



New South Wales

# Building and Construction Industry Security of Payment Amendment Bill 2010

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Building and Construction Industry Security of Payment Act 1999* (the **principal Act**) to provide a procedure for a subcontractor on a construction project who is claiming progress payments from a defaulting contractor to secure payment of those progress payments by giving notice of the claim to a principal contractor further up the chain of contractors engaged on the project. The principal contractor is then required to withhold payment of money owed by the principal contractor to the defaulting contractor, to give the subcontractor a reasonable opportunity to make use of the recovery procedures provided for under the principal Act and the *Contractors Debts Act 1997*.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

## **Schedule 1      Amendment of Building and Construction Industry Security of Payment Act 1999 No 46**

**Schedule 1 [1]** establishes the scheme for securing the payment of progress payments described in the Overview. The main features of the scheme are as follows:

- (a) a subcontractor who has made an adjudication application under the principal Act for a progress payment owed by a contractor on a construction project (the *defaulting contractor*) will be able to require another contractor on the project (the *principal contractor*) who owes money to the defaulting contractor to withhold payment of money owed to the defaulting contractor,
- (b) the principal contractor will then be required to withhold payment to the defaulting contractor (and will become liable with the defaulting contractor for the amount owed to the subcontractor by the defaulting contractor if the principal contractor fails to withhold payment to the defaulting contractor),
- (c) the obligation of the principal contractor to withhold payment continues until the subcontractor's claim is withdrawn or, if the claim is successful, for a sufficient period after the claim is finalised to give the subcontractor a reasonable opportunity to recover from the defaulting contractor using procedures under the principal Act or the *Contractors Debts Act 1997*,
- (d) the subcontractor will be able to obtain from the defaulting contractor (via the claim adjudication process) the name and contact details of any person who is a principal contractor to the defaulting contractor,
- (e) the principal contractor will be protected from any claim for payment by the defaulting contractor while the obligation to withhold payment continues.

**Schedule 1 [2]** makes a consequential amendment.

**Schedule 1 [3]** authorises the making of savings and transitional regulations.

**Schedule 1 [4]** enacts a transitional provision to provide that the scheme extends to matters arising before the commencement of the scheme.

First print



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New South Wales

# **Building and Construction Industry Security of Payment Amendment Bill 2010**

No. , 2010

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## **A Bill for**

An Act to amend the *Building and Construction Industry Security of Payment Act 1999* to make further provision for securing the payment of progress payments under contracts for construction work.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Building and Construction Industry Security of Payment     Amendment Act 2010</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on a day or days to be appointed by proclamation.	6

<b>Schedule 1</b>	<b>Amendment of Building and Construction Industry Security of Payment Act 1999 No 46</b>	1 2 3
<b>[1] Part 3, Division 2A</b>		4
	Insert after Division 2 of Part 3:	5
<b>Division 2A</b>	<b>Claimant's rights against principal contractor</b>	6 7
<b>26A</b>	<b>Principal contractor can be required to retain money owed to respondent</b>	8 9
	(1) A claimant who has made an adjudication application for a payment claim can require a principal contractor for the claim to retain sufficient money to cover the claim out of money that is or becomes payable by the principal contractor to the respondent.	10 11 12 13
	(2) Such a requirement is made by serving on the principal contractor a request (a <i>payment withholding request</i> ) in the form approved by the Director-General of the Department of Services, Technology and Administration.	14 15 16 17
	(3) A <i>principal contractor</i> for a claim is a person by whom money is or becomes payable to the respondent for work carried out or materials supplied by the respondent to the person as part of or incidental to the work or materials that the respondent engaged the claimant to carry out or supply.	18 19 20 21 22
	(4) A person who is served with a payment withholding request must, within 10 business days after receiving the request, notify the claimant concerned if the person is not (or is no longer) a principal contractor for the claim. Maximum penalty: 5 penalty units.	23 24 25 26 27
	<b>Note.</b> A person may no longer be a principal contractor as a result of money owed to the respondent having been paid by the person before the payment withholding request was served.	28 29 30
<b>26B</b>	<b>Obligation of principal contractor to retain money owed to respondent</b>	31 32
	(1) A principal contractor who has been served with a payment withholding request must retain, out of money owed to the respondent, the amount of money to which the payment claim relates (or the amount owed by the principal contractor to the respondent if that amount is less than the amount to which the payment claim relates).	33 34 35 36 37 38

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- (2) The amount is only required to be retained out of money that is or becomes payable by the principal contractor to the respondent for work carried out or materials supplied by the respondent to the principal contractor as part of or incidental to the work or materials that the respondent engaged the claimant to carry out or supply. 1  
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- (3) The obligation to retain money under this section remains in force only until whichever of the following happens first: 7  
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- (a) the adjudication application for the payment claim is withdrawn, 9  
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- (b) the respondent pays to the claimant the amount claimed to be due under the payment claim, 11  
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- (c) the claimant serves a notice of claim on the principal contractor for the purposes of section 6 of the *Contractors Debts Act 1997* in respect of the payment claim, 13  
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- (d) a period of 20 business days elapses after a copy of the adjudicator's determination of the adjudication application is served on the principal contractor. 16  
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- (4) A part payment of the amount claimed to be due under the payment claim removes the obligation under this section to retain money to the extent of the payment. 19  
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- (5) When the claimant's adjudication application is determined, the claimant must serve a copy of the adjudicator's determination on the principal contractor within 5 business days after the adjudicator's determination is served on the claimant. 22  
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Maximum penalty: 5 penalty units. 26
- 26C    Contravention of requirement by principal contractor** 27
- (1) If a principal contractor discharges the principal contractor's obligation to pay money owed under a contract to the respondent in contravention of a requirement under this Division to retain the money, the principal contractor becomes jointly and severally liable with the respondent in respect of the debt owed by the respondent to the claimant (but only to the extent of the amount of money to which the contravention relates). 28  
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- (2) The principal contractor can recover as a debt from the respondent any amount that the claimant recovers from the principal contractor pursuant to a right of action conferred by this section. 35  
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<b>26D</b>	<b>Protections for principal contractor</b>	1
(1)	An obligation under this Division to retain money owed by a principal contractor to the respondent operates (while the obligation continues) as a defence against recovery of the money by the respondent from the principal contractor.	2 3 4 5
(2)	Any period for which a principal contractor retains money pursuant to an obligation under this Division is not to be taken into account for the purposes of reckoning any period for which money owed by the principal contractor to the respondent has been unpaid.	6 7 8 9 10
(3)	A claimant who has served a payment withholding request on a principal contractor in connection with an adjudication application must, if the adjudication application is withdrawn, give the principal contractor written notice of the withdrawal of the application within 5 business days after it is withdrawn. Maximum penalty: 10 penalty units.	11 12 13 14 15 16
(4)	The principal contractor is entitled to rely in good faith on a statement in writing by the respondent in the form of a statutory declaration that:	17 18 19
(a)	a specified amount claimed to be due under an adjudication application has been paid, or	20 21
(b)	an adjudication application has been withdrawn.	22
<b>26E</b>	<b>Respondent to provide information about principal contractor</b>	23
(1)	An adjudicator may, in connection with an adjudication application and at the request of the claimant, direct the respondent to provide information to the claimant as to the identity and contact details of any person who is a principal contractor in relation to the claim.	24 25 26 27 28
(2)	A respondent must comply with a direction of an adjudicator under this section. Maximum penalty: 10 penalty units.	29 30 31
(3)	A respondent must not, in purported compliance with a direction of an adjudicator under this section, provide information that the respondent knows is false or misleading in a material particular. Maximum penalty: 10 penalty units.	32 33 34 35
<b>26F</b>	<b>Other rights of claimant not affected</b>	36
	This Division (including any action taken by a claimant under this Division) does not limit or otherwise affect the taking of any	37 38

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	other action by a claimant to enforce a payment claim or adjudication determination.	1 2
<b>[2] Section 34A</b>		3
	Insert after section 34:	4
<b>34A Nature of proceedings for offences</b>		5
	Proceedings for an offence under this Act may be dealt with summarily before the Local Court.	6 7
<b>[3] Schedule 2 Savings and transitional provisions</b>		8
	Insert at the end of clause 1 (1):	9
	<i>Building and Construction Industry Security of Payment Amendment Act 2010</i>	10 11
<b>[4] Schedule 2, Part 4</b>		12
	Insert at the end of Schedule 2:	13
<b>Part 4 Provisions consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2010</b>		14 15 16
<b>4 Application of amendments</b>		17
	An amendment made to this Act by the <i>Building and Construction Industry Security of Payment Amendment Act 2010</i> extends to matters arising before the commencement of the amendment (including an adjudication application made before that commencement and pending on that commencement).	18 19 20 21 22