

# Exchanging Cross Bows for Muskets?

## Is there more sting in the changes to Security of Payment legislation?

The *Building and Construction Industry Security of Payment (Amendment) Act 2006* took effect as at 30 March 2007. Under the amended Act, changes will apply to all payment claims served after 30 March 2007, but only to contracts entered into after that date.

Prior to the amendments, payment claims were for progress payments only. The recent amendments mean the Act now also applies to final payment claims, "milestone" and one-off payments. This is a significant change.

### Variations

Some variations will now not be allowed as part of a payment claim. Variations that are fully agreed between the parties as to the amount owing, and where it is agreed the work is properly described as a variation (class 1 variations) can be included and dealt with.

However, where there is no agreement as to:

- whether the work is a "variation";
- whether the contractor is entitled to payment for it;
- the value or the method of valuing the variation;
- the time when payment is due;

then the work will be classified as a class 2 variation. These are claimable only in certain circumstances. The original contract value must not exceed \$5 million (unless the contract does not provide any method for resolving disputes). If the total sum claimed for variations exceeds 10% of the contract value, then the maximum for further claimable variations is capped at a contract value of \$150,000 (rather than \$5 million).

The amended Act introduces a new category of "excluded" amounts that includes:

- claims for latent conditions and prolongation costs;
- claims for breach of contract or arising in connection with the contract;
- 'non-claimable' variations.

Consequently almost all *unresolved* variation claims, where the original contract value is more than \$5 million, will be excluded under the Act. Also, where the original contract sum is between \$150,000 and \$5 million, a large proportion of unresolved variation claims will be excluded.

### Adjudication

Adjudication has been increased in scope, and is now available even when the Respondent has not provided a valid payment schedule within time or at all.

Also, a Respondent will get a "second bite at the cherry" by being allowed to provide new reasons in its Adjudication Response (which have not been relied upon before) to justify the difference between claimed sums and scheduled sums. The Claimant's time to respond, however, will only be two working days.

Also, a reminder notice must be given to the Respondent within ten days after the original due date for payment, even though the Respondent had originally neglected to provide a payment schedule.

These changes will have a significant impact on claims, and the adjudication process. You need to be aware of your legal obligations.

*This article contains general information and should not be acted upon without specific professional advice based on your own circumstances.*

**Building disputes**  
 Are payments overdue?  
 Has construction come to a halt?  
 Is VGAT or Court the next step?

**Contract advice**  
 What is your risk allocation?  
 Are you SOP compliant?  
 Will your contract conditions stand up?

**Ad Positional**

**Cooke Lawyers**  
 Straightforward  
 Cost conscious

Building and Construction Team  
 03-9321 7836  
 awhitelaw@rigbycooke.com.au  
 Level 13, 400 La Trobe Street, Melbourne VIC 3000 Australia  
 www.rigbycooke.com.au

**rigbycooke | lawyers**