



Small
Business
Commissioner

NSW Small Business Commission
Level 1, 10 Valentine Avenue,
Parramatta NSW 2150
PO W275, Parramatta Westfield NSW
2150
T 1300 795 534
www.smallbusiness.nsw.gov.au

Our Reference: TA20/4391

Mr John Tansey
Security of Payment Regulation 2020
Policy and Strategy, Better Regulation Division
Locked Bag 2906
LISAROW NSW 2252

By email: SecurityofPaymentPolicy@customerservice.nsw.gov.au

Dear Mr Tansey

Building and Construction Security of Payment Regulation 2020

The NSW Small Business Commission (NSWSBC) welcomes the opportunity to provide feedback on the Regulatory Impact Statement – Building and Construction Regulation 2020.

The NSWSBC advocates on behalf of small businesses in NSW, provides mediation and dispute resolution services, and speaks up for small business in government.

Small businesses are the engine room of the NSW economy and around 128,000 NSW small businesses are in the construction industry, representing the single largest industry group in NSW.

Cash flow and liquidity are some of the biggest challenges facing construction businesses. The ASIC data highlights that the top two nominated reasons for construction business failure in 2018-19 were inadequate cashflow, or high cash use and poor financial control, including lack of records. These challenges are expected to be heightened in the current COVID-19 business environment.

The NSWSBC has been a strong advocate for changes to the Building and Construction Industry Security of Payment Act 1999 (SOPA) since 2013. The NSWSBC has presented three previous submissions in response to the proposed reforms to the Security of Payment Legislation, regarding the 'deemed' statutory trust proposal, the Security of Payment Reforms implementation options paper released in December 2018 and the Financial impact analysis of Statutory Trusts in the building and construction industry consultation in July 2019.

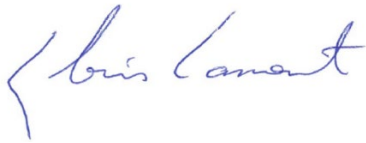
The NSWSBC welcomes the Building and Construction Industry Regulation 2020. The updated Regulation is a crucial part of reform for the industry and will assist in supporting the SOPA Amendment Act that was introduced in October 2019. It is important to note, however, that the changes to SOPA last year and the introduction of the updated Regulation need to be part of a broader compliance and enforcement framework that captures and links various regulations across the commercial and Government supply chain in the construction industry.

Subcontractors in the construction industry are still faced with challenges related to late or non-payments and these issues were highlighted in results from a survey with construction businesses carried out by the NSW SBC in NSW in late 2019. Responses to the survey pointed to cashflow, late/non-payments, finding new contracts, and managing expenses, overheads and staff as the main business issues. There was also a reported lack of awareness of rights under SOPA, including knowing when to enact rights or where to report issues. Only 3.9% of respondents said they had ever engaged an Authorised Nominated Authority. The results highlight the ongoing appetite for practical solutions to late/non-payment moving forward.

We encourage the Department of Customer Service to continue to engage with stakeholders with any changes to underpinning policy and guidelines in this area of work in the future.

Please find attached our detailed comments in relation to the questions outlined in the Regulatory Impact Statement (Appendix 1) and a copy of the results from the survey conducted with the construction industry (Appendix 2). For further information, please contact Ms Sylvia Georgiou, Principal Advisor on 0417 463 707 or email sylvia.georgiou@treasury.nsw.gov.au.

Yours sincerely

A handwritten signature in blue ink that reads "Chris Lamont". The signature is written in a cursive style with a large initial 'C'.

Chris Lamont
NSW Small Business Commissioner
23 July 2020

Attached: Appendix 1 and Appendix 2

Appendix 1

Regulatory Impact Statement – Building and Construction Industry Security of Payment Regulation 2020 – June 2020

Question	Page No	Answer
1. Is the commencement date of 1 September 2020 for the proposed Regulation appropriate? Why or why not?	20	<p>The commencement date is appropriate as the Building and Construction Industry Security of Payment Amendment Act 2018 (the Amendment Act) commenced on 21 October 2019 and it is important to implement the updated Regulation to support the Amendment Act and complete the review process for the Act that began in 2018 as soon as possible.</p> <p>However, the NSW SBC is keen to understand how the updated regulation will be communicated to educate the supply chain, particularly for small businesses to understand their rights and obligations as a result of the updated Regulation.</p>
2. Do you support maintaining the exemption for owner occupier construction contracts? Why or why not?	22	No comment.
3. If the exemption is removed, are additional consumer protection safeguards required? Why or why not? If so, what safeguards do you suggest and please provide comment on the suitability of imposing contract requirements under the Home Building Act 1989, noting the threshold requirement.	22	No comment.
4. Do you support a reduction in the retention money trust account threshold from \$20 million to \$10 million? Why or why not?	23	The NSW SBC welcomes Clause 6 of the proposed Regulation that will reduce the threshold for projects from a value of at least \$20 million to projects with a value of at least \$10 million for contracts entered from 1 January 2021. This is a positive step toward achieving the recommendations in both the Murray Review and the Collins Inquiry that supported the expansion of retention money trust requirements to all contracting parties under security of payment legislation. The NSW SBC agrees that it is critical to countering the situation of head contractors

		misusing and withholding retention moneys duly owed to subcontractors.
5. Are there any reasonable circumstances in which retention money could not be deposited into a trust account with 7 days?	23	No. It is important that retention money is deposited into a trust account as soon as possible to ensure all contractors in the supply chain are paid within a reasonable time period. This will assist in reducing the risk to smaller subcontractors in the supply from bearing the costs of projects and deter head contractors from misusing or withholding retention moneys from small subcontractors that struggle with cashflow. Furthermore, this will also help to boost the flow of cash through the supply chain as it is often lower tier contractors that suffer from any delays in payments.
6. Is the suggested timeframe of 7 days to deposit money into a trust account appropriate? If not, what is a more appropriate timeframe?	23	Yes
7. Is there any reason why a subcontractor should not be provided with a copy of the ledger for retention money?	24	It is important that the Regulation supports subcontractors throughout the supply chain by enabling easy access to information that will potentially impact timely payments. The NSW SBC supports that under clause 16(2) of the proposed Regulation, the head contractor will be required to keep a separate ledger for retention money held for each subcontractor. The NSW SBC also supports the proposal that subcontractors must be provided with a copy of the ledger at least once every 3 months, or as often as agreed in writing between the two parties, provided it is at least once every 12 months.
8. Is the timing proposed for providing copies of the ledger reasonable? If not, why?	24	Yes. It is important that a copy of the ledger is provided to each subcontractor as soon as possible and that the Regulation supports transparency. Small subcontractors in particular do not have the time or resources to be chasing ledgers and head contractors should be required to openly share information that is critical in ensuring payments will be made on time to subcontractors.
9. Do you support the proposed maximum penalty units for these offences? If not, why?	25	The NSW SBC supports maximum penalty amounts to deter non-compliant conduct and to increase accountability in the management of retention monies. The unit must be calibrated in line with strong evidence and modelling that offers an effective deterrent to the commission of these offences. This also needs to be supported through an education campaign, with a governance model that ensures compliance.

10. Are the proposed qualifications and experience appropriate for adjudicators? Why or why not?	28	The NSW SBC supports the recommendations in the Murray Report that a minimum mandatory set of skills and experience would provide a benchmark for the quality expected of adjudicators and would support consistency.
11. Should it be mandatory for all adjudicators to have specific qualifications and experience? If not, why?	28	Yes. This will be critical to ensuring that there is consistency among adjudicators skills and experience and also with advice provided to parties involved in an adjudication.
12. Do you agree with the number of CPD points that must be undertaken by an adjudicator? If not, why?	28	Yes. Continuing professional development (CPD) will be important and will ensure continuing consistency among adjudicator qualifications and knowledge of new requirements and industry developments.
13. Are the CPD education and training activities for adjudicators appropriate? If not, what types of CPD activities would be more appropriate?	28	The requirements should be rigorously tested to ensure that they will upskill and maintain the relevant CPD needs of the industry.
14. Do you agree with the proposed transitional period for CPD of 1 September 2021? If not, what is a more suitable transitional period?	28	Yes. The transitional provision proposed in the Regulation will assist in preparing adjudicators prepare for the mandatory CPD from 1 September 2021.
15. Is the 5-year period proposed for renewal of an ANAs authorisation suitable? If not, why?	28	Yes. The 5-year period proposed for renewal is reasonable.
16. Is the date proposed for the reduction in project value suitable? If not, why?	29	Although it is important to implement the reduction in project value for retention money trusts as soon as possible, it is accepted that the proposed Regulation provides a transitional period to allow industry to adapt to the new requirements and postpones the applicability of the \$10 million threshold requirement to contracts entered into on or after 1 January 2021.

Appendix 2

NSWSBC Construction Industry Survey Results – December 2019

Introduction

The NSWSBC conducted an online survey in the final quarter of 2019 with the aim of collecting baseline data on subcontractors' experience in the industry and better understand the construction industry's needs.

Methodology:

Targeted questions were developed to understand (questionnaire attached at Appendix A):

- size of business
- construction sub industry
- current business issues
- if they are subcontracting to any NSW Government projects
- if they investigate the solvency and reputation of construction businesses before subcontracting for them
- if they carry out their own estimation of time, cost and materials before engaging as a subcontractor
- if they typically sign a contract before commencing work
- if they project cash flow when preparing for projects
- what cash flow tools and resources they currently use
- how often they monitor cashflow
- if they've had any problems in the past with late or non-payment on NSW, other state, federal or commercial projects
- impact on their business resulting from any late/non-payments
- if they currently report late/non-payments to a relevant government agency
- how long they usually wait before reporting a late/non-payment
- awareness and understanding of NSW Building and Construction Industry Security of Payment Act (SOPA) and if they have ever made a claim under SOPA or ever use the services of an authorised nominating authority
- interest in connecting with either Business Connect or a NSWSBC mediation officer.

The online survey was initially shared on social media, resulting in 50 responses. Email invitations were then distributed to all active construction businesses in NSW listed in the Australian Business Register that also had an email address. Responses to all questions in the survey were voluntary.

Use of survey:

Survey results can be used to:

- inform and plan for future advocacy work
- provide an industry snapshot on our website
- provide information to other government agencies and working groups (eg Construction Leadership Group) and inform strategies focusing on skills and increasing awareness of subcontractor issues

Survey findings

Close to 700 responses received (n = 693)

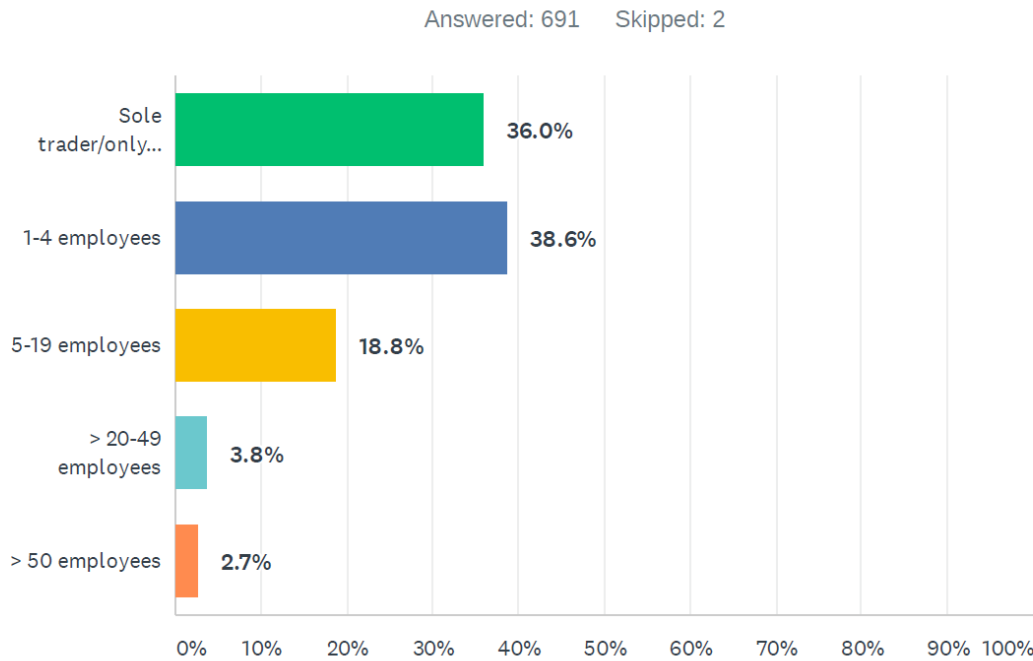
Results point to cashflow, late/non-payments, finding new contracts and managing expenses and overheads and staff as the main business issues.

There was also a reported lack of awareness of rights under SOPA, knowing when to enact rights or where to report issues.

There is appetite for practical solutions to late/non-payment moving forward.

Who filled out the survey?

- 93.4% of respondents were small businesses with less than 20 employees.

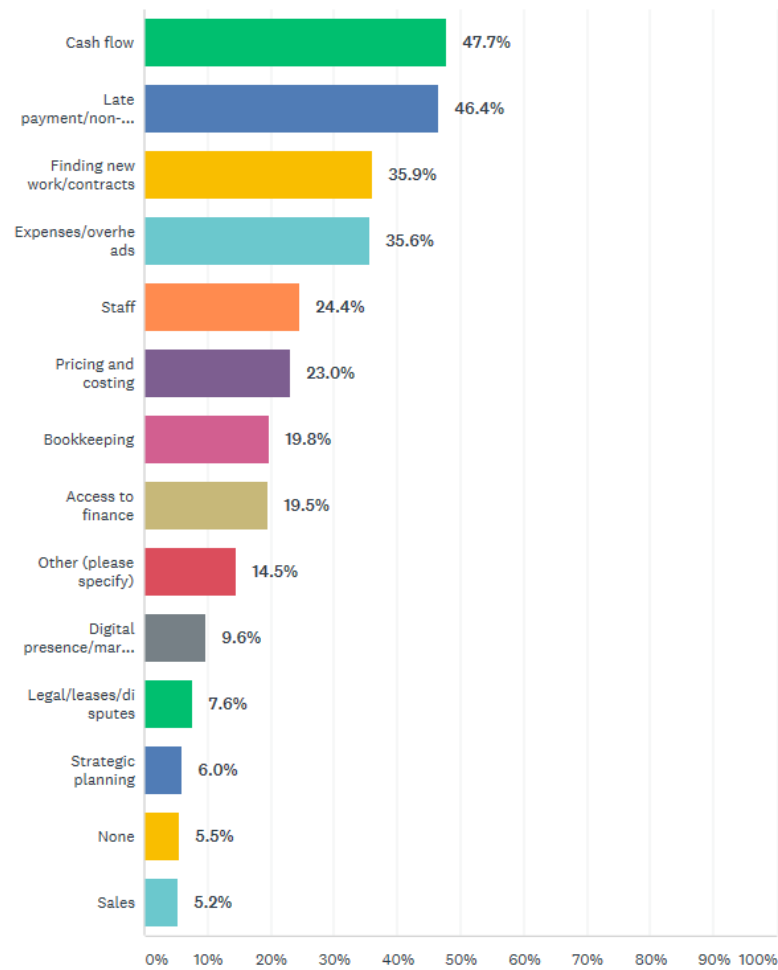


- Respondents were from a mix of ANZSIC sub-industries, with carpentry services (20.4% of responses), other construction services (16%), electrical services (10.9%) and plumbing services (7.8%) accounting for 55.1% of total responses.

Main business issues

- Results point to cashflow, late/non-payments, finding new contracts and managing expenses and overheads and staff as the main business issues.

Answered: 688 Skipped: 5



How they do business

- 13% of respondents stated they were currently subcontracting to a NSW Government infrastructure project.
- 52.6% of respondents noted they do not investigate the solvency/finances and reputation of construction businesses before subcontracting to them (a further 5.5% were unsure).
- 95.3% reported they carry out their own estimation of time, cost and materials before starting a subcontracting job.
- 63% of businesses that responded to the survey also said they typically sign a contract and negotiate a payment schedule before starting work.
- 62.3% also stated they forecast their cashflow in preparation for projects.
- To forecast their cashflow, 35.8% said they use a cashflow spreadsheet, 26% noted software, 20.3% accountant, 10.3% finance staff in the business, and 3.5% a business advisor.
- When asked about monitoring cashflow, 44% said they monitor their weekly, 32.8% selected daily, and 11.7% monthly, 6.6% fortnightly, 3.1% quarterly and only 1.3% said they never monitor their cashflow.

Late payments/non payments

When asked if they had any challenges in the past with receiving payments for projects they have subcontracted to:

- Around 20% have had some problems in the past with receiving payments on NSW Government projects – 5.7% were experienced in the past 3 months, 3.4% in the past 6 months, 5.2% in the past 12 months and 5.7% greater than 12 months.
- 55.7% have had a problem with receiving payments from commercial projects – 19.3% in the past 3 months, 11.1% in the past 6 months, 11.5% in the past 12 months and 13.7% greater than 12 months.
- 92% stated they had no payment issues with Federal Government projects and 88% said they had no payment problems with local government projects.
- The results above should be interpreted with caution when comparing across government jurisdictions as they could also reflect the level of engagement by these subcontractors with each jurisdiction.

Reported impacts of late/non-payments

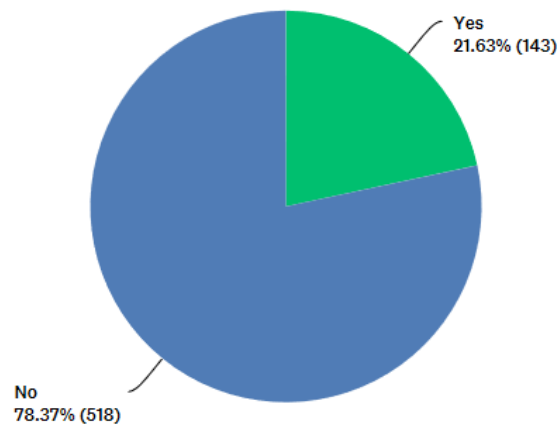
- Cashflow – go into overdraft, cannot pay BAS, impacts ability to pay staff and accounts, trade bills/supplier and personal bills such as mortgage and utilities, use of credit while waiting for payment.
- Time – chasing payments, mediating or litigating and less time looking for new contracts.
- Business operation – reduction in staff numbers, ability to buy materials for future jobs, limits opportunity to employ more staff.
- Personal – stress, impacts relationships, marriage breakdown.
- Cost – litigation and debt recovery.
- Tax – forced into payment plans with ATO in order to ensure wages were paid first, penalised by ATO, late with superannuation payments, paid interest in ATO bill.
- Business – closed, went into liquidation, close to bankruptcy.
- Other – impacts credit rating when cannot meet other financial obligations.

Reporting non/late-payments

- Most businesses don't know which agency to report a late/non-payment so nothing reported.
- Those that do report a late/non-payment typically wait for 3 months before doing so (19%), or 1 month (18.6%), with only 4.5% reporting the issue immediately and 6.9% in a week.

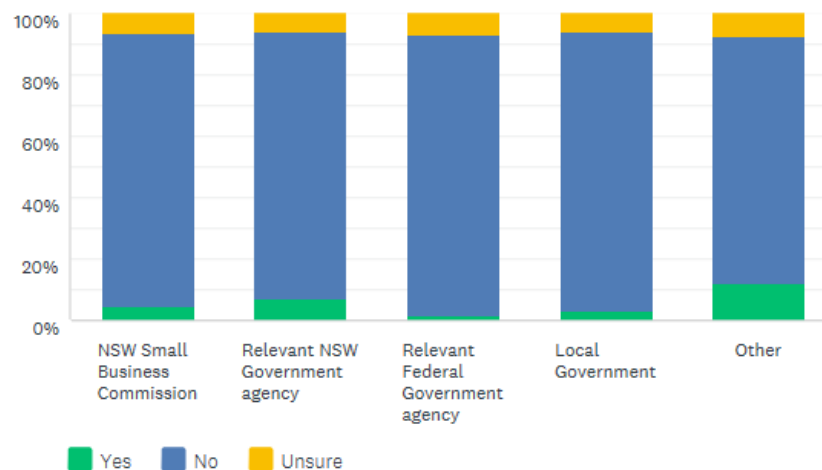
Do you know which government agency you should report a non-payment issue to?

Answered: 661 Skipped: 32



Did you report the non-payment to a relevant agency?

Answered: 607 Skipped: 86

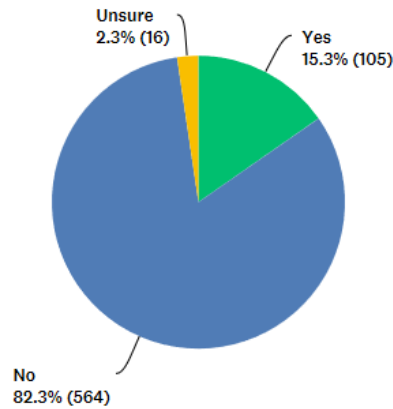


NSW Building and Construction Security of Payment Act (SOPA)

- Most respondents were either not aware of SOPA (37.8%) or said they would like more information (32.7%).
- Similarly, 42.7% said they did not know when to enact SOPA and 35.8% said they would like more information on when to enact.
- Only 15.3% of respondents have ever used SOPA to make a payment claim.

Have you ever used the NSW Building and Construction Security of Payment Act (SOPA) to make a payment claim?

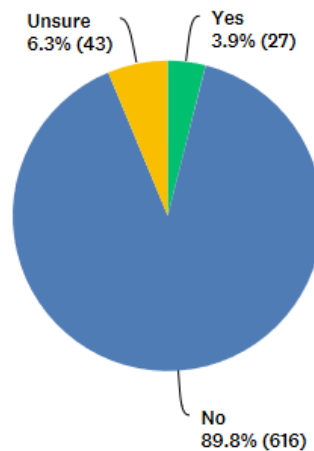
Answered: 685 Skipped: 8



- Only 3.9% identified that they had ever engaged the services of an Authorised Nominating Authority.

Have you ever engaged the services of an Authorised Nominating Authority (ANA)?

Answered: 686 Skipped: 7



Other respondent feedback regarding SOPA

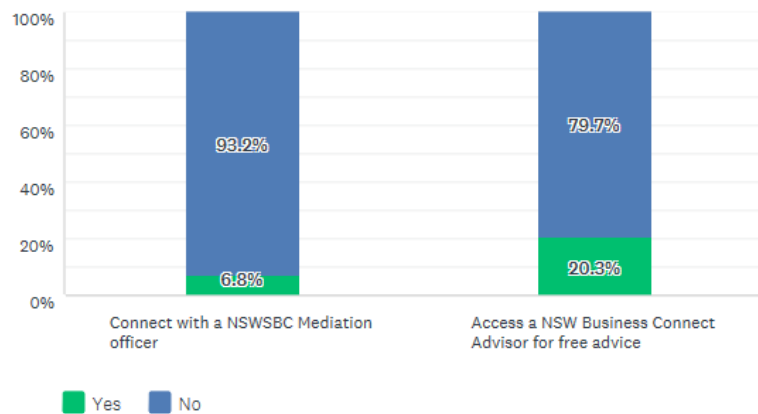
- Takes too long for a subcontractor to obtain enforceable action
- Subcontractors bear the cost of putting in the claim
- SOPA useless - didn't receive any \$ for our outstanding invoice
- Rarely use SOPA because it's confusing, clumsy and difficult to negotiate
- On the job urgent issues occur that need immediate action – if pause job to get variation in place, threatened with late penalties. Submit the variations at the completion of the job, but then construction companies refuse to pay – commercial project example
- Variations is where money is usually lost as variations are typically not funded.

Referrals from survey

- All referrals from the survey were sent to Business Connect and NSWBC mediation services. Both Business Connect and NSWBC mediation services have confirmed they have communicated with all businesses that requested contact.

Would you like to:

Answered: 657 Skipped: 36



Other comments/suggestions from respondents

- Non-licence or insurance issues in industry
- Private builders/owner builders also have non-payment issues
- Paperwork/red tape to start work – licence renewal fees too high – HBCF, STP, BAS, Fair Trading, local council registration
- Small businesses do not have resources or time for paperwork
- Any work done under \$10,000 for builders should be paid within 7 days
- Unlicensed tradespeople working in industry
- Need a simple standard contract that can be used by small businesses in construction
- SOPA Act and Guidelines should be sent to all contractors who register or start their contract licences
- Database of non-paying companies
- Red tape on government jobs bigger issue than non-payment
- Project bank accounts (PBA's)
- Pheonixing – need to discourage
- Needs to be a body independent of MBA and HIA to address needs of subcontractors.