



How to Secure and Claim Retention Money

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Overview

- How to claim retention money under Security of Payment Legislation in NSW, QLD, ACT, SA and VIC?
- Tips and Traps in Contracts
- How to identify “Pay when Paid” provisions and claim release of retention money



Claiming Retention under SOP

Claiming Retention Money at Practical Completion

- Generally Contracts provide the following:
50% of retention money held will be released at practical completion with balance to be released after expiry of defects liability period
- Claim for 50% of retention included in last progress claim after practical completion



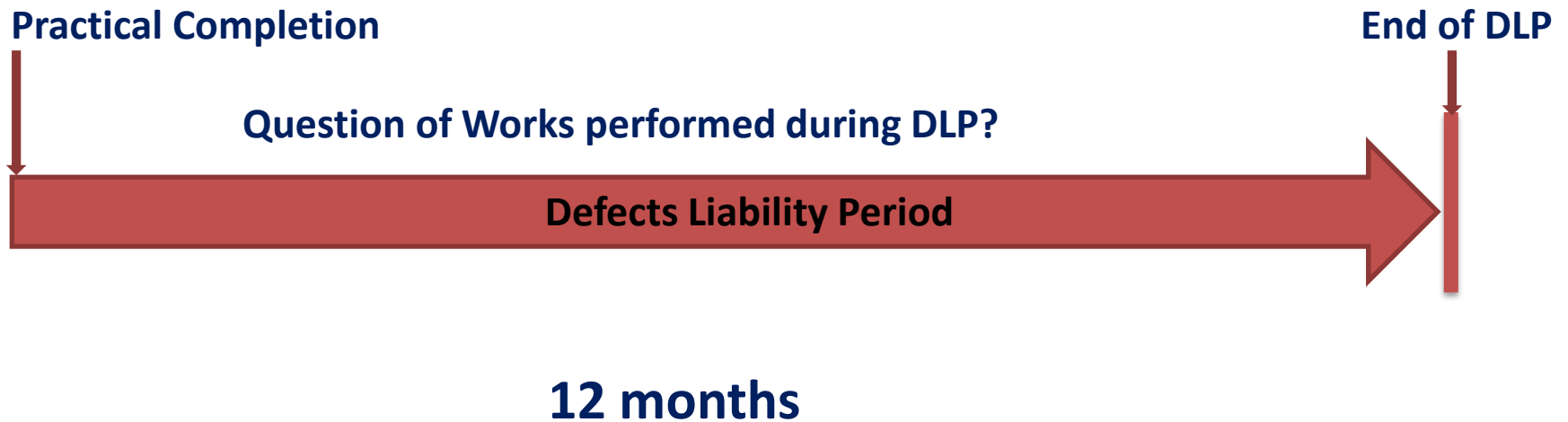
Expiry of Defects Liability Period : NSW, ACT & SA

Claiming Retention Money after expiry of DLP

- **Final Claim under Contract?**
- **No specific provisions in relation to final payment claims in Security of Payment Legislation NSW, ACT & SA**
- **General time limit for progress claims apply (s13(4) NSW, s10(2) ACT and s 13(4) SA) being the later of:**
 - **period determined by terms of contract; or**
 - ***12 months (or 6 months in SA) after the construction work to which the claim relates was last carried out***



Final Claims NSW and ACT





Expiry of Defects Liability Period -QLD

Claiming Retention Money after expiry of DLP

- **Specific timeframes for final payment claim s 17A(3) being the later of:**
 - **period worked out under the contract;**
 - **28 days after the end of the last defects liability period, if any, worked out under the contract;**
 - **6 months after completion of all construction work to be carried out under the construction contract.**



Expiry of Defects Liability Period -VIC

Claiming Retention Money after expiry of DLP

- **Specific timeframes for final payment claim s 9(2) and S 14 (5) being :**
 - **period determined by the terms of the contract;**
 - **3 months after the reference date specified in s9(2);**
 - **S 9(2)(d) – reference date for final payment on date immediately following expiry of defects liability period or issue of a certificate specifying the final amount payable under the contract**



Tips and Traps in Contracts

1. **Bank Guarantees cannot be claimed under SOP;**
2. **Make sure that the Contract provides for a final claim after expiry of Defects Liability Period;**
3. **Recourse against security terms must be reasonable – retention money should be security for performance and rectification of defects - not a source of cashflow for the Head Contractor;**
4. **What happens to retention money at Termination for Convenience ?**

Pay when Paid Provisions

Security of Payment Legislation provides that Pay when Paid Provisions has no effect in relation to any payment for construction work

Building and Construction Industry Security of Payment Act 2002 (VIC) – s 13

Building and Construction Industry (Security of Payment) Act 2009 (ACT) – s 14

Building and Construction Industry Security of Payment Act 1999 (NSW) – s 12

Building and Construction Industry Payments Act 2004 (QLD) – s 16

Building and Construction Industry Security of Payment Act 2009 (SA) – s 12

Pay when paid provision, of a construction contract means a provision of the contract –

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- (c) That otherwise make the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.*

Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5

- The High Court of Australia confirmed that any contract clause which ties the release of retention to some event under the Head Contract will be a pay when paid provision under the Security of Payment legislation and therefore the relevant clause is of no effect.
- What is the practical application of the High Court's finding?
- If your retention money clause is a “pay when paid” provision it will be of no effect, which means there is no longer any entitlement to withhold payment of retention money
- Demand early release of retention money!

Retention Money - “ Pay when Paid Provisions”

Examples of Pay when paid provisions:

- “(a) Upon the later of the occurrence of practical completion under the Subcontract or practical completion under the Head Contract the Contractor will release 50% of Security then held to the Subcontractor.*
- (b) The Contractor will release the balance of Security held after the later to occur of:*
- (i) expiry of the last defects liability period under the Head Contract; or*
 - (ii) delivery of a Deed of Release under sub-clause 10.16.”*

or

“50% of retention further held under the Subcontract, may be released upon request by the Subcontractor to the Contractor, following expiry of the last defects liability period under the Head Contract”

Conclusion



- **Time Limits for Final Claims**
- **Beware of unreasonable recourse terms**
- **Retention Money “pay when paid provisions”**
- **Demand early payment of Retention Money if applicable**
- **Contact Neca Legal if you are unsure about your rights to claim retention money**

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