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## A Simple Guide to applying the Security of Payments Act 2009 (Vic)

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Anyone working within the building and construction industry is aware of the *Building and Construction Industry Security of Payment Act 2009 (Vic)* (“the Act”), however many find it challenging to decipher. This article aims to provide a step-by-step guide on how to navigate the Act, make payment claims correctly and to ensure any disputes will be handled in an efficient manner.

Whilst every state in Australia does have similar laws, there is no standardised law in Australia. For the purposes of this article, the Victorian legislation will be focused upon however, whilst the Queensland and NSW legislation’s general purpose and application is the same, it does differ in application and we therefore recommend you contact our offices directly in any of the states to discuss further.

### What is the purpose of the Act?

The purpose of the Act is to streamline procedures within the building and construction industry by ensuring progress payments are made and received in a timely and efficient manner. Particularly, the Act identifies the dispute resolution method for payment claims.



## Does the Act apply to you?

The Act applies to any company, business or individual who undertakes to carry out construction work or to supply related goods and services under a construction contract.<sup>1</sup> In practice, any contractor, subcontractor, consultant or supplier working within the construction business (except for 'Domestic Building Contracts'<sup>2</sup>), will fall within the Act's ambit.

For example, if a clause exists in a construction contract which specifies the need to make claims under the Act, then the Act will apply to you. Importantly, the Act will also apply even if the construction contract does not have a specific reference.

## How do you issue a payment claim under the Act?

Payment claims can be claimed at any stage of the construction process and can be either a once-off single payment, a milestone payment or a final payment.

There are three major points to be aware of when issuing a payment claim:

- (1) the timing of when payment claims can be made;
- (2) the content which must be outlined in payment claims; and
- (3) how the payment claim is to be served on the other party.

### Timing of Claims

As a starting point, a party can make a payment claim on the contractor on the reference date detailed within the construction contract.<sup>3</sup> If no such date exists, a payment claim can be made every 20 business days after the first works are carried out.<sup>4</sup>

However, parties should be aware of the exceptions to this rule.

1. For payment claims made for *one-off payments*, a party can make a payment claim on the day after the work was carried out or goods provided<sup>5</sup>; and
2. For payment claims made for a *final payment*, a party can make a payment claim upon:
  - (a) the expiration of the rectification or defects or omission period;
  - (b) the issuing of the final certificate;
  - (c) the day after the last work was carried out or goods were provided if neither (a) nor (b) apply between the parties.<sup>6</sup>

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<sup>1</sup> *Building and Construction Industry Security of Payment Act 2009* (Vic) s 3(1).

<sup>2</sup> See *Domestic Building Contracts Act 1995* (Vic).

<sup>3</sup> *Building and Construction Industry Security of Payment Act 2009* (Vic) s 9(2)(a).

<sup>4</sup> *Ibid* s 9(2)(b).

<sup>5</sup> *Ibid* s 9(2)(c).

<sup>6</sup> *Ibid* s 9(2)(d).

## Content of Payment Claims

The Act requires that all payment claims:

- are in the prescribed form agreed to under the construction contract;
- contain the prescribed information agreed to under the construction contract;
- include a description of the scope of work;
- detail the amount due; and
- state the payment claim is made pursuant to the Act.<sup>7</sup>

## Service

Once a payment claim is drafted in accordance with the above, a person needs to ensure that it is effectively served on the required person by usual methods of service including delivering it to the person personally or sending it by post to their ordinary place of business.<sup>8</sup>

### **If you are served with a payment claim, what should you do?**

Upon being served with a payment claim, a party is required to produce a 'payment schedule' within 10 business days<sup>9</sup> or the time stipulated in the contract<sup>10</sup>. If this is not produced, the amount owing will become due and payable.

## What is a Payment Schedule?

A payment schedule should include the following information:

- an assessment of the work claimed to be completed and the requisite amounts claimed to be payable;
- a reference to the payment claim that the payment schedule relates to;
- the "scheduled amount" (that is, what is proposed to be paid by the party receiving the payment claim);
- reasons for the variation to the payment claim (if applicable); and
- reasons for the withholding of any payment (if applicable).<sup>11</sup>

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<sup>7</sup> Ibid s 14.

<sup>8</sup> Ibid s 50.

<sup>9</sup> Ibid s 15(4)(a).

<sup>10</sup> Ibid s 15(4)(b).

<sup>11</sup> Ibid s 15(2).

## What are my rights for enforcement against the party if the Respondent fails to pay?

A number of options are available in the event that a payment schedule is not served within the requisite timeframe or a payment under the Schedule is not received.

### Charging of Interest

Interest can be charged by the party pursuant to the terms of the construction contract. In the absence of such a term, the *Penalty Interest Rates Act 1983* (Vic) dictates this amount to be 10% p.a.<sup>12</sup>

### Suspension of Work

The Act also provides for the party to suspend all work.<sup>13</sup> However, in order to do so, a notice of intention must be served on the counterparty, allowing at least 3 business days before work is actually suspended.<sup>14</sup>

### Exercising a Lien

A lien can be registered over any unfixed plant or material within the construction site that was supplied by the party during the construction. In order to do this, a notice of intention must be served in advance of any lien being registered.<sup>15</sup>

If such action were to be taken, the lien would be subject to other priority liens being registered and therefore would be assessed on a case by case basis. If you are considering such action, please contact our office so we can discuss your specific circumstances and provide you with guidance.

### Adjudication

#### *What is it?*

Adjudication is a formal process outlined in the Act to deal with a dispute in relation to Payment Claims, as opposed to issuing debt recovery proceedings in the relevant court. They are overseen by Authorised Nominating Authorities (“ANAs”).

#### *When can you apply?*

A party can make an application in the following circumstances:

1. the respondent provides a payment schedule under Division 1 but:
  - a. the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

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<sup>12</sup> Ibid s 12(2).

<sup>13</sup> Ibid s 29(1).

<sup>14</sup> Ibid.

<sup>15</sup> Ibid s 12A.

- b. the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or
2. the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.”<sup>16</sup>

### *Why use this process?*

The process is designed to be a quick and effective method of dealing with construction payment disputes. The short turnaround timeframes that are required under the Act, mean determinations are made not long after the work has been completed.

The process includes short timeframes for parties per below:

1. a Notice of Intention to make application is served within 10 business days of the payment falling due;<sup>17</sup>
2. an Application can be made after 2 business days from when the notice was served;<sup>18</sup>
3. the Respondent then has 5 business days to respond to the application;<sup>19</sup>
4. the Claimant then has 2 business days to file submission based on the response;<sup>20</sup> and
5. Finally, the Adjudicator must make a determination within 10 business days after they accept their appointment.<sup>21</sup>

### **What if payment is still not made or you would like to have a determination reviewed?**

Depending on the circumstances of the case, there are a number of options available to you to enforce determinations. These include:

1. seeking a court order; or
2. suspending work or seeking payment from the principal.

If you are not satisfied with your determination or have not received payment from the counterparty after a determination has been made, please contact JHK Legal to seek assistance with recovering payment.

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<sup>16</sup> Ibid s 18(1).

<sup>17</sup> Ibid s 18(2)(a).

<sup>18</sup> Ibid s 18(2)(b).

<sup>19</sup> Ibid s 21(1).

<sup>20</sup> Ibid s 21(2B)(b).

<sup>21</sup> Ibid s 22(4)(a).

JHK Legal can provide you with tailored advice and discuss possible next steps whether you need help recovering or responding to a payment claim. Please contact our offices should you require assistance in clarifying your obligations, or require advice on any construction matters.

*\*\* Note - the Building and Construction Security of Payments Act differs in each State. Whilst the east coast (Victoria, New South Wales and Queensland) have adopted a similar model, it is important to confirm your requirements, obligations and time frames under your states legislation.*