

NSW SECURITY OF PAYMENT REFORM: WHAT YOU NEED TO KNOW

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Legal Briefings - By **Michael Lake, Katherine Mackellar, Patrick Tighe and Dennaë Smith**

The latest round of amendments to NSW's security of payment legislation, the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the **Act**) have now been passed.¹

Many of the amendments arise from recommendations made by John Murray AM in his report on the national review of security of payment laws issued in December 2017.

The amendments are broad and significant. Among other things:

- executive and accessorial liability now applies, exposing directors and management personnel to prosecution if the corporation commits an offence under the Act.
- payment claims must again state that they are made under the Act.
- the progress payment and payment claim provisions have been simplified, with the 'reference date' concept removed.
- the due date for payment by head contractors to subcontractors has been reduced from 30 to 20 business days.

The amendments have not yet commenced. However, an options paper issued by NSW Fair Trading late last year confirms the NSW Government's intent that the amendments commence in three or four rounds during the course of 2019. Commencement dates are likely to be confirmed later in February 2019.

Below we identify some of the more significant amendments, and when the NSW Government has proposed they will commence. The amendments will only apply to construction contracts entered into after the date they commence.

FIRST ROUND OF CHANGES

The first round of changes could commence as early as February 2019 and include those discussed below.

The Act currently makes non-compliance with certain provisions an offence and specifies the maximum penalty for an individual or corporation. The Amendment Act significantly reforms the offence provisions.

INCREASED PENALTY UNITS FOR OFFENCES

The amount payable (expressed in penalty units) for failing to comply with offences identified in the Act in relation to supporting statements and payment withholding requests has increased. If for instance a head contractor fails to serve a supporting statement with its payment claim, the penalty for a corporation has increased from 200 penalty units (currently \$22,000) to 1,000 penalty units (\$110,000).

LIABILITY FOR DIRECTORS AND MANAGEMENT

Executive and accessorial liability is a new and significant feature of the Act, exposing directors and management personnel to prosecution if the corporation commits an offence under the Act.

ACCESSORIAL LIABILITY

Accessorial liability will apply to all offences under the Act capable of being committed by a corporation.

In short, a director or person involved in managing the company's affairs or the project in question can commit an offence if the corporation commits an offence (ie not serving a supporting statement with a payment claim) and the person among other things, *'aids, abets, counsels or procures the commission of the corporate offence'* or *'is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence.'*

The maximum penalty for a director or manager is the maximum penalty specified for an individual for the offence. For some offences the maximum penalty includes 3 months imprisonment.

EXECUTIVE LIABILITY

Executive liability will apply to particular offences: to start with, just the offences in relation to the head contractor's supporting statement (but when the Regulation² is amended, as we note below, this list will be expanded).

A person can be liable if, like the accessorial liability offences, they are a director or relevantly involved in the management of the company and, among other things, they fail to take all 'reasonable steps' to prevent or stop the commission of the offence. The term 'reasonable steps' is broadly defined, and includes action towards '*ensuring that the corporation arranged regular professional assessments of its compliance with the provision*' and '*ensuring that the corporation's employees, agents and contractors are provided with information, training, instruction and supervision appropriate to them to enable them to comply with the provision creating the executive liability offence so far as the provision is relevant to them.*'

The maximum penalty for a person committing an executive liability offence is 200 penalty units (currently \$22,000).

INVESTIGATION AND ENFORCEMENT POWERS

The Amendment Act includes new provisions relating to authorised officers who are charged with, among other things, investigating, monitoring and enforcing compliance with the Act. These new provisions give authorised officers broad powers, including to require persons to provide information or records or answer questions, and to enter premises and inspect or seize records in the circumstances set out in the Act.

The Amendment Act creates new offences relating to the authorised officers' powers, including for failing to comply with a requirement of, or obstructing, an authorised officer. It also enables authorised officers to issue a penalty infringement notice (an on the spot fine) to a person who has committed an offence under the Act or Regulation, as prescribed by the Regulation.

CORPORATIONS IN LIQUIDATION CANNOT SEEK THE ACT'S BENEFITS

The Amendment Act provides that a corporation in liquidation cannot make a payment claim, or take action to enforce a payment claim (such as by pursuing adjudication). This addresses recent case law which held in effect that a company in liquidation could still seek the Act's benefits.

Other changes likely to commence in February 2019 include an amendment expressly allowing the Supreme Court to sever any part of an adjudication determination affected by jurisdictional error, and confirm the balance.

SECOND ROUND OF CHANGES

The second round of changes are proposed to commence on 1 June 2019 and include the following:

PROGRESS PAYMENTS AND PAYMENT CLAIMS

The Amendment Act simplifies the provisions entitling a party to claim a progress payment by issuing a payment claim.

Most significantly, the Amendment Act removes the concept of a 'reference date' which is currently used to determine the date on and from which a party can claim a progress payment. The new default position will be that a payment claim can be served on and from the last day of the month the work was first carried out (or goods or services were first supplied), and on and from the last day of each subsequent month.

Finally, the Amendment Act provides that if a construction contract is terminated, a payment claim may be served on and from the termination date. This overcomes court decisions to the contrary.

DUE DATE FOR PAYMENT TO SUBCONTRACTORS

The maximum payment period for payments from a head contractor to a subcontractor has been reduced from 30 to 20 business days.

PAYMENT CLAIM ENDORSEMENT

The Amendment Act reinstates the need for a payment claim to state that it is made under the Act.

OTHER CHANGES

Other changes likely to commence in June 2019 include various relatively minor reforms to the adjudication process, including allowing a claimant to withdraw an adjudication application at any time before it is determined.

THIRD ROUND OF CHANGES

The third round of changes are proposed to commence in December 2019, and include the following:

INSPECTION OF TRUST RECORDS BY SUBCONTRACTORS

The Act includes provisions dealing with the retention money trust accounts required to be established by head contractors, although the requirements are largely addressed in the Regulation. The Amendment Act provides that the regulations may now include provisions dealing with the inspection of records relating to the trust accounts by the subcontractor entitled to payment.

PRESCRIBING INFORMATION FOR SUBCONTRACTORS

The Amendment Act provides that the regulations may prescribe information required to be given to subcontractors when entering into a construction contract, and to create offences for non-compliance. The NSW Government has identified that it will work with stakeholders to develop this information.

OTHER CHANGES

The Amendment Act includes amendments to allow the Act to apply to residential construction contracts between an owner-occupier and a head contractor (which is not the case now), with further provisions to be addressed by amendment to the Regulation.

FOURTH ROUND OF CHANGES? PROPOSED AMENDMENTS TO THE REGULATION

The NSW Government has identified several proposed reforms to the Regulation which are anticipated to be drafted and available for consultation in May 2019. They include the following:

REDUCING THE THRESHOLD FOR RETENTION MONEY TRUST REQUIREMENTS

Currently, the Act and Regulation require head contractors to pay subcontractor retention money into a trust account on construction projects valued over \$20 million. The NSW Government proposes to reduce this threshold to \$10 million, and to remove the requirement to issue an annual report on the operation of such trust accounts.

INSPECTION OF TRUST ACCOUNT RECORDS

The NSW Government proposes to amend the Regulation to allow subcontractors to inspect the trust account records its head contractor is required to keep.

PRESCRIBING PENALTY NOTICE OFFENCES

The Amendment Act allows authorised officers to issue penalty infringement notices in relation to offences specified in the Regulation. The NSW Government proposes that:

- certain offences under the Act relating to supporting statements and payment withholding will also be subject to penalty infringement notices; and
- several offences under the Regulation in relation to retention money trust accounts will be subject to penalty infringement notices.

The NSW Government also proposes to increase the maximum penalties for offences under the Regulation in relation to the retention money trust account to 1,000 penalty units for a corporation, and 200 penalty units for an individual.

EXECUTIVE LIABILITY OFFENCES

Consistent with the changes to the Act, the NSW Government proposes to apply accessorial liability to all offences under the Regulation capable of being committed by a corporation (including, for instance, a head contractor failing to pay retention moneys held in trust for a subcontractor into a qualifying trust account). In addition, the NSW Government proposes to apply executive liability to certain offences under the Regulation in relation to retention money trust accounts.

WHAT THIS MEANS FOR YOU

The upcoming amendments to NSW's security of payments legislation are extensive and wide ranging. It will be necessary for parties participating in construction projects in NSW to consider how the amendments affect them and to revisit their construction contracts and refresh their project management and administration practices to ensure they are prepared for when the amendments come into effect, and can comply with them.

ENDNOTES

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

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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