

Enforce Progress Payments

Sometimes, despite having served a valid Payment Claim, you still remain unpaid past due date. This article explains how to enforce your claims for overdue progress payments.

A Look Back

Suppose you've prepared and served your valid Payment Claim, the next stage is a 10 business day wait (or such number of days as provided in your construction contract) for the Respondent's move.

- In response to your Payment Claim, Respondent can:
- Pay claimed amount (Payment Schedule not required)
- Propose to pay a lesser amount (Payment Schedule + scheduled amount required)
- Ignore Payment Claim and not pay the claimed amount (he shouldn't, but he technically can if he wants to)

Scenarios where Enforcement would be proper:

There are three instances where you may resort to any of the modes of enforcement under the SOP Act. These are when Respondent:

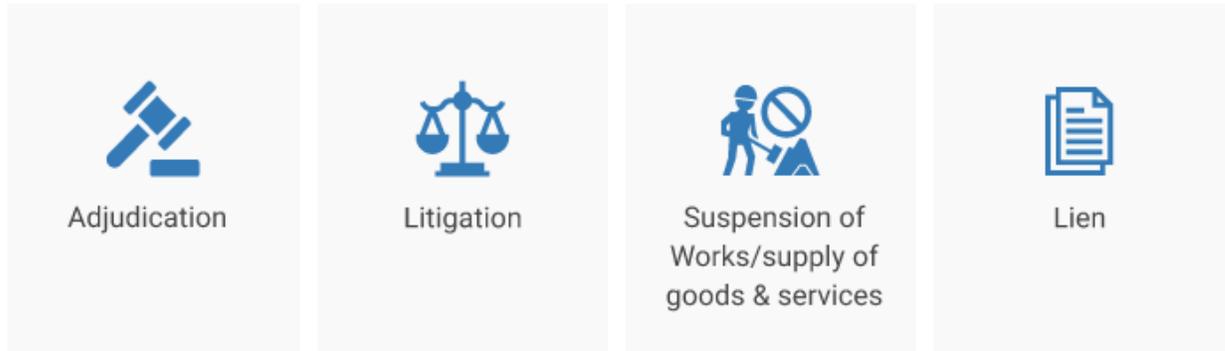
1. Does not respond and also does not pay claimed amount
2. Serves Payment Schedule with a scheduled amount less than the claimed amount
 - Claimant accepts lesser amount - done
 - Claimant does not accept lesser amount
3. Serves Payment Schedule, claimant accepts, pays amount less than scheduled amount

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Remedies

In all those instances, you are allowed to pursue any of the following remedial actions, to enforce payment:



Adjudication

1. Adjudication is a process created by the SOP Act to resolve a disputed claim for payment due under a construction contract. It can help resolve payment disputes quickly, fairly and at a lower cost than going to court.
2. An adjudicator must be appointed by an Authorised Nominating Authority (ANA) – an organisation that is authorised by the Victorian Building Authority to nominate adjudicators under the SOP Act.
3. In arriving at a decision regarding the payment dispute, the adjudicator must consider the following things only (and not take any excluded amount into account):
 - the SOP Act and Regulations
 - the contract
 - the payment claim
 - the payment schedule (if any)
 - the claimant's and respondent's submissions
 - the results of any inspection

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Important Timelines

There are strict timelines that must be complied with in commencing adjudication.

Scenario	When to lodge Adjudication Application
If Respondent serves a Payment Schedule and the scheduled amount is less than the claimed amount	The claimant has 10 business days after receiving the payment schedule to apply.
If Respondent provides a payment schedule but does not pay any or all of the 'scheduled amount' when it is due	The claimant has 10 business days after the due date for payment to apply.
If Respondent fails to provide a payment schedule and fails to pay any or all of the 'claimed amount' when it is due	<ul style="list-style-type: none"> ☑ The claimant has 10 business days after the due date for payment to notify the respondent that they intend to apply. ☑ A claimant can only apply under section 18(1)(b) if they provide the respondent with a section 18(2) notice

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Litigation

A claimant may choose to go to court to resolve a payment dispute rather than apply for adjudication. This is done by lodging a complaint with the Magistrates' Court or a writ in the County Court or the Supreme Court, depending on the value of the claim.

The claimant can also go to court to enforce payment of an adjudicated amount. An adjudication certificate is filed in the court, with an affidavit attesting that the respondent has failed to pay, and the court can issue a warrant or other order requiring payment.

Suspension of Works/Supply of Related Goods and Services

The claimant has a right to suspend work or the supply of goods and services to the respondent until the amount payable has been paid. You must give the respondent three business days' written notice of the suspension. The notice must state that it is made under the SOP Act. A claimant who exercises this right in accordance with the SOP Act is not liable for any consequential loss or expense suffered by the respondent.

Lien

A lien is a form of security over property where one party retains ownership of the property as security for the performance of an obligation by the other party. A lien can only apply to property that is physically transferable, for example, unfixed goods and materials.

As the claimant, you retain ownership of the unfixed plant or materials until the respondent pays any outstanding progress payment that is due.

How We Can Help

Our specialist construction lawyers can help you choose the best option for your particular circumstance, and assist and represent you in adjudication and litigation, as well as prepare the relevant notices and documents should you opt for remedies other than adjudication and court action.

Should you need further information, please feel free to give us a call. First consult is free.

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