1. On 21 November 2018, the Building and Construction Industry Security of Payment Amendment Act 2018 (NSW) (the Amendment Act) was passed by the NSW Parliament. It is now waiting assent. The Amendment Act contains some significant amendments to the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act). The Amendment Act adopts some (but not all) of the recommendations of the recent Murray Report. The amendments will not have retrospective application to existing construction contracts. This article highlights some of the key reforms.

2. Section 7(2)(b) of the existing SOP Act has the effect of excluding the operation of the security of payment scheme from application to a construction contract for the carrying out of residential building work on premises in which the party for whom the work is being carried out proposes to reside in. One of the more controversial reforms suggested in the Murray Report (see Recommendations 12 and 13) was to abolish the residential building work exemption for owner-occupiers.

3. The Amendment Act deletes section 7(2)(b). Consequently, the scheme now applies to residential building work being undertaken for owner-occupiers.

4. For the reasons set out in our earlier article, the exemption for owner-occupiers should have been maintained. It opens up the owner-occupiers of NSW to the potentially serious consequences of security of payment processes being invoked by builders. Commercially savvy builders in this part of the market have greater knowledge and bargaining power than most owner-occupiers. There is a real risk of abuses of the scheme in a sector of the market which has (until now) been spared from its reach.

5. A series of amendments will have the effect of overcoming two aspects of the High Court of Australia's decision in Southern Han Breakfast Point (in liq) v Lewence Construction [2016] HCA 52. These amendments effectively adopt Recommendations 14 to 17 of the Murray Report. New section 13(1C) provides that where a construction contract has been terminated, there is a statutory right to make a payment claim for the purposes of the SOP Act on and from the date of termination. The amendments abolish the concept of the ‘reference date’. The defined term ‘reference date’ is found in section 8(2) of the SOP Act. A ‘reference date’ is, among other things, a date determined by or in accordance with the terms of a construction contract as the date on which a claim for payment may be made under the contract. The defined term is cross-referred to in section 8(1) of the SOP Act. Section

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6. Whilst the introduction of a right to make a payment claim upon termination of a construction contract was critical to the High Court’s reasoning in *Southern Han*. The Amendment Act amends these mechanisms by:

a. Omitting current section 8 (including the defined term ‘reference date’) and introducing a new section 8 which simply provides that ‘A person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment.’

b. Replacing the cross reference in section 13(1) to section 8(1) so it cross refers to the new section 8.

c. Introducing new sections 13(1A) and 13(1B), the effect of which is to introduce a new regime whereby the statute defines the default timing for the making of payment claims (namely on and from the last day of the named month in which the construction work was first carried out under the contract and on and from the last day of each subsequent named month). The default position may be deviated from if the relevant contractual provisions provide for an earlier date than that prescribed by section 13(1A). There are some consequential amendments to section 13(5) and (6) to reflect the abolition of the ‘reference date’.

6. Whilst the introduction of a right to make a payment claim upon termination of a construction contract will remove some of the anomalous practical effects arising out of the *Southern Han* decision in a termination context, these parts of the Amendment Act raise a series of further issues:

a. The amendments do not appear to contemplate the unique circumstances of a payment regime which is defined by reference to the achievement of milestones. The definition of ‘progress payment’ in the SOP Act includes payment by reference to milestones. Under these forms of construction contract, the right to make a payment claim is typically defined by the achievement of a milestone (rather than being defined by a nominated date in a calendar month). The definition of a ‘progress payment’ in the SOP Act includes milestone payments. The definition of ‘progress payment’ is not amended by the Amendment Act. The amendments to sections 8 and 13 do not link back to a milestone payment regime. This leaves open the possibility that contractual milestone payment regimes are in effect negated by the new section 13(1A). This could have impacts for the financing arrangements under ‘milestone payment’ mechanisms.

b. Construction contracts which seek to control the timing of the ability to make payment claims by making (for example) the right to make a payment claim dependent in part on the provision of certain documentation may potentially be ineffective in light of the amendments to sections 8 and 13.

c. The amendments represent a significant form of state intervention in the freedom of parties to contractually define and control the timing for the submission of payment claims under a construction contract. This is potentially problematic higher up the contracting chain. Whilst new section 13(1C) is a welcome reform, sections 13(1A) and 13(1B) may have distorting consequences as they have the practical effect of removing the contractual freedom of parties to be able to regulate the time at which payment claims may be made under a construction contract.

The ‘Magic Words’ are needed again

7. The requirement to endorse all payment claims as claims under the SOP Act in order to have statutory effect is re-introduced in an amendment to section 13(2)(c). This is a welcome reform.
New Compliance Provisions

11. There are a raft of new compliance provisions and enhanced investigation and enforcement powers.

Summary

12. The parts of the Murray Report which have not been adopted in the Amendment Act are perhaps of as much interest as those which have been adopted:

a. Recommendations 43 to 50 of the Murray Report relate to reviews of adjudication determinations. Mr Murray advocated a self-contained legislative review mechanism for adjudication determinations. None of these recommendations have been adopted in the Amendment Act. Given the Amendment Act does not narrow the ambit of what may be adjudicated (either by value or class of contract) and the negligible rights which aggrieved respondents now have to seek judicial review of erroneous adjudication determinations, it is regrettable that the Amendment Act does not adopt the Murray Report recommendations which would have the effect of providing at least some level of embedded peer review in the NSW scheme. There is nothing offered in the Amendment Act which will improve the quality of adjudication determinations in NSW.

b. Recommendation 82 (which would have the effect of empowering adjudicators to make decisions about the release of both cash retention and other forms of security such as bank guarantees and insurance bonds) has not been adopted. This is a welcome result.

c. Recommendation 84 (which would have the effect of voiding certain contractual notice provisions) has not been adopted. This is also a welcome result.

13. Much like the Murray Report, some of the reforms set out in the Amendment Act are welcome, whilst others are more problematic. It remains to be seen whether other recommendations will be implemented in due course and the position which will be taken in other States and Territories. For now at least, the goal of national harmonisation remains elusive. The main critique which may be offered of the reform package is that it continues to adopt the ‘one size fits all’ approach. The justification for expansion of rights of builders as against owner-occupiers is tenuous at best. The SOP Act is a significant form of state intervention in commercial relations in the construction sector. The goal of improving cash flow for small subcontractors and suppliers and the weakest and most vulnerable in the contracting and supply chain is understandable and worthy. The problem is that the scheme also has unqualified application to more sophisticated commercial players higher up the contracting chain. Consideration should have been given to confining and limiting the scheme in NSW, rather than expanding its ambit. The problem with the philosophical underpinning of the Murray Report is that it proceeds on the basis that expanding the ambit of the scheme is an appropriate legislative approach. The Amendment Act is aligned with this view.

Contact

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