

Our Ref: RDR
Your Ref:



18 January 2019

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

Security of Payment Reforms: Implementation
Regulatory Policy, BRD
Department of Finance, Services and Innovation
Locked Bag 2906
LISAROW NSW 2252

Dear Sir or Madam

Submissions re Security of Payment Reforms

I write to provide submissions in response to the questions in '*Security of Payment Reforms – Implementation (Options Paper - December 2018)*'.

COMMENCEMENT OPTIONS

Reforms commenced with minimal transitional period

Questions	Response
Q1. Is the proposed start date for these reforms feasible?	Yes, other than the item specified in Q2 below.
Q2. Are there reasons why these reforms should start later?	The executive liability offences expose company officers to very high personal liabilities. I greatly doubt the message about this new personal financial exposure has been effectively disseminated or indeed communicated much at all. Time should, I submit, be permitted for education before the company officers are "thrown to the lions".

Reforms with a transitional period

Questions	Response
Q3. Is the proposed start date for these reforms feasible?	Feasible yes, but an individual analysis discloses that it is not necessary to delay the commencement of all the subject amendments.

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Q4. Are there reasons why these reforms should start earlier or later?

Progress payments and payment claims

Most amendments are straightforward and can be easily by accommodated. Provided there is sufficient education and notification, **31 March 2019** would be appropriate.

Due dates

Many contracts have adopted previous maximum period (i.e. 30 business days). Sufficient time will be needed to communicate the new requirements, so that new contracts are consistent with the amended Act.

Further, this change should only apply to contracts entered into upon the commencement date. Failing that the change is in a relevant respect retrospective, which is uncommercial, disruptive and unfair.

Payment claim endorsement

This will require education, to ensure stakeholders access the Act's provisions in respect of payment claims and rapid adjudication, whilst the change is minor, its impact is quite significant. A postponed commencement date for education seems appropriate.

Miscellaneous adjudication reforms

The reforms by paragraphs [17] - [20] of Schedule 1 to the amending act could be commenced **immediately** as they mainly impact parties that should already be aware of the proposed changes.

Transitional arrangements in respect of the new time period to complete the adjudication application, paragraph [18] of Schedule 1 to the amending act, will need to be crystal clear as to whether it applies to applications already lodged (or accepted by the nominated adjudicator).

Reforms requiring subordinate legislation before commencement

Questions	Response
Q5. Is the proposed start date for these reforms feasible?	Yes.
Q6. Are there reasons why these reforms should start earlier or later?	No.

Application of amendments

Questions	Response
Q7. Do you support the reforms only applying to a construction contract entered into after commencement?	Yes, but only in respect of due dates for payment.
Q8. Are there specific reforms which you would consider to be more appropriate to apply to contracts entered into prior to commencement? If yes, why?	Those reforms by paragraph [9] – [12] of the Schedule to the amending act to section 13 of the <i>Building and Construction Industry Security of Payment Act 1999</i> (NSW) could be commenced on 31 March 2019, provided that there is sufficient education and notification.
Q9. Are there specific reforms that you would not support being applied to contracts entered into prior to commencement? If yes, why?	I do not support those reforms of payment period by clause 7 of the Bill to be applied to the contract entered into prior to the proposed commencement date, as discussed in my submissions above in response to the questions 4, in particular, in relation to 'Due dates'.

PROPOSED REFORMS TO THE REGULATION

Questions	Response
Q10. Do you support maintaining a threshold to limit the application of the retention money trust obligations or should it be removed?	I support maintaining a threshold to limit the application of the retention money trust obligation, provided the threshold for retention money is reduced to \$100,000. \$10,000,000 is far too high, by orders of magnitude, to deliver on the potential benefits for the vast majority of contractors.
Q11. Do you support reducing the threshold for retention money trust obligations from \$20 million to \$10 million?	Yes, but would prefer much lower, i.e. \$100,000.
Q12. Is there another amount	\$100,000, thus permitting most contractors to stand to

you consider appropriate for the threshold? Why?	benefit from the requirement.
Q13. Do you support extending the retention money trust obligations to the entire contracting chain and not limiting the obligation to head contractors?	Yes. The requirement for a trust account is quite straightforward. The regulation is light touch.
Q14. Do you support removing the annual reporting requirements in clause 16 of the Regulation?	Yes.
Q15. What is an appropriate transitional period to allow for industry to prepare for the proposed changes to the retention money trust obligation?	Commence on 1 July 2019, but only in respect of contracts entered into on and from that date, allowing ample time for education and not cutting across arrangements/contracts already entered in to.
Q16. Do you support the inspection of retention money trust account records?	Yes.
Q17. Do you support inspection being subject to an appropriate fee?	Yes.
Q18. Should the Regulations prescribe a maximum fee to be imposed? If yes, what do you think an appropriate maximum fee would be?	Yes. \$200. Failure to specify a maximum will lead to exorbitant amounts being claimed, in effect preventing contractors from such inspections, like law firms costs for producing client documents in response to subpoenas.
Q19. Do you support the offences listed above being subject to a penalty infringement notice?	Yes.
Q20. Do you support the proposed penalty notice amounts for these offences?	Yes
Q21. Are there other offences which you consider appropriate	No

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for a penalty infringement notice? If yes, what penalty notice amount would you consider appropriate?	
Q22. Do you support increasing the value of penalty unit for the offences listed above?	Yes, but my submission is that the 500% difference between personal and corporate penalties is excessive.
Q23. Do you support the proposed penalty notice amount for these offences?	Yes.
Q24. Do you support accessorial liability applying to all offences under the Regulation which are capable of being committed by a corporation?	Yes
Q25. Do you support executive liability applying to the offences listed above?	Yes
Q26. Are there any other offences in the Regulation which you consider executive liability should apply to?	No
Q27. Do you support the proposed penalty unit amounts listed above for these offences?	S26A,B, D and (5) is way too low at \$110. Such a low penalty will not encourage compliance (or ever be prosecuted). It is immaterial. I submit that it should be made a material amount, say \$1,100 for all.

Yours sincerely

Robert Riddell

Partner