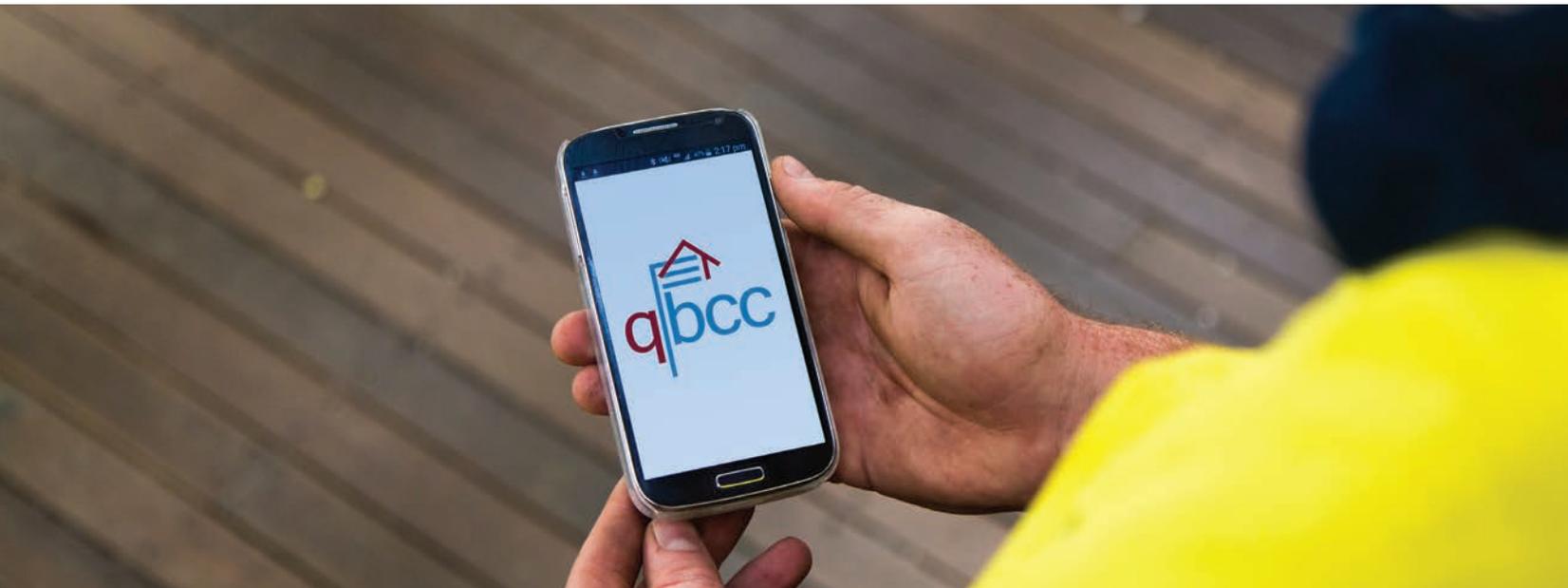


CONTRACTOR GUIDE TO PAYMENTS

INFORMATION ON THE RIGHTS AND RESPONSIBILITIES IN THE BUILDING AND
CONSTRUCTION INDUSTRY AROUND CONTRACTS, PAYMENTS AND DISPUTES.



APRIL 2022

WHO SHOULD USE THIS GUIDE?

Anyone who carries out building work, construction work or supplies related goods and services in Queensland. This includes:

QBCC licensees working as:

- head contractors
 - subcontractors
 - trade contractors
 - owner builders.
-

Suppliers

Other building and construction industry consultants

Such as:

- architects
 - engineers.
-

Principals in the contractual chain

Such as:

- developers
 - commercial building owners.
-

This guide does not include information for home owners.

Information about home owner's contracts is available in the *Domestic building contracts guide* on the QBCC website.



CONTRACTS

What is a contract?

A contract is a mutual agreement created between two or more parties that documents and records what the parties have agreed to do for each other.

Contracts can be written or oral. They should outline the commercial relationship between parties and document the terms of the agreement.

In the building and construction industry, there are many different types of contracts depending on who the agreement is between and the size and complexity of the project.



COMMON TERMS

The **contracting party** is the party that has engaged another party to carry out work under a contract.

The **contracted party** is the party that has **been engaged** under a contract to carry out work.



When is a written contract required?

The law requires a written contract to be in place in certain circumstances.

Table 1: Written contract requirements

TYPE OF WORK	PARTIES TO THE CONTRACT		WHEN IS A WRITTEN CONTRACT REQUIRED?	
	Contracting party	Contracted party		
Domestic building work	Resident home owner	Contractor	UNDER \$3,300	A written contract is not required.
			\$3,300 TO \$20,000	A written contract must be in place before commencing work.
			MORE THAN \$20,000	A written contract must be in place before commencing work. A copy of the <i>QBCC consumer building guide</i> must also be given to the owner.
Commercial or domestic building work	Contractor Owner of an investment or commercial property Developer	Contractor	\$10,000 OR LESS	A contract must be in writing before the work is completed.
			MORE THAN \$10,000	A contract must be in writing before work starts.

The QBCC strongly recommend that parties use written contracts and agree to all terms in writing as it provides more certainty for both parties than verbal contracts.

What do I need to include in the contract?

The law requires certain information to be included in a contract.

At a **minimum** your contract should include:

- the scope of the work covered by the contract
- when the work is to be completed
- the amount to be paid for the work (or how the amount is to be calculated)
- details of any agreement between the parties about retentions and securities
- the name and licence number of the building contractor
- the address of the site where the work is being carried out.

The law also prohibits the unlawful contract terms and provides a minimum and/or default terms for when contracts are invalid or do not cover what is required.

There are a range of templates for contracts available on the QBCC website. Alternatively, you may use one provided by your industry association or develop your own. If you are developing your own it is recommended that you seek legal advice to ensure that it complies with the legislation.



Entering into a contract with a home owner

All contracts for domestic building work above \$3,300 must be in writing. You must give the owner a fully signed copy of the entire contract (including any associated plans and specifications) **within 5 business days** after the contract is signed and entered into.

For contracts priced at \$20,000 or more, you must also give the owner the *QBCC consumer building guide* before they sign the building contract.

Residential construction work performed in Queensland valued at more than \$3,300 is subject to protection under the Queensland Home Warranty Scheme. The premium is linked to the insurable value of the work and is commonly included in the deposit amount payable when the owner signs the contract. You are required to collect the premium from the home owner and pay it to the QBCC within 10 business days after the date the contract was entered into or before the contracted work is started (whichever is earlier).

The QBCC has numerous contract templates associated with domestic building work available for free download on its website qbcc.qld.gov.au.

Engaging others to carry out work—contracting party requirements

Have a written contract

If you are engaging another party to carry out building work, you require a written contract either before the work starts or before the work is completed (see Table 1 on previous page). It's a good idea for all contracts to be in writing as soon as possible to reduce the potential for confusion as to the terms of your agreement. The contract should be signed and dated by both parties and kept by both parties for their records.

Terms of the contract

For some contracts, the due date stated in a contract cannot be greater than the following maximum timeframes. If they exceed these timeframes, they become void and the default timeframe of 10 business days applies:

- for **commercial building contracts** the maximum payment term is 15 business days after submission of the payment claim
- for **subcontracts or construction management trade contracts** the maximum payment term is 25 business days after submission of the payment claim.

Further, you cannot include 'pay when paid' provisions in your contract. These are also considered void and have no effect.

If the contract is silent on payment timeframe, the default timeframe of 10 business days also applies.

There are other default provisions provided for in the legislation that cover if the contract is silent or the terms included are void.

The QBCC has a QBCC commercial subcontract template which includes all required information and can be used by contractors and subcontractors to document commercial building agreements (including subcontracts for residential building work).

You may require a trust account

If you enter into a contract with a principal (as a head contractor) and are engaging subcontractors to carry out all or part of the work, you may require a project trust account.

Any parties withholding cash retention amounts as security under their contract may require a retention trust account.

Use the QBCC's online trust account tool to work out if you need a trust account. If a trust account is required, you must notify parties of the account.

Withholding retentions

If you are withholding cash retentions, there are limits on the amount of retentions and securities that you're able to withhold under a contract. Generally, the retention/security withheld must not exceed 5 per cent of the contract price at any time before practical completion. After practical completion, this reduces to 2.5 per cent of the contract price.

You are only able to withhold 10 per cent of cash retentions from each progress payment.



Being engaged to carry out work—contracted party requirements

Have a written contract

As a contracted party, you also have a responsibility to ensure that a contract is in writing. The contract should be signed and dated by both parties and a copy kept for your records.

Before signing a contract, make sure you read and understand the terms and conditions included, read the fine print carefully and don't be afraid to seek legal advice before signing.

! IMPORTANT

Confirm any variations to the contract in writing as soon as possible before work begins on them and request any other directions in writing. It is also a good idea to keep copies of emails, quotes and specifications—even notes about discussions that have been had.

Terms of the contract

There are default provisions and limits on the payment terms that may be included within a contract. If a contract doesn't include any terms or the terms are void, the legislation provides:

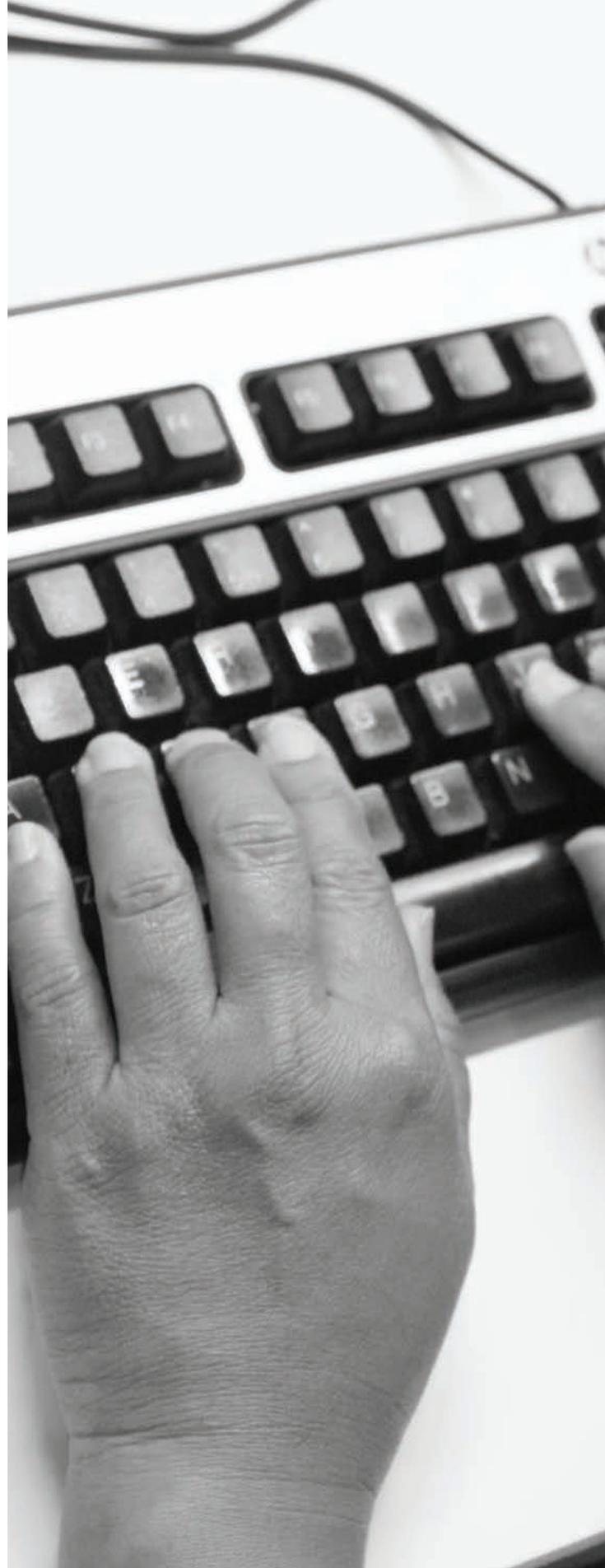
- default reference dates for when progress payment claims and the final payment claim may be submitted
- default dates for due dates for payment and the end of the defects liability period
- maximum amounts of retentions and securities that may be withheld under a contract
- rights to suspend work or claim interest on unpaid amounts
- rights to be paid or receive a payment schedule in respond to a payment claim submitted.

You may require a trust account

If you are engaged on a project trust project, you may not only be paid from a trust account but you may also require a trust account yourself. The contracting party (as trustee) is required to notify you of the trust account.

If you are further subcontracting out work under a project trust project and withholding cash retention amounts as security under the contract, you may require a retention trust account.

Use the QBCC's online trust account tool to work out if you need a trust account.



PAYMENTS

For claimants

Requesting payment

Submit a payment claim (invoice) for work that you have completed as per the requirements of your contract or as per the default provisions of the legislation. If you follow the requirements, you increase the payment protections provided by legislation.



COMMON TERMS

The **claimant** is the party that has given a payment claim.

Payment claim requirements

A payment claim must be in writing and:

- identify the work or goods and services to which the claim relates
- state the amount owed
- request payment of the amount owed.

An example payment claim template is available to download from the QBCC website.

Additionally, if you are a head contractor issuing a payment claim to the principal or developer, you must also include a **supporting statement**.

A **supporting statement** is a written document that tells the contracting party whether all subcontractors of a head contractor have been paid in full and whether there are any outstanding amounts owed to subcontractors. Only the head contractor who is contracted directly by the developer or owner needs to give a supporting statement and only if they have engaged subcontractors under the construction contract.

An example supporting statement template is available to download from the QBCC website.

When to give a payment claim

You may only give one payment claim for each reference date and only on or after a reference day (not before).

If you give a payment claim prior to a reference date it may be considered an invalid payment claim and you may lose your rights to payment in a dispute.

Your contract may specify when to make a claim for payment. If it doesn't specify, then the following timeframes apply:

- **no reference date provided in the contract**—the default reference date is the last day of each calendar month
- **progress payments or one-off payment claims**—must be given within 6 months of the date that the work was completed or good and services were supplied
- **final payment claims**—must be issued within the required timeframes (whichever is the longer timeframe between the below two options will apply):
 - » within 28 days following the end of the last defects liability period
 - » within 6 months of completing all construction work or supplying related goods and services under the contract.
- **termination reference date**—if your contract is terminated and the contract includes a final reference date after termination, you must use this as your reference date or the date of termination if your contract doesn't specify.

How much can you claim

A payment claim can include a claim for:

- work carried up to the reference date
- outstanding payments from a previous payment claim.

NOTE

You cannot claim for work that you are yet to complete.

You may also be entitled to interest for late progress payments for each day the amount is unpaid. Your contract may specify this or there is a penalty rate provided by legislation.

Final payment claims

In most cases, a building contract will require a final payment claim to be submitted for the payment of retention amounts. The contracting party is required to give you a notice of the end of defects liability period which signals that it is time to give your final payment claim.

A final payment claim must be submitted within:

- the date specified in the contract, or
- 28 calendar days after the end of the last defects liability period, or
- 6 months after the completion of all construction work under the contract.

Your rights to a response

When you issue a payment claim, the person owing you the payment must either:

- give you a payment schedule (within 15 business days or less if specified in the contract), or
- pay the claimed amount (in full) by the due date for payment.

If a payment schedule is provided proposing to pay a lesser amount, this scheduled amount must still be paid by the due date for payment.

When will you be paid

The due date for payment is either:

- as specified in your contract, or
- if your contract doesn't specify or the payment terms are void—10 business days after a payment claim is made.

How will you be paid

You should be paid as per your contract or as you have agreed upon. You are likely to receive a remittance advice following a deposit into your account.

Payment from a trust account

If the contracting party has a trust account and is withholding and/or paying you through this account, they are required to notify you of the account on transfer of funds relating to you.

You have more rights and protections under the legislation if you are paid through a trust account. You may request particular information from the trustee about transactions and amounts that relate to you as a beneficiary. There is a template on the QBCC website that you can use for this request.

See QBCC's *Beneficiary guide—trust accounts* on the website for further information.

For respondents

Making payments

You should never ignore a payment claim.

If someone claims you owe them money and gives you a payment claim, you must respond by paying and/or providing a payment schedule within 15 business days after receiving the payment claim or earlier if the contract specifies a shorter timeframe.



COMMON TERMS

The **respondent** is the party that has received a payment claim.

Payment schedules

You are required to give a payment schedule if you do not pay the claimed amount in full by the due date for payment.

You should give a payment schedule if you:

- do not agree with the amount claimed and propose to pay a lesser amount
- believe that the payment claim is invalid
- are disputing the claim
- are withholding cash retention amounts from payment.

Document requirements

A payment schedule is a written document that must:

- identify the payment claim to which it is responding
- state the amount—if any—the contracting party intends to pay
- state all reasons for paying the lesser amount or for withholding payment.

An example payment schedule template is available to download from the QBCC website.

Timeframe requirements

You must pay the claimed or scheduled amount in full by the due date for payment. The due date for payment is either:

1. as specified in your contract or
2. if your contract is silent or the payment terms are void—10 business days after a payment claim is made.

If you give a payment schedule proposing to pay a lesser amount, you must still pay the scheduled amount by the due date for payment.

How to make payment

You are required to pay the contracted party as per your contract or as you have agreed upon. Depending on the terms of your contract, a remittance advice may be required to notify the contracted party that you have paid.

Payment from a project trust account

If you are a head contractor and have a project trust account, you are required to pay subcontractors through this account.

NOTE

Subcontractors are parties that are directly engaged by you to carry out protected work or related services for the project trust project. You cannot pay subcontractors for other projects, employees or persons engaged only to supply goods from the project trust account.

If there are insufficient funds in the project trust account to make payment, you are required to top up the account.

All payments from a project trust account must be deposited into the subcontractor's nominated bank account. You are required to notify the subcontractor of transfers from a project trust account. There is a template on the QBCC website for this notice—*Payment advice – withdrawal from project trust account*.

See QBCC's *Trustee Guide – retention trusts* on the website for further information.

Withholding cash retentions

If you are withholding cash retentions from a progress payment, you are required to notify the claimant of the amount of retentions withheld. You may be required to withhold the retention amounts in a retention trust account if the contract is for work on a project trust project. If so, retention amounts must be transferred to the retention trust account at the time of making payment.

The *Trustee guide—retention trusts* (available on the QBCC website) has further information.

REMINDER

There are limits on the amount of retentions and securities that you're able to withhold under a contract. Generally, the retention/security withheld must not exceed 5 per cent of the contract price at any time before practical completion. After practical completion, this reduces to 2.5 per cent of the contract price. You are only able to withhold 10 per cent of cash retentions from each progress payment.

Notice of end of defects liability period

If you are holding retentions or other securities after practical completion, you are required to notify your contractors about the end of the defects liability period and prompt them to issue their final payment claim. This notice must be given within 10 business days before the end of the defects liability period using the *S67NC Notice end defect period* form available on the QBCC website.

If the defects liability period is linked to the defects liability period for another contract, the notice may be given within five business days after you are given your defects liability notice under the other contract.

If the contract does not state or is unclear on when a retention amount or security is to be released, the default defects liability period is 12 months from the date of practical completion.

Releasing retention amount or security

You must release any retention amounts or securities withheld as per the requirements of your contract unless the amount has been paid into a court or is the subject of an ongoing dispute. There are significant penalties for a failure to do so.

Payment from a retention trust account

If you have withheld retention amounts in a retention trust account on behalf of a contracted party, they can only be released to that party or used to correct defects or omissions in their work. All payments from a retention trust account must be deposited into the contracted party's nominated bank account. You are required to notify the contracted party of transfers from a retention trust account. There is a template on the QBCC website for this notice—*Payment advice—deposit into retention trust account*.

See QBCC's *Trustee guide—retention trust accounts* on the website for further information.

DISPUTES

Disputes in the building and construction industry often arise when parties to a contract have a disagreement about payment or the quality of work completed or goods and services provided.

The following advice is recommended to avoid a dispute altogether or assist when there is a disagreement between parties:

- have a written contract and agree to any variations in writing
- document and keep copies of any communication, work completed and agreements made
- encourage and contribute to open communication
- know your rights and what options are available to you if a dispute does arise
- ensure that you give valid payment claims and payment schedules.



Information for claimants—payment dispute options

What to do if you're not paid or you disagree with a payment schedule

There are different options available to you depending on who your dispute is against as outlined in the table below.

It's important to note that not all options will be suitable or available for every dispute, some options have limited timeframes for commencing action and you should consider seeking legal advice prior to pursuing options as there can be serious consequences (including financial costs) for taking action when you're not entitled to.

DISPUTE AGAINST	OPTIONS AVAILABLE
Resident home owner	<ul style="list-style-type: none">• QBCC early dispute resolution service• QCAT• the courts.
Another contractor	<ul style="list-style-type: none">• suspending work• QBCC monies owed complaint• QBCC notification of offence form• adjudication—lodged through the QBCC• payment withholding request• QCAT• the courts• subcontractors' charges.
Owner of an investment or commercial property including a developer	<ul style="list-style-type: none">• suspending work• QBCC notification of offence form• adjudication—lodged through the QBCC• charge over property• payment withholding request (lodged to the financier/bank)• QCAT• the courts.

Suspending work

- free unless legal advice is sought
- encourages payment only, does not enforce
- a notice must be given at least 2 business day before suspending work
- can be used at the same time as other payment dispute options that enforce payment
- stops further payment debt accruing
- may aggravate parties involved.

QBCC monies owed complaint

- free to lodge
- no time limitations
- can only be used against a QBCC licensee
- does not settle a dispute or enforce payment but may result in the QBCC taking action against the licensee.

You can lodge a monies owed complaint form with the QBCC online or manually.

QBCC notification of offence form

- free to lodge
- submit within 2 years from the date of the offence
- cannot be used for a complaint against a resident homeowner
- does not settle a dispute or enforce payment but may result in the QBCC investigating and taking action.

You can lodge a notification of offence form with the QBCC online or manually.

QBCC early dispute resolution service

- can only be used in a dispute with a home owner for defective building work, incomplete building work or a contractual issue
- cannot be used for commercial or industrial building work
- contract must be underway (it cannot be terminated or completed).

You can lodge a complaint form with the QBCC online or manually.

Don't forget to check out qbcc.qld.gov.au for all your resources

Adjudication

- generally faster and more cost effective than going to court
- fees and strict timeframes for lodgement
- enforceable decision and further options available once a decision has been made in your favour
- cannot be used for a complaint against a resident home owner
- adjudicator fees may apply.

You can lodge an adjudication application with the QBCC online or manually.

Charge over property

- an option following an adjudication decision made in your favour
- creates a security interest and right for you to apply to court to sell the property to recover money owed to you
- can only be used by head contractors against a party that is (or is related to) the registered owner of the property where the work was carried out
- legal advice is recommended
- a lodgement fee applies
- action still required after a charge is lodged and the charge expires after two years.

Register a charge over property with the Titles Registry using a Form 14.

Payment withholding request

- an option following an adjudication decision made in your favour
- requires the party higher in the contractual chain (or financier) to withhold payment (of an equal amount) to the party that owes you money
- can only be used when the higher party still owes money to the respondent
- no cost and safeguards outstanding amounts however it does not enforce payment.

Use the QBCC's template payment withholding request form to submit to the higher party.

Queensland Civil and Administrative Tribunal (QCAT)

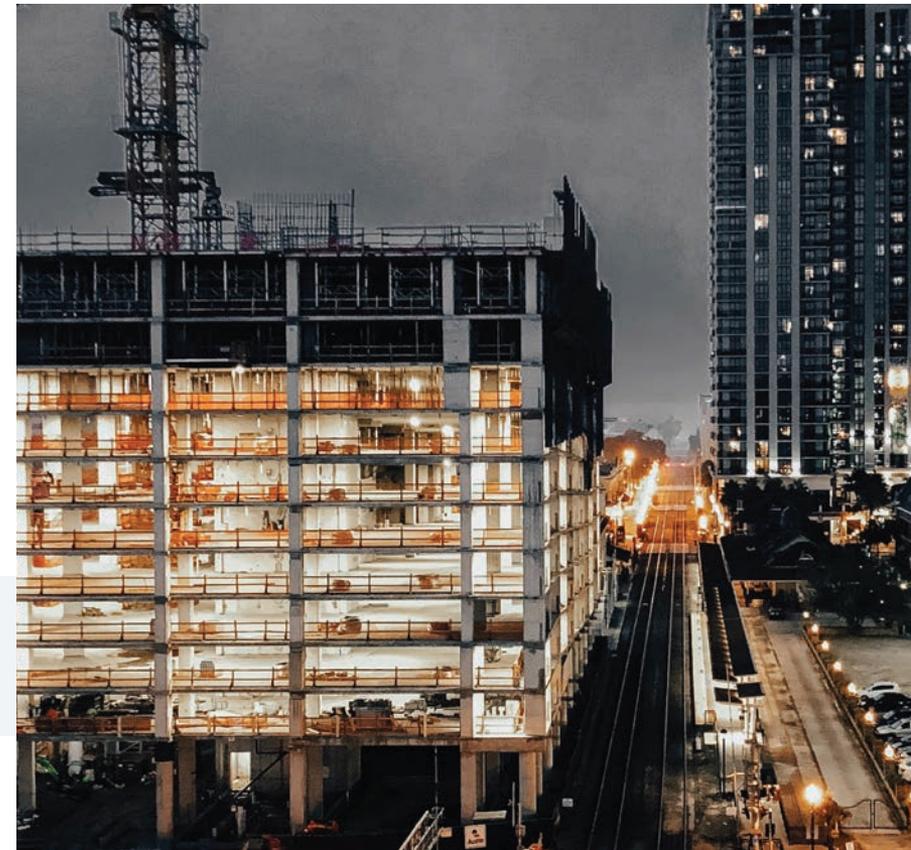
- you must participate in a dispute resolution process with the QBCC beforehand
- can be used for commercial building disputes for amounts of up to \$50,000 (or more if both parties agree) or for domestic building disputes of any amount
- legal advice is recommended
- there are fees involved however is generally more cost effective and accessible than other court processes
- enforceable decision.

Lodge an application with QCAT directly.

The courts

- legal advice and fees involved and it can be an expensive option
- a warning notice must be given at least 5 business days before proceeding
- enforceable decision
- different disputes are taken to different courts (the magistrate, district or supreme court).

Seek independent legal advice before proceeding.





Information for respondents—payment dispute options

Importance of a payment schedule

Giving a payment schedule promotes communication between both parties and may help to avoid a payment dispute occurring altogether.

If you do not agree with a payment claim, it is important to respond to the claim with a payment schedule that includes all reasons you are not paying the claimed amount in full.

If you do not give a payment schedule, and the claimant takes the matter to adjudication, you will not be allowed to provide an adjudication response and an adjudicator will not be able to consider your reasons for not paying the claimed amount in full. You are also not able to provide any new reasons for part or non-payment to what was provided in the payment schedule.

When in a payment dispute

If a contracted party (claimant) does not agree with a payment schedule that you've provided or you've failed to pay or respond to a payment claim within the required timeframes, they may start a dispute resolution process against you.

As a respondent, there are different rights and actions that you can expect depending on what dispute resolution process is started by the claimant. These are outlined in the table opposite.

DISPUTE RESOLUTION PROCESS	WHAT TO EXPECT
QBCC early dispute resolution service	The QBCC may work with both parties to facilitate an agreement.
QBCC monies owed complaint	The QBCC may take action against you if you have committed a payment offence or failed to meet your minimum financial requirements.
QBCC notification of offence	The QBCC may require you to provide documents or information and may take action against you if you have committed a payment offence.
Adjudication—lodged through the QBCC	<p>You will receive a copy of the adjudication application.</p> <p>You will receive a notice of acceptance from the adjudicator the matter has been referred to.</p> <p>You may then give the adjudicator a written adjudication response, but only if you gave the claimant a payment schedule.</p> <p>An informal conference may be conducted.</p> <p>The adjudicator will give you a copy of the adjudication decision. If that decision is that you must pay an amount to the claimant, you must make the payment within 5 business days after you receive the copy of the decision.</p>
Charge over property	If the registrar of titles registers a claimant's interest in your property (a charge over property), you will not be allowed to sell or otherwise deal with your property unless the court directs you to.
Payment withholding request (given to a higher party)	If your contracting party/financier receives a payment withholding request relating to an adjudicated amount you have not paid, they are required to withhold that amount from any payment they are liable to make to you.
Suspending work	<p>You will receive a notice before work is suspended.</p> <p>The claimant is not liable for any loss or damage you suffer as a result of them suspending work.</p>
Subcontractors' charges	<p>Within 10 business days after you receive a 'notice of claim', you must send a 'response to notice of claim' form to the claimant and the higher party that pays you, declaring whether you accept or dispute the claim.</p> <p>If you accept the claim, the higher party will need to divert an amount they are liable to pay you and pay it directly to the subcontractor claimant.</p> <p>If you dispute the claim, the claimant may pursue court proceedings.</p>
QCAT	Before a dispute can proceed to QCAT, parties must participate in QBCC's dispute resolution process. The QCAT process guides the next process.
The courts	<p>You will receive a written notice of intention to start legal proceedings no later than 30 business days after the due date for the payment you failed to make in full and on time.</p> <p>The legal system guides the next steps.</p>

COMMON TERMS

Contracting party vs contracted party:

The **contracting party** is the party to the contract requiring work to be carried out.

The **contracted party** is the party to the contract that is carrying out the work.

Construction work vs building work:

Construction work (includes but is not limited to) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, roadworks, power lines, telecommunication. (See section 65 of the BIF Act).

Building work broadly means the erection or construction of a building—a fixed structure typically with walls and a roof. It includes both domestic building work and commercial building work but there are also specific exclusions for what is not considered to be building work.

(See Schedule 2 of the *QBCC Act* and Schedule 1 of the *QBCC Regulation*).

Domestic building work

Domestic building work includes (but is not limited to):

- the erection or construction of a detached dwelling
- the renovation, alteration, extension, improvement or repair of a home
- removal or resiting work for a detached dwelling
- the installation of a kit home at a building site.

Related goods and services

Related goods are goods used for construction work and includes plant, materials (hired or otherwise) and components that form part of any building or structure. (Section 66 of the BIF Act).

Related services are services arising from or for use in construction work. This includes labour to carry out construction work, architectural, design and surveying services, and soil testing. (Section 66 of the BIF Act).

Resident owner

A **resident owner** is an individual that intends to reside in the building on completion (or within 6 months of completion) of building work under a domestic building contract. A resident owner however, does not include an owner builder or a building contractor.

Claimant

The **claimant** is a person who is (or claims to be) entitled to a progress payment under a construction contract. The claimant may give a payment claim to the person (**respondent**) who may be liable to make payment under the construction contract.

Respondent

The **respondent** is the person who may be liable to make payment under the construction contract.

Higher Party

A higher party, for an adjudicated amount, means:

- (a) if the claimant for the amount is a subcontractor—the person from whom an amount is or becomes payable to the respondent under an arrangement with the respondent for related work or services; or
- (b) if the claimant for the amount is a head contractor—the person who is the financier for the related work or services.

Progress payment

A progress payment is the payment that a person is entitled to for completing construction work or related goods and services for the construction work.

Business Day

Any day that:

- is not a Saturday or Sunday
- is not a public holiday or
- does not fall between 22 December and 10 January.

Parties in the contractual chain

Principal—the principal is the person who is the contracting party for the building contract. They are typically the owner or developer of the land.

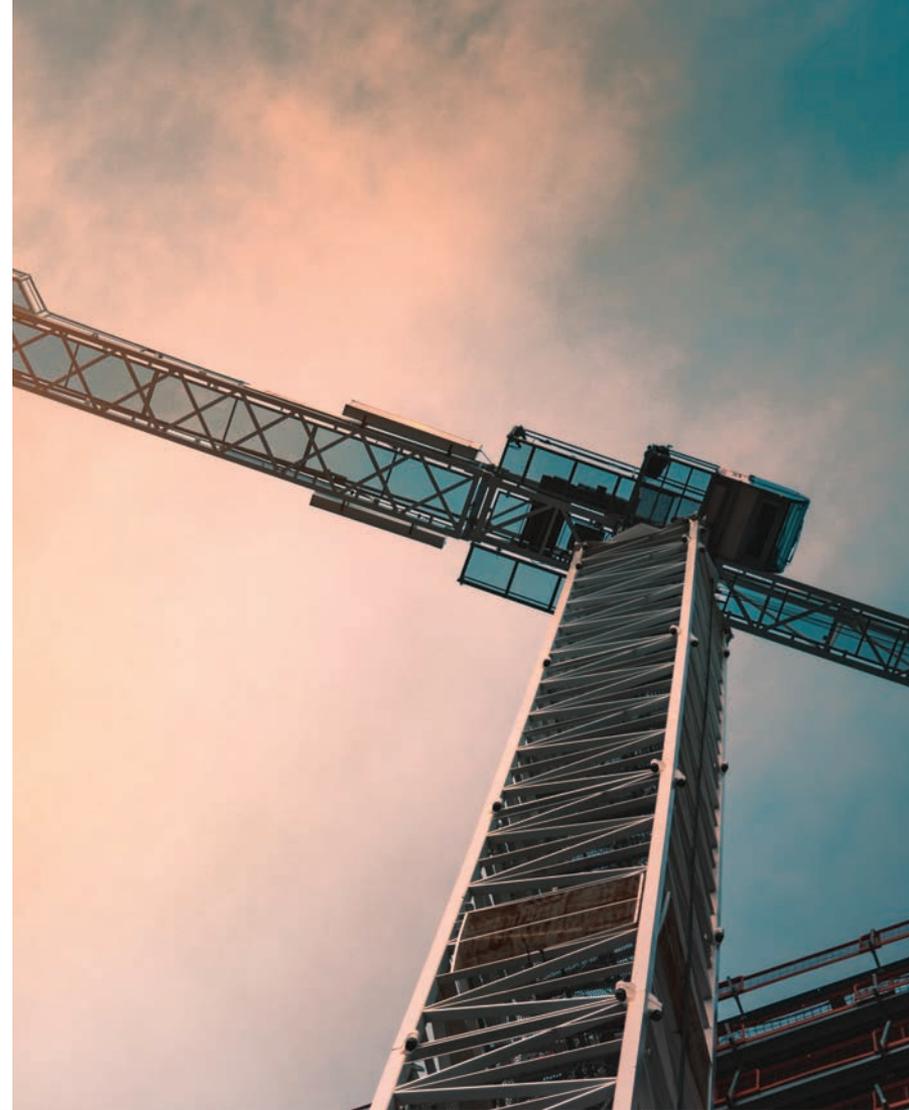
Head contractor—the contracted party for a contract that is NOT also a subcontract of another contract.

Subcontractor—is a person that enters into a contract with a building contractor to carry out construction/building work to be carried out under the relevant contract.

Suppliers—a subcontractor is a supplier, if under their subcontract they are only required to supply goods and service without carrying out building work. A subcontractor is NOT a supplier if they are required to hold a licence to lawfully supply goods and services under the:

- the *Building Act 1975*
- the *Electrical Safety Act 2002*
- the *Plumbing and Drainage Act 2018*; or
- the *QBCC Act*.

Related goods and services providers—are parties that provide materials or services that either form part of, or assist with the carrying out of, construction work. Providers may include architects, engineers, surveyors, interior designers, landscapers, soil testers, machinery operators and professional cleaners.



FURTHER INFORMATION AND SUPPORT

Trust accounts are an additional measure to support security of payment within the building and contraction industry. There are specific guides available for trust accounts including:

- *Trustee guide—project trust accounts*
- *Trustee guide—retention trust accounts*
- *Beneficiary guide—trust accounts*.

Information for both home owners and contractors on the requirements of domestic building work is outlined in the *Domestic building contracts guide*.

These resources are available for download and viewing from the QBCC website, or can be obtained by contacting us for further information.

Need more information?

Visit qbcc.qld.gov.au or call us on 139 333.

