

NEW SOUTH WALES

DRAFT GOVERNMENT BILL

**Building and Construction Industry Security
of Payment Amendment Bill 2018**

Explanatory note

Overview of Bill

The object of this Bill is to amend the *Building and Construction Industry Security of Payment Act 1999* (the *Principal Act*) as follows:

- (a) to ensure that a person who has undertaken to carry out construction work, or to supply related goods or services, under a construction contract is generally entitled to a progress payment on a monthly basis,
- (b) to reduce the period required to elapse after a head contractor or subcontractor makes a payment claim before payment of the claim becomes due and payable,
- (c) to enable regulations to be made dealing with the inspection, by a subcontractor entitled to retention money, of records kept in connection with the operation of a trust account into which the money is required to be paid,
- (d) to increase the maximum penalties that an incorporated head contractor may be liable to pay for offences relating to the supporting statement declaring that subcontractors have been paid all amounts due and payable that must accompany a payment claim served by the contractor on a principal,
- (e) to make other miscellaneous amendments relating to the procedure for recovering progress payments under the Principal Act, including providing for a code of practice relating to persons who are authorised to nominate adjudicators under the Principal Act,
- (f) to include investigation and enforcement powers under the Principal Act,
- (g) to provide for the period within which proceedings for an offence may be commenced in the Local Court,

- (h) to provide for the issue of penalty notices for offences against the Principal Act or the regulations,
- (i) to provide for the personal liability of directors and other officers for offences by corporations,
- (j) to make other minor amendments, including consequential amendments and amendments in the nature of statute law revision.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act 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

Schedule 1 [3] ensures that a person who has undertaken to carry out construction work, or supply related goods or services, under a construction contract is generally entitled to a progress payment on a monthly basis (or more frequently, if the contract so provides). Schedule 1 [3] also specifies when the person is entitled to a progress payment in the case of a single or one-off payment, a milestone payment or the termination of the contract. **Schedule 1 [1] and [2]** make consequential amendments.

Schedule 1 [4] and [5] ensure that a progress payment is generally due and payable no later than:

- (a) 10 (instead of 15) business days after a head contractor makes a payment claim for the payment, or
- (b) 20 (instead of 30) business days after a subcontractor makes a payment claim for the payment.

Schedule 1 [6] enables regulations to be made dealing with the inspection by a subcontractor entitled to retention money of records kept in connection with the operation of a trust account into which the money is required to be paid.

Schedule 1 [7] makes it clear who is entitled to make a payment claim.

Schedule 1 [8] requires a payment claim to state that it is made under the Principal Act.

Schedule 1 [9] increases the maximum penalty from 200 penalty units (currently, \$22,000) to 1,000 penalty units (currently, \$100,000) that an incorporated head contractor may be liable to pay for the offence of serving a payment claim on a principal without a supporting statement declaring that all subcontractors have been paid all amounts due and payable to them for the construction work concerned.

Schedule 1 [10] increases the maximum penalty from 200 penalty units to 1,000 penalty units that an incorporated head contractor may be liable to pay for the offence of providing a supporting statement knowing that the statement is false or misleading in a material particular.

Schedule 1 [11] inserts a note consequent on the insertion of section 34D by **Schedule 1 [32]**.

Schedule 1 [12] makes an amendment in the nature of statute law revision.

Schedule 1 [13] and [15] enable the regulations to prescribe the manner in which adjudication applications and adjudication responses are to be lodged.

Schedule 1 [14] makes provision with respect to the withdrawal of an adjudication application.

Schedule 1 [18] modifies the period within which an adjudicator is required to determine an adjudication application where a respondent is entitled to lodge an adjudication response. In any such case, the adjudicator is required to determine the application within 10 business days after

either the response is lodged or (if a response is not lodged) the end of the period within which the respondent is entitled to lodge a response. **Schedule 1 [16] and [17]** make consequential amendments.

Schedule 1 [19] requires the service of an adjudicator's determination on the claimant and the respondent. **Schedule 1 [20]** makes a consequential amendment.

Schedule 1 [21]–[23] increase the maximum penalties for certain offences relating to the scheme in the Principal Act that enables a contractor for a construction project who is claiming progress payments from a defaulting subcontractor to secure payment of those progress payments by giving notice of the claim to a principal contractor further up the chain of contractors engaged on the project. In the case of the amendments made by Schedule 1 [21] and [22], the applicable maximum penalties are increased from 5 penalty units (currently, \$550) to 50 penalty units (currently, \$5,500), in the case of a corporation, or 10 penalty units (\$1,100), in the case of an individual. In the case of the amendments made by Schedule 1 [23], the applicable maximum penalties are increased where the offender is a corporation from 10 penalty units to 50 penalty units.

Schedule 1 [24] provides for a code of practice relating to persons who are authorised to nominate adjudicators under the Principal Act.

Schedule 1 [25] ensures that the methods of service specified in the Principal Act extend to any documents (rather than applying just to notices) authorised or required to be served under the Principal Act. **Schedule 1 [26] and [28]** make consequential amendments.

Schedule 1 [27] clarifies that if a construction contract provides for a manner of service that manner is applicable only to parties to the contract.

Schedule 1 [29] clarifies that the expression *serve*, when used in connection with the service of documents, includes give, send or otherwise provide.

Schedule 1 [30] makes provision with respect to judicial review of adjudicators' determinations. Schedule 1 [30] also provides that corporations in liquidation cannot serve payment claims or take other action under Part 3 of the Principal Act to enforce a payment claim.

Schedule 1 [31] inserts a new Part 3A containing provisions relating to investigation and enforcement powers for the purposes of the Principal Act.

Schedule 1 [32] deals with offences under the Principal Act as follows:

- (a) by providing that proceedings for an offence against the Principal Act or the regulations are to be commenced no later than 2 years after the date on which the offence is alleged to have been committed (proposed section 34A),
- (b) by providing for the issue of penalty notices for offences against the Principal Act or the regulations (proposed section 34B),
- (c) by providing for the personal liability of directors and other officers for being an accessory to an offence committed by a corporation (proposed section 34C), and
- (d) by providing for the personal liability of directors and other officers for certain offences committed by a corporation (proposed section 34D).

Schedule 1 [33] consolidates provisions relating to the disclosure of information obtained in connection with the administration or execution of the Principal Act.

Schedule 2 Law Enforcement (Powers and Responsibilities) Act 2002 No 103

Schedule 2 makes a consequential amendment to the *Law Enforcement (Powers and Responsibilities) Act 2002*.

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**Building and Construction Industry Security
of Payment Amendment Bill 2018**

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NEW SOUTH WALES
DRAFT GOVERNMENT BILL

**Building and Construction Industry Security
of Payment Amendment Bill 2018**

No , 2018

A Bill for

An Act to amend the *Building and Construction Industry Security of Payment Act 1999* to make further provision with respect to payments for construction work carried out, and related goods and services supplied, under construction contracts; and for other purposes.

public consultation draft

Building and Construction Industry Security of Payment Amendment Bill 2018 [NSW]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Building and Construction Industry Security of Payment Amendment Act 2018*.

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:

milestone payment means a payment that is based on an event or date and known in the building and construction industry as a “milestone payment”.

reference date—see section 8.

[2] Section 4, definition of “progress payment”

Omit paragraph (c). Insert instead:

- (c) a milestone payment.

[3] Section 8 Rights to progress payments

Omit section 8 (2). Insert instead:

- (2) Each of the following is a *reference date* under a construction contract (except as provided by subsections (3)–(6)):
- (a) the last day of the named month in which the construction work is first carried out, or the related goods and services are first supplied, under the contract,
 - (b) the last day of each subsequent named month in which the work is carried out or the goods and services are supplied.
- (3) If the contract makes express provision with respect to the date on which a claim for a progress payment may be made in relation to work carried out, or related goods and services supplied, the date determined in accordance with the contract is a *reference date*:
- (a) except as provided by subsections (4)–(6), and
 - (b) so long as the date determined in accordance with the contract is earlier than the reference date that would otherwise apply under subsection (2) in relation to the work carried out or the goods and services supplied.
- (4) The *reference date*, in the case of a single or one-off payment, is the day immediately following the day on which the construction work was last carried out, or the related goods and services were last supplied, under the contract.
- (5) The *reference date*, in the case of a milestone payment, is the day immediately following the event or date on which the milestone payment is based.
- (6) The final *reference date*, if the contract is terminated, is the day immediately after the day on which the contract is terminated.

[4] Section 11 Due date for payment

Omit “15” from section 11 (1A) (a). Insert instead “10”.

[5] Section 11 (1B) (a)

Omit “30”. Insert instead “20”.

[6] Section 12A Trust account requirements for retention money

Insert “or the subcontractor entitled to the retention money” after “Commissioner” in section 12A (3) (b).

public consultation draft

Building and Construction Industry Security of Payment Amendment Bill 2018 [NSW]
Schedule 1 Amendment of Building and Construction Industry Security of Payment Act 1999 No 46

[7] Section 13 Payment claims

Omit “referred to in section 8 (1) who is or who claims to be entitled” from section 13 (1).
Insert instead “who is or who claims to be entitled under section 8”.

[8] Section 13 (2) (c)

Omit the paragraph. Insert instead:

(c) must state that it is made under this Act.

[9] Section 13 (7)

Omit “200 penalty units”.

Insert instead “1,000 penalty units (in the case of a corporation) or 200 penalty units (in the case of an individual).”

[10] Clause 13 (8)

Omit “200 penalty units or 3 months imprisonment, or both”.

Insert instead “1,000 penalty units (in the case of a corporation) or 200 penalty units or 3 months imprisonment, or both (in the case of an individual).”

[11] Section 13, note

Insert at the end of section 13:

Note. An offence against subsection (7) or (8) committed by a corporation is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation—see section 34D.

[12] Section 17 Adjudication applications

Omit “notified” from section 17 (2) (a). Insert instead “served notice on”.

[13] Section 17 (3) (b)

Insert “, in the manner (if any) prescribed by the regulations,” after “made” in section 17 (3) (b).

[14] Section 17A

Insert after section 17:

17A Withdrawal of application

A claimant may withdraw an adjudication application, at any time before the application is determined by an adjudicator, by notice in writing served on the respondent and on either the authorised nominating authority to which the application was made or the adjudicator.

[15] Section 20 Adjudication responses

Insert at the end of section 20 (2) (c):

, and

(d) must be lodged in the manner (if any) prescribed by the regulations.

[16] Section 21 Adjudication procedures

Omit section 21 (1). Insert instead:

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Building and Construction Industry Security of Payment Amendment Bill 2018 [NSW]
Schedule 1 Amendment of Building and Construction Industry Security of Payment Act 1999 No 46

- (1) An adjudicator is not to determine an adjudication application until after the end of the period (the *response period*) within which the respondent may lodge an adjudication response under section 20.

[17] Section 21 (2)

Omit “unless it was made before the end of the period within which the respondent may lodge such a response”.

Insert instead “lodged after the end of the response period”.

[18] Section 21 (3) (a)

Omit the paragraph. Insert instead:

- (a) within 10 business days after:
- (i) if the respondent is entitled to lodge an adjudication response under section 20—the date on which the respondent lodges the response or (if a response is not lodged within the response period) the end of the response period, or
 - (ii) in any other case—the date on which notice of the adjudicator’s acceptance of the application is served on the claimant and the respondent, or

[19] Section 22 Adjudicator’s determination

Insert at the end of section 22 (3):

, and

- (c) be served by the adjudicator on the claimant and the respondent.

[20] Section 23 Respondent required to pay adjudicated amount

Insert “by the adjudicator” after “served” in paragraph (a) of the definition of *relevant date* in section 23 (1).

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

Omit section 26A (5) (not including the note). Insert instead:

- (5) A person who is served with a payment withholding request must, if the person is not (or is no longer) a principal contractor for the claim, give notice to that effect to the claimant concerned within 10 business days after receiving the request.

Maximum penalty: 50 penalty units (in the case of a corporation) or 10 penalty units (in the case of an individual).

[22] Section 26B Obligation of principal contractor to retain money owed to respondent

Omit “5 penalty units” from section 26B (5).

Insert instead “50 penalty units (in the case of a corporation) or 10 penalty units (in the case of an individual).”

[23] Sections 26D (3) and 26E (2) and (3)

Omit “10 penalty units” wherever occurring.

Insert instead “50 penalty units (in the case of a corporation) or 10 penalty units (in the case of an individual).”

[24] Section 28A

Insert after section 28:

28A Code of practice for authorised nominating authorities

- (1) The Minister may, by order published on the NSW legislation website, make a code of practice to be observed by an authorised nominating authority in relation to its activities under this Act. The order is to set out the code of practice.
- (2) The code of practice takes effect on the day on which the order is published or, if the order specifies a later date for commencement, on the later date.
- (3) The Minister may, by order published on the NSW legislation website, amend or repeal the code of practice.
- (4) An authorised nominating authority that contravenes a provision of the code of practice that is identified in the code as an “offence provision” is guilty of an offence under this section.
Maximum penalty: 50 penalty units.
- (5) The Minister may withdraw a person’s authority to nominate adjudicators for the purposes of this Act if the Minister is satisfied that the person has contravened a provision of the code of practice. Nothing in this subsection limits:
 - (a) the grounds on which the Minister may withdraw any such authority under section 28, or
 - (b) the right of a person under that section to apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of the Minister’s decision to withdraw the authority.

[25] Section 31 Service of documents

Insert “or other document” after “notice” wherever occurring in section 31 (1) and (2).

[26] Section 31 (1) (d) and (d1)

Omit “notices” wherever occurring. Insert instead “documents”.

[27] Section 31 (1) (e)

Omit section 31 (1) (e). Insert instead:

- (e) in the case of service by a party to a construction contract on another party to the construction contract—in any other manner that may be provided under the construction contract.

[28] Section 31 (3)

Insert “or other documents” after “notices”.

[29] Section 31 (4)

Insert after section 31 (3):

- (4) In this section, *serve* includes give, send or otherwise provide.

[30] Sections 32A and 32B

Insert after section 32:

32A Judicial review of adjudicator's determination

- (1) If, in any proceedings for judicial review of an adjudicator's determination, the Supreme Court finds that a jurisdictional error occurred in the making of the determination, the Court may make any one or more of the following orders:
 - (a) an order setting aside the determination, in whole or in part,
 - (b) an order remitting the matter to the adjudicator for redetermination, in whole or in part, in accordance with any directions of the Court,
 - (c) any other order that the Court thinks fit.
- (2) Nothing in this section limits the Supreme Court's powers in relation to judicial review of an adjudicator's determination.

32B Application of Part to a claimant in liquidation

- (1) A corporation in liquidation cannot serve a payment claim on a person under this Part or take any action under this Part to enforce a payment claim (including by making an application for adjudication of the claim) or an adjudication determination.
- (2) If a corporation in liquidation has made an adjudication application that is not finally determined immediately before the day on which it commenced to be in liquidation, the application is taken to have been withdrawn on that day.

[31] Part 3A

Insert after Part 3:

Part 3A Investigation and enforcement powers

Division 1 Preliminary

32C Authorised officers

- (1) In this Part:
authorised officer means:
 - (a) a person employed in the Department of Finance, Services and Innovation who is appointed under this Part as an authorised officer, or
 - (b) an investigator appointed under section 18 of the *Fair Trading Act 1987*.
- (2) The Secretary may appoint a person employed in the Department of Finance, Services and Innovation as an authorised officer for the purposes of this Part.
- (3) A person appointed under subsection (2) is to be provided by the Secretary with a certificate of identification.
- (4) An authorised officer must, when exercising on any premises any function of the authorised officer under this Part, produce the officer's certificate of identification to any person apparently in charge of the premises who requests its production.

32D Purposes for which functions under Part may be exercised

- (1) An authorised officer may exercise the functions conferred by this Part for any of the following purposes:
 - (a) for the purpose of investigating, monitoring and enforcing compliance with the requirements imposed by or under this Act,

- (b) for obtaining information or records connected with the administration of this Act,
 - (c) for the purpose of administering or executing this Act.
- (2) In this Part, a reference to an *authorised purpose* is a reference to any purpose referred to in subsection (1).

Division 2 Information gathering powers

32E Exercise in conjunction with other powers

A power conferred by this Division may be exercised whether or not a power of entry under Division 3 is being exercised.

32F Power of authorised officers to require information and records

- (1) An authorised officer may, by notice in writing given to a person, require the person to furnish to the officer such information or records (or both) as he or she may require for an authorised purpose.
- (2) A notice under this Division must specify the manner in which information or records are required to be furnished and a reasonable time by which the information or records are required to be furnished.
- (3) A notice under this Division may only require a person to furnish existing records that are in the person's possession or that are within the person's power to obtain lawfully.
- (4) The person to whom any record is furnished under this Division may take copies of it.
- (5) If any record required to be furnished under this Division is in electronic, mechanical or other form, the notice requires the record to be furnished in written form, unless the notice otherwise provides.

32G Power of authorised officers to require answers

- (1) An authorised officer may 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.
- (2) An authorised officer may, by notice in writing, require a corporation to nominate, in writing within the time specified in the notice, a director or officer of the corporation to be the corporation's representative for the purpose of answering questions under this section.
- (3) Answers given by a person nominated under subsection (2) bind the corporation.
- (4) An authorised officer may, by notice in writing, require a person to attend at a specified place and time to answer questions under this section if attendance at that place is reasonably required in order that the questions can be properly put and answered.
- (5) The place and time at which a person may be required to attend under subsection (4) is to be:
 - (a) a place and time nominated by the person, or
 - (b) if the place and time nominated is not reasonable in the circumstances or a place and time is not nominated by the person, a place and time

nominated by the authorised officer that is reasonable in the circumstances.

Division 3 Entry to premises

32H Power of authorised officers to enter premises

- (1) An authorised officer may enter any premises at any reasonable time.
- (2) Entry to any premises may be effected with or without the authority of a search warrant.

32I Entry into residential premises only with permission or search warrant

This Division does not empower an authorised officer to enter any part of premises that is used predominantly for residential purposes without the permission of the occupier or the authority of a search warrant.

32J Search warrants

- (1) An authorised officer under this Act may apply to an issuing officer for the issue of a search warrant if the authorised officer believes on reasonable grounds that:
 - (a) a requirement imposed by or under this Act is being or has been contravened at any premises, or
 - (b) there is, in or on any premises, matter or a thing that is connected with an offence under this Act or the regulations.
- (2) An issuing officer to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised officer named in the warrant and any other person named in the warrant:
 - (a) to enter the premises, and
 - (b) to exercise any function of an authorised officer under this Part.
- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.
- (4) Without limiting the generality of section 71 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, a police officer may:
 - (a) accompany an authorised officer executing a search warrant issued under this section, and
 - (b) take all reasonable steps to assist the authorised officer in the exercise of the officer's functions under this section.
- (5) In this section:
issuing officer means an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

32K Power to require owner or occupier to provide assistance

An authorised officer proposing to exercise a power of entry under this Division may, by notice in writing given to the owner or occupier of the premises, require the owner or occupier to provide such reasonable assistance and facilities as are specified in the notice within a specified time and in a specified manner.

32L Powers that can be exercised on premises

- (1) An authorised officer may, at any premises lawfully entered, do anything that in the opinion of the authorised officer is reasonably necessary to be done for an authorised purpose, including (but not limited to) the things specified in subsection (2).
- (2) An authorised officer may do any or all of the following:
 - (a) make any examinations and inquiries that the authorised officer considers necessary,
 - (b) direct a person to produce records for inspection,
 - (c) examine and inspect any records,
 - (d) copy any records,
 - (e) seize any thing that the authorised officer has reasonable grounds for believing is connected with an offence against this Act or the regulations,
 - (f) do anything else authorised by or under this Act.
- (3) The power to seize any thing connected with an offence includes a power to seize:
 - (a) a thing with respect to which the offence has been committed, and
 - (b) a thing that will afford evidence of the commission of the offence, and
 - (c) a thing that was used for the purpose of committing the offence.
- (4) The power to do a thing under this section includes a power to arrange for that thing to be done.
- (5) A power to do something under this section in relation to a thing may be exercised without the consent of the owner of the thing.
- (6) In this section, a reference to an offence includes a reference to an offence that there are reasonable grounds for believing has been committed.

32M Dealing with seized things

- (1) An authorised officer who seizes any thing under this Division on any premises must issue the person apparently in charge of the premises with a written receipt for the thing seized.
- (2) An authorised officer may retain any thing seized under this Division until the completion of any proceedings (including proceedings on appeal) in which it may be evidence.
- (3) A record may only be retained under subsection (2) if the person from whom the record was seized is provided, within a reasonable time after the seizure, with a copy of the record certified by the authorised officer as a true copy. The copy is, as evidence, of equal validity to the document of which it is certified to be a copy.
- (4) Subsection (2) ceases to have effect in relation to anything seized if, on the application of a person aggrieved by the seizure, the court in which proceedings referred to in that subsection are commenced so orders.

Division 4 Offences

32N Failure to comply with requirement under Part

- (1) A person must not, without reasonable excuse, refuse or fail to comply with a requirement made of the person under this Part.

Maximum penalty:

- (a) in the case of a corporation—40 penalty units, or
(b) in the case of an individual—20 penalty units.

- (2) A person is not guilty of an offence of failing to comply with a requirement under this Part to furnish records or information or to answer a question unless the person was warned on that occasion that a failure to comply is an offence.

32O False or misleading conduct under Part

A person must not provide any information or do any other thing in purported compliance with a requirement made under this Part, knowing that it is false or misleading in a material respect.

Maximum penalty:

- (a) in the case of a corporation—1,000 penalty units, or
(b) in the case of an individual—200 penalty units or 3 months imprisonment, or both.

32P Obstruction of authorised officer

- (1) A person must not, without reasonable excuse, delay, hinder or obstruct an authorised officer in the exercise of the officer's functions under this Part.

Maximum penalty:

- (a) in the case of a corporation—40 penalty units, or
(b) in the case of an individual—20 penalty units.

- (2) A person is not guilty of an offence under this section unless, before the alleged offence occurred, the authorised officer produced the authorised officer's certificate of identification for inspection by the person.

[32] Sections 34A–34D

Omit section 34A. Insert instead:

34A Proceedings for offences

- (1) Proceedings for an offence against this Act or the regulations may be dealt with summarily before the Local Court.
- (2) Proceedings for an offence against this Act or the regulations may be commenced within, but not later than, 2 years after the date on which the offence is alleged to have been committed.

34B Penalty notices

- (1) An authorised officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence.
- (2) A penalty notice offence is an offence against this Act or the regulations that is prescribed by the regulations as a penalty notice offence.
- (3) The *Fines Act 1996* applies to a penalty notice issued under this section.

Note. The *Fines Act 1996* provides that, if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.

- (4) The amount payable under a penalty notice issued under this section is the amount prescribed for the alleged offence by the regulations (not exceeding the maximum amount of penalty that could be imposed for the offence by a court).
- (5) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (6) In this section, *authorised officer* means a person employed in the Department of Finance, Services and Innovation who is designated by the Secretary as an authorised officer for the purposes of this section.

34C Liability of directors etc for offences by corporation—accessory to the commission of offences

- (1) For the purposes of this section, a *corporate offence* is an offence against this Act or the regulations that is capable of being committed by a corporation.
- (2) A person commits an offence against this section if:
 - (a) a corporation commits a corporate offence, and
 - (b) the person is:
 - (i) a director of the corporation, or
 - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the corporate offence, and
 - (c) the person:
 - (i) aids, abets, counsels or procures the commission of the corporate offence, or
 - (ii) induces, whether by threats or promises or otherwise, the commission of the corporate offence, or
 - (iii) conspires with others to effect the commission of the corporate offence, or
 - (iv) is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence.

Maximum penalty: The maximum penalty for the corporate offence if committed by an individual.

- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.
- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the corporate offence.
- (5) This section does not affect the liability of the corporation for the corporate offence, and applies whether or not the corporation is prosecuted for, or convicted of, the corporate offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of

the corporation) who are concerned in, or party to, the commission of the corporate offence.

34D Liability of directors etc for specified offences by corporation—offences attracting executive liability

- (1) For the purposes of this section, an *executive liability offence* is:
- (a) an offence against section 13 (7) or (8) that is committed by a corporation, or
 - (b) an offence against the regulations that:
 - (i) is created under section 12A, and
 - (ii) is prescribed by the regulations as an offence to which this section applies, and
 - (iii) is committed by a corporation.
- (2) A person commits an offence against this section if:
- (a) a corporation commits an executive liability offence, and
 - (b) the person is:
 - (i) a director of the corporation, or
 - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the executive liability offence, and
 - (c) the person:
 - (i) knows or ought reasonably to know that the executive liability offence (or an offence of the same type) would be or is being committed, and
 - (ii) fails to take all reasonable steps to prevent or stop the commission of that offence.

Maximum penalty: 200 penalty units.

- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.
- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the executive liability offence.
- (5) This section does not affect the liability of the corporation for the executive liability offence, and applies whether or not the corporation is prosecuted for, or convicted of, the executive liability offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are accessories to the commission of the executive liability offence or are otherwise concerned in, or party to, the commission of the executive liability offence.
- (7) In this section:
- director* has the same meaning it has in the *Corporations Act 2001* of the Commonwealth.
- reasonable steps*, in relation to the commission of an executive liability offence, includes, but is not limited to, such action (if any) of the following kinds as is reasonable in all the circumstances:
- (a) action towards:

- (i) assessing the corporation's compliance with the provision creating the executive liability offence, and
- (ii) ensuring that the corporation arranged regular professional assessments of its compliance with the provision,
- (b) action towards ensuring that the corporation's employees, agents and contractors are provided with information, training, instruction and supervision appropriate to them to enable them to comply with the provision creating the executive liability offence so far as the provision is relevant to them,
- (c) action towards ensuring that:
 - (i) the plant, equipment and other resources, and
 - (ii) the structures, work systems and other processes, relevant to compliance with the provision creating the executive liability offence are appropriate in all the circumstances,
- (d) action towards creating and maintaining a corporate culture that does not direct, encourage, tolerate or lead to non-compliance with the provision creating the executive liability offence.

[33] Sections 36–36B

Omit the sections. Insert instead:

36 Disclosure of information

A person must not disclose any information obtained in connection with the administration or execution of this Act unless that disclosure is made:

- (a) with the consent of the person from whom the information was obtained, or
- (b) in connection with the administration or execution of this Act, or
- (c) for the purposes of any legal proceedings arising out of this Act or for the purposes of any report of any such proceedings, or
- (d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or
- (e) with other lawful excuse.

Maximum penalty: 100 penalty units.

**Schedule 2 Law Enforcement (Powers and Responsibilities)
Act 2002 No 103**

Schedule 2 Search warrants under other Acts

Insert in alphabetical order:

Building and Construction Industry Security of Payment Act 1999, section
32J,