

# ALERT

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## 2014 amendments to NSW Security of Payment legislation

From 21 April 2014, significant changes to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) came into force.

The changes apply to contracts entered into from 21 April 2014, and chiefly affect principals, head contractors, and subcontractors (including suppliers) of any contracting level, as those terms are defined in the amending legislation.

There are three key changes:

### 1 Maximum payment terms for progress payments

A progress payment by a principal to a head contractor now becomes due and payable on the 15th business day after the relevant payment claim is made, or at such earlier date as provided in the construction contract.

A progress payment by a head contractor to a subcontractor, and at every lower level of the contracting chain, now becomes due and payable on the 30th business day after the relevant payment

claim is made, or at such earlier date as provided in the construction contract (the subcontract or sub-subcontract, as the case may be).

Any provision in a construction contract that allows for longer payment terms than those specified in the amended Act is of no effect.

### 2 Supporting statement required for head contractors' payment claims

A head contractor must not serve a payment claim on a principal unless the claim is accompanied by a supporting statement that is stated to relate to the payment claim. The statement required is that all subcontractors (including suppliers) have been paid all amounts that have become due and payable for the construction work concerned.

There is a penalty of up to \$22,000 for contravention of this new requirement. There is also provision for a maximum penalty of



\$22,000 and/or 3 months' imprisonment for a head contractor who serves a supporting statement knowing that the supporting statement is false or misleading in a material respect.

New Regulations set out the acceptable form of supporting statement. The form contains two tables: a schedule of subcontractors paid all amounts due and payable; and a schedule of subcontractors for which an amount is in dispute and has not been paid.

Authorised officers may investigate the conduct of head contractors and obtain information and documents relating to their compliance with the supporting statement requirements, including payment of subcontractors for specified construction work. Ancillary penalties (of up to \$22,000 and/or 3 months' imprisonment) support this investigation and enforcement regime.

### 3 No endorsement on payment claims

The former requirement that a payment claim must include an endorsement that it is a payment claim under the Act has been removed.

However, it will still be a requirement that a payment claim under the Act must identify the construction work to which the payment claim relates and must indicate the claimed amount.

So any invoice or claim fulfilling these minor requirements and arising as a claim under a construction contract (as defined) by

a person who has undertaken construction work or the supply of related goods and services (all as defined) will be a payment claim.

Would-be respondents take note!

### Comment

These changes do not currently apply to residential builders contracting directly with a consumer who lives or will live in the premises being constructed.

The reforms will have far-reaching effects. Principals now must pay amounts due under a construction contract on or before 15 business days after the referable payment claim is made. Principals, head contractors and subcontractors (as respondents) must now remain vigilant for any claim for payment falling within the terms of the Act – the warning words no longer need be added to the claim and, as such, claims will more readily qualify as payment claims, bringing the potential consequences that the industry is well familiar with. Head contractors must now adopt the practice of providing accurate supporting statements with their payment claims. Head contractors must now pay amounts due and payable under construction contracts on or before 30 business days after the referable payment claim is made. Similarly, subcontractors (as respondents) must now adhere to the same 30 business day maximum payment terms.

In addition, the new amendments bring in a degree of uncertainty associated with the definitions of 'principal', 'head contractor' and 'subcontractor'. The risk will fall with would-be respondents to ascertain whether or not the procurement method and contracting structure employed on their project results in their characterisation as 'head contractor'.

In combination, the reforms may pose challenges for head contractors (as defined), who on the one hand must be alert to payment claims that no longer bear the typical endorsement, and on the other hand must provide supporting statements with their upstream payment claims.

Further, the amended Act makes provision for the future introduction via the Regulations of a retention money trust account, requiring head contractors to hold retention moneys in trust for subcontractors. Following a consultation process concluded in January 2014, it is not yet clear if or when the NSW government proposes to enliven those requirements.

The new changes represent the implementation of some of the recommendations of the 2012 Collins Inquiry – the Independent Inquiry into Construction Industry Insolvency in New South Wales. Bruce Collins QC made 44 recommendations in light of numerous contractors going broke, some while engaged on NSW government projects. The changes to the Act to date represent only those proposals that received unqualified government support. The extent to which the rest of the recommendations receive similar support in future remains to be seen.

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Immediate compliance with the new positive obligations is required for contracts entered into after 21 April 2014. Beyond that, contract review is desirable, including to:

- ensure contractual payment regimes (including as to payment terms) are effective; and
- adjust any contractual requirements for claims, which may have unintended or undesirable consequences in light of the law changes.

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