

Building Industry Security of Payment in 2020

Daniel Turk & Mitchell Hay | March 2020 | Commercial

What is security of payment?

Security of payment legislation exists in each jurisdiction in Australia and is available for contractors doing work or supplying goods in the construction industry (apart from owner-occupier residential developments). It is designed to rapidly inject cash-flow for creditors and quickly determine any disputes that may arise between parties.

In NSW, contractors can include:

- Contractors carrying out construction work
- Suppliers of goods such as materials and equipment
- Architects
- Interior designers
- Engineers

Each regime is similar with some subtle differences between them, especially in relation to due dates.

There are benefits for creditors in NSW, for example, debtors who have not served a payment schedule after receiving a payment claim invoice by the supplier are unable to dispute the debt – sections 15(4) and 20(2A) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the 'Act')

The legislation also allows creditors to serve a notice on principal contractors to withhold payment to the contracting debtor until an adjudication application is determined – section 26A of the Act.

Change in NSW

For those who may be unaware, the Building and Construction Industry Security of Payment Amendment Act 2018 (NSW) (the 'Amendment Act') commenced in October 2019. The *Amendment Act* introduced and re-introduced some key changes to the security of payment legislation in New South Wales, many of which

are favourable to contractors who are not being paid by debtors in a timely manner. Below are some of the key changes that may be relevant to you as creditors as well as how you can protect and enforce your rights under the various security of payment regimes across Australia. Remember, these provisions are available not just to contractors who provide building services, but also apply to those who supply goods and materials to commercial and residential development construction projects (excluding owner-occupier construction).

Say goodbye to reference dates

The *Amendment Act* has abolished the reference date concept in favour of a simple entitlement for contractors to issue one payment claim per month. An invoice is a payment claim if it complies with the requirements in the Act. Generally, your right to do this will arise on and from the last day of the month in which the work was completed or the goods supplied. Otherwise, if the contract specifies an earlier date, you may issue a payment claim from that date. You may also now issue more than one payment claim per month if provided for in your contract. If not, you will have to stick with the old one per month rule.

Remember to endorse your payment claims

It's back. After a brief hiatus, you are once again required to state on the invoice that your payment claim is made under the NSW Act.

Show me the money!

NSW due dates for payment have been shortened in many cases from 30 business days to 20 after service of a payment claim.

Don't terminate your rights

Previously, termination of a construction contract may have been interpreted by the courts as extinguishing your rights to use the Act to recover payments from your

debtors. Now, a construction contract may be terminated without affecting your rights to seek adjudication of a dispute under the Act. The right to issue a payment claim now arises on and from the date of termination.

Adjudication amputation

The Supreme Court can now sever part of an adjudication determination without invalidating the entire decision. If any part of a determination is found to contain jurisdictional error, the Court can now void that part of the determination whilst allowing the rest of the determination to be enforceable.

Withdrawal of application

The Act now specifically allows a claimant to withdraw their adjudication applications before a determination is made. However, if the respondent objects to the withdrawal and the adjudicator determines that it is in the interests of justice to do so, the withdrawal may be rejected.

Liquidation ends it all

If a claimant is in liquidation, the Act now specifically prohibits adjudication applications being made or continuing as well as enforcement of an adjudication determination.

What does this mean for me?

Changes have been made to a number of security of payment regimes in Australia in recent years. Whilst these regimes can greatly assist creditors in the construction industry, it can be difficult to stay on top of the legislative changes as and when they occur. This is especially difficult for those who operate in more than one state or territory in Australia as there are subtle differences between each state's regimes.

Used properly, security of payment legislation can assist you to secure your cash-flow relatively quickly, due to the strict time limits imposed. However, you need to be very familiar with these time limits as they can also work to defeat your adjudication application if you miss a deadline. Constant legislative changes, no matter how helpful, make this all the more difficult.

If you are thinking of improving your cash flow by using the security of payment legislation, make sure you are familiar with the current state of the law and seek legal assistance if you are ever unsure.

For more information, please contact:



Daniel Turk

Partner

T: 02 8257 5727

M: 0408 667 220

daniel.turk@turkslegal.com.au



Mitchell Hay

Associate