



# **WIN: WHAT IN-HOUSE LAWYERS NEED PUBLIC SECTOR ESSENTIALS**



Security of Payment

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This session will provide an overview of the *Building and Construction Industry (Security of Payment) Act 1999* (NSW) (**SOPA**):

1. Objectives of SOPA
2. Mechanism under SOPA
3. The April 2014 amendments to SOPA under the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW)
4. SOPA issues for government agencies

## ■ Part 1 Section 3

- The objective of the *Building and Construction Industry (Security of Payment) Act 1999* (NSW) (**SOPA**) is to ensure that any person who carries out construction work (or undertakes to supply related goods and services) under a construction contract is entitled to receive and recover progress payments
- Grants a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments
- Establishes a procedure:
  - Payment claim is made by the payee
  - Payment Schedule provided by the payer
  - Disputes are referred to an adjudicator for determination
  - Progress payment is determined accordingly

- **Part 2 - Rights to Progress Payment**
  - **Section 8:** Rights to progress payments
  - **Section 9:** Amount of progress payments
    - amount calculated in accordance with contract
    - if no express provision, value of construction work (or related goods and services) carried out/undertaken/supplied
  - **Section 10:** Valuation of construction work and related goods and services:
    - in accordance with the terms of the contract; or, if no express provision:
      - contract price for the work; and
      - any other rates or prices set out in the contract; and
      - adjustment for any agreed variation and costs of rectifying defects if any
  - **Section 11:** Due date for payment

- **Part 3 – Procedure for recovering progress payments**
- **Division 1: Payment Claim/Payment Schedule**
  - Claimant issues a Payment Claim (**s 13**)
  - The Respondent provides a Payment Schedule to the Claimant within **10 business days or time required by the contract, whichever is less (s 14)**
  - Payment schedule must set out the amount the Respondent proposes to pay and if it is less than what was claimed, the reason for withholding payment (**s 14**)
  - Where the amount the Respondent proposes to pay is less than the claimed amount or if the Respondent fails to pay the scheduled amount by the due date, Claimant may commence adjudication by submitting an adjudication application

### ■ Division 2: Adjudication of disputes

- Adjudication application submitted to an authorised nominating authority chosen by Claimant. Timing (**s 17**):
  - 20 business dates: Claimant receives Schedule, does not dispute Schedule but Respondent fails to pay by due date
  - 10 business days: Receives Schedule but amount less than claimed or NIL
  - 10 business days from last day of the 5 day notice period: no Payment Schedule, Respondent given notice of intention to adjudicate within 20 business days after due date, and further 5 days to provide Schedule
- Adjudication response submitted by the Respondent (**s 20**)
  - 5 business days after receiving copy of application; or 2 business days after receiving notice of adjudicator's acceptance, whichever time expires later
  - However, note 20(A) and (B): Respondent can only lodge response if it has provided a Payment Schedule and Respondent cannot include reasons for withholding payment unless those reasons were included in the Schedule
- Decision by adjudicator given within 10 business days of the adjudicator's acceptance (or time as agreed by parties) (**s 21**)

- **Division 2: Adjudication of disputes (conti.)**
  - Adjudicator's Determination (**s 22**)
    - Must determine
      - amount of progress payment (adjudicated amount)
      - date became or becomes payable
      - rate if interest payable
    - be in writing
    - include reasons for determination
  - Adjudicator's fees must be paid before determination is released
  - Respondent has 5 business days from release of the determination to pay the adjudicated amount (if any) (**s 23**)
  - Respondent fails to comply – Claimant can obtain an adjudication certificate from the authorised nominating authority and file with Court as a **judgment debt (ss 24 & 25)**



- **Easter Monday Changes**

- SOPA was amended by the *Building and Construction Industry Security of Payment Amendment Bill 2013* (NSW) (**Amendment Act**)
- First phase of reform in response to the Final Report of the Independents Inquiry into Construction Industry Insolvency in NSW (**Collins Inquiry**)
- The changes took effect from Easter Monday (21 April 2014) and only apply to contracts entered into after 21 April 2014



- **Easter Monday Changes**
  - Purpose: to provide "*greater protection for subcontractors and promote cash flow and transparency in the contracting chain*" in an attempt to decrease building company insolvencies
- **Three Pillars of Change**
  1. No magic words required
  2. Mandatory Supporting Statement
  3. Deadlines for Payment

- **No Magic Words Required**
  - Prior to the Amendment Act, a payment claim needed to expressly state that it was a payment claim under the SOPA (Magic Words)
  - Post Amendment Act - no need for Magic Word
  - Principals must be careful not to miss any payment claims even where such claims are not accompanied by the Head Contractor's supporting statement
  - **If Principal misses a payment claim and, as such, fails to issue a payment schedule in time, it will be liable in law to pay the entire amount claimed as a debt**

- **Supporting Statement**

- The Amendment Act requires that a payment claim by a Head Contractor is accompanied by a supporting statement
- The supporting statement must include a declaration that all subcontractors have been paid all amounts that have become due and payable

- **Head Contractor Statutory and Criminal penalties**

- A Head Contractor must not serve a payment claim on a Principal unless the claim is accompanied by a supporting statement
  - Failure to do so – **Maximum penalty of \$22 000**
- A Head Contractor must ensure that any supporting statement that it issues is not false or misleading
  - Failure to do so – **Maximum penalty of \$22 000 or 3 months imprisonment, or both**

- **Supporting Statement (Conti.)**
  - The Amendment Act provides for authorised officers to ensure compliance
  - **This means that head contractors must keep records of all payments to their subcontractor so as to be able to provide evidence of such payment on request by an authorised officer**

### ■ Deadlines for Payment

- The Amendment Act introduced mandatory payment deadlines for making progress payments unless the contract provides for earlier payment period
- If a contract clause provides for longer payment period, that provision, to the extent that it extends the deadline for payment, will have no effect
- Payment deadlines:
  - **From Principal to Head Contractor** - the earlier of 15 business days after the payment claim is made under the SOPA or the date specified in the contract; and
  - **From Head Contractor to Subcontractor** – the earlier of 30 business days after a payment is made under the SOPA or date specified in the contract.

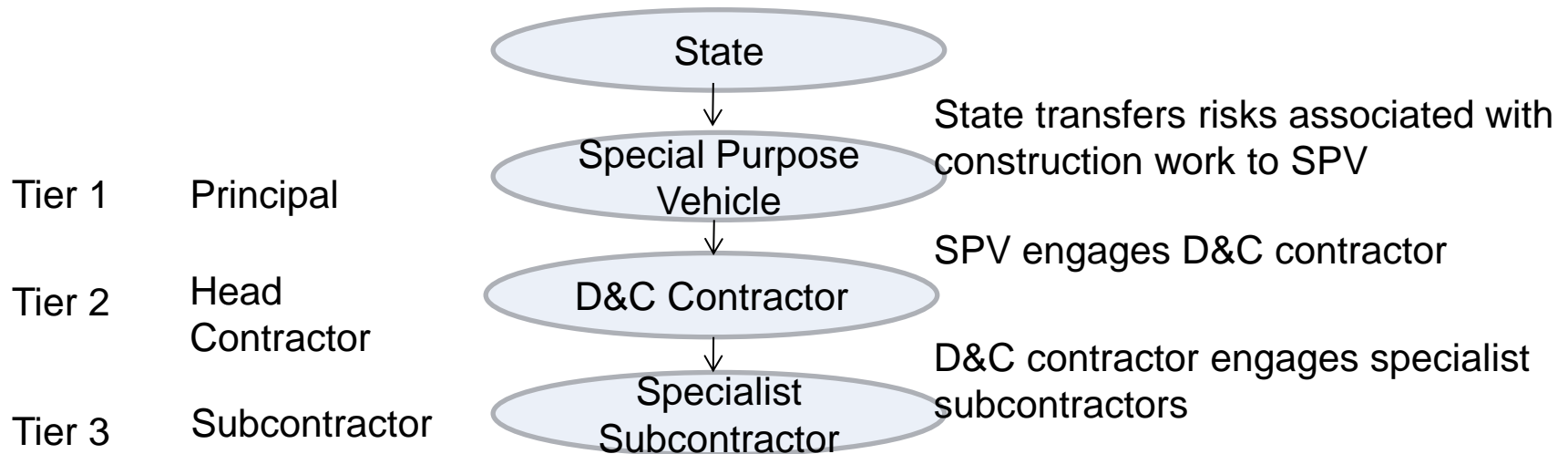
- **Deadlines for Payment (Conti.)**

- Given the strict deadlines, it is important to identify the participants in a project
- The Amendment Act provides the following definitions:
  - **Principal** – *"...person for whom construction work is to be carried out or related goods supplied under a construction contract ... and who are not themselves engaged under a construction contract to carry out construction work or supply related goods and services..."*
  - **Head Contractor** – *"... person who is to carry out construction work or supply related goods and services for the principal under a construction contract ... and for whom construction work is to be carried out or related goods and services supplied ..."*
  - **Subcontractor** – *"... a person who is to carry out construction work or supply related goods and services under a construction contract otherwise than a head contractor"*

# 4. Issues for Government Agencies

- **Importance of properly identifying participants of a project**

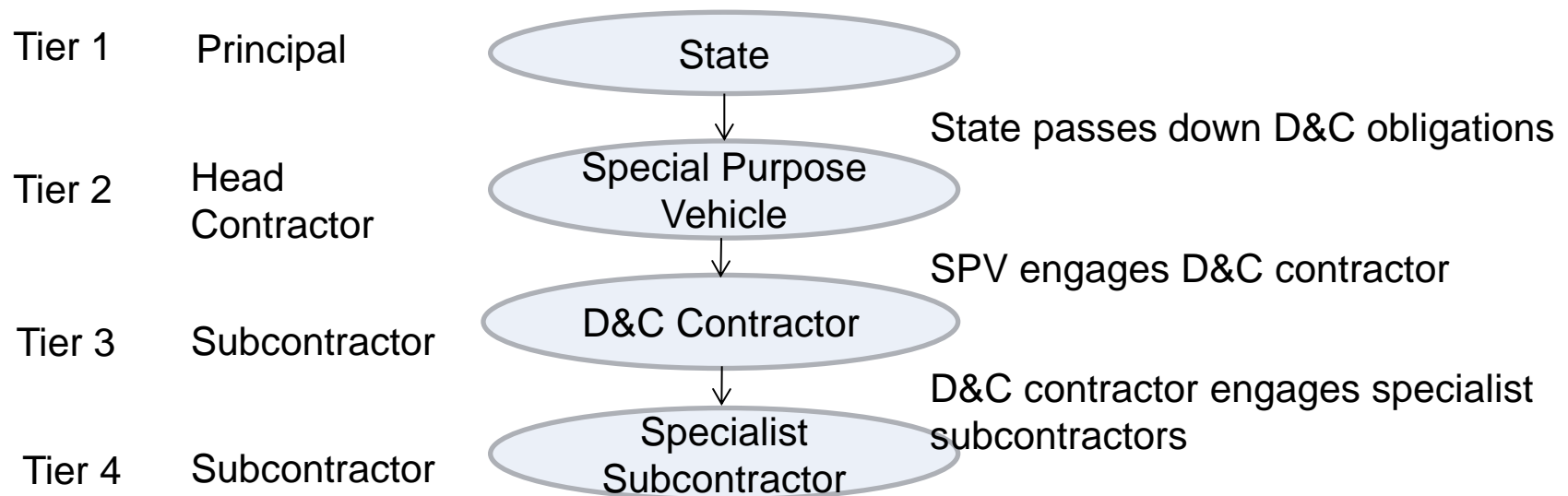
- Example – Government Contracting – PPP Context
- Normally under a PPP arrangement, the Government entity transfers the risks associated with construction works over to the SPV
- As such, in practice:
  - The SPV position is more akin to that of a 'Principal'
  - The D&C contractor is more akin to that of a 'Head Contractor'





# 4. Issues for Government Agencies

- Importance of properly identifying participants of a project (conti.)
  - Post-Amendment – new definitions:
    - Government entity will be the 'Principal'
    - SPV will be 'Head Contractor'
    - D&C Contractor will be 'Subcontractor'



- **Importance of properly identifying participants of a project (conti.)**
  - **Government entities need to be aware that the obligations of a 'Principal' under SOPA may be imposed on Government entities**
  - **Examples of obligations include:**
    - Recognise a payment claim and address it appropriately; and
    - Obligations in relation to making a progress payment the earlier of 15 business days after the payment claim is made under the SOPA or the date specified in the contract

- **Emphasis placed on compliance by Government agencies**
  - Compliance and Enforcement Policy – Building and Construction Industry Security of Payment Act (NSW Government Department of Finance and Services, version 10, April 2014)
    - Provision 3.4 emphasises that the SOPA applies to Government agencies in their role as Principals to construction contracts
    - the Government has considerable influence on industry behaviour
    - the Department will target their compliance campaigns to reflect a focus on Government contracts

- **Security of Payment Regulation**
  - Follows the Collins Inquiry
  - Draft Building and Construction Industry Security of Payment Amendment (Retention Trust Money Account) Regulation 2014 (announced 8 Dec 2014/comments closed on 16 January 2015)
  - Objectives of proposed changes:
    - Better protect subcontractor retention monies
    - Strengthen transparency and minimise red tape in relation to subcontractor payments
  - Draft indicates changes applicable to contracts between head contractors and their direct subcontractors for non-residential building projects >\$20m
- **NSW Fair Trading also to undertake full review of SOPA in 2015**



**QUESTIONS?**





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