



Australian Government
**Australian Building and
Construction Commission**

Security of Payment

WESTERN 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 Western 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 – Western Australia

In Western Australia, the *Construction Contracts Act 2004* (WA) (WA SOP Act) governs security of payment.

The purpose of the WA SOP Act is to:

- prohibit or modify certain provisions in construction contracts;
- imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts;
- provide a means for adjudicating payment disputes arising under construction contracts, and for related purposes.

To use the mechanisms in the WA 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/

Construction Contracts Act 2004 (WA)

www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_188_homepage.html

WA Department of Mines, Industry Regulation and Safety

– Information on using the Construction Contracts Act

www.commerce.wa.gov.au/building-and-energy/information-using-construction-contracts-act

Find an appointor or adjudicator

www.commerce.wa.gov.au/building-and-energy/find-appointor-or-adjudicator

Attachment A

Key WA SOP Act Requirements

REQUIREMENT	DETAILS
You must be a party to a construction contract for the WA SOP Act to apply	Construction contract can be either written, oral or both .
Due date for payment	Construction contract must require payment within 42 days after payment claim is made. <ul style="list-style-type: none"> If payment terms are longer than 42 days, contractual terms must be read as being amended to require payment within 42 days (section 10 WA SOP Act); If the construction contract does not contain payment terms, default 28 day payment terms apply (Schedule 1, Div 5, section 7(3)(b) WA SOP Act).
Entitlement to be paid	Arises as per contractual terms. If contract is silent, contractor entitled to be paid a reasonable amount for performing its obligations (section 14 and Schedule 1, Div 2 WA SOP Act)
Entitlement to claim progress payment	Arises as per contractual terms. If contract is silent, contractor: <ul style="list-style-type: none"> is entitled to make one or more claims for a progress payment for obligations it has performed and for which it has not been paid; and claim can be made at any time after contractor has performed any of its obligations (section 15 and Schedule 1, Div 3 WA SOP Act)
Format of payment claim	<ul style="list-style-type: none"> As per contractual terms. If contract is silent, claim must meet criteria set out in Schedule 1, Div 4 of WA SOP Act (section 16 WA SOP Act)
Responding to or disputing a payment claim	As per contractual terms. If contract is silent, either: <ul style="list-style-type: none"> pay whole amount claimed within 28 days of receiving claim; or provide notice of dispute to claimant within 14 days after receiving claim and (if applicable), pay the amount of the claim that is not disputed within 28 days of receiving claim (section 17 and Schedule 1, Div 5 WA SOP Act).

REQUIREMENT	DETAILS
Why make a payment claim under the WA SOP Act?	Allows contractor to access statutory rights: <ul style="list-style-type: none"> Adjudication (Part 3 WA SOP Act) Stop work notice (section 42 WA SOP Act); Adjudicator's determination may be enforced as orders of court (section 43 WA SOP Act)
Adjudication of payment dispute	Any party to contract may apply for adjudication of dispute. Application for adjudication must be made within 90 business days of payment dispute arising. Response to adjudication application must be served within 10 business days after service of adjudication application. Prescribed appointer must appoint registered adjudicator to adjudicate matter within 5 business days of being served adjudication application. Appointed adjudicator must determine or dismiss matter within 10 business days after date on which adjudication response served; or within 10 business days after last date on which adjudication response required to be served (sections 25-37 WA SOP Act). Adjudication determination may be enforced as orders of court (section 43 WA SOP Act).
Provisions that are of no effect	<ul style="list-style-type: none"> 'Pay if paid' and 'pay when paid' provisions (section 9 WA SOP Act). Provision in an agreement or arrangement, whether a construction contract or not and whether in writing or not, that purports to exclude, modify or restrict the operation of the WA SOP Act (section 53(1) WA SOP Act). Any purported waiver, whether in a construction contract or not and whether in writing or not, of an entitlement under the WA SOP Act (section 53(3) WA SOP Act).



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abcc.gov.au/update

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