

# Submission

August 19, 2016

PARLIAMENT  
OF  
SOUTH  
AUSTRALIA

**Small Business Commissioner John Chapman**  
**Small Business Minister Martin Hamilton Smith**

Initiatives to improve payments to subcontractors in the building and  
construction industry



**MASTER BUILDERS**  
SOUTH AUSTRALIA

## Contents

1. Introduction.....	4
2. Recognizing the need for an industry-based solution .....	4
3. Avoiding the wrong solutions for the right reasons.....	5
4. Cost impact of proposals .....	7
5. Proposals to be considered as part of Stage One .....	7
Insertion of penalty provision (proposal 1.1) .....	7
Appointment of Small Business Commissioner as sole ANA (proposal 1.2) .....	9
Fixing of fees to cover sole ANA administrative costs (proposal 1.3).....	10
Publication of adjudications (proposal 1.4) .....	11
Clarification of Christmas shutdown period (proposal 1.5) .....	12
Additional procedures for Government projects (proposal 1.6) .....	12
Development of a Building and Construction Industry Code (proposal 1.7) .....	14
Small Business Commissioner secretariat (proposal 1.8) .....	15
Security of Payment education program (proposal 1.9).....	15
6. Proposals to be considered as part of Stage Two.....	16
Introduction of simple and complex claims (proposal 2.1) .....	16
Extension to apply to home owner builders (proposal 2.2) .....	17
Good behaviour test for principal contractors (proposal 2.3).....	18
Statutory declarations as to payment of subcontractors (proposal 2.4) .....	18
Disputed amounts to be held in trust during adjudication (proposal 2.5) .....	19
Retention trust arrangements for projects over \$10 million (proposal 2.6).....	20
7. Proposals to be considered as part of Stage Three .....	21

Project Bank Accounts .....	21
8. Alternatives to be Considered.....	22
Returning to standard contracts – the root cause .....	22
Remove limit on date payments .....	23
Improved business education .....	23
Form of contract.....	23
A renewed focus on sham contracting at a State level .....	23
National harmonization.....	24
9. Approaches to Cost Recovery .....	24
10. Sector-specific Feedback .....	25
11. Conclusions .....	25

## 1. Introduction

This submission is made on behalf of Master Builders Association of South Australia Inc (“Master Builders SA”), established in 1884 as the peak body representing South Australia’s building and construction industry.

Master Builders SA is committed to building a productive industry and a prosperous South Australian community and economy.

The South Australian building and construction industry directly employs more than 55,000 South Australians across all sectors, including residential, commercial, civil engineering, land development and building completion services. Indirectly, the industry supports tens of thousands more South Australian jobs.

The industry undertakes about \$15 billion of work every year, contributing more than \$1 for every \$7 of economic activity within the State. Indirectly, more than one-quarter of South Australia’s wealth is produced by the building and construction industry.

South Australia’s building and construction industry is focused on the development and transfer of skills into a life-long career. It is consistently among the leading sectors when it comes to training and apprentices and last year provided new apprentice places for more young workers than the Northern Territory, ACT and Tasmania combined.

Master Builders SA is proud of the industry it represents, the jobs it creates, the 11,000 homes it built and extended for families last year and the offices it has built for South Australian businesses.

## 2. Recognizing the need for an industry-based solution

When Retired District Court Judge Alan Moss completed his review of the Building and Construction Industry Security of Payment Act 2009 in February 2015, Master Builders SA made an extensive submission that separately outlined responses from head contractors and subcontractors<sup>1</sup>. The primary recommendation of that submission<sup>2</sup> was that a cross-sectoral body be convened to develop an industry perspective on the changes.

Given the close-knit nature of South Australia’s construction industry, it is essential the State Government appreciates how any single change might flow through the sector from a truly commercial perspective. Initiatives that are proposed in good faith and with the intention of benefitting industry participants down the supply chain may in fact impede cash flow – and therefore hurt the very businesses the initiatives are designed to support.

Further, while it is sometimes assumed that subcontractors will always benefit from the strengthening of claimant rights under the legislation, subcontractors often face claims from their secondary contractors, placing them in a position similar to that of a head contractor. It is therefore misleading to

consider this an issue of “head contractor versus subcontractor”; an industry-based approach is needed.

Master Builders SA has therefore undertaken a very different approach to this Consultation Paper to offer the State Government a true industry perspective on the proposed reforms.

Committees convened by Master Builders SA representing commercial contractors, subcontractors and construction contract specialists were separately consulted to gather sector-specific responses. These were tabled before Master Builders SA’s Industry Futures Working Group, a body that brings representatives of each of these group to develop a whole-of-industry response.

In addition, Master Builders SA undertook further consultation with individual members representing subcontractors and head contractors, and other industry associations representing specialized subcontracting trades.

Master Builders SA represents almost 1800 subcontractors and, together with our housing and commercial members, remains the only South Australian association that can claim to represent the breadth of the State’s building and construction industry.

This submission therefore reflects the process that Master Builders SA recommended in its February 2015 submission. The recommendations within this submission reflect concerns raised by the entire building and construction industry – not just head contractors, and not just subcontractors. Moreover, it reflects an appreciation as to how these proposals are likely to impact the industry at all levels.

We are confident this represents the best interests of a functioning and stable industry in South Australia. Master Builders SA embraces its role as the voices of this industry and, on the strength of our consultation on this proposal, will actively pursue those interests.

### **3. Avoiding the wrong solutions for the right reasons**

The Small Business Commissioner’s Consultation Paper refers to the collapse of Tagara Builders and BJ Jarrad as highlighting the need for changes that go beyond those recommended by Retired District Court Judge Alan Moss<sup>3</sup>.

Master Builders SA undertook its own review of industry needs in the wake of the collapse of Tagara Builders, and returned a broad array of recommendations that were aimed at improving industry outcomes with a full understanding of the events leading to the collapse of that company<sup>4</sup>. This has been sent to Treasurer Tom Koutsantonis, Small Business Minister Martin Hamilton-Smith, Small Business Commissioner John Chapman and Industry Advocate Ian Nightingale.

Despite offering a range of measures to improve industry health – and outlining why that was key to improving subcontractor outcomes – no formal response has been received to date, and nor does this Consultation Paper make reference to that work. Certain recommendations have been included in this submission in response to specified proposals and in answer to the call for alternatives.

The proposals contained within the Consultation Paper limit themselves to a perspective of the contractual relations between head contractors and subcontractors. They do not reflect the commercial arrangements of subcontractors and their chain of sub-subcontractors, and nor do they

reflect the likely impact of those proposals on the broader commercial and contractual environment. As noted by the Contracts Committee:

“The Consultation Paper appears to take a knee-jerk reaction rather than thinking about the value of long-term value reforms.”<sup>5</sup>

Reliance on the case of Tagara Builders may result in the wrong solutions for the right reasons, argued one head contractor:

“Tagara was an extreme example and (does) not represent normal head contractor/subbie relationships. It could be argued that some of those subbies and suppliers went into the contracts fully aware of Tagara’s difficulties... A train wreck was always likely.”<sup>6</sup>

This was reinforced in another response, perhaps highlighting the need for improved commercial education:

“As was the case with the recent collapse of building companies in South Australia, subcontractors continued to carry out works with those companies even though they had encountered payment issues with them in the past and they were aware of questions being asked within the industry about those companies’ long term viability. That is their choice and they much accept responsibility for taking on that risk.”<sup>7</sup>

Instead, many of these issues relate to an industry shift that has taken place over the past decade. One contractor – who acts as both a head contractor and subcontractor – said:

“The issue regarding non-payment stems back to a change of construction industry culture from 10 years ago. Risks are being pushed down the chain, contracts are becoming increasingly complex and margins are narrowing considerably as price becomes the dominant determinant of tender success. At the same time, subcontractors are taking on greater responsibility for design and delivery, but are still being judged on the lowest price. Security of payment alone will not fix these drivers.”<sup>8</sup>

## Recommendations

- 1. Master Builders SA recommends the State Government avoid limiting its assessment of the effectiveness of the Security of Payment regime to the collapse of Tagara Builders and BJ Jarrad and instead assess precursor actions and the impact on the industry as a whole.**
- 2. Master Builders SA warns that ignoring the impact on the entire contractual chain risks institutionalizing measures that will hold back industry.**

Master Builders SA believes this understanding is imperative if the Small Business Commissioner and the Minister for Small Business are to implement reforms that open up commerce in South Australia and not limit the opportunities available for the entire sector and its long chain of participants.

As such, Master Builders SA urges the State Government to avoid implementing the wrong solutions for the right reasons. The collapse of Tagara Builders and BJ Jarrad had a significant impact; however, the State Government should avoid limiting its assessment to the collapse of those companies and not the precursor actions leading to those collapses.

If the State Government ignores those lessons, it risks introducing changes that will hurt the very people it is seeking to help and institutionalizing measures that will limit the ability of South Australian companies to compete on the national stage.

## 4. Cost impact of proposals

This Consultation Paper explicitly refers to the question of how to raise revenue to offset additional costs of proposals contained within the Paper<sup>9</sup>.

However, it fails to consider the likely cost of compliance facing industry participants including head contractors and those subcontractors facing claims from their secondary subcontractors.

One head contractor estimated the implementation of all proposals could cost the company almost \$250,000 in the first year alone. That company estimated it would face an industry levy of \$35,000, an additional \$10,000 in legal fees to rewrite standard legal documents, and a need to employ and resource new staff to undertake additional administrative demands – a measure estimated to cost more than \$150,000. Further, contracting parties are likely to place greater emphasis on the use of guarantees so as to avoid the costs of managing trust accounts. This is likely to occur by way of paying a premium for those contractors who rely on guarantees, a tactic that might result in up to \$50,000 in additional client costs.

While these estimates were not fully substantiated, the basic elements would likely impact head contractors and subcontractors alike to a material extent.

## Recommendations

### 3. An assessment of proposed reforms must not ignore the potential compliance costs to be borne by industry to avoid negative impacts.

The introduction of a complex Security of Payment regime specific to South Australia would also create an additional administrative burden for interstate companies seeking to manage South Australian projects. It would create additional red tape and run counter to the goal of a national uniform Security of Payment Act recommended by the recent Senate Inquiry into Insolvency in the Construction Industry<sup>10</sup>.

At a time when negligible margins are driving tension and disputes between head contractors and subcontractors<sup>11</sup>, Master Builders SA suggests the proposals for change must take into account the likely cost impact on industry participants to avoid proposals having negative repercussions that would limit jobs.

## 5. Proposals to be considered as part of Stage One

Master Builders SA has approached these proposals individually in the structure proposed by the Consultation Paper in the interests of clarity. However, we note our recommendation below that the proposal relating to the division between simple and complex claims<sup>12</sup> if adopted would be better introduced immediately rather than waiting for a second stage of reforms.

We will approach each measure individually below.

### Insertion of penalty provision (proposal 1.1)

Although it is appreciated that this idea was broadly recommended by the Senate Standing Committee on Economics<sup>13</sup>, concerns were raised by head- and subcontractors alike about the

imprecise nature of this proposal to the extent that it is likely to be unenforceable and the excessive penalties proposed.

Security of Payment processes impose administrative burden and legal expense on head contractors. Sometimes those processes are triggered by subcontractors to circumvent mutually-agreed contractual terms for payment which head contractors would expect their subcontractors to follow, or to gain a strategic advantage rather than in good faith to resolve payment disputes. The subcontractors concerned might well be unlikely to be subsequently engaged by those head contractors – an outcome tied to commercial relationships, and not intimidation.

One subcontractor noted that Security of Payment processes are only employed “when the relationship had broken down entirely” rather than as a recurrent process. If they were pressured to avoid Security of Payment processes, they would refuse to work with that head contractor as it would be indicative of a hard-nosed approach that would frustrate the overall relationship. It was widely agreed that parties to a dispute rarely wish to work together after a matter has proceeded to a formal dispute:

“The commercial reality is that people have the freedom not to deal with others after or during civil disputes.”<sup>14</sup>

Beyond the difficulty in distinguishing the natural breakdown of commercial relationships from criminal behaviour, there remains the challenge of policing and prosecuting such a measure. As noted by one subcontractor:

“How the hell are you going to prove it? He’s not going to use words to that effect and send it to you in an email.”<sup>15</sup>

## Recommendations

- 4. Master Builders SA opposes the introduction of a penalty for intimidation given the likely inability to police the distinction between commercial reality and criminal behaviour. Further, the higher burden of proof is unlikely to be satisfied, and goodwill for the Security of Payment regime is likely to suffer as a result.**

Such a penalty would be required to be proven beyond reasonable doubt, necessitating a lengthy investigation for a matter that may be revealed to be a commercial dispute. This may mean that the provision is better known for its ability to waste investigative resources, resulting in the underlying scheme being maligned by prosecutors and the broader industry – including the very participants the provision aims to protect.

There are also concerns about potential repercussions for the application of such a provision. An overzealous supervisor or contracts administrator might commit acts that might give rise to an allegation of intimidation, but the owner of the company – either the head contractor or the subcontractor vis-à-vis its own secondary subcontractors – may be held responsible with the resulting penalties attached.

It is further noted that the financial benefit of penalties are likely to accrue to the State Government’s general revenue account and thus use the detriment of the subcontractor to benefit taxpayers. This is clearly a matter of revenue and not justice.

Given the proposed two-year jail sentence – the deprivation of liberty being the greatest punishment

a court can impose – Master Builders SA opposes such a penalty provision in light of its imprecision and the likely impossibility to prosecute the proposed offence. There is also ready agreement amongst sectors that the proposed penalty is excessive.

Because of these issues, the proposed offence might have the unintended effect of polarizing relationships in the industry further. In this regard some contractors have expressed concerns that the offence could potentially be abused by subcontractors who threaten to make false allegations of intimidation.

Master Builders SA is not aware of any proposals to introduce such a provision in other Australian jurisdictions. Where raised at Senate and local levels, it has been reliant upon anecdotal evidence. If a similar provision were to be implemented in future, a nationally-consistent approach would be essential.

### **Appointment of Small Business Commissioner as sole ANA (proposal 1.2)**

Master Builders SA supports in principle the appointment of a sole authorized nominating authority (ANA) for the economies of scale, avoidance of bias, quality control and singular focus that such an arrangement may offer. The arrangement appears to be successful in Queensland.

However, Master Builders SA questions whether the Small Business Commissioner is the appropriate organization to be the sole ANA on two grounds.

The Office of the Small Business Commissioner is to be commended for proving itself a strong advocate of small business. Unfortunately, this success is likely to give rise to a perception that this advocacy would be carried across to the role of a sole ANA. Master Builders SA believes the Office of the Small Business Commissioner would better serve its primary constituency by retaining its role as an advocate for small business within a broader system of the management of disputes. This was expressly recognized by one subcontractor during consultation:

“It needs to be independent for all, not just ‘small’ businesses, to be beyond reproach.”<sup>16</sup>

Given the need for industry support to extend the adoption of Security of Payment legislation within South Australia, there remains a credible risk that the appointment of the Small Business Commission as sole ANA may counter the desired cultural shift for a want of perceived impartiality.

The Office's role as a strong advocate of small business and involvement in the adjudication process may also open the way for the challenge of adjudications.

In the Supreme Court decision of *Tali Engineering*<sup>17</sup>, Justice Malcolm Blue found there was a denial of natural justice in respect of an adjudication as there was a reasonable apprehension of bias of the authorized nominating authority and the adjudicator. The adjudication was declared void and set aside.

### Recommendations

- 5. Master Builders SA supports and recommends the adoption of a single ANA.**
- 6. The Magistrates' Court or SACAT should be appointed sole ANA to take advantage of economies of scale from access to existing conciliation systems, an approach that will also protect the Small Business Commissioner from a potential conflict of interest. This approach will also reduce the cost impact on industry at a time when falling margins are leading to an escalation of intersectoral tensions.**

The establishment of the Office of the Small Business Commissioner as a sole ANA will also carry a significant cost for the establishment of a secretariat<sup>18</sup>, a cost which will be borne by industry and which is likely to increase the competitive tensions that have given rise to the issues of concern within this Consultation Paper.

After comprehensive industry consultation, Master Builders SA believes taxpayers would be better served by utilizing existing judicial or quasi-judicial structures that are already focused on managing conciliation processes with an established infrastructure for the management of disputes and referral to higher judicial authorities. The registries of the Magistrates' Court and the South Australian Civil and Administrative Tribunal (SACAT) both offer established administrative and customer service systems and procedures and a commitment to alternative dispute resolution – and both have, at their heart, a duty to be impartial. Although they also manage cases where the State Government is a party, they have no formal role

in advocating for a sector and so have no issue of apprehended bias.

We note here that the appointment of SACAT as the sole ANA might offer administrative advantages when considering rights of review concerning an adjudicator's decision to dismiss without consideration of the merits of an application. If such a right of review is made available, a quasi-judicial body such as SACAT might offer a ready avenue for review within the same body.<sup>19</sup>

Master Builders SA believes these institutions are better placed to offer much-wanted economies of scale while also allowing the Office of the Small Business Commissioner retain its role of advocate.

### Fixing of fees to cover sole ANA administrative costs (proposal 1.3)

The establishment of a sole ANA will likely involve additional costs. Limiting the impact of these costs on industry is to be preferred given the current environment of negligible margins and high competition, both of which increase competitive tensions between sectors, leading to greater disputes.

Master Builders SA's recommendation that the sole ANA role be provided by the Magistrates' Court

or SACAT is likely to limit the cost impact on industry given it would obviate the need to create a new administrative structure and the attendant infrastructure and ongoing operational costs.

It is acknowledged that, as proposed, amendment of the Act would be required to allow some form of cost recovery. Direct cost recovery might be prohibitive of the establishment of a new secretariat but not for the expansion of an existing registry function.

### Publication of adjudications (proposal 1.4)

Master Builders SA believes the publication of adjudications can be instrumental in underpinning the success of the Security of Payment regime with some important caveats.

## Recommendations

7. **Given the availability of more cost-efficient alternatives, Master Builders SA does not believe there is an established case for imposing a new industry levy.**
8. **Master Builders SA supports and recommends the publication of adjudication decisions including the identity of parties and the conciliator.**
9. **Publication should be limited to decisions, and not applications, and be delayed until the earliest of the expiration of 12 months or practical completion to avoid unintended commercial repercussions.**
10. **Parties should have the right to apply for suppression of details to avoid compromising other court proceedings or in other extenuating circumstances.**

Transparency of decisions is likely to be a key to improved confidence in the operation of South Australia's Security of Payment Act and its outcomes. Published decisions will reflect the behaviour of all parties, including head contractors, subcontractors and adjudicators. Publication of adjudications would offer a longitudinal record of company behaviour and, thus, provide industry participants with a reliable record of individual practices and individual adjudicator practices.

Objections were readily dismissed:

"People can find out information already if they really want to know, so if you have nothing to hide, there is nothing to worry about."<sup>20</sup>

"It will get the rogues out of the industry – on all sides."<sup>21</sup>

There were, however, concerns that the publication of adjudications might spark the lodgment of contractual counter claims outside of the Security of Payment process based upon an assessment of the decision but without the benefit of the underlying claim and response. There was also concern that adjudication determinations may not reflect offers to settle, nor might they stipulate the full grounds for acceptance or rejection of a claim, leading to misinterpretation of the matter.

Master Builders SA believes these concerns are best answered through training of adjudicators in the writing of determinations<sup>22</sup> and through the development of a standard form determination that requires certain matters be outlined to provide a context for the determination.

All sectors raised objections to the immediate publication of decisions insofar as they might interfere with

management and progress of current projects, damage relationships and create a run of

opportunistic payment claims and adjudication applications when in fact contractual payment terms are working for all parties. This would create greater administrative and financial pressure on companies and thus risk creating a demand for cash flow outside of terms, with the potential unintended consequences of harming lower tier subcontractors.

This can be prevented by introducing a requirement for delayed publication. Publication could be delayed for 12 months or until practical completion – whichever is the earliest – and full details published unless either party applies for suppression of certain details. For example, suppression of business dealings or financial matters might be warranted where such matters are subject to Family Court orders.

Master Builders SA states, for the sake of clarity, that decisions should be publicized, and not applications. The publication of all applications risks introducing greater risks that could create cash flow problems for head contractors, large subcontractors, and for all businesses attached to them.

### Clarification of Christmas shutdown period (proposal 1.5)

Master Builders SA recommends amending the definition of “business day” in section 4 of the Act to allow for a Christmas shutdown period.

## Recommendations

### 11. Industry’s shutdown period should be expressly recognized to assist clarity, recognize industry practices and to avoid ambush claims.

The Security of Payment Act is based upon discrete business days allowed for responses within the State’s building and construction industry but fails to reflect the industry practice of a Christmas shutdown period when industry winds down. This wind-down period is an accepted offset for the demands of lengthy days to meet construction deadlines throughout the year, and is a time when key staff take leave and offices are closed.

Specifying dates for such a shutdown on an annual basis would recognise this practice and thus prevent the practice of “ambush claims” where extensive demands are lodged on Christmas Eve, resulting in high legal and personal costs to meet legislated response times.

This could be achieved by defining the shutdown period by regulations on an annual basis or by following the Queensland approach of excluding certain days between December 22 and January 10 from the definition of “business day” for the purposes of the Act<sup>23</sup>.

Despite some concerns that the institution of a date spread could result in manipulation of the timing of claims for additional benefit, this measure is broadly supported by head contractors, subcontractors and contract specialists.

### Additional procedures for Government projects (proposal 1.6)

This proposal appears to recommend client Departments be mandated to collect declarations – which subcontractors and others along the contracting chain may be required to provide in addition to

the head contractor – and the Office of the Small Business Commissioner be funded to establish a separate telephone line and investigative unit for the taking of complaints and separate investigation.

Most Government capital works projects already require the completion of statutory declarations concerning the payment of subcontractors. These are required by the Department of Planning, Transport and Infrastructure (DPTI) for the same reason as outlined by the Office of the Small Business Commissioner.

Indeed, the existing Code of Practice for the South Australian Construction Industry clearly establishes the expectations of the main Government client, DPTI, as to timely payments and provides for all parties to contact the Department in the event of non-payment – and a requirement that the Department notify its Minister of such complaints<sup>24</sup>.

Unfortunately, it appears that these procedures are not policed, thus raising the question as to the value of the existing practice. Until the existing system is fully utilised, the creation of a new system to do the same thing – even as a trial – can only be seen as an administrative burden with dubious concrete benefits. This might equally be the case where the actions of the Office of the Small Business Commissioner elicit a similar lack of response.

## Recommendations

**12. Proposals for additional procedures should be avoided given the existence of alternative dispute resolution mechanisms through contracts, Security of Payment and the industry Code of Practice.**

**13. The State Government should avoid imposing additional administrative and cost burdens on industry when existing mechanisms can be more easily implemented.**

Additionally, to be truly effective, this measure would extend along the entire contract chain to protect secondary and subsequent contractors, requiring head contractors to sight all subsidiary declarations to cover downstream payments. Needless to say, this adds substantial administrative burden to all industry participants.

One of the main issues of difference relating to payments within the construction industry is disputes about the value of variations. The distinction needs to be made between claims for money that is due and is simply not being paid and claims where there is a genuine dispute about the fact and extent of entitlement. A statutory declaration will commonly require a party to declare that all sums due have been paid and this declaration can be honestly made by a party who may not have paid everything that is claimed but who has paid what that party considers is not in dispute and continues to negotiate the balance. So collection of statutory demands is not a complete answer in any event.

Any system would need to clearly distinguish between non-payment and disputed amounts if it is to avoid being embroiled in complex contractual matters. The existing Security of Payment system offers such an alternative, but without the additional administrative burden.

Master Builders SA believes that parties already have access to alternative dispute resolution through existing contractual provisions – the very terms agreed by the parties – as well as through the Security of Payment Act and the Code of Practice. The proposal contained within this

Consultation Paper suggests adding additional resolution pathways without fixing those in existence. Further, there is a direct and indirect cost to the establishment of these additional pathways which is likely to further raise tensions in an industry battling negligible margins.

Master Builders SA believes an examination of the effectiveness of existing pathways – including the involvement of DPTI – would result in better outcomes for industry without raising a new series of cost and compliance demands.

### Development of a Building and Construction Industry Code (proposal 1.7)

As noted above, industry contracts already contain provisions relating to alternative dispute resolution, including requirements for formal meetings and mediation which are expressed as mandatory preconditions to taking any legal action. In addition, participants have access to the dispute resolution provisions contained within the Security of Payment Act and those involved in State Government contracts can rely on the provisions of the Code of Practice.

Industry associations provide conciliation services and, in many cases, Courts will mandate conciliation conferences and mediation before litigation can proceed to trial. The pre-action protocol for construction disputes in the District and Supreme Courts requires a meeting between parties before proceedings are issued, at which other options are reviewed. Mediators and arbitrators are

commonly used, along with other methods of alternative dispute resolution. The Magistrates' Court also offers a low-cost managed mediation service with either court officers or experienced independent lawyers available to act as mediators, using court facilities.

The majority of these mechanisms offer access to those facilities sought by the proposed Code: they focus on low cost and speedy resolution, they allow access to technical experts to resolve matters and, for the most part, compel parties to attend or attach penalties to refusal to participate and thus have the same effect of forcing parties to the table as sought by the Small Business Commissioner.

## Recommendations

**14. Introduction of a Building and Construction Industry Code would simply add another burden to industry as the approach overlooks existing mechanisms available to industry. Master Builders SA recommends such a Code be avoided.**

Creating a new Industry Code would add another layer of complexity and compliance for little perceived benefit, according to one head contractor:

"It is simply creating one redundancy on top of another redundancy."<sup>25</sup>

The Subcontractor Committee agreed:

"It is going to make life harder, more work. It should go back to the Contract; forget the Code, forget everything else."<sup>26</sup>

This proposal risks creating another administrative demand in an area where the majority of businesses are calling for harmonization of laws in an increasingly national workplace.

Master Builders SA believes existing pathways should be strengthened before another pathway is

introduced. Industry feedback is also concerned that the Office's lack of in-house commercial construction experience may hinder its effectiveness in resolving highly technical disputes.

## Small Business Commissioner secretariat (proposal 1.8)

The establishment of a secretariat is predicated upon the creation of new work processes to be managed by the Office of the Small Business Commissioner. Master Builders SA believes many of these proposed functions are either unnecessary by reason of duplication of existing avenues or can be better served by existing institutions in a manner that preserves the Small Business Commissioner's ability to unashamedly advocate on behalf of small business.

Master Builders SA supports the value that the Commissioner can bring to representing that vital sector of the South Australian economy and supports ongoing financial support to fully resource the Office. However, that expansion should not come at the expense of existing South Australian businesses in the form of additional administrative or cost burdens.

While Master Builders SA believes an industry-wide levy might be an efficient manner of collecting funds, there is widespread concern that this levy might simply be used to raise revenue without direct contribution to industry.

Therefore, Master Builders SA does not yet see a strong case for imposing an industry levy given the existence of far more cost-effective alternatives.

## Recommendations

- 15. The availability of existing mechanisms for improving payment conditions makes the creation and costs of a separate secretariat unnecessary. Given the costs would be borne by industry at a time of negligible margins, Master Builders SA believes this would be dangerous and counter-productive.**
- 16. Master Builders SA believes education is a key element of a successful Security of Payment regime but notes that collaboration with industry associations is essential to creating a successful initiative and avoiding wasting taxpayer funds.**

## Security of Payment education program (proposal 1.9)

Master Builders SA believes this is a vital element to ensuring the success of Security of Payment processes.

When the Act was introduced, Master Builders SA ran an extensive series of seminars to inform members of the Act, its provisions and benefits. The effect of the Act has also been introduced into all relevant training courses in a bid to fully arm newcomers to the industry with the tools they need to succeed. In addition, Master Builders SA has raised the Act in ongoing education programs to upskill participants, during which the lack of knowledge was clear.

There is a low level of demand for specific courses relating solely to Security of Payment, a phenomenon which Master Builders SA believes would be worthwhile

investigating as it may be reflected in any offerings undertaken by the Small Business Commissioner as part of this proposal.

The success of this measure would be reliant upon a close connection with industry, but industry bodies appear to share a view that many don't care about the matter until it's too late.

It is recommended that this proposal will only succeed by employing a collaborative approach among industry bodies and the Small Business Commissioner, drawing upon the resources and connections of all to deliver the best outcome. If this approach is not taken, there is a real risk that taxpayer or industry funds will be used to achieve the same outcome: a lack of awareness among those who need it the most.

Alternatively, the Office of the Small Business Commissioner could accredit existing courses provided by industry bodies to reflect the overall empowerment of the sector while also leveraging existing industry connections and networks.

## 6. Proposals to be considered as part of Stage Two

As noted above, Master Builders SA has adopted the staged approach recommended in the Consultation Paper purely as a structure for a methodical response to the proposals raised in the Paper itself. That is, we believe some elements outlined in later stages can be adopted immediately to deliver better industry outcomes.

### Recommendations

17. The distinction between simple and complex claims should be introduced immediately.
18. Further consultation is required to establish the elements comprising a "complex" claim. Master Builders SA recommends consideration of a monetary demarcation, the existence of a significant time lapse, the existence of technical complexity or latent defect, or any situation where the parties agree to the additional time frames.
19. Master Builders SA recommends the adoption of a three-year time frame to review the effectiveness of these proposed criteria.

### Introduction of simple and complex claims (proposal 2.1)

Master Builders SA supports the introduction of a distinction between simple and complex claims immediately. It is an improvement to the Act that should not wait for a 12-month review period.

The Act provides five business days for respondents to outline their adjudication response, a timeframe that overlooks the complexity of some projects and claims. Often claims may relate to variations filed with the client or disputed works requiring technical input from quantity surveyors. Alternatively, a claim may relate to several time periods and differing works. Forcing an adjudication response to be made within five days does no favours to respondent or claimant. The short time frame for responses creates a risk of encouraging ambush claims, as occurs regularly in Eastern State jurisdictions and is being increasingly seen in complex cases in South Australia. These claims are initiated by a brief payment claim, followed by an extremely detailed and voluminous adjudication application resulting from many months of legal work. This may in fact escalate tensions between the parties and increase the poor view in which the Act is

held. It has also led to a rise in the number of legal challenges to adjudications<sup>27</sup>, whereas the introduction of a distinction between simple and complex claims has cut the number of challenges.<sup>28</sup>

Introducing a distinction between simple and complex claims with an allowance for 10 business days in which to respond for complex claims would assist all parties and improve the realistic nature of the Act and its processes. Additional provisions extending the drop dead dates in the complex stream could also be considered though this needs to be balanced against the interim “pay now argue later” nature of adjudications.

It is understood the Queensland Act sought to introduce such a demarcation based on amount, time and other facts, but reduced the demarcation to \$750,000 after other matters were found to be too difficult to implement.

Master Builders SA believes there is merit in further discussion about what constitutes a complex claim but raises the following characteristics as a starting point:

- A monetary limit, although this may differ according to contracts and parties;
- claims involving issues of delay and delay costs;
- claims involving technically complex issues or latent conditions; or
- Where parties agree.

## Recommendations

**20. Master Builders SA supports the extension of the Security of Payment regime to home owner builders in principle provided an education pack or fact sheet is developed in conjunction with Consumer and Business Services to properly educate home owner builders.**

**21. Master Builders SA is willing to help develop of this product.**

**22. Consideration should be given to a monetary threshold distinguishing sophisticated home owner builders for inclusion to operation of the Act.**

Any change to this effect should be made subject to a review after three years to ascertain the effectiveness of such a measure.

### Extension to apply to home owner builders (proposal 2.2)

Master Builders SA received little feedback on this proposal but supports the extension in principle.

Subcontractors have little power against home owner builders but are subject to claims under the Act against their own operations.

Master Builders SA believes this measure, if introduced, would need to be accompanied by a fact sheet to accompany the claim as a way of educating owner builders as to their obligations. Master Builders SA is willing to assist with the development of such a fact sheet or education pack in conjunction with Consumer and Business Services.

Such a provision could also be limited according to whether the home owner builder is considered a “sophisticated” participant so as to distinguish a domestic

operation from a quasi-professional build. This could be achieved through the imposition of a dollar value threshold.

## Good behaviour test for principal contractors (proposal 2.3)

### Recommendations

- 23. Master Builders SA rejects the need for a good behaviour test as this appears to duplicate existing prequalification undertaken by DPTI.**
- 24. The main thrust of a good behaviour test would be better achieved through the publication of adjudications.**
- 25. Master Builders SA rejects the proposal to post statutory declarations on websites and notice boards for the administrative impact and likelihood of frustration.**
- 26. Existing statutory declaration requirements could be more effectively extended by requiring them to be made available upon request.**

Both this proposal and the specific matter raised within the Consultation Paper under this heading would be answered in part by the publication of adjudications. The airing of relevant matters short of formal court proceedings would enforce the Security of Payment process while also placing all parties on notice that frivolous claims will be revealed by way of publication – with clear repercussions as to a company's commercial reputation.

In contract, the impact of the good behaviour test would be limited. It would not be visible to all and would give rise to claims that the State Government and its agencies were intervening in the market with inadequate evidence. This process could also give rise to potential abuse by those airing unsubstantiated claims against head contractors and subcontractors.

In a sense, this process is already employed by DPTI to assess commercial viability and capacity under the prequalification process. Introducing a similar measure under the Industry Participation Scheme risks it being proposed as red tape ready to be cut in the next Simplification Day.

Further, DPTI is currently reviewing its prequalification scheme. Given industry acceptance of that scheme, it would be advisable to await for the completion of that review or seek to form part of that process rather than create a competing requirement that simply introduces additional red tape.

## Statutory declarations as to payment of subcontractors (proposal 2.4)

The scope of this measure appears to already be in place (see discussion above regarding proposal 1.6). Master Builders SA believes all contracting parties, including subcontractors, should in principle be required to complete such statutory declarations if the ultimate aim of improving the health of the industry is to be pursued.

However, the proposal to require publication on company websites and noticeboards has been

soundly rejected by industry representatives at Master Builders SA.

The lack of policing of existing documents raises questions over whether this process will fundamentally change behaviour.

Notices are frequently torn down or covered, meaning contracting parties risk penalties for the actions of others – or must task a contract administrator with visiting all sites on a regular basis to replace lost or discarded statements.

Similarly, posting such statements on a website risks creating additional administrative work with no guarantee of change. As one subcontractor noted:

“I’d just take my whole website down.”<sup>29</sup>

Suggestions of a requirement that businesses email copies of the statutory declaration to current subcontractors<sup>30</sup> provide a ready means of communicating but introduce an additional administrative demand.

Instead, members consulted by Master Builders SA agreed that statutory declarations should be made available upon request. This would appear to satisfy the Consultation Paper’s aims without requiring companies to invest in unproductive processes. Subcontractors asking for copies of the declarations would also be clearly indicating concerns as to their own transactions, offering an opportunity for the parties to promptly resolve the matter.

## Disputed amounts to be held in trust during adjudication (proposal 2.5)

This proposal risks hurting the very businesses it seeks to assist and should be rejected.

The proposal appears to be based on Court proceedings where in certain circumstances amounts are ordered to be paid into Court as a guarantee against future cost claims. There are key differences that makes this analogy an inappropriate measure for Security of Payment.

First, Court proceedings tend to extend for months at a time, whereas Security of Payment is heavily circumscribed in terms of timely resolution of disputes. In short, the matter should nearly be resolved by the time payment is received.

## Recommendations

**27. Introducing a requirement to pay disputed amounts into trust would freeze cash flow and stop payments to subcontractors. Master Builders SA rejects this proposal on the grounds it is contrary to the aims of the review.**

Secondly, Courts do not require the full amount in dispute to be paid into Court, but only a contribution toward the other party’s costs, and then only when the Court has been persuaded that such an order is warranted. Instead, this proposal would require a company to pay the full amount in dispute.

Finally, parties to a judicial proceeding rarely have rights of set-off than can be employed as part of the contractual process.

Alternatively, it may be based on the process available in New South Wales where the principal (or other party

liable to make payment to the party against whom the payment claim is made) can be served with a

payment withholding request once an adjudication application has been made.

One of the key difficulties with this proposal is that it draws the principal on the project into the dispute and risks escalating the issue. It also effectively reverses the burden of proof temporarily as the head contractor or subcontractor affected has to bear the cash flow risk while the issue is resolved. It is not only the head contractor who might be deprived of cash flow but also a subcontractor who faces adjudication claims from one or more secondary subcontractors. The effect of the proposal is therefore directly contrary to the aim sought.

If this process is followed, the full impact on commerce should be properly understood. Multiple claims could be made against the same company and freeze its cash flow. That frozen cash flow would therefore be unavailable for other subcontractors.

The lack of a test as to the veracity of claims in this proposal raises the prospect that such claims could be used as a weapon to tie up a company without any burden of proof, with a particularly devastating impact where the respondent has received no payment from the client.

It is also noted that this measure would have been unlikely to have resolved issues concerning Tagara Builders.

The introduction of such a measure would require the Office of the Small Business Commissioner to retain capability in trusts management given its current lack of capacity. This would add another cost burden to industry.

Master Builders SA recommends this proposal be rejected if the Commissioner wishes to improve cash flow to subcontractors.

### **Retention trust arrangements for projects over \$10 million (proposal 2.6)**

Master Builders SA has previously provided extensive reasons why it believes trust arrangements will not improve cash flow in South Australia's building and construction industry<sup>31</sup>.

Instead, bank guarantees and performance bonds are the best protection against company collapses. They cannot be absorbed into the working capital of a company, and cannot be readily distributed by an insolvency representative if the company falls into administration or liquidation.

The difficulty lies in smaller businesses not having a sufficient asset base for bank guarantees or bonds and a practice of some entities to demand cash retentions in place of a guarantee.

Master Builders SA has previously recommended a State Government-backed facility to allow smaller businesses to issue guarantees, with commercial costs to be recovered in a manner similar to its practice of backing Builders Indemnity Insurance.

Subcontractors have made it clear that industry should only work with guarantees as it was the only way of protecting retention funds, and head contractors have indicated that they would pay more to a business willing to provide a guarantee rather than another offering a cash retention as this reduces administration costs.

### Recommendations

- 28. Retention trusts are unlikely to protect subcontractor retentions from insolvency-driven distributions in the event of a company collapse. A more effective mechanism would be a State Government-backed guarantee scheme to support small builders and contractors.**
- 29. Master Builders SA notes the effectiveness of Project Bank Accounts is dependent upon contract forms. Given the shift to design and construct within the South Australian market, there may be limited scope for this initiative. Master Builders SA recommends further discussion should this proposal be considered.**

Thus, those subcontractors unable to offer guarantees are likely to be more exposed, offered less reliable work and lower rates if this measure is introduced. This would appear to be counter to the aims of the Consultation Paper.

However, a subcontractor did suggest an alternative: the automatic release of retentions at the end of the retention period. At present, subcontractors must apply for the release of funds. Automating this – or requiring a notice of dispute to be sent – may evoke a shift of responsibility and ease the administrative burden on subcontractors. This proposal has not been aired with other sectors but is included here for purposes of discussion.

### 7. Proposals to be considered as part of Stage Three

The Consultation Paper raises the prospect of Project Bank Accounts if all measures fail. Although this has been hung out as a measure of last resort, Master Builders SA has elected to respond briefly to the notion as a matter of record. In the event this measure is raised for implementation at a later date, Master Builders SA would appreciate an opportunity to respond more fully, drawing upon the expertise of members who have been exposed to Project Bank Accounts in other jurisdictions.

### Project Bank Accounts

Head contractors have told Master Builders SA that Project Bank Accounts are used regularly for Defence contracts where a head contractor is employed on a managing contract with a clear requirement to pass through payments to subcontractors who have been retained for the project.

It should be emphasized that Project Bank Accounts are typically only contemplated in managing contractor arrangements, where the builder has significant early contract involvement. DPTI and local government appear to be making a deliberate effort to move away from this delivery method and instead are favouring design and construct (D&C) projects where a contractor assumes a principal's design brief and takes on design and construct obligation for a fixed or maximum price.

Project Bank Accounts are also generally only suitable for very large projects. In summary they are not a "one size fits all" solution.

Where Project Bank Accounts are considered relevant, the maintenance of separate project accounts may limit the ability of a business to manage cash flow across multiple projects. While the

security of subcontractor payments may be reinforced, it is likely that projects will bear greater costs from holding higher cash reserves. The client is likely to bear the impact of this measure as construction costs increase.

Master Builders SA recommends the outcomes of interstate trials be reviewed prior to introducing a South Australian trial.

## 8. Alternatives to be Considered

These alternatives have been raised during the consultation period and during earlier work undertaken by members of Master Builders SA's committees.

### Returning to standard contracts – the root cause

Principals are increasingly demanding bespoke contracts that have moved away from the standard contract (such as the AS2124 and AS4000 series of standard forms published by Standards Australia) to shift as much risk as possible to the private sector – a practice widely acknowledged within industry as being the root of many current issues.

DPTI itself is developing its own amended form of standard contract that could represent a significant rejection of the brevity and risk allocation in standard form contracts, thus introducing higher risk along the contracting chain.

This is introducing a fundamental change where risk is transferred to those who least understand it or can afford it. In particular, subcontractors at the end of the chain do not invest in expert legal advice and so put themselves at greater risk while accepting lower prices that fail to cover that risk, thereby increasing the risk of company collapses. This was a clear concern from one subcontractor:

“Previously there was just a standard contract about 20 pages long. Now there are floors and floors of people drafting the most arduous contracts known to man. The purpose is to distract the contractor from having line of sight over their obligations”.<sup>32</sup>

A head contractor highlighted one case where responsibility for “all latent conditions” including “the possibility of ground contamination” was transferred to the head contractor, and then on to the civil contractor – despite being a risk that reasonably should be borne by the client:

“The all too common practise of people ... re-arranging contracts to the point of being unrecognisable will only ever have the consequence of passing risk down the chain. It sets the tone for client behaviour, which in turn, sets the head contractor on a path of risk passing. The end of that line is the sub-contractors and the material supply chain... Poor behaviour by the client and their lawyer, poor behaviour by the contractor and silly behaviour by the civil contractor in accepting this risk.”<sup>33</sup>

A growing practice of issuing standard contracts without marking changes is also increasing this risk of collapse.

Master Builders SA recommends the Small Business Commissioner work with all State Government instrumentalities to advocate a return to standard contracts in order to support the State's small businesses as this practice will not be resolved through amendments to the State's Security of Payment legislation.

## Remove limit on date payments

The specified claim dates (“reference dates”) place an artificial limit that can test trust and force outcomes, one subcontractor has suggested.

A claim may be held off in order to help a builder make ends meet, but if that deadline is missed, then there is a lengthy delay before another claim can be raised.

Introducing some flexibility may help all parties achieve greater payment success and contribute to improved trust throughout the industry.

Master Builders SA would welcome the opportunity to further explore this possibility.

## Improved business education

It was noted in Master Builders SA’s earlier submission regarding industry reform that many of those businesses most affected by the collapse of Tagara Builders had ignored danger signs. In some cases they had also tendered on low prices to buy work, even though those prices would not cover their costs. There was also a misunderstanding as to the risk they were carrying based on certain contractual forms. This is particularly prevalent in the early stages of establishing a business when moving from an apprenticeship and into the commercial sphere<sup>34</sup>.

Requiring greater practical business knowledge for licensing is likely to substantially reduce this risk and develop stronger businesses for the future.

## Form of contract

A push for “hard money” contracts has created an environment where, despite the quality factors sought by prequalification and the Industry Participation Policy, the price of the tender is seen as the dominant factor to winning Government work. Contractors are tempted to cut margins to win work, hoping to recover a sustainable business through variations.

This is clearly unsustainable.

## Recommendations

**30. Master Builders SA recommends further consideration be given to alternative measures raised in this document and in earlier submissions by Master Builders SA if the State Government is interested in effective measures that are Budget-neutral.**

The practice of relying upon the cheapest tender price often results in a higher overall cost to taxpayers once rectification costs are considered. Master Builders SA believes there is scope for a Government-wide reconsideration of this practice to support a more viable industry.

## A renewed focus on sham contracting at a State level

Master Builders SA has received an increasing number of complaints about subcontractors being undercut by

companies employing sham contracting practices.

Companies might treat their employees as contractors and so avoid paying superannuation and Workcover premiums – a practice that not only increases the fallout in the event of a collapse but also results in a major cost advantage that squeezes out companies attempting to employ South Australians and invest in their future.

In the words of one subcontractor:

“Is there anything against it? Because I may do the same thing if I want work.”<sup>35</sup>

Although the laws governing this area are the responsibility of the Commonwealth, Master Builders SA believes the Small Business Commissioner has a strong role to play in protecting and supporting South Australian contractors against sham contractors. We look forward to working with the Office of the Small Business Commissioner to improve compliance in this regard.

## National harmonization

South Australia’s construction industry is part of a national marketplace. The development of an Industry Participation Policy (IPP) that requires local involvement is recognition of this phenomenon.

But while the IPP seeks involvement from businesses entering South Australia, little thought has been given in this review to South Australian businesses seeking to grow outside the State. It is this growth that will deliver real benefits and wealth for South Australia and should serve as a keystone for legislative reform.

Master Builders SA therefore recommends the Small Business Commissioner and Small Business Minister have due regard for the aim of harmonizing Security of Payment laws. A company that faces restrictions from an additional red tape burden while operating in South Australia is distracted from growing its interstate operations – or may look to move interstate for a more attractive regulatory environment.

Master Builders SA urges the State Government to recognise this very real drive for productivity that all businesses face, and to consider a best-practice approach that delivers the right solutions for the right reasons.

The Senate Standing Committee on Economics has recommended the national harmonization of Security of Payment legislation<sup>36</sup>. While we continue to argue for legislation that reflects the needs of South Australia and its industry, we recommend any initiative that introduces further disparity between States should consider its likely impact on productivity and competition.

## 9. Approaches to Cost Recovery

Master Builders SA has raised concerns about the full cost impact of the matters raised within this Consultation Paper with reference to proposal 1.3 above. In general, there is concern that the creation of a dedicated secretariat and investigative unit – and the requisite costs – appears to have overlooked existing processes and facilities offered by alternative arms of Government.

Master Builders SA opposes any measure that might duplicate an existing measure or introduce another compliance cost with little or no benefit.

In supporting the proposal for the publication of adjudications and the creation of a sole ANA, Master Builders SA believes the existing structures provided by the Magistrates' Court or SACAT provide a more effective avenue without imposing a new cost structure relating to the establishment of a new facility.

Although an industry levy might be viewed as an efficient method of cost recovery, there is concern amongst industry participants that the focus will be on raising revenue rather than recovering costs. Master Builders SA is therefore hesitant to support such a mechanism without sufficient safeguards. This is particularly important given the likelihood that the imposition of additional construction costs will exacerbate competitive tensions and create a new round of businesses seeking to undercut others to win work.

## 10. Sector-specific Feedback

Master Builders SA's original submission regarding the review of the Security of Payment Act dutifully recorded feedback from head contractors and subcontractors and recommended representatives of both sectors develop industry-wide solutions.

We have adopted that recommendation for the purposes of this Consultation Paper.

Our Commercial Contractors' Committee provided feedback on every proposal at a meeting on June 29, 2016. Feedback from our Contracts Committee was sought at its June 30, 2016 meeting and feedback from our Subcontractors Committee was sought at its July 13, 2016, meeting.

These views were consolidated for a discussion among representatives from each group at a round table on July 15, 2016. This discussion was undertaken by our Industry Futures Working Group, a group of senior industry representatives who were asked to represent their sector – but also to represent the best interests of industry. This group was initially formed to develop industry policy in the wake of the collapse of Tagara Builders.

Individual meetings were held with stakeholders from all sectors to gain additional insight, and discussions were held with members of the Construction Industry Forum on August 9, 2016 and with specialist contractor associations on August 10, 2016.

Master Builders SA outlines this process to confirm our confidence that this submission represents an industry-wide perspective and our commitment to strongly representing that perspective in the interests of the broader industry.

A summary of sector-based responses is available [here](#).

## 11. Conclusions

Master Builders SA is supportive of creating a stronger Security of Payment system to enable the speedy resolution of payment claims. We believe this is likely to be best achieved through a change

of culture and improved education, and not through the introduction of criminal penalties and duplicated administrative practices.

Members remain concerned about the potential cost impact of many proposals with a fear that the higher costs may result in a hastening of the very tensions that underlie this Consultation Paper.

There are a number of proposed improvements that present less of an impact on commercial dealings and at a lower cost – Master Builders looks forward to working with the State Government to achieve the best outcome for industry and for taxpayers.

---

<sup>1</sup> Master Builders SA, Submission to Small Business Commissioner John Chapman and the Minister for Small Business Tom Koutsantonis, February 2015. Available at [https://www.mbase.com.au/\\_files/d/44398/Submission\\_-\\_Security\\_of\\_Payment\\_Act.pdf](https://www.mbase.com.au/_files/d/44398/Submission_-_Security_of_Payment_Act.pdf) (accessed August 15, 2016).

<sup>2</sup> *ibid*, par. 3.1, 4.

<sup>3</sup> Chapman, John, Proposed Changes to the Building and Construction Industry Security of Payment Act 2009 and other Initiatives to Improve Payment to Subcontractors in the Building and Construction Industry, June 2010, 5. Available at [http://www.sasbc.sa.gov.au/files/540\\_consultation\\_paper\\_2016\\_06\\_17.pdf](http://www.sasbc.sa.gov.au/files/540_consultation_paper_2016_06_17.pdf) (accessed August 15, 2016).

<sup>4</sup> Master Builders SA, Improving the South Australian Construction Industry, December 2015. Available at [http://mbasa.com.au/\\_files/d/38088/Submission\\_to\\_Treasurer\\_Tom\\_Koutsantonis\\_-\\_Improving\\_the\\_South\\_Australian\\_Construction\\_Industry.pdf](http://mbasa.com.au/_files/d/38088/Submission_to_Treasurer_Tom_Koutsantonis_-_Improving_the_South_Australian_Construction_Industry.pdf) (accessed August 15, 2016).

<sup>5</sup> Recorded comment from June 30, 2016 meeting of Master Builders SA Contracts Committee.

<sup>6</sup> Recorded comment from June 29, 2016 meeting of Master Builders SA Commercial Contractors Committee.

<sup>7</sup> Email discussion on August 17, 2016 with head contractor A.

<sup>8</sup> Recorded comment from July 7, 2016 meeting with specialist contractor.

<sup>9</sup> See, for example, Chapman, 8.

<sup>10</sup> Senate Standing Committee on Economics, Insolvency in the Australian construction industry, December 2015, recommendation 28, page xxx. Available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Insolvency\\_construction/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report) (accessed August 17, 2016).

<sup>11</sup> Master Builders SA, Improving the South Australian Construction Industry, 9.

<sup>12</sup> See discussion regarding proposal 2.1 on page 14.

<sup>13</sup> Senate Standing Committee on Economics, *op cit*, recommendation 24, page xxx.

<sup>14</sup> Recorded comment from July 6, 2016 meeting of Master Builders SA Subcontractors Committee.

<sup>15</sup> *ibid*.

<sup>16</sup> *ibid*.

<sup>17</sup> *Built Environs Pty Ltd v Tali Engineering Pty Ltd & Ors* [2013] SASC 84. Available at <http://www.austlii.edu.au/au/cases/sa/SASC/2013/84.html> (accessed August 16, 2016).

<sup>18</sup> Estimated to be \$900,000, presumably per annum: Chapman, proposal 1.8, 14.

<sup>19</sup> See, for example, recognition of the role of the State Administrative Tribunal in Western Australia: Skaik, Samer, Submission on SOP Consultation Paper, June 2016, 11. Available at [http://www.sasbc.sa.gov.au/files/591\\_consultation\\_paper\\_submission\\_samer\\_skaik\\_2016\\_07\\_27\\_a822230.pdf](http://www.sasbc.sa.gov.au/files/591_consultation_paper_submission_samer_skaik_2016_07_27_a822230.pdf) (accessed August 16, 2016).

<sup>20</sup> Subcontractors Committee.

<sup>21</sup> *ibid*.

<sup>22</sup> See also calls for compulsory legal training, technical education, construction experience and continuing professional

---

development for adjudicators: Skaik, 27. Master Builders SA supports the need for continuing technical development for adjudicators.

<sup>23</sup> Building and Construction Industry Payments Act 2004 (Qld), Schedule 2, section 9. Available at <https://www.legislation.qld.gov.au/legisln/current/b/buildngcipa04.pdf> (accessed August 18, 2016).

<sup>24</sup> Construction Industry Forum, Code of Practice for the South Australian Construction Industry, March 2016, 24. Available at [http://www.dpti.sa.gov.au/\\_data/assets/pdf\\_file/0006/255561/08\\_code\\_of\\_practice\\_and\\_implementation\\_guidelines\\_2016\\_p022\\_v1.2.pdf](http://www.dpti.sa.gov.au/_data/assets/pdf_file/0006/255561/08_code_of_practice_and_implementation_guidelines_2016_p022_v1.2.pdf) (accessed August 15, 2016).

<sup>25</sup> Commercial Contractors Committee.

<sup>26</sup> Subcontractors Committee.

<sup>27</sup> Skaik, 22.

<sup>28</sup> *ibid*, 25.

<sup>29</sup> Subcontractors Committee.

<sup>30</sup> Anderson, Nick, Proposed Changes to the Building and Construction Industry Security of Payment Act 2009 and Other Initiatives, July 2016. Available at

[http://www.sasbc.sa.gov.au/files/604\\_consultation\\_paper\\_submission\\_nick\\_anderson\\_undated\\_a822798.pdf](http://www.sasbc.sa.gov.au/files/604_consultation_paper_submission_nick_anderson_undated_a822798.pdf) (accessed August 16, 2016).

<sup>31</sup> Master Builders SA, Improving the South Australian Construction Industry, 10-12.

<sup>32</sup> Recorded comment from August 3, 2016 interview with specialist contractor.

<sup>33</sup> Email discussion on August 17, 2016 with head contractor B.

<sup>34</sup> Master Builders SA, Improving the South Australian Construction Industry, 4.

<sup>35</sup> Recorded comment from July 19, 2016 interview with specialist contractor.

<sup>36</sup> Senate Standing Committee, *op cit*, recommendation 28, page xxx.