



INFORMATION SHEET

Workplace Services

Changes to the Building and Construction Industry Security of Payment Act 1999 (NSW)

Towards the end of 2010, the *Building and Construction Industry Security of Payment Amendment Bill 2010* was passed by the NSW Parliament. This amendment has made some significant changes to the *Building and Construction Industry Security of Payment Act 1999*. The changes were effective from 28 February 2011.

Involving the Principal Contractor

The amendments allow a subcontractor claimant who is owed money by a contractor respondent and has made an adjudication application to require a principal contractor to “retain sufficient money to cover the claim” out of money that:

- is or becomes payable by the principal contractor to the contractor respondent for work carried out or materials supplied by the contractor respondent to the principal contractor; and
- relates to work carried out or the materials supplied by the contractor respondent that is a part of “or incidental to” the work the contractor respondent engaged the subcontractor claimant to carry out or supply.

Who is a Principal Contractor?

A person will be a “principal contractor” if they have a requirement to pay or will have a requirement to pay a contractor respondent for work they did or materials they supplied if the work/supply was a part of or “incidental” to the work or materials that the contractor respondent engaged the subcontractor claimant to do or supply. A home owner who intends to reside in premises is NOT a principal contractor under the Act (as the SOP Act does not have application to home owners, unless they do not intend to ever reside in the premises, for example, building a residential property purely for investment purposes).

Payment withholding request

A principal contractor who has been served with a payment withholding request will need to retain, out of money owed to the contractor respondent, the amount of money to which the payment claim relates until the earlier of:

- the withdrawal of the adjudication application;
- the payment by the contractor to the subcontractor for the amount claimed;
- the contractor serves a certificate under the Contractors Debt Act 1997; or
- 20 business days after an adjudicator's determination is served on the principal contractor.

How will the changes affect you?

Are you a contractor?

Subcontractors could use these new provisions to bypass the contractor and secure payments higher up the contractual chain. This may impact on a contractor's cash flow.

Under the previous system, subcontractor claims could be contested by a contractor in the adjudication process. However, under the new system, potentially large amounts of cash flow could be frozen, regardless of whether the subcontractor claims are legitimate or not.

Are you a principal contractor?

Principal contractors should also be wary of the amendments. Subcontractors now have an increased ability to impose cash flow pressure on contractors.

In addition, if a principal contractor fails to withhold payment from the contractor respondent in accordance with a payment withholding request the principal contractor becomes directly liable to the subcontractor. Therefore, principal contractors will need to ensure that they have procedures in place to make sure that they withhold any amounts required.

For further guidance, you can contact your HIA Workplace Adviser on **1300 650 620**.