



# CHANGES TO ADJUDICATION IN WA? THE BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) BILL 2020 *PART 1*

There is a lack of uniformity across Australia concerning the legislative regimes that deal with payments in the construction industry. The regimes are divided into what are referred to as the “East Coast” model (NSW, Vic, ACT, Tas, SA and QLD) and the “West Coast” model (WA and NT). There has long been a call for harmonisation across all states and territories, and it appears the East Coast model may win out.



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The draft Building and Construction Industry (Security of Payment) Bill 2020 (the Draft SOP Bill) was recently released for comment. If enacted, the Draft SOP Bill will replace Western Australia's current *Construction Contracts Act 2004* (WA) (CCA) and will overhaul Western Australia's adjudication process to align it more closely with the East Coast security of payment model. The aim of adjudication – to resolve payment disputes quickly, informally and inexpensively as possible - remain the same.

This briefing, which is the first of two, outlines the changes to the adjudication process under the Draft SOP Bill. Our next article addresses the changes to the terms of construction contracts proposed under the Draft SOP Bill.

**New requirements regarding payment claims, payment schedules and the type of claims that can be adjudicated**

The Draft SOP Bill introduces the following changes relating to claims for payment:

- The term “payment dispute”, a key feature of the CCA, is not used in the Draft SOP Bill and adjudications can only be initiated by a party that has performed construction work. The consequence of this is that no longer will “down-stream” adjudications, such as those initiated by principals seeking recovery of liquidated damages, be possible.
- The maximum time for payment of a payment claim (currently 42 days in the CCA) has been reduced under the Draft SOP Bill to 20 business days in contracts between a principal/head contractor, and 30 business days for contracts between a head contractor and subcontractors.
- Payment claims must expressly state that they are made under the legislation. This is a feature of East Coast models but is not present in the CCA.
- If a payment claim is made, a respondent must either pay it in full or issue a payment

schedule within 15 business days. If a respondent does not issue a payment schedule and does not pay the amounts claimed, a claimant can recover the amount in court or via an adjudication.

- A payment claim must be made within 6 months from the date the works the subject of the payment claim were completed. The CCA does not contain any long-stop date for payment claims.

**Adjudication process**

The key differences in the adjudication process between the current CCA and the Draft SOP Bill are illustrated in the table on the opposite page.

**Key takeaway**

If adopted, the Draft SOP Bill will substantially change the adjudication regime in Western Australia, though it does not aim to achieve full harmonisation with East Coast models.

Also, if the Draft SOP Bill is enacted it will only apply to contracts signed after the new legislation comes into force, and as a consequence we can expect there will be a number of years during which both the CCA and the Draft SOP Bill regimes will be in force.

	CCA	Draft SOP Bill
<b>Filing an adjudication application</b>	Within 90 business days after a payment dispute arises.	<p>If a payment schedule is given an adjudication application must be made within 20 business days of receipt of the payment schedule.</p> <p>If no payment schedule is given, the claimant must give the respondent a further 5 business days in which to issue a payment schedule. The claimant can then file for adjudication application within 20 business days from the end of the 5 business day grace period.</p>
<b>The adjudication response</b>	The respondent has 10 business days to respond, and can raise new arguments to justify non-payment.	<p>If a payment schedule is given, the respondent has 10 business days to respond to an application for adjudication, though cannot raise new matters in the adjudication response beyond those in the payment schedule.</p> <p>If no payment schedule is given, the respondent cannot respond to an adjudication application and a determination will be made without the respondent's participation in the adjudication.</p>
<b>Adjudicator's role and their determination</b>	<p>The adjudicator's determination must be given within 10 days of receiving the adjudication response.</p> <p>There is no right to additional time unless the parties agree, and an adjudicator has no right to appoint an expert.</p>	<p>The adjudicator's determine is due within 10 days of receiving the adjudication application, though a determination is not invalid merely by being delivered late.</p> <p>The adjudicator can engage an expert to investigate and report on any matter.</p>
<b>Reviewing an adjudicator's determination</b>	<p>A party may apply to the State Administrative Tribunal for a review of the decision if the adjudicator dismissed the application without making a determination on its merits.</p> <p>An application is to be made within 28 days.</p>	<p>A claimant may apply for a review of the adjudicator's determination if:</p> <ul style="list-style-type: none"> <li>the adjudicated amount is less than the claimed amount and the amount of that difference exceeds a fixed sum (currently suggested to be \$200,000); or</li> <li>the adjudicator determined that no amount was payable.</li> </ul> <p>A respondent may apply for a review of the adjudicator's determination if:</p> <ul style="list-style-type: none"> <li>A payment schedule was provided to the claimant; and</li> <li>the adjudicated amount is more than the scheduled amount and the amount of that difference exceeds a fixed sum (currently suggested at \$200,000).</li> </ul> <p>An application for review must be made within 5 business days of receiving the adjudicator's determination.</p> <p>Upon receiving an adjudication review application, an authorised nominating authority will appoint a review adjudicator.</p>
<b>Costs of the adjudicator and the parties' cost</b>	Adjudicator's costs are shared. Parties are liable for their own costs, except for frivolous or vexatious conduct on the part of one party. (In practice payment of another party's costs is rarely, if ever, ordered.)	<p>Adjudicator's costs are shared though an adjudicator can take account of, among other things, frivolous or vexatious conduct of the parties to apportion payment between the parties.</p> <p>Parties to an adjudication are liable for their own costs and cannot recover those costs from the other party.</p>
<b>Insolvent claimants</b>	Not addressed.	A corporation in liquidation cannot make a payment claim or take any action to enforce a payment claim through adjudication.

*The key differences in the adjudication process between the current CCA and the Draft SOP Bill.*

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