

Passed by both Houses



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2010

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2010*



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2010

Act No , 2010

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.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Building and Construction Industry Security of Payment Amendment Act 2010*.

2 Commencement

This Act commences 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

[1] Part 3, Division 2A

Insert after Division 2 of Part 3:

Division 2A Claimant's rights against principal contractor

26A Principal contractor can be required to retain money owed to respondent

- (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.
- (2) Such a requirement is made by serving on the principal contractor a request (a *payment withholding request*) in the form approved by the Director-General of the Department of Services, Technology and Administration.
- (3) A payment withholding request must include a statement in writing by the claimant in the form of a statutory declaration declaring that the claimant genuinely believes that the amount of money claimed is owed by the respondent to the claimant.
- (4) A *principal contractor* 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.
- (5) 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.

Note. 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.

26B Obligation of principal contractor to retain money owed to respondent

- (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).

- (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.
- (3) The obligation to retain money under this section remains in force only until whichever of the following happens first:
 - (a) the adjudication application for the payment claim is withdrawn,
 - (b) the respondent pays to the claimant the amount claimed to be due under the payment claim,
 - (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,
 - (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.
- (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.
- (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.
Maximum penalty: 5 penalty units.

26C Contravention of requirement by principal contractor

- (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).

- (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.

26D Protections for principal contractor

- (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) 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.
- (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.
- (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:
 - (a) a specified amount claimed to be due under an adjudication application has been paid, or
 - (b) an adjudication application has been withdrawn.

26E Respondent to provide information about principal contractor

- (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.
- (2) A respondent must comply with a direction of an adjudicator under this section.
Maximum penalty: 10 penalty units.
- (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.

26F Other rights of claimant not affected

This Division (including any action taken by a claimant under this Division) does not limit or otherwise affect the taking of any other action by a claimant to enforce a payment claim or adjudication determination.

[2] Section 34A

Insert after section 34:

34A Nature of proceedings for offences

Proceedings for an offence under this Act may be dealt with summarily before the Local Court.

[3] Schedule 2 Savings and transitional provisions

Insert at the end of clause 1 (1):

*Building and Construction Industry Security of Payment
Amendment Act 2010*

[4] Schedule 2, Part 4

Insert at the end of Schedule 2:

**Part 4 Provisions consequent on enactment of
Building and Construction Industry
Security of Payment Amendment Act 2010**

4 Application of amendments

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2010* extends to matters arising before the commencement of the amendment (including an adjudication application made before that commencement and pending on that commencement).