

## Construction Alert

# Security of Payment Scheme to Commence in South Australia

December 2011

The *Building and Construction Industry Security of Payment Act 2009* (SA) (**Act**) will commence on 10 December 2011.

The Act introduces a security of payment scheme in South Australia. The Act was modelled on similar legislation in the Eastern States. Security of payment schemes now exist in all Australian States and Territories.

### What is "Security of Payment"?

The Act provides a person who undertakes "construction work" or supplies "related goods and services" a statutory entitlement to progress payments regardless of the terms of the relevant construction contract.

The Act provides access to a "fast track"<sup>1</sup> process for the recovery of progress payments without limiting the parties' rights to have the matter determined using ordinary litigious procedures.

In addition the Act makes "pay when paid" provisions of construction contracts of no effect.

### "Construction Work"

The Act applies to "construction contracts" (whether written or oral) entered into after the commencement of the Act. A construction contract is a contract whereby one party agrees to carry out construction work or supply related goods and services for another party.

"Construction work" and "related goods and services" are defined broadly. The Act applies to most works undertaken by contractors in commercial construction projects. The Act excludes drilling for oil, the extraction of oil, natural gas and minerals (including underground works) and has only limited application to domestic building work.

### Right to Progress Payments

The Act provides that a person who has undertaken construction work or supplied related goods and services is entitled to a progress payment on and from each "reference date".

The reference date is either the date on which a progress claim may be made as provided for under the contract or if the contract is silent, the last day of each month. The amount of the progress payment is either as provided for under the contract or it is the value of the work undertaken until the reference date.

A progress payment is either payable as provided for under the contract or otherwise within 15 business days after a "payment claim" is made.

### Payment Claims

A person entitled to a progress payment (**Claimant**) is entitled to make a payment claim under the Act. The payment claim must identify the relevant work and the amount of the progress payment claimed to be due and also state that it is a payment claim made under the Act.

A payment claim must be served either within the time specified under the contract or 6 months after the construction work was carried out or related goods and services provided, whichever is the later.

### Payment Schedules

A person served with a payment claim (**Respondent**) may reply to a payment claim by providing a "payment schedule" to the Claimant within either the time specified in the construction contract or 15 business days, whichever is the earlier. A payment schedule must identify the relevant payment claim and the amount the Respondent intends to pay to the Claimant.

If the Respondent intends to pay an amount less than the payment claim the payment schedule must set out the reasons why.

If the Respondent does not provide a payment schedule within time the Claimant is entitled to recover the payment claim as a debt in Court or make an application for adjudication. Similarly if the Respondent does not pay the amount it scheduled as payable the Claimant may recover that amount as a debt in Court or make an application for adjudication.

<sup>1</sup> *Lucas Stuart Pty Ltd v Council of the City of Sydney* [2005] NSWSC 840, [13].

## Adjudication

A dissatisfied Claimant may refer the payment claim for adjudication by making an application to an "Authorised Nominating Authority" (ANA). The ANA will then refer the adjudication application to an adjudicator. The parties may not choose who will be the adjudicator.

The claimant may apply for adjudication within 15 business days after receiving the payment schedule. If the Respondent did not provide a payment schedule within time it is given a last chance to do so, after which time the Claimant may make an adjudication application.

The Respondent may provide the adjudicator with an "adjudication response". The Respondent may only provide an adjudication response if it has served a payment schedule on the Claimant. An adjudication response may contain submissions to the adjudicator but may not include reasons for withholding payment which are not already included in the payment schedule.

The adjudicator is obliged to make a determination within 10 business days after receiving an adjudication response or if no response is lodged, within 10 days from the date the response was due unless the parties otherwise agree. The Respondent must then pay any amounts determined by the adjudicator as payable within 5 business days of service of the determination on the Respondent or such later date as determined by the adjudicator. If this amount is not paid the Claimant may obtain an "adjudication certificate" from the relevant ANA. An adjudication certificate may be filed as a judgment for a debt in Court.

## Recovery of Debts under the Act

If the Claimant seeks to recover an amount as a debt in Court the Act prevents the Respondent from bringing a

cross claim or raising any defence. With some narrow exceptions these provisions have been strictly enforced interstate.<sup>2</sup>

Payment of a claim under the Act is not intended to be a final determination of the parties' rights. The Act expressly preserves the parties' rights to dispute the claim in substantive proceedings. Security of payment is a 'pay now, argue later' scheme.

In practice principals are often concerned that the payment of a claim under the Act provides the contractor with a 'fighting fund' to be used against the principal in any substantive proceedings.

## What does this mean for the SA Construction Industry?

The introduction of a security of payment scheme is a significant development for the South Australian construction industry.

Principals and contractors alike will need to be aware of their rights and obligations under the Act. Many interstate principals have discovered that non-compliance with the Act may have serious consequences. Industry participants should review and update their standard form contract documents and ensure adequate claims assessment procedures are in place prior to the commencement of the Act.

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<sup>2</sup> Project Venture Development No 11 Pty Ltd v TQM Design & Construct Pty Ltd [2009] NSWSC 699.

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