



OUT19/1089

Mr John Tansey
Executive Director, Regulatory Policy
Better Regulation Division (BRD)
Department of Finance, Services and Innovation (DFSI)
Locked Bag 2906
LISAROW NSW 2252

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

Dear Mr Tansey

Security of Payment Reforms: Implementation

Thank you for giving the Office of the NSW Small Business Commissioner (OSBC) the opportunity to comment on the *Security of Payment Reforms – Implementation Options Paper – December 2018*.

The OSBC advocates on behalf of small businesses in NSW, provides mediation and dispute resolution services, and speaks up for small business in government. The OSBC has been advocating for changes to the *Building and Construction Industry Security of Payment Act 1999* (SOPA) since 2013. More recently in 2018, the OSBC led a review into the circumstances surrounding the decision by Ostwald Brothers to enter into voluntary administration while engaged on the Wave 5A section of the Woolgoolga to Ballina Pacific Highway upgrade, which left 23 sub-subcontractors unpaid a total of \$7 million. As part of that review, the OSBC found instances where SOPA continued to be unaffordable and inaccessible for many small businesses.

Please see the OSBC's comments concerning the focus questions on the discussion paper below:

Reforms commenced with minimal transitional period - When could these reforms commence?

Question 1:

- The OSBC is of the view that reforms which have been identified as not requiring either subordinate legislation or significant preparation time by industry stakeholders should commence as soon as practicable. A later start date would only delay meaningful change in the sector.
- The key to these reforms and all those that follow, will be a strong and targeted education campaign to ensure that all businesses in the contracting chain are aware of the reforms and what their obligations and rights are under them. Education needs to start immediately and continue on an ongoing basis. Any delay in the roll out of reforms should not push back targeted education campaigns. The OSBC has been heavily involved in improving subcontractor education ensuring that the SOPA Act becomes more accessible to those most vulnerable. The OSBC is also currently working with NSW Government Roads and Maritime Services to pilot a new approach to onboarding subcontractors on Government infrastructure

projects. As such, we would welcome the opportunity to assist DFSI in educating those up and down the chain regarding these new reforms.

- We are also keen to understand how these reforms will be communicated. We want to ensure that the cost of these reforms is not going to disproportionately impact small businesses and hence are keen to understand what safeguards are in place to ensure that costs are not passed down the supply chain.

Question 2:

- Nil comment.

Reforms with a transitional period - When could these reforms commence?

Questions 3:

- The OSBC agrees with the proposed preferred option of a commencement date of 1 June 2019 for the reforms which have been identified as likely to have a direct impact on industry practices and where it would be appropriate to provide preparation time before commencement.

Questions 4:

- Any start date later than 1 June 2019 for these reforms would be opposed. As the Collins Inquiry noted, payment practices in the industry are often late, delayed or reduced payments. Throughout 2018, in our discussions with various adversely affected subcontractors, the OSBC has been told that payment is often made up to three months, or in some cases longer, in arrears. In the event of an insolvency, this means small subcontractors are often left unpaid.

Reforms requiring subordinate legislation before commencement - When could these reforms commence?

Questions 5-6:

- The OSBC is keen to ensure that these reforms start as soon as practicable and definitely no later than the proposed proclamation and commencement dates. The OSBC has multiple constituents who raise issues with non-payment in the construction industry each month.

Application of amendments - Questions for comment.

Question 7:

- The OSBC supports the reforms only applying to a construction contract entered into after commencement. This will save small businesses time and expense dedicated to amending contracts retrospectively to align with legislation that has entered into effect after the project has commenced.

Question 8:

- Despite the above comment, the OSBC is of the opinion that in the event that there are specific reforms that are to apply to contracts entered into prior to commencement (rather than all reforms) they would include the reforms outlined relating to the following:

- Prohibiting a corporation in liquidation from serving or enforcing a payment claim (clause 33)
- Extending circumstances for releasing withheld money (clause 22)
- Progress payments, payment claims and due dates (sections 8 and 13)

All of the above reforms relate to cash flow. Point 8 of the 'NSW Government Action Plan: A Ten Point Commitment to the Construction Sector' is specifically aimed at improving the security and timeliness of contract payments improve cash flow, particularly for smaller subcontractors. Cash flow for small businesses, particularly in this sector is critical. Reforms need to be enacted immediately to ensure subcontractors have access to their cash flow, particularly given the increase of work in this market. By providing subcontractors with more timely payments, it will better enable them to manage their own cash flow.

Question 9:

- Nil comment.

Proposed reforms to the Regulation. Reducing the threshold for retention money trust requirements - Questions for comment.

Question 10:

- The OSBC agrees with the Commonwealth commissioned review into building and construction insolvency conducted by John Murray AM, 'Review of Security of Payment Laws' (the Murray Review) that the trust arrangements must cascade to all parts of the contractual payment chain for construction projects over \$1 million. The overall construction project value must be the only threshold that is applied. That is, trust arrangements must cascade to all parties down the supply chain regardless of the value of the individual construction contracts between parties.

Question 11:

- As above, the OSBC believes that the threshold for retention money trust obligations should be obligatory for all construction projects over \$1 million.

Question 12:

- The OSBC recommends that a contract value threshold of a \$100,000 floor is applied so that all contracts below this value are exempt from the trust framework. This amount will strike balance between implementation costs and benefits to subcontractors.

Question 13:

- As above, the OSBC supports extending the retention money trust obligations to the entire contracting chain and not just limiting the obligation to head contractors, with all contracts below \$100,000 excluded from the obligation.

Question 14:

- The OSBC does not support removing the annual reporting requirements in clause 16 of the Regulation. A robust compliance and enforcement framework needs to support a trust model. The OSBC believes anything less will still risk the trust

accounts being treated by trustees as their own capital. A robust compliance and enforcement framework would require adherence to and application of basic accounting practices to ensure that transactions are recorded and can be reported on at any time to have a proper view of the cash position, and to detect and prevent fraudulent activity. As such the OSBC believes that there should not be any additional management costs or regulatory burden because the business is simply accounting for transactions, reconciling accounts and generating reports - which has to be done no matter which model you apply. Any alternative such as a statutory declaration, will quite simply not work. This has been confirmed time and time again, notably in the NSW Government commissioned Independent Inquiry into Construction Industry Insolvency chaired by Bruce Collins QC (the Collins Inquiry), which highlighted that the provision of false or misleading statutory declarations is widespread across the construction industry.

- NSW Fair Trading must have the appropriate resources and enforcement powers to ensure compliance in the industry. More information is needed about the increased powers they will have, the resources they will be given to carry out this task, and how their auditing process will work.

Question 15:

- The OSBC is unable to propose an appropriate transition period to allow industry to prepare for the proposed changes to the retention money trust obligation without the transparency of what the trust model will look like – how the trust framework will operate needs clarifying. However, the OSBC is of the strong view that only a trust model will ensure subcontractors are paid for the work they complete and as such, this needs to be implemented as soon as practicable. The OSBC would propose that a targeted and well-funded ongoing education campaign will need to pre-empt any transition to allow industry to fully prepare. The OSBC is uniquely placed given our recent track record in this sector to assist in delivering this education piece.

Proposed reforms to the Regulation. Inspection of trust account records.

Questions 16:

- The OSBC supports the proposed reform allowing for the inspection of retention money trust accounts.

Questions 17:

- The OSBC opposes any fee being placed on small business. A fee will only operate as another barrier to small businesses being paid for the work they do.

Questions 18:

- Despite the above comment, if a fee were to be introduced, the OSBC is of the view that the maximum fee should be minimal and operate on a cost recovery basis only without any profit being realised for the service. The fee should not be prohibitive and should ensure accessibility.

Proposed reforms to the Regulation. Prescribing penalty notice offences.

Question 19:

- The OSBC is of the view that a range of penalties, including criminal offences, need to be considered as part of the compliance and enforcement framework to ensure compliance and as such is supportive of penalty infringement notices being introduced for the listed offences. The OSBC would like to point out that there will be instances where a Head Contractor role is held by a small business, and as such would like to emphasise that the fine should commensurate to the size of the contract. The focus has to be on behavioral change and not revenue. A strong, well-funded and targeted education campaign is vital in achieving lasting behavioral change.

Questions 20:

- The OSBC is of the view that the ceiling for the offences for corporations needs to commensurate with the contract value to ensure that the amount is an effective deterrent to the commission of the offence.

Questions 21:

- Nil comment.

Proposed reforms to the Regulation. Increased penalty units for offences.

Questions 22-23:

- The OSBC supports increasing the value of the penalty unit for the listed offences as long as there is strong evidence and modelling that doing so correlates with compliance and offers a more effective deterrent to the commission of the offence. This again has to be supported through an education campaign, with a governance model that ensures compliance.

Proposed reforms to the Regulation. Executive Liability offences.

Question 24:

- The OSBC supports the proposal to apply accessorial liability to all offences under the Regulation which are capable of being committed by a corporation.

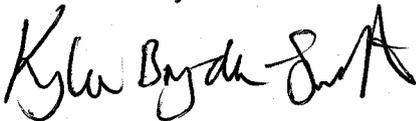
Question 25:

- The OSBC supports the proposal to apply executive liability to directors and officers for all offences listed above.

Question 26-27:

- Nil comment.

Yours sincerely



Kylie Bryden-Smith

Acting NSW Small Business Commissioner

29 January 2019