



## Security of Payments

### HIA's Policy Position on Security of Payments

#### **1. Freedom of contract and limited government intervention**

To ensure the efficient operation of the market for all businesses operating in the residential construction industry, HIA supports the general principle that parties should be free to contract and agree upon their own terms and conditions, including the terms and conditions of payment.

#### **2. Security of payment**

Any government intervention in the form of security of payment laws must be limited, focusing on facilitating prompt cash-flow and the timely payment of progress claims between all parties to construction contracts, including client to builder.

Security of payment laws should cover all building work contracts, including payments by domestic clients to builders. If a party in a contract chain is subject to a mandatory or implied condition or right under legislation, that condition or right, as a matter of commercial risk management, must be reflected throughout the entire contract chain.

#### **3. Right to payment**

HIA supports the needs of parties to construction contracts to be paid for the work that they perform in a timely manner and in accordance with the contract. Where a payment is genuinely disputed, HIA supports the implementation of systems that enable the fast and cost effective determination of such disputes. Contractual dispute resolution mechanisms, such as mediation, expert determination, arbitration and adjudication should be preferable to mandatory statutory mechanisms.

#### **4. Implied rights**

HIA opposes implied legislative rights (such as statutory construction trusts, statutory rights to suspend works and statutory liens) supplanting contractual relationships.

Only where the contract is silent or inadequate should HIA support the operation of implied contractual rights for the making of progress claims, the assessment of progress claims and payment of progress claims.

#### **5. Progress payments**

HIA supports progress payment rights being implied into a contract and not being stated as a separate statutory right. HIA opposes any implied time limit for the payment of claims. Such matters should be left to the parties to negotiate.

HIA does not support 'paid when paid' or 'paid if paid' clauses. Such clauses attempt to pass the risk of the owner not paying on to the subcontractor, even though the principal contractor/builder as general contractor is in a better position to manage and monitor risk of non-payment than are its subcontractors.

## **6. Construction trusts and retentions**

HIA opposes any type of deemed or construction trust for the residential building industry, including for deemed trusts arising on the insolvency of the principal for retentions. Statutory construction trusts are unfair, impractical and inequitable:

- a. Increasing costs and red tape in the industry;
- b. Disrupting normal commercial relationships;
- c. Unreasonably restricting the ability of a builder to use money received from progress payments in a flexible manner, depriving them of working capital.

Retentions are monies held to secure performance of the contract and not moneys yet earned by the subcontractor.

HIA supports an amendment to section 556 of the *Corporations Act* to extend priority to subcontractors (as well as employees) in the event of the insolvency of the principal contractor/builder.

## **7. Caveats**

HIA supports the right of the builder to lodge a caveat over the property of the owner in all cases. Where there is a restriction on the right to lodge a caveat over domestic building work, HIA supports the right to caveat being allowed immediately on the commencement of adjudication proceedings.

## **8. HIA's rapid adjudication principles**

- HIA is supportive, in principle, of a rapid adjudication scheme to assist in achieving the timely and cost-effective of payment disputes, thereby assisting in prompt cash-flow through to a contracting business.
- HIA's support for rapid adjudication is subject to that model covering all contracts in the residential building industry, including payments from clients to builders.
- Claimants should not have an excessive time period to commence adjudication proceedings. HIA supports a maximum time period of 90 days for parties to issue a payment claim under rapid adjudication laws. The right to adjudication should be lost unless the claimant makes a claim within a 20 working day time limit (or other short time period) from a triggering event.
- Rapid adjudication laws and rules should be user friendly and easy to understand. Claimants and respondents should be able to prepare their own paperwork and this be acceptable to an adjudicator.
- HIA supports the ability of a claimant to register and enforce an adjudicated outcome through the Courts as a judgment and subject to the court rules. Claimants should not have additional right to other litigants. HIA does not support the respondent being given the option of giving security in lieu of payment or the claimant having additional rights to suspend works.
- HIA does not support any model that allows for central record keeping of adjudications. Adjudicated outcomes are matters for the parties and should not be misused by the regulator for unrelated purposes such as licensing.
- HIA supports the right of appeal from an adjudicator's decision on errors of law and breaches of natural justice.

**9. *Training, education and awareness***

HIA supports greater education for subcontractors and trade contractors including training in business skills and commercial risk management so they have a greater understanding of their rights and obligations and are in a better position to respond to adverse circumstances.