



## “Don't get caught with your pants down” Security of Payment Act – The Facts

The tool talk in the construction industry is all about the Security of Payment Act. With a significant jump in claims this year and about 80% of claims being won by contractors and subcontractors, EVERYONE in the construction industry needs to be aware that a “She'll be right” attitude just won't cut it.

The time prior to the Building and Construction Industry Payment Act 2004 (security of payment), was referred to by many subcontractors, as the bad old days. Too often, when making a payment claim for construction work or related goods and services, the man with the money would dispute to deny or try to delay payment and sometimes string out the time for payment with promises of future work if the claimant could “just wait a bit longer”. Subbies had to then weigh up whether to take the matter further or not. Basically the war of payment saw victory lie in the hands of the person with the dollars because obtaining judgement in a building dispute was a drawn out, expensive

process that sometimes caused insolvency. Often it was better accepting their loss and just quickly moving on to the next job.

John Mitchell, founder of John Mitchell & Associates (now Mitchell Brandtman), was involved in a push that put a green paper to parliament with the intent that subcontractors would be paid. He knew that something needed to be done. What he didn't foresee, was how the Security of Payment Act can be misused to force the respondent to make payment on account for unproven costs. Claimants can secure payment on account inexpensively and speedily. In fact, to be more precise, the whole process from go to woe takes just 35 days including adjudication. Needless to say that the critical issue is timing and all parties need to stay informed and up to speed with the application of the Act.

**So...let's take a look at some interesting facts:**

### CLAIMANT

#### Who can make a claim under the Act?

- Contractors against principals/developers
- Subcontractors against contractors
- Suppliers against customers
- Plant and equipment hires against clients
- Consultants against clients

#### Construction work and services can be claimed under the Act even if the contract:

- Is not written
- Does not provide for progress payments
- Has only a single payment to be made when the work is complete

#### What can a claim be made for?

- Completed construction work
- Construction materials or plant hire provided
- Consulting services provided
- Interest on overdue progress payments
- Losses and additional expenses due to work being deleted from the contract while work is suspended under the protection of the Act
- Cash security and retention monies
- At the end of a contract, a claim under the Act can be made for final payment

**ADJUDICATORS will not search for reasons to knock back money hence the Security of Payment Act is also known in the industry as the Exhibition Act. Roll up, Roll up ...every claimant wins a prize**

### ADJUDICATION

- An Adjudicator is an independent party who, from documentation only, decides the amount that is due in respect of a progress payment claimed under the Act.
- The claimant and only the claimant can engage an adjudicator if the respondent fails to pay the amount on the due date.
- Before making the adjudication application, the claimant must, within 20 business days after the due date for payment, give the respondent notice that they have just 5 business days to provide the claimant with a payment schedule.
- Adjudicators take the power away from the superintendent and are a law unto themselves.

**FINANCIERS BEWARE:**  
Even though this Act directly affects contracting parties, it does pass on implications to financiers through payment turnaround or if the developer defaults under the Act.

The material in this bulletin is for general comment only. For further information on research findings, contact **David Mitchell** on **07 3327 5000**. If you would prefer to receive our bulletin via email, or do not wish to receive our information in future, please email **Lisa Veneran**, Marketing Manager at **lveneran@mitbrand.com**



**MitchellBrandtman**

Quantity Surveyors & Construction Cost Managers

Email [bne@mitbrand.com](mailto:bne@mitbrand.com)

[www.mitbrand.com](http://www.mitbrand.com)



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## ADVICE TO PRINCIPALS

- Make sure contracts are administered diligently. There is nothing to gain by avoiding the issues.
- The issue is between the contractor and the principal, so it is the principal who needs to deal with the claim. Don't hide behind your superintendent.
- If you stay diligent, you will be well placed if you go through the adjudication process.
- You won't have to create a defence because you are the defence.
- Remember critical time frames.

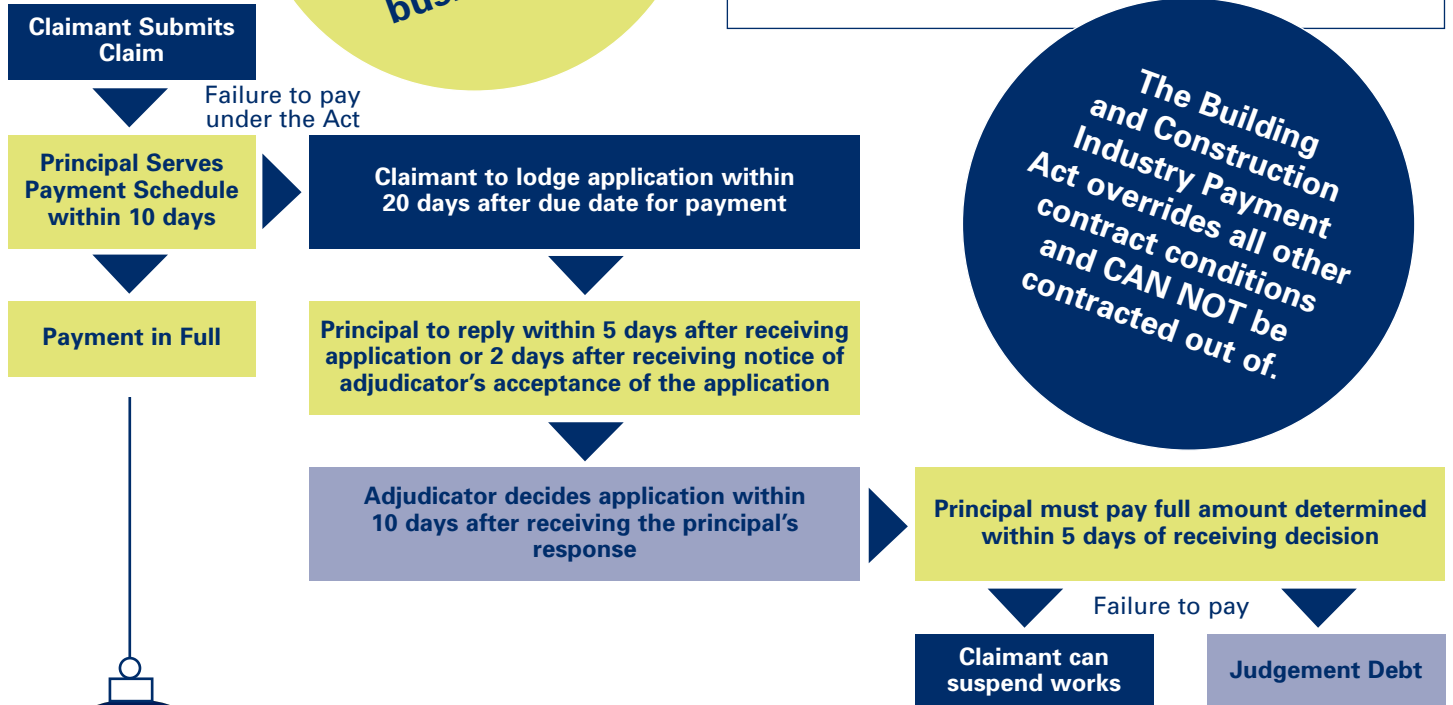
## TIMING

- The claimant must record the date the respondent receives their claim.
- If the respondent does not agree with the claim, they have 10 business days after receiving the claim, to provide a payment schedule.
- If the respondent fails to provide a payment schedule within the 10 business days, they must pay the claimant the full amount stated in the claim within 5 business days. **No Questions Asked.**
- A claim can be made up to 12 months after the end of the construction contract.

**An interstate case recently disputed is a perfect example of how critical timing in this process really is. The contractor served a payment claim for \$15M the day before Christmas. The developer did not adhere to the critical time frame and responded 11 business days after he was served the claim. The developer was required to pay the \$15M in full. Even though this was a fabricated claim, it still had to be paid.**

**Under the Act, the days from 27 through to 31 December are not counted as business days.**

**The Building and Construction Industry Payment Act overrides all other contract conditions and CAN NOT be contracted out of.**



*The team from Mitchell Brandtman wish you and yours a very Merry Christmas. We look forward to seeing you next year.*