

## PLEASE NOTE:

The answers provided below are not intended as legal advice.

Please reach out to Morrissey Law + Advisory, or your preferred legal advisor, for specific advice on your situation.

### Question:

**What are the new Guidelines for construction released by the NSW government on 20 July 2021?**

### Background:

The daily press conferences and rhetoric that the Premier has been providing shows a clear intention to follow the well-trodden path of creating economic activity through stimulating the construction industry.

The “construction pause” introduced on Saturday 17 July 2021 stopped all construction works from occurring within the Greater Sydney area. The construction industry is unlike many other industries however, as the complexity of delivering projects with hundreds (if not thousands) of different contractors, suppliers and personnel means that putting a whole industry on a 2 week sabbatical would not simply end once the 2 weeks had passed and work was allowed to return to site. Construction sites that run well are clearly planned and supplies and workers arrive on site at the times that they are needed with the tools and supplies to complete their scope of works. There is considerable lead time needed for work to start again on 31 July 2021.

The NSW Government realised this, and yesterday (20 July 2021) released a set of guidelines on how the construction industry is to operate until 31 July 2021.

### Question:

**What is the purpose of the new construction guidelines?**

### Answer:

There are 3 key objectives.

1. To enable to the construction industry to bounce back and start works immediately on 31 July 2021.
2. To keep cash flowing through the industry when no physical work is being undertaken on site.
3. Ensure companies remain solvent and employees employed.

### Question:

**Who do the new guidelines apply to?**

### Answer:

The guidelines apply to head contractors, sub-contractors and suppliers that are engaged on NSW Government agency projects where there is a “construction site” that has been shut down. The guidelines may also be applied on projects by State Owned Corporations and other tiers of government.

Examples of projects on which these guidelines apply include:

- Sydney Fish market
- SFS redevelopment
- Sydney Metro
- Cross city tunnel

### Question:

**What is a State Owned Corporation?**

### Answer:

A state owned corporation is a company where the shareholder is the NSW Government. These can include utility providers (Hunter Water, Essential Energy, Water NSW), and others. The full list is here <https://bit.ly/3kG1pwO>.

If you are currently undertaking a project where the principal is a state owned corporation or another tier of government (such as local council), contact them to determine if they will be applying the guidelines and what that means for your works.

**Question:**

**How to ensure you comply with the requirements of the NSW Government guidelines for construction sites?**

**Answer:**

There is a set of behaviours which the Government is expecting those that wish to rely upon the guidelines to adhere to. They change the contractual landscape of how you will need to operate in the framework of the “construction pause”.

The key changes are:

- Must be collaborative
- Any claims need to be supported by an open book
- Contractors and suppliers cannot profit from the “construction pause”

You also must look to mitigate your time, and therefore costs, that will be incurred on a project that you would seek recompense from NSW Government. This must be done within the framework of achieving the objective of having the construction site reopen and progressing at as close to capacity on 31 July 2021. To achieve that, contractors should spend this time on analysing and updating their programmes to allow for their new covid safety plan, but also to allow for acceleration of works if required.

That includes reviewing and updating your on-site covid plans, a template covid safety plan is available here: <https://bit.ly/3wZZjug>

**Question:**

**Can you still be paid during the “construction pause”?**

**Answer:**

Yes.

The NSW Government, and the contractors working on a NSW Government construction site are being asked to look at ways to keep cash flowing through the various contractual parties. NSW Government is able to (outside the contractual mechanisms) assess claims that are partially complete, or progressively make payment of those claims.

Contractors can also claim (on a payment on account basis – which all claims always are), advance payments, including for the full anticipated July account in the July payment run.

**Question:**

**Do you need to separate out a claim for “Closure of construction site” and other normal claims under the contract?**

**Answer:**

Yes.

Claims related to ‘Closure of Construction Site’ should be prepared independently of any other claims. In particular, contractors should ensure that claims for delays, EOTs or otherwise are clearly separated for pre-existing project performance issues, or to unrelated delay to those that have resulted from this construction pause.

We recommend drafting a standalone claim that would directly reference these guidelines. If you need assistance, please reach out to determine what should be included.

**Question:**

**Does SOP still apply whilst the “construction pause” is underway?**

**Answer:**

Yes. Security of Payments Act still applies.

**Question:**

**What impact do the “construction pause” have on our contracts?**

**Answer:**

Head contractors must ensure that all relief they receive is passed on to the subcontractors and suppliers.

Liquidated damages for the “construction pause” will not apply.

Notices of delay or intention to claim under the contracts will also be waived whilst the guidelines apply, and that period is either 19 July 2022, or completion, whichever is earlier.

The full guidelines are available here <https://bit.ly/3eGHv0R>.