CIVIL CONTRACTORS FEDERATION
The Voice of the Industry

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18 September 2018 CCF2018-463

Attn: Ms Katie Harbon
Policy Manager
Better Regulation Division Department of Finance, Services and Innovation
McKell Building, 2-24 Rawson Place
Sydney NSW 2000

Email: SecurityofPayment2018@finance.nsw.gov.au

Dear Ms Harbon,

Response on Security of Payment Reforms September 2018

The Civil Contractors Federation New South Wales (CCF NSW) is the peak body representing employers in the New South Wales civil construction industry. In NSW the industry comprises some 15,000 employers paying $12bn in wages to 200,000 employees.

CCF is the only body empowered under the *Fair Work (Registered Organisations) Act 2009* to represent all and only employers in the civil construction industry.

Our Membership is diverse, but all accept to be bound by a Code of Conduct that sets them apart as organisations aspiring to excellence and improve the industry. Our Members represent the largest construction companies in the world to the very smallest. 50% of our Membership is based in regional NSW. Members include both contractors and suppliers.

We have consulted with Members over the proposed reforms. They are, to be frank, fatigued from six years of SOPA reviews, are sceptical over consistent promises of reform, and are angry over poor decisions made in the last reform round.

However, regarding the Bill, we are greatly heartened. This is an excellent step forward and with minor adjustments will be well supported by the CCF NSW.

In contrast, the deemed statutory trust concept is deeply concerning.

Finally, we raise a cautionary point about regulation and communications.

The Bill

We are very pleased to say that, in general, the Draft Bill is broadly considered a significant leap forward in improving the NSW security of payment regulatory regime.

Much of what has been included in the Bill reflects representations that we have repeatedly made over a number of years on behalf of the industry. Some changes correct very poor decisions made in the last reform in 2014. Very importantly, the Bill represents a balanced position for all size businesses.

There are some specific issues we wish to raise:

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Reference Dates

We remain of the view that "reference dates" are complicated and a cause of considerable friction. The principle we have held true to in seeking is that work done in Month A and that is invoiced should be paid within a legislated maximum time after the end of Month A, or the invoice date, whichever is the later. We are very pleased to see the Government is looking to rectify this.

However, we do not seek that during or at the end of the construction work, a claim cannot be made for Month A in a later month. We are concerned the current wording may prevent this. As a further example of possible unintended consequences, the intent of s13(4) of the Act may be frustrated by the current wording. In our view this must be clarified in the Bill.

Due Date for Payment

We are very pleased the Government is reinstating previous payment terms, as we have sought consistently since 2014.

We have been asked recently by the Department to specifically comment on the 10 and 20 working day payment terms (for head and sub-contractors respectively):

- We support the Bill's 10 and 20 working days, and do not support any longer period for either party.

- We do not support a shorter period than 20 days for sub-contractors. It is our view the parties must be given realistic time to review claims, else they will act to protect themselves. To make it less than 20 days would make it difficult for claims to be appropriately assessed. For example, unlike a head contract, sub-contract claims may need cross-checking against work undertaken by other sub-contractors. Were less than 20 days implemented, an unintended consequence might be quasi-automatic rebuttals/objections to claims. Our position is made in consideration of the very positive step to accept our recommendation that a reference date for work done in a month cannot extend beyond the end of that month – this will speed up payments to sub-contractors and reduces the need for less than 20 days.

Retention Money in Trust

We are delighted the Government has agreed to remove the bad 2014 imposed auditing and reporting obligations. Given the Government is open to a deemed statutory trust for progress payments, an option could be that the deemed statutory trust be first trialled with Retention Monies. This would remove the considerable administrative burden of establishing an actual trust, but provide the same security.

Implementation

We urge the Government to rectify the issues we have raised, then place the Bill before the Houses and have it legislated as soon as possible.

Employers do not implement different systems for different contracts. They change their systems for all of business. Employers will need at least three (3) months to change their systems in order to implement these reforms. Further, there should be a grace period of a further three (3) months in which education rather than punishment is the focus of non-compliance observations.

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'Deemed' Statutory Trust

We have a large number of questions and concerns about the operation of the 'deemed' statutory trust. Much more detail than is included in the Consultation Paper is required before we could support the proposition.

Goal failure: The goal of deemed trusts appears to be to protect primarily small businesses, yet the target threshold of $1m is too high – it excludes those it seeks to protect. To protect them, both the main contract and sub-contract values would need to be significantly lower. However, if this were to be done, compliance and administration costs become very real concerns. Repeated acknowledgement has been made by industry commentators (and by the Government in its Paper) that small businesses will struggle to comply if the sub-contract threshold is set very low.

Effectiveness: The premise underpinning the need for a deemed statutory trust is questioned. Under current legislation, all businesses must be able to pay their debts as and when they fall due. Deemed trusts thus appear to be a 'doubling up' of compliance obligations to solve a single problem which can be managed more efficiently in other ways.

Rogues will ignore both sets of rules. However, whereas the Corporation Act requirement does not pose additional administration burden on companies that seek to comply with the law, deemed trusts *will* pose considerable additional burden for <u>all</u>.

In our view what is a more effective strategy is to expand the regulator's investigative powers and penalties to seek rogues out and manage them…exactly as the Bill proposes to do.

We therefore question whether, given some excellent legislative reforms are being made to enforce compliance, it would not be prudent to allow those reforms to be tested before adding yet another level of complexity on the industry.

Clarifications: A raft of clarifications are needed. To do this the legislation will become incredibly complex, and in doing so will make the administration burden even greater.

Administration Burden: Strong feedback has been received from employers of all sizes over the cost of administering this proposal. We have considerable concerns how SMEs would meet the compliance obligations, and what the total cost would be. It is clear from that feedback significant effort will be required to manage and monitor the system. This will flow through the chain into the cost of infrastructure, and so to the NSW taxpayer. This should be assessed before progressing.

Unintended Consequences: There will be significant unintended consequences. A number of businesses have said to us this will encourage them to move away from sub-contracting to SMEs, and others to changing the size of contracts they are willing to engage. These were not considered by either Collins or Murray. We recommend the NSW Government better define the model and explore these thoroughly before moving forward.

Our considerable concern is that deemed statutory trusts for progress payments as described in the Paper appears to fail its single purpose, but successfully introduces an unholy trinity of additional administrative burden; additional compliance burden; and unintended consequences.

Indeed, we would argue that such trusts may not be needed. We have long argued that in NSW there is insufficient investigative powers for the SOPA regulator – but the Bill remedies that. It may be that, if the Bill is introduced, a far more economically efficiently instrument will achieve the goal. We should give it time to see.

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Indeed, given the Government is open to a deemed statutory trust for progress payments, an option could be that a deemed statutory trust be first trialled with Retention Monies. This would remove a considerable administrative burden of establishing trusts, and further assess unintended consequences of such trusts.

In short, before we can support a deemed statutory trust as described, we would need to understand how it would work specifically in the civil contracting environment.

Small v Large Business

These are positive reforms, discussing important issues. It is counter-productive to talk of them, or to create structures, with a 'class war' approach in mind. We will wholeheartedly reject representations by any person or party that promotes an adversarial, bipolar, 'small business versus large' approach or rationale for these reforms.

In our industry such a perspective does not exist and it would be incredibly counter-productive to generate it. To do so will have significant negative consequences for which the Government will be unable to control.

Specifically, we caution two things be avoided:

- The Government must ensure we only have one regulator, and that is the Department of Fair Trading. We will likely reject any proposal to have the Small Business Commissioner formally involved in any additional capacity than already exists in the SOPA process. Any suggestion that the Small Business Commissioner should in some way be introduced will likely not be supported by us.

- Rhetoric over announcing these changes should be measured and not focused on 'small v large'. Doing so entrenches positions and will create a siege mentality that does not exist in our industry. While it may support special interests, it is wrong and will harm our industry.
  That is not to say that the reforms should not be seen, nor spoken of, as supporting small businesses, for they will. But the commentary should reflect that the Bill supports businesses, both large and small, and is focused on reducing red tape, speeding up cash flow, and finding and punishing rogues.

CCF NSW reiterates its strong support for the Bill, with the minor reforms noted herein. We congratulate the Government, the Minister, and the Department, for their excellent work.

Yours sincerely,

[redacted]

David Castledine B.Eng, LL.B
Chief Executive Officer
Civil Contractors Federation NSW