

# Security of Payment Act Essentials

A guide to the legislation governing construction industry progress payments in NSW



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## Introduction

In NSW, people and businesses who carry out construction work or supply related goods and services under a construction contract are entitled to receive progress payments under the [Building and Construction Industry Security of Payment Act 1999](#) (NSW) (“the Act”) and the [Building and Construction Industry Security of Payment Regulation 2020](#) (“the Regulations”).

These “Security of Payment laws” were introduced to decrease the risk of insolvency in the NSW building and construction industry by ensuring regular cash flow amongst members of the contractual chain.

The Security of Payment laws create a rapid mechanism for resolving payment disputes with a range of statutory rights and rules including:

- the right to receive progress payments
- the method for calculating the amount of a progress payment
- the requirement for service of valid payment claims
- the method for determining the due date for a progress payment
- strict time limits for the service of ‘payment schedules’ disputing payment claims
- recovery of payment claims as indisputable statutory debts through NSW courts where a payment schedule is not served in time
- the right to suspend work for non-payment
- interest payable and the exercise of liens when progress payments become due and payable
- prompt, affordable and enforceable determinations of payment disputes by independent adjudicators
- the right to obtain payment directly from a principal contractor (further up the contractual chain) for progress payments owed by a head contractor

These important statutory rights provide crucial protection to otherwise vulnerable subcontractors

and cannot be excluded by the terms of a construction contract (see [Section 34](#) of the Act).

## The types of construction work covered by the Security of Payment Act

“Construction work” is defined in Section 5 of the Act as any of the following:

- the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of:
  - buildings or structures forming, or to form, part of land (whether permanent or not), or
  - any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection
- the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems
- any operation which forms part of the preparation or completion of the works described above including:
  - site clearance, earth-moving, excavation, tunnelling and boring
  - the laying of foundations
  - the erection, maintenance or dismantling of scaffolding
  - the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site
  - site restoration, landscaping and the provision of roadways and other access works

- the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension
- the painting or decorating of the internal or external surfaces of any building, structure or works

### The types of related goods and services covered by the Security of Payment Act

“Related goods and services” are defined in Section 6 of the Act as:

- Goods of the following kind:
  - materials and components to form part of any building, structure or work arising from construction work
  - plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,
- Services of the following kind:
  - the provision of labour to carry out construction work
  - architectural, design, surveying or quantity surveying services in relation to construction work
  - building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work

### The right to receive progress payments

Section 8 of the Act provides that people and businesses who carry out construction work or supply related goods and services under a construction contract in NSW are entitled to receive a progress payment. The right to progress payments exists whether a contract is verbal or written, where there is no contract, despite any “pay when paid” provision in the contract (Section 12) and even where the contract states that the contractor cannot claim progress payments.

### Calculating the amount of a progress payment

The amount of a progress payment is to be calculated as follows:

- the amount calculated in accordance with the terms of the contract (Section 9(a)), or
- if the contract does not specifically deal with the matter, the amount calculated on the basis of the value of the construction work done and/or the value of the related goods and services supplied under the contract (Section 9(b)).

Where construction work and/or related goods and services require valuation for the purposes of a progress payment because the contract does not specifically deal with the matter, the work and/or related goods and services are to be valued having regard to:

- the contract price for the work and/or related goods and services (Sections 10(1)(b)(i)) and 10(2)(b)(i))
- any other rates or prices set out in the contract (Sections 10(1)(b)(ii)) and 10(2)(b)(ii))
- any agreed variation by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount (Sections 10(1)(b)(iii)) and 10(2)(b)(iii))
- if any of the work or related goods are defective, the estimated cost of rectifying the defect (Sections 10(1)(b)(iv)) and 10(2)(b)(iv))

and

- in the case of materials to form part of any building, structure or work arising from construction work, the only materials to be included in the valuation are those that have, or will, become the property of the person for whom the construction work is being done (Section 10(2)(b)).

## The requirement for service of valid payment claims

Crucially, most rights under the Act arise from the service of a valid payment claim and it is fundamentally important that those seeking payment understand the requirements of this rule. To make a valid payment claim, the claimant must:

- provide the payment claim in writing, stating the amount due and describing the construction work and/or related goods or services being claimed (Sections 13(2)(a) and 13(2)(b))
- state the following in the payment claim: "*This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW*" (Section 13(2)(c)), and
- serve the payment claim:
  - at the time specified in the contract (Section 13(1A)), or
  - on or after the last day of the month (Section 13(1A)), or
  - in the case of a construction contract that has been terminated, on and from the date of termination) (Section 13(1C))

and

  - within the period in accordance with the contract, or the 12-month period after the construction work or supply of related goods and services to which the claim relates was last carried out, whichever is the later.

The claimed amount may include:

- any amount held by the respondent under the contract that the claimant claims is due for release (Section 13(3)(a)), and
- any loss or expenses incurred as a result of the removal by the respondent from the contract of any part of the work or supply of related goods and services following the claimant exercising the right to suspend the work and/or supply (Section 13(3)(a)) (see below regarding the right to suspend work).

Except as otherwise provided for in the contract, a claimant may only serve one payment claim in any month for work done, or related goods and services supplied, in that month (Section 13(5)). However, a single payment claim may include:

- more than one progress payment (Section 13(6)(a)), or
- an amount that has been the subject of a previous claim (Section 13(6)(b)), or
- an amount for work done, or for related goods and services supplied, in a previous month (Section 13(6)(c)).

Payment claims served by head contractors on principal contractors must be accompanied by a supporting statement in the prescribed form that indicates that it relates to that payment claim (Section 13(7)).

## Determining the due date for a progress payment

Service of a valid payment claim creates the following due dates for payment:

- For payment by a principal contractor to a head contractor (other than an owner occupier residential construction contract), 15 business days after the claim is served or an earlier date as provided in the contract (Section 11(1A))
- For payment by a head contractor to a subcontractor (other than an owner occupier residential construction contract), 20 days after the claim is served or an earlier date as provided in the contract (Section 11(1B))
- For payment by a head contractor to a subcontractor (residential building work), 10 days after the claim is served (Section 11(1C))

## Time limits for the service of payment schedules

Where the recipient of a payment claim (the "respondent") does not intend to pay some or all of the claimed amount, they must serve a 'payment schedule' in response to the claim

(Section 14(1)). The payment schedule must:

- be in writing, addressed to the claimant and identifying the payment claim to which it relates (Section 14(2)(a))
- state the scheduled amount of the payment, if any, that the respondent proposes to make (including the amount of “Nil” if no payment is proposed) (Section 14(2)(b))
- state all the reasons why the proposed payment is less than the amount claimed (Section 14(3)), and
- be served on the claimant so that it reaches them within the following timeframes:
  - If the payment due date has not expired, within 10 business days after service of the payment claim or within the time required by the contract (whichever is earlier) (Section 14(4)(b))
  - If the payment due date has expired, within 5 business days after receiving a notice of intention to apply for adjudication (Section 17(2)(b))

If a payment schedule is not served within the timeframe allowed, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates (Section 14(4)).

When preparing a payment schedule disputing a payment claim, respondents must be aware that they will be confined to the reasons in the payment schedule should the payment claim become the subject of an adjudication (see below for information relating to adjudications). It is, therefore, very important that respondents who dispute a payment claim include every reason for doing so in their payment schedule as they will not be permitted to put any reasons to an adjudicator that are not included in the payment schedule.

### **The consequences of failing to respond to a payment claim in accordance with the Act**

There are very serious consequences for

respondents who fail to respond to a payment claim in accordance with the Act by:

- failing to serve a payment schedule prior to the expiry of the due date for payment and failing to pay the amount claimed by the due date (Section 15), or
- providing a payment schedule but failing to pay the amount in the schedule by the due date (Section 16).

### **Recovery of payment claims as indisputable statutory debts**

In either of the above circumstances, the claimant may commence debt recovery proceedings to recover the unpaid portion of the claimed amount as an indisputable statutory debt. If the claimant commences such proceedings, the respondent is not entitled to bring any cross-claim against the claimant, or to raise any defence in relation to matters arising under the contract (Sections 15(4) and 16(4)).

As an alternative to commencing debt recovery proceedings, the claimant may seek to have the matter determined by adjudication (Sections 15(2)(a)(ii) and 16(2)(a)(ii)).

### **The right to suspend work for non-payment**

The failure of a respondent to respond to a payment claim in accordance with the Act also entitles the claimant to serve notice on the respondent of the intention to suspend work, or the supply of related goods and services (Sections 15(2)(b) and 16(2)(b)).

The claimant may then formally suspend work, or the supply of related goods and services, if at least 2 business days have passed since the notice of intention was served on the respondent (Section 27(1)).

The right to suspend the work, or the supply of related goods and services, continues until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount payable (Section 27(1)).

A claimant who suspends work, or the supply of related goods and services, in accordance with this right conferred by the Act is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the suspension (Section 27(3)). On the other hand, a respondent will be liable to pay the claimant the amount of any loss or expense incurred as a result of the removal (by the respondent) from the contract of any part of the work or supply of related goods and services in response to the suspension (Section 27(2A)).

The claimant is also entitled to suspend work, or the supply of related goods and services, where a respondent fails to pay an adjudicated amount (see below).

### Interest payable on outstanding amounts and the exercise of liens

Interest is payable on the unpaid amount of a progress payment that has become due and payable. The rate of interest payable is the rate prescribed under Section 101 of the *Civil Procedure Act 2005* (NSW) (6.25% as at 27 July 2021) or the rate specified in the construction contract, whichever is greater.

If a progress payment becomes due and payable, the claimant is also entitled to exercise a statutory "lien" over any unfixed plant or materials supplied in connection with the construction work (Section 11(3)). A lien is a right to retain possession of items as security for the payment of amounts owed.

### Adjudications: enforceable determinations of payment disputes by independent adjudicators

Disputed payment claims, breaches of the rules relating to payment schedules and non-payment entitle the claimant to apply for adjudication of a payment claim by an independent adjudicator (an "adjudication application") (Section 17(1)).

Adjudication is generally the preferred choice for claimants where there is no statutory right

to payment because the respondent has provided a valid payment schedule disputing the claim.

### Making an adjudication application

Adjudication applications are made to an authorised nominating authority (chosen by the claimant) who refer the application to an independent adjudicator. The adjudicator may accept the application by serving notice of the acceptance on the claimant and the respondent.

The following strict timelines apply to the making of an adjudication application:

- Where a payment schedule has been served but the scheduled amount is less than the amount in the payment claim, the adjudication application must be made within 10 business days after the payment schedule has been received by the claimant (Section 17(3)(c))
- Where a payment schedule has been served but the respondent fails to pay the whole or any part of the amount in the payment schedule by the due date for payment, the adjudication application must be made within 20 business days after the due date (Section 17(3)(d))
- Where the respondent fails to provide a payment schedule and fails to pay the whole or any part of the claimed amount by the due date:
  - The respondent is to be notified within 20 business days of the payment due date of the claimant's intention to apply for adjudication (the "notice of intention") (Section 17(2)(a))
  - The respondent must be given 5 business days to provide a payment schedule after receiving the notice of intention (Section 17(2)(b))
  - The adjudication application must be made within 10 business days of the 5-day payment schedule period referred to above (Section 17(3)(e))



The adjudication application must contain certain documents and information including copies of the contract, payment claim and payment schedule (if any) together with all information in support of the application that the claimant wants the adjudicator to consider.

### Payment withholding requests

A claimant who has made an adjudication application is entitled to serve a 'payment withholding request' on a principal contractor in the form of a statutory declaration declaring that the claimant genuinely believes that the amount of money claimed is owed by the respondent to the claimant (Sections 26A(2) and 26A(3)).

Where there is uncertainty as to the existence of a principal contractor, an adjudicator may (at the request of the claimant) direct the respondent to provide information to the claimant as to the identity and contact details of any person who is a principal contractor in relation to the claim (Section 26E(1)).

A principal contractor who has been served with a payment withholding request must retain, out of money owed to the respondent, the amount of the payment claim (or the amount owed by the principal contractor to the respondent if that amount is less than the amount of the payment claim) (Section 26B(1)). The amount is only required to be retained out of money that is (or becomes) payable by the principal contractor to the respondent in connection to work or materials that the respondent engaged the claimant to carry out or supply (Section 26B(2)).

If a principal contractor who has been served with a payment withholding request breaches the obligation to retain money by paying an amount to the respondent, the principal contractor becomes liable (with the respondent) for the debt owed by the respondent to the claimant (but only to the extent of the amount paid by the principal contractor to the respondent) (Section 26C(1)).

The principal contractor can recover as a debt from the respondent any amount that the claimant then recovers from the principal contractor (Section 26C(2)).

The principal contractor's obligation to retain money remains in force until:

- the adjudication application is withdrawn or the adjudicator fails to determine the adjudication application and the claimant does not make a new application, or
- the respondent pays the amount due under the payment claim. or
- the claimant serves a notice of claim on the principal contractor under Section 6 of the *Contractors Debts Act 1997* (NSW) in respect of the payment claim, or
- a period of 20 business days passes after a copy of the adjudicator's determination is served on the principal contractor.

### Lodging an adjudication response

Respondents who have provided a payment schedule within the time allowed may lodge with the adjudicator a response to the claimant's adjudication application (an "adjudication response") (Sections 20(1) and 20(2A)).

It is a strict requirement that an adjudication response is made within:

- 5 business days after the respondent received a copy of the adjudication application (Section 20(1)(a)), or
- 2 business days after the respondent received notice of the adjudicator's acceptance of the application (Section 20(1)(b)).

The adjudication response must identify the adjudication application to which it relates and should include full details of the reasons for withholding payment given in the payment schedule. The adjudication response must not, however, include any reasons for withholding payment that were not included in the payment schedule (Section 20(2B)).

The adjudication response may also respond to issues raised in the adjudication application.

The respondent must serve a copy of the adjudication response on the claimant (Section 20(3)).

### The adjudication procedure

An adjudicator is not to consider or determine:

- an adjudication application until after the end of the period within which the respondent may lodge an adjudication response (Section 21(1)), or
- an adjudication response unless it was made within the time allowed (Section 21(2)).

An adjudicator must determine an adjudication application as quickly as possible (Section 21(3)). In any case, the application must be determined:

- Within 10 business days after:
  - the adjudication response is lodged, or, if a response is not lodged, the end of the period within which the respondent was entitled to lodge a response (Section 21(3)(a)(i)), or
  - in any other case, the date on which notice of the adjudicator's acceptance of the application is served on the claimant and the respondent (Section 21(3)(a)(ii)), or
- within such further time as the claimant and the respondent may agree (Section 21(3)(b)).

An adjudicator may do any of the following for the purposes of determining an adjudication application:

- request further written submissions from either party (the other party must be given an opportunity to comment on those submissions) (Section 21(4)(a))
- set deadlines for further submissions and comments by the parties (Section 21(4)(b))

- call a conference of the parties (to be conducted informally without legal representation) (Sections 21(4)(c) and 21(4A)), and
- carry out an inspection of any matter to which the claim relates (Section 21(4)(d)).

The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within the time allowed or to comply with the adjudicator's call for a conference of the parties (Section 21(5)).

### Adjudication determinations

An adjudicator must determine:

- the amount of the progress payment (if any) to be paid by the respondent to the claimant (the "adjudicated amount") (Section 22(1)(a)), and
- the date on which any such amount became or becomes payable (Section 22(1)(a)), and
- the rate of interest payable on any such amount (Section 22(1)(a)).

In determining an adjudication application, the adjudicator is restricted to considering the following matters only (Section 22(2)):

- the Act
- the construction contract
- the payment claim and all submissions and relevant documents provided by the claimant in support of the payment claim
- the payment schedule (if any) and all submissions and relevant documents provided by the respondent in support of the payment schedule
- the results of any inspection carried out by the adjudicator.

The adjudicator must serve on the claimant and the respondent a written determination which includes the reasons for the determination (Section 22(3)).

If an adjudicator has determined the value of any work done, or related goods and services supplied, because the contract does not specifically deal with the matter, that value is to be used in any subsequent adjudication unless the claimant or respondent satisfies the adjudicator that the value has changed since the previous determination (Section 22(4)).

If the adjudicator's determination contains a clerical mistake, miscalculation, mistaken description or an error arising from an accidental slip or omission, the adjudicator may correct the determination accordingly (Section 22(5)).

### **The consequences of not paying an adjudicated amount to a claimant**

If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before:

- the date occurring 5 business days after the date on which the adjudicator's determination is served by the adjudicator on the respondent concerned (Section 23(1)(a)), or
- any later date that the adjudicator has determined (Section 23(1)(b)).

If the respondent fails to pay the adjudicated amount by the due date, the claimant may request the authorised nominating authority to provide an "adjudication certificate" and serve notice on the respondent of the claimant's intention to suspend work, or the supply of related goods and services, under the construction contract (Section 24(1)). Such a notice must state that it is made under the Act (Section 24(2)).

An adjudication certificate must state that it is made under this Act and must specify the name of the claimant, the name of the respondent, the adjudicated amount and the due date for payment (Section 24(3)).

A claimant may request the authorised nominated authority to specify in the adjudication certificate any amount of interest due and payable or any unpaid share of adjudication fees owed to the claimant by the respondent. If such amounts are specified in the adjudication certificate, those amounts are to be added to (and become part of) the adjudicated amount (Sections 24(4) and 24(5)).

### **Filing an adjudication certificate as an enforceable judgment debt**

An adjudication certificate accompanied by an affidavit by the claimant may be filed in court as an enforceable judgment debt (Section 25(1)).

The affidavit by the claimant must state the adjudicated amount which remains outstanding at the time the certificate is filed (Section 25(2)). If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only (Section 25(3)).

If the respondent commences court proceedings to have the judgment set aside, the respondent is not, in those proceedings, entitled:

- to bring any cross-claim against the claimant (Section 25(4)(a)(i)), or
- to raise any defence in relation to matters arising under the construction contract (Section 25(4)(a)(ii)), or
- to challenge the adjudicator's determination (Section 25(4)(a)(iii))

and

- is required to pay into court the unpaid portion of the adjudicated amount as security pending the final determination of those court proceedings (Section 25(4)(b)).

### Key deadlines and due dates for compliance with the Act

Payment following a payment claim		
Payment claim	Due date (business days)	Section
Payment by principal to head contractor	15 days after claim is made	11(1A)(a)
Payment by head contractor to subcontractor (non-residential)	20 days after claim is made	11(1B)(a)
Payment by head contractor to subcontractor (residential)	10 days after claim is made	11(1C)(b)
Providing a payment schedule in response to a payment claim		
Payment schedule	Deadline (business days)	Section
Before payment due date has expired	10 days after claim is made	14(4)(ii)
After payment due date has expired	5 days after receiving notice of intention to apply for adjudication	17(2)(b)
The adjudication process		
Adjudication application	Deadline (business days)	Section
Claimant receives payment schedule, does not dispute schedule but respondent fails to pay by due date	20 days to lodge application	17(3)(d)
Claimant receives payment schedule and the scheduled amount is less than the claim amount	10 days to lodge application	17(3)(c)
No payment schedule received, due date has passed, respondent given notice of intention to apply for adjudication, respondent given further 5 days to give payment schedule	10 days to lodge from last day of the 5-day notice period	17(3)(e)
Notice of intention to apply for adjudication	20 days after due date for payment has passed	17(2)(a)
Adjudicator acceptance	Should be within 4 days of adjudication application, otherwise claimant can make new application	26(1)(a)
New adjudication application	Within 5 days of becoming entitled to lodge new application	26(3)
Adjudication response	Due 5 days after receiving adjudication application from claimant, or 2 days after receiving adjudicator acceptance	20(1)
Adjudicator's decision	Due within 10 days of adjudicator acceptance	21(3)(a)
Payment of adjudication amount	5 days after release of adjudicator decision	23(1)(a)
Payment withholding requests		
Payment withholding request	Deadline (business days)	Section
Principal contract served with a payment withholding request but that person is no longer the principal contractor	10 days to give notice to claimant	26A(5)
Claimant must serve adjudication determination on principal contractor	Within 5 days of receiving determination	26B(5)
If adjudication application is withdrawn, claimant must notify principal contractor	Within 5 days of the application being withdrawn	26D(3)
Claimant must serve notice of claim to principal contractor under Contractors Debt Act 1997	Within 20 days of serving adjudication determination on them	26B(3)

The Security of Payment Act can have severe consequences for head contractors who fail to meet its requirements, and significant benefits for subcontractors who use the laws wisely. If you:

- are seeking to enforce payment of a construction contract progress claim, or
- have been served with a payment claim and wish to dispute the amount claimed, or
- are involved in an adjudication

you should seek immediate legal advice to avoid breaching the rules for validity of payment claims and the strict timelines for service and lodgement of payment schedules and adjudication responses.

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