Security of Payment Reform – Industry Advisory Group

Submissions on behalf of the Society of Construction Law Australia in relation to Discussion Paper – Workshop 2

IAG Secretariat

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Dear Members of the IAG,

Please see below the Submissions presented on behalf of the ***Society of Construction Law Australia*** on the above.

By way of general introductory comment:

(a) The Society cautions against over-reacting to the issue of non-payment of subcontractors, especially where existing payment rights and procedures could be adequate if fully utilised, eg. the rapid adjudication system. Some fine tuning is appropriate.

(b) Any regimes imposed will apply to contractors at various levels of the contracting chain because they, in turn, subcontract the supply of construction services and materials down the line.

(c) The creation of complicated legislation, regulation and further red tape, with resultant uncertainty for those who might be affected by additional layers of legislation, regulations and penalties, may also apply to the smaller sectors of the industry. They could become the victims rather than the intended beneficiaries of over-reactive responses to the issues.

(d) Important jurisprudential questions apply in creating a special category of actions and protections in favour of some creditors, as opposed to others who do not fall within the construction contract chain (eg. employees; parties who become creditors of the offending entity in different contexts that are not covered by the remedies under consideration such as those providing services such as cleaning services, administrative and office services, landlords etc.).

(e) Regimes which create separate remedies for creditors in the construction contracting chain could have the result of creating undue preferences in the event of subsequent insolvency.

(f) It is not possible and it is not desirable for regulations, demerits, banning and other enforcement regimes under consideration to interfere with freedom of choice and contracting, and the existing laws and procedures that are available to the industry.

1.1 Improving behaviour in the industry

(a) The Society is of the view that matters involving behaviour in the building industry should remain within the ambit of the Building Services (Registration) Act 2011 (WA) which contains section 53.

(b) This section can be extended by including wording that is clearer than the present wording of section 53(1)(j).

(c) Nevertheless the urge to broaden them too widely should be approached with caution and should have regard to the problems sought to be tackled and the broad spectrum of businesses and individuals who may be affected. These should also be weighed against the existing rights and remedies available.

(i) So, for example, questions relating to undisputed judgments or adjudication debts should be dealt with in accordance with the existing procedures applicable to payment of debts (eg. adjudications, statutory demands, enforcement of judgments etc).

(ii) Adding these to the disciplinary proceedings will not facilitate payment.

(iii) Rather, the existing processes for requiring payment, such as execution on debts and issuing statutory demands, are far more effective ways of securing payment.

(d) The Society does not support a regime which creates additional special harsh treatment of stakeholders in the construction industry who do not pay immediately on judgments or adjudications because there could be legitimate reasons for non-payment and these should be dealt with within the legal procedures available.

(e) In this regard, the Society notes that the adjudication system already imposes an additional regime which can and should be used by creditors in the construction industry seeking payment. There is no reason to extend this to provide for additional penalties or disciplinary action.

(f) Alternatively, if disciplinary action is considered appropriate by the IAG, sufficient safeguards must be built into the process to enable contractors who do not pay for good reason, to be able to show cause why the disciplinary outcomes should not apply to them.

1.2 Civil penalty

(a) The Society does not consider that there is a need to create an additional civil penalty.

(b) There are sufficient layers of legislation and regulation of the industry without creating new sources of obligations and responsibilities that contractors and subcontractors will be expected to comply with.

(i) Creating new penalties that go beyond the standards imposed on other disciplines within the construction industry and more generally, will extend to stakeholders across the board and broad spectrum of businesses within the industry.

(ii) Indiscriminate application of the system may not be appropriate.

(iii) Some of them will not, as a matter of reality, have the resources to be fully informed of the full extent of legislation and regulation relevant to them.

(c) Moreover, it is not at this level that the main issues giving rise to the present enquiry, arise.

(d) Over-reacting to the present problems of non-payment of subcontractors could impose a harsh regime directed at an industry already subject to significant regulation. This will impact segments of the industry which are not causing non-payment. Such measures could therefore be **counterproductive** to the stakeholders that the exercise is intended to protect.

(e) Civil penalties also do **not immediately and directly benefit** the creditors whose interests are under consideration. Those stakeholders have rights and processes that can be followed with more effective results than to await the outcome of processes that apply civil penalties.

(f) Creating too much red tape and over regulation could be counter productive and less effective than **educating stakeholders** to exercise the rights and rapid processes available to them eg. under the Construction Contracts Act.

1.3 Demerit Points System

(a) The Society is not in favour of introducing a *"demerit points system"* to ban building contractors that fail to comply with contractual payment obligations because this legislative interference could be subjected to abuse, over-regulation, additional red tape and will require government resources to manage.

(b) In any event, the Society does also not believe that demerit points should accrue for breaches of other legislation.

(c) The more layers of regulation, civil penalties, disciplinary action and demerit systems that are created, the more expensive it will become to do business. Such measures increase the use of lawyers. Red tape affects the efficiency of the industry.

(d) This also assumes the ability of the industry to become significantly more sophisticated in the awareness of such measures, which could have the effect of penalising the victims rather than benefit them.

1.4 Banning industry participants

(a) The registering authority should be able to take into account the financial ability of any applicant seeking registration to perform his/her/its relevant obligations, including, where appropriate, to conduct its business.

(b) The Society refers to Part 2 of Division 2 Regulation 18 of the *Building Services (Registration) Regulations 2011*, which could be expanded on to provide reasonable but not prohibitive requirements.

(c) Otherwise, any regime banning or excluding insolvents or bankrupts from running a construction business or any business at all should **not** be dealt with in the context of the Western Australian legislation dealing with the construction industry, but should be left to the general laws and legislation dealing with insolvency and bankruptcy.

(d) It is inappropriate to single out the construction industry in Western Australia. The Society has regard to the potential impact of these provisions on builders and subcontractors and is concerned that draconian measures could unfairly single out those businesses/individuals in the construction industry in Western Australia.

(e) In any event, denying registration should not be permanent, although the registering authority should be able to take into account the financial ability of the applicant to conduct its business, and refers to Part 2 of Division 2 Regulation 18 of the *Building Services (Registration) Regulations 2011*.

(f) Banning people from performing a role within the construction industry that has been their source of livelihood for which they have otherwise been qualified is an overreaction to situations where subcontractors/creditors have not been paid because they have failed to exercise the remedies that were available to them when the debts arose (eg. claiming payment in the adjudication system).

(g) In addition, there may be reasons for some entities to fail which may not warrant banning (eg. where principals/contractors up the line go insolvent). Denying them the opportunity to subsequently trade or become involved in construction industry limits choices to subcontractors/suppliers/creditors who might be prepared to deal with them in the future.

(h) There should be no *"two strikes and you are out"* concept as that concept fails to take into account:

(i) Individual circumstances;

(ii) The fact that peoples' livelihoods are at risk, not merely the imposition of a fine;

(iii) There may be acceptable justification for not imposing a ban.

(i) There are jurisprudential objections against interfering in contractual relations between parties and the expectation that parties will enforce their rights in accordance with the rights and procedures available (eg. adjudication).

(j) If, contrary to those objections, a system resulting in banning is considered appropriate, adequate safeguards must be built into the system to enable the respondents to show cause why banning or exclusion from the harsh measures suggested, should not be imposed in their case.

(k) In any event, such restrictions should not apply where companies enter into Deeds of Company Arrangements with creditors, as this assumes an acceptance by creditors of the outcome.

1.5 Improving business skills in the industry

(a) Given the current requirements for registration which contemplates,

(i) at the one end of the scale, attendance at a formal course which includes business management, and,

(ii) at the other end of the scale, easier registration for certain categories of applicants who will have already undergone formal training and education,

there does not seem to be a requirement for mandatory additional training.

(b) Courses offered by the MBA and other organisations already cater for the educational training that might be suggested in this context.

(c) CPD training adds a level of costs that may not be appropriate to all stakeholders.

(d) It is also difficult to provide for a *"one size fits all"* especially in the context of ongoing educational requirements where the regulations may affect organisations like Multiplex on the one hand and an owner/operator at the other end of the scale.

(e) The Society believes that:

(i) the system of registration;

(ii) the categories of registration;

(iii) the course requirements before registration will be allowed,

should be sufficient to take care of the education of the industry in this regard.

Please do not hesitate to advise if further elaboration is required on any of the above submissions.

Dated at Perth the 16 day of May 2018

Basil Georgiou

Director and Past Chair