MASTER ELECTRICIANS AUSTRALIA

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Discussion Paper 3

Security of payment reform

Response August 2018

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is www.masterelectricians.com.au .

Master Electricians appreciates the opportunity to comment on the discussion paper for proposed changes to the Security of Payment Reforms. Master Electricians, in reviewing the document, has done so based on the experience of what an electrical contractor and/or consumer may experience.

Master Electricians has contributed to a number of reviews and reports concerning security of payment and we agree with the discussion paper's premise for change and agree with the historical difficulties and problems still facing the industry.

(1) Do you support the adoption of the statutory right to progress payment?

Yes. However we do realise that in some contracts milestones are the preferred method of progress payment. MEA believes that there should be a statutory right to payment based on either progress or milestone however characterized.

(2) Do you support the ability to recover an unpaid portion of a claimed amount as a statutory debt if a principal fails to issue a payment schedule?

Yes MEA would support a system whereby a principal who does not issue a payment schedule after receiving a payment claim and provides no details as to why the payment has not been forthcoming should be required to pay the debt claimed. This process we envisage will reduce the times subcontractors are not informed concerning the reasons as to why a full claim has not been paid and allows a subcontractor to adjust their cash flow and consider options in relation to challenging the non payment. Principals should not simply be able to be a wall of silence and non payment.

(3) Do you support removing the exemption for the fabrication and assembly of plant for mining activities?

MEA does not support a continuation of the Mining industry exemption. Whilst we recognise that this sector generally are not regarded as large defaulters on payments we do have anecdotal evidence that payment terms continue to stretch and reduce cashflow for members and their businesses.

(4) Do you support barring claimants who have carried out unlicensed work from using security of payment laws to recover outstanding payments?

MEA doe not support a blanket barring of total claims that involve some portion of unlicensed work. MEA does support licensed work carried out by a licensed subcontractor should be able to claim all relevant work. If an adjudicator or court find work within a claim or contract not to be within the subcontractors license, the claim should be adjudicated on the basis of licensed

work only and that unlicensed work costs and repatriation is excluded from the claim and ealt with by the parties through other avenues.

(5) Do you support the maximum due date for payment of claims being set at 25 business days (i.e. 5 weeks)? If not, why not?

Yes MEA would support 25 Business days

(6) Do you support the ability of a contractor to make a claim under the construction contract every month, or more frequently if provided under the contract?

Yes MEA does strongly support claims every month

(7) Do you support the proposal under the Murray Model that payment claims must be endorsed and be accompanied by a supporting statement?

Yes MEA does support that claims are endorsed. However the form and function of that endorsement is an important issue. MEA would say that currently under the NSW and proposed Qld Acts that a formal endorsement / statement identifying it as a payment claim under the relevant act should not necessitate or be a barrier for claiming funds. Properly presented invoice and statement of claim should suffice.

(8) Will introducing a statutory requirement to serve a payment schedule be effective in speeding up the payment process?

It is the view of MEA that, simply requiring a payment schedule to be served may not actually achieve a “speeding up” of the claim however what it will provide is an early indication of the company willingness to pay and or identify for the subcontractor what effect that decision will have on their cash flow allowing them to make arrangements if necessary to cover costs for employees and suppliers

(9) What impact will the payment schedule requirements have on you and your members, in terms of costs of preparing them and any other impact?

MEA and member feedback indicates that there will be minimal costs and or impact for members and that it will assist as outlined in question 8

(10) Is a maximum period of 10 business days to serve a payment schedule reasonable? What length of time would you propose?

MEA would say 10 days is reasonable.

(11) Is it fair that a claimant be entitled to commence an adjudication process or recover unpaid payment claims through the courts if a payment schedule is not provided or the scheduled amount is not paid by the due date for payment?

MEA agrees that claimants should have the right/opportunity to commence an adjudication. The adjudication can be withdrawn or not commenced if the principal/builder remains in contact and provides reasons to the subcontractor. Principals not providing reason or any indication as to if and when subcontractors are going to get paid is a significant issue and a primary reason the all governments across the country recognise that stricter and more enforceable processes are required.

(12) Will introducing these consequences under the Murray Model speed up the payment process?

MEA is of the view that that the whole suite of Murray review changes including ability to initiate action if payment schedules are not served will speed up payments as dispute will no longer be delayed due to one party being uninformed about the state of the payment claim. It will allow earlier adjudication of claims and likely for smaller amounts.

(13) What effect would the existence of these consequences have on respondents – would it incentivize them to pay where there is no genuine dispute of the claim? Would it induce respondents to pay (even where they dispute the claim) out of fear of an adjudication process or court proceeding?

It has been apparent to industry and Governments at all levels that unless there is consequence to a lack of action then respondents are likely to delay and utilize unfair market pressure on to smaller less equipped companies. MEA believes that there is a higher incentive to pay where there is no genuine dispute.

(14) Is it fair to require a respondent to a payment dispute to only respond with reasons that were articulated to the claimant in the payment schedule? If 'no', what would you propose as an alternative?

Is it "fair" for subcontractors to be told a list of reasons why payment is withheld only to be faced with further reasons unannounced until an adjudication has begun? The work is done or its not done, the reason for non-payment should not materially change between payment schedule and adjudication. An adjudicator is making a decision concerning the state of work in most cases two months or later; new reasons should not be introduced just because solicitors get involved in the process.

(15) Do you support the proposed role of appointors/ANAs under the Murray Model?

MEA believes that the regulator should take a more active role in the appointment and education of adjudicators. The QBCC model of acting as a registrar for adjudication matters allows the regulator to ensure no real or perceived bias between which adjudicators or ANA are selected. It also ensures that results and education and standards can be maintained.

The current system of industry based ANA private appointers creates a perception of bias and undermines the trust within the system.

(16) Do you support the timeframes for making an application for adjudication being:

a. 10 business days where amount in payment schedule is less than the amount claimed?

b. 20 business days where amount in payment schedule is not paid?

c. 15 business days where no payment schedule issued?

MEA would support that all three business day conditions should be the same. It is our view that under the three examples given that 20 business days should be considered.

(17) Do you support limiting the circumstances where parties can agree on an adjudicator, in the manner outlined in the Murray Model?

MEA does support the Murray model again on a basis that Principals will use their market power differential to force or coerce subcontractors into approving a certain adjudicator. Examining the previously mention QBCC model this model then removes this as an issue because it is a power not available to the parties to negotiate on as it is up to the registrar to appoint an adjudicator

(18) Do you support the right of a party, in some circumstances, to be allowed to apply to a senior adjudicator for a review? What benefits/costs might this impose? How should a 'senior adjudicator' be defined?

MEA does not support the right to review with another "Senior" adjudicator. Error occurring may well be in the area of jurisdiction or law however if the adjudication education nomination and selection process is sound then competence should not be an issue. If parties want to challenge the result, then they have the usual ability to access relevant courts and argue utilizing their rights under contract law. MEA may support a process of further adjudication review if narrow terms of referral are set as to quantum of the award rather than the whole adjudication reasoning or grounds argued on or some form of jurisdiction argument. Again the Qld model of a Regulated Registrar appointing and setting education standards for adjudicators goes some way to reduce these occurrences in our view

(19) Do you support the right for a claimant to suspend works for non-payment where a payment schedule is not provided or the amount stated in a payment schedule is not paid?

MEA yes does support the right of a claimant to stop work. Stopping work and not incurring further expense is necessary. Previous reviews and our members regularly detail to us examples where disputes involving non payment are not identified or resolved, and result in contracts terminated for convenience with no further reference dates available meaning all work after the dispute started is not paid for and in many cases can't be claimed. The absences of a payment schedule allows a subcontractor to minimise losses and ensure any money received is not seen as a preferential payment in the event of a liquidation. The ability to address the balance of power by withholding work and not being subject to liquidated damages is a powerful tool to offset the current power imbalance between builders and subcontractors.

(20) What impact would these rights have on your organisation or members?

MEA believes these changes will assist members reduce losses and improve cashflow and certainty in business

(21) Do you support the right for a claimant (who has made an application for adjudication) to serve the principal with a payment withholding request to require them to withhold money owed to the respondent (i.e. the party against whom the adjudication application has been brought)?

MEA would support this action if there is not another way of securing funds via Project Bank Accounts or Construction trusts. This option would be as a last resort if there was no other way to secure payment. It is clumsy and has the potential to cause further friction between Client Principal and subcontractor. This form of action is required when Principals do not inform subcontractors about when payment will be made or no payment is received. It would be a measure of last resort and one that few of any subcontractors would undertake due to the seriousness and reputational / relationship risk that such an action would most likely result in

(22) Do you think the new rights may affect the ability of head contractors to obtain finance?

Given that the above rights refer to a subcontractor taking action upon non payment it is doubtful that this would result in a risk profile from a bank leading to the non funding of project based on these conditions alone. Banks may well take into account disputation history as an indicator of past performance and future risk. Finance is based on a full assessment of risk and in most cases this risk is assessed even before subcontractors are selected so again limiting available information for a bank to assess.

(23) How likely would it be for subcontractors and suppliers to exercise the right to issue a payment withholding request?

As previously stated it would be a measure of last resort and one that few if any subcontractors would undertake due to the seriousness and reputational / relationship risk that such an action would most likely result in

(24) Do you support the Building Commission developing and enforcing a grading policy for adjudicators?

MEA agrees that to remain an adjudicator a number of assessments should be undertaken. This assessment may consider:

- Qualifications (industry and adjudication related)
- Experience (industry and adjudication)
- Knowledge
- Performance (includes workload, recency of experience, meeting regulatory deadlines, following procedural requirements history)
- Continuous professional development undertaken
- Fit and proper person test

In addition, checks as to CPD and experience and performance should be undertaken periodically to confirm that Adjudicators remain relevant and up to date with changes in case law and related impacts on decisions.

(25) Do you support the Building Commission implementing a yellow card / red card system for adjudicators?

Adjudicators should be evaluated however without further detail regarding a yellow card/ red card system it is difficult to consider. MEA, as previously stated, supports Adjudicators being assessed against the unexhaustive list below

- Qualifications (industry and adjudication related)
- Experience (industry and adjudication)
- Knowledge
- Performance (includes workload, recency of experience, meeting regulatory deadlines, following procedural requirements history)
- Continuous professional development undertaken
- Fit and proper person test

Failing one or more of these should/would remove an Adjudicators ability to conduct adjudications

(25) Do you support specifically allowing electronic service of all notices under a contract? Would you support a power to prescribe other methods of service to account for changes in technology?

MEA supports electronic service. It is important that the Western Australia legislation meets today business practices. Many contracts stipulate how service is done for progress payments using proprietary software and portals. It is usually the Principal that determines these arrangements and as such service should also be able to be completed through the same services.

(26) Do you support reporting requirements for ANAs/Appointors? What costs may this reporting impose on ANAs/Appointors?

As previously stated we believe the regulator should be more involved in the supervising of the system including the performance or otherwise of adjudicators

(27) Do you support the prohibition on unreasonable time-bars as outlined in the Murray Model? Do you have any concerns with the way it may operate in practice? If so, please specify.

MEA does support the banning of unreasonable time bars. In relation to unreasonable time bars we see that through education of Adjudicators and relevant decision in other jurisdictions adjudicators can learn the assessment of what makes an unreasonable time bar. Certainly if an adjudicator make a decisions to award a claim on declaring the time bar unreasonable this would be appealable as a jurisdictional error and as such will be subject to a higher court. This collection of decisions will help inform adjudicators. Whilst this may be a new developing area of law for adjudicators it is not a new law for general unfair contract terms. We believe that WA Crown Law should be able to provide guidance on current case law to assist in the implementation of this area for adjudicators.

VARIATIONS

(1) Which option(s) do you support? And why?

The issue concerning variations is complex and the ability to give a full position will very much depend on the wording of relevant legislation. However we do believe that the current system is not working as well as it could and as such out of the options presented MEA would support that all variations should be in writing.

We believe to “do nothing” is not appropriate and we also see that variations of costs and penalty system as suggested without appropriate example wording would be difficult to support at this early stage

(2) With regard to the option(s) you support, are there any additional advantages you feel need to be noted?

No

(3) Which option(s) do you oppose? And why?

MEA would not support option one, but as stated may consider options 3 and 4 should an appropriate model be found or suggested by another party.

(4) With regard to the option(s) you oppose, are there any additional disadvantages you feel need to be noted?

(5) With regard to the option(s) you oppose, are there any alternative formulation you would support?

Part IV – Simplifying and standardising construction contracts by mandating minimum documentation requirements

1. Do you support the proposition that all, or certain terms and conditions, of a construction contract should be reduced to written form? – if yes/no, why?

MEA does not support that all contracts must be reduced to written form. The area of contract law is well developed and the jurisprudence on the area is reasonably well understood. This includes that even verbal agreement can contain the elements of contract being offer consideration and acceptance. To nullify a contract for either party simply because it is not in writing will disadvantage all parties at different times. Whilst the aim to increase understanding and education of contracts is warranted in the industry a one size fits all approach in this area would not be achievable.

MEA would however support that written contracts should be entered where a certain value of work is reached. We would support this being set at a contract value for a project.

2. If 'yes' to Question 1:

a. for what type of works, and at what value, should the construction contract be in writing?
b. what terms and conditions of the construction contract should be in writing at a minimum?
c. how should a requirement for construction contracts to be put in writing be implemented?

a) All Commercial, Industrial, Mining and Civil Construction work over the value of $150,000

b) Nature of contract, Scope of works, Value, Retention, Service, Insurance, Subcontracting, Protection of People and Property, Liability, Latent conditions, Site issues, Testing commissioning, Commencement and completion, Delays / Extension of Time, Defects, Variations, Disputes, technical specification, design drawings, interpretation.

c) Given that this will target the smaller end of the industry where it is more common that contracts do not exist we believe a trial period in a distinct sector be undertaken and evaluated in the first instance. It would apply to contracts made after a certain date and not interfere with current projects or works in progress.

3. If 'yes' to Question 1, what should be the consequence of non-compliance with a statutory requirement for the contract to be in writing – for example, should the contract be unenforceable, or should non-compliance attract a civil penalty but without any ramifications for the enforceability of the contract?

A significant civil penalty should apply, and that penalty should then also contribute to any demerit point system for Builders to maintain their license etc. The civil penalty should be such that it is a significant value possibly reflected by the value of the work to be undertaken. Values can be done on a trade by trade basis up to and including the total cost of the project.

Given the vast jurisprudence on contracts we don't believe that a verbal agreement should be null and void simply because it was verbally established. We do believe the existing precedence in law is robust to adjudicate matters in dispute either through a relevant Security of Payment process or via the Civil courts.

4. What would be the cost to your organisation or members of the introduction of legislative requirements for construction contracts to be in writing?

MEA believes that this would create some additional cost such as seeking relevant advice

5. What other ways could security of payment for subcontractors and suppliers be improved by way of reducing the uncertainty and risk associated with:

a. parties entering into verbal contracts; or
b. parties entering into written contracts which omit to address certain issues that commonly arise in relation to a construction project, e.g. variations, extensions of time?

MEA believe issues such as Retention trusts Project Bank Accounts and Construction Trusts would help in this area.

6. Which of the two options for reform do you support, and why?

MEA would support mandating written contracts based on a certain level of work as described earlier.

Part V – Mandating the use of standard form construction contracts

(1) Do you think the use of standard form contracts should be encouraged in the construction industry? Why?

MEA agrees that Standard Form contracts should be encouraged. We say this as the advantages of using standard form contract we say results in a better understanding of

- Familiarity terms and conditions may grow and be better understood
- Risk allocation is understood
- Reducing costs In getting additional legal and other assessments

(2) Would increased use of standard form contracts throughout the construction industry improve security of payment for subcontractors and suppliers?

MEA believe that it would increase confidence in the industry however we do not think there would be a causal link between mandating a particular standard form contract and the insolvency rate / payment habits of Building Companies.

(3) If 'yes' to Question 1 above:

a. Should the use of standard form contracts be mandated for certain types of construction contracts (e.g., relating to a particular type of works, or value of works)?
b. If 'yes' to sub-question (a), then how should the use of standard form contracts be mandated? – should it be tied to the registration of building contractors, or be applied to all industry participants for certain projects?

(4) Which of the options for reform do you support/not support, and why?

MEA does not support either of the options in the discussion paper. We do see advantage in mandating standard form contracts however given the difference in projects / scope of works/ risk of projects a one size fits all approach would not be acceptable to any party. MEA also does not believe that doing nothing is a viable option in terms of improving security of payment and industry behaviour.

(5) What other measures could the government take to simplify and standardise contracting arrangements across the construction industry?

We have no further suggestions currently.

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