

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT ACT 2010—BRINGING FORWARD THE REMEDY

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INTRODUCTION

On 28 February 2011 the *Building and Construction Industry Security of Payment Amendment Act 2010* (the Amending Act) came into force.

This is only the second amendment to the *Building and Construction Industry Security of Payment Act 1999* (the SoP Act) since it was introduced on 26 March 2000.

In short, the Amending Act addresses a gap identified in the application of the *Contractors Debts Act 1997* (the CD Act). The amendments enable a subcontractor to require a principal to retain monies without the previous requirement of a judgment or an adjudication certificate. That is, a subcontractor may now circumvent contractual privity and require a principal to retain monies upon an adjudication application being made by that subcontractor under the SoP Act.

PRE-AMENDMENT

The CD Act enables a subcontractor who is owed money by a contractor to obtain payment out of money that is payable or becomes payable to that contractor by a principal (noting that the subcontractor can only obtain this payment if the work carried out or materials supplied by the subcontractor are part of, or incidental to, the work or

materials the principal engaged the contractor to carry out or supply) (section 5 of the CD Act).

The problem for a subcontractor under the CD Act is that to obtain payment of the money owed, a debt certificate must have been issued for the money owed and the subcontractor must serve a notice of claim on the principal (section 6 of the CD Act).

A debt certificate will only be issued by a Court:

- when judgment is obtained (section 7(1) of the CD Act); or
- when an adjudication certificate within the meaning of the SoP Act has been filed as a judgment for a debt in accordance with section 25 of the SoP Act (section 7(1A) of the CD Act).

POST-AMENDMENT

The Amending Act inserts Division 2A into the SoP Act which has the following features:

- once an adjudication application is made, a principal can be required by a subcontractor (by service of a 'payment withholding request') to retain sufficient money to cover the payment claim amount out of money that is or becomes payable by the principal to the contractor (section 26A(1) of the SoP Act);
- the obligation of the principal to retain money remains in force until the one of the events listed in section 26A(3) of the SoP Act occur;
- if the principal contravenes the requirement to retain money, the principal becomes jointly and severally liable with the contractor in respect of the debt owed by the contractor to the subcontractor; and
- a contractor can be required to provide information to a subcontractor as to the identity and contact details of any person who is a principal in relation to the claim.

The amendments only relate to the retention of money by a principal. In order for a subcontractor to be actually paid, a subcontractor will still need to use the debt certificate mechanism in the CD Act.

The amendments are retrospective to the extent that they apply to any adjudication applications made prior to 28 February 2011.

ISSUES

While the principal is protected by various provisions in section 26D of the SoP Act, principals who do not have efficient intra-organisational communications may find themselves exposed to the risk of double payment in the event that a payment withholding request is received just before payment is made to a contractor.

The Amending Act increases the possibility of dubious claims made by subcontractors interfering with the cashflow of contractors (whereas previously a subcontractor needed to have at least a judgment or adjudication certificate before requiring a principal to retain monies). This is particularly an issue if the amount claimed by a subcontractor is large.

Subcontractors are clearly the beneficiaries of the Amending Act. However, the ability of subcontractors to create mischief under the Amending Act over an extended period of time is limited given the strict timeframes under the SoP Act and the timeframes in sections 26B(3)(d) and 26B(5) of the SoP Act.

Further, payment withholding requests must be supported by a statutory declaration. Subcontractors should be aware that penalties exist for persons who make false statutory declarations.