

Passed by both Houses



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2018

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

Legislative Council
2018

Clerk of the Parliaments



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2018

Act No , 2018

An Act to amend the *Building and Construction Industry Security of Payment Act 1999* to make further provision with respect to payments for construction work carried out, and related goods and services supplied, under construction contracts; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Building and Construction Industry Security of Payment Amendment Act 2018*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Building and Construction Industry Security of Payment Act 1999 No 46

[1] Section 4 Definitions

Omit the definition of *exempt residential construction contract* from section 4 (1).

Insert in alphabetical order:

exempt residential construction contract means:

- (a) a construction contract that is connected with an owner occupier construction contract, or
- (b) any other type of construction contract for the carrying out of residential building work that is prescribed by the regulations for the purposes of this definition.

owner occupier construction contract means a construction contract for the carrying out of residential building work within the meaning of the *Home Building Act 1989* on such part of any premises as the party for whom the work is carried out resides or proposes to reside in.

[2] Section 4 (2)

Omit the subsection. Insert instead:

- (2) A reference in this Act to a contract that is connected with an owner occupier construction contract is a reference to a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the owner occupier construction contract.

[3] Section 7 Application of Act

Omit section 7 (2) (b).

[4] Section 8

Omit the section. Insert instead:

8 Right to progress payments

A person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment.

[5] Section 11 Due date for payment

Omit the note to section 11 (1A).

[6] Section 11 (1B) and (1C)

Omit “a construction contract that is connected with” wherever occurring.

[7] Section 11 (1B) (a)

Omit “30 business days”. Insert instead “20 business days”.

[8] Section 12A Trust account requirements for retention money

Insert “or the subcontractor entitled to the retention money” after “Commissioner” in section 12A (3) (b).

[9] Section 13 Payment claims

Omit “8 (1)” from section 13 (1). Insert instead “8”.

[10] Section 13 (1A)–(1C)

Insert after section 13 (1):

- (1A) A payment claim may be served on and from the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and on and from the last day of each subsequent named month.
- (1B) However, if the construction contract concerned makes provision for an earlier date for the serving of a payment claim in any particular named month, the claim may be served on and from that date instead of on and from the last day of that month.
- (1C) In the case of a construction contract that has been terminated, a payment claim may be served on and from the date of termination.

[11] Section 13 (2) (c)

Omit the paragraph. Insert instead:

- (c) must state that it is made under this Act.

[12] Section 13 (5) and (6)

Omit the subsections. Insert instead:

- (5) Except as otherwise provided for in the construction contract, a claimant may only serve one payment claim in any particular named month for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in that month.
- (6) Subsection (5) does not prevent the claimant from:
 - (a) serving a single payment claim in respect of more than one progress payment, or
 - (b) including in a payment claim an amount that has been the subject of a previous claim, or
 - (c) serving a payment claim in a particular named month for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in a previous named month.

[13] Section 13 (7)

Omit “200 penalty units”.

Insert instead “1,000 penalty units in the case of a corporation or 200 penalty units in the case of an individual”.

[14] Section 13 (8)

Omit “200 penalty units or 3 months imprisonment, or both”.

Insert instead “1,000 penalty units in the case of a corporation or 200 penalty units or 3 months imprisonment (or both) in the case of an individual”.

[15] Section 13, note

Insert at the end of section 13:

Note. An offence against subsection (7) or (8) committed by a corporation is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation—see section 34D.

[16] Section 17 Adjudication applications

Omit “notified” from section 17 (2) (a). Insert instead “served written notice on”.

[17] Section 17A

Insert after section 17:

17A Withdrawal of application

- (1) A claimant may withdraw an adjudication application at any time:
 - (a) before an adjudicator is appointed to determine the application, or
 - (b) if an adjudicator has been appointed—before the application is determined,by serving written notice of the withdrawal on the respondent and on the authorised nominating authority or the adjudicator (if any).
- (2) If an adjudicator has been appointed to determine an adjudication application, the withdrawal of the application does not have effect if any other party to the construction contract concerned objects to the withdrawal and, in the opinion of the adjudicator, it is in the interests of justice to uphold the objection.

[18] Section 21 Adjudication procedures

Omit section 21 (3) (a). Insert instead:

- (a) within 10 business days after:
 - (i) if the respondent is entitled to lodge an adjudication response under section 20—the date on which the respondent lodges the response or, if a response is not lodged, the end of the period within which the respondent was entitled to lodge a response, or
 - (ii) in any other case—the date on which notice of the adjudicator’s acceptance of the application is served on the claimant and the respondent, or

[19] Section 22 Adjudicator’s determination

Insert at the end of section 22 (3) (b):

, and

- (c) be served by the adjudicator on the claimant and the respondent.

[20] Section 23 Respondent required to pay adjudicated amount

Insert “by the adjudicator” after “served” in paragraph (a) of the definition of *relevant date* in section 23 (1).

[21] Section 26A Principal contractor can be required to retain money owed to respondent

Omit section 26A (5) (but not the note). Insert instead:

- (5) A person who is served with a payment withholding request must, if the person is not (or is no longer) a principal contractor for the claim, give notice to that

effect to the claimant concerned within 10 business days after receiving the request.

Maximum penalty: 50 penalty units in the case of a corporation or 10 penalty units in the case of an individual.

[22] Section 26B Obligation of principal contractor to retain money owed to respondent

Omit section 26B (3) (a). Insert instead:

- (a) the adjudication application for the payment claim is withdrawn and the claimant does not make a new adjudication application in accordance with section 26,
- (a1) the adjudicator fails to determine the adjudication application in accordance with section 21 and the claimant does not make a new adjudication application in accordance with section 26,

[23] Section 26B (5)

Omit “5 penalty units”.

Insert instead “50 penalty units in the case of a corporation or 10 penalty units in the case of an individual”.

[24] Sections 26D (3) and 26E (2) and (3)

Omit “10 penalty units” wherever occurring.

Insert instead “50 penalty units in the case of a corporation or 10 penalty units in the case of an individual”.

[25] Section 28 Nominating authorities

Insert after section 28 (1A):

- (1B) An authority under this section may be given unconditionally or subject to conditions.

[26] Section 28 (2)

Insert “or is given subject to conditions” after “withdrawn” in section 28 (2) (b).

[27] Section 28A

Insert after section 28:

28A Code of practice for authorised nominating authorities

- (1) The Minister may, by order published on the NSW legislation website, make a code of practice to be observed by an authorised nominating authority in relation to its activities under this Act. The order is to set out the code of practice.
- (2) The code of practice takes effect on the day on which the order is published or, if the order specifies a later date for commencement, on the later date.
- (3) The Minister may, by order published on the NSW legislation website, amend or repeal the code of practice.
- (4) An authorised nominating authority that contravenes a provision of the code of practice that is identified in the code as an “offence provision” is guilty of an offence under this section.

Maximum penalty: 50 penalty units.

- (5) The Minister may withdraw a person’s authority to nominate adjudicators for the purposes of this Act if the Minister is satisfied that the person has contravened a provision of the code of practice. Nothing in this subsection limits:
- (a) the grounds on which the Minister may withdraw any such authority under section 28, or
 - (b) the right of a person under that section to apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of the Minister’s decision to withdraw the authority.

[28] Section 31 Service of documents

Omit “notice” wherever occurring in section 31 (1) and (2). Insert instead “document”.

[29] Section 31 (1) (d) and (d1)

Omit “notices” wherever occurring. Insert instead “documents”.

[30] Section 31 (1) (e)

Omit the paragraph. Insert instead:

- (e) in the case of service by a party to a construction contract on another party to the construction contract—in the manner that may be provided under the construction contract.

[31] Section 31 (3)

Omit “notices”. Insert instead “documents”.

[32] Section 31 (4)

Insert after section 31 (3):

- (4) In this section:
 - document* includes written notice or determination.
 - serve* includes give, send or otherwise provide.

[33] Sections 32A and 32B

Insert after section 32:

32A Finding of jurisdictional error in adjudicator’s determination

- (1) If, in any proceedings before the Supreme Court relating to any matter arising under a construction contract, the Court makes a finding that a jurisdictional error has occurred in relation to an adjudicator’s determination under this Part, the Court may make an order setting aside the whole or any part of the determination.
- (2) Without limiting subsection (1), the Supreme Court may identify the part of the adjudicator’s determination affected by jurisdictional error and set aside that part only, while confirming the part of the determination that is not affected by jurisdictional error.

32B Application of Part to a claimant in liquidation

- (1) A corporation in liquidation cannot serve a payment claim on a person under this Part or take action under this Part to enforce a payment claim (including by making an application for adjudication of the claim) or an adjudication determination.

- (2) If a corporation in liquidation has made an adjudication application that is not finally determined immediately before the day on which it commenced to be in liquidation, the application is taken to have been withdrawn on that day.

[34] Part 3A

Insert after Part 3:

Part 3A Investigation and enforcement powers

Division 1 Preliminary

32C Authorised officers

- (1) In this Part:
authorised officer means:
- (a) a person employed in the Department of Finance, Services and Innovation who is appointed under this Part as an authorised officer, or
 - (b) an investigator appointed under section 18 of the *Fair Trading Act 1987*.
- (2) The Secretary may appoint persons employed in the Department of Finance, Services and Innovation as authorised officers for the purposes of this Part.
- (3) A person appointed under subsection (2) is to be provided by the Secretary with a certificate of identification.
- (4) An authorised officer must, when exercising on any premises any function of the authorised officer under this Part, produce the officer's certificate of identification to any person apparently in charge of the premises who requests its production.

32D Purposes for which functions under Part may be exercised

- (1) An authorised officer may exercise the functions conferred by this Part for any of the following purposes:
- (a) for the purpose of investigating, monitoring and enforcing compliance with the requirements imposed by or under this Act,
 - (b) for obtaining information or records connected with the administration of this Act,
 - (c) for the purpose of administering or executing this Act.
- (2) In this Part, a reference to an *authorised purpose* is a reference to any purpose referred to in subsection (1).

32E Extraterritorial application

A notice may be given under this Part to a person in respect of a matter even though the person is outside the State or the matter occurs outside the State, so long as the matter affects or relates to construction work carried out in the State or to related goods and services supplied in the State.

Division 2 Information gathering powers

32F Exercise in conjunction with other powers

A power conferred by this Division may be exercised whether or not a power of entry under Division 3 is being exercised.

32G Power of authorised officers to require information and records

- (1) An authorised officer may, by notice in writing given to a person, require the person to furnish to the officer such information or records (or both) as the officer may require for an authorised purpose.
- (2) A notice under this Division must specify the manner in which information or records are required to be furnished and a reasonable time by which the information or records are required to be furnished.
- (3) A notice under this Division may only require a person to furnish existing records that are in the person's possession or that are within the person's power to obtain lawfully.
- (4) The person to whom any record is furnished under this Division may take copies of it.
- (5) If any record required to be furnished under this Division is in electronic, mechanical or other form, the notice requires the record to be furnished in written form, unless the notice otherwise provides.

32H Power of authorised officers to require answers

- (1) An authorised officer may require a person whom the authorised officer suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required for an authorised purpose to answer questions in relation to those matters.
- (2) An authorised officer may, by notice in writing, require a corporation to nominate, in writing within the time specified in the notice, a director or officer of the corporation to be the corporation's representative for the purpose of answering questions under this section.
- (3) Answers given by a person nominated under subsection (2) bind the corporation.
- (4) An authorised officer may, by notice in writing, require a person to attend at a specified place and time to answer questions under this section if attendance at that place is reasonably required in order that the questions can be properly put and answered.
- (5) The place and time at which a person may be required to attend under subsection (4) is to be:
 - (a) a place and time nominated by the person, or
 - (b) if the place and time nominated is not reasonable in the circumstances or a place and time is not nominated by the person, a place and time nominated by the authorised officer that is reasonable in the circumstances.

Division 3 Entry to premises

32I Power of authorised officers to enter premises

- (1) An authorised officer may enter premises at any reasonable time.
- (2) Entry to premises may be effected with or without the authority of a search warrant.

32J Entry into residential premises only with permission or search warrant

This Division does not empower an authorised officer to enter a part of premises that is used predominantly for residential purposes without the permission of the occupier or the authority of a search warrant.

32K Search warrants

- (1) An authorised officer under this Act may apply to an issuing officer for the issue of a search warrant if the authorised officer believes on reasonable grounds that:
 - (a) a requirement imposed by or under this Act is being or has been contravened at any premises, or
 - (b) there is, in or on any premises, matter or a thing that is connected with an offence under this Act or the regulations.
- (2) An issuing officer to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised officer named in the warrant and any other person named in the warrant:
 - (a) to enter the premises, and
 - (b) to exercise any function of an authorised officer under this Part.
- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.
- (4) Without limiting the generality of section 71 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, a police officer may:
 - (a) accompany an authorised officer executing a search warrant issued under this section, and
 - (b) take all reasonable steps to assist the authorised officer in the exercise of the officer's functions under this section.
- (5) In this section:
issuing officer means an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

32L Power to require owner or occupier to provide assistance

An authorised officer proposing to exercise a power of entry under this Division may, by notice in writing given to the owner or occupier of the premises, require the owner or occupier to provide such reasonable assistance and facilities as are specified in the notice within a specified time and in a specified manner.

32M Powers that can be exercised on premises

- (1) An authorised officer may, at any premises lawfully entered, do anything that in the opinion of the authorised officer is reasonably necessary to be done for an authorised purpose, including (but not limited to) the things specified in subsection (2).
- (2) An authorised officer may do any or all of the following:
 - (a) make examinations and inquiries that the authorised officer considers necessary,
 - (b) direct a person to produce records for inspection,
 - (c) examine and inspect records,

- (d) copy records,
 - (e) seize anything that the authorised officer has reasonable grounds for believing is connected with an offence against this Act or the regulations,
 - (f) do anything else authorised by or under this Act.
- (3) The power to seize anything connected with an offence includes a power to seize:
- (a) a thing with respect to which the offence has been committed, and
 - (b) a thing that will afford evidence of the commission of the offence, and
 - (c) a thing that was used for the purpose of committing the offence.
- (4) The power to do a thing under this section includes a power to arrange for that thing to be done.
- (5) A power to do something under this section in relation to a thing may be exercised without the consent of the owner of the thing.
- (6) In this section, a reference to an offence includes a reference to an offence that there are reasonable grounds for believing has been committed.

32N Dealing with seized things

- (1) An authorised officer who seizes any thing under this Division on any premises must issue the person apparently in charge of the premises with a written receipt for the thing seized.
- (2) An authorised officer may retain any thing seized under this Division until the completion of proceedings (including proceedings on appeal) in which it may be evidence.
- (3) A record may only be retained under subsection (2) if the person from whom the record was seized is provided, within a reasonable time after the seizure, with a copy of the record certified by the authorised officer as a true copy. The copy is, as evidence, of equal validity to the record of which it is certified to be a copy.
- (4) Subsection (2) ceases to have effect in relation to anything seized if, on the application of a person aggrieved by the seizure, the court in which proceedings referred to in that subsection are commenced so orders.

Division 4 Offences

32O Failure to comply with requirement under Part

- (1) A person must not, without reasonable excuse, refuse or fail to comply with a requirement made of the person under this Part.
Maximum penalty:
 - (a) in the case of a corporation—40 penalty units, or
 - (b) in the case of an individual—20 penalty units.
- (2) A person is not guilty of an offence of failing to comply with a requirement under this Part to furnish records or information or to answer a question unless the person was warned on that occasion that a failure to comply is an offence.

32P False or misleading information

A person must not provide information or a record or give an answer in purported compliance with a requirement made under this Part knowing that the information, record or answer is false or misleading in a material respect.

Maximum penalty:

- (a) in the case of a corporation—500 penalty units, or
- (b) in the case of an individual—100 penalty units.

32Q Obstruction of authorised officer

- (1) A person must not, without reasonable excuse, delay, hinder or obstruct an authorised officer in the exercise of the officer's functions under this Part.

Maximum penalty:

- (a) in the case of a corporation—40 penalty units, or
- (b) in the case of an individual—20 penalty units.

- (2) It is a defence to an offence under this section if the person charged establishes that the authorised officer failed to produce the authorised officer's certificate of identification when requested to do so.

[35] Sections 34A–34D

Omit section 34A. Insert instead:

34A Proceedings for offences

- (1) Proceedings for an offence against this Act or the regulations may be dealt with summarily before the Local Court.
- (2) Proceedings for an offence against this Act or the regulations may be commenced within, but not later than, 2 years after the date on which the offence is alleged to have been committed.

34B Penalty notices

- (1) An authorised officer within the meaning of Part 3A may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence.
- (2) A penalty notice offence is an offence against this Act or the regulations that is prescribed by the regulations as a penalty notice offence.
- (3) The *Fines Act 1996* applies to a penalty notice issued under this section.
Note. The *Fines Act 1996* provides that, if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.
- (4) The amount payable under a penalty notice issued under this section is the amount prescribed for the alleged offence by the regulations (not exceeding the maximum amount of penalty that could be imposed for the offence by a court).
- (5) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.

34C Liability of directors etc for offences by corporation—accessory to the commission of offences

- (1) For the purposes of this section, a *corporate offence* is an offence against this Act or the regulations that is capable of being committed by a corporation.
- (2) A person commits an offence against this section if:
 - (a) a corporation commits a corporate offence, and
 - (b) the person is:
 - (i) a director of the corporation, or
 - (ii) 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, and
 - (c) the person:
 - (i) aids, abets, counsels or procures the commission of the corporate offence, or
 - (ii) induces, whether by threats or promises or otherwise, the commission of the corporate offence, or
 - (iii) conspires with others to effect the commission of the corporate offence, or
 - (iv) is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence.

Maximum penalty: The maximum penalty for the corporate offence if committed by an individual.

- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.
- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the corporate offence.
- (5) This section does not affect the liability of the corporation for the corporate offence, and applies whether or not the corporation is prosecuted for, or convicted of, the corporate offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are concerned in, or party to, the commission of the corporate offence.

34D Liability of directors etc for specified offences by corporation—offences attracting executive liability

- (1) For the purposes of this section, an *executive liability offence* is:
 - (a) an offence against section 13 (7) or (8) that is committed by a corporation, or
 - (b) an offence against the regulations that:
 - (i) is created under section 12A, and
 - (ii) is prescribed by the regulations as an offence to which this section applies, and
 - (iii) is committed by a corporation.

- (2) A person commits an offence against this section if:
- (a) a corporation commits an executive liability offence, and
 - (b) the person is:
 - (i) a director of the corporation, or
 - (ii) 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 executive liability offence, and
 - (c) the person:
 - (i) knows that the executive liability offence (or an offence of the same type) would be or is being committed or is recklessly indifferent as to whether it would be or is being committed, and
 - (ii) fails to take all reasonable steps to prevent or stop the commission of that offence.

Maximum penalty: 200 penalty units.

- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.
- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the executive liability offence.
- (5) This section does not affect the liability of the corporation for the executive liability offence, and applies whether or not the corporation is prosecuted for, or convicted of, the executive liability offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are accessories to the commission of the executive liability offence or are otherwise concerned in, or party to, the commission of the executive liability offence.
- (7) In this section:
- director* has the same meaning it has in the *Corporations Act 2001* of the Commonwealth.

reasonable steps, in relation to the commission of an executive liability offence, includes, but is not limited to, such action (if any) of the following kinds as is reasonable in all the circumstances:

- (a) action towards:
 - (i) assessing the corporation's compliance with the provision creating the executive liability offence, and
 - (ii) ensuring that the corporation arranged regular professional assessments of its compliance with the provision,
- (b) action towards ensuring that the corporation's employees, agents and contractors are provided with 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,
- (c) action towards ensuring that:
 - (i) the plant, equipment and other resources, and
 - (ii) the structures, work systems and other processes, relevant to compliance with the provision creating the executive liability offence are appropriate in all the circumstances,

- (d) action towards 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.

[36] Section 35 Regulations

Insert after section 35 (3):

- (4) The regulations may:
 - (a) prescribe information that is required to be provided to a subcontractor when entering into a construction contract, and
 - (b) create offences punishable by a penalty not exceeding 100 penalty units in relation to that requirement.

[37] Sections 36 and 36A

Omit sections 36–36B. Insert instead:

36 Disclosure of information

A person must not disclose any information obtained in connection with the administration or execution of this Act unless that disclosure is made:

- (a) with the consent of the person from whom the information was obtained, or
- (b) in connection with the administration or execution of this Act, or
- (c) for the purposes of legal proceedings arising out of this Act or for the purposes of a report of legal proceedings, or
- (d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or
- (e) with other lawful excuse.

Maximum penalty: 100 penalty units.

36A Delegation

The Minister may delegate the exercise of any function of the Minister under this Act (other than this power of delegation) to:

- (a) the Secretary, or
- (b) a person employed in a Public Service agency responsible to the Minister, or
- (c) a person, or a class of persons, authorised for the purposes of this section by the regulations.

[38] Schedule 2 Savings and transitional provisions

Insert at the end of the Schedule, with appropriate Part and clause numbering:

Part Provisions consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2018

Application of amendments

Except as provided by the regulations, an amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2018*

does not apply in relation to a construction contract entered into before the commencement of the amendment.