

Security of Payment Reforms

Summary

On 20 November 2013 the Building and Construction Industry Security of Payment Act 1999 ("**the Act**") was amended so that the following new payment terms apply to all construction contracts (other than excluded construction contracts) entered on or after 21 April 2014.

Construction contracts for residential building work (as defined in the Home Building Act 1989) where the principal resides in or proposes to reside in the premises where the work is undertaken remain as excluded construction contracts ("**residential contracts**"). References below do not apply to these contracts.

Key changes

1. Progress payments to head contractors are due 15 business days after a progress claim is made unless the contract includes a shorter payment period. Any contractual provision allowing a longer payment period is void.
2. Progress payments to subcontractors under contracts not connected with residential contracts are due 30 business days after a progress claim is made unless the contract includes a shorter payment period. Any contractual provision allowing a longer payment period is void.
3. There is no requirement that a payment claim state that it is made under the Act unless the payment claim is made under a contract connected with a residential contract.
4. Payment claims submitted by head contractors must include a declaration (in the form at Schedule 1 to the Building and Construction Industry Security of Payment Regulation 2008 *that* all subcontractors and suppliers have been paid all amounts that have become due and payable in relation to the construction work.
5. A maximum penalty of \$22,000 if a head contractor does not provide the required declaration in relation to the payment of all subcontractors and suppliers with each payment claim.
6. A maximum penalty of \$22,000, or three months imprisonment, or both, if a head contractor knowingly makes a false or misleading declaration in relation to the payment of all subcontractors and suppliers.
7. Officers of the Director-General of the Department of Finance and Services are authorised to investigate the compliance of head contractors with the subcontractor and supplier payment declarations.
8. A maximum penalty of \$22,000, or three months imprisonment, or both, for a failure to comply with a request for information by an investigating officer or knowingly providing false information to an investigating officer.
9. Regulations may be made to require retention money to be held in trust for subcontractors in a trust account established and operated in accordance with the regulations.

The NSW Government is currently consulting with the industry on the appropriate model for cash retention moneys to be held in trust and has released a consultation paper which proposes that a trust fund for cash retention moneys be administered by the Office of the Small Business Commissioner ("**OSBC**") as the statutory trustee, in a similar fashion to the current Retail Leases Bond Scheme.

Action that needs to be taken

1. Ensure that systems are reviewed to maintain cashflow based upon payment terms to Head Contractors of 15 business days.
2. Ensure that systems are reviewed to maintain cashflow based upon payment terms to Subcontractors of 30 business days (we note that secondary subcontracts, between subcontractors and sub-subcontractors, also have 30 day payment terms— accordingly, systems to maintain cashflow should be reviewed on this basis).
3. Systems are implemented to respond to all payment claims within 10 business days after receipt, noting that a payment claim no longer need state that it is made under the Act (unless the payment claim is for a contract connected with a residential contract).

Key takeaways

- Progress payments to head contractors are due 15 business days after a claim, unless stated otherwise in the contract.
- Subcontractors must receive payments within 30 business days after a claim, with no longer payment periods allowed.
- Head contractors must include a declaration with payment claims confirming all subcontractors and suppliers have been paid.
- Penalties for non-compliance with payment declaration requirements can reach \$22,000 or three months imprisonment.
- The NSW Government is consulting on a trust fund model for cash retention moneys to protect subcontractors.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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