



# AMENDMENTS TO THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999 (NSW)

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# Introduction cont.

These amendments come into effect on 21 October 2019 as a response to a Review of the NSW Security of Payment Laws, which was conducted by Mr. John Murray AM.

NECA made submissions to Mr. Murray on necessary changes that would better assist the electrical contracting industry.

In this webinar, we will be discussing the following topics:

- the new requirements for payment claims, as well as the service of such claims;
- Reduced payment terms;
- the issuing of Payment Claims upon termination of a contract;
- Increased penalty rates for offences under the Act;
- Powers of authorised officers; and
- Liability of directors under the Act.

# Requirements of a Payment Claim

## Entitlement to Progress Payment

Entitlement to receive a progress payment is no longer triggered by a “reference date”.

Section 8 of the Act will read as follows:

*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.*

The “reference date” terminology has been entirely omitted from the Act.

# Requirements of a Payment Claim cont.

## When should I serve my Payment Claim?

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 and of the last day of each subsequent named month;
- if the construction contract makes provision for an earlier date in any particular named month, the claim may be served on and from that date instead; and
- In the case of a terminated contract, on and from the date of termination.

# Requirements of a Payment Claim cont.

## What are the requirements of my Payment Claim?

- Must identify the construction work (or related goods and services) to which the progress payment relates; and
- Must indicate the amount of the progress payment that is claimed; and
- **Must state that the Payment Claim is made under the Act -**

*“This is a payment claim made under the *Building and Construction Industry Security of Payment Act 1999 (NSW)*”*

# Reduced payment terms for subcontractors

Payment Claim	Current Act	Amended Act (21 October 2019)
Payment by head contractor to subcontractor (non-residential)	30 Business Days	20 Business Days (or earlier if provided in the Contract)

# Increased Penalty Rates

## **SUPPORTING STATEMENT BY HEAD CONTRACTOR**

- Under section 13(7) of the current Act, a head contractor must not serve a payment claim on a Principal unless the claim is accompanied by a supporting statement by head contractor that indicates that it relates to that particular payment claim.
- The current penalty for failing to serve a supporting statement has been increased from \$22,000 to \$110,000.

# Powers of Authorised Officers

## Authorised Officer

- A person employed in the Department of Finance, Services and Innovation who is appointed as an authorised officer; or
- An investigator appointed under section 18 of the Fair Trading Act 1987.

## How can an Authorised Officer exercise its Power?

- For the purposes of investigating, monitoring and enforcing compliance with the requirements imposed by the Act;
- For obtaining information or records connected with the administration of the Act; or
- For the purposes of administering or executing the Act.



# Powers of Authorised Officers cont.

## Powers of Authorised Officer

An authorised officer may:

- by notice in writing, require a person to furnish such information or records as the officer may require.
- 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.

# Liability of Directors

## Accessory to the commission of offences

A Corporate Offence is an offence against the Act or the Regulations that is capable of being committed by a corporation. A person commits an offence against section 34C of the Amendment Act if:

- A corporation commits an offence under section 34C; and
- The person is:
  - A director of the corporation; or
  - An individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation.

# Liability of Directors cont.

## Offences attracting Executive Liability

An executive liability offence includes:

- an offence against sections 13 (7) and (8) that is committed by a corporation (supporting statement by head contractor);
- An offence against the regulations that is:
  - Created under section 12A (retention trust money);
  - Prescribed by the regulations; and
  - Is committed by a corporation.

# Liability of Directors cont.

## Directors exposure to penalties

Accessory to the Commission of Offences:

- The maximum penalty for the corporate offence if committed by an individual

Offences attracting executive liability:

- Maximum penalty is 200 penalty units (\$22,000)

# Retention Trust Account

Section 12A of the current Act provides for the making of regulations 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. This regulation came into effect in relation to contracts entered into after 1 May 2015 for projects valued at over \$20million.

Under the Amendment Act, the right to inspect the trust records is extended to the subcontractor entitled to the retention money.

# Overview of the Amendments

SECTION	CURRENT ACT	AMENDED ACT (21 October 2019)
Section 8	Entitlement to a progress payment on and from a reference date.	Removal of the terminology “reference date”
Section 11(1B)(a)	Subcontractor payment terms 30 Business Days	Subcontractor payment terms 20 Business Days
Section 13	Service of payment claims on and from a reference date or in accordance with the construction contract	Service of payment claims on the last day of the named month and each subsequent month or as set out in a construction contract
Section 13(1C)	N/A	Service of payment claim on and from the date of termination

# Overview of the Amendments cont.

SECTION	CURRENT ACT	AMENDED ACT (21 October 2019)
Section 13(2)	Payment claims must: <ul style="list-style-type: none"><li>• Identify the work claimed; and</li><li>• Indicate the amount claimed.</li></ul>	Payment claims must: <ul style="list-style-type: none"><li>• Identify the work claimed; and</li><li>• Indicate the amount claimed; and</li><li>• State that it is made under the Act.</li></ul>
Section 13(7)	A penalty of \$22,000 for failing to serve a Supporting Statement by Head Contractor on Principal.	A penalty of \$110,000 for failing to serve a Supporting Statement by Head Contractor on Principal.



# Further Amendments

Please note that the amendments set out in this presentation are not the only amendments to the Act. We have set out those amendments that are likely to directly affect our members in the electrical contracting industry.

If you would further information about the other amendments to the Act, please contact Lauren Howe on 1300 361 099 or [lauren.howe@neca.asn.au](mailto:lauren.howe@neca.asn.au).



# Contact Us

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