

27th December 2018

Attn: Ms Katie Harbon,
Policy Manager, Better Regulation Division
Department of Finance, Services and Innovation
McKell Building, 2-24 Rawson Place
Sydney NSW 2000

Email: SecurityofPayment2018@finance.nsw.gov.au

Dear Katie

Response to Security of Payment Reforms – Implementation Dates

We thank government for being consulted on this issue.

We propose two dates for commencement of the amendments. The first date in the last week of February and the second date in the last week of April 2019.

The amendments can be conveniently split into two groups.

The first group being those amendments which are not impacted by contractual provisions between industry parties and would commence in February. The second group, commencing in April, being amendments, which are (or may be) impacted by contractual provisions between industry parties or require an education campaign of industry participants and/or adjudicators. This second group can be further refined by separating out the only amendment which needs to be contingent on the creation of a new contract between industry parties. This reform is the reduction of the maximum period for payment terms from 30 business days to 20 business days.

A. Amendments not impacted by contractual provisions between industry parties

1. All amendments under the heading 'Reforms commenced with minimal transitional period'.
 - a. Investigation and enforcement;
 - b. Increased penalty units for offences;
 - c. Executive Liability offences;
 - d. Supreme Court power to sever;
 - e. Prohibiting a corporation in liquidation from making payment claims;
 - f. Extended circumstances for releasing withheld money; and
 - g. Miscellaneous reforms.

In short, we agree with the Options Paper proposed start date for all these reforms.

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2. The first three amendments under the heading ‘Reforms requiring subordinate legislation before commencement’
 - a. Removal of ‘owner-occupier’ exemption’;
 - b. Inspection of trust records by subcontractors; and
 - c. Prescribing information for subcontractors.

The speed at which the regulations are made is in the hands of the Minister. These three amendments do not require extensive consultation or training. They simply create the power to do something by regulation in the future. We can identify no practical reason for these amendments not to commence in February 2019.

B. Amendments impacted by contractual provisions between industry parties or that require training – commencement from end April 2019

1. All amendments under the heading ‘Reforms with a transitional period’.
 - a. Progress payments and payment claims
The creation of a clear and simple entitlement to be paid monthly, as is the intent of the amendment, should override contractual provisions which obfuscate this intent. The amendment removes confusion as to the dates for the entitlement to be paid which confusion has, in many cases, been deliberately created by long, complex reference date provisions.

Further, where a contract is non-compliant with the amendment, the adjudicator will apply the statutory provision rather than the contract provision. Adjudicators are familiar with this approach in relation to disregarding ‘pay when paid’ provisions in contract.

An argument over reference dates is only relevant for the purpose of adjudication. At the workplace, parties are concerned by the due date for payment rather than the obscurities of the reference date. The amendment to remove the ‘reference dates’ is relevant to the adjudication process and can be managed by the adjudicator. There is no need to provide a longer education period.

Adjudicate Today training of adjudicators and staff will complete by the end of March 2019.

- b. Due dates
As previously observed, this reform should apply in relation to new contracts made after April 2019. Four months for education of industry participants is ample time.
- c. Payment claim endorsement
Endorsement of the payment claim has nothing to do with the contract. It clarifies the intent of the claimant. It is a matter for government, industry associations and ANAs to publicise the change. Given the law is returning to what it was, and most participants still print the endorsement on their invoices, minimal time for education is necessary. The greater good lies in removing a major cause of adjudication application invalidity urgently rather than have a long period for ‘education’ which is, frankly, unnecessary.

- d. Miscellaneous adjudication reforms
These changes relate to the process of adjudication and require training of adjudicators and ANA staff. The requisite training is simple and can be readily completed by all ANAs before the end of April 2019.

2. The final amendment under the heading 'Reforms with a transitional period'.

- a. Code of Practice for ANAs
Adjudicate Today commits to providing the necessary cooperation and resources to assist in the development of the Code of Practice by the end of March 2019. Staff and adjudicators can be trained in any new requirements for implementation for the end of April.

The issues raised under 'Proposed reforms to the Regulation' are matters for industry representatives and associations. Other than providing support for amendments consistent with the recommendations of the Murray Review, we make no comment.

Happy to discuss these views at any time.

Yours sincerely



Bob Gaussen
Owner