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[redacted]

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Response to exposure draft of the Building and Construction Industry Security of Payment Amendment Bill 2018

I write to provide my response on key issues relating to the exposure draft of *the Building and Construction Industry Security of Payment Amendment Bill 2018* (Bill).

I note the comments in the Explanatory Statement regarding the Report I provided to the Commonwealth relating to the review of the security of payment laws in Australia (Murray Review). In particular, I note the comment that the Bill has not been prepared to give effect to the Murray Review, but that the NSW Government considers that its *"proposed reforms are consistent with the findings of the Murray Review"* and that the NSW Government is working with the Commonwealth and other State and Territory governments as part of the BMF's deliberations.

I accept that several of the amendments are consistent with the relevant recommendations contained in the Murray Review.

In particular the NSW Government's proposal to introduce a "deemed" statutory trust is clearly consistent with Recommendation 85 of the Review and I accordingly strongly support this major reform initiative. I have, by way of a separate submission, set out my detailed comments relating to the various features of the Government's statutory trust proposal.

In regard to the various key matters contained in the Bill, I make the following observations:

1. Endorsement of a payment claim

The reinstatement of the requirement that any payment claim made under the Security of Payment Act be endorsed with a statement that it is a claim made under the Act is a welcomed measure and consistent with Recommendation 23 of the Murray Review (although I also recommended that a payment claim should set out the period within which a payment schedule is required to be provided as well as the potential consequences for failing to respond to a payment claim).

It should be noted that the removal of the requirement to include such a statement in the 2014 amendments was made due to the concern expressed by Collins that the endorsed statement had caused subcontractors to hesitate to invoke their statutory rights because of fear of retribution and missing out on future work. Accordingly, it seems to me that in order to address the issue of possible intimidation and retribution, consideration should also be given to the implementation of Recommendation 76 of the Murray Review which would make it an offence for a party to use coercive and threatening conduct or otherwise applying undue influence or pressure to a person that is seeking payment under the Act. To merely reinstate the requirement for endorsement of a payment claim without introducing an appropriate provision outlawing intimidatory conduct would fail to address the fears of many subcontractors that the service of a payment claim made under the Act may lead to threats of retribution in the form of no repeat work;

2. Changes to "*reference date*"

The proposed amendment purporting to overhaul the definition of a *"reference date"* is not (contrary to the assertion at page 6 of the Explanatory Statement) consistent with Recommendation 14 of the Murray Review. In my Review, I recommended that the expression *"reference date"* be abandoned and that a person who has carried out construction work (or undertaken to supply related goods and services) under a construction contract be entitled to make a payment claim for every named month (or more frequently if so provided under the contract). The Bill not only retains the expression *"reference date"* but introduces limitations to that expression by providing payment claims made subsequent to the first payment claim can only be made on *"the last day of each subsequent named month in which the work is carried out or the goods and services are supplied"* (emphasis added).

The change in the wording of the expression *"reference date"* as proposed under Section 8 (2)(b) of the Bill (and as underlined above) will effectively prevent a claimant from making a progress claim in a month in which no construction work has been carried out (or no goods and services has been supplied). I fail to understand why a claimant should be deprived from making a payment claim for any named month even if it did not carry out construction work (or supplied

related goods and services) during that named month. There may be good reasons why a claimant may not be able to include the value of all of the construction work it had carried out (or supplied related goods and services) during that particular month. For example, it may be that part of the work that a claimant had carried out that month (or the goods and services it supplied) related to a variation direction but the value of which had not yet been agreed, or the claimant had not yet obtained an invoice from its subcontractors and/or suppliers. Under the proposed s8(2)(b) of the Bill, a claimant would now not be able to make a payment claim in the subsequent month for that work. There seems little logic for introducing such a limitation for a party's right to make a claim for the construction work it had carried out (or the related goods and services it had supplied) where the other party has received the benefit of such work (or the goods and services supplied). Such an outcome would also be inconsistent with s.13(4)(b) of the Act which permits a payment claim to be served within a period of 12 months after the construction work to which the claim relates was last carried out (or related goods and services to which the claim relates were last supplied).

I therefore urge that rather than proceed with the proposed amendment set out in the Bill, consideration be given to the implementation of Recommendation 14 of the Bill (and the various consequential amendments to the current legislation that would entail the removal of the expression of *"reference date"*);

3. Due date for payment

The proposed amendments relating to due dates for payment as set out in ss11(1A)(a) and 11(1B)(a) of the Bill are not consistent with the specific recommendation set out in the Murray Review. Recommendation 19 of the Murray Review states:

> *"the legislation should provide that the due date for when a progress payment is to be paid is:*
>
> *(a) The date provided for under the terms of the contract, subject to the payment term not exceeding 25 business days after the payment claim has been made, or*
>
> *(b) (b) if the contract makes no express provision with respect to the matter, 10 business days after the payment claim had been made".*

Thus, under Recommendation 19 of the Murray Review, a head contractor would be free to negotiate appropriate payment terms under its head contract and its subcontracts so as to create the type of *"buffer"* within its payment cycle (and thereby protect its cash flow position) that Collins had referred to in his Report (see page 365 of the Collins Report) so long as the due date for payment under its contracts with its subcontractors does not exceed 25 business days.

It is true that under the amendments set out in the Bill the time frames for progress payment to be made by a principal to a head contractor and by a head contractor to a subcontractor are proposed to be shortened (from 15 business days to 10 business days under a head contract and from 30 business days to 20 business days under a subcontract), however the proposed changes do not address the adverse impact that these provisions have had on subcontractors since the 2014 amendments.

Prior to the 2014 amendments, section 11(1) of the NSW Act provided that:

> *(1) A progress payment under a construction contract becomes due and payable:*
>
> *(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or*
>
> *(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made ...".*

The above section was repealed and replaced in 2014 with provisions that now prescribe that the maximum due date for payment will depend on whether the progress payment to be made under a construction contract fall within any of the following:

(a) In relation to a progress payment by a principal to a head contractor, then the due date for payment is 15 business days after a payment claim has been made (s.11(1A));

(b) In relation to a progress payment to a subcontractor, then the due date for payment is 30 business days after a payment claim has been made (s.11(1B)); and

(c) In relation to a progress payment to a subcontractor under a construction contract that is connected with an "exempt residential construction contract", then 10 business days after a payment claim had been made, or such larger period as provided in the construction contract (s.11(1c)).

The 2014 amendments caused an elongation of the due date for payment of a payment claim for many subcontractors. Take for example the case of a subcontractor who has entered into an oral contract for the carrying out of construction work (which is a very common occurrence in the construction industry). Whereas previously the due date for payment would have been the default period of 10 business days after their payment claims had been made, this had now, by reason of section 11(1B), been extended to 30 business days. For many small businesses carrying out such construction work, the 2014 amendments have produced an unfair outcome and have been seen as being

fundamentally inconsistent with the prime objective of facilitating prompt payment.

Further, the 2014 amendments have created unnecessary confusion and uncertainty as to whether, in particular circumstances, the person making a progress claim is to be regarded as a head contractor or subcontractor. The need to obtain clarity as to the due date for payment is of critical importance given that such date becomes the trigger for the commencement of the time relating to the claimant's right to serve a section 17(2) notice, an adjudication application and suspend work by the giving of the requisite notices (refer to sections 17(2), 17(3)(d), 15, 16, 24 and 27).

Accordingly, for the reasons set out above, I urge the NSW Government to consider the implementation of Recommendation 19 of the Murray Review in lieu of the proposed amendments to sections 11(1A)(a), and 11(1B)(a).

4. Withdrawal of an adjudication application

Whereas it is not incorrect to state that the introduction of section 17A is inconsistent with Recommendation 56 of the Murray Review (as stated at page 12 of the Bill's Explanatory Statement), I would nonetheless wish to make some further comment.

Subsequent to the release of the Murray Review some industry commentators have expressed the view that the claimant should only be entitled to discontinue an adjudication application with the consent of a respondent. It is argued that it would be unfair on a respondent who, having been served with a copy of the claimant's adjudication application and having incurred considerable time and cost in preparing its defence, to then be advised mid-way through the adjudication process that the claimant no longer wishes to proceed with its application. A respondent may however wish for the claimant's adjudication application to be determined in order to obtain some "temporary finality" to the claimant's claims, or, at the very least, seek the claimant to reimburse it of the costs it incurred in the preparation of its adjudication response before agreeing for the claimant's application to be withdrawn.

Whilst the concerns outlined in the above paragraph are not unreasonable there is however an equally compelling counter-argument. A claimant may only come to appreciate the merits of its case (or rather the weakness of its position) once it has been served with a copy of the respondent's adjudication response and may, at that stage, wish to take steps to bring the adjudication proceedings to an end so not have the adjudicator spend more time in the making of a determination. In such circumstances a claimant should not be frustrated in its attempt to bring its adjudication to an end because of a respondent's refusal to give its consent.

It has also been brought to my attention that the introduction of section17A may increase the practice of "adjudication shopping" by enabling a claimant who is

dissatisfied with an ANA's appointment of an adjudicator to withdraw its application and then resubmit a fresh application to another ANA. In my view the risk of such practice would be significantly reduced if the NSW Government were to implement Recommendations 36 and 37 of the Murray Review. A legislative scheme that provides for an adjudicator to only be appointed by a regulator rather than an ANA offers little scope for a claimant to game the system in the belief that it may enhance its prospect of a more favourable outcome by resubmitting its previously withdraw adjudication application.

Nonetheless I accordingly support the introduction of section 17A of the Bill, but would also urge that consideration be given to the implementation of Recommendations 36 and 37 of the Murray Report;

5. Period for the making of a determination

The amendment to section 21(3)(a)(i) of the Act requiring an adjudication determination to be made within 10 business days after the date on which the respondent lodged its adjudication response is consistent with Recommendation 42 of the Murray Review. The amendment will ensure that an adjudicator will have a reasonable time frame in which to consider all relevant material in the decision-making process.

I accordingly support this amendment.

6. Adjudicator to serve copy of determination on respondent.

The proposed insertion of section 22(3)(c) requiring an adjudicator to serve a copy of the adjudication determination on the respondent will impose an unnecessary burden on an adjudicator. There may well be instances where an adjudicator will have difficulties in effectuating service on a respondent and a claimant's right to enforce its statutory entitlement should not be further hobbled by the introduction of this additional hurdle. It needs to be borne in mind that currently a claimant will not be able to enforce the adjudication determination until it has served a copy on the respondent and so I fail to see the purpose behind this proposed amendment. No recommendation requiring an adjudicator to serve a copy of the determination was included within the Murray Review.

I accordingly do not support the insertion of this proposed provision.

7. Sever and remit an adjudication determination

Recommendation 57 of the Murray Review recommended that where an adjudicator has committed jurisdictional error of law in part of the adjudication determination which does not affect the whole of the determination, a court should be provided with the power to sever that affected part of the determination and allow the remainder of the determination to be enforceable. However, for the reasons set out by Applegarth J in B M Alliance Coal Operations

Pty Ltd v BGC Contracting Pty Ltd & Ors [2013] QSC67 at [45], I was not persuaded that there would be merit to extend the court's power to enable a matter to be remitted to the original adjudicator for re-determination (see page 216 of the Murray Review).

Accordingly, I support only that part of the proposed section 32A that enables the court (where it considers it appropriate) to sever that part of the adjudicator's determination that is affected by jurisdictional error and so confirm that the balance of the determination remains enforceable. Further, the notion of empowering a court to remit a *"matter to the adjudicator for redetermination"* poses a number of difficulties, including:

- The adjudicator may not be available to redetermine the matter (i.e. he/she may be ill, overseas or otherwise committed);
- the current legislation will need to expressly empower the adjudicator to make a determination on the *"remitted matter"* within a specified time frame and to allow each party with the opportunity to make submissions on the specific matters (as well as the opportunity to respond/comment on each other's submissions); and
- Ensuring that the legislation entitles the adjudicator (notwithstanding the provisions currently set out in section 29 of the Act) to be paid for his/her fees and expenses associated with the making of a redetermined decision.

8. Prohibiting a corporation in liquidation from making a payment claim.

The policy reasons set out at pages 14 and 15 of the Explanatory Statement is consistent with those set out in the Murray Review upon which Recommendation 10 had been made. The proposed section 32B will provide clarity on an issue that has been the subject of recent consideration by the NSW and Victorian Supreme Courts and will be seen by industry as consistent with the prime objective of the legislation viz: to assist the cash flow of a solvent contractor and not to be a vehicle to enable a liquidator to obtain an interim determination requiring a respondent to make payment to an insolvent claimant.

I therefore support the proposed s.32B

9. Code of practice for ANA's

The implementation of the Code that will outline the standards of conduct and practices for ANA's (and the adjudicators on their panel) is consistent with the policy considerations that were outlined in section 14.1 of the Murray Review and Recommendation 60. Clearly much will turn on the content set out in the Code, but it is noted that a draft of the proposed Code will be released for public comment in the near future.

I accordingly support the insertion of section 28A into the Act.

10. Investigation and enforcement powers

The compliance and enforcement powers to be included in Part 3A of the Act are eminently sensible. The provisions will facilitate the appointment of an authorised person to effectively investigate and enforce compliance and confer the requisite powers to more effectively deal with complaints of non-compliance.

11. Directors and executive liability

I support the insertion of 34C and 34D that extend liability to a person who is not only a director but also a member of the key management personnel of a corporation. The provisions address the concerns expressed in the Report of the Senate Economics Reference Committee and implements its recommendations of extending liability to directors/executives for corporate contraventions of the Act.

I do hope that the above comments will be of assistance, but I would be more than happy to expand on any matters if required.

Yours sincerely

[redacted]

J Murray

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