

Construction Matters

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Building and Construction Industry Code of Conduct 2016

A new code of conduct for Western Australia's building and construction industry came into effect on 1 January 2017. The new Building and Construction Industry Code of Conduct 2016 (the code) applies to all state building work with a value over AU \$10 million and was introduced to try and prevent anti-competitive behaviour, improve workplace safety and add to the range of measures adopted by the state government to ensure subcontractors are paid on time.¹

While the purpose of the code is to promote reputable, fair, safe and responsible behaviour by building contractors dealing with the state government and public funds, it is also intended to generally improve the wider construction industry.

Compliance with the code is now required to successfully tender for state building work and ongoing compliance is required during the performance of the awarded contract. It should be carefully noted that compliance with the code does not only apply to state government contracts, but also private building work executed while a contractor is subject to the code. As a result, a building contractor subject to the code is required to inform the Building and Construction Code Monitoring Unit (BCCMU) when it executes private contracts in excess of AU\$2 million.

It is also the responsibility of contractors to ensure that their subcontractors comply with the code.

Other key elements include:

1. Building contractors are required to provide the BCCMU with significant access to work sites, documents, employees and contractors. Contractors and subcontractors must not obstruct the BCCMU in investigating compliance.
2. Building contractors must have a Workplace Relations Management Plan (WRMP). The WRMP requires the contractor to document and consider compliance with the code, management and communication on the project and workplace relations risks, including industrial action
3. Building contractors cannot enter into services contracts which are harsh or unfair within the meaning of the *Independent Contractors Act 2006* and the Australian Consumer Law (Cth).
4. The code requires any contracts entered into to contain genuine dispute settlement procedures and sets out minimum requirements for such procedures.
5. Building contractors must take all reasonable steps to avoid and resolve industrial action.
6. Building contractors must comply with the *Construction Contracts Act 2004* (WA) and must not include provisions which are prohibited under the Act.
7. Building contractors are required to notify the BCCMU of any breach as soon as practicable but no later than 48 hours of becoming aware of the breach.

While the code obligations largely existed under current state and commonwealth legislation, the code reiterates these obligations and structures them around the tender process and performance of state building work. Past non-compliance may adversely affect the contractor and its related entities from being awarded work in the future. Therefore, it is important for contractors and subcontractors to be aware of the requirements and implement appropriate measures to ensure compliance.

The Commerce Minister Michael Mischin previously stated that he "anticipated the code will apply to nine major projects before the end of January 2017 with a combined contract value in excess of \$250 million".

¹ Amendments to the *Construction Contracts Act 2004*, which came into force on 15 December 2016 and the introduction of Project Bank Accounts for Department of Finance contracts.

Overview of the *Building and Construction Industry (Improving Productivity) Act*

The *Building and Construction Industry (Improving Productivity) Act* (*ABCC Act*) was assented to on 1 December 2016. The *ABCC Act* was one of two bills responsible for this year's double dissolution, and is directed at ensuring "the rule of law prevails on building sites across the country."¹

The act re-establishes the Australian Building and Construction Commission (ABCC). The ABCC previously existed under the *Building and Construction Industry Improvement Act 2005* (Cth) before being abolished and replaced by the Fair Work Building Industry Inspectorate in 2012 through the *Fair Work (Building Industry) Act 2012* (Cth).

The stated object of the act is "to provide an improved workplace relations framework"² to promote fair, efficient and productive building work. The Australian Building and Construction Commissioner (ABC Commissioner) has power to "investigate, monitor and promote compliance with the act, the Building Code and designated building laws"³ in an effort to improve enforcement of laws prohibiting unlawful industrial action and coercion in the construction sector.

Many of the functions and powers held by the new ABC Commissioner existed in a similar form under the *Fair Work (Building Industry) Act 2012* (Cth) and will not be new. However, the *ABCC Act* does introduce several key changes, in addition to the re-establishment of the ABCC.

Key Changes

1. Expanded "building work" definition – The expanded definition widens the scope of the legislation to include the transport or supply of goods directly to building sites, including offshore resource platforms, to be used in building work. The change to this definition is important as it is referenced in the industrial action provisions, Building Code provisions and in relation to the role of the Federal Safety Commissioner.
2. Unlawful picketing and unlawful industrial action – Chapter 5 of the *ABCC Act* deals with unlawful action, including unlawful picketing and unlawful industrial action. Unlawful picketing must have the purpose of preventing or restricting access, either directly or through intimidation, to building or ancillary sites and be motivated for the purpose of advancing claims or industrial objectives. Unlawful industrial action is industrial action that is not protected under the *Fair Work Act*. For both actions, any person may seek an injunction. The power of the court to grant an injunction includes actions not yet occurring and is therefore very wide. The penalties for unlawful picketing or industrial action have also been increased to AU\$36,000 for individuals and up to AU\$180,000 for corporations.

3. New powers – Authorised officers have powers not available under past legislation. Officers now have the power to ask for a person's name and address.
4. Enterprise agreements – The *ABCC Act* expands the existing offence of coercion to include superannuation and to make it explicit that action intended to force an employer to enter into an enterprise agreement is unlawful. Enterprise agreements must comply with the Building and Construction Industry Code which will be introduced in 2018.
5. Coercive powers – The *ABCC Act* reintroduces the powers of the commissioner to require a person to answer questions or produce documents even if that might tend to incriminate the person, although some constraints have been imposed on the ABCC's conduct of investigations and other enforcement action.
6. The legislation provides for a working group to be established to examine the issue of security of payments for building contractors (see recent review announced of all state security of payment legislation).

Despite the challenge of passing this legislation, the *ABCC Act* is, in parts, substantially similar to the *Fair Work (Building Industry) Act 2012* (Cth). Many of the controversial changes have been watered down or left out, with the most notable change being the express inclusion of the unlawful picketing and industrial action provisions.

Reference Date Required for When Payments Can Be Claimed

On 21 December 2016, the High Court, for the first time, handed down a decision relating to security of payment legislation. In *Southern Han Breakfast Point Pty Ltd. (in Liquidation) v. Lewence Construction Pty Ltd.* [2016] HCA 52 the High Court unanimously held that "the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim."

The Facts

Southern Han and Lewence entered into a construction contract for the construction of an apartment block at Breakfast Point in New South Wales, therefore the contract was governed by the *Building and Construction Industry Security of Payment Act 1999* (NSW) (*SOP Act*).

On 10 October 2014, Southern Han gave Lewence a notice to show cause under the contract. Then, on 27 October 2014, Lewence having responded to the notice to show cause, Southern Han gave Lewence a further notice purporting to exercise its right to remove the whole of Lewence's remaining work to be completed under the contract. Lewence treated the removal of work as repudiation of the contract by Southern Han and, on 28 October 2014, purported to accept the repudiation and terminate the contract.

Subsequently, on 4 December 2014, Lewence served Southern Han with a payment claim under the *SOP Act* for work carried out between the last progress payment reference date (being 8 October 2014) up to 27 October 2014 (being the date on which the contract terminated).

The key issue before the High Court was whether the payment claim was a valid payment claim.

1 Senate, Second Reading.

2 *ABCC Act* s 3.

3 *BCC Act* s 4.

Decision

The High Court held that the existence of a reference date, whether it is provided for by the construction contract or calculated in accordance with the *SOP Act*, is required to make a valid payment claim. Therefore, where a payment claim is made but there is no reference date on and from which the payment claim is made, and when an adjudicator is sought, the adjudicator should decline to make a decision about the claim.

Where a construction contract provides a mechanism for determining reference dates, the reference dates must be determined by reference to the construction contract only. The mechanism for calculating reference dates in the *SOP Act* only applies where a construction contract makes no express provision for reference dates.

The *SOP Act* cannot be used to create alternative dates for payment where the right to make payment claims under the contract has been suspended or where the right to make payment claims under the contract has been extinguished.

The High Court found Lewence's payment claim was not valid for the following reasons:

1. The contract contained an express provision for calculating reference dates, therefore Lewence could not rely on the provisions of the *SOP Act* to create a new reference date for its claim
2. Lewence had terminated the contract which precluded any further payment claims being made under the contract

What Does This Mean?

This recent High Court decision has provided practitioners and clients guidance on the following:

- If a construction contract makes express provisions for when claims for payment can be made, then parties to the contract cannot rely on the *SOP Act* to calculate alternative dates on and from which they may make a claim
- Where a construction contract is terminated, no further payment claims can be made under the *SOP Act*
- Where a construction contract suspends the right to make payment claims, no further payment claims can be made under the *SOP Act*
- An adjudicator has no jurisdiction to decide a payment claim where there is no right to make a payment claim in the contract or under the *SOP Act*

Given the similarity between the *SOP Act* and security of payment legislation of other states and territories, this decision is likely to have wide application.

New Arbitration Procedural Rule in Western Australia

Arbitration is increasingly used as a method of dispute resolution in Western Australia, with the Supreme Court of Western Australia encouraging parties to resolve disputes outside the courtroom. To encourage parties to utilise arbitration both the *International Arbitration Act 1974* (Cth) (IAA) and *Commercial Arbitration Act 2012* (WA) (CAA) grant the Supreme Court jurisdiction to enforce and support both international and domestic arbitration. These acts demonstrate the court's commitment to arbitration as a method of dispute resolution.

Western Australia furthered its commitment to arbitration on 3 January 2017, as the Supreme Court (Arbitration) Rules 2016 (WA) (Arbitration Rules) came into operation.

The Arbitration Rules outline procedures and contain the forms relevant to the commencement of actions in the Supreme Court that relate to domestic and international arbitration.

The Arbitration Rules outline the procedures that parties need to follow and specific requirements necessary when making applications to the Western Australian Supreme Court under the IAA and CAA for:

- Staying proceedings or referring proceedings to arbitration
- Setting aside and enforcing arbitral awards
- Subpoenaing witnesses or evidence
- disclosure of confidential information
- Interim measures
- Enforcement of procedural orders

Furthermore, Schedule 1 of the Arbitration Rules contains the forms relevant to the commencement of actions in the Supreme Court. The Arbitration Rules operate in conjunction with the Rules of the Supreme Court 1971 (WA).

The Arbitration Rules are imperative as they simplify and consolidate the process of initiating court proceedings relating to international and domestic arbitration in Western Australia. The Arbitration Rules also promote consistency across other Australian jurisdictions in relation to arbitration.

The Arbitration Rules will assist practitioners and clients to deal with arbitration matters and ensure that the Supreme Court of Western Australia has the ability to deal with arbitration matters. This will further promote parties to use arbitration as a dispute resolution mechanism.

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