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# More changes to the Security of Payment Laws to commence in 2019

## INTRODUCTION

Recent changes to one of the most central pieces of legislation in the building and construction industry, the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('Act') takes effect in 2019 and will introduce several measures designed to give better protection for subcontractors. Principals and contractors need to familiarise themselves with these changes, update their contracts to reflect requirements of the Act and review internal processes to avoid breaches non-compliance.

## KEY CHANGES

The key changes in this round of amendments are as follows:

1. payment to subcontractors cannot be more than 20 business days;
2. payment claims can be made after a construction contract is terminated;
3. payment claims must now state that they are made under the Act;
4. the term "reference date" no longer exists and claims can now be submitted on and from the last day of each "named month."

5. Authorised officers under the Act have broader investigatory rights to ensure compliance under the Act.

Each of these amendments is explained in detail below.

## REFERENCE DATES (S 8)

Prior to the amendments, claimants were only entitled to submit a statutory claim for payment on and from a 'reference date'. This is no longer the case.

Unless the construction contract states otherwise, payment claims may now be served on or from the last day of the month the work was first carried out and then each subsequent month after that. The purpose of this amendment is to remove the age old debate about using up reference dates and to ensure claimants have a reference date every month to submit a claim.

## TERMINATION (S 13)

Claimants will now be able to submit statutory payment claims after termination. Head contractors and principals will no longer be able to terminate construction contracts before the final payment claim reference date accrues.

It goes without saying that the change has been in direct response to the High Court case of *Southern Han Breakfast*<sup>1</sup> where the Court unanimously held a reference date was an essential pre-condition to the making of a payment claim and that such dates did not survive the termination of a contract.

#### **PAYMENT TO SUBCONTRACTORS (S 13)**

Payment claims served by subcontractors under the Act are now due and payable 20 business days after a payment claim is made instead of 30 business days. This period can be reduced but not extended by the terms of a construction contract. It is important to ensure that all subcontracts are updated to reflect these new and mandatory payment terms.

#### **ENDORSEMENT (S 13)**

Payment claims under the Act must now explicitly state that they are a claim made under the Act after a change which constitutes a backflip from NSW Government's amendments in 2014.

The changes come after findings that subcontractors were reluctant to use the Act when seeking payment from head contractors due to the perception that the head contractors would think they were gearing up for adjudication or a contractual dispute.

The reintroduction of endorsement follows a recommendation made by the Murray Review which highlighted the potential confusion that was arising with claims under the Act and under the contract. The reintroduction of the "magic words" is designed to alleviate this uncertainty.

#### **CHANGES TO PENALTIES**

##### **INCREASED PENALTIES FOR CORPORATIONS**

The amendments impose harsher penalties on corporations. For example, failing to provide a supporting statement (as prescribed by the Regulations) alongside a payment claim will now incur a maximum of 1000 penalty units for corporations, and a maximum of 200 penalty units for an individual, as opposed to the previous maximum of 200 penalty units for any party.

A single penalty unit imposes an amount equivalent to \$110 which means that the maximum amount payable by a corporation has increased to \$110,000.

#### **CHANGES TO ADJUDICATION**

##### **APPLICATION WITHDRAWAL (S 17)**

An adjudication application may now be withdrawn from any point before the application is determined.

##### **RESPONSE PERIOD (S 21)**

The timeframe for an adjudicator to respond to an adjudication application has been reduced. Adjudicators will have just ten business days after an application is submitted to make their determination, as opposed to current circumstances where adjudicators have ten days after notifying parties of their acceptance of the application.

##### **NEW COURT POWERS (S 32)**

The Supreme Court will now be able to set aside parts of an adjudication determination that contains jurisdictional error, leaving the remaining parts of

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<sup>1</sup> *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340.

the determination that is not affected by error to remain valid.

Currently a single jurisdictional error will invalidate an entire determination, even if that error is confined to only part of that determination.

We consider that this change will stop parties from challenging decisions with only minor mistakes in an attempt to remove the entire decision.

### NEW INVESTIGATION AND ENFORCEMENT POWERS (PART 3A)

In addition to the powers conferred upon the Supreme Court, the amendments also provide an increased scope for NSW Fair Trading (the government department responsible for enforcement of the act) to investigate and ensure compliance with the Act. These amendments expand upon the previous provisions conferring investigative powers for the purpose of enforcing compliance with provided supporting statements.

These increased powers include most notably the power to request and make copies of information and or records relevant to the Act, the power to request a person attend a specific time and place to answer questions, and the power to enter premises other than residential premises without a search warrant.

It is unclear at this point how and to what extent these new powers will be deployed by Fair Trading for the benefit of ensuring compliance with the Act.

**For more information** on the *Building and Construction Industry Security of Payment Amendment Act 1999* (NSW) contact one of our Principal Solicitors:

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