



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2018

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is cognate with the *Retirement Villages Amendment Bill 2018*.

Overview of Bill

The object of this Bill is to amend the *Building and Construction Industry Security of Payment Act 1999* (the **Principal Act**) as follows:

- (a) to modify provisions relating to the entitlement under the Principal Act to receive progress payments and to serve claims in respect of those payments,
- (b) to provide that a progress payment to be paid to a subcontractor under a construction contract is due and payable no later than 20 (instead of the current 30) business days after the subcontractor makes a payment claim for the payment,
- (c) to increase penalties for offences under the Principal Act, including offences relating to the supporting statements that are required to accompany payment claims,
- (d) to make miscellaneous amendments relating to the procedure for recovering progress payments under the Principal Act, including providing for a code of practice relating to persons who are authorised to nominate adjudicators,
- (e) to enable the Supreme Court to set aside (in whole or in part) an adjudicator's determination if it finds that a jurisdictional error has occurred,
- (f) to enable the regulations to require information to be provided to subcontractors when entering into construction contracts,
- (g) to include investigation and enforcement powers under the Principal Act,
- (h) to provide for the period in which proceedings for offences against the Principal Act or the regulations may be commenced in the Local Court,

- (i) to provide for the issuing of penalty notices for offences against the Principal Act or the regulations,
- (j) to provide for the personal liability of directors for offences by corporations,
- (k) to make other amendments of an administrative, minor or consequential nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act 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

Schedule 1 [3] removes the owner-occupier exemption from the Principal Act (that is, the exemption applying to construction contracts for residential building work where the party for whom the work is carried out resides or proposes to reside on the premises). The regulations may currently exempt classes of construction contracts from the Principal Act. **Schedule 1 [1], [2] and [5]** are consequential amendments.

Schedule 1 [4] restates the statutory entitlement to receive progress payments for construction work undertaken to be carried out, or for related goods and services undertaken to be supplied, under a construction contract and removes provisions relating to when that entitlement arises. **Schedule 1 [8]** is a consequential amendment.

Schedule 1 [6] provides that a progress payment to be paid to a subcontractor under a construction contract is due and payable no later than 20 (instead of 30) business days after the subcontractor makes a payment claim for the payment.

Schedule 1 [7] enables regulations to be made dealing with the inspection, by a subcontractor who is entitled to retention money, of records kept in connection with the operation of a trust account into which the money is required to be paid.

Schedule 1 [9] provides that a person who is entitled to a progress payment may serve a payment claim on and from the last day of each named month or, if the construction contract provides for a date in a particular named month for the serving of a payment claim, on and from that date.

Schedule 1 [10] provides that in all cases a payment claim must state that it is made under the Principal Act.

Schedule 1 [11] generally limits a person from making more than one payment claim each month for construction work carried out in that month.

Schedule 1 [12] and [13] increase the penalties for the offence of serving a payment claim on a principal without a supporting statement declaring that all subcontractors have been paid all amounts due and payable to them for the construction work concerned and for the offence of providing a supporting statement knowing that the statement is false or misleading in a material particular.

Schedule 1 [14] is consequential on the amendment made by **Schedule 1 [34]** (proposed section 34D).

Schedule 1 [15] makes it clear that a written notice of a claimant's intention to apply for the adjudication of a payment claim must be served on the respondent.

Schedule 1 [16] provides for the withdrawal of adjudication applications.

Schedule 1 [17] modifies the period within which an adjudicator is required to determine an adjudication application where a respondent is entitled to lodge an adjudication response. The adjudicator will be required to determine the application within 10 business days after either the

response is lodged or (if a response is not lodged) the end of the period within which the respondent is entitled to lodge a response.

Schedule 1 [18] requires the service of an adjudicator's determination on the claimant and the respondent. **Schedule 1 [19]** is a consequential amendment.

Schedule 1 [20], [22] and [23] increase the penalties for certain offences under the scheme in the Principal Act that enables a contractor for a construction project who is claiming progress payments from a subcontractor to secure payment of those progress payments by giving notice of the claim to a principal contractor further up the chain of contractors engaged on the project.

Schedule 1 [21] provides that the obligation of a principal contractor to retain money owed to the respondent no longer applies if the adjudication application by the claimant is withdrawn and a new application is not made.

Schedule 1 [24] makes it clear that the Minister's authorisation of persons to nominate adjudicators under the Principal Act may be given unconditionally or subject to conditions. **Schedule 1 [25]** is a consequential amendment.

Schedule 1 [26] provides for a code of practice relating to persons who are authorised to nominate adjudicators under the Principal Act.

Schedule 1 [27] ensures that the methods of service specified in the Principal Act extend to any documents (rather than applying just to notices) authorised or required to be served under the Principal Act. **Schedule 1 [28] and [30]** are consequential amendments.

Schedule 1 [29] makes it clear that if a construction contract provides for a manner of service that manner is applicable only to parties to the contract.

Schedule 1 [31] makes it clear that the expression *serve*, when used in connection with the service of documents, includes give, send or otherwise provide.

Schedule 1 [32] enables the Supreme Court to set aside (in whole or in part) an adjudicator's determination if it finds that a jurisdictional error has occurred. **Schedule 1 [32]** also provides that corporations in liquidation cannot serve payment claims or take other action under Part 3 of the Principal Act to enforce a payment claim.

Schedule 1 [33] inserts proposed Part 3A containing provisions relating to investigation and enforcement powers for the purposes of the Principal Act.

Schedule 1 [34] deals with offences under the Principal Act as follows:

- (a) by providing that proceedings for an offence against the Principal Act or the regulations are to be commenced no later than 2 years after the date on which the offence is alleged to have been committed (proposed section 34A),
- (b) by providing for the issue of penalty notices for offences against the Principal Act or the regulations (proposed section 34B),
- (c) by providing for the personal liability of directors for being an accessory to an offence committed by a corporation (proposed section 34C),
- (d) by providing for the personal liability of directors for certain offences committed by a corporation (proposed section 34D).

Schedule 1 [35] enables the regulations to prescribe information that must be provided to subcontractors when entering into construction contracts.

Schedule 1 [36] consolidates provisions relating to the disclosure of information obtained in connection with the administration or execution of the Principal Act and enables the Minister to delegate the Minister's functions under the Principal Act.

Schedule 1 [37] provides that the amendments made by the proposed Act do not apply to existing construction contracts.