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EBSWORTH
LAWYERS

Preparing for the
2022 Security of
Payment Season

NOVEMBER 2022

BUSINESS DAYS OVER THE HOLIDAY PERIOD

The timelines in the security of payment legislation are based on 'business days' as defined in the *Building and Construction Industry Security of Payment Act (Vic) 2002 (SOP Act)*. For ease of reference, we have set out the "business days" over the upcoming holiday period in **Annexure A** below.

Some warnings to remember:

- Be careful and confirm that the deadline for submitting payment schedules in the contract is not earlier than you think. The SOP Act requires a payment schedule within the earlier of 10 business days of the payment claim or as set out in the contract. If your contract requires a response based on calendar days or has a different definition of 'business day', the deadline may be earlier than you think.
For example, 14 calendar days can be significantly earlier than 10 business days - especially over the holiday period.
- A payment claim can only be served on or after the 'reference date'. This is the date for submitting payment claims under the contract (or monthly if it is silent). If a Claimant serves a payment claim before the reference date, then it will be invalid and cannot be relied upon.
For example, a payment claim submitted on Christmas Eve before the Claimant's office closes will be invalid if the contract requires payment claims to be submitted on or after the 25th day of each month.
- Many contracts state that a deadline that falls on a non-business day may be extended until the following business day. If it is served prior to that later date, then it would be invalid.
For example, a payment claim that would otherwise be due on 25 December may not have a 'reference date' until 29 December.
- Victoria, unlike QLD and NSW, does not have a blackout period over the Christmas period (22 to 24 December, 27 to 31 December 2022, and 2 to 10 January 2023 in QLD) (27, 28, 30, or 31 December 2022 in NSW). Therefore, you may still make and/or receive adjudication applications during the Christmas period.

ARE LIQUIDATED AND / OR DELAY DAMAGES EXCLUDED UNDER SOPA?

Victoria has a unique position in its SOP Act compared to other States in that it does not permit claims for 'excluded amounts'. Claimants cannot include these 'excluded amounts' in payment claims, and Respondents are not liable to pay them.

The concept of 'excluded amounts' is relevant for both contractors' delay costs claims and principals' liquidated damages claims for delayed projects. Notably:

- Claimants (eg, head contractors) are prevented from claiming their delay and disruption costs, or other time-related costs as these are 'excluded amounts'; and
- Respondents (eg, principals) are prevented from levying liquidated damages as they must pay the full value of work performed (on an interim basis).

Previously, a Claimant would have had to contest liquidated damages as soon as they were applied. As a result, a Claimant would have no choice but to apply for an adjudication during the Christmas period if liquidated damages were applied in the December payment schedule.

However, as outlined in our article [Are Liquidated Damages Excluded Under the SOPA](#), this has recently changed following the decision in *Goldwind Australia Pty Ltd v ALE Heavylift (Australia) Pty Ltd* [2021] VSC 625 (**Goldwind**). In summary, a Claimant can now claim for work done, which may include an amount previously levied for liquidated

damages. This means that a Claimant can make a calculated decision as to when they should apply for an adjudication to recover payment for the works that have been performed but not paid due to the deduction of liquidated damages (eg, during the Christmas period or when they return to work).

This takes the pressure off Claimants, however, Goldwind is problematic for Respondents because, in effect, liquidated damages can be clawed back under the SOP Act at any time until the final reference date has expired.

HWL Ebsworth Lawyers has expertise in advising on the above mentioned matters. Please contact **Leighton Moon**, **Paul Graham** or **Tara Nelson** of our Construction and Infrastructure team to discuss any issues relating to security of payment.

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[Click here](#) to find out more about our Construction and Infrastructure Group

ANNEXURE A - SECURITY OF PAYMENT SEASON CALENDAR (VICTORIA) 2022/23

| SECURITY OF PAYMENT SEASON CALENDAR (VICTORIA) | | | | | | |
|------------------------------------------------|--------|---------|-----------|----------|--------|----------|
| DECEMBER 2022 | | | | | | |
| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
| | | | | 1 | 2 | 3 |
| 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 11 | 12 | 13 | 14 | 15 | 16 | 17 |
| 18 | 19 | 20 | 21 | 22 | 23 | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | 31 |

| SECURITY OF PAYMENT SEASON CALENDAR (VICTORIA) | | | | | | |
|------------------------------------------------|--------|---------|-----------|----------|--------|----------|
| JANUARY 2023 | | | | | | |
| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| 8 | 9 | 10 | 11 | 12 | 13 | 14 |
| 15 | 16 | 17 | 18 | 19 | 20 | 21 |
| 22 | 23 | 24 | 25 | 26 | 27 | 28 |
| 29 | 30 | 31 | 1 | 2 | 3 | 4 |

| KEY | |
|-----|-----------------------------------------------------------------------|
| | "Business day" as defined under the SOP Act - counts towards deadline |
| | Non "business day" - does not count towards deadline |