

## **Changes to the Security of Payment Act in New South Wales**

In a previous article we reviewed the changes made to the Security of Payment Act in Queensland with the introduction of the *Building Industry Fairness (Security of Payment) Act 2017*.

We now turn to changes that have recently been made in New South Wales with the introduction of the *Building and Construction Industry Security of Payment Amendment Act 2018 (NSW)*.

These changes only apply to construction contracts that came into effect from 21 October 2019 and of course where the works take place in NSW or the laws of NSW apply.

A short overview of the eight main changes is provided below.

### **1. Reference Dates Removed**

Reference dates have been completely removed. A contractor does not now have to wait for a “reference date” to make a payment claim. Instead, a claim can be made once a month commencing from the last day of the month in which construction work was first carried out. If the Principal has still specified a claim date on the contract e.g. the 20<sup>th</sup> of each month, in which case the claimant can issue a claim as early as that day of the month but cannot be penalized for submitting a claim later.

Further, as the contractor now has the right to make a monthly claim, contracts with milestone payments where claims could be spaced more than a month apart based on progress are invalid.

### **2. Must refer to Security of Payment Act in Payment Claims**

In the original *Building and Construction Industry Security of Payment Act 1999 (NSW)*, it was a requirement to refer to the Act in each payment claim. This requirement was removed in 2014; however, it is now again made obligatory. A payment claim without expressly referring to the Act are now invalid.

### **3. Faster Payments to Subcontractors**

In a move that will certainly please subcontractors, a head contractor must now make payments to subcontractors within 20 business days rather than the previous 30 business days. The time limit for payments to principals remain at 15 business days from the claim date.

### **4. Ability to Submit a Post-Termination Payment Claim**

A key change to the Act now expressly enables a contractor to make one further payment claim following termination of the contract. This claim must be made within 12 months of termination, i.e. the statutory period for claims.

Prior to this the right of a contractor to make a claim after termination was a grey area and subject to judicial review.

## **5. Ability to Withdraw an Adjudication Application**

The Act now allows an applicant to withdraw an adjudication application prior to a determination being made, subject to the respondent not making an objection and the adjudicator agreeing that for the purposes of justice the application should be determined. Prior to an adjudicator being appointed, the applicant is able to unilaterally withdraw the application.

It is expected that allowing applications to be withdrawn will save costs where agreement between the parties has been reached while the adjudicator is reviewing the application. Although it may appear illogical, a respondent may object to an application being withdrawn if it considers that it could be in a worse position in a future adjudication on the same issues or it has expended considerable sums that would have to be expended again in a future adjudication.

## **6. Setting Aside of an Adjudicator's Determination**

An important procedural change is that an adjudicator's determination is not fully set aside should a procedural error be found. Now, the Supreme Court can set aside the part of the determination that contains the error but enforce the remainder of the determination. It is expected this will reduce the number of costly and time consuming Supreme Court appeals being launched.

## **7. Prevention of Payment Claims by Claimants in Liquidation**

The changes introduced now prohibit a payment claim being made by a company in liquidation. Also prohibited is an adjudication application being made by a claimant in liquidation and any adjudications in progress would be deemed to be withdrawn the day prior to the company going in to liquidation.

## **8. Increased Penalties**

There are a raft of increased penalties including a fivefold increase in penalty points, from 200 to 1,000, for corporations that provide false or misleading supporting statements, which are commonly required to accompany payment claims under head contracts.

## **Conclusions**

The changes introduced by the *Building and Construction Industry Security of Payment Amendment Act 2018 (NSW)* are quite significant and affect many aspects of the Act. Accordingly, principals and head contractors should review contract terms to determine if they comply with the amendments introduced by the Amendment Act.

For assistance with payment claims, payment schedules or adjudication applications please email us at [info@geoecs.com.au](mailto:info@geoecs.com.au).