

Beware of SOPA – 10 Days to Dispute Invoices

Owners corporations and owner occupiers entering into contracts with builders need to be aware of the Building and Construction Industry Security of Payment Act 1999 (NSW) (**SOPA**) to avoid payment disputes which can be very costly and difficult to challenge.

While owner occupier residential contracts were previously exempt from SOPA prior to the commencement of the Building and Construction Industry Security of Payment Regulation 2020 (NSW), owner occupier construction contracts entered into on or after 1 March 2021 are now caught by the SOPA regime. This change provides additional relief to residential builders. Residential builders will now be able to serve payment claims on owner occupiers and refer payment claims to adjudication under SOPA.

What is a Payment Claim?

- SOPA gives contractors and subcontractors a statutory right to progress payments. It adopts the approach of “pay now, argue later” to help preserve cash flow in the construction industry.
- A payment claim is a document which identifies the construction work (or related goods and services) undertaken to which the progress payment relates, and must identify the amount of the payment which it claims is due. A payment claim can take the form of an invoice.

What is a Payment Schedule?

- Where payment claims are submitted in accordance with the Act, the other party to the contract must either:
 - pay within a specified time; or
 - give reasons for not paying the full amount in the form of a payment schedule.
- A payment schedule must:
 - identify the payment claim to which it relates; and
 - indicate the amount the that the recipient proposes to make.
- A payment schedule must be in writing and can be in the form of an email, a letter, text message or fax.
- A payment schedule must be provided within the earlier of 10 business days from receipt, or within the time required under the contract. If a payment schedule is not provided in the

timeframe, the recipient becomes liable to pay the full claimed amount in the payment claim.

What do you do if you don't like an invoice?

- In many cases, the Courts and adjudicators have considered an invoice to be a payment claim under SOPA.
- It is important to respond to the contractor as quickly as possible with a payment schedule (and by no later than 10 business days from receipt) if you do not agree with the sums claimed by a contractor in an invoice.
- If you provide a payment schedule later than 10 days, you may not be able to rely on it if the contractor decides to take Court action.

What to do if the contractor sues in Court?

- A contractor can sue in Court for the full amount of the payment claim if a payment schedule is not provided in time.
- By the time a contractor commences Court proceedings under SOPA, it will probably be too late to provide a payment schedule.
- A court action brought under SOPA limits the defences available. You cannot use any terms of the contract in the defence, or a cross-claim.
- However, SOPA is a highly technical piece of legislation and if the contractor did not comply with all the requirements when serving a payment claim, the proceedings could be subject to challenge.
- An owners corporation needs to consider the cost implications of being involved in legal proceedings and should obtain legal advice about the defences and prospects of success.

What to do if you receive adjudication application?

- Adjudication is a quasi-interim process under SOPA, where a nominated adjudicator determines the amount to be paid under a payment dispute.
- Adjudication usually allows a last opportunity to put on a payment schedule (within 5 days after receiving the claimant's notice that they wish to apply for adjudication).
- Adjudication is also a highly technical process with many parts and a very tight timeframe. Owners Corporations should not delay in obtaining legal advice if they receive an adjudication application.

- An adjudicator's decision is binding and enforceable but can be subject to challenge in the Courts.

How long do I have to respond?

We have previously prepared a number of factsheets about the adjudication process and the timeframes for a response.

<http://www.bannermans.com.au/construction/articles/security-of-payments/194-security-of-payments>

<http://www.bannermans.com.au/files/SOPA3.pdf>

The NSW Government is currently proposing reform of SOPA to change the timeframes available to respond.

Schemes should consider their contracting practices and obtain legal advice prior to entering into contracts to avoid a lengthy and expensive process under SOPA.

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11 August 2021