

CHANGES TO SECURITY OF PAYMENT LEGISLATION FROM 28 FEBRUARY 2011 BE ON THE LOOKOUT FOR PAYMENT HOLDING REQUESTS

Notice Good News for Subbies

Warning for Builders and Proprietors

CHANGES TO SECURITY OF PAYMENT LEGISLATION – Commencing 28 February 2011 arising from the Building and Construction Industry Security of Payment Amendment Act 2010

On 24 November 2010 the Building and Construction Industry Security of Payment Amendment Act 2010 [*the Amendment Act*] was passed and has now been proclaimed to **commence on 28 February 2011**.

Important Changes to Occur from 28 February 2011

In summary the changes as a result of the Amendment Act will from 28 February 2011 require a “*Principal Contractor*” (mainly Builders and Proprietors) on receipt of a Payment Holding Request, to withhold monies from contractors, equal to the amount claimed by a subbie in a lodged Adjudication Application.

Penalties will be imposed on Claimants, Respondents and Principal Contractors should they fail to comply with the new amendments

Principal Contractors can also become jointly and severally liable with Respondents for monies payable to Claimants if they pay a contractor after receiving a Payment Holding Request.

What is a Principal Contractor? And what are they to do?

A “Principal Contractor” can potentially be any party in the contractual chain that is liable to pay money to a contractor who is the subject of an Adjudication Application by a subcontractor.

From 28 February 2011 a Principal Contractor will be required on receipt of a Payment Holding Request to withhold money from the Respondent to cover the amount of the claim made by the Claimant in its Adjudication Application.

What triggers the requirement to withhold payment?

The requirement of the Principal Contractor to withhold money is triggered by the service of a Payment Withholding Request on the Principal Contractor by a Claimant who has lodged an Adjudication Application.

On being served with a Payment Withholding Request, a Principal Contractor must retain out of money otherwise payable to the Respondent, the amount stated in the Payment Withholding Request.

What is the extent of the Principal’s obligation?

The obligation to retain money on receipt of a Payment Withholding Request will remain in force until which ever of the following happens first:

- a) The Adjudication Application for the Payment Claim is withdrawn.
- b) The Respondent pays to the Claimant the Adjudicated Amount.
- c) The Claimant serves a Notice of Claim on the Principal Contractor for the purpose of Section 6 of the Contractors Debts Act 1997 in respect of the Payment Claim.
- 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.

When the adjudication application is determined, the Claimant must serve a copy of the determination on the Principal Contractor within 5 business days after the determination is served on the Claimant.

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A penalty applies should a Claimant fail to comply with this requirement.

What happens if the Principal fails to comply?

If the Principal Contractor contravenes the requirement to withhold payment after receiving a Payment Withholding Request, the Principal Contractor becomes jointly and severally liable with the Respondent in respect of the debt owed by the Respondent to the Claimant

What does all this mean?

There are a number of significant implications arising from the amendments which include the following:

For Builders and Principals

The Principal may be liable to the Claimant for money owing by the Respondent

Any failure by the Principal to comply with the obligation to withhold money attracts not only a penalty but **a joint and several liability with the Respondent to pay the Adjudicated Amount owed by the Respondent to the Claimant to the extent of any contravention.**

For Respondents to Adjudication Applications

An Adjudicator can direct a Respondent to disclose the identity of a Principal Contractor

The power is given to an Adjudicator to direct a Respondent to provide information to the Claimant as to the identity and contact details of the person who is a Principal Contractor in relation to the claim.

A failure by the Respondent to comply with such a direction attracts a penalty.

For Claimants to Adjudication Applications

A Claimant can now secure upfront from a third party, money claimed in an Adjudication Application

The Claimant can now secure from the Principal Contractor money claimed in an Adjudication Application at the time of lodging an Adjudication Application, thereby increasing its chance of recovering any Adjudicated Amount.

What Problems May Arise

Potential to Freeze Cash Flow to Contractors

Claims that are overstated or without basis could potentially freeze the cash flow to Respondents as there is no preliminary review of the amount claimed in the Adjudication Application and frozen by the Payment Withholding Request.

For example, a subcontractor with a substantial variation or time related claim which may be totally unsubstantiated, will as a consequence of the amendments be able to require the Principal Contractor to retain those monies from monies payable by the Principal Contractor to the Respondent once he lodges an Adjudication Application.

Potential for Abuse by Claimants

Potentially, the amendments may encourage spurious claims by claimants who may attempt to use the procedures under the Act to leverage a resolution with Respondents who will wish to avoid monies for unmeritorious claims being withheld by a Principal Contractor up the contractual chain at the risk of the Project.

Potential Liability for Principal Contractors

If a Principal Contractor after being served with a Payment Holding Request pays a Respondent contrary to the Payment Holding Request, the Principal Contractor may be liable to the Claimant for the extent of any contravention and so may be liable to pay twice.

If you would like any further information on this topic, please contact David Glinatsis, Solicitor Director, or Craig Blackwell, Senior Associate on (02) 8239 6500 or email david.glinatsis@kreissonlegal.com.au or craig.blackwell@kreissonlegal.com.au

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