

18 September 2016

Security of Payment 2018
Department of Finance, Services and Innovation
Regulatory Policy Branch
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**Re: Multiplex Constructions Pty Ltd - Submission
Building and Construction Industry Security of Payment Amendment Bill (2018)**

Multiplex Constructions Pty Ltd (**Multiplex**) supports initiatives to improve the New South Wales construction industry and appreciates the opportunity to provide submissions on the *Building and Construction Industry Security of Payment Amendment Bill (2018)* (**Draft Bill**) issued proposing changes to the *Building and Construction Industry Security of Payment Act 1999* (**Act**). Multiplex provides its submissions to address each of the proposed amendments in the Draft Bill, by reference to each of the headings contained in the Explanatory Statement.

Multiplex would like to highlight 3 main concerns that it has with the Draft Bill, and Multiplex will also provide a response to the remainder of the proposed amendments below.

1. Introducing accessorial and executive liability – Sections 34C and 34D

Multiplex does not support the proposed changes to the Act to introduce accessorial and executive liability.

Multiplex's main concern is that the proposed reforms are very broad, and can inadvertently expose directors and executives to personal liability by an honest mistake of an employee in the day to day administration of the Act. In Multiplex's view, there is already very serious repercussions for fraudulently signing a statutory declaration, but broadening the extent of the personal liability to include, for example, where a corporation breaches the Act and "the person is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence" (clause 34C(2)(c)(iv)), it places strict liability on such individuals.

Further, Multiplex proposes that if accessorial and executive liability is going to be enacted, that it should be narrowed to only capture behaviour by those individuals that is knowingly in breach of the Act, and only capture the more serious offences under the Act. Similar legislation where there is personal liability for directors, such as the Work Health and Safety Act 2011 (NSW), has enacted defences that may be raised in response to an alleged offence committed by the individual, which is not proposed in the Draft Bill. This issue should be addressed. For instance, there could be due diligence type defences based on training and education.

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Multiplex is of the firm view that these changes should not be enacted and that the Department of Fair Trading should increase its focus on prosecuting offences by corporations under the Act, and to the extent that there is fraudulent or other criminal behaviour under currently enacted laws, appropriate action is taken.

2. *Allowing inspection of trust account records - Section 12A*

Multiplex agrees that subcontractors are entitled to know that their retention monies are held on trust and being administered correctly. However, Multiplex does not agree that a head contractor should be required to show subcontractors all funds on trust. This amendment would require disclosing significant detail of all subcontractor's retention monies to be able to comply with the current proposed option in the Draft Bill, and would be nearly impossible to achieve while maintaining confidentiality.

Multiplex would support a requirement to issue an audit certificate advising compliance on a regular basis (annual or bi-annual) signed by an independent accounting/audit firm. Multiplex would encourage a representative of government to meet with head contractors to discuss and understand what would be required by way of disclosure of sensitive information. In Multiplex's view, the same objective could be achieved by requiring an external audit certificate to be issued to all subcontractors advising compliance.

Alternatively, Multiplex proposes that a statutory declaration could be issued annually, declaring compliance with the trust account requirements.

3. *Shortening payment due dates – Section 11(1A) and (1B)*

While we would not object to the proposed shortening of payment terms for a head contractor, Multiplex proposes that Government canvas the opinions of property development entities on whether they can assess, issue certificates and arrange payment from financiers within a 10 working day time frame. In most cases push back in the industry on payment terms comes from financiers.

In relation to shortening of subcontractor payment from 30 business days to 20 business days, Multiplex proposes a compromise of 25 business days. Although supportive of the government attempting to improve the flow of monies within the construction industry, Multiplex is of the view that a maximum of 20 working days creates an inconsistency on the payment timing each month. Multiplex's current account process across Australia is for payment to subcontractors to be paid on the last business days of each month, and sometimes that would fall within 20 business day but would often fall outside the 20 business days amendment proposed in the Draft Bill.

This proposed amendment would also make the payment process within NSW inconsistent with other States within Australia. This creates difficulty for a business that operates across Australia, as well established processes that aid productivity may need to be changed. In addition it creates some uncertainty for subcontractors who may do work for us across a number of states. Multiplex would support a maximum of 25 business days or payment on the last business day of each month, whichever is the earlier date.

Multiplex also provides its submissions in response to each of the other proposed amendments contained within the Draft Bill.

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4. *Rights to progress payments – Sections 4 and 8*

Multiplex is not opposed to the proposed amendments in the Draft Bill that establish a minimum monthly entitlement to a progress payment in Section 8 of the Act. Multiplex does however query the administrative burden of opening up the possibility of more than one progress claim per month that can proceed to adjudication, as opposed to making an amendment which simply clarifies the position that a claimant can make a claim on a monthly basis.

Multiplex would also propose that any milestone or one off payments not create a separate reference date. In Multiplex's view, the Draft Bill should clarify that such milestone payments do not create a separate reference date, but can be claimed in a progress claim that month. Multiplex supports any changes that help to ensure that the Act achieves its purpose, such as a right to a monthly progress claim, or more regularly if agreed between the parties, but that referring disputes to adjudication under the Act should be permitted once a month. Any disputed claimed amounts in that month could be referred to adjudication under the existing system.

5. *Establishing an entitlement to final progress payment after termination – Section 8*

Multiplex agrees with the amendment in the Draft Bill to clarify that a reference date arises the day after a contract is terminated to avoid the scenarios described in the Explanatory Paper.

6. *Endorsement of payment claim – Section 13(2)(c)*

Multiplex strongly approves the reinsertion of the requirement that a progress claim under the Act must include an endorsement that it is being made under the Act.

As raised in Multiplex's submission in response to the Building and Construction Industry Security of Payment Act - Discussion Paper December 2015, by removing the "flag" that the claim has been made under the Act, respondents have had to assume that all progress claims could end in adjudication and therefore further increasing the cost of preparing payment schedules. Given that respondents cannot add or provide additional reasons in its adjudication response if it is not included in the payment schedule, it has meant that Multiplex's payment schedules can often contain multiple reasons for not paying a certain item, where such a response is not necessary in the day to day administration of progress payments.

7. *Withdrawal of adjudication applications – Section 17A*

Multiplex agrees with the proposed amendment to make it expressly clear that a claimant can withdraw an adjudication application if the matter is resolved.

8. *Adjudicator to determine within 10 business days – Section 21*

Multiplex agrees with the proposal to clarify that the adjudicator has 10 business days from receipt of the adjudication response to consider the adjudication application.

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9. Code of practice for authorised nominating authorities (ANAs) – Section 28A

Multiplex supports any reform to the Act that seeks to address the perception in the industry that some ANA's are 'claimant-friendly'. An enforceable code that is proposed is in Multiplex's view a positive step to address the issue, but this is subject to the Code containing enough deterrents to promote compliance by the ANAs. Multiplex notes that the Code is yet to be drafted, but would look forward to an opportunity to comment on any proposed Code of Conduct.

10. Supreme Court power to sever and remit adjudication determinations – Section 32A

Multiplex agrees with the proposal to enable to Supreme Court to sever part of an adjudication determination that is affected by jurisdictional error, to reduce the incentive for parties to seek to challenge a decision and have it set aside for jurisdictional error.

Multiplex understand that case law in some jurisdictions has already clarified this position, and expressly addressing it as proposed in the Draft Bill will remove any ambiguity.

11. Corporations in liquidation making a payment claim – Section 32B

Multiplex agrees with the proposal to enact a provision that prevents corporations in liquidation making a payment claim.

Multiplex proposes that this should go one step further, and apply to any corporation that is in voluntary administration or any other type of insolvency process. At the very least, Multiplex proposes that any such claims for payment be suspended until the solvency of the corporation is determined or another arrangement is agreed between the respondent and the relevant corporation's administrators to ensure that any interim payment does not become a final payment if the corporation shortly after goes into liquidation in any event.

The substantiation in the Explanatory Statement for proposing this change in the Draft Bill should also apply to corporations in voluntary administration for example, to ensure that an adjudicator's determination does not become final and binding on the respondent.

As you are aware, if an entity does end up in liquidation and the subcontract is terminated, Multiplex faces all costs of engaging a new entity to finish the works, and any defects.

12. Appointment of authorised officers – Section 32C, 32D

Multiplex does not object to this proposal in the Draft Bill.

The proposed changes in the Draft Bill setting out the expanded role of the authorised officers is very broad, and has the potential to increase the administrative burden on the department of Fair Trading. The proposed changes at section 34A are seeking to extend the time for prosecution due to an inability of the department of Fair Trading to prosecute offences within 6 months, yet these provisions are only going to increase the workload required to properly carry out these new powers.

13. Standard information sharing provisions – Section 36

Multiplex agrees with this proposal in the Draft Bill.

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14. Compliance and enforcement powers and associated offences – Section 32F to 32J

Multiplex does not object to this proposal in the Draft Bill. Multiplex understands the justification for the proposed amendments in Sections 32D-32J, but is concerned about a lack of parameters around when they powers can be exercised. The definition of an *authorised purpose* is very broad, and Multiplex proposes that there should be a requirement that an authorised officer must have reasonable grounds to suspect a contravention of the Act in order to exercise the powers. Multiplex also proposes that the *authorised purpose* must be expressly stated or referenced when these powers are being exercised.

15. Prescribing penalty infringement notice offences – Section 34B

Multiplex does not object to this proposal in the Draft Bill.

16. Commencement of proceedings – Section 34A

Multiplex does not support the increase of the statutory limitation period for prosecuting offences under the Act.

In Multiplex's opinion, timely enforcement is a key requirement to reducing the number of contraventions under the Act. If continuous contraventions of the Act are not prosecuted for a period of 2 years, potentially 2 years' worth of contraventions could occur before action is taken. In Multiplex's view, this proposed change in the Draft Bill is not the most effective way to address the failure of Fair Trading to prosecute all non-compliances of the Act.

Multiplex proposes that this should be a matter of priority for the Department of Fair Trading to address internally, as opposed to allowing more time to elapse before any action is taken against the contravening party.

If you have any questions and would like to discuss the comments raised, please do not hesitate to contact me on [REDACTED]

Yours faithfully,
Multiplex Constructions Pty Ltd

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