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Workshop 2 – CCF WA written comment.

Introducing a Demerit Point System and other sanctions to improve behaviour in the industry

Overview

CCF WA believes it is important to point out that the reforms proposed in this section will not satisfactorily address late payment issues in the building and construction industry. Any changes to the *Building Services (Registration) Act 2011* (BSR Act) can only affect companies that are registered builders. While any action is of course better than none, we are concerned that there will be an attitude within government of 'mission accomplished' if BSR Act reforms are implemented.

While some recent high-profile failures by building companies have grabbed the headlines, the problem of late payments is much more widespread. As the industry group representing civil construction, CCF WA knows of numerous civil contractors and suppliers financially affected by a recent spate of company failures in our sector. Many of those affected companies were subcontracting on government projects.

Rather than focusing on narrow reforms that will only affect a portion of the industry, we recommend the Government leverage its market power as the State's major procurer of building and construction services. The first concern for Government should be that subcontractors are getting paid on Government projects. This can be achieved through reforms such as:

- Mandating a fair, standardised subcontract on government projects
- Ensuring all head contractors and subcontractors have the financial capacity to pay their subcontractors
- Ensuring all subcontractors and sub-subcontractors on government projects are paid on time, with penalties for non-compliance.



We acknowledge that such reforms would require great political will, as they would involve multiple departments and agencies, as opposed to the BSR Act reforms that can be implemented by DMIRS. However, if the Government is serious about security of payment reform, it must tackle the issue from a whole-of-government perspective and attempt reform to the whole-of-contracting chain, across all construction trades and sectors.

A potential platform for wide-ranging reform already exists in the form of the *Building and Construction Industry Code of Conduct 2016*, which already contains some security of payment and contract requirements – although they don't appear to be widely monitored or enforced (when subcontractors approach government agencies alleging unfair contracts or payment issues, they are usually told that the agency's hands are tied when it comes to how the head contractor manages its subcontractors and sub-subcontractors).

Another potential platform would be the proposed Procurement Act, a recommendation of the Special Inquiry into Government Programs and Projects (Langouland Inquiry). The inquiry noted that

The lack of central leadership and the presence of multiple Acts for construction of public works has caused fragmentation and leads to inefficiency and duplication. The framework does not provide optimal support for the Government's commitment to maximising local content, providing opportunities for jobs on government projects, supporting small and medium businesses and Aboriginal businesses.

A Procurement Act could also provide optimal support for the Government's commitment to security of payment for subcontractors.

It is important to note that any security of payment reforms via the *Building and Construction Industry Code of Conduct 2016* or a new Procurement Act could apply to contractors while doing both State Government work and private projects – so the influence of the reforms would spread broadly across the whole sector, through private and public works by all companies involved in construction, not just registered builders.

(1) Do you think that there is a need for reforms to the current registration framework to impose standards for the appropriate and timely payment of debts owed under contracts? If not, why not?

See above – broader reforms are needed.



(2) Do you support the SERC Inquiry Report recommendation for a statutory offence to sanction those who engage in behaviour to intimidate, coerce or threaten another person against using security of payment legislation? If not, why not?

Yes, CCF supports this recommendation

(3) If such an offence is introduced in WA, do you support Option 2 or 3, or both Option 2 and 3, or an alternative option?

Option 3 – Options 2 and 4 will have limited effect as will only apply to builders.

(4) Do you support the BSB having the powers to take action against building contractors that fail to pay a debt ordered by a court, or an adjudicator under the CCA? If not, why not?

As mentioned in our submission to Workshop 1, CCF WA believes the current process for enforcing determinations (Division 5, s42-43) is too complex and onerous. A simpler, stronger process, with strong penalties for delayed compliance, is needed to ensure adjudicators' determinations are paid promptly. However, this process must be industry wide, not through the BSR Act.

(5) Should the BSB have the power to take action against all building service contractors (i.e. building, painting, plumbing and building surveyor contractors)?

If reforms are proposed that will give the BSB more powers, those powers should of course apply to all contractors within the BSB's remit. A non-payer is a non-payer, whether a licensed builder or a licensed plumber.

(7) Under Option 4 and 5, should the BSB discontinue any action if the debt is subsequently paid?

No, late payment should be the trigger.

(8) Do you support the introduction of a demerit point system for building contractors as contemplated in Option 5? If not, why not? What, if any, benefits or costs to you foresee?

We do not support any measures that will target just one sector of the industry. Even within the building sector there are different "tiers" of builder that need to be considered to confirm that any action treats all builders equitably. The Government should focus on broad-based reforms, particularly those that do not require regulation but leverage its influence as a major client for the industry.



Banning persons with a history of insolvency or bankruptcy

(1) Do you support the exclusion of a company or an individual from the building and construction industry in circumstances where:

- a. In the case of a company - its officers have previously been involved in the management of a company, which has experienced an event of insolvency?*
- b. In the case of an individual - the individual has experienced a personal bankruptcy, or was an officer of a company which experienced an event of insolvency?*

Any reforms that involve action by the BSB cannot achieve “exclusion of a company or an individual from the building and construction industry”. If a company is denied registration as a builder, it is not excluded from the building and construction industry – it is excluded from becoming a registered builder. This is an important distinction, but we are concerned it is a distinction that is too easily overlooked, especially when contemplating reforms through the narrow prism of builders registration legislation.

Notwithstanding these concerns, any move to exclude persons/companies with a proven history of phoenixing, leaving creditors in their wake, would be beneficial.

(2) Further to Question 1(a) above, should the exclusion also apply where the company entered into a Deed of Company Arrangement with its creditors?

This should be at the regulator’s discretion, taking into account the circumstances.

(4) If the BSB were to be given the powers in Question 1:

- a. should the BSB still have the discretion as to whether to register or renew the registration of an applicant, or should the BSB be prohibited outright from granting the registration or renewal?*
- b. should the relevant event that triggers the exclusion – that of bankruptcy or insolvency, be limited to bankruptcy or insolvency in connection with the running of a construction business, or should it be any business at all?*
- c. should the exclusion be confined to applicants for the grant or renewal of building contractor registration, or should it also be applied in relation to the other occupations that the BSB registers – painting contractors, building surveying contractors, and plumbing contractors?*

We support the BSB having discretionary powers in these situations. Those powers should of course apply to all contractors within the BSB’s remit.



(5) How long after the bankruptcy or insolvency event occurred should a new registration be refused by the BSB?

We support the BSB having discretionary powers.

(6) Should the BSB have the power to permanently deny registration where the same individual or officer has been involved in two or more failed businesses, within a short period of time?

While permanent de-registration is a drastic measure, we support the BSB having this discretion in extreme circumstances.

Improving business skills in the industry

(1) Do you agree with the proposition that there is a need to improving the level of business skills of participants in the building and construction industry? If not, why not?

CCF WA agrees there is a need to improve skills among SMEs in construction.

(2) If a voluntary or mandatory education program was to be introduced, what topics would be of the most benefit for building contractors? And for sub-contractors? (e.g. business planning, management account, risk analysis and management, and business law)

To address security of payments issues, the skills that most need addressing are estimating (i.e. calculating project costs and tendering) and contract administration.

(3) If mandatory business education requirements were to be imposed, should these requirements apply to all registered building contractors renewing their building contractor registration, or only to new applicants for building contractor registration?

As described in the overview to our submission, any mandatory requirements for registered builders will address only part of the issue – a point reinforced by the Building Commission data showing only 12 of the 218 insolvencies in the WA construction industry were in respect of registered building contractors.

The Government can have more wide-reaching effect on improving business education by mandating minimum requirements for all subcontractors on Government projects. We note that the Government already places prescriptive



requirements on companies as part of the *WA Building and Construction Industry Code of Conduct 2016* around areas such as safety planning and workplace relations.

(4) What benefits/costs do you foresee if mandatory business education requirements were to be imposed?

We are not convinced that mandatory business education requirements will be effective. If person have to be forced to undergo training, they may be unlikely to benefit. However, we believe voluntary schemes should be available, subsidised by Government (e.g. through the Construction Training Fund).

We again recommend the Government make greater use of its influence as a client – for example, rather than trying to force subcontractors to learn how to interpret complex contracts, it would be more effective to ensure contracts are simpler and fairer.

Please don't hesitate to contact CCF WA Member Services Manager Andy Graham on agraham@ccfwa.com.au for more information or to arrange a meeting to discuss any issues raised. CCF WA looks forward to participating in future workshops and contributing to much-needed reform in this area.

Yours sincerely,

Jeff Miller
Chief Executive Officer (WA)