



# National Review of Security of Payment Legislation

Each State in Australia has Security of Payment legislation which provides protection to contractors in the construction industry by ensuring they have adequate avenues to recover payment owed for works performed. Unlike other States, Western Australia’s Security of Payment legislation affords protection to not only contractors but Principals as well, allowing claims to be made up and down the supply chain.

The level of protection and approach to Security of Payment legislation varies significantly across Australia and so in December 2016 the Federal Government announced a much needed review of the legislation to align existing Security of Payment legislation nationally.

The review is focused on:

- Evaluating existing state-based legislation to identify best practice;
- Consulting with stakeholders, including the Security of Payments Working Group (SPWG) which was established in 2016 by virtue of the Building and Construction Industry (Improving Productivity) Act. The SPWG was established to monitor the impact of Commission activities on the compliance of those in the building industry and make recommendations to the Australian Building Construction Commission about policies, procedures or programs that could be implemented to improve compliance;
- Contractual terms which hinder contractors obtaining payment;
- Assessing previously developed models for Security of Payment other than those currently in place.

An interim report is to be submitted to the Minister for Employment by 30 September 2017 and the final report by 31 December 2017.

## State-Based Developments

Western Australia and Queensland have led the way in changing legislation to better protect contractors.

### Western Australia

In November 2013 Western Australia trialled Project Bank Accounts (“PBAs”) on seven projects undertaken by Building Management and Works (“BMWs”). The trial illustrated the significant value PBAs have in securing certain and timely payments for project contractors and inevitably led to the passing of the Construction Contracts Amendment Bill 2016 (WA) and the announcement that PBAs will be used on most BMWs projects with a value in excess of \$1.5 million from 30 September 2016 onwards.

The Construction Contracts Amendment Bill 2016 (WA) (“the Amendment Bill”) has taken effect as the Construction Contracts Amendment Act 2016 (“the Amending Act”). The Amending Act commenced on 15 December 2016, however some of the changes proposed by the Amendment Bill were implemented on 3 April 2017.

Key changes are:

1. A requirement for businesses to maintain separate PBAs under trust arrangements to ensure retentions are safeguarded in the event a contractor becomes insolvent.
2. Changing 'day' to 'business day' to ensure those served with adjudication applications prior to Christmas or Easter extended public holidays are not disadvantaged with reduced time to formulate a response.
3. Increasing the time period to serve applications and adjudicate on disputes to allow time for smaller contractors to meet the requirements of and access the rapid adjudication scheme.
4. Allowing claims which have already been rejected or disputed to be claimed again later in a contract. This does not however apply to claims which have been dismissed or ruled on under an adjudication application.
5. Reducing time for contractors to pay subcontractors to facilitate cash flow.
6. Narrowing the mining exclusion in response to concerns whether the exclusion applied to singular items of equipment opposed to the entire project.
7. Providing wider powers to the adjudicator allowing them to hear an application which may not be in the required form under the Act and make determinations which give effect to settlement terms which may have been reached.
8. Removal of the requirement to seek leave of court to enforce a determination.

It is expected further changes will also come into place in Western Australia in 2017 to impose penalties on those who fail to comply with the Amending Act.

Changes similar to the above are being proposed for Queensland, with the Queensland Government running public consultation.

### Queensland

Queensland proposes to make amendments to its Security of Payment regime, builder licensing requirements and the power of Queensland Building and Construction Commission ("QBCC") to regulate non-conforming building products. In summary, Queensland proposes to:

1. Require project bank accounts be established.
2. Remove provisions in the Building Construction Industry Payments Act 2004 (Qld) ("BCIPA") which allow claimants to use BCIPA if a contract is terminated because it is more convenient to do so.
3. Allow adjudicators to make respondents pay a contractor's costs applying for adjudication.

4. Give adjudicators authority to make respondents pay interest on unpaid claim amounts.
5. Combine BCIPA, Queensland Building and Construction Commission Act 1991 (Qld) ("QBCC Act"), and Subcontractors' Charges Act 1974 (Qld) ("SCA") into one piece of legislation; the Queensland Security of Payment legislation.
6. Extend QBCC powers to enable it to regulate the use of non-conforming building products through auditing and investigating buildings and allowing it to prosecute offenders amongst other things.
7. Recognise New South Wales licensees in Queensland to ensure they are not also required to obtain the same class of licence from the QBCC as that already held in New South Wales.
8. Align the licensed work threshold to that of other states and introduce a single mechanical services licence similar to that in Tasmania and Victoria to prevent holding of multiple licence classes.
9. Consolidate the QBCC investigative powers into the QBCC Act to ensure a single point of reference.

Queensland's consultation period closed on 31 March 2017 and a consultation report is expected to be released shortly. Changes proposed for Queensland are not expected to commence implementation until late 2017.

The introduction of PBAs coupled with the simplification, consolidation and amendment of existing legislation indicates strong steps are being taken to protect contractors, afford them greater rights and more efficient and less costly ways of obtaining payment for work performed.

### Other States

Other States in Australia are yet to commence the implementation of improvements similar to those in Western Australia and Queensland, however it is expected once the full report is submitted for review at the end of 2017, other States will follow the report's recommendations in harmonising legislation to protect contractors.

### What Should You Be Doing?

Those in Queensland and Western Australia should ensure they have made, or are preparing to make, appropriate amendments to ensure contracts entered into align with changes which have and are being made legislation by Amending Acts. Contractors and Principals should familiarise themselves with the current and future changes to ensure they are compliant.

Our Construction Solutions professionals provide a range of consulting services to owners, contractors, design professionals, investors, law firms and multinational companies on complex construction projects. Our advisors can also assist in the event a construction/engineering organisation is in financial distress and seeking to recover costs by way of the Security of Payment Act. Read our [brochure](#) for more information on our construction solutions advisory services.

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PERTH

**Daniel Woodhouse**

Managing Director

+61 8 6430 1340

daniel.woodhouse@fticonsulting.com

SYDNEY

**Joseph Hansell**

Managing Director

+61 2 8247 8058

joseph.hansell@fticonsulting.com

MELBOURNE

**Paul Allen**

Managing Director

+61 3 9604 0603

paul.allen@fticonsulting.com

BRISBANE

**Renee Lobb**

Senior Director

+61 7 3225 4976

renee.lobb@fticonsulting.com



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