

ACT: Changes to the Building and Construction Industry (Security of Payment) Act 2009



CRISP
LAW

Newsletter

April 2024: Issue 1



In this Newsletter, we discuss the recent changes to the Australian Capital Territory (ACT) *Building and Construction Industry (Security of Payment) Act 2009*. We will focus on the key changes and how these amendments will impact the Building and Construction Industry in the ACT.

Introduction

The *Building and Construction Legislation Amendment Act 2023* was passed on 12 December 2023 and introduced amendments to the *Building and Construction Industry (Security of Payment) Act 2009* (SOPA).¹ These amendments commenced on 11 March 2024 and have been introduced to provide clarity around the building and construction processes.

The purpose of these amendments as discussed in the explanatory statement to the *Building and Construction Legislation Amendment Bill 2023* is to support national consistency in the security of payment legislation.² These amendments will bring the ACT more in line with the New South Wales (NSW) legislation.

They will also be beneficial to the industry as they aim to set statutory timeframes for payment where a timeframe has not been set under the contract or provide for a period of time for payment longer than the time provided for under statute.³

Importance and Relevance of this Newsletter

This newsletter is important for the building and construction industry to be aware of as it introduced significant amendments that will change the operation of the Security of Payment regime. The key amendments to the SOPA are the removal of 'reference dates' and the introduction of a maximum payment timeframe which will be explained below.

As these amendments have already commenced, they will apply to all contracts entered into on or after 11 March 2024. This means that all standard contracts will now need to be updated to ensure compliance with the legislation. The responsibility will be on those in the building and construction supply chain to ensure that Contractors and Subcontractors will be paid on time. Failure to do so will result in a risk of being subject to an adjudication application.

Key Changes

Removal of 'reference dates'

As noted above, the term 'reference dates' has been removed from the SOPA. This will have significant implications for the Building and Construction industry as this was central to a claimant's entitlement to make a payment claim.

¹ *Building and Construction Legislation Amendment Act 2023* (ACT) Pt 4.

² Explanatory Statement, *Building and Construction Legislation Amendment Bill 2023* (ACT), p22 <https://www.legislation.act.gov.au/View/es/db_68427/20230914-81940/html/db_68427.html>.

³ Supplementary Explanatory Statement, *Building and Construction Legislation Amendment Bill 2023* (ACT), p2 <https://www.legislation.act.gov.au/View/es/db_68427/20231129-82380/html/db_68427.html>

Prior to the change, 'reference date' was defined in section 10(3) as:

- (a) a date stated in, or worked out under, the contract as the date when a claim for a progress payment is to be made in relation to work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
- (b) if the contract does not provide a date mentioned in paragraph (a) –
 - (i) the last day of the calendar month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
 - (ii) the last day of each subsequent named month.⁴

The above provision has since been removed. Section 10(1) has also been amended to remove the term reference date and now reads:

- (1) A person is entitled to a payment (final progress payment) if the person has undertaken, under a construction contract, to (a) carry out construction work; or (b) supply related goods and services.⁵

Another amendment was made to section 15(5) removing the wording a 'claimant must not give more than 1 payment claim for each reference date under the contract' to now state:

- (5) A claimant must not give more than 1 payment claim for each calendar month, unless the construction contract provides for more than 1 payment claim to be given in a calendar month.⁶

These changes have been introduced following a recommendation of John Murray AM in the Final Report on the 'National Review of Security of Payment Laws' from December 2017. Within the report, John Murray recommended in item 14 that 'to avoid confusion within the industry the use of the expression 'reference date' should be abandoned'.⁷

The above changes have been welcomed by the industry as the removal of reference dates will create a simplified adjudication process by reducing confusion in the industry and mirroring the NSW legislation.

⁴ SOPA (n1) s10(3).

⁵ Ibid s10(1).

⁶ Ibid 15(5).

⁷ John Murray AM – Australian Government, 'Review of Security of Payment Laws' (Report) (December 2017) < https://www.ag.gov.au/sites/default/files/2020-03/review_of_security_of_payment_laws_-_final_report_published.pdf>.

Introduction of section 15(3A)

A new section 15(3A) has been introduced. This section entitles a claimant to make a claim on or after the last day of the calendar month, the day provided for under the contract if before the last day of the calendar month or the day of termination.

The section is as follows:

- (3A) A payment claim may be given on or after –
- (a) the last day of the calendar month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract and of each subsequent calendar month; or
 - (b) if the construction contract provides for a payment claim to be given before the last day of a calendar month – the day provided under the contract; or
 - (c) if the construction contract has been terminated – the day of termination.⁸

This new provision is now consistent with the NSW Security of Payment Act approach and will likely be interpreted consistently with the case of *BCFK Holdings Pty Ltd v Rork Projects Pty Ltd [2022] NSWSC 1706*. This NSW case confirmed that only one payment claim can be served after the termination of a construction contract.⁹

Similarly, in the ACT, only one payment claim can be served if the contract has been terminated, but it must be served on the day of termination.

Introduction of maximum payment terms

Significantly, section 13(1) has been amended to tighten the statutory timeframes for due dates for payment. Prior to 11 March 2024, parties in the ACT could set their own due dates for payment in a construction contract. The previous section allowed for payment to be made on the day payable under the contract or 10 business days if the contract did not set a date.

For example, payment terms could be set for 90 days, where the claimant would have to wait until that time for payment to be made. Payment terms of this length were not uncommon in the ACT. This was also extended when payment was late.

The above no longer applies as the amendments have now set a maximum payment term of 15 Business Days after a payment claim is submitted. The new section now reads:

⁸ Ibid (s15(3A)).

⁹ *BCFK Holdings Pty Ltd v Rork Projects Pty Ltd [2022] NSWSC 1706*.

13(1) A progress payment under a construction contract is payable on the earlier of the following:

- a) 15 business days after a payment claim is given under part 4 in relation to the payment;
- b) the day when the payment becomes payable under the contract.¹⁰

The key change in the amended section is that a progress payment is payable **‘on the earlier of’** 15 business days or the date payable under the contract. This means that all payments must now be made within 15 business days of the payment claim being submitted or a timeframe under the contract that is **shorter** than 15 business days.

This timeframe also applies regardless of Contractor or Subcontractor status. This is different to the NSW legislative regime as they have different timeframes for Contractors and Subcontractors. Within NSW under section 11, the payment timeframe for head contractors is 15 business days and is extended to 20 business days for subcontractors.¹¹

Overall, the new amendment will accelerate payment terms and help to standardise the time and process to apply for adjudication.

Other changes

Other minor changes have been made to the SOPA. These include the following:

- The term ‘milestone payments’ have been removed during the changes to section 10(2)(c) and section 10(3). The term was defined in section 10(3) to mean ‘a payment that is based on an event or date’. The sections still hold the same meaning; however, the specific term has been removed.¹²
- The amendment to section 15(6) extended the section from ‘However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim’ to state:

15(6) Nothing in this section prevents the claimant from –
(a) including more than 1 progress payment in a payment claim; or
(b) including in a payment claim an amount that has been the subject of a previous claim; or

¹⁰ SOPA (n1) s13(1).

¹¹ *Building and Construction Industry Security of Payment Act 1999* (NSW) s11.

¹² SOPA (n1) s10(2)(c) and s10(3).

(c) giving the respondent a payment claim in a particular calendar month for work carried out, or related goods and services supplied, in an earlier calendar month.¹³

- The words ‘the earlier of’ will also be omitted from sections 16(4)(b) and s18(1)(b).

Conclusion and Implications

Overall, it is important for all the Building and Construction industry to be aware of the new changes to the SOPA in the ACT due to the significant implications on contracts entered into on or after 11 March 2024. All standardised construction contracts will need to be updated to ensure compliance with the legislation.

The removal of reference dates will simplify the adjudication process as it will reduce confusion concerning when the applicable reference date is, and the tighter payment due dates will facilitate faster payments. These changes will affect all claims for payment and as such it is important that all those impacted make the necessary adjustments to ensure consistency within the industry as the new obligations cannot be contracted out of.

¹³ SOPA (n1) s10(2)(c) and s10(3).