

18 September 2018

Security of Payment 2018
 Department of Finance, Services and Innovation
 Regulatory Policy Branch
 Locked Bag 2906
 LISAROW, NSW 2252

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

Dear Sir/Madam,

Building and Construction Industry Security of Payment Amendment Bill 2018

We refer to our submissions to the Department of Finance, Services and Innovation dated 31 August 2018 in relation to the proposed imposition of a deemed statutory trust.

These submissions are made in relation to the proposed amendments to the *Building and Construction Industry Security of Payment Act 1999 (NSW) (the Act)* by way of the *Building and Construction Industry Security of Payment Amendment Bill 2018 (the Bill)*.

Kreisson are a construction and engineering law firm and our lawyers have been providing legal services to owners, builders, subcontractors and other participants in the building and construction industry for over thirty years.

Kreisson has been involved in numerous adjudications, as well as Court proceedings, about Security of Payment claims in all Australian jurisdictions.

We are therefore well placed to provide considered opinions about the Bill.

| Item | Section of Act | Description of amendment | Kreisson comment |
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| 1 | [3] Section 8 Rights to progress payments; [1] Section 4 Definitions; [2] Section 4, definition of "progress payment" | Establishing a minimum monthly entitlement to a progress payment | Kreisson supports this amendment. |

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| 2 | [3] Section 8 Rights to progress payments | Establishing an entitlement to a final progress payment after termination | <p>Kreisson supports this amendment.</p> <p>In Kreisson's opinion, a party that has carried out construction work should be entitled to recourse under the Act for work carried out up until the date of termination of a contract (as opposed to having to commence proceedings to recover those sums).</p> <p>This is consistent with the overall objective of the Act, which is to promote cash flow.</p> |
| 3 | Reference: [4] Section 11 (1A) (a) Due date for payment and [5] Section 11 (1B) (a) | Shortening payment due dates | <p>Kreisson supports this amendment. There is a disparity between the 15 business day due date period under a head contract and the 30 business day period under a subcontract.</p> <p>In addition, on one view, a notice under section 17(2) of the Act can only be issued following the due date for payment.</p> <p>This would mean that subcontractors would need to wait 30 business days (45 days) in total before they could issue a notice under section 17(2) of the Act.</p> <p>This is unfair and prejudices the claimant with a delay before the claimant is in a position to assert its rights under the Act.</p> <p>This prejudice arises because of a failure by the respondent to comply with the Act and to submit a payment schedule within time.</p> <p>Kreisson also suggests that section 17(2)(a) of the Act is amended so that it is clear that a claimant can provide a notice under that provision immediately following the 10 business day period after a payment claim is made.</p> |
| 4 | [6] Section 12A Trust account requirements for retention money | Allowing inspection of trust account records | <p>Kreisson supports this amendment.</p> <p>It is an ordinary consequence that a beneficiary of trust money has a right to inspect the books of an account in which money is held on their behalf.</p> |

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| 5 | [8] Section 13(2)(c) | Endorsement of payment claim | <p>Kreisson supports this amendment.</p> <p>In Kreisson's opinion, the removal of these words has caused confusion as to whether a party intends to trigger the Act.</p> <p>In addition, a party can submit a claim in stealth without the endorsement of the claim and then rely upon the section 20(2B) arguments because the respondent has submitted a mediocre payment schedule.</p> |
| 6 | [14] Section 17A | Expressly provide for the withdrawal of adjudication applications | Kreisson supports this amendment. |
| 7 | [16] Section 21 Adjudication procedures; [17] Section 21(2); [18] Section 21(3)(a) | Adjudicator to determine an application within 10 business days | <p>Kreisson strongly supports this amendment.</p> <p>In Kreisson's opinion, an adjudicator should be provided with additional time as proposed to determine an application.</p> <p>This is because an adjudicator is required to determine a claim in a very short period of time, often where there is voluminous material to consider.</p> <p>In addition, the adjudicator will now have all of the material before them (i.e. they will now have an adjudication response) when the 10 business day deadline commences.</p> |
| 8 | [24] Section 28A | Code of practice for authorised nominating authorities (ANAs) | Kreisson cannot support nor oppose this amendment until the proposed Code is released for public consultation. |
| 9 | [30] Section 32A | Supreme Court power to sever and remit adjudication determinations | <p>Kreisson strongly rejects this amendment.</p> <p>The underlying subject matter of this amendment has been subject of various cases in New South Wales, Queensland and Victoria</p> <p>In <i>Multiplex Constructions Pty Ltd v Luikens and Anor</i> [2003] NSWSC 1140 the Court said at [92]:</p> <p><i>"...if the adjudicator's decision as to any component part of the adjudicated amount</i></p> |

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| | | | <p><i>is shown to be liable to be set aside on judicial review, the consequence is that, subject to other discretionary considerations, the whole of the determination must be quashed if jurisdictional error infects any part of the process whereby the adjudication amount has been produced”.</i></p> <p>In <i>Seabay Properties Pty Ltd v Galvern Construction Pty Ltd</i> [2011] VSC 183 the Court said at [67]:</p> <p><i>“...there can be little room for the concept of partial invalidity in relation to determinations arrived at in breach of its requirements. Indeed, it would be rarely safe to introduce such a concept”.</i></p> <p>The impact of the amendments, if introduced, can most properly be described by the High Court’s comments in <i>Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd</i> [2018] HCA 4, where the High Court stated at [105]:</p> <p><i>“Parliament cannot be taken to have intended to create a race to court between the beneficiary of an adjudicator’s determination seeking a court judgment and the opposing party seeking that determination be quashed so that a certificate cannot be issued or filed”.</i></p> <p>In Kreisson’s opinion, the comments made by the Court in various decisions as outlined above and in other cases should be followed, as this is consistent with the intent of legislature at the time the Act was introduced.</p> |
| 10 | [30] Section 32B | Prohibiting a corporation in liquidation from making payment claims | <p>Kreisson does not support this amendment. It is incorrect to say that a company in external administration has no further need to maintain cash flow.</p> <p>The loss of cash flow will effectively cut off opportunities to restructure distressed contractors.</p> |

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| | | | <p>There was strong support for recent amendments to the <i>Corporations Act 2001</i> (Cth) about 'ipso facto' termination.</p> <p>The provision of an adjudication determination goes some way to corroborate a proof of debt, notwithstanding it is an interim determination and final proceedings are stayed during the external administration.</p> |
| 11 | [31] Part 3A, Sections 32C, 32D | Appointment of authorised officers | <p>Kreisson does not support this amendment.</p> <p>In Kreisson's opinion, it is not appropriate for a Government agency to intervene in, or investigate what are, essentially, commercial disputes between citizens.</p> <p>There is no overriding public interest in the outcome or process of such dispute.</p> |
| 12 | [33] Section 36 Disclosure of information | Standard information sharing provisions | <p>In Kreisson's opinion, this proposal requires further thought by the Government.</p> <p>Privacy legislation only applies to "personal information" for natural persons. Most participants in the construction industry are organised as corporations.</p> <p>Fair Trading New South Wales should observe the <i>Harman</i> undertaking.</p> |
| 13 | [31] Sections 32F – 32J | Compliance and enforcement powers and associated offences | <p>Kreisson does not support this amendment.</p> <p>In Kreisson's opinion, it is not appropriate for a Government agency to intervene in, or investigate what are, essentially, commercial disputes between citizens.</p> <p>There is no overriding public interest in the outcome or process of such dispute.</p> |
| 14 | [9] Sections 13(7); [10] 13(8); [21] 26A (5); [22] 26B (5); [23] 26D (3); 26E (2) and (3); [31] 32O | Updating penalty units | <p>Kreisson does not support this amendment.</p> <p>In Kreisson's opinion, it is not appropriate to impose penalties on citizens in their commercial dealings, unless there is an overall detriment to society as a whole.</p> |

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| 15 | [32] Section 34B | Prescribing penalty infringement notice offences | <p>Kreisson does not support on the spot fines.</p> <p>In Kreisson's opinion, it is not appropriate for a Government agency to intervene in what are, essentially, commercial disputes between citizens.</p> <p>There is no overriding public interest in the outcome or process of such dispute.</p> <p>Innocent citizens notoriously pay "on the spot" fines simply to avoid the cost and inconvenience of defending summary proceedings.</p> |
| 16 | [32] Sections 34C and 34D | Introducing accessorial and executive liability | <p>Kreisson does not support this amendment.</p> <p>It is proposed for the corporate veil to be pierced.</p> <p>Traditionally, the position has been that a company is a separate legal entity and is able to sue and be sued, and that a piercing of the corporate veil would be reserved for a limited range of serious circumstances, such as fraud.</p> <p>In Kreisson's opinion, contraventions of the Act do not warrant the piercing of a corporate veil, as the Act essentially governs payment rights in a commercial context between parties to a construction contract.</p> <p>There are various rights and remedies which already exist to a claimant party to recover payment under the Act.</p> <p>In Kreisson's opinion, the proposed provisions would not in any way assist the overriding purpose of the Act, which is to ensure that contractors and subcontractors receive payment.</p> <p>In addition, the reforms impose overly onerous regulatory burdens on corporations and requires for corporations to implement stringent procedures, some of which involve third parties, whose actions cannot be controlled by the corporation.</p> |

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| | | | <p>This is particularly so given the broad range of circumstances where an executive liability offence may be found to be apparent.</p> <p>For example, it is suggested that an executive liability offence will be committed if a contractor of that corporation does not receive information, training, instruction and supervision in relation to the executive liability provisions of the Act which involve that party.</p> <p>Using a principal that is a corporation as an example, the corporation, its directors and individuals involved in the management of that corporation, should not be responsible for providing training to head contractors to ensure that they comply with their requirements under the Act.</p> <p>Theoretically, this may mean that the corporation would need to train the head contractor on the supporting statement and retention money trust requirements under the Act.</p> |
| 17 | [32] Section 34A | Commencement of proceedings | <p>Kreisson does not support this amendment.</p> <p>In Kreisson's opinion, it is not appropriate for a Government agency to intervene in what are, essentially, commercial disputes between citizens.</p> <p>The extension of the statutory limitation period increases the regulatory burden on industry participants.</p> <p>It becomes more difficult to investigate and defend an alleged offence as time goes on, as memories fade, records are lost, and witnesses may move out of the jurisdiction.</p> |
| 18 | Clause 5 | Reducing the threshold for retention money trust requirements | <p>Kreisson neither supports nor opposes this amendment in the absence of any statistical analysis.</p> |
| 19 | Clause 4 | Inspection of trust account records | <p>Kreisson strongly supports this amendment.</p> <p>In Kreisson's opinion, it is not appropriate for a Government agency to intervene in</p> |

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| | | | what are, essentially, commercial disputes between citizens. |
| 20 | Clause 16 | Streamlining retention money trust reporting requirements | Kreisson strongly supports this amendment. |

Yours sincerely,
KREISSON



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