

Security of payment

Questions and answers

Security of payment provisions under the *Code for the Tendering and Performance of Building Work 2016* (Code)

This Q&A list should be read along with the more detailed security of payment information on the ABCC website at
www.abcc.gov.au/securityofpayment

1. What is the issue and how big a problem is it?

The late payment of subcontractors is a significant problem in the building and construction industry.

According to a 2017 survey published in the *Review of Security of Payment Laws*, three quarters of Australian subcontractors in the building and construction industry said at least 40 per cent of their invoices were paid late, with one third of these saying 60 per cent of their invoices were paid late.

The ABCC's responsibility is ensuring code covered contractors are complying with the Code, which includes paying their subcontractors on time and not unreasonably withholding payments.

2. Who is covered by security of payment (SOP) provisions in the Code?

All contractors that have expressed interest in or tendered for Commonwealth funded building work since 2 December 2016.

3. What is the ABCC's role in SOP?

The ABCC is responsible for monitoring the security of payment provisions in the Code. The ABCC is also a member of the Security of Payments Working Group established under the *Building and Construction Industry (Improving Productivity) Act 2016*.

The Working Group's functions include making recommendations to the ABCC about policies, procedures and programs that could be implemented to improve compliance with security of payment laws.

The Code requires code covered contractors to:

- comply with state and territory security of payment laws
- not coerce or unduly pressure or influence a contractor, subcontractor or consultant to exercise or not to exercise rights under security of payment laws or to exercise them in a particular way
- report disputed or delayed progress payments
- ensure payments that are due and payable are made in a timely way and not unreasonably withheld
- have a documented dispute settlement process detailing how disputes about payments to subcontractors will be resolved, that includes referral to an independent adjudicator
- comply with the dispute settlement process and any determination
- ensure disputes about payments are resolved in a reasonable, timely and cooperative way
- comply with any project bank account or trust arrangement that may apply on a Commonwealth funded project
- not engage in illegal or fraudulent phoenix activities for the purpose of avoiding any payment due to another building contractor or building industry participant or other creditor.

4. What are the new mandatory reporting requirements?

The obligation to report a disputed or delayed payment arises as soon as practicable after the date on which the payment falls due. This obligation may arise where:

- An amount is certified by a Principal (or Superintendent) under a contract and not paid within the contractual timeframe.
- 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.
- 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.
- 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.
- 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.

5. Is there a transition period for complying with the new reporting requirements?

To allow contractors time to set up processes to comply with this new reporting requirement, this transitional process will apply:

- **From 16 July to 31 August 2018 (“the transition period”)** — the ABCC will focus on educating Code covered contractors about the revised definition of the mandatory reporting requirements and ensuring they rectify any failures to report.
- **From 1 September 2018** - a failure to report under the revised definition will be responded to in the same way as any other breach of the Code.
- **Throughout the transition period**, the ABCC will receive and act upon any report, complaint or enquiry captured by the revised definition and enforce any breaches of the security of payment provisions of the Code in the usual manner (except failures to report).

Head contractors on Commonwealth funded building projects may wish to amend their WRMP in line with the new reporting requirement. Amended WRMPs do not need to be reviewed by the ABCC.

6. How will the ABCC deal with payment delays or disputes?

The ABCC will respond to reports made via the Security of Payment reporting form available at www.abcc.gov.au/securityofpayment. We will also answer enquiries and respond to complaints via enquiry@abcc.gov.au and our hotline 1800 003 338.

Please note that any enquirers will be informed that there are strict timeframes regarding access to adjudication under state and territory laws. If subcontractors are considering resolving a dispute through adjudication, they need to seek adjudication themselves alongside any action that the ABCC might undertake.

As a first step, the ABCC will check whether the contractor that owes money is covered by the Code – if so, the ABCC can ensure they have complied with Code requirements.

Where the respondent is not code covered, the ABCC will direct the subcontractor to their state or territory agency for assistance.

If the ABCC has jurisdiction to seek Code compliance, the ABCC will establish whether there has been a Code breach.

In appropriate circumstances, the ABCC will seek voluntary rectification of a Code breach through payment of monies owed to a subcontractor. Code covered contractors that breach the Code risk being sanctioned from tendering for future Commonwealth funded building work.

7. What is the SOP education campaign?

The overarching goal of the campaign is to improve awareness, engagement, reporting and compliance with the security of payment provisions in the Code and effectively convey the ABCC's role in supporting compliance.

The objectives of this campaign are to:

- improve code covered contractor awareness and compliance with their obligations regarding security of payment provisions in the Code, including mandatory reporting of a broader definition of disputed or delayed payments
- improve subcontractor awareness of their rights under state and territory security of payment laws, and how the ABCC may use the Code to assist with disputed or delayed payments.

8. What are the key messages of the campaign?

An ABCC priority is the timely and efficient payment of subcontractors by code covered contractors.

- Are you owed money? Subcontractors deserve to be paid on time. The ABCC may be able to help.
- Are you being pressured not to recover monies owed? Subcontractors should be able to access their security of payment rights without undue pressure, influence or coercion.
- Some contractual payment terms may not be enforceable under state and territory laws.
- Code covered contractors need a documented payment dispute process, which includes access to an independent adjudicator.
- Code covered contractors must comply with the adjudicator's determination.
- Code covered contractors must notify the ABCC of payment disputes or delays.

Find security of payment rights and responsibilities on the ABCC website.

9. What SOP information and resources are available to the building industry?

From 16 July 2018, you can find the latest security of payment (SOP) information at www.abcc.gov.au/securityofpayment. Resources include a SOP subcontractor booklet, a subcontractor flyer on how the ABCC can help, a code covered contractor flyer that serves as a checklist and a Security of Payment State and Territory Laws Checklist.

A new SOP reporting form is also available at www.abcc.gov.au/securityofpayment.

ABCC staff are available to give presentations on SOP.

We encourage all organisations that work with the building industry to link to our website to help ensure subcontractors are aware of their rights and code covered contractors are aware of their obligations. The text below provides a useful introduction when linking to the ABCC website. Images are also available – contact enquiry@abcc.gov.au :

*Any contractor expressing interest in or tendering for Commonwealth funded building work since 2 December 2016 has responsibilities under the Code for the Tendering and Performance of Building Work 2016 (**Code**), which is monitored by the Australian Building and Construction Commission (**ABCC**).*

Code covered contractors have specific requirements to ensure security of payments and failure to comply is a breach of the Code. These include:

- *making payments in a timely manner*
- *not unduly pressuring, influencing or coercing subcontractors not to exercise their rights under security of payment laws*
- *having a documented dispute settlement process including a referral process to an independent adjudicator for determination*
- *complying with this process and any determination*
- *notifying the ABCC of payment delays or disputes as soon as practicable after the date the payment falls due.*

The ABCC can assist subcontractors who are owed money by code covered contractors. Where appropriate, this may include seeking voluntary rectification via payment of monies owed. If a code covered contractor has breached the Code, the ABCC may recommend to the Minister for Jobs and Small Business that the contractor be excluded from tendering for and being awarded Commonwealth funded building work.

For more details visit the security of payment section of the ABCC website.