

NSW SECURITY OF PAYMENT REFORM UPDATE: WHAT YOU NEED TO KNOW

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Legal Briefings - By **Michael Lake, Katherine Mackellar and Samuel Hoare**

In November 2018, significant amendments to NSW's security of payment legislation, the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the **Act**) passed into law.¹ Our [previous article](#) described those amendments.

The amendments did not commence immediately, with NSW Fair Trading first consulting with the industry on when the amendments should commence. NSW Fair Trading also foreshadowed that it would release the draft amendments to the *Building and Construction Industry Security of Payment Regulation 2008* (NSW) (the **Regulation**) necessary to support some of the amendments to the Act.

Just last week, the NSW Government provided an update on the likely commencement date of the reforms, and released a draft *Building and Construction Industry Security of Payment Amendment Regulation 2019* (NSW) (the **Draft Amending Regulation**).²

As a result, the industry now has a complete picture of the reforms set to become law later this year, particularly in relation to new offences set to be introduced.

We identify the key features of the Draft Amending Regulation below.

WHEN WILL THE AMENDMENTS COMMENCE?

No specific date has been identified, but the NSW Government has indicated that (based on the result of industry feedback) it expects that the amendments to the Act and Regulation will commence in a single tranche towards the end of 2019. More specifically, the NSW Government has identified that amendments to the Regulation are likely to be finalised and published by the middle of this year, with the amendments to both the Act and Regulation then commencing three months later.

As we said in our earlier update, the amendments will only apply to construction contracts entered into after the date they commence.

CHANGES PROPOSED UNDER DRAFT AMENDING REGULATION

LIABILITY FOR DIRECTORS AND MANAGEMENT

The Amendment Act introduced executive liability for contraventions, exposing directors and management personnel to prosecution where a corporation commits certain offences under the Act and Regulation.

The Amendment Act confirmed that executive liability will apply to the offences in the Act with respect to the supporting statement required to accompany the head contractor's payment claims.

The Draft Amending Regulation proposes that executive liability will also apply to most, but not all, of the offences in the Regulation with respect to retention money trust accounts. The offences which will *not* attract executive liability are those in clauses 7 (relating to notification of account details) and 16 (relating to annual reports) of the Regulation.

PENALTY NOTICES

The Amendment Act also includes new provisions relating to authorised officers who are charged with, among other things, investigating, monitoring and enforcing compliance with the Act. Those powers include issuing penalty infringement notices (an on the spot fine like those available regarding certain traffic offences) to a person who is alleged to have committed certain offences under the Act or Regulation, as prescribed by the Regulation.

The Draft Amending Regulation identifies the proposed offences with respect to which penalty infringement notices may be issued. The offences include those relating to:

- supporting statements;
- payment withholding requests; and
- retention money trust accounts.

Essentially, the specified offences are those where compliance can be quickly and easily assessed (for instance, a penalty infringement notice may be issued for failing to issue a supporting statement by a certain date, but not for knowingly issuing a false or misleading supporting statement).

The Draft Amending Regulation also specifies the amount payable if a penalty infringement notice is issued. Depending on the particular offence, the amount ranges from \$1,100 to \$2,200 for an individual, and from \$5,500 to \$11,000 for a corporation. These amounts are substantially lower than the maximum amounts payable for the same offences if prosecuted by means other than issuing a penalty infringement notice.

OWNER OCCUPIER CONSTRUCTION CONTRACTS

Finally, the Draft Amending Regulation exempts residential owner occupier construction contracts from the operation of the Act.

CONSULTATION PERIOD

Depending on the feedback received during the consultation period, the Draft Amending Regulation may change before it is enacted.

NSW Fair Trading is seeking feedback on the Draft Amending Regulation until 21 June 2019. Consultation is invited through their [web form](#) or via [email](#) or post.

WHAT THIS MEANS FOR YOU

The proposed amendments to the Act and Regulation will likely commence in late 2019. The proposed changes are extensive and significant. Parties participating in construction projects in NSW should begin considering whether their contracts and project administration practices will comply with the amendments. If the proposed amendments affect you, consider providing feedback to NSW Fair Trading or contacting us to discuss further.

ENDNOTES

1. The *Building and Construction Industry Security of Payment Amendment Act 2018* (NSW) (**Amendment Act**).
2. This will amend the *Building and Construction Industry Security of Payment Regulation 2008* (NSW).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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