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LAWYERS

## CONSTRUCTION LAW INSIGHT

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# Payment claims over the Christmas period

Some operators in the construction industry see Christmas as an opportune time to serve payment claims and/or payment withholding requests under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) in the hope they will go unanswered and become debts due.

To avoid being caught out by these practises, it is essential for Principals to have processes in place so they are notified as soon as possible when claims are made under the Act so they can respond in time and not become subject to the strict consequences of failing to meet the time limits imposed by the Act.

Implementing appropriate procedures is more important than ever as the Act requires parties further up the contractual chain to comply with any 'payment withholding request' issued under the Act to avoid becoming jointly and severally liable to a claimant.

### Payment process under the Act

The Act provides contractors with a statutory right to make payment claims from the date stipulated in the contract, or where not stated, from the last day of each month.

The payment claim must:

- identify the work claimed
- indicate the amount, and
- state it is made under the Act.

Within ten business days of receiving a claim, or any shorter time provided in the contract, the Principal must pay the amount claimed or serve a payment schedule if he or she disputes any amount.

Business days under the Act are defined to exclude a Saturday, Sunday or public holiday and 27, 28, 29, 30 and 31 December. The time begins from when the payment claim is received at any 'place of business' whether a

### Who does this affect?

Principals or contractors who have had work performed by other contractors in the last 12 months.

### Highlights

- Principals need to be aware of potential payment claims from sub-contractors over the Christmas period.
- The time allowed to respond to payment claims made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) continues to run over much of the Christmas shutdown period and can often catch Principals by surprise.
- To avoid any payment claims being unanswered and becoming due debts, it is critical that Principals provide responses within the time stipulated in the Act, even if their offices are closed.

central, regional or site office. It does not necessarily need to be served on the address used in the contract or used commonly by the parties.

The payment schedule must:

- identify the payment claim
- indicate the amount the respondent proposes to pay, and
- for any difference in the amounts, briefly explain why.

If a Principal fails to serve a payment schedule within time, the contractor will become automatically entitled to the amount claimed as a debt due, and the contractor may apply to Court to have that debt enforced even by directly accessing bank accounts of the Principal.

For example, a payment claim served on Christmas Eve, excluding the days exempted by the Act, requires a payment schedule by Friday, 13 January 2011. In the case of a large payment claim of multiple millions, this would effectively leave just five business days to prepare and serve a detailed payment schedule (assuming a Christmas shutdown to 6 January).

While any amount paid under the Act does not finally determine the rights and liabilities of the parties (it is an interim payment only), the amount must still be paid. In our experience, this is often the subject of dispute.

If a Principal wants to dispute a payment claim or an item claimed it is important to:

- provide a payment schedule within the time period, taking into consideration the Christmas shutdown
- be aware of the possibility of opportunistic claims being made over this period, and
- implement procedures in advance to identify potential claims.

Please feel free to contact us over the Christmas period for urgent advice in relation to any payment claims received under the Act or the preparation of payment schedules.

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