



MARCH 2021

NEW SOPA CHANGES FOR RESIDENTIAL BUILDERS COMMENCED 1 MARCH 2021

Written by **David Glinatsis**

I. OVERVIEW

From 1 March 2021, Schedule 2 of the *NSW Building and Construction Security of Payment Regulation 2020* will apply. This means that residential home builders in NSW will have access to the payment claim process under the *NSW Security of Payment Act 1999* (SOPA) (the Act).

Speaking on the changes, NSW Minister for Better Regulation Kevin Anderson commented that “*at a time when many small building businesses are doing it extremely tough and cash flow is essential to staying afloat, it is vital there aren’t long delays in them getting the money they are owed.*”

However, while it is clear that the Regulations aim to protect building businesses from the consequences of late payment, builders need to proactively familiarise themselves with the adjudication process to take full advantage of the Act’s protections and reduce the time until they get paid.

II. PRIOR STATUS

Before the 2020 Regulations, the Regulations had excluded ‘owner occupier construction contracts’ from the processes under the Act, which are contracts for residential building work that the owner of the premises lives or proposes to live in.

Home building disputes had thus primarily been governed by the *Home Building Act 1989* (NSW),

which nominates the NSW Civil and Administrative Tribunal as chiefly responsible for resolving building claims. This has resulted in lengthy and expensive tribunal proceedings which can disrupt business operations, project delivery and strain relationships with subcontractors.

The effect of the reforms is to remove the 'owner occupier exclusion' from SOPA, with the intent of avoiding drawn-out tribunal and court proceedings by providing builders with much shorter timeframes until payment.

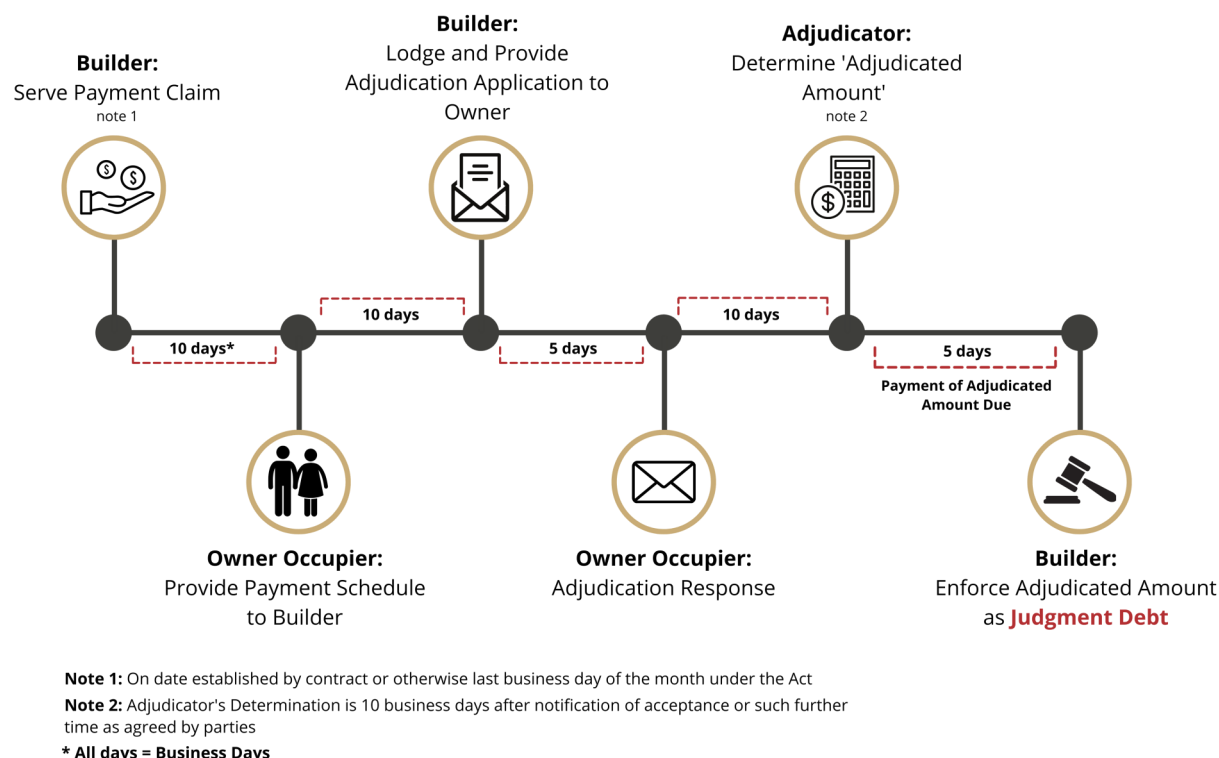
III. WHAT RESIDENTIAL BUILDERS NEED TO KNOW

Under the Regulations, residential home builders will be able to serve payment claims under SOPA on owner occupiers once per month, unless the contract specifies otherwise.

The service of a payment claim will trigger the adjudication process under SOPA for which there are strict consequences if statutory deadlines are not met.

At the end of the process, an adjudicator will make an enforceable determination on the adjudicated amount, with due date for payment.

For a simplified high level illustration of the SOPA process, see the infographic below.



If the 'adjudicated amount' remains unpaid, the builder can give notice of its intention to suspend work within 2 business days. There are also rights for the builder to suspend works under the Act if no payment schedule has been provided by the owner occupier following receipt of a payment claim.

The builder can seek to register the adjudication determination as a judgment, and then commence debt recovery enforcement proceedings in court for which the owner occupier will be liable for interest.

IV. KEY TAKEAWAYS

- The Regulations which started on 1 March 2021 include owner occupier construction contracts in the adjudication process under SOPA.
 - Residential builders and subcontractors in NSW should become familiar with the payment claim process under SOPA.
 - Contracts should address the minimum requirements of the Act and set out the contractual processes for making and responding to payment claims.
 - Owner occupiers should become aware of contractual and statutory deadlines, as a failure to respond to a payment claim can exclude participation in adjudication and result in a statutory debt which the builder can enforce against them.
-

CONTACT US

If you would like assistance or further information regarding your payment claims or payment schedules, please contact Kreisson on (02) 8239 6500 or at excellence@kreisson.com.au.

REFERENCES

1. *Building and Construction Industry Security of Payment Regulation 2020* (NSW)
2. *Building and Construction Industry Security of Payment Act 1999* (NSW)
3. Media release: <https://kevinanderson.com.au/media-releases/5wbibqens4jv2mi4pbg2uksz30khtws48L>
4. *s48L Home Building Act 1989* (NSW)

This communication is sent by Kreisson Legal Pty Limited (ACN 113 986 824). This communication has been prepared for the general information of clients and professional associates of Kreisson Legal. You should not rely on the contents. It is not legal advice and should not be regarded as a substitute for legal advice. The contents may contain copyright.