



An update on the Security of Payment Reforms – Implementation Options Paper

THE CALL FOR SUBMISSIONS

In earlier articles we outlined some of the reforms introduced by recent amendments to the Building and Construction Industry Security of Payment Act 1999.

Some of the key reforms include:

- a) A reduction of the maximum time a head contractor has to pay subcontractors from 30 business days to 20 business days;
- b) A new payment structure that will enable a subcontractor to make a payment claim at least once per month for work;
- c) The ability for a subcontractor to make a final claim if a contract is terminated; and
- d) Increased compliance and enforcement provisions for Fair Trading.

The amending legislation was assented to on **28 November 2018** but will not commence until appropriate subordinate legislation, administrative changes and changes to industry practices have been implemented.

To assist in the commencement of the reforms, Fair Trading has released an Options Paper – Security of Payment Reforms – Implementation dated December 2018,¹ which sets out various options for the commencement of each of the reforms for industry feedback.

The feedback will be used to assist in the drafting of amending Regulation for release for public comment in **early 2019**.

The time for the lodgement of submissions closes on **28 January 2019**.

A copy of the Fair Trading Options Paper can be accessed [here](#).

CATEGORIES OF REFORM

The Options Paper identifies the following categories of reform:

- Reforms with a minimal transition period which do not require either subordinate legislation or significant preparation time by industry stakeholders and which have been proposed to commence in **February 2019**.
- Reforms with a transitional period which are likely to have a direct impact on industry practices and where it would be appropriate to provide preparation time before commencement. The proposed date for the commencement of these reforms is the **middle of 2019**.
- Reforms that require subordinate legislation or administrative changes and which have been proposed to commence in **late 2019**.

REFORMS WITH MINIMAL TRANSITION PERIOD

The Options Paper considers that the following set of reforms could commence in early 2019:

- Investigation and enforcement provisions which include the standard powers for authorised officers to gather information and enter premises for investigating, monitoring and enforcing compliance and administering the Act.
- Increased penalty units for the following offences:
 - ◇ Supporting Statement not attached to payment claim;
 - ◇ Supporting Statement is false or misleading;
 - ◇ Not notifying changed circumstances ;
 - ◇ Not giving notice of withdrawal of adjudication application;
 - ◇ Not providing identity and contact details of principal contractor; and
 - ◇ Executive liability offences for directors and persons involved in the management of companies.²
- New powers to the Supreme Court to sever, where appropriate, part of an adjudicator's determination affected by jurisdictional error.
- Prohibiting a corporation in liquidation from making payment claims.
- Extended circumstances for releasing withheld money when an adjudication application is withdrawn or where an adjudicator fails to determine the application within timeframes and a new adjudication is not made.
- A number of miscellaneous reforms.

REFORMS WITH TRANSITIONAL PERIODS

The Options Paper identifies the following reforms which will have a direct impact on industry practices and require a transitional period before commencement:

- The reduction of the maximum payment period from head contractor to subcontractor from 30 business days to 20 business days.
- The reinsertion of the requirement that a payment claim include an endorsement that it is a claim made under the Act.

- Miscellaneous adjudication reforms which deal inter alia with:
 - ◇ the trigger for commencing the 10 business day deadline for an adjudication determination;
 - ◇ a new process to withdraw an adjudication application; and
 - ◇ the responsibility of the adjudicator serving an adjudication determination on the parties.

It is proposed that the reforms commence in **June 2019** with a commencement date being proclaimed in **February 2019** which would provide at least 3 month transitional period.

REFORMS REQUIRING SUBORDINATE LEGISLATION OR ADMINISTRATIVE CHANGES BEFORE COMMENCEMENT

The following reforms have been identified in the Options Paper as requiring subordinate legislation or administrative changes:

- removal of 'owner occupier' exemption to allow it to be refined or removed;
- the keeping of records by the head contractor in connection with the operation of the trust account and the inspection of those records by subcontractors entitled to retention monies;
- the prescribing of information to subcontractors which will assist subcontractors to better understand the operation of the Act and its processes;
- code of practice for Authorised Nominating Authorities which will clarify expectations, responsibilities and obligations in their undertaking of functions under the Act;
- accessorial liability of directors and people involved in the management of companies for the commission of corporate offences; and
- the reduction of the project value threshold for retention money requirement from \$20 million to at least \$10 million.

It is anticipated that a number of these reforms will be drafted and available for consultation in **May 2019**.

The proposed date for commencement is **December 2019**, which will allow time for the making of the required regulations and administrative changes; consultation and the proclamation of a commencement date by **September 2019**, which would then give industry a 3 month transition period to prepare for the commencement of the reforms.

OTHER MATTERS

As a general rule, the reforms will not apply to a construction contract entered into prior to commencement.

There may, however, be some reasons why this general rule should be varied in the case of some reforms.

Submissions have been invited on whether specific reforms should apply to contracts entered into, prior to commencement.

MORE INFORMATION

Kreisson will provide further updates on the reform process, as more information is made available, during the consultation and transition period.

David Glinatsis is the Director of Kreisson.

For more information, please refer to our [earlier articles](#) or contact us at excellence@kreisson.com.au or on 02 8239 6500.

¹https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0010/438616/Security-of-Payment-Reform-Implementation-paper.pdf

²see our article on [Personal Liability for Directors and Managers of Corporations under Security of Payment Reforms](#)

This communication is sent by Kreisson Legal Pty Limited (ACN 113 986 824). This communication has been prepared for the general information of clients and professional associates of Kreisson Legal. You should not rely on the contents. It is not legal advice and should not be regarded as a substitute for legal advice. The contents may contain copyright.



kreisson.com.au

