



New South Wales

# Building and Construction Industry Security of Payment Amendment Bill 2013

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Building and Construction Industry Security of Payment Act 1999* (the *Principal Act*) with respect to payments to be made under construction contracts (including the timing of, and other requirements for, those payments).

## 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

### Due date for making progress payments

Section 11 of the Principal Act is amended so that a progress payment to a head contractor by the principal becomes due and payable no later than 15 business days after the payment claim is made, and a progress payment to a subcontractor becomes due and payable no later than 30 business days after the payment claim is made. See **Schedule 1 [3]**.

Section 11 of the Principal Act is also amended so that a construction contract has no effect to the extent it allows payment of a progress payment at a later date. See **Schedule 1 [4]**.

The exemption from the Act that currently applies to a residential construction contract between a head contractor and a consumer (the *main contract*) is extended for the purposes of the amendments to section 11 so that those amendments will not apply to a residential construction contract that is connected with the main contract.

### **Removal of requirement for statement that a payment claim is made under the Principal Act**

Section 13 of the Principal Act is amended to remove the requirement that a payment claim must state that it is made under the Principal Act. The requirement will continue to apply for residential construction contracts that are connected with a residential construction contract between a head contractor and a consumer. See **Schedule 1 [5]**.

### **Requirement for a payment claim to be accompanied by a supporting statement**

Section 13 of the Principal Act is amended to make it an offence:

- (a) for a head contractor to serve a payment claim on the principal unless the claim is accompanied by a supporting statement, or
- (b) for a head contractor to serve a payment claim on the principal accompanied by a supporting statement knowing that the supporting statement is false or misleading in a material particular.

A supporting statement is a statement that is in the form prescribed by the regulations and that includes a declaration to the effect that all subcontractors have been paid all amounts that have become due and payable. See **Schedule 1 [6]**. The new supporting statement requirements do not apply to the head contractor under a residential construction contract with a consumer because those contracts are already exempt from the Principal Act.

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

Proposed new section 36 of the Principal Act provides for the appointment of authorised officers who may require a head contractor or associated persons to provide information or documents relating to compliance with the new provisions of section 13 about supporting statements. Proposed new section 36A states how documents produced are to be dealt with. Proposed new section 36B provides for secrecy concerning information and documents that are produced. See **Schedule 1 [8]**.

### **Savings and transitional provisions**

Schedule 2 to the Principal Act is amended to authorise regulations to be made prescribing matters of a savings or transitional nature consequent on the amendment of the Principal Act, and to provide that an amendment made by the proposed Act does not apply in relation to a construction contract entered into before the commencement of the amendment. See **Schedule 1 [9] and [10]**.

### **Other amendments**

The Bill contains other amendments to the Principal Act of a minor, consequential or ancillary nature. See **Schedule 1 [1], [2] and [7]**.



New South Wales

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New South Wales

# Building and Construction Industry Security of Payment Amendment Bill 2013

No. , 2013

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## **A Bill for**

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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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Building and Construction Industry Security of Payment Amendment Act 2013</i> .	3
	4
<b>2 Commencement</b>	5
This Act commences on a day or days to be appointed by proclamation.	6

<b>Schedule 1</b>	<b>Amendment of Building and Construction Industry Security of Payment Act 1999 No 46</b>	1
		2
<b>[1] Section 4 Definitions</b>		3
Insert in alphabetical order:		4
<i>exempt residential construction contract</i> means a construction contract specified in section 7 (2) (b) as a construction contract to which this Act does not apply.		5
<i>head contractor</i> means the person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the <i>main contract</i> ) 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.		8
<b>Note.</b> There is no head contractor when the principal contracts directly with subcontractors.		14
<i>principal</i> means the person for whom construction work is to be carried out or related goods and services supplied under a construction contract (the <i>main contract</i> ) 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.		16
<i>subcontractor</i> 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.		22
<b>Note.</b> A subcontractor's contract can be with the head contractor or (when there is no head contractor) with the principal directly.		25
<b>[2] Section 4 (2) and (3)</b>		27
Insert at the end of section 4:		28
(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.		29
(3) Notes included in this Act do not form part of this Act.		34
<b>[3] Section 11 Due date for payment</b>		35
Omit section 11 (1). Insert instead:		36
(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.		37
(1A) A progress payment to be made by a principal to a head contractor under a construction contract becomes due and payable on:		40
(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		42
(b) an earlier date as provided in accordance with the terms of the contract.		45
<b>Note.</b> 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		46
		47

	section 7 (2) (b.). Subsection (1C) applies to progress payments under a construction contract that is connected with an exempt residential construction contract.	1 2
(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:	3 4 5
	(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	6 7 8
	(b) an earlier date as provided in accordance with the terms of the contract.	9
(1C)	A progress payment to be made under a construction contract that is connected with an exempt residential construction contract becomes due and payable:	10 11
	(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or	12 13
	(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.	14 15 16
<b>[4]</b>	<b>Section 11 (8)</b>	17
	Insert after section 11 (7):	18
	(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).	19 20 21
<b>[5]</b>	<b>Section 13 Payment claims</b>	22
	Omit section 13 (2) (c). Insert instead:	23
	(c) if the construction contract is connected with an exempt residential construction contract, must state that it is made under this Act.	24 25
<b>[6]</b>	<b>Section 13 (7)–(9)</b>	26
	Insert after section 13 (6):	27
	(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.	28 29 30 31
	(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.	32 33 34 35
	(9) In this section: <i>supporting statement</i> 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.	36 37 38 39 40
<b>[7]</b>	<b>Section 26A Principal contractor can be required to retain money owed to respondent</b>	41 42
	Omit “Director-General of the Department of Services, Technology and Administration” from section 26A (2).	43 44
	Insert instead “Director-General of the Department of Finance and Services”.	45

<b>[8] Sections 36–36B</b>	1
Insert after section 35:	2
<b>36 Investigation of compliance with provisions regarding supporting statements</b>	3
(1) The Director-General of the Department of Finance and Services may, by order in writing, appoint a Public Service employee (an <i>authorised officer</i> ) for the purpose of investigating compliance with section 13 (7) or (8).	4 5 6
(2) An authorised officer may, by notice in writing, require a person whom the officer reasonably believes:	7 8
(a) is or was a head contractor, or	9
(b) is or was employed or engaged by a person whom the officer reasonably believes is or was a head contractor,	10 11
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.	12 13 14 15
(3) A person must not:	16
(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	17 18
(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.	19 20 21
Maximum penalty: 200 penalty units or 3 months imprisonment, or both.	22
(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.	23 24 25
<b>36A Dealing with documents produced</b>	26
(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.	27 28
(2) An authorised officer may:	29
(a) take possession, and	30
(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.	31 32 33 34
(3) A certified copy provided under subsection (2) is receivable in all courts as if it were the original.	35 36
(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:	37 38 39
(a) the person otherwise entitled to possession of the document, or	40
(b) a person authorised by the person so entitled,	41
to inspect the document and make copies of, or take extracts from, the document.	42 43



<b>36B</b>	<b>Preservation of secrecy</b>	1
(1)	A person engaged in the administration of this Act must not:	2
(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	3 4 5 6
(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.	7 8 9 10
	Maximum penalty: 200 penalty units.	11
(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.	12 13 14 15 16 17
	Maximum penalty: 200 penalty units.	18
(3)	It is not a contravention of subsection (1) or (2) if a person discloses any such information or contents:	19 20
(a)	in any proceedings for an offence against this Act, or	21
(b)	in any civil proceedings arising under a construction contract, whether under Part 3 or otherwise, or	22 23
(c)	in any legal proceedings where the disclosure is made in answering a question that the person is compellable to answer in those proceedings.	24 25
<b>[9]</b>	<b>Schedule 2 Savings and transitional provisions</b>	26
	Omit clause 1 (1). Insert instead:	27
(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.	28 29
<b>[10]</b>	<b>Schedule 2, Part 5</b>	30
	Insert after Part 4:	31
<b>Part 5</b>	<b>Provision consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2013</b>	32 33 34
<b>5</b>	<b>Application of amendments</b>	35
	An amendment made to this Act by the <i>Building and Construction Industry Security of Payment Amendment Act 2013</i> does not apply in relation to a construction contract entered into before the commencement of the amendment.	36 37 38 39