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BUILDING AND COSNTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT BILL 2018

Society of Construction Law of Australia

Introduction

1. This Submission is prepared by members of The Society of Construction Law Australia (**SoCLA**) forming an informal committee consisting of lawyers, adjudicators and consultants to the industry who do not represent exclusive classes of stakeholders in the industry and whose experiences cover the broad range of parties in the contracting chain.

2. By way of general introduction, SoCLA maintains that notwithstanding the merit of many of the amendments proposed in the Bill, priority should be given to national harmonisation of security of payment. Harmonisation is viewed almost universally both within the Society, and more generally amongst stakeholders, as being desirable. The Society is not convinced by the rationale that NSW should "take the lead" on amending its legislation to adopt the Murray recommendations (this is despite the objective merit of those recommendations, many of which are consistent with the Society's views). Harmonisation has proven to be very difficult to achieve in other areas, despite its objective desirability and general support from constituents. Creating further differences is likely to make it even harder in connection with security of payment in the construction industry.

3. Despite the forgoing, the Society broadly supports most of the proposed amendments. The Society has confined its comments to the items where in its view further comment is specifically warranted. Unless otherwise stated the Society fully supports all amendments whether or not addressed below.

Reference in Bill	Principle reform	SoCLA submission
[1], [2], [3]	Provide a statutory minimum entitlement to make a payment claim at least once per month, for work done within that month	SoCLA has previously provided the view that payment claims should be capable of being made in accordance with the frequency provided for under the contract. Any legislation should be careful not to interfere with existing contracts or to create a regime that confuses the contractual rights and obligations of the parties. It is not the case that one size fits all and an over-prescriptive regime could create problems that were not intended. Further, there is concern amongst our members that

Reference in Bill	Principle reform	SoCLA submission
		the proposed drafting is complicated and may lead to even more confusion despite its intended purpose being to create a universal default position.
[3]	Allow claimant to make a final payment claim where a contract has been terminated	SoCLA maintains that the security of payment regime should not prevent the making of a claim after the termination of a contract. In particular, this will address behaviour of upstream parties terminating prior to a reference date to prevent a claimant from making a final claim.
[4], [5]	Shorten payment due dates	SoCLA remains of the view that: 1. There should be uniformity in payment terms; and 2. 10 business days may be too short in particular for large and complex claims. There is a balancing act between achieving the regime's object of regular and prompt payment and creating a regime where business large and small are regularly in breach. An appropriate default can be implemented (largely benefiting smaller operators), without further shortening the payment terms for project owners to unrealistically short periods.
[8]	Reinsert the requirement for the endorsement of payment claims	SoCLA sees the "requirement of an endorsement … as a necessary step to communicate the party's intention, reducing the chance of any inadvertent activation of the Act and focusing the mind on the requirements of a payment claim. If the security of payment regime can be inadvertently activated the interaction with the limitation on more than one payment claim in respect of each reference date under the construction contract can create adverse outcomes precluding claims being made, contrary to the intent of the scheme … The Society adopts the view that while a failure to provide the precise wording should not defeat a claim and the security of payment regime should permit accidental slips or omissions or inconsequential mis-quoting, there is a need for the payment claim to communicate to the recipient that it is a payment claim and that it carries with it a statutory effect".
[13] [15]	Section 17(3)(b) Section 20 Allow regulation to be made	The experience of SoCLA members is that inconsistency in the manner of making of applications between ANA's is an inconvenience which can create unnecessary confusion and potentially barriers to using the regime for SMEs. It would be useful however to see the regulations

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	concerning form of Applications and responses	proposed as part of the consideration of this amendment.
[14]	Expressly provide for the withdrawal of adjudication applications	SoCLA supports making the ability to withdraw an Adjudication express, however care needs to be taken to ensure this is not used to "adjudicator shop". Further, it should be express that the claimant is 100% liable for the fees in such circumstances, unless expressly agreed otherwise in writing by the parties (and advised to the adjudicator). Without this, there is potential for disputes about liability for fees.
[16], [17], [18]	Adjudicator to determine an application within 10 business days	SoCLA maintains that the time for the determination should be pursuant to a sliding scale depending upon the size of the claim. Adjudicators determining large claims are put under undue pressure by a universal time period for the determination which impacts negatively on the quality of the determination. Poor quality determinations diminish the way the regime is perceived. By providing adequate time to do a thorough job on large claims will likely only affect he parties who will not be substantially impacted by the further delay.
[19]	Section 22 Adjudicator's determination	SoCLA is of the view that it should be sufficient for the response to be delivered to the last notified address of the respondent to ameliorate the risk of the process be frustrated by an respondent "disappearing" making it impossible to effect "service".
[24]	Enable the Minister to make a code of practice for Authorised Nominating Authorities	SoCLA has previously published its concerns with "for profit" ANAs and the impact they have on the credibility of the system. Assuming the proposed code would seek to address some of those issues, this is a welcome amendment. In SoCLA's opinion, the role of an ANA should not be a profit-driven model, and introducing a code of practice for ANAs therefore serves to curb any undesirable behaviours for-profit ANAs may engage in and forces them to refocus on the true, original purpose of ANAs and adjudicators (being to quickly and fairly determine adjudication applications). In its submissions on the Murray Review, SoCLA also supported eligibility criteria to be put in place for adjudicators prior to their appointment and quality controls introduced for adjudicators who wish to remain so. SoCLA remains of the view that adjudicators should be subject to: • demonstrating minimum standards of skills and experience in order to become adjudicators; and • review of their performance and maintenance

Reference in Bill	Principle reform	SoCLA submission
		of standards and education to remain adjudicators.
[30]	Supreme Court power to sever and remit adjudication determinations	In its 2014 report SoCLA concluded that the level of successful challenges to decisions was much too high, reflecting both the quality of adjudication decisions and also the quality of security of payment systems. In its 2017 submissions on the Murray Review, SoCLA supported Courts being given the power to sever a void part of an adjudicator's determination as it would allow them to better do justice to the parties and potentially avoid the need for further more expensive and time consuming dispute resolution mechanisms. However, severance will not always be a suitable mechanism and situations may arise where one aspect of a determination might be able to be severed but in doing so it will impact on the general justice and fairness of the outcome in that issues have not been properly balanced. In saying that, SoCLA has previously expressed the view that courts are well suited to and experienced in determining whether such actions are appropriate in the context of the determination as a whole, and this small aside does not outweigh the huge administrative benefits that courts being able to sever void parts of determinations will bring.
[30]	Prohibiting a corporation in liquidation from making payment claims	SoCLA supports the implementation of a prohibition on a corporation in liquidation from making payment claims, however it should be noted that this would not have avoided the litigation in *Hakea Holdings Pty Ltd v Denham Constructions Pty Ltd* [2016] NSWSC 1120 as Denham did not go into liquidation until after that matter had concluded. The even with this amendment, the "safe harbour" regime may lead to further cases where the "pay-now-argue-later" foundation of the SOPA regime is undermined. Finally, SoCLA believes that provision should be made for payment of the adjudicator's fees in the event work as begun to avoid dispute over such matters.
[31]	Part 3A Investigation and enforcement powers	SoCLA supports increasing the robustness of the enforcement of the regime. However the effectiveness will be in the implementation of the new provisions. Anecdotally, the perception in the industry is that behaviour must be particularly egregious to be investigated and acted upon. In other words transgressions of a comparatively minor nature will

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		escape unpunished, leading to poor practices becoming embedded in some quarters. The regime proposed is in line with similar investigative powers for other regimes and in the Society's view are entirely appropriate. Increasing the time for enforcement proceedings, can only assist to hold wrongdoers to account. *Penalties* The Society supports the imposition of penalties that reflect the gravity of the offense as well as the purpose for which the penalties are imposed. However, imposing higher penalties will not act as a deterrent if they are not enforced (or are rarely enforced). Also, the penalties may act as a deterrent for small to mid-tier construction companies but may not have an impact on larger construction companies.

Dated at Sydney the 18th day of September 2018

Security of Payment Committee, SOCLA

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