



Australian Government
**Australian Building and
Construction Commission**

Security of Payment

SOUTH AUSTRALIA



What is 'Security of Payment'?

In general terms, 'security of payment' refers to a building contractor's right to receive payments that are due as outlined in their contract. For example, a head contractor must pay a subcontractor's progress payments on time.

Each state and territory has its own security of payment laws. Broadly, the laws provide a rapid statutory mechanism for resolving payment disputes on an interim basis. This is known as adjudication. There are however, significant differences in how the laws operate and strict timeframes required for adjudication applications.

This fact sheet sets out the key requirements for the South Australian security of payment regime to assist you in ensuring that you get paid on time and that you pay your subcontractors on time.

Security of Payment Laws – South Australia

In South Australia, the *Building and Construction Industry Security of Payment Act 2009* (SA) (SA SOP Act) governs security of payment.

- The object of the SA SOP Act is to ensure that a person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
- The SA SOP Act ensures that a person is entitled to receive a progress payment by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.
- The SA SOP Act ensures that a person is able to recover a progress payment by establishing a procedure that involves the making a payment claim, the provision of a payment schedule, the referral of any disputed claim to an adjudicator for determination and the payment of the progress payment so determined.

To use the mechanisms in the SA SOP Act to recover money due and owing to you, you must meet certain criteria and strict timeframes for the provision of certain information. These are summarised in **Attachment A** to this fact sheet.

Disclaimer: The checklist is intended only to provide a general overview of the Security of Payment legislation in each State and Territory. It is not intended to be a comprehensive statement of the requirements of the Security of Payment Legislation and nor does it constitute legal advice. You should refer to the specific provisions of the relevant Security of Payment legislation to ensure compliance with the applicable requirements.

The role of the ABCC

The Australian Building and Construction Commission (ABCC) monitors and promotes compliance with the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act), designated building laws and the *Code for the Tendering and Performance of Building Work 2016* (Code) by building industry participants.

Building contractors and building industry participants become subject to the Code (code covered entities) from the first time they submit an expression of interest or tender for Commonwealth funded building work on or after 2 December 2016.

The Code imposes a number of security of payment obligations on code covered entities.

I'm owed money. How can the ABCC help me?

The ABCC may be able to assist you if:

- you are not getting paid, or have been paid late for building work you have undertaken; and
- you have been engaged on a project in respect of that building work, by a building contractor who does Commonwealth funded building work (a code covered entity).

The ABCC may determine that the code covered entity has breached the Code. In these circumstances, the ABCC can intervene and seek that the code covered entity voluntarily rectify its Code breach, which may include making overdue payments.

Depending on the seriousness of the breach, the ABCC may also recommend to the Attorney-General and Minister for Industrial Relations that a sanction be imposed on the code covered entity. If the Minister imposes a sanction, the code covered entity may be prevented from tendering for Commonwealth funded work in future for a period of time.

Unfortunately, the ABCC cannot order a code covered entity to pay amounts that are due and owing in the same way that a court can.

To report to the ABCC that you are owed money, please complete and submit the Security of Payment Reporting Claimant form accessible at: abcc.gov.au/building-code/contractors/construction-phase/security-payment

I owe my subcontractors money. What are my Code obligations?

If you are a code covered entity, you must comply with the security of payment obligations under the Code which include the following:

- Comply with state and territory security of payment laws.
- Ensure payments that are due and payable are made in a timely way and not unreasonably withheld.
- Have documented dispute settlement processes detailing how disputes about payments to subcontractors will be resolved.
- Ensure disputes about payments are resolved in a reasonable, timely and co-operative way.
- Comply with any project bank account or trust arrangement that may apply on a Commonwealth funded project.
- Report disputed or delayed progress payments to the ABC Commissioner.

You must **report disputed or delayed progress payments to the ABC Commissioner** in the following circumstances:

1. An amount is certified by a Principal (or Superintendent) under a contract and not paid within the contractual timeframe.
2. An amount is specified in a payment schedule/notice of dispute issued under the security of payment laws and not paid by the date prescribed by those laws.
3. Other than in Western Australia and the Northern Territory, no payment schedule/notice of dispute is issued in response to a valid payment claim and the full amount of the payment claim is not paid by the date prescribed by the security of payment laws.
4. An adjudicator makes a determination under the relevant state and territory security of payment legislation and the adjudicated amount is not paid by the date prescribed by the security of payment laws.
5. A third party such as a court, arbitrator, or expert issues a binding determination and the amount determined is not paid in accordance with the determination.

To report a disputed or delayed progress payment to the ABCC, please complete and submit the Code Covered Entity Security of Payment reporting from accessible at:

abcc.gov.au/building-code/contractors/construction-phase/security-payment

Contact the ABCC

For further information and assistance, contact the ABCC via the avenues below:



ABCC hotline
1800 003 338



abcc.gov.au

ABCC – Security of Payment information
abcc.gov.au/building-code/contractors/construction-phase/security-payment



ABCC – Presentation
ABCC representatives are available to present an information session at your workplace.
abcc.gov.au/book-presentation

Where else can I go for help?

Protecting your small business (ASIC)

asic.gov.au/for-business/small-business/protecting-your-small-business/

Building and Construction Industry Security of Payment Act 2009 (SA)

<https://www.legislation.sa.gov.au/LZ/C/A/BUILDING%20AND%20CONSTRUCTION%20INDUSTRY%20SECURITY%20OF%20PAYMENT%20ACT%202009.aspx>

Small Business Commissioner South Australia

https://www.sasbc.sa.gov.au/security_of_payment

Building and Construction Payment Claim FAQ

https://www.sasbc.sa.gov.au/security_of_payment/building_and_construction_payment_claim_faq

Authorised Nominating Authorities

https://www.sasbc.sa.gov.au/security_of_payment/authorised_nominating_authorities

Attachment A

Key SA SOP Act Requirements

REQUIREMENT	DETAILS
You must be a party to a construction contract for the SA SOP Act to apply	Construction contract can be either written, oral or both .
Entitlement to claim progress payment	<p>On and from each reference date under a construction contract, a person who has undertaken to carry out construction work under the contract is entitled to a progress payment (section 8 SA SOP Act).</p> <p>'reference date' means:</p> <p>(a) a date pursuant to the contract for a progress payment claim to be made; or</p> <p>(b) if the contract does not provide a reference date, the last day of the named month in which the construction work was first carried out under the contract and the last day of each subsequent named month (section 4 SA SOP Act).</p>
Issuing a payment claim	<p>If entitled to a progress payment, claimant may issue a payment claim (section 13(1) SA SOP Act).</p> <p>Payment claim must identify the construction work to which progress payment relates; must indicate the amount of the progress payment that the claimant claims to be due; and must state that it is made under the SA SOP Act (section 13(2) SA SOP Act).</p> <p>A payment claim may be served only within the period determined by the contract; or the period of 6 months after the construction work to which the claim relates was last carried out – whichever is the later (section 13(4) SA SOP Act).</p> <p>A claimant cannot serve more than 1 payment claim in respect of each reference date under the construction contract. However, this does not prevent claimant from including in a payment claim an amount that has been the subject of a previous claim (section 13(5) and (6) SA SOP Act).</p>
Responding to or disputing a payment claim (issuing a payment schedule)	<p>Person on whom payment claim is served may reply to claim with a payment schedule (section 14(1) SA SOP Act).</p> <p>Payment schedule must identify payment claim to which it relates; and must schedule the amount of the payment (if any) that respondent proposes to make (section 14(2) SA SOP Act).</p> <p>If scheduled amount is less than claimed amount, payment schedule must explain why and provide reasons for withholding payment (section 14(3) SA SOP Act).</p> <p>Respondent must issue payment schedule as per contractual timeframe; or within 15 business days after payment claim is served, whichever expires earlier (section 14(4) SA SOP Act).</p> <p>If respondent does not provide a payment schedule to claimant within statutory timeframes, respondent becomes liable to pay entire claimed amount by due date (section 14(4) SA SOP Act).</p>

REQUIREMENT	DETAILS
Due date for payment	<p>Either:</p> <ul style="list-style-type: none"> • Date on which payment becomes due and payable per contract; or • In absence of contractual terms, 15 business days after payment claim is made (section 11 SA SOP Act).
Consequences of not paying claimant	<p>No payment schedule issued</p> <p>If respondent becomes liable under section 14(4) SA SOP Act to pay claimed amount to claimant by not issuing a payment schedule within statutory timeframe; and fails to pay whole or part of claimed amount on or before due date, claimant may:</p> <ul style="list-style-type: none"> • Recover unpaid portion of claimed amount as a debt in court of competent jurisdiction; or • May make adjudication application under SA SOP Act in relation to claim; and • May serve notice on respondent of intention to suspend construction work under contract (Sections 15(1) and (2) SA SOP Act). <p>Payment schedule issued</p> <p>If respondent provides a payment schedule to claimant within statutory timeframes; and payment schedule indicates scheduled amount; and respondent fails to pay whole or part of scheduled amount on or before due date, claimant may:</p> <ul style="list-style-type: none"> • Recover unpaid portion of claimed amount as a debt in court of competent jurisdiction; or • May make adjudication application under SA SOP Act in relation to claim; and • May serve notice on respondent of intention to suspend construction work under contract (Sections 16(1) and (2) SA SOP Act).

REQUIREMENT	DETAILS
Adjudication of payment dispute	<p>Requirements to access adjudication</p> <p>Claimant may apply for adjudication of payment claim if:</p> <ul style="list-style-type: none"> Respondent provides payment schedule but scheduled amount is less than claimed amount (section 17(1)(a)(i) SA SOP Act); or Respondent fails to pay whole or part of scheduled amount by due date (section 17(1)(a)(ii) SA SOP Act); or Respondent fails to provide payment schedule and fails to pay whole or part of claimed amount by due date (section 17(1)(b) SA SOP Act). <p>Notice of intention to apply for adjudication</p> <p>Claimant cannot make application under section 17(1)(b) SA SOP Act (where the respondent does not issue a payment schedule and fails to pay the whole or part of the claimed amount), unless:</p> <ul style="list-style-type: none"> claimant notified respondent, within 20 business days immediately following due date, of claimant's intention to apply for adjudication; and respondent has opportunity to provide payment schedule within 5 business days after receiving notice (section 17(2) SA SOP Act). <p>Adjudication process</p> <p>Adjudication application must be in writing, made to authorised nominating authority chosen by claimant (with copy served on respondent), must identify payment claim and payment schedule (if applicable) to which it relates; must be accompanied by applicable application fee; may contain submissions relevant to the application; and:</p> <ul style="list-style-type: none"> for application under section 17(1)(a)(i) SA SOP Act (where the scheduled amount is less than the claimed amount), made within 15 business days after claimant receives payment schedule; and for application under section 17(1)(a)(ii) SA SOP Act (where respondent fails to pay whole or part of scheduled amount), made within 20 business days after due date for payment; and for application under section 17(1)(b) SA SOP Act (where the respondent does not issue a payment schedule and fails to pay the whole or part of the claimed amount), made within 15 business days after the end of the 5 day period after receiving claimant's notice of intention to adjudication (section 17(3) SA SOP Act). <p>Authorised nominating authority may refer application to adjudicator.</p> <p>Respondent may lodge adjudication response only if respondent has provided payment schedule within timeframes specified in sections 14(4) and 17(2)(b) SA SOP Act (section 20(3) SA SOP Act).</p> <p>Respondent may then lodge response with adjudication at any time within 5 business days after receiving copy of application; or 2 business days after receiving adjudicator's acceptance of application, whichever expires later (section 20(1) SA SOP Act). Response must also be served on claimant (section 20(5) SA SOP Act).</p> <p>Adjudicator must ordinarily determine the application within 10 business days (section 21 SA SOP Act).</p> <p>Respondent must pay adjudicated amount (if any) on or before relevant date (that is, the date occurring 5 business days after date on which determination is served on respondent; or if adjudicator determines a later date – that later date) (section 23 SA SOP Act).</p>

REQUIREMENT	DETAILS
Why make a payment claim under the SA SOP Act?	<p>Allows contractor to access statutory rights:</p> <ul style="list-style-type: none"> Adjudication (Part 3, Div 2 SA SOP Act) Stop work notice if claimed, scheduled or adjudicated amount not paid (section 15(2)(b), 16(2)(b) and 24(1)(b) SA SOP Act); Adjudicator's certificate can be issued for adjudication determination. Certificate can be filed as a judgment debt in court of competent jurisdiction and is enforceable accordingly (section 25 SA SOP Act)
Provisions that are of no effect	<ul style="list-style-type: none"> 'Pay when paid' provisions (section 12 SA SOP Act). Provisions in agreement, whether in writing or not, that exclude, modify or restrict (or purport to; or have the effect of excluding, modifying or restricting) the operation of the SA SOP Act (section 33 SA SOP Act).



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CONTACT US

1800 003 338

abcc.gov.au

GPO Box 9927

Melbourne VIC 3001

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