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Australia's property industry

Creating for Generations

Mr John Tansey
Executive Director
Regulatory Policy
Department of Finance, Services and Innovation
Level 5, McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

Dear Mr Tansey,

The Property Council welcomes the opportunity to provide feedback on the Consultation Draft of the *Building and Construction Industry Security of Payment Amendment Bill 2018* and also appreciates the invitation to be involved in the stakeholder roundtable on this draft Bill.

The property and construction industry in NSW plays a critical role in the broader economy. The Property Council has supported efforts to reduce the instance and effect of insolvency within the building and construction industry. We appreciate the Government's engagement and understand and support the intent of providing more protection for subcontractors.

The Property Council's comments on the draft Bill are below:

Section 11 due date for payment

The proposed reduction in timeframe of due dates for payment from 15 business days to 10 business days is unreasonably short.

The Property Council submits that the current legislation of prescribed terms requiring principals to make payment to a head contractor within 15 business days of receipt of a payment claim is too onerous from both administrative and financial perspectives. To reduce this to 10 business days is unrealistic and unmanageable.

When considered in conjunction with the timing of a payment schedule, the current 15 business days allows only 5 days from the completion of an assessment to the latest date for making payment.

This is inconsistent with the industry (and the wider economy) which typically operates on a standard payment term for creditors of 30 days. This allows sufficient time for assessment as well as internal administration required for larger organisations.

This is particularly relevant on more significant projects where a number of expert consultants may be required to participate in the review process to determine the value of works completed which in many instances can be a precondition for release of funding by debt providers.

The Property Council's preferred position is that a more flexible payment period be adopted which allows for a maximum period for making payment of up to 30 days for all parties involved,

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and is strongly opposed to the due date of payment being reduced from the current 15 business days to the proposed 10 business days.

Section 17A withdrawal of application

The Property Council agrees with the concerns that were raised in the stakeholder meeting about this amendment and believe it may be used by claimants to “adjudicator shop”. Even though this is not the intent of the proposed amendment, the current drafting could allow for this to occur. Also, it could allow claimants to arbitrarily withdraw prior to an adjudication. Respondents can spend considerable time and money on providing a response and to have a claimant withdraw late in proceedings would, at times, be inequitable. The Property Council’s preferred position is that the claimant can withdraw at any time prior to the authorised nominating authority referring an adjudication application to an adjudicator. An application should also be able to be withdrawn at any stage prior to an adjudication decision by agreement of the two parties.

Section 28 a code of practice for authorised nominating authorities

The Property Council strongly supports a code of practice for authorised nominating authorities. The industry has concerns that given the claimant chooses the Authorised Nominating Authority (ANA) who then chooses the adjudicator, the adjudicator could be more likely to deliver claimant friendly outcomes. This may result in the ANA developing a reputation of being claimant friendly. Anecdotally, certain ANA’s are known to be more claimant friendly within the industry. A code of practice would improve accountability of the ANA’s. The Property Council would welcome being consulted on the drafting of the code of practice.

Liability of directors

In light of the new offences for corporations, directors and officers under Section 34 C and 34D, the higher obligations placed on Directors, and the increase in penalties in the Bill, insurance premiums will rise. This increase in insurance premiums will increase construction costs and potentially worsen housing affordability.

Additional comments

Section 18 of the current Act outlines the eligibility criteria for adjudicators and that such qualifications, expertise and experience may be prescribed by the regulation. The regulation is yet to proscribe any of these provisions. We would request that when the Government is drafting the new regulation that this issue is examined.

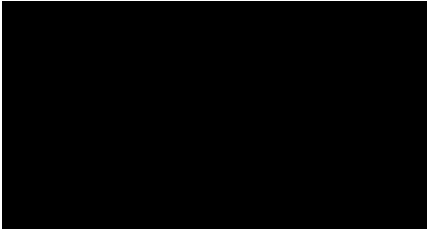
The accreditation and selection process of adjudicators is not well suited to the resolution of larger and more complex matters. We note that adjudicators are not required to have any form of legal training which is acceptable for simple claims, however in larger claims and more complex matters, it becomes more critical to ensure that the contractual rights and obligations are properly considered in a determination.

Adjudicators are also not selected in relation to their appropriate field of expertise and often have no experience in relation to the subject matter upon which they are making a determination including claims relating to delay and disruption, latent conditions or complicated design issues.

The Property Council submits that stricter and more suitable requirements of the education and experience of adjudicators should be introduced as part of the adjudicator accreditation process and the education and experience of adjudicators should be considered before they are appointed to more complex matters. These requirements should be prescribed in the regulation.

Should you have any questions on this submission please contact Emma Ashton, Senior Policy Advisor, on [REDACTED]

Yours sincerely,



Jane Fitzgerald
Executive Director – NSW
Property Council of Australia

