

CHANGES TO THE SECURITY OF PAYMENT ACT COMMENCE TODAY – ARE YOU READY?

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Australia Construction Alert

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The changes to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Act) commence on 21 October 2019. The long awaited changes seek to improve the flow of payments to subcontractors and clarify the application of the Act to companies in liquidation.

Significantly, the changes do not apply to construction contracts entered into before the commencement of the amendment, except as provided by the regulations.

The key changes include:

- Claimants are entitled to serve a payment claim on and from the date a contract is terminated
- Progress payments from head contractors to subcontractors are required within 20 business days of receiving the payment claim
- Payment claims must now state that they are made under the Act
- A claimant can withdraw an adjudication application by serving written notice of withdrawal
- Increased penalties for head contractors that fail to provide a supporting statement when serving a payment claim on a principal
- Executive liability offences for directors that knowingly or recklessly fail to include supporting statements, or provide false or misleading supporting statements
- Claimants in liquidation can no longer serve payment claims, enforce payment claims, or, apply for an adjudication determination
- New powers have been given to 'authorised officers' to investigate, monitor, and enforce compliance with the Act
- Adjudication determinations may be partially quashed for jurisdictional error.

NO APPLICATION TO CLAIMANTS IN LIQUIDATION

The Act provides welcome clarity as to the application of the Act to claimants in liquidation and closes the disparity between the New South Wales and Victorian approaches. The Act now expressly precludes corporations in liquidation from making payment claims and bringing adjudication applications under the Act.

This amendment is particularly interesting in light of the New South Wales Court of Appeal's recent decision in *Seymour Whyte Constructions Pty Ltd v Ostwald Bros (in liq)* (see our e-alert [here](#)) which held that the Act could operate for the benefit of corporations in liquidation – an unexpected outcome given these amendments were awaiting proclamation at the time the Court's decision was delivered.

PAYMENT CLAIMS CAN BE SERVED AFTER THE CONTRACT IS TERMINATED

A payment claim can now be served after a construction contract is terminated. This ends the uncertainty created by *Southern Han Breakfast Point v Lewence Construction*, where the Court unanimously held that a right to a progress payment may not arise following termination of a contract.

WHAT THIS MEANS FOR YOU

- Ensure all records are in order due to the potential for authorised officers to enter premises, obtain search warrants to inspect and/or seize records if they suspect an offence has been committed.
- Increased penalties will require corporations to vigilantly provide accurate supporting statements with each payment claim to avoid large fines. Failure to do so may also see company directors personally liable for misconduct.
- Faster turnaround times for paying progress payments will require efficient management of cash flow by respondents to payment claims.
- Corporations in liquidation can no longer take advantage of the Act.

If you would like assistance on how to adequately address the impact of these new amendments on your business, please contact the authors of this alert.

KEY CONTACTS



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