



AUSTRALIAN
CONSTRUCTORS
ASSOCIATION

NSW SECURITY OF PAYMENT REFORMS – IMPLEMENTATION

**SUBMISSION BY AUSTRALIAN CONSTRUCTORS
ASSOCIATION**

2019

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RESPONSE TO QUESTIONS IN OPTIONS PAPER

QUESTIONS 1 AND 2 – Reforms Commenced With Minimal Transitional Period

- 1. Is the proposed start date for these reforms reasonable?**
- 2. Are there reasons why the reforms should start later?**

ACA Response

The reforms covered by questions 1 and 2 govern the following issues:

- investigation and enforcement
- increases in penalty units for offences
- Executive liability offences
- Supreme Court power to sever
- Prohibiting a corporation in liquidation from making payment claims
- Extended circumstances for releasing withheld money
- Miscellaneous reforms

ACA recommends that the start date for the reforms should be 1 December 2019, and that all reforms should commence on the same date rather than be by way of staged commencement. The ACA's position is based on the following:

- Many industry participants either do not use or do not understand many aspects of security of payment legislation (SOP). The reforms, which are significant in themselves, should only be commenced after there has been adequate time allowed for industry participants to receive training in the use of the legislation and the impacts of non-compliance.
- Apart from the need to provide adequate education and training in the implementation of the reforms, industry participants will need to consider the impact of the reforms on their business and administrative operations and make appropriate adjustments to internal procedures and possibly the business structures themselves.
- The reforms relating to Executive Liability will be difficult for smaller organisations to address and there will be additional expense and time needed for many organisations to train their executives or to restructure their operational systems.
- Lastly, the reforms have the potential to result in a significant shakeout of industry participants. The government needs to avoid the possibility of a significant number of industry participants leaving the industry and the impact that could have on the capability and capacity of the industry to deliver projects.

QUESTIONS 3 AND 4 – Reforms With a Transitional Period

3. Is the proposed start date for these reforms feasible?

4. Are there reasons why these reforms should start earlier or later?

ACA Response

The reforms covered by questions 3 and 4 govern the following issues:

- Progress payments and payment claims
- Due dates
- Payment claim endorsement
- Miscellaneous adjudication reforms

The ACA submits that these critical reforms should commence on 1 December 2019 ie 6 months later than currently proposed. The ACA submits that a 6 month deferral is warranted for the reasons set out in terms of the response to questions 1 and 2 above. Further reasons are encapsulated in comments on other questions.

While the Implementation Paper indicates that the reforms will simplify and clarify procedures and processes, the practical impact of the reforms are, in ACA view, underestimated in terms of their impact and are likely to be very significant for many industry participants.

By way of example, the changes that reduce the maximum payment period for payments from a head contractor to a subcontractor from 30 to 20 business days is likely to place many contractors in immediate cashflow stress because they are unlikely to be paid their own progress claims before the 20 business day obligation arises.

There are also issues as to the usual dates in each month for receipt and payment of claims. Accordingly, head contractors will be impacted by cashflow issues. This is particularly significant on larger projects where progress claims may be tens of millions of dollars.

The ACA also submits that the practical impact of the reform to the due dates conflicts with the proposals being developed by the Construction Industry Leadership Forum (CILF) being led by Infrastructure NSW and the NSW Treasury. Pursuant to practice notes being developed under the auspices of the CILF it is proposed that payment terms on major infrastructure construction projects should be established such that their commercial structure enables the contractor to:

- access and attain a cash neutral position through its own responsible financial management; and
- facilitate supply chain benefits to its subcontractors, including through pass down of equivalent arrangements where applicable, to enable subcontractors to access and attain a cash neutral position through their own responsible financial management.

This is to allow a contractor to sustainably mobilise and maintain a healthy supply chain throughout the delivery of a project and does not imply or infer that responsibility for financial management is transferred away from the supply chain.

Major infrastructure construction projects can require contractors to provide significant early cash outlays, which place the contractor at a negative cash flow position at the outset of a project. **Added cost pressure arises from payment term duration and misalignment in**

payment cycles where contractors are frequently required to pay their supply chain earlier than the time they receive payment under the head contract.

This misalignment can be a function of legislative requirements for public sector financial management and legal protections over payments to subcontractors. The strain that this places on the cash flow of head contractors can have knock on effects down the subcontracting chain, impact the contractors' bonding facilities and their ability to satisfy financial capacity requirements associated with licensing and pre-qualification requirements and introduce commercial motivations into the sequencing of delivery that are not 'best for project'.

Accordingly, the ACA submits that there needs to be additional implementation time for the commencement of the legislation to enable industry and government to more fully explore the ramifications of the reforms and adjust operational arrangements as necessary.

QUESTIONS 5 AND 6 – Reforms Requiring subordinate Legislation Before Commencement

5. Is the proposed start date for these reforms feasible?

ACA Response

These reforms should commence at the same time as we indicated should apply to other proposals referred to above.

6. Are there reasons why these reforms should start earlier or later?

ACA Response

N/A

QUESTIONS 7, 8 AND 9 – Application of Amendments

7. Do you support the reforms only applying to a construction contract entered into after commencement?

ACA Response

Yes, the reforms should not apply to contracts already in existence. This should extend to any variations to those contracts and contracts entered into under the umbrella of a head contract already in existence eg a contract for remediation works entered into after the commencement of the legislation but relating to a project the head contract of which has been entered into prior to the commencement of the legislation.

8. Are there specific reforms which you would consider to be more appropriate to apply to contracts entered into prior to commencement? If yes, why?

ACA Response

The following reforms should apply to contracts entered into prior to commencement:

- All proposed minimal transitional period reforms (excluding Executive Liability offences)
- Payment claim endorsement
- Miscellaneous adjudication reforms

- Code of Practice for ANAs
- Reducing the threshold for retention money trust requirements (and removal of annual report requirement)

9. Are there specific reforms that you would not support being applied to contracts entered into prior to commencement? If yes, why?

ACA Response

The following reforms should not apply to contracts entered into prior to commencement

- Executive Liability offences
- Progress payments and progress claims
- Due dates
- Inspection of trust records by subcontractors\
- Prescribing information for subcontractors (applies at the time the contract is entered into in any event)

QUESTIONS 10 TO 15 – Proposed Reforms to the Regulation

10. Do you support maintaining a threshold to limit the application of the retention money trust obligations or should it be removed?

ACA Response

Yes, there should be a limit below which retention money trust obligations should not apply. The setting of a limit will avoid significant unnecessary expense for the industry.

11. Do you support reducing the threshold for retention money trust obligations from \$20 million to \$10 million?

ACA Response

Yes, this suggestion is supported and the ACA further submits that if the proposals are to achieve greatest effect the threshold should be much lower as it is the smaller contracts that are the primary area of concern in terms of impact on subcontractors and suppliers..

12. Is there another amount you consider appropriate for the threshold? Why?

ACA Response

The ACA has no comment on this question.

13. Do you support extending the retention money trust obligations to the entire contracting chain and not just limiting the obligation to head contractors?

ACA Response

Extending trust account obligations to the entire contracting chain may have unintended administrative and financial consequences for many entities, in particular smaller subcontractors and suppliers. However, the ACA is of the view that if the legislation is to be fully effective in addressing payment issues it should be extended down the contracting chain and not just be aimed at larger contractors who are more likely to be capable of meeting their responsibilities.

14. Do you support removing the annual reporting requirements in clause 16 of the Regulation?

ACA Response

The ACA does not support the proposal to remove the reporting requirements. Annual reporting will be a small but potentially effective way of maintaining compliance control over contractors.

15. What is an appropriate transitional period to allow for industry to prepare for the proposed changes to the retention money trust obligation?

ACA Response

ACA submits that the transition period should be the same as it has proposed for other provisions ie 1 December 2019.

QUESTIONS 16 TO 18 – Inspection of trust accounts

16. Do you support the inspection of retention money trust account records?

ACA Response

The ACA strongly opposes this proposal. It is both expensive and impractical, administratively complicated, especially where large projects are concerned and there is already a power in the regulator to require information regarding moneys held in a retention trust account.

17. Do you support inspection being subject to an appropriate fee?

ACA Response

If it is determined that subcontractors should have access to trust account information, there should be a fee that equates to full cost recovery by the entity in control of the trust account.

The ACA is concerned that in the absence of an appropriate fee the right to inspect will be open to abuse through vexatious or frivolous applications.

18. Should the Regulations prescribe a maximum fee to be imposed? If yes, what do you think an appropriate maximum fee would be?

ACA Response

There should be no maximum fee prescribed but instead the entity should be able to charge a reasonable fee related to the cost of providing access. Reasonable fees/costs apply in many areas of litigation and are appropriate here if access is to be granted.

QUESTIONS 19 TO 21 – Prescribing Penalty Notice Offences

As a matter of principle, the ACA is concerned about the applicability of offences to individuals and would prefer these not to be implemented. The ACA is also concerned as to the proposals that will apply accessorial or executive liability to all offences under the regulation.

To the extent that they have to be in place, the ACA submits that offences applicable to individuals 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. In other respects, the ACA provides specific comments below on the assumption that the ACA's primary position is not adopted.

19. Do you support the offences listed above being subject to a penalty infringement notice?

ACA Response

The ACA supports this proposal as it will save legal and related costs and is relevant for appropriate offences

20. Do you support the proposed penalty notice amounts for these offences?

ACA Response

The ACA supports the proposed penalty notice amounts

21. Are there any other offences which you consider appropriate for a penalty infringement notice? If yes, what penalty notice amount would you consider appropriate?

ACA Response

The ACA submits that penalty notices would be appropriate to the following:

- a breach of section 36(3)(a) of the Act, being to “refuse or fail to comply with a notice under this section [investigation of compliance with requirements for supporting statements] to the extent that the person is capable of complying with it”; and
- a breach of CI 16(1) of the Regulations being a failure to provide a trust account review report and retention account statement within 3 months after the end of the financial year, provide the Secretary with the following (for more minor breaches, such as being late or the statement not being in the correct form).

A penalty of 10% of the maximum penalties is an appropriate amount for the penalty notices.

QUESTIONS 22 AND 23 – Increased penalty units for offences

22. Do you support increasing the value of the penalty unit for the offences listed above?

ACA Response

Not supported. The increases are significant and in most instances not proportionate to the offence.

23. Do you support the proposed penalty notice amount for these offences?

ACA Response

Not supported. The offences are not of the same seriousness as other offences and the same penalty should not apply to all of the offences.

QUESTIONS 24 TO 27 – Executive Liability Offences

24. Do you support accessorial liability applying to all offences under the Regulation which are capable of being committed by a corporation?

ACA Response

The ACA does not support accessorial liability applying to executives but if it is to apply it should only be applicable to the most serious offences eg failing to hold retention money in a trust account (CI 6), unauthorised withdrawals from a trust account (CI 8(1)), and providing false or misleading information to the Secretary (CI 17).

In addition, relevant time periods should also be amended from “days” to “business days” eg where a bank fee is charged for overdrawing a trust account but this is only discovered after a period of non-work days (e.g. Easter or Christmas) a breach of CI 11 would likely occur. The relevant time periods need to reflect the business reality. This amendment is particularly important if accessorial liability is to be imposed.

25. Do you support executive liability applying to the offences listed above?

ACA Response

No, the ACA submits that only the most serious should be executive liability offences, such as failing to hold retention money in a trust account (CI 6), unauthorised withdrawals from a trust account (CI 8(1)), or providing false or misleading information (CI 17). Again, the relevant time periods need to be amended from “days” to “business days”. This amendment is particularly important if executive liability is to be imposed.

26. Are there any other offences in the Regulation which you consider executive liability should apply to?

ACA Response

There are no other offences that executive liability should apply to.

27. Do you support the proposed penalty unit amounts listed above for these offences?

ACA Response

Not supported. The ACA submits that the penalty units are significant and generally not proportionate to the offence (i.e. given many offences are likely to be more administrative in nature). The ACA position is that lower penalty units are appropriate.

The ACA would be pleased to further discuss its responses with Government. Should further input be required, please contact the ACA Executive director, Lindsay Le Compte on (02) 94665522 or by email lindsay.lecompte@constructors.com.au