- ▲ You must now identify whether your claim is a standard or complex claim – **when you serve it.**

- ▲ **Key Amendments – changing time frames**
 - ▲ Claimant now has only 6 months to lodge a claim from when work last carried out, rather than 12 months (unless contract states otherwise)
 - ▲ Respondent now has 15 business days to respond to a complex claim (rather than 10 business days) ...
 - ▲ **but** 30 business days if served > 90 days after a reference date in the contract



- ▲ **Key Amendments – changing time frames**
 - ▲ For adjudication responses, Respondents now have more time to prepare and consider responses
 - ▲ For standard claim, a Respondent now has 10 business days to lodge a response (up from 5)
 - ▲ For complex claim, a Respondent has 15 business days to lodge response (but may apply for a further 15 days)
 - ▲ For complex claims, Respondents may include new reasons in an adjudication response
 - ▲ Complex adjudications may take up to 6 months!
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- ▲ Key Amendments – changing time frames
 - ▲ To reflect industry shut-down practice, a ‘business day’ is now defined to exclude:
 - ▲ 3 business days prior to Xmas Day and
 - ▲ period between Xmas and New Year; and
 - ▲ 10 business days after New Year
 - ▲ ANAs do not exist in Qld anymore and all adjudication applications are now made to the registry within QBCC

Security of Payment Qld - cont

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- ▲ Key Amendments – Notify before proceedings
 - ▲ A Claimant must now give a Respondent a 2nd opportunity to serve a payment schedule before commencing Court proceedings
 - ▲ Must be given within 20 business days after the due date for payment
 - ▲ Previously a section 21 notice was only required if you wanted to proceed to adjudication

- ▲ **2014 changes to NSW SOPA**
 - ▲ retention moneys – new regulation in force 1 May 2015
 - ▲ Head contracts > \$20M – monies into trust
 - ▲ time for payment – max times under s.11 of the Act
 - ▲ 15 business days after the payment claim for head contractors
 - ▲ 30 business days after the payment claim for subcontractors
- ▲ No need to for endorsement “*This is a payment claim...*”
- ▲ Therefore critical to manage ‘reference dates’



Recent Cases – Reference Date

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- ▲ What is a 'reference date'
 - ▲ - a date, on or after, a claimant has a right to make a payment claim (eg 25th of month, last business day of month etc)
 - ▲ 2 types of contract for the purposes of the SOP Act
 - ▲ those which do not have express provisions; and
 - ▲ those that do
 - ▲ Given recent Court decisions, this distinction is now crucial



Recent Cases – Reference Date

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- ▲ **If No Express Provision for claim**
 - ▲ usually contract is in the form of a quote / purchase order (not a formal contract) – may be oral agreement
 - ▲ whilst the contract may include payment terms, it does not provide a right to lodge a payment claim
 - ▲ Therefore, the SOP Act provides a right to lodge a claim
 - ▲ (Qld) – from each reference date (s12)
 - ▲ (NSW) – on and from each reference date (s 8)
from the last day of the month



Recent Cases – Reference Date

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- ▲ Recent NSW Supreme Court Cases
 - ▲ *Grid Projects v Proyalbi Organic Set Plaster* [2012] NSWSC 1571
 - ▲ Court found that a reference date arose only if a claimant had done work in a 'named' month
 - ▲ Stephenson J found that s13(5) of the Act prevented the claimant serving a 2nd payment claim in respect of a reference date which only occurred on the last month in which work was last carried out

Recent Cases – Reference Date

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- ▲ Recent NSW Supreme Court Cases
 - ▲ *Broadview Windows v Architectural Project Specialists* [2015] NSWSC 955
 - ▲ (*also Veer Build v TCA Electrical* [2015] NSWSC 864)
 - ▲ Court reconsidered position for these types of contracts based upon earlier Court of Appeal decisions
 - ▲ Found that reference dates continue to accrue after work had finished (NSW 12 months, Qld now 6 months)
 - ▲ Sensible outcome – consistent with intention of Act - good for claimants and smaller contractors
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- ▲ **Contracts with Express Provision for Claim**
 - ▲ Most 'formal' contracts have express provisions dealing with when you can lodge a claim (25th day of month etc)
 - ▲ Therefore default provision in the Act does not apply
 - ▲ Usually no problems when contract 'on foot'
 - ▲ Issues arise when work comes to an end (contract is discharged, terminated).
 - ▲ Consider *Patrick Stevedores v McConnell Dowell*..

Terms Surviving Termination

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- ▲ Most clauses do not survive termination of a contract.
- ▲ Consider *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2014] NSWSC 1413
- ▲ **Facts**
- ▲ Contract was terminated for convenience on 24 April 2014.
- ▲ MacDow lodged a payment claim for \$55M on 30 June 2014.
- ▲ An adjudicator ultimately awarded \$24M against Patricks.
- ▲ Contract included a term setting out what demobilisation payments were due if contract was terminated for convenience – this clause was said to survive termination.
- ▲ The progress payment clauses (which allowed MacDow to claim for work done) were silent regarding survival post-termination



Terms Surviving Termination

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- ▲ Patricks appealed on the basis that there was no right under contract to make the progress claim.
 - ▲ **Judgment**
 - ▲ Court confirmed that whether a term survives 'a question of construction'
 - ▲ If parties made specific provision for some clauses to survive termination, it would be odd if they also intended other clauses to continue
 - ▲ So, MacDow had no right to serve a payment claim and their claim was invalid – determination for \$24M was set aside.
 - ▲ **Therefore**
 - ▲ Consider what clauses should survive early termination
 - ▲ Consider including / limiting a right to a claim under the contract following termination.
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Recent Cases – Preconditions

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- ▲ Recent Qld Supreme Court Cases
 - ▲ *BRB Modular v AWX Construction* [2015] QSC 218
 - ▲ Contract required claimant to provide a Statutory Declaration confirming payment of all contractors 2 days before accruing a right to make a payment claim
 - ▲ Claimant lodged qualified Declaration with payment claim (not 2 days before)
 - ▲ Adjudicator found significant monies owing by Respondent

Recent Cases – Preconditions

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- ▲ Recent Qld Supreme Court Cases
 - ▲ *Respondent appealed citing lack of reference date as preconditions*
 - ▲ Court found that these contractual preconditions offended s99 of the Qld Act
 - ▲ Section 99 of the Act states that any provision of a contract which has effect of excluding, modifying or restricting statutory entitlement to make a claim is void
 - ▲ Now good clear line of authority to the effect that these contractual preconditions are void for purposes of Act
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Summary SOP Issues

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- ▲ Be mindful of reference dates
- ▲ You do not want to use your last reference date inadvertently if you may want to use the Act later
- ▲ Once contract comes to an end normally – you may only have one reference date to use to lodge a claim
- ▲ If contract is terminated early (including 'for convenience'), you may have no right to make a claim at all.



Consequential v Indirect Loss

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- ▲ “Consequential Loss”
 - ▲ Contracts traditionally excluded “consequential loss”
 - ▲ Recent decisions have expanded what is meant by this term
 - ▲ *Peerless* (2008)- some consequential loss may be direct loss
 - ▲ *GEC v City of Sunshine* – loss of profits and loss of revenue may be direct loss
- ▲ Term “consequential loss” should no longer be used
- ▲ Term “indirect loss” is now being favoured
- ▲ Extremely precise and legalistic drafting now needed for exclusion and indemnity clauses

Termination for Convenience


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- ▲ Right
 - ▲ Principal may terminate contract at any time for any reason
- ▲ Considerations
 - ▲ **Notice period:** Ensure an appropriate notice period given scope and duration of contract
 - ▲ **Compensation:** Ensure compensation for work complete, demobilisation costs and cost of goods ordered and legally obliged to pay for
 - ▲ **Profit:** Ultimately a commercial issue whether right to profit foregone (often % of contract sum, small fixed fee or % of remaining work removed)
 - ▲ **Market Position:** increasingly no lost profit in any form.



Poor Contracts & Admin

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- ▲ Astounding how many commercial disputes involve arguments about what is the contract
 - ▲ Typical that key documents or contract schedules are not completed, drawings are not properly referenced or revision numbers are not included
 - ▲ Annexures in standard form contracts poorly understood
 - ▲ - must carefully read the clause referred to – don't assume.
 - ▲ Contract Administration – communication critical
 - ▲ Be clear (blunt) in your correspondence – reduce all agreements to writing!
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Dispute Resolution

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- ▲ Mediation (not binding but effective initial step)
 - ▲ Expert Determination (limitations and consider binding below an agreed limit)
 - ▲ Adjudication (very effective in construction sector but must be prepared)
 - ▲ Arbitration (private but expensive, drawn out and unpredictable)
 - ▲ Litigation (last resort but better option than arbitration)
 - ▲ Carefully consider your preference for DR – this term survives discharge of the contract
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Questions ??

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Thank you

Any Questions?