

BUILDING & CONSTRUCTION

Some Commercial Law Issues that Affect the Construction Industry

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Making a Payment Claim

The Building and Construction Industry Security of Payment Act 2009 (the Act) is in fantastic in theory and in practice IF you get it right - as it can get people paid and issues settled - quickly. Using the Act puts you in a privileged position as you have rights beyond those set out in the contract. Importantly;

It is a pay now argue later system.

You cannot contact out of the Act.

You cannot have a pay when paid arrangement.

To benefit under the Act, you must follow the rules.

If the rules are not followed you will be back where you were before the Act was introduced to get paid –either in court or following the dispute resolution process in your contract.

Exclusions

You cannot make a payment claim if you are doing–

- domestic building work (as defined in the Building Work Contractors Act 1995) where the person engaging the builder resides or intends to reside in the place where the work is being done. (N.B. a subcontractor to a builder doing domestic building work CAN make a payment claim)
- Insurance work
- Contract where payment for the construction work is calculated by reference to something other than the value of the works

There are also other exclusions (See section 7)

Making your Claim

Assuming that none of the exclusions apply, to lodge a valid payment claim you need to answer yes to all the following questions:-

1. Are you licensed to the work you want to claim for?
2. Are you doing **construction work** or supplying related goods and services?
3. Is your contract a **construction contract**?
4. Have you worked out the **reference date**?
5. Have you **identified the construction work** with sufficient particularity?
6. Have you **served your claim** as allowed in the Act?
7. Is this your only claim for a **particular reference date**?
8. Does your claim state that it is **made under the Act**?

1. Construction Work (section 5)

This is broadly defined to include traditional construction work and ventilation, power supply, heating, lighting communication etc. For the full definition go to http://www.austlii.edu.au/au/legis/sa/consol_act/bacisopa2009606/s5.html

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The definition also includes the supply of **related goods and services**. Related goods and services include:-

- *materials and components* that form part of any building or structure
- *Plant and materials* supplied (and this includes hired) in connection with construction work
- *Services* including architectural, design, survey, engineering and project management

For more information go to section 6 of the Act

(http://www.austlii.edu.au/au/legis/sa/consol_act/bacisopa2009606/s6.html)

2. Construction Contract

Construction contracts under the Act include not only written contracts but also oral contracts and arrangements “under which one party undertakes to carry out construction work of to supply related goods and services, for another”. (Section 3)

The concept of arrangement is a broad one and includes, for example, undocumented variations. However, it does not include works where it cannot be shown that there was a request made for works and the request was agreed to.

In other words, the formal elements of a contract do not need to be proved for a claim to succeed.

3. Reference Date

First look to your contract for the date/s on which you can make a progress claim. If dates are in the contract, then you can make a claim on those dates.

If the contract is silent (or does not exist) then you make one claim a month for work done in the previous month. A month starts on the first of the month and finishes on the last day of the month.

4. Identification of the Works

The rule here is that the claim needs to identify the works sufficiently so that:-

- the person receiving the claim can value the work to which the claim relates and respond to it; and
- any adjudicator who has to look at the claim, can understand the limits of the dispute.

The claim cannot be an ambit one, unless the contract provides for example that progress payments will be paid at a fixed monthly rate (e.g. \$100,000.00 per month).

A payment claim can be made up of a number of documents – but must not leave people guessing which ones.

5. Service of Claim

Like all things there are rules for this as well.

Section 34 of the Act sets out that service is allowed by

- personal delivery,
- lodging the claim at the usual place of business during normal office hours,
- post
- fax or
- as per your contract

There is no mention of service by email. However, though it is probably allowed (*Kavia Holdings Pty Ltd v Suntrack Holdings Pty Ltd* [2011] NSWSC 716), if the contract does not designate an email address, then it will be delivered when it comes to the attention of the recipient; not when it is received on the recipient's mail server.

It is always a good idea to have proof of delivery regardless of how the notice is served.

6. One Payment Claim per Reference Date

Only one payment claim can be served with respect to each reference date. None after the first will be valid. *Sometimes*, when more than one payment claim is served at the same time on the same date, that might constitute a single payment claim.

7. Statement that the Claim is Made Under the Act

In short, you must put

“This claim is made under the Building and Construction Industry Security of Payment Act 2009.”

on your claim. If you do not, the claim will not be valid.

Summary

There is no other way to say it. The checklist is important.

If you do not satisfy all the requirements, your payment claim will not be valid.

If in doubt, ask for professional help. After all, the cost to get your paperwork checked and right first time up will far outweigh the cost of having to prove that your claim is a valid one.

Pro Forma Payment Claim

Payment claims do not have to follow a particular format, but they must contain certain information. The pro-forma below is one suggestion.

Explanatory notes are on the following page.

Letterhead

Date:

123 Constructions Pty Ltdⁱ
321 Avenue Street
SUBURB SA 50**

By Facsimile: 8888 8888ⁱⁱ

Invoice/Payment Claim No. ^{iii}**

This claim is made under the Building and Construction Industry Security of Payment Act 2009.^{iv}

Contract: ^v

Site:^{vi}

Progress claim No:^{vii}

Contract Amount	\$100,000.00
Variations	\$20,000.00 ^{viii}
TOTAL	\$120,000.00
Value of Contract Completed	\$45,000.00 ^{ix}
Value of Variations Completed	\$10,000.00
TOTAL completed to date	\$55,000.00
Less Amount paid	\$30,000.00
AMOUNT CLAIMED (see attached schedule)	\$25,000.00
GST	\$2,500.00
TOTAL AMOUNT CLAIMED	\$27,500.00 ^x

SCHEDULE^{xi}

ⁱ Insert either the registered office or the usual place of business of the person who owes you money.

ⁱⁱ Personal service, mail and facsimile delivery are all acceptable. Email service also allowed, but best to look at your contract first.

Keep a record of when and how the payment claim was served.
If you use facsimile, keep the transmission record as proof of sending.

ⁱⁱⁱ Review your contract to see if your payment claim can also be your invoice. Usually it is possible to do this.

^{iv} If you leave this out your claim will fail.

^v If you have a contract number, then insert here.

^{vi} An additional and often used form of identification is useful.

^{vii} Complete this if the payment claim is part of a series of progress payments.

^{viii} Insert the value of the additional works that you have done under the contract as a variation.

^{ix} Unless this is the last progress payment, this amount will be less than the contract value.

^x How much you want to be paid under the payment claims is inserted here.

^{xi} You need prove what works you have done in the Schedule. The value of these works will be the value of the claimed amount. The person on whom the payment claim is served must have sufficient detail to allow them to respond to the payment claim with a payment schedule. If this is not provided, you claim will fail.