



## CONSTRUCTION LAW UPDATE No. 1001

### How will the New Law on progress payments work?

#### Introduction

Late last year, the South Australian Parliament passed the *Building and Construction Industry Security of Payment Bill 2009* (the “New Law”). The New Law dramatically changes the ground rules on timing and liability for responding to payment claims in the construction industry. The New Law sets up a new right to construction payments with some limited exclusions. Notably, payment claims by a builder to an owner who intends to live in the house under construction are excluded, but payment claims by subcontractors building the same house are included, as are virtually all other types of construction payment claims.

The New Law will come into effect on a date to be announced, possibly in July this year and will apply to all construction contracts made after that day.

In this update, we give some examples of how dramatic the effect of the New Law will be, drawing from experiences in NSW where very similar legislation has been in effect for over 10 years.

#### Terminology

Under the New Law:

- A “payment claim” is a request for a progress payment (including final, one-off or milestone payments);
- A “payment schedule” is a response to a request for a progress payment. Under the New Law, the payment schedule must be given to the claimant within 15 days of receipt of the payment claim. If the full payment claim is not to be paid, the payment schedule must say why.

#### Example 1

In *Walter Construction v CPL* (2003) NSWSC 266, the builder and owner entered into an AS4300 building contract for the construction of a multi-storey residential building consisting of 46 apartments, basement car parking, landscaping works, residential gymnasium and a swimming pool.

Historically, under AS4300, progress payment claims were certified by the Superintendent who frequently reduced the amount claimed. Once the payment was certified, the owner had to make payment of the certified amount within 5 days.

On 20 December 2002, Walter sent to CPL and the Superintendent a payment claim seeking \$14.9 million. CPL failed to provide a payment schedule to Walter within the period required under the NSW version of the New Law. However, on 23 January 2003, the Superintendent certified a payment of \$952,351 and on 28 January 2003, the owner paid the builder that amount.

Relying on the NSW version of the New Law, the builder suspended work under the contract and applied for summary judgment for the remaining \$13.962 million.

The builder had not provided a payment schedule. Similar to the NSW version, under the New Law, failure to provide a payment schedule within 15 days of receipt of the payment claim, entitles the claimant to summary judgment.

The owner put forward numerous reasons in an attempt to avoid summary judgment. The reasons put forward included:

- The payment claim was made earlier than the date specified in the contract for progress payments;
- No certificate had been issued for the amount awarded;
- The payment claim included delay and disruption costs.

None of these succeeded – the Court found that the parties had discussed an early claim due to the Christmas close down, that a certificate was not required and that delay and disruption costs could be included as construction work under the NSW version of the New Law.

This example shows the dramatic effect under the New Law of failing to respond properly to a progress payment claim.

## Example 2

In *John Holland v Cardno (2004)* NSW 258, Cardno sent a payment claim to John Holland. The claim included \$43,700 for “consulting engineering services” but no timesheets were included with the payment claim. The contract between the parties required Cardno to provide timesheets with any payment claim.

John Holland provided a payment schedule in the timeframe required under the NSW version of the New Law, stating it would not pay the claim because the timesheets had not been provided. Cardno referred the matter to adjudication.

Once a matter is referred to adjudication, the claiming party is required to provide an “adjudication application” to the adjudicator, including submissions, as to why the payment claim is good. Cardno did so and with its adjudication application produced the timesheets.

The NSW version of the New Law requires the other party (John Holland) to then provide an adjudication response to the adjudicator. However, the adjudication response cannot include reasons that were not included in the payment schedule.

Obviously, in its responding payment schedule, John Holland did not give any detailed challenge to the timesheets, as they were not even referred to in Cardno’s payment claim. However, it was therefore prevented from referring to the timesheets in its adjudication response.

The adjudicator found for Cardno and awarded it \$29,767.

John Holland appealed to the Supreme Court saying that this was a denial of natural justice. It said it was not fair that Cardno could provide a payment claim that was not detailed and subsequently provide the details in its adjudication application. Due to the provisions of the NSW version of the New Law, this strategy deprived John Holland from providing a response to the details in the timesheets.

The Supreme Court agreed. The adjudicator’s decision was set aside. The decision means that a payment claim must include sufficient details of the work that is the subject of the claim to enable the other party to understand the claim and respond in detail to it in the payment schedule.

## Conclusion

All building contractors in South Australia ignore the impending New Law at their peril. The salient points are:

- A payment claim (request for money) must include sufficient details of the work done;
- Unless the claim is to be paid in full, the responding payment schedule must include all the reasons why the respondent says the amount is less and why the payment is not to be made;
- If the payment schedule is not provided within 15 days, the claimant can obtain summary judgment against the other party;
- If the matter is referred to an adjudicator, the responding party is limited in its submissions to the adjudicator to the reasons it stated in the payment schedule.

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Tom is a former engineer who ran his own construction company for 20 years before becoming a construction lawyer. He has wide experience in the engineering and construction law field and specialises in the resolution of commercial disputes.

**Fenwick Elliott Grace is conducting training seminars on the New Law. The seminars to date have all sold out but further sessions have now been scheduled. Contact us for details of venues and times. Also see our website for more information on the New Law and to register for a training seminar.**

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