

Passed by both Houses



New South Wales

# Building and Construction Industry Security of Payment Amendment Bill 2013

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*I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.*

*Clerk of the Legislative Assembly.  
Legislative Assembly,  
Sydney,*

*, 2013*



New South Wales

## **Building and Construction Industry Security of Payment Amendment Bill 2013**

Act No     , 2013

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An Act to amend the *Building and Construction Industry Security of Payment Act 1999* with respect to the timing of, and other requirements for, payments under construction contracts; and for other purposes.

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*I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.*

*Assistant Speaker of the Legislative Assembly.*

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Building and Construction Industry Security of Payment Amendment Act 2013*.

**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

Insert in alphabetical order:

*exempt residential construction contract* means a construction contract specified in section 7 (2) (b) as a construction contract to which this Act does not apply.

*head contractor* means the person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the *main contract*) and for whom construction work is to be carried out or related goods and services supplied under a construction contract as part of or incidental to the work or goods and services carried out or supplied under the main contract.

**Note.** There is no head contractor when the principal contracts directly with subcontractors.

*principal* means the person for whom construction work is to be carried out or related goods and services supplied under a construction contract (the *main contract*) and who is not themselves engaged under 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 main contract.

*subcontractor* means a person who is to carry out construction work or supply related goods and services under a construction contract otherwise than as head contractor.

**Note.** A subcontractor's contract can be with the head contractor or (when there is no head contractor) with the principal directly.

### [2] Section 4 (2) and (3)

Insert at the end of section 4:

- (2) A reference in this Act to a contract that is connected with an exempt residential 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 exempt residential construction contract.
- (3) Notes included in this Act do not form part of this Act.

### [3] Section 11 Due date for payment

Omit section 11 (1). Insert instead:

- (1) Subject to this section and any other law, a progress payment to be made under a construction contract is payable in accordance with the applicable terms of the contract.
- (1A) A progress payment to be made by a principal to a head contractor under a construction contract becomes due and payable on:
  - (a) the date occurring 15 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or
  - (b) an earlier date as provided in accordance with the terms of the contract.

**Note.** This Act does not apply to a progress payment to be made by a principal to a head contractor under an exempt residential construction contract. (See

section 7 (2) (b).) Subsection (1C) applies to progress payments under a construction contract that is connected with an exempt residential construction contract.

- (1B) A progress payment to be made to a subcontractor under a construction contract (other than a construction contract that is connected with an exempt residential construction contract) becomes due and payable on:
- (a) the date occurring 30 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or
  - (b) an earlier date as provided in accordance with the terms of the contract.
- (1C) A progress payment to be made under a construction contract that is connected with an exempt residential construction contract becomes due and payable:
- (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or
  - (b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

**[4] Section 11 (8)**

Insert after section 11 (7):

- (8) A provision in a construction contract has no effect to the extent it allows for payment of a progress payment later than the relevant date it becomes due and payable under subsection (1A) or (1B).

**[5] Section 12A**

Insert after section 12:

**12A Trust account requirements for retention money**

- (1) The regulations may make provision for or with respect to requiring retention money to be held in trust for the subcontractor entitled to the money and requiring the head contractor who holds retention money to pay the money into a trust account (a *retention money trust account*) established and operated in accordance with the regulations.
- (2) The regulations may provide for the trust account into which retention money is to be paid to be a trust account established with a financial institution by the head contractor or a trust account established and operated by the Small Business Commissioner.
- (3) Without limitation, the regulations under this section may include provision for or with respect to the following:
  - (a) the procedures to be followed in connection with the authorisation of payments out of a retention money trust account,
  - (b) the keeping of records in connection with the operation of a retention money trust account and the inspection of those records by the Small Business Commissioner,
  - (c) the resolution of disputes in connection with the operation of a retention money trust account.
- (4) A regulation may create an offence punishable by a penalty not exceeding 200 penalty units for any failure to comply with the requirements of the regulations under this section.

- (5) In this section, *retention money* means money retained by a head contractor out of money payable by the head contractor to a subcontractor under a construction contract, as security for the performance of obligations of the subcontractor under the contract.

**[6] Section 13 Payment claims**

Omit section 13 (2) (c). Insert instead:

- (c) if the construction contract is connected with an exempt residential construction contract, must state that it is made under this Act.

**[7] Section 13 (7)–(9)**

Insert after section 13 (6):

- (7) A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.  
Maximum penalty: 200 penalty units.
- (8) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.  
Maximum penalty: 200 penalty units or 3 months imprisonment, or both.
- (9) In this section:  
*supporting statement* means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

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

Omit “Director-General of the Department of Services, Technology and Administration” from section 26A (2).

Insert instead “Director-General of the Department of Finance and Services”.

**[9] Sections 36–36B**

Insert after section 35:

**36 Investigation of compliance with provisions regarding supporting statements**

- (1) The Director-General of the Department of Finance and Services may, by order in writing, appoint a Public Service employee (an *authorised officer*) for the purpose of investigating compliance with section 13 (7) or (8).
- (2) An authorised officer may, by notice in writing, require a person whom the officer reasonably believes:
- (a) is or was a head contractor, or
- (b) is or was employed or engaged by a person whom the officer reasonably believes is or was a head contractor,
- to provide the officer with information, and all documents, relating to compliance with section 13 (7) or (8) and in particular relating to the payment of subcontractors by or on behalf of the head contractor in respect of specified construction work.

- (3) A person must not:
- (a) refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it, or
  - (b) in purported compliance with such a notice, provide information or a document knowing that the information or document is false or misleading in a material particular.

Maximum penalty: 200 penalty units or 3 months imprisonment, or both.

- (4) A person is not excused from providing information or a document in response to a notice under this section on the ground that the information or document may tend to incriminate the head contractor.

### **36A Dealing with documents produced**

- (1) An authorised officer may inspect a document produced in response to a notice under section 36 and may make copies of, or take extracts from, the document.
- (2) An authorised officer may:
- (a) take possession, and
  - (b) retain possession for as long as is necessary for the purposes of this Act, of a document produced in response to a notice under section 36, if the person otherwise entitled to possession of the document is supplied, as soon as practicable, with a copy certified by an officer to be a true copy.
- (3) A certified copy provided under subsection (2) is receivable in all courts as if it were the original.
- (4) Until a certified copy of a document is provided under subsection (2), the person having possession of the document must, at such times and places as he or she thinks appropriate, permit:
- (a) the person otherwise entitled to possession of the document, or
  - (b) a person authorised by the person so entitled,
- to inspect the document and make copies of, or take extracts from, the document.

### **36B Preservation of secrecy**

- (1) A person engaged in the administration of this Act must not:
- (a) in the course of that administration, disclose to another person so engaged any information or the contents of any document provided in response to a notice under section 36 without informing the other person that the information or document was so provided, or
  - (b) otherwise than in the course of that administration, disclose any such information or contents to any person without the written permission of the Director-General of the Department of Finance and Services given in relation to the disclosure.

Maximum penalty: 200 penalty units.

- (2) A person who was, but is no longer, engaged in the administration of this Act must not, without the written permission of the Director-General of the Department of Finance and Services, disclose to any other person any information or the contents of any document provided in response to a notice under section 36 that came to his or her knowledge in the course of that administration.

Maximum penalty: 200 penalty units.

- (3) It is not a contravention of subsection (1) or (2) if a person discloses any such information or contents:
- (a) in any proceedings for an offence against this Act, or
  - (b) in any civil proceedings arising under a construction contract, whether under Part 3 or otherwise, or
  - (c) in any legal proceedings where the disclosure is made in answering a question that the person is compellable to answer in those proceedings.

**[10] Schedule 2 Savings and transitional provisions**

Omit clause 1 (1). Insert instead:

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

**[11] Schedule 2, Part 5**

Insert after Part 4:

**Part 5 Provision consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2013**

**5 Application of amendments**

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2013* does not apply in relation to a construction contract entered into before the commencement of the amendment.