

SUBMISSION TO NSW SECURITY OF PAYMENT REVIEW
18 SEPTEMBER 2018

Dear Sir/Madam,

This is a submission to the NSW Government review of the Security of Payment Legislation. Amendments have been proposed through the *Building and Construction Industry Security of Payment Amendment Bill 2018*, for which comments were sought from the public.

I am an adjudicator in the building and construction industry. Regularly, I come across ambiguity and inconsistency within construction contracts; also, I come across ambiguity when certain contracts are interpreted together with the Security of Payment legislation. Accordingly, my suggestion as below is intended at the elimination of ambiguity, specifically at section 11.

For further clarification, I may be reached at [REDACTED]

Chidambara C B
Integrity Business Centre

[REDACTED]

[REDACTED]

Section 11 Due Date for Payment

Amendments are proposed in such a way that the due date for payment will be:

- (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.

After the proposed amendment, section 11(1A) and 11(1B) will be worded as follows:

(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 10 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 20 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.*

Comments:

The purpose of this section [11(1A) and 11(1B)] is that, it distinguishes between Principal, head contractor and subcontractor, and it allows for different number of days (10 days, 20 days) for different categories of contractor.

In real life, at the construction site, quite often, gray area exists. To add to the complexity, three-party contracts (or Tripartite Contracts) are common. Two examples are:

(a) A supplier (**Party 1**) may supply special electrical goods; some of the goods may be installed by another subcontractor (**Party 2**); a specialist (**Party 3**) may be present at the site to give directions and/or to check whether installation of the electrical goods is correctly done. Principal (**Party 4**) may be separate party.

(b) Principal (**Party 1**) may engage a head contractor (**Party 2**); in turn, head contractor may engage a subcontractor (**Party 3**) for most part of the works. For some part of the building works, Principal (**Party 1**) may directly give instructions to subcontractor (**Party 3**); head contractor (**Party 2**) may not be involved at all for that specific part of the works; Subcontractor (**Party 3**) may engage sub-subcontractor (**Party 4**) for certain pieces of work; in this scenario, subcontractor (Party 3) actually becomes a head contractor for a portion of the works.

These types of situations are common in the building and construction industry. Note that the SOP Act should be able to cater to all the sectors within the building & construction industry, including a complicated contracting chain. Consequently, my suggestion is not to define separate categories of Principal, Head Contractor and Subcontractor as is done in the NSW Act at present. Instead, the words from the legislation of Northern Territory and Western Australia may be adapted.

The relevant section from NT Legislation is reproduced below:

13 Provisions requiring payment to be made after 50 days

A provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed must be read as being amended to require the payment to be made within 28 days after it is claimed.

Similarly, section 10 of the Western Australian Act states that,

A provision in a construction contract that purports to require a payment to be made more than 42 days after the payment is claimed is to be read as being amended to require the payment to be made within 42 days after it is claimed.

The legislation in NT and WA makes no distinction between principal, head contractor and subcontractor. The WA Act amends the maximum payment period to 42 days for all construction contracts. I suggest that the words from WA and NT Acts be adapted for this purpose to establish the 'maximum payment period' under the NSW Act.

For NSW, such an amendment would result in a sentence like this:

A provision in a construction contract that purports to require a payment to be made more than 20 business days after the payment is claimed is to be read as being amended to require the payment to be made within 20 business days after it is claimed.

By adapting such a provision in NSW, there will be two benefits:

(a) It is not necessary to define principal, head contractor and subcontractor in the Act. It would eliminate the inconvenience, or frustration, to define a contractor correctly in a particular construction contract; thus, it would eliminate relevant errors in adjudication submissions and in the adjudication determination. Moreover, parties will not be able to challenge any adjudication determination in the Court for the reason that a given contractor was incorrectly classified as a head contractor or as a subcontractor.

(b) The relevant sections are in operation in Northern Territory and Western Australia for more than a decade. So, it is a legal provision that withstood the test of time in WA and NT.

***** End *****