

Security of Payment Guide

Understanding progress payments in the building and construction industry

The Security of Payment laws

In NSW, people who carry out construction work or supply related goods and services under a construction contract are entitled to receive progress payments for the work or supply of those goods and services.

This is regulated by the *Building and Construction Industry Security of Payment Act 1999* (NSW) and Building and Construction Industry Security of Payment Regulation 2020 (NSW) (“Security of Payment laws”).

The Security of Payment laws are relevant to those involved in contracts within the building and construction industry such as builders, tradies, subcontractors, consultants and suppliers.

The purpose of the Security of Payment laws is to reduce the risk of insolvency in the building and construction industry in NSW by ensuring members of the contractual chain are paid for the work or services they provide.

What do the Security of Payment laws apply to?

- ✓ Any construction contract.
- ✓ A construction contract that is written or oral.
- ✓ A construction contract that is partly written and partly oral.
- ✓ A construction contract that says it is to be governed by a law of a State or Territory outside of NSW but the work is carried out in NSW.
- ✓ On and from 1 March 2021, owner occupier construction contracts.

What are owner occupier construction contracts?

Owner occupier construction contracts are construction contracts for residential building work on any premises or part of the premises where the contracting party resides or proposes to reside in. For example, an home owner engaging a builder to build their home.

What's not covered under Security of Payment laws?

- ✗ A construction contract where the work is performed outside of NSW.
- ✗ A construction contract for goods and services supplied in respect of construction work outside of NSW.
- ✗ A construction contract that regulates an employer/employee relationship.
- ✗ A construction contract that relates to a financial loan.

What is a progress payment?

A progress payment includes:

- The final payment for construction work carried out or the supply of the goods/ services under the construction contract, or
- A single or one-off payment for carrying out construction work or the supply of goods/ services under the construction contract, or
- A payment based on an event or date (“milestone payment”).

This does not prevent the building contractor making one payment claim for a progress payment in any particular month for construction work carried out or for related goods and services supplied in that month.

How is a progress payment amount determined?

The progress payment amount is usually set out in the construction contract.

If the progress payment amount is not set out in the construction contract, the amount will be calculated based on the value of the construction work undertaken or the goods/service provided.

When is a progress payment due for payment?

A progress payment should be made in accordance with the terms of the applicable construction contract.

Due date for payment

A person entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

There are specific maximum deadlines for payment depending on the nature of the contract.

If the construction contract under which the payment claim is made is **not** an owner occupier construction contract as defined by the Act, the following will apply:

Where a head contractor makes a payment claim to a principal, the payment claim becomes due and payable by the principal:

- 15 business days after the payment claim is served on the principal, or
- an earlier date if the construction contract between the principal and head contractor specifies this.

A progress payment to be made to a **subcontractor** becomes due and payable:

- 20 business days after the payment claim is served on the head contractor, or
- an earlier date if the construction contract between the parties specifies this.

Where a party to an **owner occupier construction contract** makes a payment claim, the claim becomes due and payable:

- in accordance with the terms of the contract, or
- if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is served on the person liable to make the payment.

Procedure for recovering progress payments

- ✓ A claimant can serve one payment claim in any month under each contract (can be on last day of one month and first day of next month) or on or from an earlier date if the contract provides this.

- ✓ If the construction contract has been terminated, a payment claim can be made from the date of termination.
- ✓ A payment claim must identify the goods or services the claim relates to, the claimed amount, and clearly state it is a payment claim made under the Security of Payment laws.
- ✓ A claimant can only make a claim within the period determined in the contract or 12 months after the work was carried out (whichever is later).
- ✓ A head contractor claimant must fill out and attach a supporting statement form to their claim.

Replying to a payment claim: payment schedules

A party who has been served a payment claim ("the respondent"), may reply by providing a **payment schedule** to the claimant.

There are strict timeframes for a respondent to provide a payment schedule to a claimant. These are:

- within the time outlined in the construction contract, or
- within 10 business days after the payment claim is served (whichever is earlier).

If a respondent does not provide a payment schedule to the claimant within the timeframe required, they are liable to pay the amount requested by the claimant in the payment claim.

A payment schedule must identify:

- the payment claim it is for
- the amount of payment (if any) that will be paid (the "scheduled amount")
- if the scheduled amount is less than the claimed amount, why the scheduled amount is less
- if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.

Important facts

- Interest is payable on the unpaid amount of a progress payment that has become due and payable.
- If a progress payment is due and payable, a claimant can exercise a legal right (called a lien) to legally possess any unfixed plant or materials they have supplied to the respondent, until the progress payment is paid.

What if a progress payment is not paid?

If the claimant has made a payment claim, and the respondent does not accept the payment claim, a claimant can apply to have the matter dealt with by an adjudicator or a court.

A claimant can make a claim in court or make an application for the matter to be heard by an adjudicator, if:

- the respondent does not provide a payment schedule, or
- the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
- the respondent does not pay the claimant in accordance with the payment schedule.

A claimant can serve a payment withholding request on a principal contractor to retain sufficient money to cover the claim out of money that is, or becomes payable by the principal contractor to the respondent.

Adjudication

A claimant may apply for adjudication of a payment claim where the respondent provides a payment schedule but:

- the scheduled amount indicated in the payment schedule is less than the claimed amount, or
- the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount.

The claimant may also apply for adjudication of a payment claim if the respondent fails to provide a payment schedule at all to the claimant and also fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

Information relating to the adjudication of payment claims is outlined in [Division 2, Part 3 of the Act](#).

Key points: Adjudication

- The Security of Payment laws provide rules relating to an adjudication application, such as the number of days an application must be made within. For more details see [section 17 of the Act](#).
- A claimant may withdraw an adjudication application at any time before an adjudicator has been appointed or before the application is determined.
- Authorised nominating authorities (organisations authorised by the Minister) refer adjudication applications to an eligible adjudicator. The eligibility criteria for adjudicators is detailed in [clause 19 of the Regulation](#).

Trust account requirements

If a head contractor has a construction contract with a principal that has a value of at least **\$20 million**, the head contractor has an obligation to:

- ✓ Hold **retention money** in trust for the subcontractors entitled to the money.
- ✓ Ensure that the money is paid into and retained in a trust account established with an authorised deposit-taking institution (ADI) approved under [section 87 of the Property and Stock Agents Act 2002](#).
- ✓ Ensure the retention money is paid into the trust account no later than 5 business days after the head contractor is required to retain the retention money.

What is retention money?

Retention money means money that is retained by a head contractor out of money that the head contractor is required to pay to a subcontractor under a construction contract as security for the performance of obligations of the subcontractor under the contract.

For example, 5% of the contract's value may be held as the retention money, or there could be an arrangement where there will be a 10% deduction from each of the subcontractor's progress payments which is kept as the retention money component. Each construction contract may contain different terms and can be negotiated.

Establishing a trust account

When establishing a trust account for retention money, there are certain requirements, such as notifying the Secretary of the account's details and notifying the ADI that it is an account opened for the purposes of the Security of Payment laws.

For more information on the requirements when opening a trust account see [clause 9 of the Regulation](#).

Withdrawals from a trust account

A head contractor must not withdraw retention money from a retention money trust account except for 1 of these 4 reasons:

- ✓ Payment of money in accordance with the terms of the construction contract under which the money was retained by the head contractor.
 - ✓ If the head contractor and subcontractor make an agreement in writing.
 - ✓ To pay an amount that an adjudicator has determined the respondent must pay to the claimant.
 - ✓ In accordance with an order of a court or tribunal.
- ✗ It cannot be used by the head contractor to pay their own debts.

Record keeping

A head contractor must keep records in the form of a ledger to keep track of things such as the amounts deposited into or withdrawn from the account. The ledger is to be provided to the subcontractor at least once every 3 months, or as often as may be agreed in writing by the head contractor and the subcontractor (but at least once every 6 months).

More information

Visit fairtrading.nsw.gov and search for “security of payment” or email securityofpayment@custom-erservice.nsw.gov.au

For further help call 13 32 20. If you're deaf, hard of hearing, or speech-impaired, contact us through the [National Relay Service](#). If you speak a language other than English, call our Telephone Interpreter Service on 13 14 50.

Definitions: key terms

Principal means the person for whom construction work is to be carried out or related goods and services supplied under a construction contract (the main contract) and who is not themselves engaged under a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the main contract.

Head contractor means the person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the main contract) and for whom construction work is to be carried out or related goods and services supplied under a construction contract as part of or incidental to the work or goods and services carried out or supplied under the main contract. **Note**—There is no head contractor when the principal contracts directly with subcontractors.

Subcontractor means a person who is to carry out construction work or supply related goods and services under a construction contract otherwise than as head contractor.

Claimant means a person by whom a payment claim is served.

Respondent means a person on whom a payment claim is served.

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