



CONSTRUCTION LAW UPDATE No. 907

NEWSFLASH

**This newsflash contains key points about new legislation which will have a major effect on payments in the construction industry. Under the new law, contractors, subcontractors and suppliers will be entitled to payment of what they claim, regardless of whether it is really due, if the paying party does not get the newly required paperwork in on time.**

The *Building and Construction Industry Security of Payment Act 2009* (“**the Act**”) was passed by the South Australian Parliament on 3 December 2009. The Act is based on the New South Wales legislation, but with some amendments.

Under the Act, a contractor, subcontractor or supplier who undertakes construction work or supplies materials or services for construction work can make a **Payment Claim**. To turn an ordinary invoice into a Payment Claim, all they have to do is to state that it is made under the Act.

The paying party then has 15 business days to serve a **Payment Schedule** identifying the amount, if any, that they propose to pay.

- If the paying party does not serve their Payment Schedule within that 15 days, then the claimant is entitled to the amount they have claimed regardless of whether it is really due. There is no grace period and the Courts will have no power to give the paying party another chance.
- If the paying party does put in a Payment Schedule proposing to pay whole or part of what is claimed, then they become legally liable to pay that amount.

If the paying party proposes in their Payment Schedule to pay less than what has been claimed, fails to pay what they have proposed to pay, or fails to provide a

Payment Schedule at all, then the claimant may apply for adjudication. If the claimant opts for adjudication, the paying party has another opportunity to provide a Payment Schedule within 5 business days.

The Act forbids the parties from agreeing who the adjudicator should be. The claimant can choose any Adjudicator Nominating Authority (“**ANA**”). These ANAs can either be professional organisations or private “for profit” companies.

The adjudicator has to make a decision within 10 business days. The adjudicator will normally make the decision on the basis of the documents alone; if a conference is called by the adjudicator, then the parties are not allowed to have any legal representation. The paying party is allowed to put in an adjudication response but is forbidden from putting anything in the adjudication response that has not already been included in the Payment Schedule.

The adjudicator determines the amount of the progress payment, not on the basis of what is really due, but on the basis of what appears from the written material. Accordingly, it is **vital** that the parties get the paperwork required by the Act in on time. If they do not do so, the Act is unforgiving. Experience from similar legislation on the east coast shows that a very large proportion of cases (about half) are determined, not on the basis of what is really due, but on the basis that the paying

party has failed to get a sufficiently detailed Payment Schedule in on time.

Decisions of adjudicators can be registered as judgments. If the paying party does not pay, then the amount of the adjudicator's decision, including interest, is enforceable as a judgment debt of the Court; the losing party has to pay, and is not allowed to challenge the adjudicator's determination on the grounds that the money was not really due. The losing party can still issue fresh proceedings in Court, and if they can eventually show that the money was never due, they would be entitled to repayment.

There are a couple of other noteworthy provisions in the Act:

- If the paying party fails to pay as required by the Act, the claiming party is entitled to suspend work.
- Pay when paid clauses are banned.

It is not possible to legally contract out of the Act.

There are some exclusions from the Act:

- Mining.
- Contracts for domestic building work with resident (or intending resident) owners. Thus, although house builders will not be able to use the Act against resident owners, their subcontractors will be able to use the Act against them.

This Act is likely to have a massive effect on the ability of contractors and subcontractors to recover their accounts relatively quickly and cheaply. The typical cost of an adjudication is about 10% of the cost of a Court case or a traditional arbitration. On the east coast, there are now thousands of adjudications per year.

No date as yet has been set for the commencement of the new Act; it is likely to start in the first half of 2010.

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Robert has been closely involved in adjudication for the last 15 years in the UK, internationally and in Australia. He has trained and appointed many adjudicators and adjudicated or represented parties in many adjudications with an aggregate value of thousands of millions of dollars.

In 2007, Robert was described by the Construction Law Journal as “of the single most influential figures in shaping the way in which statutory adjudication was introduced into the UK”. Since that time, he has lectured in several states on adjudication topics.

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Fenwick Elliott Grace is a law firm that specialises in providing legal services to the construction and engineering industries.

If you would like to receive our updates by email, please contact Kerrin Burrow on (08) 8110 8000 or by email at [kerrin.burrow@feg.com.au](mailto:kerrin.burrow@feg.com.au).

**Because of the default provisions in this new legislation, contractors, subcontractors and developers are all in for an unwelcome shock unless they understand the new legislation, and how to operate it. Fenwick Elliott Grace and the Master Builders Association are holding training sessions for the industry commencing at 2:30 pm on 4 February 2010. Contact Eunie de Bruyn on (08) 8110 8000 or see our website [www.feg.com.au](http://www.feg.com.au) for registration details.**