

Security of Payment - Changes to Legislation: What Strata Managers Need to Know

With media reports of record insolvency levels in the constructions industry, the NSW Government has moved to tighten up the ability of Security of Payment legislation to improve cash flow and payment terms within the industry.

The following changes apply from 21 October 2019:

- The Security of Payment legislation will not apply where the building contract is with an owner occupier. An Owners Corporation cannot be an owner occupier.
- To be a valid payment claim under the Security of Payment Act, the payment claim needs to contain a statement that it is a claim under the Act, thus: *“This progress claim is made under the Building and Construction Industry Security of Payment Act 1999 (NSW)”*. (This is a re-introduction of a previous requirement.)
- The reference date for progress claims no longer applies, instead:
 - A payment claim may be served on or after the last day of each month;
 - However, if the contract make provision for an earlier date, the claim may be served on or after that date; and
 - Where a construction contract has been terminated, a payment claim may be made on or from the date of termination.
- The date by which an adjudicator is to make a determination is now 10 business days from the date on which the respondent makes, or was entitled to make, an adjudication response. If the respondent is not entitled to respond, then 10 business days from the date of the adjudicator’s acceptance of the application applies. It remains open for the claimant and respondent to agree to give the adjudicator further time.
- A claimant may now withdraw an adjudication at any time. However, if an adjudicator has already been appointed then the respondent may object, and if the adjudicator considers it in the interests of justice to do so, the adjudication can continue. If the claimant goes into liquidation is taken to have been withdrawn.
- A code of practice has been brought in for the authorised nominating bodies.



T: (02) 9929 0226
E: dbannerman@bannermans.com.au
P: PO Box 514

M: 0403 738 996
W: www.bannermans.com.au
NORTH SYDNEY NSW 2059

ABN: 61 649 876 437
AUSTRALIA

- Authorised officers may be appointed to enforce compliance with the Building and Construction Industry Security of Payment Act 2018 (NSW). They will have wide investigative powers, including; entry to premises, access to documents and records, and to question people. Penalties apply where there is non-compliance without reasonable excuse. In the case of corporations those penalties can also be applied against directors and managers.

We expect builders and developers to be the more likely target for the exercise of these powers, but there is no such limitation in the legislation. So it is possible that strata managers may need to respond to such investigations.

- There are now a range of ‘Executive Liability Offences’ for which the directors and managers of companies can be penalised for the company’s non-compliance with certain provisions of the Act.

For example, a payment claim must not be served with a “supporting statement” in the prescribed form declaring that all subcontractors have been paid the construction work concerned. Knowingly making a false declaration is punishable with an \$11,000 fine for a corporation, and potentially \$2,200 and or 3 months imprisonment for a director or manager of the company.

Other areas where penalties apply include obligations with respect to payment holding requests and funds held in trust including retention monies.

Strata Managers need to be aware that a ‘payment withholding request’ requires owners to hold back a specified sum of money from the contractor upon receipt of a request from a contractor’s subcontractor claiming monies owed from the contractor.

Further articles on the management of security of payment claims and adjudications can be found on the Bannermans [website here](#).

Prepared by Bannermans Lawyers
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T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA