

New South Wales has enacted a number of amendments to the *Building and Construction Industry Security of Payment Act 1999* (the Act) but these changes will not take effect as yet. The date for the commencement of these amendments has yet to be proclaimed.

The industry should be prepared to accommodate the changes which confusingly will apply only to contracts entered into after the date of commencement. This means that you will need to continue administering claims made in relation to existing contracts under the existing regime even after the amendments become effective.

The changes that you should be aware of are as follows:

- 1 Payment Claims Modified.** Except where a payment claim relates to residential building work (see 5 below), payment claims will no longer be required to contain a statement that they are made under the Act to be valid.
- 2 Quicker progress payment.** Progress payments will now have to be made within a prescribed period:
 - (a) in relation to a claim by a Head Contractor, Principals must pay not more than 15 Business Days after the payment claim is made;
 - (b) in relation to a claim by a subcontractor, Head Contractors must pay not more than 30 Business Days after a payment claim is made (s11).A provision for a later date in a contract will have no effect.
- 3 Trust Account.** Regulations can be made for the establishment of a retention money trust account into which retention moneys in relation to subcontracts must be paid. Obviously this will apply to Head Contractors but not Principals. Curiously, it seems to contemplate cash retentions only as the definition of retention money is not broad enough to encompass bank guarantees or similar securities. To give teeth to this requirement, the Act contemplates that the Director General of the Department of Financial Services could appoint an authorised officer to carry out investigations of Head Contractors to determine whether the relevant sections have been complied with. There are penalties for non-compliance.
- 4 Supporting Statement.** To be valid under the Act, a payment claim served by a Head Contractor on a Principal must be accompanied by a "supporting statement". The supporting statement will be a form prescribed in the Regulations. Similar statements are already required in New South Wales by legislation or contracts so this ought not be a difficult requirement to comply with.

- 5 Residential building work.** Whilst the amendment continues the exemption of the requirements of the Act in respect of construction contracts to carry out residential building work in which the Principal intends to reside (now defined as "exempt residential construction contracts"), it curiously requires that any "...construction contract... connected with an exempt residential construction contract, must state that it is made under this Act": (s.13(2)(c)). Presumably, this means subcontracts relating to exempt residential construction contracts. Progress payments relating to such contracts must be made in accordance with the terms of the contract but if the contract makes no express provision not more than ten business days after a payment claim is made in accordance with the Act, which in this case must state that it is made under the Act.

Action

Until such time as the amendment is proclaimed, all claims must be administered as they currently are. When proclamation occurs there will be some confusion for some time because only contracts entered into after the date of proclamation will be affected by these amendments. This will mean that for a period participants in the construction industry would have to administer two separate regimes for progress claims under the Act; one that would apply to contracts entered into before the commencement of these amendments and one that would apply after.

Notwithstanding that, it would be prudent to bring to the attention of affected personnel within your organisation the effect of these amendments and to reinforce the message that any progress claim must be dealt with promptly and within the prescribed times. It has been our practice to encourage all of our clients to administer all progress claims in accordance with the Act, whether the Act applies or not. This ought to help minimise time bars being missed and the dreadful consequences that could flow.

Additionally, amendments to future contracts may be necessary to accommodate the time limitations imposed by these amendments.

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