

## New obligations for builders and large businesses: NSW SOP Regulation and the Payment Times Reporting Act

Head contractors in the building and construction industry need to be aware of additional reporting requirements created by recent changes to Security of Payment regulations in NSW.

Separately, in a move likely to impact many organisations including large builders, the Commonwealth Government has introduced legislation requiring all large entities to report on their small business payment practices and terms.

The *Building and Construction Industry Security of Payment Regulation 2020 (NSW) (NSW SOP Regulation)* came into effect on 20 September 2020, repealing the previous 2008 version of the regulations. A key change to the Regulation is the introduction of a requirement for head contractors to provide individual retention money trust account ledgers to subcontractors every three to six months.

The *Payment Times Reporting Act 2020 (Cth)* came into effect on 1 January 2021. The Act requires entities earning over \$100 million in revenue to report every six months on payment times of small business invoices, as well as payment practices, terms, and small business supply chain finance requirements.

In this document, we take an in-depth look at the changes to the Security of Payment Regulations and the reporting requirements introduced by the *Payment Times Reporting Act* legislation, including the penalties for non-compliance.

As compliance with the new obligations may involve significant cost to some businesses, we have identified a number of ways costs may be reduced.

Businesses could consider taking the following steps:

- take alternative security to retention monies where appropriate;
- obtain agreement (in writing) from subcontractors that ledgers will only be provided every six months - it would be sensible to include such a provision in all subcontracts;
- develop a register of all small business invoices, due dates and payment times in a central location to allow for easy extraction; and
- automate processes where possible.

### New Reporting Obligations for Retention Money Trust Accounts under the NSW SOP Regulation

#### Application of the NSW SOP Regulation and general requirements

The *NSW SOP Regulation* applies to construction head contractors where the value of the head contract is at least \$20 million.<sup>1</sup> This is unchanged from the prior version of the regulation.

If a head contract does not state a total price, the value will be the market value of the head contract, or the goods and services to be supplied under the head contract.

Head contractors are required to hold any retention monies from subcontractors in a trust account with an approved deposit-taking institution (which has either been approved under section 87 of the *Property and Stock Agents Act 2002* (NSW) or in writing by the Secretary) (Approved ADI).<sup>2</sup> The trust account must either be:

- a. a separate trust account containing money held for a particular subcontractor; or
- b. a separate trust account for all retention money held in connection with one or more construction contracts.

(Retention Money Trust Account).<sup>3</sup>

The Regulation defines retention money as any part of money payable to a subcontractor under a subcontract which is retained by the head contractor as security for the subcontractor performing its contractual obligations. It therefore excludes forms of security which are in the nature of bank guarantees or insurance bonds from the operation of the Regulation.

Head contractors are required to ensure that retention money is paid into a Retention Money Trust Account as soon as possible, but no later than five business days after it is required to retain the money.<sup>4</sup> In other words, five business days after the relevant payment claim becomes due for payment.

### **Records and reporting requirements: Subcontractors**

The most substantial changes to the *NSW SOP Regulation* are the new requirements surrounding the Retention Money Trust Accounts.

Head contractors must keep records of all Retention Money Trust Accounts. These records must show the amounts deposited into or withdrawn from each account.<sup>5</sup>

The *NSW SOP Regulation* also requires head contractors to keep a separate ledger for each subcontractor, documenting the retention money held in respect of each subcontract.<sup>6</sup>

Each ledger must describe the following:

- a. the amounts deposited into or withdrawn from the Retention Money Trust Account in respect of the subcontractor;
- b. the date of each transaction; and
- c. the balance after each transaction.<sup>7</sup>

The head contractor and the subcontractor can agree in writing how often a copy of the ledger must be provided to the subcontractor. However, this time cannot be less frequent than every six months.<sup>8</sup>

If the head contractor and the subcontractor have not agreed to a specific time in writing, the ledger must be provided to the subcontractor every three months.<sup>9</sup>

The head contractor must retain all records for three years after the Retention Money Trust Account is closed.<sup>10</sup>

The maximum penalty for not complying with the reporting requirements described above is currently \$110,000 for a corporation, or \$22,000 for an individual.

### **Reporting requirements: NSW Fair Trading**

Under the previous regulation, head contractors were required to provide an account review report and retention account statement to the Commissioner for Fair Trading, Department of Finance, Services and Innovation (NSW Fair Trading) in respect of each financial year.

The effect of the Regulation is to modify the previous requirements. The reporting requirements to NSW Fair Trading are now as follows:

1. Within 10 business days of establishing a new Retention Money Trust Account, head contractors must notify NSW Fair Trading in writing, and include the following information:
  - a. the name of the Approved ADI at which the Retention Money Trust Account has been established;

- b. the branch or BSB number of the branch at which the Retention Money Trust Account has been established;
  - c. the name of the account;
  - d. the number of the account;
  - e. the opening balance of the account; and
  - f. the date the account was opened.<sup>11</sup>
2. Head contractors must also notify NSW Fair Trading as follows:
- a. written notification within five business days after becoming aware that one of its Retention Money Trust Accounts has been overdrawn, including the following information:
    - i. the name and number of the account;
    - ii. the amount by which the account is overdrawn; and
    - iii. the reason for the account being overdrawn;<sup>12</sup>
  - b. written notification of the closure within 10 business days after closing a Retention Money Trust Account.<sup>13</sup>

Head contractors can notify NSW Fair Trading by letter or by emailing [SecurityofPayment@customerservice.nsw.gov.au](mailto:SecurityofPayment@customerservice.nsw.gov.au).

The current maximum penalty for not complying with the reporting requirements described above is \$110,000.

## Reporting requirements under the *Payment Times Reporting Act*

The Commonwealth *Payment Times Reporting Act* introduced obligations for reporting entities relating to timely payment of invoices from small business suppliers. The Act defines small businesses as entities carrying on an enterprise in Australia which had an annual turnover of less than \$10 million for the most recent income year.<sup>14</sup> An “income year” is defined by the *Payment Times Reporting Act* as having the same meaning as in the *Income Tax Assessment Act 1997* (Cth) or, if income tax is not payable by the entity under that Act, it means a financial year or, if the rules prescribe a period of 12 months, the prescribed period.

For a majority of Australian corporations, this will correspond with the typical financial year of 1 July to 30 June.

### Reporting Entities

All “reporting entities” must comply with the reporting obligations set out in the *Payment Times Reporting Act*.

In determining which entities will be “reporting entities”, the *Payment Times Reporting Act* distinguishes between “controlling corporations” and “members” of controlling corporations.

Controlling corporations are companies which are not the subsidiary of any other company.<sup>15</sup> Companies which are a subsidiary of another company are referred to as “members” of a controlling corporation’s group.

A controlling corporation:

- a. will be a reporting entity if it had an income of more than \$100 million in the previous income year,<sup>16</sup> or if the total income of all companies within the controlling corporation’s group was more than \$100 million for the previous income year;<sup>17</sup>
- b. will continue to be a reporting entity until the Payment Times Reporting Regulator (Regulator) confirms in writing that it is no longer a reporting entity;<sup>18</sup> and
- c. can apply in writing for a determination from the Regulator that it is no longer a reporting entity. The Regulator will make this determination if the entity’s total income for each of the past two income years was \$100 million or less.<sup>19</sup>

A member of a group of a controlling corporation:

- d. will be a reporting entity if the controlling corporation of the group is a reporting entity and the member entity's own income for the previous income year was at least \$10 million; and
- e. will cease to be a reporting entity immediately after the end of an income year if the entity is not a volunteering entity and if its total income for the that income year and the income year that immediately preceded it was less than \$10 million.<sup>20</sup>

## Reporting requirements

The *Payment Times Reporting Act* came into effect on 1 January 2021. All reporting entities must give the Regulator a payment times report for each reporting period.<sup>21</sup>

The reporting periods are based on the income year used by the individual reporting entity. The first reporting period is the first six months of that income year, and the second reporting period is the remainder of that income year.

Each payment times report must be given to the Regulator within three months after the end of the reporting period.<sup>22</sup>

Reporting entities can apply in writing to the Regulator for an extension of time to submit a report. Such an application must:

- a. describe the circumstances that led to the need for an extension;
- d. include evidence of those circumstances; and
- e. include any other information prescribed by the rules.<sup>23</sup>

The payment times report must be signed by a responsible member of the reporting entity,<sup>24</sup> and include all of the information set out in **Schedule A** below in respect of the relevant reporting period.

Any reporting entity which does not comply with the above requirements will incur a civil penalty of 60 units (currently \$13,320).<sup>25</sup>

A civil penalty of 350 units (currently \$77,700) will be incurred if a report is found to be false or misleading.<sup>26</sup>

Reporting entities must keep records of any information used to prepare a report for at least seven years after the end of the relevant reporting period. Failing to do so could result in a civil penalty of 200 units (currently \$44,400).<sup>27</sup>

The Department of Industry, Science, Energy and Resources website provides some general guidance which may assist in preparing the report or developing a precedent (<https://www.industry.gov.au/publications/payment-times-reporting-scheme-guidance-for-reporting-entities>).

## Schedule A - Information to be included in a payment times report

The *Payment Times Regulation Act 2020* (Cth) section 14 and *Payment Times Reporting Rules 2020* (Cth) rule 9 require any payment times report to include the following information:

- a. the reporting entity's name and ABN;
- b. a description of the reporting entity's main business activity in accordance with the Business Industry Codes;
- c. the relevant reporting period;
- d. a statement on the reporting entity's standard payment periods during the reporting period, including the shortest and longest payment periods for the entity;
- e. details and an explanation of any changes to the standard payment periods during the reporting period, including the shortest and longest payment periods for the entity;
- f. the proportion (calculated by the total number and total value) of small business invoices paid during the reporting period that were paid in accordance with the following:<sup>28</sup>
  - i. within 20 days after the day the relevant small business invoice was issued (the **issue day**);
  - ii. between 21 and 30 days after the issue day;
  - iii. between 31 and 60 days after the issue day;
  - iv. between 61 and 90 days after the issue day;
  - v. between 91 and 120 days after the issue day; and
  - vi. more than 120 days after the issue day;
- g. the proportion (calculated by total value) of all of reporting entity's procurement which was procured from small business suppliers;
- h. the details of the reporting entity's principal governing body;
  - i. if the entity is a member of a controlling corporation's group, identify the controlling corporation;
- j. a declaration by a responsible member of the reporting entity that the report will be provided to its principal governing body;
- k. the name of the responsible member of the reporting entity who signed the report, and the date it was signed;
- l. the name and contact details of the person giving the report to the Regulator;
- m. the details of any notifiable event which occurred since the last report was given to the Regulator;
- n. details of the practices or arrangements used by the reporting entity for receiving or paying small business invoices;
- o. details of any practices or arrangements used by the reporting entity which require a small business to pay an amount, including a subscription or membership fee:
  - i. to participate in the reporting entity's procurement processes, including to lodge a tender; or
  - ii. for the reporting entity to accept a small business invoice issued by the small business;
- p. if the reporting entity used small business supply chain finance arrangements during the reporting period:
  - i. a description of the arrangements used;
  - ii. a statement of the proportion (calculated by the total number and total value) of small business invoices paid by the reporting entity that were paid using those arrangements; and

- iii. details of any benefits, including commissions or other payments, received by the reporting entity during the reporting period from the providers of those arrangements;
- q. a statement on whether small businesses were required to agree to use small business supply chain finance arrangements to participate in the reporting entity's procurement processes or to receive payments in relation to small business invoices;
- r. a statement on when the report will be provided to the reporting entity's principal governing body; and
- s. any additional information providing context or explanation in relation to other information included in the payment times report.

In addition, the values reported should be to the nearest whole number, in Australian dollars, and exclusive of GST where appropriate.<sup>29</sup>

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## Endnotes

- 1. *Building and Construction Industry Security of Payment Regulation 2020* (NSW) reg 6.
- 2. *Ibid* reg 5.
- 3. *Ibid* reg 8.
- 4. *Ibid* reg 8(2).
- 5. *Ibid* reg 16(1).
- 6. *Ibid* reg 16(2).
- 7. *Ibid* reg 16(3).
- 8. *Ibid* reg 16(4).
- 9. *Ibid*.
- 10. *Ibid* reg 16(5).
- 11. *Ibid* reg 9(3).
- 12. *Ibid* reg 13.
- 13. *Ibid* reg 14.
- 14. *Payment Times Reporting Act 2020* (Cth) s 5 (*'Payment Times Reporting Act'*).
- 15. *Ibid* s 4.
- 16. *Ibid* s 7(2)(i).
- 17. *Ibid* s 7(2)(ii).
- 18. *Ibid* s 7(3).
- 19. *Ibid* s 7(5)-(7).
- 20. *Ibid* s 7(4).
- 21. *Ibid* s 12.
- 22. *Ibid* s 13(1).
- 23. *Payment Times Reporting Act* (n 15) s 13(3).
- 24. *Ibid* s 14(5).
- 25. *Ibid* s 15.
- 26. *Ibid* s 16.
- 27. *Ibid* s 29.
- 28. *Ibid* s 14(1)(a)-(n), (4); *Payment Times Reporting Rules 2020* (Cth) r 9.
- 29. Australian Government Department of Industry, Science, Energy and Resources, 'The Payment Times Reporting Scheme at a glance', *Australian Government Department of Industry, Science, Energy and Resources* (Web Page) <<https://www.industry.gov.au/data-and-publications/payment-times-reporting-scheme-guidance-for-reporting-entities/the-payment-times-reporting-scheme-at-a-glance>>.



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