

BANNERMANS STRATA UPDATE:

Building & Construction Industry Security of Payments Act 1999 (NSW)

Owners corporations enter into many agreements not realising the interim relief payment requirements that they may be subject to under the Building and Construction Industry Security of Payments Act 1999 (“the Act”) which do not need to be disclosed in the contract.

The main object of the Act is to provide for those in the construction industry a process where they can seek interim relief and payment of a progress payment without first having to litigate the matter.

Owners corporations should be aware that there will be many instances where they may be subjected to short timetables provided under the Act which cannot be varied, and the failure to comply can have harsh consequences.

There are many services which are caught by the Act, such as:

- Repairs and restoration;
- Upgrade contracts; and
- Maintenance under building management agreements

The procedure under the Act is triggered upon receipt of a payment claim which identifies the work and amount to which it relates.

For a contract entered into prior to 21 April 2014 a payment claim must contain the statement: “This is a claim for payment under the Building & Construction Security of Payments Act 1999”.

For contracts entered into from 21 April 2014, unless the contract is connected with a residential construction contract, a payment claim no longer needs to include that statement.

Also, for contracts entered into from 21 April 2014, a payment claim must be accompanied with a declaration in the prescribed form that all subcontractors have been paid all amounts that have become due and payable.

One of the urgent responses required

If the owners corporation wishes to object to making the payment, it has 10 business days to provide a payment schedule as provided under the Act. The Act provides that a “business day” means any date other than:

- a) A Saturday, Sunday or public holiday, or
- b) 27, 28, 29, 30 or 31 December.

It is important that a payment schedule include all reasons for withholding payment. Any reasons not included cannot be relied upon in any adjudication of the payment dispute.

One of the consequences of failing to comply is that the claimant is entitled to proceed to take steps, such as obtaining judgement from a court for the interim payment and issue a suspension notice for the works.

If a payment schedule under the Act is provided, the matter can then proceed to adjudication, but once again there are very short time limits for submission, etc.

This is a particularly onerous timetable for owners corporations considering the notice periods for meetings under the Strata Schemes Management Act 1996, and in many instances,

KEY POINTS

Some key points for owners corporations to consider are:

1. For contracts **prior to 21 April 2014**, be aware of invoices, accounts or claims for payment containing the statement “This is a claim for payment under the Building & Construction Security of Payments Act 1999”. Claims for payments under contracts entered into **from 21 April 2014** need no longer contain those words, unless the contract is connected with a residential construction contract.
2. Understand that many of its arrangements may be subject to short time limit requirements under the Act.
3. Where problems are arising with a contractor, it should be ready to seek urgent advice and be in a position to provide an urgent payment schedule etc.

urgent decisions and ratification may be required.

Due Date for Payment

For contracts entered into before 21 April 2014 a progress payment becomes due and payable 10 business days after a payment claim is made, or an earlier date set by a contract. For contracts entered into from 21 April 2014 a progress payment paid by a principal to a head contractor becomes due and payable 15 business days after a payment claim is made, or an earlier date set by a contract.

Subcontractors

Claimants are entitled to follow a process to require an amount be retained by the principal contractor, which may include an owners corporation. This could significantly affect cash flow that could affect payment to others. Further, an owners corporation may be required to provide certain information during the adjudication process.

There are numerous consequences and penalties for failing to comply.

For further information in relation to the processes under the Act please refer to [Security of Payments Workflow](#) and [Security of Payments Flowchart](#).

Only some of the aspects of the Building and Construction Industry Security of Payments Act 1999 are dealt with here and it is an extremely complex piece of legislation. This document is not legal advice and you should seek legal advice regarding any of the issues referred to.