

# Article

## DISPUTE RESOLUTION & INSOLVENCY

### Navigating the *Building & Construction Industry Security of Payment Act 2009 (SA)*

By Lecia Wood

Construction industry security of payment legislation is enacted in each state and territory in Australia to promote cash flow down the contracting chain. It does so by providing protections for contractors and faster mechanisms to recover progress payments or unpaid debts (including final payments and retention monies). It prohibits 'pay when paid' contract provisions and may override the withholding of retention monies.

The *Building and Construction Industry Security of Payment Act 2009 (SA)* (SOPA) provides a statutory entitlement to payment regardless of whether the parties' construction contract makes provision for progress payments. It proceeds from the principle, originating in the UK legislation from which the Australian Acts drew their inspiration, that parties should have access to a fast-track, uncomplicated system where, in the interests of ensuring prompt payment to maintain a contractor's cash flow, the process proceeds on a 'pay now, argue later' principle. It only finally resolves the dispute if the parties choose to allow any adjudication decision to be the final word on the dispute. If either party is not satisfied with or cannot live with an adjudication determination, then the parties still retain an unfettered right to have their dispute determined by the Courts.

#### The key steps under the SOPA?

This article provides a user-friendly guide to the procedure available under the SOPA:

- a. to make a "payment claim";
- b. prepare a responding "payment schedule";

- c. refer any disputed claim to an adjudicator for determination; and
- d. require payment of an adjudicated or unpaid progress claim.

#### Does the SOPA apply to my business?

Any business or person who undertakes construction work or who supplies goods or services under a construction contract can utilise the SOPA to recover progress payments for that work.

The SOPA applies to any construction contract (except for domestic contracts with homeowners), whether written or oral, for the supply of goods or services in connection with construction work undertaken in South Australia.

Notwithstanding the procedures and protections afforded by the SOPA, it is always best practice to document your agreement by written contract (correctly recording the parties, scope of work, payment terms and pricing). This preliminary step invariably alleviates dispute and cost at the payment and enforcement stage. The SOPA can still be utilised where your contract is comprised of an oral agreement recorded by quotations, invoices and emails.

Construction work is broadly defined under the SOPA to include the alteration, restoration, maintenance, extension or demolition of buildings or structures, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, rail and waterways, pipelines, reservoirs, water mains, sewers, industrial plant and installations for the purposes of land drainage or coast protection.

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It also covers installation services (including heating, power, air-conditioning, water, security and communication), cleaning (in the course of construction work), earth-moving, laying foundations, site preparation, painting and decorating.

“Services” (in connection with construction work) include the provision of labour, architectural, design or surveying services, building, engineering, decorating or landscaping (where those services are not provided as an employee).

### What is excluded under the SOPA?

The SOPA does not apply to a construction contract that forms part of a loan agreement or a contract of guarantee or insurance agreement with a recognised financial institution. It also specifically excludes domestic building work where a party to the contract resides or proposes to reside.

### How do I issue a payment claim under the SOPA?

A claim for a progress payment (“*payment claim*”) may be issued on the “*reference date*” stipulated in any contract (i.e., the 15th of each month) or, if no date is stated, the last day of the month in which the works are carried out. It is important to ensure the claim is served on the reference date, as this triggers the time period for a response by the recipient. A “*payment claim*” must identify the correct legal names of the claimant and party liable to pay (the respondent), the specific construction work (or related goods or services), the claimed amount and must expressly state that it is a “*payment claim made under the Building & Construction Industry Security of Payment Act 2009 (SA)*”.

A “*payment claim*” must be issued within 6 months of the construction work, included in the claim, being carried out unless the contract provides otherwise. However, a payment claim can include claims for earlier works that have not been paid, provided some works comprising the subject of the claim have been performed within 6 months of the claim.

### Due date for payment

Where a construction contract does not provide a due date, payment will be due and payable 15 business days after a “*payment claim*” is made. Interest is payable on any unpaid amounts that become due and payable (in accordance with the terms of the contract or, where no provision for interest is made, at the judgment interest rate prescribed by the *Supreme Court Act 1935* (currently 6%).

### Requirements where a payment claim is disputed

If an amount claimed in the “*payment claim*” is disputed on the basis of, for example, alleged defects in workmanship, incomplete work or a failure to agree on a variation, the respondent may provide a written response (a “*payment schedule*”) stating the amount (if any) that will be paid and, if any amount is to be withheld, the “*payment schedule*” must state the reasons for any withholding.

Disputed “*payment claims*” proceed under the SOPA to an out of Court adjudication process.

### What is an adjudication?

Adjudication is a fast-tracked, interim dispute resolution measure conducted outside of Court by ministerially appointed adjudicators (professionally trained individuals who hold a relevant degree in law or construction industry qualification).

The SOPA provides tight time frames for a claimant to apply for an adjudication of any unpaid or disputed portion of a “*payment claim*”. Where no “*payment schedule*” was provided, the claimant must, within 20 days of the payment due date, provide notice to the respondent of its intention to apply for an adjudication, following which the respondent has a further 5 days to provide a “*payment schedule*”.

At the expiry of that 5-day period, the claimant has 10 business days to lodge an “*adjudication application*” with a nominated adjudication body (i.e. Adjudicate Today, Australian Solutions Centre).

An “*adjudication application*” must be in writing and must be made to an authorised nominating authority identifying the payment claim and relevant supporting and responding material.

A respondent will have 5 business days to lodge an “*adjudication response*”. A respondent who failed at each junction to provide a “*payment schedule*” will not be permitted to provide an “*adjudication response*”.

An adjudicator may request written submissions, and may conduct an inspection or informal conference between the parties. Adjudicators must make their decision within 10 business days (unless otherwise agreed with the parties) from the date of receipt of the “*adjudication response*” (or when it was due).

If a respondent does not comply with an adjudication decision, the claimant may obtain an “*adjudication*

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certificate” for registration as a judgment debt in Court.

### How do I enforce a “payment claim”?

If the respondent fails to pay the “payment claim” or provide a written “payment schedule” within 15 business days (or any time stipulated by the contract) of service, a statutory debt arises under the SOPA. The claimant may then recover the “payment claim” or any unpaid portion by applying to Court for judgment to be entered.

In an application to Court for the entry of judgment following a respondent’s failure to serve a “payment schedule”, the respondent is precluded under the SOPA from raising a counterclaim or ground of defence in relation to matters arising under the construction contract. The intention of this prohibition is to prevent disputes as to, for example, construction defects and variations, which commonly lead to protracted and expensive litigation.

This does not preclude a respondent from raising genuine disputes as to defects or delay damages that arise under the construction contract or at common law, but those disputes must be raised in separate court proceedings and cannot operate as a bar to judgment for the amount of the unanswered payment claim.

### Suspension of works

The claimant may also serve notice (providing 2 clear business days) on the respondent of the claimant’s intention to suspend works. A claimant who lawfully suspends construction work for non-payment under the SOPA is not liable for loss or damage suffered by the respondent, or persons claiming through the respondent, during a period of suspension.

### Benefits of the SOPA

The procedure under the SOPA can result in a significantly abridged recovery of unpaid debts with limited legal cost contrasted with general state court proceedings. General court proceedings to enforce a debt prescribe a pre-action notice period (of 21 days minimum), a time frame for filing defences (28 days) and evidence (a further 28 days) and, if contested, the time and cost of obtaining expert reports (i.e. as to construction or engineering issues in dispute) and trial

at which witnesses of fact may be cross-examined at length.

In an industry that is dependent on a contracting chain comprising multiple trades and suppliers, certainty of payment and a fast-tracked process to resolve disputes is essential to minimise construction delays and insolvency issues.

### Summary

Achieving a working understanding of the mechanisms under the SOPA and utilising its procedures effectively will secure better cash flow and readily result in cost and management savings for businesses in the construction industry. Establishing working and adaptable precedents to streamline the procedures under the SOPA and ensure compliance with its time requirements is crucial to a streamlined experience of the procedure under the SOPA. Finally, when acting for contractors in construction disputes, they should be encouraged to always mark their payment claims as those issued pursuant to the SOPA in order to attract its operation and the fast-track low cost system of dispute resolution that it provides for.



MORE INFO

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