
A Fast Track to Payment? The Security for Payment Act and Whether It's Right for You

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“Holy Grail”, or wholly inappropriate? Security for payment legislation is yet to catch on in Victoria to the extent it has in New South Wales, where the equivalent legislation is ‘going great guns.’ But knowing when the law needs to be used and the knowledge of how to implement its requirements, is no simple task, write Miro Djuric and Justin Cotton of Lovegrove Solicitors.

The *Building and Construction Industry Security of Payment Act 2002* has been in operation since 31 January 2003 and applies to any construction contract, written or oral, where the site of the work is in Victoria. It's coup de grace, where it applies, is speedy and therefore cost effective resolution of just payment claims.

At the outset, note that there are changes afoot with a new Bill introducing various changes to the Act, expected to come into force within the next month or two. *We will keep you abreast of any changes and will provide a follow up article in due course.*

Does it apply to you?

The Act can apply to Architects and the services they provide. Looking at the definition to “construction contract”, it is defined as “*contract or other arrangement under which one party undertakes to carry out construction work or to supply related goods and services, for another party*”. The definition in the Act is very broad and covers, amongst other matters, supplying construction related goods and services. This includes architectural and design services, based on s6 of the Act.

The over-arching purpose of the Act is to reduce payment delays for subcontractors

(suppliers) and contractors by offering an entitlement to recover progress payments (fast-track) in circumstances where the relevant construction contract fails to specify how the progress payments are to be made. It negates the ability of a head contractor to say to a 'subbie': "I haven't been paid, so you'll have to wait as well."

The claimant may serve the payment claim on a person liable to make the payment under the construction contract. Only one payment claim may be made in respect of a specific progress payment.

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How it works

The Act prescribes a procedure for making a progress payment claim whereby one party ("the claimant") can make a progress payment claim at 20 days intervals (unless the contract specifies otherwise). The claim must identify the construction work to which it relates, indicate the amount claimed and clearly state that it is made under the Act. Case law has interpreted the Act as requiring the claim to be a *progress* claim, rather than a final claim.

A party who has received the progress payment claim ("the respondent") may issue a progress payment schedule within the time specified in the contract or 10 business days after receipt of the progress payment claim (whichever expires first).

The payment schedule must identify the payment claim to which it relates, the amount (if any) the respondent intends to pay and if the scheduled amount is less than the claimed amount the reasons why the scheduled amount is less.

If that scenario applies, within 5 business days after the claimant receives the payment schedule, the claimant may apply in writing for adjudication of its payment claim. The adjudication application can be made directly to an adjudicator agreed between the parties or to an authorised nominating authority.

The adjudicator is required to determine the application within 10 business days after agreeing to accept it. He or she has to determine any payment necessary (“the adjudicated amount”), and the date upon which it becomes payable.

Wielding the Suspension Axe

Section 29 of the Act entitles a claimant to suspend the carrying out of construction works. The right to suspend “*exists for so long as the respondent fails to comply with the requirements referred to in sections 16(1), 17(1) or 27(1)*”. In other words if the respondent fails to deliver a payment schedule by the due date and fails to pay by the due date or refuses to comply with the adjudicator’s determination, then the amount claimed becomes a debt due and may be recovered in court. The claimant is then entitled to suspend the work under a construction contract upon 2 days notice.

The Act allows the respondent to provide security instead of making payment of an adjudicated amount, pending the final determination of the dispute in court, in a tribunal or at arbitration.

Recovery from the Principal

The Act can also, potentially, find a way around the doctrine of ‘privity of contract’. It provides that where the respondent fails to pay the adjudicated amount or provide

security, the claimant can obtain a statutory right to be paid by the principal, moneys owed by the respondent. This payment will be made out of money that is still owed to the respondent by the principal under the head contract. This remedy only applies where:

- the adjudicator has determined that an amount is payable (i.e. not where the respondent fails to provide a payment schedule); and
- the claimant has obtained judgement for the adjudicated amount as a debt due in a Court (s30).

Out of Time? Compliance with strict timelines

In order to receive the benefits of the Act one must ensure that deadlines and requirements imposed by the Act are strictly complied with. Great care should be exercised in relation to payment claims, payment schedules and adjudication applications with respect to both content and timing. You should seek legal advice in relation to whether the Act's remedies are appropriate and for help in implementing them.

Miro Djuric and Justin Cotton are Senior Associates with Lovegrove Solicitors

Lovegrove Solicitors have expertise in construction law advice and litigation, including advice on security for payment, and are available now to provide advice in these areas.

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- *Advice for Architects prior to entering into contracts / contract drafting*
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