

Overview

The Building and Construction Industry Security of Payment Act legislation ("SOPA Legislation") affects most contracts entered into between a builder and client, subcontractor or supplier.

The purpose of the SOPA Legislation is to provide a subcontractor with a quick means of enforcing progress payments to improve the cash flow of all parties in the contract chain.

The Actual Time Limits that are Critical

Critical time periods apply at each stage of the process which cannot be extended. Time frame under the Act can be summarised as follows:-

- (a) i) **10 business days for the Respondent to serve a payment schedule or pay all or part of the payment claim.**
 - ii) **A further 5 business days if the Claimant issues a Section 17(2) Notice (NSW) or Section 21(2) Notice (QLD) should the Respondent not serve a payment schedule after being served with the payment claim.**
- (b) **10 business days for Claimant to submit an Adjudication Application.**
- (c) **4 business days in which the Adjudicator must accept Adjudication Application.**
- (d) **Respondent to serve response on Adjudicator within 5 business days after receiving Adjudication Application or 2 business days after receiving Notice of Acceptance, whichever expires later.**
- (e) **10 business days after acceptance (NSW) or 10 business days after Respondent is due to submit their Adjudication Response (QLD) for Adjudicator to make their determination.**
- (f) **5 business days or as Adjudicator's determination for Respondent to pay amount determined.**
- (g) **2 business days Notice of Intention to suspend works.**

There is little doubt that the time constraints imposed by the SOPA legislation encourage contractors and builders to invest more time and effort in administration and documents management given the time compression of the recovery mechanism provided by the SOPA Legislation.

About us

Mr Darren Vardy of RMG Partners Business and Insolvency Solutions Pty Limited is a qualified Adjudicator under the Building and Construction Industry Security of Payment Act Legislation ("SOPA Legislation") in New South Wales, Queensland and Victoria. Furthermore, Mr Vardy has in excess of 18 years experience in the Insolvency, Debt Recovery and Business Turnaround industry.

RMG Partners has assisted many businesses in the Building and Construction Industry who have been enduring cash flow problems to ensure their continuation and future development.

In relation to the SOPA Legislation, RMG Partners is able to assist with the following:-

- (a) **Preparation of payment claims / payment schedules and associated submissions.**
- (b) **Adjudication Applications/Adjudication Responses.**
- (c) **Dealing with challenges to an Adjudicator's determination.**
- (d) **General contract management issues including contract reconciliations; cashflow budgeting; implementation of policies and procedures to deal with the time constraints imposed by the SOPA legislation.**
- (e) **General business management issues such as business structuring to minimise risk; finance structuring and procurement; implementation of accounting systems; GST, tax and accounting advice.**



RMGPARTNERS
BUSINESS & INSOLVENCY SOLUTIONS

Darren Vardy • 0411 170 587 • dvardy@rmgpartners.com.au

GPO Box 4153 • Level 12, 88 Pitt Street, Sydney NSW 2000
tel 02 9231 0889 • fax 02 9231 0887

Suite 9, 305-307 The Kingsway, Caringbah NSW 2229
tel 02 9531 8365 • fax 02 9531 8367

www.rmgpartners.com.au

The Building and Construction Industry Security of Payments Act Legislation

"The Industry's Debt Recovery Process"



RMGPARTNERS
BUSINESS & INSOLVENCY SOLUTIONS

How does the Act work?

There are five basic steps to the Act:-

1. The Payment Claim – request for payment

A “Payment claim” is terminology used in the SOPA Legislation to describe what is normally called a tax invoice, progress payment, final claim, etc.

Only one payment claim may be submitted per construction contract per period stated in the contract (week, fortnight, 25th of the month etc) or nothing stated in the contract then after the last day of each month.

A payment claim must:-

- (a) **Identify the construction work/related goods and services.**
- (b) **Indicate claimed amount.**
- (c) **State the claimed amount is made under the Act ie. State somewhere on the document.**

NSW - “this payment claim is made under the Building and Construction Industry Security of Payment Act 1999.”

QLD - “this payment claim is made under the Building & Construction Industry Payments Act 2004.”

2. The Payment Schedule

A “Payment schedule” is a document prepared by the Respondent in support of the Respondent’s case for paying less than the amount claimed by the Claimant.

The Respondent must provide a “payment schedule” to the claimant within 10 business days from receipt of the payment claim.

The payment schedule must:-

- (a) **Identify the payment claim to which it relates.**
- (b) **Identify the amount which will be paid.**
- (c) **If less than the amount claimed, identify reasons for choosing to pay less than the total amount.**

The payment schedule document forms the basis of the Respondent’s case for withholding payment.

3. The Adjudication Application

If the builder or principal fails to provide a payment schedule, the Claimant is entitled to payment of the amount claimed and can apply to Court for summary judgment to enforce that payment. Alternatively, the Claimant can proceed with adjudication provided the Claimant complies with notices which are prescribed under the Act.

If a Claimant receives a payment schedule, then the Claimant must within 10 business days lodge an Adjudication Application with an Authorised Nominating Authority (“ANA”). The Respondent has limited time to reply.

An Adjudication Application is an opportunity of the Claimant to make submission to the adjudicator in support of the Claimant’s case for being paid. The Adjudication Application should address the reasons, if any, the Respondent has provided for withholding payment.

Whether or not a payment schedule has been provided by the builder or principal, the Claimant must act quickly in order to protect its rights under the Act.

4. The Adjudication Process

The adjudicator is to determine the amount of the payment claim to be paid by the Respondent to the Claimant, the date on which any such amount became or becomes payable and the interest rate payable on any such amount.

In determining an Adjudication Application an adjudicator can only consider the following:-

- (a) **The Act.**
- (b) **The Construction Contract.**
- (c) **The Payment Claim and Payment Schedule.**
- (d) **The result of any inspection.**

The Respondent has the opportunity to lodge a response (“Adjudication Response”) to the Adjudication Application. However, the response cannot include reasons not already included in the payment schedule.

The Adjudicator is to determine the amount of the payment claim to be paid by the Respondent to the Claimant, the date on which any such amount became or becomes payable and the interest rate payable on any such amount. The Adjudication Determination will not normally be released until such time as the Adjudicator’s fees are paid in full.

The Adjudication Determination is an interim determination which must be complied with by the parties unless modified by the Agreement or overturned by the Court.

5. Enforcement of the Determination

Once an adjudicator has given a determination, the Respondent has 5 business days to pay the amount determined by the adjudicator.

If the Respondent does not pay the amount determined by the adjudicator, the Claimant can stop work on 2 business days notice.

The Claimant can also obtain an Adjudication Certificate from the ANA which can then be filed in the Court as a judgment.

If a Respondent commences proceedings to have a judgment set aside, the Respondent is not entitled to bring any cross claim, or raise any defence arising under the construction contract or challenge the adjudicator’s determination. It is also required to pay into court security of the unpaid portion of the adjudicated amount pending final determination of the proceedings.

Once judgment has been obtained, the Claimant recovers the debt through the normal court processes which can include:

- (a) **obtain an examination summons to determine what assets the Respondent owns and their location**
- (b) **the garnishee of the Respondent’s bank account,**
- (c) **obtain a Writ of Execution,**
- (d) **make a claim against the Principal/Development using the Subcontracts Debt Act in the appropriate jurisdiction.**
- (e) **commence of a winding up or bankruptcy proceedings against the debtor (“Respondent”).**

Australian Accountants & Lawyers Conference

RMG Partners is the major sponsor of the annual Australian Accountants & Lawyers Conference. In January 2009 it will be held in Aspen, Colorado, USA.



The conference aims to create meaningful discussion to find new and creative solutions to problems faced by the professions and has been structured to be of interest to all professionals in business.

More information can be found at www.aalc.com.au