

The Building and Construction Industry (Security of Payment) Act (the 'Act') commences on 1 July 2010.

Application

The object of the Act is to ensure that a person who undertakes to carry out 'construction work' or supply related goods and services ('Work') in accordance with prescribed construction contracts is able to receive progress payments for that Work. The Act grants an entitlement to claim progress payments for Work whether or not the construction contract provides for progress payments. It also establishes a recovery procedure for those payments – all within strict timeframes. It is therefore in the best interests of principals and contractors alike that they make themselves familiar with the scheme.

The Act

The Act applies to prescribed construction contracts whether the contract is written or oral or partly written and partly oral. The Act will not apply to a construction contract entered into before 1 July 2010.

It is important however that persons entitled to make progress claims ('Claim') pursuant to 'construction contracts' ('Contract') entered into after 1 July 2010 have procedures in place to ensure the ability to make a compliant and timely Claim and that the payer is aware of the timeframe within which the Claim must be certified and paid.

The Progress Claim

The Claim may include the final payment for Work, a single or one-off payment for Work or supply or a milestone payment.

When can a Claim be made?

If the Contract does not provide for a date for the making of a Claim, the Act provides that a Claim may be made on the last day of each month in which the Work is carried out.

How is a Claim made?

1. If a form is approved under the Act, the form must be used. Note: no form is presently prescribed.
2. The Claim must:
 - (a) be in writing;
 - (b) be bona fide and not fraudulent;

- (c) state the amount of the Claim;
- (d) identify the Work or the related goods and services to which the Claim relates in sufficient detail for the principal to consider if the Claim should be paid, part paid or disputed;
- (e) state that the Claim is made under the Act; and
- (f) be given to the person who under the Contract is or may be liable to make the payment.

The Amount of the Claim

The amount of the Claim a person is entitled to make is the amount worked out under the Contract or if the Contract does not provide for an amount, the amount worked out on the basis of the value of the Work carried out or undertaken to be carried out pursuant to the Contract; or the amount worked out on the basis of the value of the related goods and services supplied or undertaken to be supplied pursuant to the Contract. The value of the Work is to take into account any agreed variations and any defective work or goods and the estimated cost of rectifying the defect.

Due date for payment

A progress payment is payable on the day when the payment becomes payable under the Contract. If no payment schedule is issued to the contractor, the payment must be made on the earlier of the time required by the Contract or 10 business days after the Claim is given to the principal. Interest is payable on the unpaid amount.

Contractual provisions to "pay when paid" are void and have no effect.

Payment Schedules

A payment schedule must be in writing and identify the Claim to which it relates, state the amount of the payment the principal proposes to make, and if less than the claimed amount provide the reasons why the scheduled amount is less or reasons for withholding any part of the payment.

If a form is approved by the Act, the form must be used. Note: no approved form is prescribed at this time.

If a payment schedule is not given within 10 days, or on an earlier date if agreed in the Contract, the principal becomes liable for the full amount of the Claim.

Adjudication of a dispute

A dispute arises when a principal is liable to pay the Claim and the principal fails to pay the whole or any part of the claimed amount on or before the due date for the payment.

The contractor may recover the unpaid proportion as a debt due by commencing legal proceedings or by making an application for adjudication of the dispute.

If an adjudicator determines that an amount is due to the contractor the determined amount must be paid within 5 business days after the day of the adjudicator's decision is given or on the date determined by the adjudicator. As the Act is primarily concerned with maintaining a contractor's cash flow, not with determining ultimate rights, the payment is a payment "on account". However, an adjudication certificate may be filed as a judgment for a debt enforceable by the Court.

For more information, please contact:

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