

# Incoming Amendments to the *Building and Construction Industry Security of Payment Act 1999 (NSW)*

Commencement Date 21 October 2019

Topic	Existing Provision	Amendment	Comments
<b>Reference dates</b>	<p><b>Section 8(1)</b> “On and from each reference date”, a person is entitled to a progress payment.</p>	<p>The following section 8 and the concept of a “<b>reference date</b>” are to be removed. Instead, new sections 13(1A) to (1C) provide when entitlement to submit payment claims accrue, such that:</p> <ul style="list-style-type: none"> <li>• (1A) – Payment claims may be served on and from the last day of the named month in which the construction work was first carried out, and on and from the last day of each subsequent named month.</li> <li>• (1B) – If the construction contract concerned makes provision for an earlier date in any particular named month, the claim may be served on and from that earlier date.</li> <li>• (1C) – A payment claim can be served on and from the date of termination.</li> </ul>	<p>This is a significant amendment, which may have serious implications for parties contracting under <b>milestone payment contracts</b>.</p> <p>As it presently stands, the reference date is determined by the provisions of the contract, but if no such provision is made, the last day of the month. Thus, milestone payments are accommodated.</p> <p>The amendments contemplate that payments would be made at least once a month, unlike most milestone payments, which are usually referable to an event.</p> <p>Does this mean that such milestone payments will no longer constitute progress payments for the purpose of the Act?</p> <p>Confusion also arises as to whether parties may make more than one payment claim per month, for example where a contract provides for <b>weekly or fortnightly payments</b>. Section 13(5), discussed below, may provide some guidance on this issue.</p> <p>The amendment also clarifies that the date of termination now provides a further entitlement to submit a payment claim.</p>
<b>Subcontract payment timeframes</b>	<p><b>Section 11(1B)(a)</b> 30-business-day limit to pay subcontractors after the receipt of the payment claim.</p>	Changed to <b>20 business days</b> .	<p>Parties contracting with subcontractors (as that term is peculiarly defined within the Act) will need to ensure that their contracts are amended to reflect this change.</p> <p>Payments to head contractors will still be due within 15 business days of receipt of the payment claim (or earlier, as provided in the contract).</p>
<b>Payment claims to reference Act</b>	<p><b>Section 13(2)(c)</b> For contracts entered into after 21 April 2014, except for construction contracts connected with residential works, payment claims do not need to state that they are made under the Act.</p>	Payment claims must state they are made under the Act.	<p>This was in the original version of the Act, but was removed in the 2014 amendments. In practice, most contractors built the required words into their standard form invoices, so we do not expect any major change of behaviour will be necessary.</p>

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<b>Multiple payment claims</b>	<b>Section 13(5)</b> A claimant cannot serve more than one payment claim in respect of each reference date.	Except as otherwise provided for in the construction contract, a claimant will only be able to serve one payment claim in any particular named month for construction work carried out or undertaken to be carried out in that month.	Whilst the default position is that only one payment claim per month is permitted, section 13(5) also contemplates that the contract may permit more, which might resolve the issue identified in relation to section 8(1) above about weekly or fortnightly payments. It does not address the milestone issue.  New section 13(6) makes clear that payment claims can cover multiple previous reference dates, include amounts the subject of previous claims and claim for work carried out in previous months.
<b>Penalty for not providing supporting statement</b>	<b>Section 13(7)</b> Maximum AU\$22,000 for <b>not serving a supporting statement</b> .	Maximum for corporations <b>increased to AU\$110,000</b> . For individuals, the maximum will remain at AU\$22,000.	Declarations made in statements such as these should be made with the utmost care to ensure their accuracy.
<b>Penalty for providing false or misleading supporting statement</b>	<b>Section 13(8)</b> Maximum AU\$22,000 or three months of imprisonment, or both, for <b>serving a supporting statement known to be false or misleading</b> .	Maximum for corporations to be <b>increased to AU\$110,000</b> , whilst for individuals, the maximum will remain at AU\$22,000 or three months of imprisonment, or both.	This will be a key area of compliance for companies and their directors.
<b>Withdrawal of adjudication application</b>	The Act does not provide an express right to the claimant to withdraw an adjudication application.	New section 17A allows a claimant to withdraw an adjudication application by written notice served at any time before an adjudicator is appointed, but if one is, then it has to be withdrawn before the application is determined and subject to the other party's objections and the interests of justice as determined by this adjudication.	
<b>Adjudication determination timeframes</b>	<b>Section 21(3)(a)</b> The adjudicator has to determine the application within 10 business days after the adjudicator has notified the parties of his or her acceptance of the application, unless the parties otherwise agree.	The adjudicator will have <b>10 business days from lodgement of the adjudication response</b> (or date that the response should have been lodged) to determine the application, unless: <ul style="list-style-type: none"> <li>• The respondent is not entitled to lodge any response, in which case the adjudicator will have 10 business days from the date of acceptance of the application</li> <li>• The parties otherwise agree</li> </ul>	This could provide adjudicators with a slightly lengthier timeframe for determining most disputes.
<b>Adjudicator to serve determination on parties</b>	The Act currently does not expressly state that the adjudicator must serve the adjudication determination on the parties.	Requirement that the adjudicator serves the determination on the parties.	In practice, adjudicators routinely provide parties with copies of their determinations and the obligation was to be implied from other provisions within the Act in any event, so this amendment is likely to have little practical effect.

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<b>Penalty for payment withholding request</b>	<p><b>Section 26A</b></p> <p>Maximum of five penalty units for failing to notify a person who serves a payment withholding request that the recipient is not, or is no longer, a principal contractor for the claim.</p>	<p>Maximum for corporations to be increased to AU\$5,500, or AU\$1,100 for an individual.</p>	<p>As detailed below, companies will be scrutinised by authorised officers appointed by the government.</p>
<b>Conduct of ANA status</b>	<b>No provisions.</b>	<p>New clause 28A appears to have been inserted to address concerns about bias by some of the ANAs. It contemplates that the minister may publish a code of practice, the breach of which could attract a fine or withdrawal of ANA status.</p>	<p>Some sectors would be eagerly awaiting the publication of a code of practice for ANAs.</p>
<b>Timeframes for withholding money pursuant to a payment withholding request</b>	<p><b>Section 26B(3)</b></p> <p>This section governs the timeframe within which a principal contractor must retain money withheld from a contractor under a payment withholding request. Under 26(3)(a), a principal contractor must retain the money until the adjudication application is withdrawn.</p>	<p>Section 26(3)(a) will be amended so that where a claimant withdraws an adjudication application because it fails to receive notice of the adjudicator's acceptance, or the adjudicator fails to determine the application within time, the obligation on the principal contractor to retain the money only expires if the claimant does not make a new adjudication application under section 26 of the Act.</p>	<p>This is a welcome clarification. It still does not address the potentially damaging effect on the cash flow of the respondent, especially where the claim lacks merit.</p>
<b>Penalty increase related to payment withholding request provisions</b>	<p><b>Section 26(B)(5)</b></p> <p>Maximum of five penalty units for claimant failing to serve a copy of the adjudicator's determination on the principal contractor within five business days of the determination.</p>	<p>Maximum for corporations to be increased to AU\$5,500, or AU\$1,100 for an individual.</p> <p>Similar increases are proposed to <b>sections 26D(3)</b> (claimant failing to serve notice of withdrawal of adjudication application on principal contractor); <b>26E(2)</b> (respondent failing to provide claimant with details of the principal contractor); and <b>26E(3)</b> (respondent providing false or misleading information in response to a direction to provide claimant information).</p>	<p>As detailed below, compliance with such provisions will be scrutinised by government compliance officers (authorised officers).</p>
<b>Service of notices</b>	<p><b>Section 31</b></p> <p>This section relates to the service of notices under the Act.</p>	<p>Any reference to "notices" within the section is to be changed to "documents".</p> <p>"Service" is given a broader meaning than that which applies normally in court proceedings.</p>	<p>This clarifies the confusion, at times, between a notice and other documents passing between parties and the concept of "service" as it applies under the Act.</p>
<b>Supreme Court's powers regarding jurisdictional error</b>	<p>There is no provision within the Act currently dealing with the Supreme Court's ability to affirm part of an adjudication that is not affected by jurisdictional error.</p>	<p><b>New section 32A will be added</b> so that the Supreme Court does not necessarily have to set aside the whole determination if the jurisdictional error by the adjudicator can be fixed by setting aside only part of it.</p>	

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<b>Liquidation</b>	There is currently only case law dealing with the extent to which a company in liquidation can have recourse to the Act.	<p><b>New section 32B will be added</b> so that companies in liquidation cannot have recourse to the Act.</p> <p>Where adjudication applications have been made before the company enters liquidation, those applications are taken to have been withdrawn on the day immediately before the date of commencement of the liquidation.</p>	This is an important clarification to the existing state of the law in relation to the Act and insolvent companies, but it leaves open the question of the extent to which companies in voluntary administration can have recourse to the provisions of the Act. Presumably, the common law will continue to apply.
<b>Investigation and enforcement powers</b>	<p><b>Section 36</b></p> <p>This provision empowers the secretary to appoint a public service employee (authorised officer) to investigate compliance with the supporting statement provisions.</p>	<p><b>New part 3A will be added</b> to provide authorised officers with the power to:</p> <ul style="list-style-type: none"> <li>• Investigate, monitor and enforce compliance with the requirements imposed by or under the Act</li> <li>• Obtain information or records connected with the administration of the Act</li> <li>• Administer or enforce the Act</li> </ul> <p>The above three purposes are individually and jointly referred to as an "Authorised Purpose".</p> <p>They have enforcement powers to:</p> <ul style="list-style-type: none"> <li>• Demand information and records (s36A)</li> <li>• Demand answers and questions (s32H)</li> <li>• Enter and search premises (s32I and H)</li> </ul> <p>These powers are reinforced by prescribed punitive measures, which includes penalties for non-compliance (Div 4).</p>	The existing Act has provisions enabling authorised officers to investigate compliance with provisions regarding supporting statements. These amendments will broaden the scope of matters within the jurisdiction of authorised officers to any matter in connection with compliance with the Act.
<b>Time limitation for prosecution of offences</b>	<p><b>Section 34A</b></p> <p>This section provides that proceedings for prosecution of an offence may be dealt with in the local court.</p>	Section 34A will be amended so that proceedings for the prosecution of offences must be commenced within two years of the date of offence.	
<b>Spot fines</b>	There is currently no provision in the Act permitting authorised officers to issue on-the-spot fines.	<p><b>New section 34B will be added</b> to provide authorised officers with the power to issue on-the-spot fines for offences committed under the Act.</p> <p>Maximum of AU\$2,200 for an individual, or AU\$11,000 for a corporation.</p>	The person receiving the fine will be left to challenge the fine through formal processes if it is disputed.

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<b>Director and senior management liability for aiding and abetting</b>	<p>There is currently no provision within the Act exposing directors and senior managers to personal liability.</p>	<p><b>New section 34C will be added</b> to expose directors and senior managers to personal penalties for offences committed by their corporations if they are found to have:</p> <ul style="list-style-type: none"> <li>• Aided, abetted, counselled or procured the commission of the corporate offence</li> <li>• Induced, whether by threats or promises or otherwise, the commission of the corporate offence</li> <li>• Conspired with others to effect the commission of the corporate offence</li> <li>• Been in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence</li> </ul> <p>A “senior manager” is an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the corporate offence.</p> <p>The maximum penalty for an offence within the Act is AU\$22,000 or imprisonment, or both (for offences concerning supporting statements under section 13(8)).</p>	<p>This is a significant amendment, which will hold directors and senior managers to account if they indirectly participate in their corporation’s commission of an offence under the Act.</p> <p>The main offences under the Act relate to:</p> <ul style="list-style-type: none"> <li>• Supporting statements</li> <li>• Retention money trust account (for non-owner-occupier projects above AU\$20 million)</li> <li>• Payment withholding requests</li> </ul> <p>This places a lot of responsibility on directors and senior managers to ensure that their corporations studiously adhere to the requirements of the Act.</p>
<b>Director and senior management personal liability for failing to prevent offences</b>	<p>There is currently no provision within the Act exposing directors and senior managers to personal liability.</p>	<p><b>New section 34D will be added</b> to expose directors and senior managers to personal penalties if they are found to have:</p> <ul style="list-style-type: none"> <li>• Known that an “executive liability offence” would be or was being committed, or was recklessly indifferent as to whether it would be or was being committed</li> <li>• Failed to take <b>all reasonable steps</b> to prevent or stop the commission of that offence</li> </ul> <p>An “executive liability offence” is:</p> <ul style="list-style-type: none"> <li>• An offence against section 13(7) or (8) that is committed by a corporation (which offences relate to supporting statements)</li> <li>• An offence against the regulations (the current proposal is for the offences to relate to trust retention money on projects above AU\$20 million)</li> </ul>	<p>This amendment creates a class of offence known as an “executive liability offence”.</p> <p>This requirement to take “all reasonable steps”, when viewed in light of the definition of “reasonable steps”, could be considered draconian.</p> <p>The obligation is also only to take the steps (or to “take action towards”), so it does not expressly require ensuring the outcome.</p> <p>These are, nevertheless, broad obligations, should be taken seriously and will inevitably increase the costs of corporations’ compliance with them.</p>

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		<p>The Act provides a definition for "reasonable steps" which has the following auditing, compliance, training and supervision obligations. The director or senior manager must take such action (if any) of the following kinds as is reasonable in all of the circumstances:</p> <ul style="list-style-type: none"> <li>• Assessing the corporation's compliance with the relevant provisions</li> <li>• Ensuring that the corporation arranges regular professional assessments of its compliance with the provisions</li> <li>• Ensuring that the corporation's employees, agents and contractors are provided with the 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</li> <li>• Ensuring that the plant, equipment and other resources, and the structure, work systems and other processes relevant to compliance with the provision are appropriate in all the circumstances</li> <li>• Creating and maintaining a corporate culture that does not direct, encourage, tolerate or lead to non-compliance with the provision creating the executive liability offence</li> </ul> <p>The maximum penalty for the personal liability is AU\$22,000.</p>	
<b>Government obligation to keep obtained information confidential</b>	<b>Section 36B</b> This section deals with the confidentiality of documents obtained by authorised officers.	Will be replaced by a new section 36, which continues to deal with the privacy of documents produced to authorised officers.	All information disclosed to authorised officers will be required to be kept confidential except in the limited circumstances listed in the section.
<b>Amendments apply only to new contracts</b>	<b>Transitional provision.</b>	Except as provided by the regulations, the amendments do not apply to construction contracts entered into before the commencement of the amendments.	