

**Investing in Infrastructure** | International Best Legal Practice in Project and Construction Agreements | January 2016

Damian McNair | Partner, Legal | M: +61 421 899 231 | E: [damian.mcnair@au.pwc.com](mailto:damian.mcnair@au.pwc.com)

# *Security of payment*



# Security of payment

## Introduction

'Security of payment' is a term used to describe the entitlement of Contractors, sub-contractors, consultants or suppliers in the contractual chain to receive progress payments due to them under construction contracts when undertaking construction work. Security of payment laws are primarily aimed at facilitating timely payment by Principals and Head Contractors down the contractual chain by operating on a 'pay now, argue later' approach. This is achieved through:

- granting claimants the right to apply to court for progress payments where the Principal or Head Contractor has not made payment in accordance with the time period required by the construction contract or enactment (as the case may be)
- establishing a mandatory adjudication scheme for the interim resolution of payment claim disputes.

Security of payment laws apply to contracts for construction work, the supply of related goods and services, and preparatory work done in anticipation of construction (including, for example, design consultancy services). 'Construction contracts', 'construction work' and 'related goods and services' are defined by the enactments to include a wide scope of activities, which vary between States and Territories. The full text of these definitions and extent to which they vary between states is contained in the Schedule to this Article.

Security of payment laws run concurrently alongside entitlements under a construction contract, and claims for payment can proceed to adjudication even if the formal dispute resolution procedure under the construction contract has commenced.

## State variances

Security of payment laws are in place in every State and Territory, however there is no standardised Australia-wide approach to security of payment. There is a clear delineation between the approach taken by Western Australia and Northern Territory (**West Coast Model**), and the remaining States and Territories (**East Coast Model**).

### East Coast Model enactments

<b>Victoria</b>	Building and Construction Industry Security of Payment Act 2002 and the Building and Construction Industry Security of Payment Regulations 2013
<b>New South Wales</b>	Building and Construction Industry Security of Payment Act 1999 and the Building and Construction Industry Security of Payment Regulation 2008
<b>Australian Capital Territory</b>	Building and Construction Industry (Security of Payment) Act 2009
<b>Queensland</b>	Building and Construction Industry Payments Act 2004 and the Building and Construction Industry Payments Regulation 2004
<b>South Australia</b>	Building and Construction Industry Security of Payment Act 2009 and the Building and Construction Industry Security of Payment Regulations 2011
<b>Tasmania</b>	Building and Construction Industry Security of Payment Act 2009

### West Coast Model enactments

<b>Western Australia</b>	Construction Contracts Act 2004 and the Construction Contracts Regulations 2004
<b>Northern Territory</b>	Construction Contracts (Security of Payments) Act 2004 and the Construction Contracts (Security of Payments) Regulations 2004

Some key differences between the East Coast Model and West Coast Model include:

- **Overriding contractual mechanisms:** The East Coast Model prescribes a statutory payment scheme that overrides any inconsistent contractual provisions.<sup>1</sup> The West Coast Model only provides legislative assistance where the construction contract does not have agreed payment provisions. This is achieved through the implication of terms relating to payment for construction works where the construction contract is silent.<sup>2</sup>
- **Procedure for payment claims:** The East Coast Model creates a statutory payment system whereby the claimant must (except in NSW) endorse its payment claim as being made under the relevant Act, and serve it upon the respondent before proceeding in accordance with the relevant Act. Payment claims under the West Coast Model are made pursuant to the procedure of each construction contract, with statutory adjudication available only where a dispute arises during the contractual payment claim procedure.
- **Payments able to be claimed:** The East Coast Model provides for recovery of progress payments up the contractual chain. Therefore, the adjudication procedure under East Coast Model enactments may only be used by Contractors and suppliers to recover payment from a Principal or Head Contractor. The scope of the West Coast Model is wider, allowing either party to make an adjudication application for any payment disputes, including debts and damages claims.
- **Default penalty:** The East Coast Model penalises a party who fails to respond to a payment claim with a payment schedule by rendering it liable to pay the whole of the claimed amount. The West Coast Model does not impose such a penalty.

## ***Procedure***

Security of payment laws only apply to a payment dispute arising out of a contract for construction work. A payment dispute will arise if:

- the amount claimed in a payment claim is due to be paid under the contract, and the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed
- any money retained by a party under the contract has not been paid (when due to be released)
- any security held by a party under the contract is due to be returned under the contract, and has not been returned.

The phrase “due to be paid” is significant. It assumes that the time for payment is expressly stipulated in the contract. However, not all contracts will contain an express term stipulating the time for payment. In these cases, security of payment laws provide a time for payment, which is stipulated to be a certain number of days from receipt of the payment claim.

The variances in procedure between the States and Territories are set out in the Schedule to this Article.

## ***Drafting implications***

Whilst the obligations created by security of payment laws cannot be excluded by contract,<sup>3</sup> the legislation does allow the parties to stipulate how they should apply. The following issues should be considered when drafting payment provisions in construction contracts:

---

<sup>1</sup> See, for eg: s 48 Vic Act; s 34 NSW Act; or s 33 SA Act, each of which hold a provision of an agreement void if the operation of the Act is, or is purported to be, excluded, modified or restricted or it may reasonably be construed as an attempt to deter a person from taking action under the Act.

<sup>2</sup> Where a construction contract does not contain written provisions with respect to matters such as variations, payment entitlement progress payments or the mode and manner of making payment claims, Part 2, Division 2 and Schedule 1 of the WA Act or Part 2, Division 2 and the Schedule of the NT Act will imply terms. For a discussion of implied terms, particularly in the context of construction contracts, see *Codelfa Constructions v State Rail Authority of New South Wales* (1982) 149 CLR 337 (although please note the controversy as to the ongoing application of *Codelfa: Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37).

<sup>3</sup> s 48 Vic Act; s 34 NSW Act; s 99 Qld Act; s 42 ACT Act; s 33 SA Act; s 11 Tas Act; s 10 NT Act; s 53 WA Act.

- **Amount of a progress payment**

Under the East Coast Model, there are two ways of determining the amount of a progress payment:

- **Method 1:** Where the construction contract expressly provides a method for calculating the value of a progress payment, it is to be determined in accordance with those terms.<sup>4</sup> In Victoria, this is subject to the following qualifications (notwithstanding anything to the contrary in the construction contract):
  - claimable variations may be taken into account<sup>5</sup>
  - excluded amounts must not be taken into account.<sup>6</sup>
- **Method 2:** where the construction contract makes no express provision for the amount of a progress payment, the amount will be calculated on the basis of the value of work carried out, or undertaken to be carried out.<sup>7</sup> The value of the work is calculated having regard to contract price, other prices, defects and variations.<sup>8</sup>

For Contractors and Principals who value certainty, stipulating the method for calculation of a progress payment is essential. If the parties do not stipulate a method by which a progress payment is calculated, the Principal is particularly exposed to the risk that the Contractor may claim any number of expenses which are not agreed.

Under the West Coast Model, where the underlying contract is silent, there will be an implied term that the Contractor has an entitlement to be paid a “reasonable amount for performing its obligations”.<sup>9</sup> With no specific provision for the valuation of a “reasonable amount”, parties that do not stipulate calculation of progress payment terms in the construction contract may be exposed to significant variations in the amount of a progress payment.

- **Time periods for payment**

Under the East Coast Model, a progress payment becomes payable in accordance with terms of contract.<sup>10</sup> Payment due dates, where the contract makes no express provision for payment, are set out in the table below.

Jurisdiction	Days (after claim is made) when payment due
Victoria	10 business days <sup>11</sup>
Queensland	10 business days <sup>12</sup>
New South Wales	15 business days for Head Contractors <sup>13</sup> 30 business days for sub-contractors <sup>14</sup>

4 s 10(1)(a) Vic Act; s 9(a) NSW Act; s 13(a) Qld Act; s 9(a) SA Act; s 13(1) Tas Act; s 11(a) ACT Act.

5 s 10(2).

6 s 10(3).

7 s 10(1)(b) Vic Act; s 9(b) NSW Act; s 13(b) Qld Act; s 9(b) SA Act; s 13(2) Tas Act; s 11(b) ACT Act.

8 s 11 Vic Act; s 10 NSW Act; s 14 Qld Act; s 10 SA Act; s 13(2) Tas Act; s 12 ACT Act.

9 s 14 (entitlement to be paid) and Sch 1, Div 2 (amount to be paid) WA Act; s 17 (entitlement to be paid) and Sch, Div 2 (amount to be paid) NT Act.

10 s 12(1)(a) Vic Act; s 11(1) NSW Act; s 15(1)(a) Qld Act; s 11(1)(a) SA Act; s 15(1) Tas Act; s 13(1)(a) ACT Act.

11 s 12(1)(b) Vic Act.

12 s 15(1)(b) Qld Act.

13 s 11(1A)(a) NSW Act.

14 s 11(1B)(a) NSW Act.

Jurisdiction	Days (after claim is made) when payment due
South Australia	15 business days <sup>15</sup>
Tasmania	20 business days for claims relating to residential structures, where the respondent is the Owner of the land or where the respondent is not a building practitioner <sup>16</sup> 10 business days for any other case <sup>17</sup>
ACT	10 business days <sup>18</sup>

Parties to construction contracts under the East Coast Model should carefully consider where there are any applicable default payment provisions in the jurisdiction in which they are operating. Parties should ensure that the payment terms outlined in the construction contract do not contravene the relevant statutory payment terms, thereby ensuring the parties are not exposed to default payment provisions.

For parties operating in Western Australia and the Northern Territory, it is notable that both jurisdictions prohibit terms in construction contracts that provide for payment to be made more than 50 days after the payment is claimed. In Western Australia, the contractual time period is read down to require payment within 50 days after payment is claimed and in the Northern Territory, the contractual time period is read down to 28 days after payment is claimed.<sup>19</sup>

- **Pay when paid provisions**

Some construction contracts may include terms that seek to make a party's liability under contract conditional on them receiving payment from another person, whether or not they are a party to the contract (a 'pay when paid' provision). A party would be inclined to include a clause such as this in order to protect their cash flow in the event that an upstream Contractor failed to make timely payment.

Under security of payment laws however, 'pay when paid' provisions are void or of no effect in each jurisdiction.<sup>20</sup> As a result, parties must carefully plan their expected cash flow and ensure that contingencies are in place to meet liabilities in the event that another party does not pay them.

## ***Drafting implications***

The application and content of security of payment laws vary from state-to-state. When drafting payment provisions in a construction contract, parties should ensure that they are aware of the statutory terms that operate alongside express terms in a construction contract, and those which serve to override contractual terms where those terms are not in line with those provided for under statute.

---

<sup>15</sup> s 11(1)(b) SA Act.

<sup>16</sup> s 15(2) and s 19(3)(a) Tas Act.

<sup>17</sup> s 15(2) and s 19(3)(b) Tas Act.

<sup>18</sup> s 13(1)(b) ACT Act.

<sup>19</sup> s 10 WA Act; s 13 NT Act.

<sup>20</sup> See: s 13 Vic Act; s 12 NSW Act; s 14 ACT Act; s 12 NT Act; s 16 Qld Act; s 12 SA Act; s 16 Tas Act; s 9 WA Act.

© 2016 PricewaterhouseCoopers. All rights reserved.  
PwC refers to the Australian member firm, and may sometimes refer to the PwC network.  
Each member firm is a separate legal entity. Please see [www.pwc.com/structure](http://www.pwc.com/structure) for further details.

At PwC Australia our purpose is to build trust in society and solve important problems. We're a network of firms in 157 countries with more than 208,000 people who are committed to delivering quality in assurance, advisory and tax services. Find out more and tell us what matters to you by visiting us at [www.pwc.com.au](http://www.pwc.com.au)

Liability limited by a scheme approved under Professional Standards Legislation.