

## Article Information

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## South Australian Construction Industry: Rising Costs & Payment Difficulties, Reminder of the Building and Construction Industry Security of Payment Act 2009 (SA)

**In the current economic climate the South Australian construction industry is faced with a range of challenges including dramatically rising costs for both materials and business related expenses, and a significant shortage of skilled labour. Perhaps unsurprisingly, this has led to commentary that projects are stalling amid damaged confidence levels.<sup>[1]</sup> Further, insolvency data released by ASIC on 6 May 2024, provided that 2,320 companies in the construction industry entered external administration or appointed a controller during the period from July 2023 to April 2024, being a substantial increase on the comparative number this time last financial year of 1,751 construction companies.**

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The increasing number of insolvencies and payment difficulties within the construction industry is a reminder of the importance of understanding the effect of the *Building and Construction Industry Security of Payment Act 2009* (SA) (**SOPA**) on your ability to manage your cash flow.

The SOPA establishes an entitlement for parties to a construction contract to recover progress payments irrespective of whether an entitlement is provided in the contract (section 3(2)). However, there are a number of requirements that must be complied with in order to recover payment under the SOPA, which we discuss below.

### Does the SOPA apply to you?

The SOPA applies to most construction contracts whether written or oral (section 7(1)). However, the SOPA does not apply to construction contracts if they fall within the exceptions under section 7, in particular the SOPA does not apply in circumstances where the party receiving the benefit of the works resides in or proposes to reside in the premises the subject of the works (section 7(2)(b)) or in circumstances where the provision of related goods and services are performed outside of South Australia (section 7(4)).

Under SOPA a construction contract is one that either relates to construction work or the provision of related goods and services, both of which are widely defined in the SOPA to cover the standard work required in the performance of construction work (sections 4-6).

### How do you recover progress payments?

An entitlement to a progress payment arises on and from each reference date under a construction contract (section 8). The reference date is determined either in accordance with the contract or if not expressly provided in the contract, it is the last day of each month commencing the month in which the works were first carried out or related goods and services were supplied (section 4).

To recover a progress payment a payment claim may be served on the party liable to make payment (**Respondent**) (section 13(1)). The payment claim must be served within the period set out in the contract or 6 months following the construction works or the provision of the related goods and services being carried out, whichever is later (section 13(4)).

A progress payment becomes due and payable on the date provided for in the construction contract or, if not set out in the contract, 15 business days following a payment claim being issued (section 11(1)) (**Due Date**).

#### *Responding with a payment schedule*

The Respondent may respond to the payment claim with a payment schedule which sets out the scheduled amount which they propose to make payment of (section 14(1)-(2)). If the scheduled amount is less than the amount of the payment claim, the Respondent must provide their reasons as to why they do not propose making payment in full (section 14(3)).

In the event the payment schedule proposes a scheduled amount that is less than the amount set out in the payment claim, an adjudication application can be made to determine an entitlement to the balance of the amount claimed in the payment claim (section 17(1)(a)(i)). An adjudication application in this circumstance must be made within 15 business days after the payment schedule is received (section 17(3)(c)). Separate to the SOPA, proceedings can also be instituted to recover the balance of the amount claimed in the payment claim.

If the Respondent fails to make payment of whole or part of the scheduled amount on or before the Due Date, the unpaid portion of the scheduled amount can be recovered by either instituting debt recovery proceedings or an adjudication application (sections 16(2)(a) & 17(1)(a)(ii)). Any adjudication application in this circumstance must be made within 20 business days after the due date for payment (section 17(3)(d)).

#### *Failing to provide a payment schedule*

If the Respondent does not provide a payment schedule within the time set out in the contract or within 15 business days after the payment claim is served (whichever time expires earlier) they become liable to make payment of the amount set out in the payment claim (section 14(4)) as a debt due and owing to you. This debt can be recovered by instituting debt recovery proceedings or an adjudication application can be made in relation to the payment claim (section 15(2)(a)).

Before making any adjudication application, the Respondent must be notified within 20 business days following the Due Date of the intention to make an adjudication application (section 17(2)(a)). The notice must also give a final opportunity for a payment schedule to be provided within 5 business days of the date of the notice (section 17(2)(b)). Following the 5 business days, if no payment schedule is received the adjudication application must be made within 15 business days (section 17(3)(e)).

A notice of intention to suspend works may also be served on the Respondent in this instance (sections 15(2)(b) & 28(1)-(2)), see below for further information.

#### *Suspension of Works*

If the Respondent fails to issue a payment schedule and fails to make payment of a payment claim or fails to make payment of whole or part of an amount accepted in a payment schedule on or before the Due Date you may serve a notice of intention to suspend works on the Respondent (sections 15(2)(b) & 16(2)(b)).

The suspension of works can occur 2 business days following the date of service of the notice (section 28(1)). However, once payment has been received in satisfaction of the scheduled amount this right only exists until the end of the third business day following the date payment is received (section 28(2)).

#### **Issues to look out for:**

1. When serving a notice pursuant to the SOPA, such as a payment claim or a notice of intention to suspend works, the notice must state that it is made under the *Building and Construction Industry Security of Payment Act 2009* (SA) (sections 13(2)(c), 15(3) & 16(3)).
2. In respect of each reference date, only 1 payment claim can be served under the construction contract (section 13(5)). However, it is possible for a payment claim to be served that captures past payment claims.
3. In light of the above two comments, a contractor may create issues for itself if it purports to endorse every invoice as being a notice made under the SOPA. As such if you expect to issue multiple invoices within a given month or with respect to a particular reference date, you ought consider which invoice you would prefer to mark as being provided under SOPA.
4. It is important to identify whether your construction contract provides for timeframes and a process by which payment claims and payment schedules are to be issued, as this may take precedence over the dates provided for in the SOPA.
5. In order for a payment claim to be made in accordance with the SOPA it must sufficiently identify the construction work or the related goods and services which the progress payment relates to (section 13(2)(a)). The payment claim must also indicate the amount of the progress payment claimed to be due (section 13(2)(b)). A failure to provide

sufficient information is a ground to challenge the payment claim.

6. Under the SOPA, a provision of a construction contract that makes payment to one party contingent on receiving payment from another party has no effect (section 12). This situation may arise where a subcontract provides that the contractor does not become liable to make payment to the subcontractor until payment is received from the customer under the head contract.
7. A payment claim is required to be served on a person who, under the contract concerned, is or may be liable for the progress payment (section 13(1)). Therefore, it is important to ensure that the payment claim identifies and is served upon the party named under the contract.
8. It is prudent to bear in mind that business day is defined in the SOPA as excluding a Saturday, Sunday, public holiday, 27 to 31 December and any other day on which there is a statewide shut-down of operations in the building and construction industry (section 4).

[1] <https://www.afr.com/property/commercial/house-builders-can-t-compete-with-states-cash-splash-20240507-p5fqwx>