

Payment Claim Validity Report

(A Guide to the *Building & Construction Industry Security of Payment Act*)



This Report has been prepared exclusively for:

XXXXXX XXXXXXXX Pty Limited

Date of Report:

15 October 2011

Prepared by:



MEMBER OF
THE LAW SOCIETY
OF NEW SOUTH WALES

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Introduction

Purpose

Our aim is to educate builders, contractors, consultants and suppliers in the building and construction industry about the *Building & Construction Industry Security of Payment Act 1999* (“*the Security of Payment Act*”) and the importance of ensuring that valid Payment Claims under the Security of Payment Act are issued whenever the Act applies. If you know someone who may benefit from receiving a Report like this please let us know or pass on our details and ask them to contact our Sam Roberts.

“The Building and Construction Industry Security of Payment Act is my favourite piece of legislation. There is no other law like it. It creates such significant rights yet so few people in the industry are aware of how to take advantage of it.”

Samuel Roberts, Roberts Legal

About Roberts Legal

Roberts Legal is a vibrant and innovative legal services practice located in Adamstown, Newcastle. We provide all commercial and general legal services. Our Solicitors deliver peace of mind by solving problems and helping people to make the right decisions.

We focus on client satisfaction and results. Our Solicitors are easy to talk to and will speak to you in plain English.

Samuel Roberts

This Report has been prepared by Samuel (Sam) Roberts. Sam is the principal Solicitor and co-founder of Roberts Legal. Sam has practised as a Solicitor in Newcastle for over 10 years. Sam’s main areas of practice include:

- Commercial Litigation
- Business Law & Risk Assessment
- Building & Construction Law
- Business Succession Planning
- Company Law, Mergers & Acquisitions
- Insolvency
- Modern Estate Planning



“I often refer to myself as an entrepreneur trapped in a Lawyer’s body. I think this is why we are seen as a very proactive legal services business. We strive to do things differently from other law firms.”

*“I really like Sam Roberts’ article on **Security of Payments**. Too many commentators focus on the dispute provisions rather than the excellent process that Sam alludes to in his article. We are delighted to see contract clauses that encourage complying Payment Claims, as opposed to the current trend for “look around the corner” avoidance tactics. I commend Roberts Legal’s approach to encouraging people to get it right up front, rather than wait until there’s a problem. It’s a breath of fresh air. We strongly encourage all businesses in the building industry to insist on using a complying process as a business-as-usual practice to protect their entitlements.”*

John Lowry, Director, The Power Tool Pty Limited

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Your Business

We confirm that your business primarily performs the following works:

- XXXXXXXXXXXXXXXXXXXXXXXX
- XXXXXXXXXXXXXXXXXXXXXXXX
- XXXXXXXXXXXXXXXXXXXXXXXX

Scope of this Report

This Report has been prepared in relation to your Tax Invoice number XXXXX dated XX XXXXXXXX XXXX addressed to XXXXXXXXXXXXXXXXXXXX and issued in respect of the Subcontract Agreement dated XX XXXXXXXX XXXX in connection with the XXXXXXXX XXXXXXXX project ("*the Tax Invoice*"). A copy of the Tax Invoice can be found at **Schedule 8** to this Report.

This Report contains:

- General advice only in relation to the *Building and Construction Industry Security of Payment Act* 1999 ("*the Security of Payment Act*"), and
- Specific advice in relation to whether the Tax Invoice is a valid Payment Claim under the Security of Payment Act.

Disclaimer: Limitations of this Report

This Report contains general advice only in relation to the *Building and Construction Industry Security of Payment Act* 1999 ("*the Security of Payment Act*"). To the extent that this Report contains specific advice in relation to the validity of your business' Payment Claims, the advice is limited to the Tax Invoice as defined above. The Report also assumes that the information about your business above accurately describes the work that you perform.

While the information in this Report was accurate on the date of this Report the law may have changed since that date. Roberts Legal is not responsible for any actions taken or not taken on the basis of this information. You should obtain specific legal advice on any matters of interest arising from this Report.

This Report has been prepared solely for the use of XXXXXXXX XXXXXXXX Pty Limited and we do not accept any liability whatsoever to third parties.

You should obtain specific advice from one of our Building & Construction Lawyers in relation to any particular matter affecting your business under the Security of Payment Act.

**To request a FREE Payment Claim Validity Report
for your business as well as our complete Guide
to the *Building & Construction Industry
Security of Payment Act*
Call 02 4952 3901 or email sam@robertslegal.com.au**

Does the Security of Payment Act apply to your Business?

The Security of Payment Act applies to all parties that enter into a contract, whether in writing or not, under which a party agrees to carry out “*construction work*” or supply “*related goods or services*” (“**Construction Contract**”), except as set out below. These definitions are broad and give the Security of Payment Act significant scope. For a full description of the definitions of “*construction work*” and “*related goods or services*” see **Schedule 3** to this Report.

Generally, the Security of Payment Act applies to the following:

- ***Manual Commercial Work***
All manual work in connection with the construction, alteration, repair, restoration, maintenance, demolition and installation of fittings in relation to commercial properties and property developments, including painting and decorating of internal and external surfaces.
- ***Incidental & Preparatory Commercial Work***
All works incidental or preparatory to the above such as excavation and earth moving, the erection and dismantling of scaffolding, the prefabrication of components, site restoration and the provision of roads or other access.
- ***Residential Building Work***
All manual *residential building work* performed under a subcontract or pursuant to an agreement with a property investor or developer.
- ***Materials & Components***
The supply of all materials and components which form part of any building, structure or work arising from the above work.
- ***Plant & Materials***
All plant, equipment and materials used in connection with the above work, whether supplied by sale, hire or otherwise.
- ***Planning & Advisory Services***
Architectural, design, surveying and quantity surveying services and building, engineering, interior or exterior decoration or landscape advisory services in relation to *construction work* (including *residential building work*).
- ***Labour Services***
The provision of labour in relation to *construction work* (including *residential building work*).

Exceptions

The Security of Payment Act does not apply to a *Construction Contract*.

- for the carrying out of *residential building work* (within the meaning of the *Home Building Act 1989*) on such part of a dwelling as the party for whom the work is carried out resides in or proposes to reside in,

Why is it Important to Serve Valid Payment Claims?

All rights under the Security of Payment Act flow from the service of a valid Payment Claim. Therefore, if your business fails to serve valid Payment Claims you will be exposing yourself to delay tactics and expensive litigation if a dispute arises or if the other party simply refuses to pay as you will be unable to utilise the regimes created by the Security of Payment Act to recover payment promptly.

The options available to a contractor, consultant or supplier to recover payment of a Tax Invoice differ significantly when the Tax Invoice is also a valid Payment Claim under the Security of Payment Act. The Flow Sheets at **Schedule 1** and **Schedule 2** illustrate these differences.

When is a Tax Invoice a Valid Payment Claim?

A Payment Claim need not also be a Tax Invoice. However, if a Tax Invoice is to also constitute a valid Payment Claim it must strictly satisfy the conditions created under the Security of Payment Act.

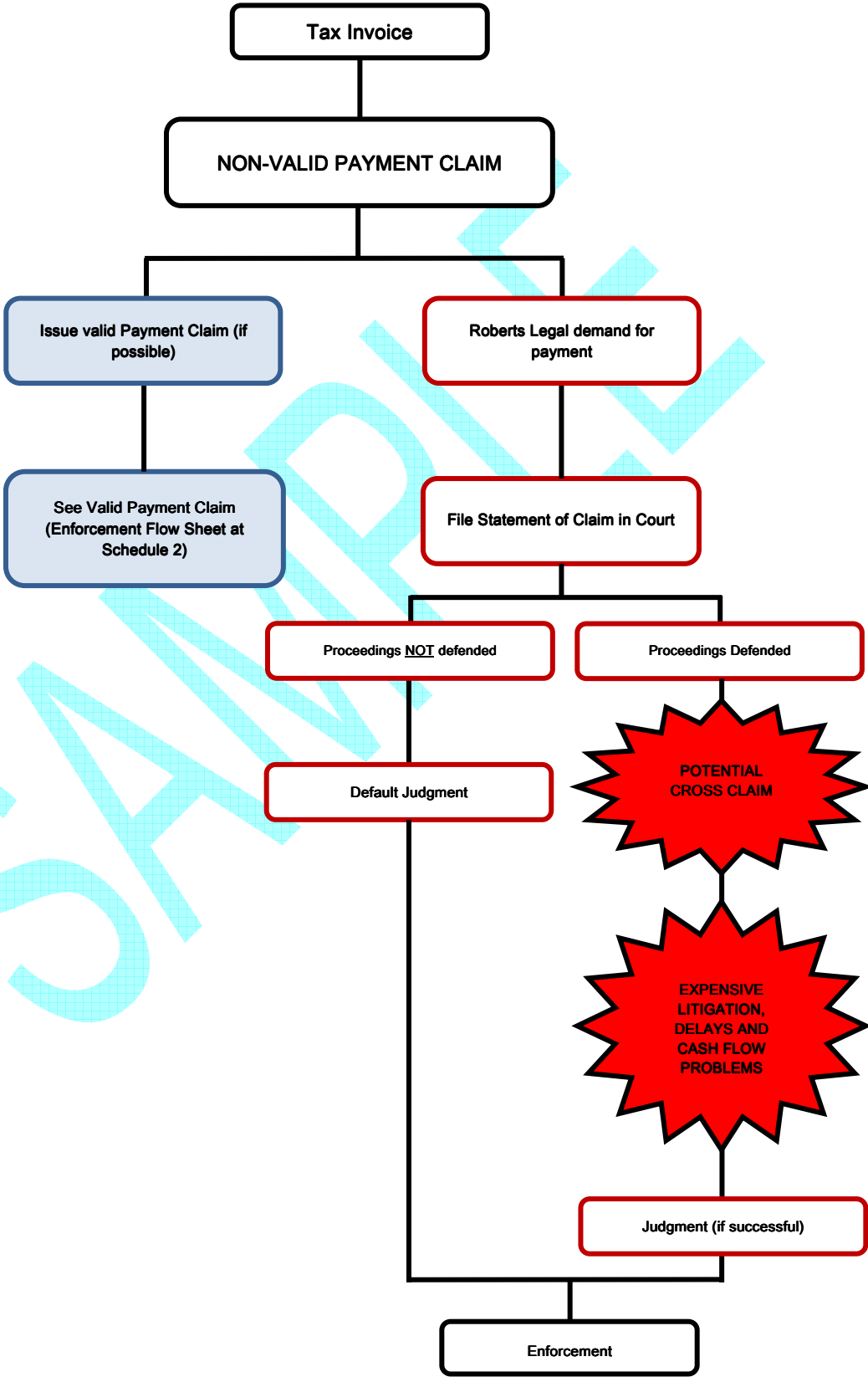
Due to the significant rights that accrue where a party fails to respond to a Payment Claim, the Courts have strictly interpreted the Security of Payment Act when determining the validity of a Payment Claim. As a result, strict compliance with the Security of Payment Act is required to serve a valid Payment Claim.

Under the Security of Payment Act a document is only a valid Payment Claim if it:

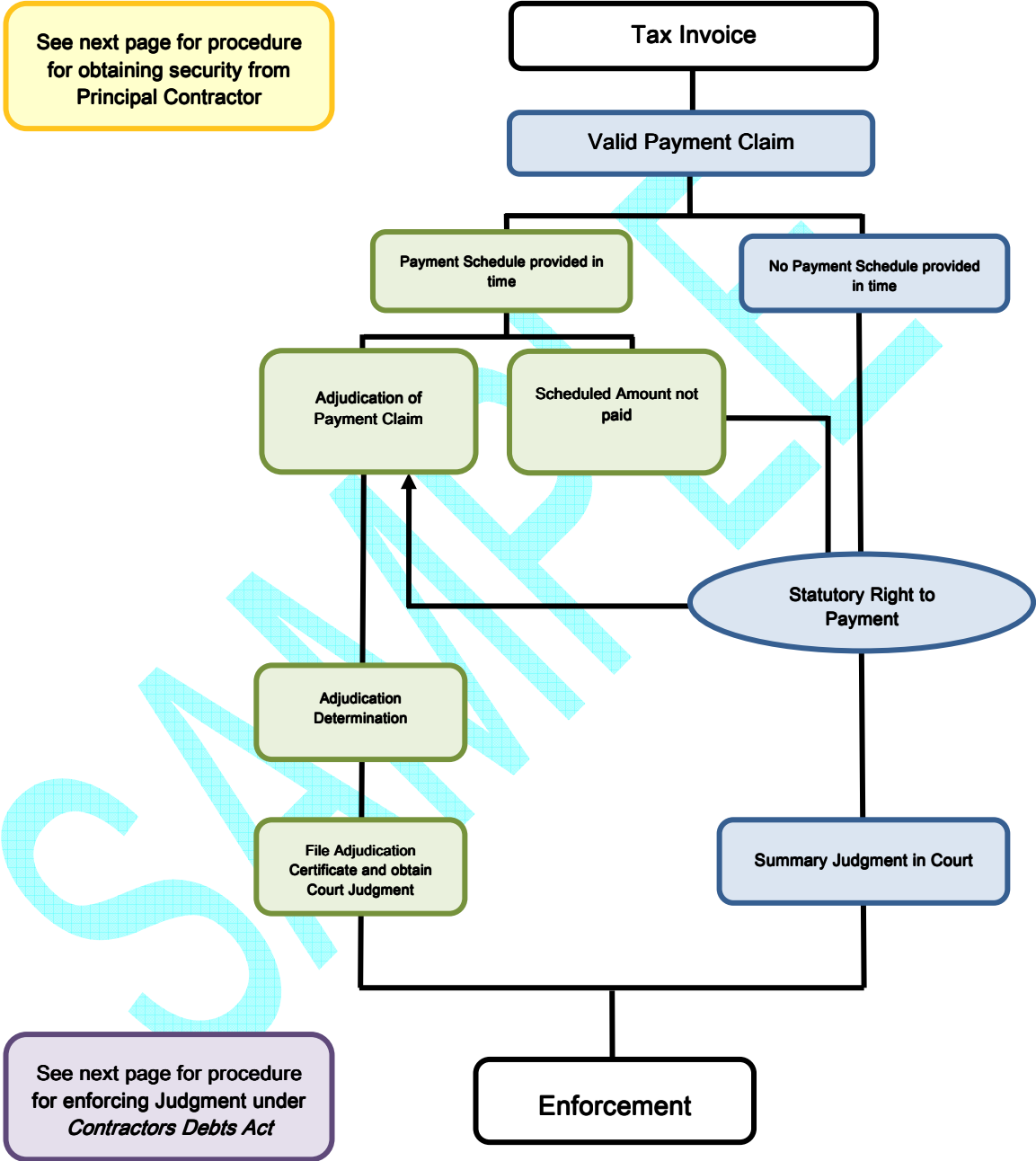
1. identifies and sufficiently describes the *construction work* (or related *goods and services*) to which the progress payment relates,
2. indicates the amount of the progress payment that the contractor claims to be payable ("*the Claimed Amount*"),
3. clearly states that it is made under the *Building and Construction Industry Security of Payment Act 1999*,
4. is issued on or after a "*Reference Date*" (see below), and
5. is served on the other party to the *Construction Contract* in a manner permitted by the Security of Payment Act (see below).

Only one (1) Payment Claim can be made in respect of each *Reference Date*. However, a party can include an amount that has been the subject for a previous Payment Claim in a subsequent Payment Claim issued in relation to a later *Reference Date*.

Schedule 1 Non-Valid Payment Claim (Enforcement Flow Sheet)



Schedule 2 Valid Payment Claim (Enforcement Flow Sheet)



See next page for procedure for obtaining security from Principal Contractor

See next page for procedure for enforcing Judgment under *Contractors Debts Act*

Schedule 6 Benefits of Roberts Legal Standard Form Contract Terms & Conditions

Contrary to popular belief and common practice, terms and conditions cannot be incorporated into a contract by inclusion on a Tax Invoice. This is because by the time the Tax Invoice is rendered the Contract has already been made and at least partly performed. Terms and conditions can only become part of a Contract by expressly forming part of a written contract, by incorporation at the time the Contract was made or by implication. Relying on verbal conditions or implied terms is not recommended and can often lead to disputes and unnecessary legal expense.

It is always best to make contracts that set out all the relevant terms and conditions in writing and exclude any previous verbal discussions. The incorporation of standard form Contract Terms & Conditions into the negotiation and acceptance stage of a Contract will:

- make it easier for your business to serve valid Payment Claims,
- help reduce the consequences of dealing with bad debtors,
- reduce the risks that businesses face generally when entering into any business contract.

The Roberts Legal standard form Contract Terms & Conditions are easy to implement for most businesses and importantly can:

1. Clarify and create additional *Reference Dates* that suit your current or preferred practice including when, in your opinion, the works, or any particular stage, is completed,
2. Create additional permitted methods of service of documents, including Payment Claims, for example by email or post to a PO Box address,
3. Limit the period within which the other party may provide a Payment Schedule in response to a Payment Claim and thereby increase the likelihood of a statutory right to payment arising in your favour,
4. Give certainty to the *Due Date* for payments,
5. Reduce the likelihood of a dispute in relation to the subject matter of the Contract or scope of works,
6. Reduce the likelihood of a dispute in relation to variations, exclusions or extras.
7. Create a right to recover legal costs in connection with a default,
8.

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