



OUT18/14531

Mr John Tansey
Executive Director
Regulatory Policy, Better Regulation Division
Department of Finance, Services and Innovation

By email: securityofpayment2018@finance.nsw.gov.au

PROPOSED REFORMS TO NSW'S SECURITY OF PAYMENT LEGISLATION

Dear Mr Tansey

Thank you for giving the Office of the NSW Small Business Commissioner (OSBC) the opportunity to provide comment on the Department of Finance, Services and Innovation's (DFSI) proposed reforms to the NSW's Security of Payment Legislation including the 'deemed' statutory trust proposal.

OSBC's Recommendations and Comments

- The OSBC supports DFSI's proposed 'deemed' statutory trust model
- Only a 'deemed' trust model will ensure smaller unsecured subcontractors are fairly paid for their work
- There is a real need for change
- This is not just about protecting small business; this is about ensuring the NSW Government's legacy on infrastructure
- However, genuine compliance and enforcement will be critical for the 'deemed' statutory trust model to work in practice
- Ongoing education will be a key part of any successful compliance and enforcement framework
- The NSW Government must act as a 'smart client' and 'model citizen'
- There is an ongoing role for the OSBC in establishing the proposed trust, its governance, and the building and construction sector more broadly

The OSBC supports DFSI's proposed 'deemed' statutory trust model

Notably, the proposed model was recommended by the 2012 Collins Independent Inquiry into Construction Insolvency in NSW ('the Collins Inquiry') and earlier this year, by the Commonwealth's Review of Security of Payment Laws ('the Murray Review').

In its current form, the SOPA Act is largely ineffective in protecting payments to smaller unsecured businesses leading up to and in an insolvency event (see **Attachment A**).

As the Collins Inquiry noted, the common payment practice in the industry are late, delayed or reduced payments. Throughout 2018, in our discussions with Wave 5A (Roads and Maritime Services Pacific Highway Project) and other subcontractors, the OSBC has been told that payment is often made up to three months, or in some cases longer, in arrears. In the event of an insolvency, this means small subcontractors are left unpaid. This clearly breaches the provisions that small businesses should be paid within 30 days. It's a harsh reality that some subcontractors may be forced to look to external administrators, as they themselves are unable to pay bills further down the supply chain.

Subcontractors can choose to 'tools down' in the event of late payment. However, as delayed payment is common practice in the industry, this is not necessarily an effective indicator of impending insolvency.

The concentration of the construction industry increases as one considers higher levels of the supply chain. For smaller unsecured subcontractors, this has the effect of creating a strong disincentive to stop work in response to delayed payment. The impact of losing future work, or indeed retribution by raising concerns about payment delays, of even one large contractor would be significant for smaller operators.

There is a real need for change

The issue of better protection for subcontractors has been debated at the Federal (e.g. 2001-2003 Coles Royal Commission into the Building and Construction Industry) and State Government levels (e.g. Collins Inquiry) for many years including earlier this year through the Commonwealth's Murray Review.

The OSBC has prepared a number of submissions to these various inquiries. And yet, the overall complexity of the Building and Construction Industry Security of Payment (SOPA) Act NSW 1999, continues to make it very inaccessible and unaffordable for many small businesses within the building and construction industry. Subcontractors often need to engage lawyers to "apply" under the existing SOPA Act and the adjudication process itself can also be a costly legal exercise.

The consequence of inaction is significant; construction is the largest small business sector whilst experiencing one of the highest insolvency rates. The flow-on effect of the ongoing insolvencies in this sector to the economy is substantial in terms of the cost to creditors, employees, subcontractors, suppliers and public revenue.

Subcontractors, their employees, and the families that depend upon them, often unfairly and disproportionately bear the brunt of an insolvency event in the construction industry (see attached case studies). For example, the Collins Inquiry pointed to a disproportionate number of insolvencies in the construction industry in NSW that left a devastating impact on subcontractors in the industry with amounts left owing to unsecured creditors in the three years up to financial year 2011/12 estimated to be in excess of \$1 billion. While these numbers are staggering, it is all too easy to forget that these numbers have a devastating impact on people's lives - professionally, financially and personally.

In 2018, the OSBC saw this devastating impact firsthand as part of its review into the circumstances surrounding the decision by Ostwald Brothers to enter into voluntary administration while engaged on the Wave 5A section of the Woolgoolga to Ballina Pacific Highway upgrade (see **Attachment B**).

This is not just about protecting small business; this is about ensuring the NSW Government's legacy on infrastructure

This year's 2018/19 NSW Budget builds further on last year's unprecedented infrastructure program, with a new record \$87.2 billion pipeline over four years. The \$87.2 billion capital program over four years to 2021-22 represents the largest ever commitment by a state government to deliver the infrastructure communities need.

This incredible infrastructure spend continues to dominate an investment program which is growing across the eastern seaboard, presenting tremendous opportunities, but also challenges, to the capability and capacity of the NSW construction sector to deliver.

But the NSW Government is taking action to respond to these challenges. The NSW Government's Ten Point Commitment to the Construction Sector (see **Attachment C**), released earlier this year, is focussed on addressing emerging constraints in the capability and capacity of the construction sector and its suppliers to support the large and growing pipeline of infrastructure investment in NSW.

Point 8 of the NSW Government's Commitment is specifically aimed at improving the security and timeliness of contract payments to smaller subcontractors. And there is good reason to do this. Cash flow is critical for many smaller contractors and the OSBC believes timely payment by NSW Government agencies and their contractors will help small business to absorb some of the expanded workload in the sector. This is critical to the successful delivery of the huge infrastructure pipeline in NSW.

To complement the NSW Government's Ten Point Commitment, the OSBC is progressing a number of recommendations to improve contract and project management on all NSW Government construction projects. The OSBC is pursuing this reform in collaboration with Infrastructure NSW and relevant NSW Government agencies that are responsible for the specific regulations in this area.

Only a 'deemed' trust model will ensure smaller unsecured subcontractors are fairly paid for their work

The existing SOPA Act has improved the situation for subcontractors in providing a mechanism for adjudication in disputes relating to progress payments.

However, the overall complexity of the SOPA Act continues to make it inaccessible and unaffordable for many small businesses within the building and construction industry. In particular, there has been a growing concern that the adjudication regime has evolved into simply another legal forum, complete with expensive lawyers and experts, rather than a quick, cheap, and just system for the efficient resolution of disputes. Put simply, it fails to offer the protection and security it was intended to.

The OSBC also believes every effort must be made to protect these small businesses by enabling faster payment terms in the construction industry, similar to the NSW Government's Australian-first commitment to pay small businesses contracted by the NSW Government, in just five days by the end of 2019. This will offer a further safeguard.

Notwithstanding examples of trust models successfully operating internationally (e.g. a number of states in the United States and provinces of Canada have established trust schemes; a Bill before the New Zealand Parliament proposes to do the same; and the United Kingdom requires a trust relationship for all government contracts), the OSBC is aware some in the sector may raise objections to a trust model on the basis that such a model will increase administrative burden and reduce cash flow for businesses.

In regards to these possible objections, the 'deemed' statutory trust model that is being proposed is a 'light touch' approach versus other options such as a full statutory trust model. The OSBC believes it strikes a fair balance between ensuring subcontractors are paid for their work while minimising administrative burden on business. With respect to concerns around impacts to cash flow; while these concerns may be true, these concerns only hold in relation to larger businesses higher up in the supply chain. In this respect, there is a need to change the current working capital model in the building and construction sector. Working capital must not include money obtained or 'borrowed' (i.e. using the monies paid for the project for their own use). Conversely, the proposed trust model would improve payment terms down the supply chain and help small businesses to manage their cash flow because they would be paid in a more timely manner. Small businesses are the backbone of our economy. With the pipeline of infrastructure work scheduled in NSW in the next four years alone, it is imperative that they are afforded the protection and security they deserve to ensure they are paid for the work they complete.

The OSBC does acknowledge that this is journey of transformational change, and as such, a work in progress. Given this, the OSBC believes that a full review of the deemed trust account model should take place within 18 months of the Bill being assented to. This review will inform any changes that may need to be made with the trust account model, ensuring protections for subcontractors on Government projects continue to operate the way in which they were intended to. At this point, this review will coincide at approximately 50% of the \$87.2 billion expenditure, scheduled over the next 4 years.

However, genuine compliance and enforcement will be critical for the 'deemed' statutory trust model to work in practice

The OSBC believes the proposed 'deemed' statutory trust model will only work if the trust accounts are genuinely treated as trust money, and are fairly paid down the supply chain for work performed. The OSBC agrees with the Murray Review that the trust arrangements must cascade to all parts of the contractual payment chain for construction projects over \$1 million. The overall construction project value must be the only threshold that is applied. That is, trust arrangements must cascade to all parties down the supply chain regardless of the value of the individual construction contracts between parties.

A robust compliance and enforcement framework needs to support such a model. The OSBC believes anything less will still risk the trust accounts being treated by trustees as their own capital. A separate and consolidated bank account must be made a mandatory requirement of the trust model as mixing trust monies with other funds would make it difficult to identify which funds should not form part of the debtor's estate for distribution to the debtor's creditors in an insolvency event.

Trustees must not be able to withdraw funds from the trust account before subcontractors have been paid for their work. Additionally, trustees must not be able to use funds in the trust unless the funds are for the purpose of payment for work that has been completed.

A robust compliance and enforcement framework would require basic accounting practices to ensure that transactions are recorded and can be reported on at any time to have a proper view of the cash position, and to detect and prevent fraudulent activity. However, these basic accounting practices should already be in place, even in small businesses, and larger businesses will already have established systems and sufficient expertise to handle more complex arrangements.

The proposed trust account means that working capital will be managed by each business without reliance on breaching credit terms. Business entities must deal with their own cash flow requirements. It is unacceptable to use subcontractors' funds as working capital, and then pay those accounts late. In some cases, the OSBC is aware that some accounts will not be paid until a discount is applied to expedite payment. Small businesses are not the banks for big business or other contractors.

The OSBC does not believe there should ever be circumstances where there are insufficient funds in the trust account to satisfy the claims of all the beneficiaries (i.e. subcontractors down the supply chain). If this is not the case, this would fundamentally undermine the very protections that a trust arrangement is meant to provide.

A range of penalties, including criminal offences, need to be considered as part of the compliance and enforcement framework to ensure compliance. The OSBC does not believe NSW Fair Trading currently has the necessary resourcing or powers to perform such a role on its own. As such, provisions need to be made for a governance model that oversees how these trusts operate with powers to enforce the model and penalise non-compliance. The governance model will also need to oversee an appropriate transition process so businesses can adjust to the new arrangements. The governance model must also include ongoing annual audits into the new trust arrangements, to ensure that all NSW Government contracts comply.

As it currently stands, the OSBC is of the view that the use of statutory declarations confirming that subcontractors have been paid is not enough. The Collins inquiry report highlighted that the provision of false or misleading statutory declarations is widespread across the construction industry. The OSBC recommends that their ongoing application as a compliance mechanism should be reviewed.

The proposal provides subcontractors with a right to inspect trust account records. However, as already discussed, the fear of losing future work often prevents subcontractors from exercising whatever limited powers they may have over those larger operators higher in the supply chain. Currently this fear of retribution leads subcontractors to choose to continue working despite delayed payment. The work that the OSBC has been doing in this area has highlighted this. In almost every example, by the time the affected small businesses understand that they can speak with the OSBC about non or late payment without retribution being a real possibility, it is too late and their payment has been caught up in liquidation. The OSBC strongly believes that this same fear would mean they are unlikely to choose to inspect the trust accounts of larger operators, making this provision an ineffective monitoring mechanism.

The OSBC also believes it must be made an offence to use coercive and threatening conduct, whether directly or indirectly, in relation to a person's statutory rights to, or claim for, a progress payment under the SOPA Act legislation. The OSBC recommends DFSI refer to Recommendation #76 in the Murray Review for suggested legislative wording.

Ongoing education will be a key part of any successful compliance and enforcement framework

Subcontractor education is a critical component to ensuring the SOPA Act becomes more accessible to small business contractors. This involves ensuring subcontractors are aware of the SOPA protections and their obligations to apply for adjudication to benefit from these recovery mechanisms. Subcontractors on NSW Government projects also need to be acutely aware of the complexities and risks associated with working on large commercial construction projects.

As part of this, the OSBC is currently working with NSW Government Roads and Maritime Services to pilot a new approach to onboarding subcontractors on NSW Government construction projects. The pilot will include a fact sheet provided to subcontractors at the time of engagement outlining key SOPA information, contract terms and where to go to for help. The fact sheet will also link subcontractors to existing NSW Government support services such as the OSBC's dispute resolution and mediation services and Business Connect's general and specialist business advice and government information services. The pilot will also include advice to NSW Government agencies on how they can be 'small business friendly' when engaging with small businesses to work on NSW Government construction projects.

Another key component of the pilot involves ensuring subcontractors on NSW Government projects have improved financial literacy, commercial acumen and are better able to scale up and manage increased cash flow.

Given the positive contribution that education will provide to contractors and subcontractors all along the supply chain in the delivery of the record \$87.2 billion infrastructure pipeline over four years, the OSBC suggests due consideration is given to the establishment of a fund for educational activities to assist businesses working

on NSW construction projects. It is the OSBC's view that the cost of the education fund would be offset by the potential savings to industry. That is, the efficiency gain generated by such education will partially offset the financial cost to government. This education component must be ongoing and funded on an ongoing basis to support the trust model beyond the transition process.

The NSW Government must act as a 'smart client' and 'model citizen'

Poor payment practices and non-compliance with the proposed trust model need to be appropriately considered in the NSW Government's procurement and project/contract management processes. This could include a weighting system that assesses payment performance informed by intelligence from other states' commercial contract management systems and Commonwealth regulators and factors this performance into NSW Government agencies' procurement decisions. An obvious, but potentially more impactful alternative would be to exclude businesses that have been found to deliberately misuse trust funds in the past from future work on NSW Government projects.

It is also possible for additional project and contract management controls to be established by NSW Government agencies. NSW Government agencies are entitled to negotiate contract terms that require head contractors to hold separate accounts and offer full transparency on the payment process all the way down the chain.

NSW Government agencies who are prudent and have public accountability obligations will ensure that only contractors who are prepared to offer security along the payment chain, regardless of any statutory regime. There are no additional management costs because it is simply accounting for transactions, reconciling accounts and generating reports - which has to be done no matter what model you apply. What it does take, at least in the construction industry, is the leadership from the NSW Government agencies controlling the funding of the projects to change to a better way of doing business. The NSW Government is making it easier to do business in NSW. We must also make it easier to be paid for work completed. The 'deemed' statutory trust that is currently proposed by the NSW Government is a much needed step in the right direction.

There is an ongoing role for the OSBC in establishing the proposed trust and the building and construction sector more broadly

As the advocate for small businesses in NSW, the OSBC must play a key role in protecting small businesses in the building and construction sector:

- The OSBC will continue to work with Infrastructure NSW and relevant NSW Government agencies to implement a number of recommendations to improve contract and project management on NSW Government construction projects.
- The OSBC will be at the heart of ongoing education across the sector. This includes the OSBC's pilot with RMS to improve the onboarding of subcontractors on NSW Government projects. The OSBC is also uniquely placed to manage any fund that is established for educational activities to assist businesses working on NSW construction projects.

- The OSBC must also be a part of any working group responsible for overseeing the governance model for the proposed trust. This group would be responsible for overseeing the transition, supporting businesses to adjust to the new way of working and ensuring the compliance and enforcement framework is appropriate.

If you require additional information or wish to discuss this matter further, please contact Alex Ferreira, Principal Advisor on [REDACTED].

Yours sincerely,

[REDACTED]

Robyn Hobbs OAM
NSW Small Business Commissioner

18 September 2018

Attachment A – Some examples of non-payment case studies received by the OSBC in July/August 2018 alone.

No	Date received	Entity	Issue type	Amount lost	Would the 'deemed' statutory trust model have prevented this lost to small business?
1	July 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$1,400,000	Yes
2	August 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$177,698	Yes
3	August 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$100,301	Yes
4	August 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$31,625	Yes
5	August 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$109,771	Yes
6	August 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$32,092	Yes
7	August 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$25,000	Yes
8	August 2018	Individual small business	Non-payment	Undisclosed	Yes
9	August 2018	Individual small business	Non-payment due to fraud	\$21,190	Yes
10	August 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$10,400	Yes
11	August 2018	Individual small business	Non-payment	\$44,000	Yes
12	August 2018	Individual small business	Non-payment due to disputes on variations	\$169,919	Yes
13	August 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$63,000	Yes
14	August 2018	Individual small business	Non-payment due to liquidation, and associated procurement and contract management issues	\$1,000	Yes

Attachment B - Wave 5A Case Study

Background

In July 2016, Roads and Maritime Services (RMS) engaged Pacific Complete, their project delivery partner, to contract Seymour White Construction to perform early works as part of a project to upgrade a section of the Pacific Highway. Seymour White Construction subsequently subcontracted Ostwald Bros, who engaged its own subcontractors (the sub-subcontractors).

In August 2017, Ostwald Bros went in to voluntary administration followed by liquidation. This meant they could not pay the sub-subcontractors, despite owing more than \$7 million to these small businesses.

The role of the Office of the NSW Small Business Commissioner (OSBC)

In late December 2017, 23 of the affected subcontractors met with the Hon. Melinda Pavey MP, NSW Minister for Roads, Maritime and Freight, and the NSW Small Business Commissioner, Robyn Hobbs to see what assistance could be provided to these sub-subcontractors. Minister Pavey asked the OSBC to review the circumstances that led to Ostwald Bros going in to voluntary administration, leaving the sub-subcontractors without payment, and to make recommendations to the NSW Government to consider improving how NSW Government contracts are managed.

The OSBC found:

- There was systemic failure along the supply chain, specifically the lack of effective contract and project management
- The effectiveness of the *Building and Construction Industry Security of Payment Act 1999 NSW* (SOPA) regulatory framework, designed to protect subcontractors from suffering unfairness or injustice, was not adequate
- PwC, Ostwald Bros' liquidator, found the board of management continued to trade for some time while insolvent before going in to voluntary administration
- RMS wasn't aware of Ostwald Bros' poor financial reputation as their contract was with Seymour White Construction
- Affected sub-subcontractors experienced payment issues as early as December 2016
- Within the industry there is a strong culture of quietly accepting overdue payments (often up to three months in arrears) for fear of not winning future work
- Multiple sub-subcontractors alleged the falsification of statutory declarations regarding on-time payment in the supply chain
- Some subcontractors claimed Pacific Complete indicated at pre-tender workshops that payment was secure because it was a government project. These claims are supported by statutory declarations.

Recommendation

To prevent or reduce the likelihood and impact of similar situations happening on future NSW Government projects, the OSBC made a key recommendation following the review:

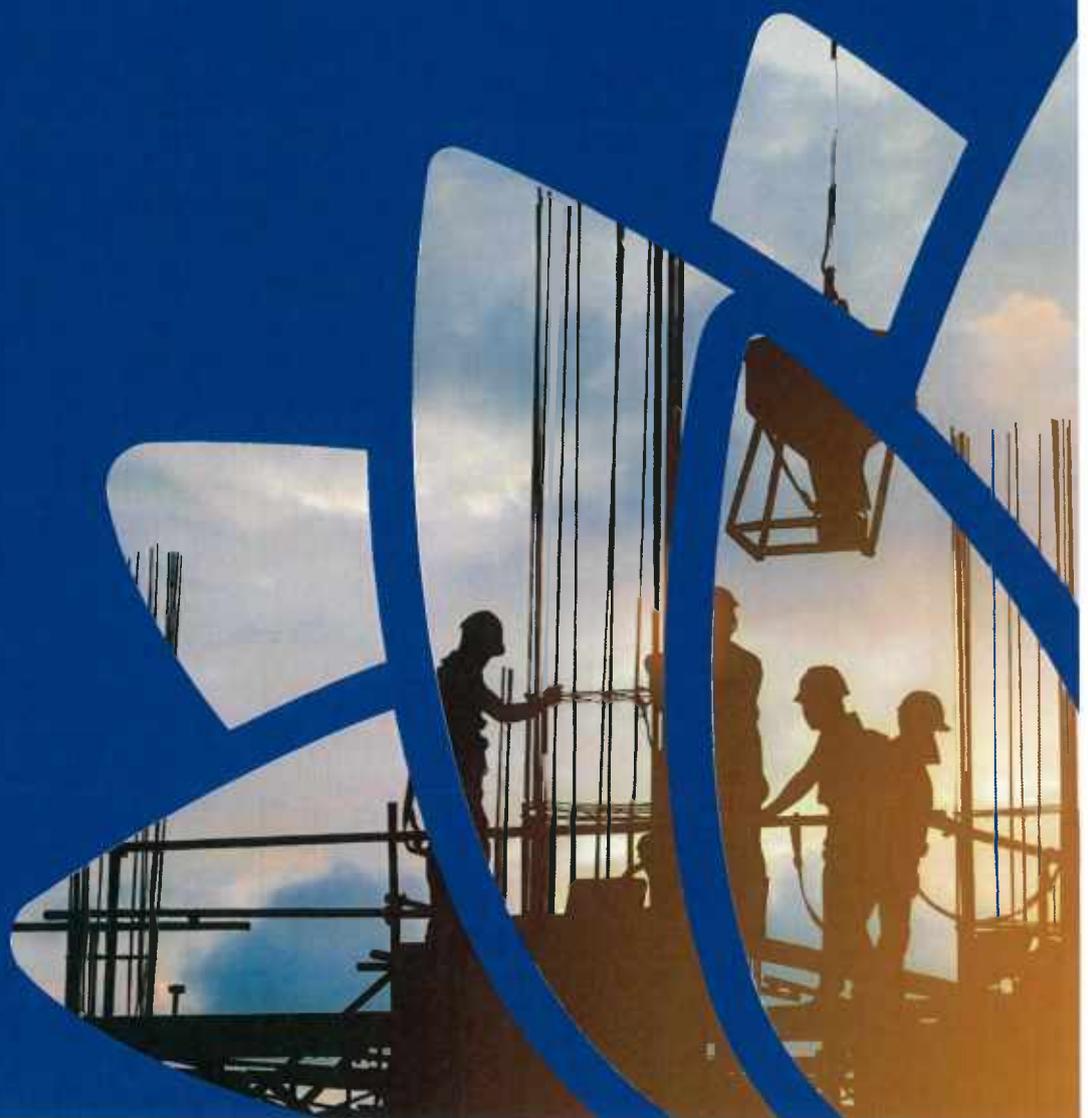
- The establishment of a 'Subcontractor Reserve' trust account to be piloted on a NSW Government contract, which would hold retention monies, with payment made from the reserve directly to the subcontractor upon completion of work.

This recommendation aligns with the 2012 Collins Inquiry, the 2018 Murray Review, and the principles now being proposed and supported in this submission.

NSW Government Action Plan

A ten point commitment
to the construction
sector

June 2018



PURPOSE

This statement has been developed by the NSW Government's Construction Leadership Group (CLG) and is endorsed by its member agencies¹, all of whom are engaged in the delivery of a large long term pipeline of infrastructure investment on behalf of the NSW Government.

The CLG member agencies recognise that the NSW Government can only achieve its infrastructure objectives in partnership with the private sector, and that this depends on healthy ongoing competition between a capable field of construction firms, sub-contractors and the industry supply chain – not just now, but for years to come.

They have therefore jointly committed to a range of steps to help improve the capability and capacity of the construction sector.

The NSW Government is committed to achieving value for money in construction procurement. But value for money does not mean obtaining the lowest price for every project. Rather, it is about adopting a broader, longer term view about the need to drive quality, innovation and cost effectiveness by fostering a thriving and sustainable construction sector in NSW.

The Government aims to be a “best in class” client for the construction industry and its suppliers. In return, it expects industry to meet the highest standards of integrity, quality, innovation, diversity and inclusiveness.

This Action Plan covers all Government-procured construction and is designed to:

- » Encourage an increase in the “supply side” capacity of the sector to meet future demand.
- » Reduce industry's costs and “down-time” by making Government procurement processes more efficient.
- » Develop the skills, capability and capacity of the construction industry's workforce.
- » Encourage culture change and greater diversity in the construction sector and its suppliers.
- » Foster partnership and collaboration between the public and private sectors to drive innovation in the NSW construction sector.



Included throughout this document are case studies which highlight some of the positive achievements which the construction sector and its suppliers have delivered in partnership with the NSW Government and its agencies.

¹ Infrastructure NSW, Transport for NSW, Roads & Maritime Services, Health Infrastructure, Schools Infrastructure NSW, Justice Infrastructure, Public Works Advisory, NSW Treasury, Department of Industry and Department of Premier and Cabinet.

A 10 POINT COMMITMENT

The member agencies commit to work together through the CLG to:

1. Procure and manage projects in a more collaborative way

- » Use early market engagement to elicit industry's views on the best choice of procurement pathway for each major project, and (where appropriate) for each works package within that project, drawing on good practice in NSW and other jurisdictions.
- » Move away from a reliance on fixed price, lump sum procurement methods, and be open to collaborative contracting models like alliancing.
- » Adopt expedited engagement processes like Early Contractor Involvement (ECI) where a project's risk profile justifies it and where it saves time and resources without sacrificing value for money.
- » Develop in partnership with industry, and then publish, simple guidelines which document "best practice" for each of the main procurement methods, and the circumstances in which each method is likely to be preferred.
- » "Close the loop" with potential bidders once market soundings for major projects have been undertaken, including through an interactive session prior to the finalisation of tender documentation, so that prospective bidders can test and understand the rationale for procurement decisions.
- » Ensure that, once awarded, contracts are managed by both parties in a professional and mutually respectful fashion.
- » Use inception workshops to establish strong behavioural alignment and shared objectives between the parties soon after contract award.



SYDNEY INTERNATIONAL CONVENTION, EXHIBITION AND ENTERTAINMENT PRECINCT

Darling Harbour Live, comprising Lendlease, Hostplus, Capella Capital, AEG Ogden and Spotless, partnered with the NSW Government to deliver the International Convention Centre Sydney (ICC Sydney) – a multi-billion dollar redevelopment of the Sydney International Convention, Exhibition and Entertainment Precinct.

Darling Harbour Live was one of the most successful PPP projects in Australia, delivered on time and on budget. The lessons learned from this major public private partnership have helped shape the future PPP model for other large-scale infrastructure projects.

The procurement process saw the NSW Government interactively engage with proponents during the bid process to provide feedback and answer questions before formal bids are submitted. During the delivery phase, Infrastructure NSW acted as a facilitator within Government to help expedite solutions to problems before they affected the consortium's ability to complete on time and budget. The co-location of the Infrastructure NSW's project team onsite enabled it to have open communication lines with all levels of the consortium's management structure.



2. Adopt partnership-based approaches to risk allocation

- » Recognise that not all risks are capable of being fully assessed, priced, managed or absorbed by the private sector, and that such risks must be managed collaboratively – including risks related to utilities, planning approvals and latent conditions. As a matter of principle, risks should be managed by the party best able to manage them, and should be shared where necessary.
- » Seek the market's views, early in any procurement process, about the extent of geotechnical and other due diligence that will help to reduce "in-ground" and other risks which are hard to investigate and forecast, and provide Government warranties for the factual accuracy of the resulting data.
- » Seek industry's views on any other areas in which value for public money and industry sustainability could most readily be improved through risk-sharing.
- » Develop standard contractual risk-sharing mechanisms for these items which keep both parties appropriately incentivised but do not put the contractor's overall viability at risk.
- » Work with industry to identify collaborative approaches across agencies and projects to manage and reduce utility-related risks.
- » Establish senior level "dispute avoidance" forums as a standard feature of major project contracts, identifying and resolving potential issues before they escalate.



INNOVATIVE PROCUREMENT

With a rapidly rising prison population to accommodate, the NSW Government looked to undertake an innovative approach in the procurement of two 400 bed rapid build prisons, ensuring the projects would be ready to house inmates prior to February 2018.

The Rapid Build prison operating model is an open plan, dormitory style approach to maximum security prison accommodation which seeks to reducing reoffending by providing inmates increased access to education and industry programs. The facility design and operating model was a 'first' for Australia. The contractor's procurement approach sought to de-risk project delivery by engaging the best available regional resources and capability.

There was very early engagement with the construction industry to test the procurement and delivery approach, with the final procurement methodology based on feedback to 'meet the market' and ensure appropriate level of participation and delivery surety. There was high weighting of non-price tender criteria which aimed to reward the contractor's commitment of best people, contributing to the success of the projects.

3. Standardise contracts and procurement methods

- » Engage with industry to identify the key areas in which greater standardisation of contract terms (across projects, agencies or infrastructure sectors) could deliver the greatest benefit in terms of improved resource efficiency.
- » Review NSW's standard contracts for large projects against contracting approaches internationally, with a view to adopting best practice internationally and, where relevant, harmonising contract terms to encourage further entry into the NSW construction market by firms from overseas
- » Adopt and publish standard guidance materials on key procurement and contract delivery approaches (including ECI and alliancing), to supplement existing materials in relation to GC21 (D&C) and PPPs.
- » Adopt a minimal set of sector-specific variations to standard contract forms, to be used only where strictly necessary and/or by agreement with bidders.
- » Provide regular background briefings for smaller contractors on the key terms and operation of standard contracts like GC21.

4. Develop and promote a transparent pipeline of projects

- » Publish a “whole of government” NSW major project pipeline document at least every six months, detailing the projects which are planned or likely to come to market over the following 3-5 years.
- » Map the network of constructors and developers across all tiers and across their supply chain as a basis for engagement and communication about the project pipeline and related issues.
- » Develop through CLG a “whole of government” approach to market engagement, including face-to-face interactive briefings with industry on the forward pipeline, in addition to briefings provided by individual agencies, and an online resource which provides easy access to project pipeline data across the NSW Government.
- » Through these forums, elicit feedback from industry on the market’s capacity – and planned investment in capacity – to deliver the forward pipeline, and on options for packaging and phasing individual projects to reduce pressure on delivery capacity and enable smaller firms to step up.
- » Offer work to the market in packages which range in size, enabling small and medium-sized firms to compete for contracts which match their capacity to deliver.
- » Engage regularly with the Commonwealth Government and other states and territories to identify and jointly respond to any emerging pressures on industry’s capacity to deliver the national pipeline of projects.

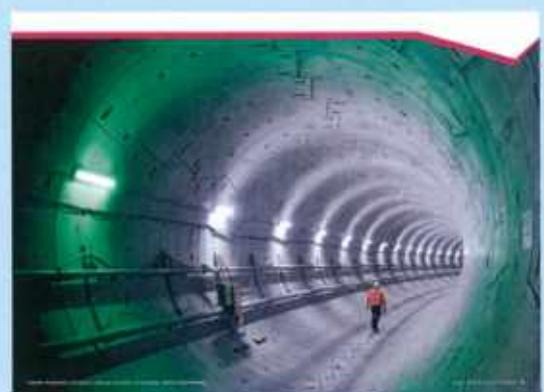


TRANSPARENCY OF PROJECT PIPELINE

In 2017 Infrastructure NSW prepared the first *NSW Infrastructure Pipeline* document to assist the NSW Government in attracting direct investment as well as participation in design, construction, management and operation of infrastructure projects in NSW. The forward-looking pipeline document, identified over 30 major infrastructure projects which the state expects to bring to market over the medium term.

Transport for NSW and Road and Maritime Services have also increased the transparency of its pipeline through several industry forums and the publishing of a yearly Major Projects Forward Work Plan. The document sets out details on more than 100 major projects including stage of development, scale and indicative timings on when the project will be procured and delivered.

The increased engagement and transparency of upcoming work allows industry to plan for their future including resourcing and capacity. It also enables industry to target projects they may be better suited to deliver from a capacity and time perspective. This ensures healthy and sustainable competition in the market and successful delivery of major infrastructure.



5. Reduce the cost of bidding

Reduce industry “down time”

- » Select shortlists of no more than three parties for each major contract, and be prepared to select shortlists of only two if appropriate security can be provided by bidders.
- » Ensure, in evaluating Expressions of Interest that only companies which are demonstrably capable of delivering the project are selected for shortlisting.
- » Seek to minimise the amount of time that unsuccessful bidders are required to remain on “hot standby” pending contractual close with the preferred bidder.
- » Review and consider streamlining internal Government approval processes (for instance at shortlisting and preferred bidder stage) in order to reduce any unnecessary delays.
- » Publish data on average approval timeframes, by agency and by contract type.

Reduce administrative bureaucracy

- » Minimise the design requirements imposed on bidders before the selection of a preferred tenderer, including (where appropriate) by the Government procuring design and adopting a “construct only” approach.
- » Reduce documentary requirements, for instance by mandating electronic lodgement of bid documents, and embracing innovative approaches such as Building Information Modelling as a standard feature of major project procurement.
- » Reduce the “credentials” requirements for firms with a proven track record and rely instead

on streamlined prequalification schemes for contractors, tiered according to their size and capacity.

- » Review existing prequalification schemes to ensure they focus on capacity and capability and do not impose unnecessary costs and administrative burdens on suppliers.
- » Minimise the number of project-specific plans bidders are required to generate and submit prior to the selection of preferred tenderer.

Provide clarity and consistency

- » Ensure, where possible, that tender evaluation criteria give bidders a clear understanding of the Government’s real priorities (for instance in relation to urban design), enabling the market to focus on those priorities with a minimum of wasted effort.
- » Avoid wherever possible changes to evaluation criteria or other key aspects of tender documentation after a Request for Tender has been issued.
- » Standardise requirements for bonding, parent company guarantees and other forms of security across projects and agencies, based on a realistic assessment of financial and performance-related risks.
- » Commit to realistic timeframes for contract and financial approvals in order to reduce industry costs, and then stick to those commitments.
- » Regularly engage with industry to seek honest feedback on how NSW Government agencies are performing in eliminating unnecessary cost and delay in tender processes, with documented follow up actions.



BARANGAROO SKILLS EXCHANGE

The Barangaroo Skills Exchange (BSX), an initiative of Lendlease in partnership with TAFE NSW and the Construction and Property Services Industry Skills Council, operates as a “pop up” college for construction workers to learn new skills and further develop their existing skills.

In two years, 10,000 workers have undertaken formal skills training, resulting in over 16,000 accredited training outcomes ranging from Skills Sets to Advanced Diplomas covering areas such as apprentice mentoring, high risk license training, trades skilling and safety leadership. With a significant commitment by Lendlease to improving social equity, a key focus is providing foundation skills to vulnerable workers to improve literacy and numeracy skills.



THE NORTHERN ROAD EMPLOYMENT AND TRAINING HUB

The Northern Road Employment and Training Hub (TNRHub) is connecting local jobseekers with training, upskilling, on the job experience and employment. The joint initiative between Roads and Maritime Services, Lendlease industry, vocational education and training and non-government groups will run until 2020 as part of construction work on The Northern Road upgrade – a component of the \$3.6 billion Western Sydney Infrastructure Plan.

TNRHub is providing “on the job” construction industry training and jobs for the long-term unemployed, young people under the age of 25, women in construction, refugees and Aboriginal and Torres Strait Islanders. So far 32 people from the target groups have been employed on the project with more expected as the project continues. Roads and Maritime, with industry, will launch three more Employment and Training hubs in 2018 and 2019.



6. Establish a consistent NSW Government policy on bid cost contributions

- » Agree to partially reimburse unsuccessful bidders' costs where it is necessary to do so in order to secure competition in the market.
- » Publish a policy position on bid cost contributions and use market soundings to discuss with industry the forward program of NSW projects for which bid costs are likely to be reimbursed.

7. Monitor and reward high performance

- » Through CLG, publish practice notes on the key behaviours and values expected of good clients and contractors, as a benchmark for performance measurement and as a basis for frank and constructive two-way performance assessments during and after projects.
- » Document the outcomes of these reviews and share data and contractor performance between NSW Government agencies through the CLG.
- » Give weight in bid evaluation to collaborative behaviour, capability and performance, based on bidders' proven track record on Government contracts in NSW and elsewhere.
- » Reward consistently high-performing contractors with the opportunity to win repeat work, as a minimum by recognising past performance in tender evaluation.
- » Adopt standardised contractual approaches to dispute avoidance and resolution.
- » Seek to adopt efficient and standardised processes for contract management, including the administration of contract payments.



BROKEN HILL PIPELINE

The John Holland MPC Group Joint Venture to design and construct the River Murray to Broken Hill pipeline will have far reaching benefits to local and surrounding communities. The Joint Venture will deliver safe and reliable water supply to Broken Hill and pump about \$50 million into the local economy, creating more than 150 local jobs.

The project is on track to surpass its Aboriginal employment target of 25 jobs, or five percent of the total workforce, with 22 Aboriginal people already employed across the project.

Training and upskilling the local community is also a part of the project's delivery, and there are currently trainees working in various roles to complete their qualifications in business, hospitality, leadership and management. A further 20 trainees will work on the pipeline while completing a Certificate II in Civil Construction.



8. Improve the security and timeliness of contract payments

- » Measure and publish agency performance data for timeliness of payments, including for agreed contract variations, and commit agencies to meet “best in class”, published performance standards.
- » Establish industry-specific escrow arrangements which ensure that smaller sub-contractors have improved security of payment.
- » Complete the review of the Building and Construction Industry Security of Payment Act 1999 and implement its recommendations.
- » Amend GC21 and other standard contracts to enable agencies to:
 - > Provide contractual payments ahead of project mobilisation in order to ease upfront cashflow pressures, particularly for smaller contractors.
 - > Provide transparent proof of payment to sub-contractors at all levels of the sub-contracting chain, for sub-contracts above a defined threshold value.



A FAST TRACK TO THE FUTURE

Launched in 2014, the *FastTracking the Future* program was created by Sydney Metro in conjunction with teachers and educators and allows schools to use a major infrastructure project in their own backyard as a real life teaching tool which students are able to easily relate to.

The program's resources, for both primary and secondary schools, are freely available via the Sydney Metro website to any school in Australia and have more than 130 classroom-ready lessons, with over 10,000 student participants so far.

Constantly evolving, the program also launched a competition to encourage design thinking in high school students in the STEM subjects. *FastTracking the Future* won the Planning Institute of Australia (NSW) Promotion of Planning Award.



9. Improve skills and training

- » Work with industry and its representative bodies to identify, measure and report on current and emerging skills gaps in the construction sector and related trades.
- » Mandate minimum levels of training in all major Government construction contracts at levels consistent with the targets of the Infrastructure Skills Legacy Program (ISLP), including (for general construction):
 - > 20% of the total labour force on a project to be of 'learning workers' (defined as trainees and workers who are updating their qualifications to meet the needs of the infrastructure project).
 - > 20% of all relevant trades positions on a project to be apprentices.
- » Adopt tender evaluation criteria and/or incentive arrangements which give bidders credit for demonstrably exceeding these thresholds.
- » Through the Department of Industry and CLG, monitor and publish data on:
 - > The levels of activity in training and development associated with all major NSW Government construction contracts.
 - > Best practice case studies on training and development.
 - > Trends in industry-wide skills, including areas of actual or emerging skills shortages.
- » Allocate a portion of regional capital project budgets across Government to fund regional smart and skilled providers, skills programs led by industry associations and other forms of vocational training in NSW, with structured input from industry on curriculum and examination requirements.
- » Increase recognition in NSW of employee trade qualifications obtained overseas and in other relevant disciplines like mining.
- » Promote opportunities for off-site prefabrication of construction components, drawing where possible on capability and capacity in the domestic manufacturing sector.
- » Wherever possible, avoid requirements in tender documentation for employee experience and length of service which may discourage "training on the job".
- » Promote on-site training for learning workers to ensure that such opportunities are readily and conveniently available to them.
- » Use CLG to share and promote and publicise "best practice" workforce development initiatives by the public and private sectors.
- » Closely monitor performance industry's performance on workforce development to ensure that all contractual obligations are met.
- » Invest strongly in developing the leadership and commercial skills of NSW Government project and contract managers at all levels.
- » Works with industry to identify opportunities for sharing facilities and resources to optimise value for money and provide continuity for trainees.



GOSFORD HOSPITAL REDEVELOPMENT

In 2016, Lendlease and Darkinjung Local Aboriginal Land Council signed an MoU acknowledging a commitment to Indigenous participation on the NSW Government's \$348 million Gosford Hospital Redevelopment. This included providing opportunities for indigenous individuals to work on the project and opportunities for indigenous businesses to supply goods and services to the project. There has been a strong focus on training and skilling Indigenous people to become tradespeople and future leaders in the construction industry. There is also a focus on supporting indigenous businesses, particularly from the local area.

As a result of these initiatives, more than 125 Aboriginal and Torres Strait Islander people have been inducted on-site. At March 2018, there were 52 indigenous employees across all trades out of an average of 120 workers on site, representing 43 percent of the workforce, and of the 53 total apprentices, 27 were Aboriginal or Torres Strait Islanders. There have been 10 indigenous businesses engaged on the project, with expenditure equal to 5 percent of total project spend.

10. Increase industry diversity

- » Work with industry to identify, measure and report on the diversity of the workforce in the construction sector and related trades.
- » Include in all major Government construction contracts recruitment and training initiatives, wherever possible involving on-site training, which reflect the aspirations of the ISLP, and in particular the targets aiming at:
 - > Doubling the number of women in trade related work (up from the NSW average of 1% to 2%).
 - > Meeting the requirements for Aboriginal participation in NSW Government construction contracts set out in the recently published *Aboriginal Participation in Construction*.
- > Ensuring that at least 8% of the total project workforce is aged less than 25 years.
- > Employing and training people from the local region.
- » Adopt tender evaluation criteria which give bidders credit for exceeding these targets.
- » Periodically review and update the ISLP to ensure it adequately addresses all relevant areas of under-representation in the construction sector's workforce.



TACKLING GENDER PAY EQUITY

In January 2018, John Holland identified that 15 per cent of the women in the workforce were being paid less than their male counterparts, and acted immediately to fix the problem. The company has committed to stamping out the gender pay gap where it exists, fixing salaries immediately and taking action to ensure pay gaps doesn't creep back in.

Gender pay equity is about ensuring women and men performing the same role are paid the same amount, and women and men performing different work of equal or comparable value are paid fairly.

John Holland will start on embedding a flexibility and wellbeing culture into the business, making the workplace more inclusive for everyone, especially women. John Holland is also an Equity Ambassador by the Workplace Gender Equality Agency (WGEA).



