

Article Information

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Contractors on the Front Foot. Owner-Occupiers Now Exposed to Security of Payment Claims

Before 1 March 2021, owner-occupiers were off-limits when it came to security of payment claims. Owner-occupier contracts were exempt from the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SoP Act).

Under the old rules, contractors had to commence proceedings against owner-occupiers in NCAT or a court to recover unsatisfied payment claims. It was slow, expensive and quite unhelpful in terms of cash-flow.

That has now changed for contracts entered into on and from 1 March 2021. It is now pay now argue later, even in the owner occupier space, provided the payment claim satisfies some simple requirements and is appropriately “endorsed”. A great outcome for contractors.

An owner-occupier is a person who lives in, or intends to live in, the dwelling that is the subject of the construction work.

At a glance:

- Contractors can now serve monthly SoP Act progress claims on owner-occupiers on and from the last day of each month.
- An SoP payment claim must be endorsed with the words “*This is a payment claim under the Building and Construction Industry Security of Payment Act*” for the SoP Act to apply to that claim.
- Head contractors must attach a simple *supporting statement* to their payment claim declaring that subcontractors have been paid.
- The recipient of the SoP payment claim must provide a payment schedule within 10 business days (or any lesser period provided in the contract) or all of the amount claimed is due and payable, on its due date, as a statutory debt.
- If an amount is scheduled in the payment schedule, the scheduled amount is due and payable, on its due date, as a statutory debt.
- If no payment schedule is provided or the contractor is not happy with the scheduled amount, it can apply to have the payment claim adjudicated.
- Any clause in the contract that is inconsistent with the SoP Act is void (e.g. “pay when paid” clauses or clauses attempting to contract out of the SoP Act). So owner-occupiers cannot “contract-out” of the SoP Act.

Some more detail:

Previously, s 8A(2) of the *Home Building Act 1989* (NSW) (**HBA**) applied to owner-occupier contracts with the effect that a right to claim progress payments could only be included in the contract if the progress payments were tied to the achievement of milestones or if the contract was a “cost plus” contract.

However, now that the SoP Act applies to owner-occupier contracts, those shackles have been released. Periodical progress claims are back as an option for owner-occupied residential building work.

Once served with a payment claim, the owner-occupier has 10 business days in which to serve a payment schedule in response, unless the contract provides for a shorter period. If the owner-occupier fails to serve a payment schedule, they will become liable for the full claimed amount. If the dispute proceeds to adjudication, the owner-occupier will not be able to advance any reasons for not paying that are not stated in the payment schedule.

The due date for payment of a progress claim is 10 business days after the payment claim is served on the owner-occupier, unless the contract provides a different date. If an owner-occupier fails to pay by the due date for payment, the contractor can suspend work (two days after serving a suspension notice) and can seek to enforce the progress claim through adjudication or, if no payment schedule was served, through fast-tracked summary judgment Court proceedings. Interest is also payable on unpaid progress claims, even if the contract does not provide for interest.

The time-frames in the SoP Act are tight, including the time-frame to make an application for adjudication. So don't sit on an unsatisfactory payment schedule, a failure to provide a payment schedule or an overdue scheduled amount, as your rights under the SoP Act might 'time out'. If you are not across the SoP Act, we suggest that you quickly seek advice as to when you need to take the next step to progress to payment.

Supporting statements and the "Security of Payment Guide"

An SoP Act payment claim served by a head contractor on an owner-occupier must be accompanied by a supporting statement declaring that all subcontractors engaged by the head contractor have been paid. If you have no subcontractors then you are not a head contractor and so you don't need to provide a supporting statement.

The Department of Fair Trading have published a special short-form of supporting statement to be used only for owner-occupier contracts, which is available on Fair Trading's website at

https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0008/984995/Supporting-Statement_Owner-occupier.pdf.

The due date for payment to subcontractors is 10 business days after the head contractor is served with the subcontractor's payment claim, unless the contract between the head contractor and the subcontractor provides a different date. If a scheduled amount is not paid then summary judgment and adjudication options are available to enforce the debt.

If an owner-occupier contract is for work worth more than \$20,000, the contractor needs to give the owner-occupier a copy of the "Security of Payment Guide"

https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0011/975008/Security-of-Payment-Guide.pdf or risk being fined.

The obligation to provide these documents is in addition to the obligation under the HBA to provide the "Consumer Building Guide" for residential building work worth more than \$5,000.

Wrap up

These changes are a big win for small to medium contractors. Contractors can put themselves on the front foot when faced with tardy or recalcitrant owner-occupiers, as they now have access to the SoP Act's fast track, pay now, argue later processes to recover progress payments.

With that said, contractors need to ensure that they provide the owner-occupier with a copy of the "Security of Payment Guide" and the "Checklist" at the time of contracting and be mindful of the supporting statement requirements.

Piper Alderman has a busy building regulatory practice, dealing with security of payment issues and claims on a daily basis. Feel free to contact Rob Riddell on +612 9253 3858 if you have any questions about the changes or if you need assistance with getting paid.

This article is based on the law in force at the time of publication and is a summary only. Seek legal advice on your specific situation before exercising your rights under the SoP Act.