

Article Information

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The 2018 security of payment amendments arise from the dead!

After falling victim to the NSW election caretaker period, the 2018 Security of Payment amendments have risen from the dead, with the corporate veil to be drawn back faster than previously telegraphed.

On 27 May 2019 the Department of Finance Services and Innovation issued a draft of the regulation to accompany the 2018 amendments to the Building and Construction Industry Security of Payment Act (BCISPA).

The covering note disclosed:

- Feedback received concerning the commencement regime for the 2018 BCISPA amendments indicated a preference for a single commencement date (as opposed to staged) for all of the reforms and for that date to be a set without undue delay (the latter being somewhat ironic!); and
- The amending regulation will be finalised and published mid-year with the amending Act and the Regulation commencing 3 months after the amending Regulation is finalised and published.

This suggests that the amendments will not commence before the end of September 2019.

The public consultation draft for the 2019 Regulation:

- Confirms the expectation that owner occupier construction contracts will be excluded from the Act;
- Extends executive liability offences beyond offences in respect of head contractors' supporting statements to include offences in respect of head contractor's obligations concerning retention trusts (which applies to projects with a value of at least \$20,000,000);

Executive liability offences lift the corporate veil, exposing head contractor or directors, and individuals involved in their management to penalties of up to \$22,000.

In respect of retention trusts, the offences to which that exposure will apply are:

- Failure to pay retention money into an approved authorised deposit taking institution (i.e. approved under the Property Stock and Business Agents Act 2002);
- Withdrawing money from a retention money trust account (RMTA) other than for:
 1. paying the money for the purpose for which the money was retained by the head contractor (as provided in the sub contract, consultancy or supply agreement);
 2. as agreed by the head contractor and the 'sub contractor' concerned; or
 3. in accordance with the order of a court or tribunal.
- Not notify the secretary of the Department of Finance, Services and Innovation if a RMTA becomes overdrawn and the reasons therefore;
- Not noting the secretary of closure of a RMTA;
- Not keeping the prescribed trust account records;
- Not providing information required by the secretary in respect of;
 1. construction contracts entered into;
 2. monies retained thereunder; and

3. and the RMTA generally;
within 7 days after the direction.

A copy of the draft regulation and instructions on how to give feedback to the department can be found [here](#).