

Security of Payment Legislation in South Australia

David Putland / Tom Earls



Introduction

- ▶ *Building and Construction Industry Security of Payment Act 2009 (SA)* (“The Act”)
- ▶ Creates a statutory right to progress payments
- ▶ Broad coverage for construction work and construction related goods and services
- ▶ Applies to construction work (as defined) where the site is in South Australia
- ▶ Powerful tool for dispute resolution

Building & Construction Industry Security of Payment Act 2009

Authorised Nominating Authority	Number of Adjudications received/awarded 17/18	Total amount claimed 17/18	Total amount awarded 17/18
ABC Dispute Resolutions Services	6/5	\$467,792.45	\$221,054.73
Adjudicate Today	50/15	\$10,740,287.98	\$1,508,798.65
Australian Solutions Centre	0/0	\$0.00	\$0.00
Resolution Institute	8/5	\$49,048,746.61	\$3,401,862.69
Master Builders Association of SA	2/1	\$84,418.68	\$850.41
Nominator	0/0	\$0.00	\$0.00
RICS Dispute Resolutions Service	1/1	\$13,843,651.93	\$1,449,628.88
TOTAL	67/27	\$74,184,897.65	\$6,582,195.36

Source: Office of the Small Business Commissioner; note these are particularly high for this financial year

Statutory Right to a Progress Payment

- ▶ Common law position is no payment until job done unless otherwise agreed
- ▶ Any person or entity who has undertaken prescribed construction work is entitled under the SOP legislation to progress payments at each “reference date”
- ▶ Progress payments will depend on the construction contract
- ▶ If there is no clause in the construction contract the progress payment will be calculated with regards to
 - Contract price
 - Variations to the contract
 - defects

Key Concepts

- ▶ “Construction Contract”
- ▶ Reference Date
- ▶ Due Date for Payment
- ▶ Business Day
- ▶ Claim
- ▶ Service
- ▶ Payment Schedule
- ▶ Adjudication

What is “Construction Work”?

▶ Section 5 of the Act

- ▶ Construction
- ▶ Alteration
- ▶ Repair
- ▶ Restoration
- ▶ Maintenance
- ▶ Extension
- ▶ Demolition
- ▶ Installation in any building, structure or works
- ▶ External or internal cleaning of buildings
- ▶ Preparatory work to complete a building

Exclusions:

- ▶ Residential building work where the contracting party intends to ‘reside’
- ▶ Drilling for, or extraction of, oil or natural gas
- ▶ extraction of minerals, including tunnelling or boring, or constructing underground works
- ▶ Employment contracts
- ▶ Insurance contracts
- ▶ Note: this list is not exhaustive

Construction related goods and services

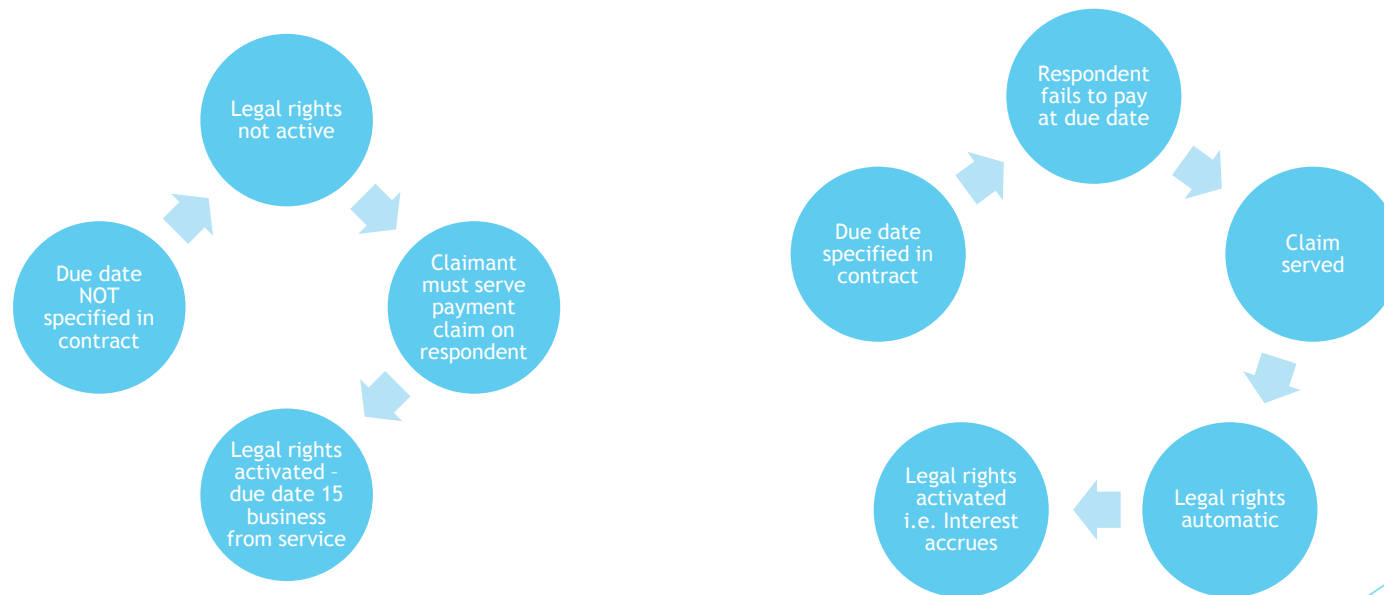
- ▶ Section 6 of the Act
- ▶ Goods
 - ▶ Materials and components to form part of any building
 - ▶ Structure or work arising from construction
 - ▶ Plant or materials work supplied by sale, hire or otherwise for use in connection with the carrying out of construction work
- ▶ Services
 - ▶ Labour
 - ▶ Architectural, design, surveying or quantity surveying services
 - ▶ Building, engineering, interior or exterior decoration or landscape advisory
 - ▶ Technical services

Reference Date

- ▶ Two Options
 - ▶ A) The construction contract determines a date where a claim may be made for progress payment
 - ▶ B) Where no date is set, the reference date will be the last calendar day of each month
- ▶ The reference date does not need to be recurring and can be altered by the construction contract
- ▶ What happens when a contract is terminated?

Due Date

- ▶ The due date ties into the reference date
- ▶ Under the legislation the default due date is set at 15 business days from the date a payment claim is served
- ▶ Similarly to the reference date the construction contract can also alter the due date



Time

- ▶ Strict timeframes that must be met
- ▶ All time limits in “Business Days”
 - ▶ Monday to Friday, excluding public holidays and the period between Christmas and New Year
 - ▶ Statewide shutdown?
- ▶ Extensions of time are not available

Payment Claims

A valid payment claim must:

- ▶ Be in writing
- ▶ Identify the construction work
- ▶ Indicate the amount claimed
- ▶ State the claim is made under the Act (eg):
‘This is a payment claim made under the Building and Construction Security of Payment Act 2009 (SA)’
- ▶ A claim may only be made within 6 months of the last construction work being undertaken and must attach to a valid reference date.

Payment Claim

header

- ▶ The claims kit includes an example payment claim, the following slides set out the necessary requirements.
- ▶ A payment claim should be prepared on the claimant's letterhead.
- ▶ The payment claim should clearly set out who the parties are:

PARTY DETAILS

TO:	[insert]
ABN:	[insert]
ACN:	[insert]
Business Address:	[insert]
Phone:	[insert]
 FROM:	 [insert]
ABN:	[insert]
ACN:	[insert]
Business Address:	[insert]
Phone:	[insert]

Note: The claimant may have to complete some research to ensure the correct company details are used.

Payment Claim

contract details

- ▶ The payment claim must identify the contract details:
- ▶ The project
- ▶ The Reference Date
- ▶ The Due Date for payment
- ▶ The total amount claimed must be included on the payment claim but it is recommended to include a full breakdown per the contract, variations and any amount previously paid
- ▶ Somewhere prominent on the payment schedule it must state:

*THIS IS A PAYMENT CLAIM MADE UNDER THE BUILDING AND CONSTRUCTION
INDUSTRY SECURITY OF PAYMENT ACT 2009 (SA)*

Payment Claim

supporting documentation

- ▶ The payment claim should be signed by an authorised representative of the business
- ▶ The attachments to the payment claim is the evidence you use to support your claim. The type of documents you may include are:
 - ▶ Invoices & receipts
 - ▶ Timesheets
 - ▶ summary of outstanding payments
 - ▶ variation schedule
 - ▶ Equipment
 - ▶ Correspondence

Service

- ▶ Section 34 of the Act
- ▶ A payment claim must be served
 - ▶ in a specified manner under the Act
 - ▶ Otherwise in accordance with rules of service
- ▶ A payment schedule must be *provided* not *served*
- ▶ Manner of service (not exhaustive):
 - ▶ Personally delivered
 - ▶ Lodging at ordinary place of business during office hours
 - ▶ Express postage with signature
 - ▶ As agreed in the construction contract (eg. email, Aconex etc.)

Payment Schedule

A valid payment schedule must:

- ▶ Be provided within 15 business days of service of the claim
- ▶ Be in writing
- ▶ Identify the claim to which it relates
- ▶ Indicate the amount (if any) that the respondent proposes to make (“the Scheduled Amount”)
- ▶ If the proposed amount is less than the claimed amount, indicate why

Payment Schedule

- ▶ A payment schedule must be provided for every claim or the consequences follow
- ▶ If information is not in the payment schedule it cannot be raised later
- ▶ Consequences of not providing a payment schedule:
 - ▶ Seek to recover as a debt due and payable, or
 - ▶ Elect to go down adjudication path

Payment Schedule

potential bases for rejecting claims

- ▶ There must be legitimate reasons for not paying where a claim is not made out, some of those reason are set out below:
 - ▶ Does not meet the definition of construction work
 - ▶ Claimant is not appropriately licenced (Section 6 of the *Building Work Contractors Act 1995*)
 - ▶ Incorrect service
 - ▶ Time constraints
 - ▶ Existence of a contract
 - ▶ Work not adequately described

Payment Schedule

potential bases for rejecting claims

- ▶ Claims can also be rejected in whole or part due to procedural or legislative reasons such as:
 - ▶ All obligations must be met under the construction contract
 - ▶ “Time bars” built into the construction contract?
 - ▶ Claim made prior to reference date / no reference date
 - ▶ Residential works?
 - ▶ Incorrect details in Payment Claim
 - ▶ Defects
 - ▶ Incomplete works / over claiming

Adjudication Applications

- ▶ Made to an Authorised Nominating Authority (ANA)
- ▶ The paths to adjudication, each with their own time limit:
 - ▶ If payment schedule received: 15 business days from receipt
 - ▶ If no payment schedule received: Must serve s17(2) notice within 20 business days from due date for payment. Adjudication application within 15 business days of the expiry of the 5 day second change period
 - ▶ If payment schedule received but no payment is made: within 20 business days from due date for payment

Adjudication Applications

- ▶ Applications must:
 - ▶ be in writing
 - ▶ Made to the ANA
 - ▶ May (read: must) contain evidence or submissions
 - ▶ Must identify the claim and payment schedule
 - ▶ Must pay the fee (if any)

Adjudication

- ▶ Response may only be submitted if a payment schedule was provided in time
- ▶ Limited only to those matters raised in the payment schedule
- ▶ Respondent has limited time to prepare an adjudication response - the later of:
 - ▶ Five (5) Business Days from service of application, or
 - ▶ Two (2) Business Days from appointment of adjudicator

Adjudication

- ▶ Adjudicator has ten (10) business days to make decision, unless extended
- ▶ Will determine
 - ▶ Amount (if any) to be paid
 - ▶ Due date for payment (generally 5 days from decision)
 - ▶ Interest
 - ▶ Cost of adjudication (not parties internal costs)
- ▶ Limited right of appeal

Impact of Recent High Court Decisions: The *Probuild* and *Maxcon* decisions

- ▶ In both decisions:
 - ▶ Cannot challenge adjudications on basis of an error of law, **unless** it relates to jurisdiction
 - ▶ Reviews of non-jurisdictional errors undermine the Act
- ▶ The *Maxcon* decision:
 - ▶ ‘Pay when paid’ contract term invalid
 - ▶ Retention sum dependent on the operation of the head contract

Impact of Decisions: Adjudicator's Powers

- ▶ In *Probuild* the misapplication of the contract's liquidated damages provisions did not render the adjudication invalid
- ▶ Many errors of law fall within jurisdiction and are therefore not subject to judicial challenge

Impact of Decision: Standard Contract Terms

- ▶ Clauses arguable “pay when paid” provisions
 - ▶ Time bars for making claims
 - ▶ Extensions of time
 - ▶ Practical completion
 - ▶ Liquidated damages
 - ▶ Release of retentions

Anti-Avoidance Provision

- ▶ The Act renders void clauses which:
 - ▶ seek to or have the effect of excluding, modifying or restricting the operation of the Act, or
 - ▶ Are reasonably construed as an attempt to deter a person from taking action under the Act

Suspension

- ▶ The Act permits persons to serve notice of suspension in certain circumstances:
 - ▶ Claim served and no schedule within 15 business days (s15(2))
 - ▶ Scheduled amount not paid by due date (s16(2))
 - ▶ Fails to pay adjudicated amount when required (s24(1))
- ▶ Must serve intention at least 2 business days
- ▶ Must return to work within 3 business days of receipt of payment
- ▶ NO entitlement to EOT under a contract

Common Tactical Considerations

- ▶ Making every invoice a payment claim under the Act?
- ▶ Requiring every invoice to be a payment claim
- ▶ Contractual limitations
- ▶ Dragging out the promise of payment

Q&A

► Questions?

Disclaimer

This presentation is for general information only and is not legal advice. Persons with queries about their own specific circumstances should seek specific advice.