

Questions & Answers

Q: What is an adjudication?

A: An adjudication is a process carried out by an independent adjudicator to decide the amount that is due in respect of a progress payment claimed under the Act. Only a claimant can start an adjudication.

Q: What is an Authorised Nominating Authority (ANA)?

A: To start an adjudication a claimant must make a written application to an ANA. A list of ANAs can be obtained from the NSW Government Information Kit and the web sites shown on this page.

After receiving an adjudication application and payment of any fee, the ANA will nominate an adjudicator.

Q: What happens if the respondent fails to pay the adjudicated amount?

A: The claimant can ask the ANA to provide an adjudication certificate. The claimant can then have the adjudication certificate filed in the appropriate court as a judgment. The claimant must support the certificate with an affidavit stating that the amount is still outstanding. The judgment debt is then enforceable in the same way as any court judgment, without time consuming and often expensive court hearings of the matters in dispute.

Q: What type of work is covered?

A: Work covered by the Act includes all types of construction and building work in the public and private sectors, as well as professional services such as architectural, design, surveying, the hire or purchase of plant and equipment, demolition and supply of building materials.

Q: Does the Act apply to homeowners?

A: The Act does not apply to contracts with homeowners who live in, or intend to live in, the dwelling where the work is being carried out. These contracts remain controlled by the Home Building Act, 1989. The Act does, though, cover all work, materials and plant supplied by subcontractors, consultants and suppliers to contractors who have contracts with such homeowners. All other residential work involving investment properties, landlords, strata title bodies corporate, developers, builders, contractors, subcontractors, consultants and suppliers is covered by the Act.

Q: What are the important things you need to check when using the Act?

A: You should:

- know your contract, its payment terms and the name of the party liable to pay your claims;
- work out from the contract or the Act the date when a claim can be made and how to calculate the amount you can claim;
- ensure that the claim includes a statement along the lines "This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW";
- check the Act for details on how to make valid payment claims, provide payment schedules and make adjudication submissions; and
- note and comply with any time restrictions imposed under the contract and by the Act.

For more Information

A comprehensive NSW Government Information Kit has been produced for the benefit of everyone in the building and construction industry. You can access a copy of the Information Kit which includes sample documents that can be used in securing payment under the Act and the full list of Authorised Nominating Authorities from:

Websites:

The Construction Policy Steering Committee website at www.cpsc.nsw.gov.au/sop

The Department of Public Works and Services website at www.dpws.nsw.gov.au

NSW Government Information Service:

- Sydney callers: (02) 9238 0950
- Rural and regional callers: 1800 463 955
- Fax: (02) 9228 7227
- Email: gisinfo@dpws.nsw.gov.au

You may also contact your Professional Association or representative Industry Body to assist you with any questions on the workings of the Act. This may include advice on Authorised Nominating Authorities you could approach for an adjudication.



Caution

This brochure summarises some of the rights and obligations in an easily understood format. It does not go into details and does not cover all situations. Consequently, there are aspects of the Act, which have not been covered. For a full appreciation of rights and obligations consult the Act or obtain legal advice.

Payment problems?

WHY NOT GET INTO THE ACT?

Building and Construction Industry Security of Payment Act
1999 NSW (as amended in 2002)



Building & Construction Industry



A New South Wales
Government Initiative

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Bob Carr MP
Premier NSW

The thought that small firms and operators can be denied their rightful payments is abhorrent. The use of protracted legal processes to do it makes a mockery of the rule of law.

That's why my Government acted decisively in 1999 with our security of payment laws. Last year, we strengthened those laws.

I'm proud of those laws and the difference they will make to the thousands of contractors, consultants and suppliers in New South Wales whose prosperity is vital to our economic success, particularly in the construction and building industry which is the engineroom of growth.

My message on security of payment is simple - if you are being denied payments or are getting the legal run-around over monies due, then make use of these new laws. They're here for your benefit and they will serve you well.

Bob Carr
Premier



Morris Iemma MP
NSW Minister for Public
Works and Services

The swift and fair settlement of any payment dispute has been a vital part of the State Government's reform agenda for the New South Wales construction industry.

The recently amended Building and Construction Industry Security of Payment Act, which operates from 3 March 2003, creates even fairer payment standards for construction contracts.

This law has established a statutory entitlement for payment for work done and for materials and plant supplied; adjudication of disputes over payment claims outside of the courts; and the speedy enforcement of payment following adjudication in favour of the claimant.

It gives claimants a quick means of getting paid without the need to undertake costly legal proceedings.

The Act will again be reviewed by early 2004 to ensure that it is working the way the Government intended it should.

Morris Iemma MP
Minister for Public Works and Services

Key Features

The Act:

- Provides a statutory right to payment for any party that contracts to carry out construction work or supply related goods or services on projects for the private and public sectors in NSW. It also gives an entitlement to receive all payments that are due, including final payments and retention monies.
- Applies to all contracts (written and oral) for construction work or supply of related goods or services at all levels in the contracting chain, with the exception of contracts with homeowners who live in, or intend to live in, the dwelling where the work is being carried out. The Act does, though, apply to all contracts between subcontractors, consultants and suppliers to contractors carrying out work for such homeowners. All other residential work involving residential investment properties, landlords, strata title bodies corporate, developers, builders, contractors, subcontractors, consultants and suppliers is also covered by the Act.
- Gives the claimant a statutory right to make progress payment claims and receive payment, even where the contract has no provision for progress payments.
- Allows claimants to secure payment on account inexpensively and speedily without the need for extensive use of lawyers, court hearings, witnesses, cross examinations and all that is usually involved in arbitration or litigation.
- Provides that in a matter of weeks, a claimant can have a judgment for a progress payment on account, which compels the respondent to pay.
- Can be used by a claimant to obtain judgment for a payment on account before, or even during, arbitration or court proceedings over the claim irrespective of who initiated the proceedings.
- Provides a minimum rate of interest on late progress payments.
- Bars 'pay when paid' and 'paid if paid' clauses and overturns them even if they are included in the contract.
- Provides that all debts under the Act are also debts under the Contractors Debts Act 1997, providing quick and direct recourse to respondents' principals to secure payment of a debt.
- Includes other protection to claimants such as a right to suspend work and be paid for any losses and expenses if sacked because of the suspension, and to claim a lien over unfixated plant and materials to settle any debts established under the Act. Respondents also cannot claim or sue for liquidated damages because of a suspension of work under the Act.



Q: Who can make claims under the Act?

- A: Those who can make a claim under the Act include:
- contractors against principals/developers;
 - subcontractors against contractors;
 - suppliers against customers;
 - plant and equipment hirers against clients; and
 - consultants against clients.

Q: What can I claim for?

- A: You can make a claim on the respondent for:
- construction work you have done;
 - construction materials or plant you have provided or hired out;
 - consulting services you have provided;
 - interest on overdue progress payments;
 - your losses and additional expenses due to work being deleted from your contract while you suspended work under the protection of the Act;
 - cash security and retention monies; and
 - at the end of a contract, a claim under the Act can be made for the final payment.

Q: How do I claim?

- A: Your claim must:
- be made at the time stated in your contract or, if there is no time stated, on the last day of the month;
 - be in writing and addressed to the respondent;
 - describe the construction work, related goods or related services for which you are claiming;
 - state the amount that you claim is due; and
 - include the words "This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW" or a similar statement with that meaning.

NB. You may want to include the above words on all your invoices for payment, to ensure all your claims are covered by the Act. Your current invoices may only need simple adjustment to accommodate these words.

Questions & Answers

Q: How long do I have to wait for a response?

- A: If the respondent is not willing to pay all that you have claimed, they have a maximum of 10 business days after you have submitted your claim to give you a payment schedule. This has to be a written statement of the amount that the respondent is willing to pay and the reasons for not paying any part of your claim.

Q: What happens if the respondent provides a payment schedule for less than the amount claimed?

- A: You can:
- accept the reasons given by the respondent for not paying the full claim and wait for the respondent to pay the scheduled amount by the due date; or
 - apply in writing to an Authorised Nominating Authority (ANA) for an adjudication. The application must be made within 10 business days after receiving the payment schedule.

Q: What happens if the respondent does not give you a payment schedule?

- A: If the respondent does not give you a payment schedule within the time required, the respondent must pay you the full amount of your payment claim by the due date for payment. If the respondent does not pay you the full amount you can sue in court to recover the amount. As an alternative to suing, you have a right under the Act to go to adjudication in order to access the simplified judgment process that adjudication gives. Whichever course you take, you also have a right to suspend work after giving notice and a right to a lien over unfixated plant and materials supplied by you to the respondent.

Q: What happens if the respondent does not pay the amount in the payment schedule by the due date?

- A: If the respondent does not pay you the full amount in the payment schedule you can sue in court to recover the amount or go to adjudication in order to access the simplified judgment process that adjudication gives. Whichever course you take, you also have a right to suspend work after giving notice and a right to a lien over unfixated plant and materials supplied by you to the respondent.

