

Article Information

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New Directors' and Officers' exposure to personal liability under Security of Payment Legislation in NSW

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Overview

This article focusses on a new approach to enforcement, which is likely to result in the level of care applied to compliance being markedly increased. Pursuant to the Amending Act, Directors and Officers of construction companies will be subject to new and increased personal exposure as a result of:

1. the introduction of executive liability in respect of certain corporate offences;
2. the dramatic increases in monetary penalties for a number of offences; and
3. the introduction of accessorial liability in respect of certain corporate offences.

Executive Liability Offences

The Amending Act introduces a new section 34D creating "executive liability offences". These are offences committed by a Corporation, but which will also expose Directors and/or Officers to personal sanctions.

At the outset, only the following offences will attract executive liability:

1. a head contractor serving a payment claim under the *Building and Construction Security of Payment Act 1999* (NSW) (**SOPA**) on the principal without a supporting statement; and
2. a head contractor serving a supporting statement knowing that the statement is false or misleading in a material particular, in circumstances where the Director or Officer knew or was recklessly indifferent to the offence being committed, and failed to take all reasonable steps to prevent or stop the commission of that offence.

Executive liability offences carry a penalty of up to 200 penalty units (currently \$22,000).

The Amending Act includes a mechanism by which other offences under SOPA might be "promoted" to executive liability offences in the future. Offences relating to retention money trusts seem a likely candidate. The ease with which the government may do this suggests that it is only a matter of time before Director and Officer's personal exposure is further expanded.

Increased Penalties

The Amending Act, upon its commencement will also markedly increase the penalties for a number of offences, including those that relate to supporting statements. For example, as things stand:

- where a head contractor serves a SOPA payment claim without a supporting statement or,
- serves a supporting statement knowing that statement to be false or misleading in a material particular,

the contractor is exposed to a fine of 200 penalty units (currently \$22,000). The Amending Act will increase the fine for these supporting statement offences to a whopping 1,000 penalty units (currently \$110,000) for a Corporation.

Accessorial Liability

If that isn't enough, the Amending Act will also expose Directors and Officers to personal liability for being an accessory to an offence committed by a Corporation, in circumstances where they:

1. aid, abet, counsel or procure the commission of the corporate offence,
2. induce, whether by threats or promises or otherwise, the commission of the corporate offence,
3. conspire with others to effect the commission of the corporate offence, or
4. in any other way, whether by act or omission, are knowingly concerned in, or party to, the commission of the corporate offence.

Where a Director or Officer is found to have committed an accessorial liability offence they will be liable to the same penalties as the Company, in their personal capacity, in effect doubling the exposure to the already massively increased penalties. Does your D & O policy cover that?

The introduction of executive and accessorial liability offences and the increases in fines (some five fold) make compliance personal. More attention to offences under SOPA is called for, particularly in respect of claims by head contractors.

Given that failure to provide a supporting statement already denies a head contractor the benefits associated with statutory debts and access to the fast track system of adjudication, one might well query whether it should also warrant exposure to such hefty fines. This is particularly the case in circumstances where upon commencement of the Amending Act, there will be no exposure to such fines at all if the payment claim omits the re-introduced endorsement that *"This is a payment claim under the Building and Construction Industry Security of Payment Act"*.

The Amending Act indicates that it will commence on a date to be proclaimed (i.e. gazetted). The changes it introduces will not apply in respect of contracts entered into before that commencement.