



**MASTER BUILDERS**  
SOUTH AUSTRALIA

**Submission to Small Business  
Commissioner John Chapman and the  
Minister for Small Business Tom  
Koutsantonis**

**Review of the Building and  
Construction Industry Security of  
Payment Act 2009 (SA)**

**February 20, 2015**



**MASTER BUILDERS**  
SOUTH AUSTRALIA

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## 1 Introduction

- 1.1 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.
- 1.2 Master Builders SA is committed to building a productive industry and a prosperous South Australian community and economy.
- 1.3 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.
- 1.4 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.
- 1.5 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.
- 1.6 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 Purpose of submission

- 2.1 The *Building and Construction Industry Security of Payments Act 2009 (SA)* (“**the Act**”) is committed to the Minister for Small Business Tom Koutsantonis. Small Business Commissioner John Chapman has functional responsibility for the Act.
- 2.2 The Act commenced on 10 December 2011 to ensure that a person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a

construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

- 2.3 The Act is modelled on the New South Wales security of payment legislation, the *Building and Construction Industry Security of Payments Act 1999* (“**NSW Act**”). The Queensland security of payment legislation, the *Building and Construction Industry Payments Act 2004* (“**Qld Act**”) is also based on the same NSW Act model. The NSW Act and Qld Act were both recently amended, and these amendments commenced in 2014.
- 2.4 Under section 36 of the Act, the Minister is to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate to secure these objectives. The review is to be undertaken as soon as possible after the period of three years from the date on which the Act came into operation, and is to be tabled in Parliament within three months after the end of this three year period.
- 2.5 Accordingly, the Minister has called for submissions to the Small Business Commissioner, which are due on 13 February 2015. Master Builders SA has been granted an extension until 20 February 2015 to lodge its submission.
- 2.6 Master Builders SA takes this opportunity to note that a longer period should have been permitted for submissions to the Small Business Commissioner, and the review under section 36 of the Act generally. This is especially so given that the three month period for review runs through the Christmas closure in the building and construction industry that is acknowledged in the Act itself. A significant number of members have made this complaint.
- 2.7 Master Builders SA has elected to make a submission to the review because the Security of Payment legislation is a very useful tool for members. The legislation provides members a fast and cost-effective means to recover payments due to them for construction work or for supplying related goods and services under construction contracts. Sustaining cash flow lower down the payment chain helps to ensure the solvency of subcontractors, and in turn the head contractors who rely upon them as well as the industry and economy as a whole.
- 2.8 Master Builders SA represents more than 2300 members of South Australia’s building and construction industry and actively represents the diverse interests of the sector. This submission captures the experience, opinions, feedback and voices of the industry.

### 3 Summary and Recommendations

#### *Resolving conflicting views on security of payment legislation in the building and construction industry*

- 3.1 This submission is made on behalf of the building and construction industry as a whole. Security of payment legislation is a highly contentious issue in the industry because the interests of “commercial contractors” or “head contractors” (referred to as “head contractors” in this submission) and their subcontractors are often in direct conflict on aspects of the legislation. Master Builders SA recommends that the State Government convene a working group with representatives of head contractors and subcontractors, as nominated by Master Builders SA with the aim of achieving a pragmatic outcome, to come to an agreement on the balance on this issue. An extension of the time for the review allowed under section 36 of the Act should be arranged if necessary.
- 3.2 Master Builders SA has not provided a conclusive view on each issue within this document but instead sought to clarify some of the fundamental differences of opinions and interest within the South Australian building and construction industry. These differences have been recorded below in a transparent effort to assist the current process while also recognising the distinct interests of our members.
- 3.3 As the sole industry body representing both head contractors and subcontractors, Master Builders SA would welcome further discussions with the Small Business Commissioner as to how to manage the reconciliation of these divergent views.

#### *Submissions by Master Builders SA and its members*

- 3.4 Validity of the policy objectives of the Act: Master Builders SA and members consider that they remain valid.
- 3.5 Extending definitions of “construction work” and “related goods and services” to which the Act applies: Members agree that the current definition is appropriate as is.
- 3.6 Current definitions of rights to progress claims, calculations of amount of progress payment and valuation of construction work and related goods and services: No member has

suggested that these are inadequate, though some head contractors have raised concerns about the Act undermining progress claim procedures set out in contracts.

3.7 Eligibility criteria for adjudicators: Some head contractors suggest that Reg 6 of the Regulations should be expanded to include more extensive eligibility requirements including higher accreditation standards, reviews, continuing professional development, and possibly a “scale” of adjudicators based on experience level.

3.8 Commissioner to investigate payment practices of head contractors: No members have commented on the proposal in the Issues Paper for the Commissioner to be able to investigate repeated use of unscrupulous tactics in non-payment of subcontractors. But it can be expected that:

3.8.1 Head contractors: Will oppose this as unnecessary, costly and administratively impracticable, especially because the Issues Paper provides no specifics; and

3.8.2 Subcontractors: May support this proposal.

This fundamental conflict between the two sectors adds merit to the recommendation by Master Builders SA that a working group comprising head contractor and subcontractor representatives – as nominated by Master Builders SA with a view to producing a pragmatic outcome – be convened to assist the resolution of fundamental matters underlying the current review.

3.9 Consequences of not paying claimant adjudicated amount: No members suggest additional powers to recover an adjudicated amount. It is acknowledged that enforcing a judgment can be difficult.

3.10 Simplification of the process under the Act: This may aid adoption of the Act but would create difficulties for more complex claims. Subcontractors support streamlining for simpler claims (generally in a manner that favours claimants) and head contractors do not agree with these points. Resolution of this would be assisted by a sanctioned working group with sectoral representatives nominated by Master Builders SA with a view to producing an effective outcome.

3.11 Government adjudicator panel: The Small Business Commissioner is considering establishing its own adjudicator panel. Master Builders SA agrees this may be a lower cost solution than private Authorised Nominating Authorities (“ANAs”), and may reduce risk of biased decisions (especially

in favour of claimants). But Master Builders SA does not consider that the role of ANAs should be abolished as has occurred in Queensland. Not-for-profit ANAs like Master Builders SA can be effective in promoting the aims of the Act and are more likely to promote long-term solutions than those bodies focused on short-term resolutions with a fee component as a motivator.

3.12 Distinguishing “simple” and “complex” claims: Queensland now distinguishes “simple” claims and “complex” claims, allowing longer timeframes for complex claims. A complex claim under the Queensland legislation is defined as being worth at least \$750,000. The South Australian Act makes no distinction between a claim for \$500 and a claim for \$5 million.

3.12.1 Head contractors: Favour a similar amendment in South Australia to allow more time to respond to claims and limit the scope for a subcontractor “ambush” on complex claims.

3.12.2 Subcontractors: Favour a similar amendment but also to seek additional changes to simple claims to favour subcontractors and expedite payment (in line with those set out at 3.20 below). This is opposed by head contractors.

3.13 Jurisdictional error: Queensland now limits the impact of adjudicators making jurisdictional errors by giving Courts the discretion to sever the affected parts of the decision, preserving the rest of the decision. This is generally supported by members and the Association.

3.14 Clarify definition of “business day”: Master Builders SA and all member responses favour this amendment as the current South Australian definition is vague and does not clearly define the Christmas shutdown and other shutdown periods.

3.15 Second chance provisions: Members disagree on treatment of “second chance” provisions in the Act, which currently require claimants to issue a head contractor a second notice and allow another chance to serve a payment schedule before adjudication.

3.15.1 Head contractors: As in the recent Queensland amendments, head contractors want the second chance provisions to be extended to Court proceedings on payment claims and adjudications.

3.15.2 Subcontractors: Want the second chance abolished entirely. Head contractors strongly object to this.

- 3.16 Supporting statements from head contractors making payment claims themselves declaring that they have paid their subcontractors: Subcontractors support this but head contractors see it as an administrative burden and already have similar obligations under more complex contracts.
- 3.17 Removal of the requirement that a payment claim include words stating it is a claim under the Act: Members strongly disagree on this.
- 3.17.1 Head contractors: Say this amendment will be very damaging. All invoices – including those not meeting requirements for progress claims under the contract – will need to be treated as claims under the Act, significantly increasing administrative burdens on head contractors. The amendment will also damage goodwill and trust within the industry.
- 3.17.2 Contractors for private residential builds: Say they are especially disadvantaged as they cannot rely on the Act against homeowners, but their subcontractors can use the Act.
- 3.17.3 Subcontractors: Support the amendment as reducing their administrative burden as they are currently required to issue a second invoice with the nominated phrase if the initial invoice is silent on the matter. This amendment would also limit the pressure placed by head contractors on subcontractors to waive the operation of the Act.
- 3.18 Cash retentions to be held in trust: New South Wales is introducing regulations for retention monies to be held in a trust fund for projects valued more than \$20 million.
- 3.18.1 Head contractors: Strongly against the amendment due to the costs and administrative burden imposed and difficulties in valuing projects, creating uncertainty in application.
- 3.18.2 Subcontractors: Support the amendment on the basis that retentions should be held aside from contractors' general monies.
- 3.19 Maximum payment provisions: Maximum payment provisions have been introduced for all payment claims under the New South Wales Act (30 business days for claims by subcontractors to head contractors, 15 business days for claims to principals).
- 3.19.1 Head contractors: Generally consider the change unnecessary.



3.19.2 Subcontractors: Support such a change.

3.20 Additional amendments proposed by subcontractors: The subcontractors committee of Master Builders SA has proposed consideration of the following:

3.20.1 Repealing the limit under the Act to one payment per reference date (i.e. one claim per month). Subcontractors say this can interfere with claiming variations under the Act. Head contractors say that this will enable abuse of the Act by subcontractors.

3.20.2 Allowing longer time frames to apply for adjudication.

3.20.3 A new legal requirement that subcontractor payment periods match head contract payment periods.

3.20.4 A right under the Act to “leap frog” and claim further up the payment chain if their head contractor fails to pay.

3.20.5 Abolishing second chances for head contractors to respond to payment claims.

Head contractors strongly disagree with these amendments and largely regard them as radical and unnecessary with the potential risk for increasing administrative demands. Head contractors will contemplate the allowance of additional payment claims for a given reference date solely to cover variations.

3.21 Longer response times for head contractors: Head contractors seek an extension of the time bars under the Act for responding to payment claims and adjudication applications. It can be expected subcontractors would disagree.

3.22 Liquidators: Head contractors are critical of their use of the Act.

3.23 Frivolous claims: Head contractors complain the Act is being misused for frivolous claims. Subcontractors disagree.

3.24 Adjudicators interstate: Head contractors seek that only South Australian adjudicators be authorised to provide for a prompt resolution of matters. Alternatively, periods allowed for responses should be constrained so as to limit the impact on business and project outcomes.

- 3.25 Repeal exclusion of housing builders from using Act: Housing contractors wish to be able to rely on the Act for protection against clients/owners. They acknowledge the State Government's policy imperatives may militate against such an amendment.
- 3.26 National harmonisation of security of payment legislation: A number of stakeholders have advocated for national harmonisation of security of payment legislation to reduce costs and confusion for businesses trading in multiple States.
- 3.26.1 Both head contractors and subcontractors support this in principle.
- 3.26.2 Head contractors and subcontractors are likely to have divergent views as to the necessary final form of the resulting legislation.
- 3.27 Master Builders SA and members consider more time should be allowed for the review, especially given that the statutory review period ran through the industry's Christmas shutdown. Given the fundamental sectoral differences outlined above, Master Builders SA recommends the establishment of a working group with a brief to work towards a pragmatic outcome.

## 4 **Conflicting views on security of payment legislation in the building and construction industry**

- 4.1 In preparing this submission, Master Builders SA has taken comments from its members. Members attached to the Master Builders SA Contracts Committee, Commercial Contractors Committee, Subcontractor's Committee and Housing Committee have been directly consulted to appreciate the complex sectoral issues raised by this legislation.
- 4.2 Security of payment legislation is a highly contentious issue within the building and construction industry because the interests of "commercial contractors" or "head contractors" (in this Submission usually referred to as "head contractors") and their subcontractors are in direct conflict on aspects of the legislation.
- 4.3 Master Builders SA recommends the State Government convene a working group with representatives of head contractors and subcontractors, as nominated by Master Builders SA with a view to achieving a conclusive and pragmatic outcome, to come to an agreement on issues raised in this review. An extension of the time for the review allowed under section 36 of the Act should be arranged if necessary.

- 4.4 It is further recommended that members of the working group be given a clear understanding that their focus is the betterment of the industry and their clients as a whole.
- 4.5 This submission will define both positions where competing views arise.

## 5 Policy objectives of the Act

- 5.1 Whether the policy objectives of the Act remain valid is a specifically identified consideration for the purposes of the review under section 36 of the Act.
- 5.2 According to section 3(1) of the Act, the object of the Act is *“to ensure that a person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services”*.
- 5.3 Master Builders SA considers, and industry feedback consistently indicates, that this is still a valid objective and an important issue in the industry. Master Builders SA has heard no suggestion from members that the policy objective is not valid or that the Act should not exist in a form fundamentally consistent with clause 3 of the Act and the East Coast model for security of payment legislation.
- 5.4 Subcontractor members are particularly passionate advocates for the objectives of the Act as the Act is an attempt to address their vulnerability to exploitation by their larger head contractors higher up the payment chain. It is noted in this respect that the Small Business Commissioner has recently highlighted (and criticised) a practice of refusal by some larger head contractors to pay subcontractors on proper payment terms.<sup>1</sup>
- 5.5 The balance of this submission deals with matters of detail as to whether the terms of the Act are appropriate (and effective) for securing this objective, which is the other consideration identified for review under section 36 of the Act.

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<sup>1</sup> Chapman, John, “Alarm Bells Ringing in Building and Construction Industries”, The Advertiser, January 29, 2015. Available at <http://www.adelaidenow.com.au/news/opinion/john-chapman-alarm-bells-ringing-in-building-and-construction-industries/story-fni6unxq-1227199952735>, accessed February 19, 2015.

## 6 Matters raised in the Issues Paper

- 6.1 The paragraphs under this heading address the “Main Issues with the Act” set out in the Issues Paper, addressing each issue raised in turn.

### *Definitions and application of “construction work”, “related goods and services”*

- 6.2 Master Builders SA considers that the definition of “construction work” under section 5 of the Act is still current. It is generally consistent with the current definitions in the NSW Act and Qld Act save minor details.
- 6.3 Master Builders SA also considers that the definition of “related goods and services” under section 6 of the Act is still current. Again, it is generally consistent with definition still used in the NSW Act and Qld Act (for example, Queensland’s definition specifically includes soil testing services related to construction work).
- 6.4 The Issues Paper queries whether section 5 of the Act or section 7 of the Act (which deals with application of the Act) should be amended to cover contracts that may not currently fall within the Act’s ambit in its current terms, but should be subject to the Act.
- 6.5 In the experience of members of Master Builders SA, this point has not been a major impediment to application of the Act to date. It is suggested that the proposed amendment is targeted at other industries. This said, Master Builders SA considers that the definitions should be amended from time to time as appropriate to cover the entire building and construction industry. It is noted in this respect that the South Australian and Queensland definitions allow for regulations in respect of the definition of “construction work” and “related goods and services”.

### *Right to progress payments – payment claims*

- 6.6 No member has advised that they consider the current definitions of rights to progress claims, calculations of amount of progress payment and valuation of construction work and related goods and services to be inadequate.

- 6.7 Relatedly however, head contractors do complain that the Act permits payment claims that do not meet the detail requirements under their construction contracts. See further paragraph 7.36 below.
- 6.8 As to the question in the Issues Paper under this heading about the requirement that a claimant provide a payment request to the respondent stating the payment claim is made under the Act, see further paragraph 7.31ff.

### *Eligibility criteria for adjudicators*

- 6.9 Head contractors have suggested that more rigorous initial accreditation and qualification, review and continuing professional development requirements could be included in Reg 6 of the Regulations, as well as a “scale” of adjudicators at varying levels of expertise. A number of matters of detail in relation to adjudicator oversight and the Code of Conduct are set out at page 6 of the Issues Paper which are beyond the scope of the responses received from members and this submission. However, Master Builders SA is keen to be involved in any review of these considerations.
- 6.10 No members have objected to the limitation on nomination where an adjudicator has been found to have made a technical error unless the cause of the error has been resolved.
- 6.11 Master Builders SA is not averse to the Small Business Commissioner providing its own adjudication panel as is proposed under this heading of the Issues Paper. This would provide the industry a solution that:
- 6.11.1 Is at lower cost; and
  - 6.11.2 Has a lower risk of adjudications compromised by bias or incompetence of adjudicators than private authorised nominating authorities who may have a commercial incentive to ensure that claimants are successful.
- 6.12 Discussion as to whether this should be an exclusive panel, effectively abolishing the role of Authorised Nominating Authorities, continues at paragraph 7.4 ff.
- 6.13 No members have commented on the proposal in the Issues Paper for the Commissioner to be able to investigate repeated use of unscrupulous tactics in non-payment of subcontractors. It could be expected that head contractors will oppose this proposal as unnecessary, costly and

administratively impracticable, especially because the Issues Paper provides no specifics. Subcontractors may support this proposal, but the objections to it are relatively compelling.

### *Consequences of not paying claimant adjudicated amount*

- 6.14 Master Builders SA has not received specific submissions relating to difficulties in recovering adjudicated sums, although the same difficulties will be encountered on enforcement of an adjudication as with any other judgment debt. It is noted that the claimant has the added benefit of the right to suspend work.

### *General issues*

- 6.15 This submission addresses elsewhere whether:
- 6.15.1 the Act is achieving its objectives in providing the building and construction industry with an effective process to secure payment outside of legal action;
  - 6.15.2 the Act is working in a manner which secures timely and fair outcomes;
  - 6.15.3 the process is unduly complex and therefore could be streamlined;
  - 6.15.4 the adjudication process is effective; and
  - 6.15.5 there are changes to the Act which can be considered.

## **7 Amendments to Interstate Security of Payment Legislation**

- 7.1 Master Builders SA has considered and sought comment from members as to the recent amendments to the NSW Act and Qld Act.
- 7.2 The most salient of these amendments are set out below, together with our comments and a summary of members' perspectives.
- 7.3 Broadly, it can be observed that where amendments were not unanimously endorsed head contractors tended to prefer the direction taken by the Qld Act (as amended), and subcontractors tend to prefer the NSW Act. It can be noted that the Qld Act amendments bring the Qld Act closer to the West Coast model for security of payment legislation.

## *Role of Authorised Nominating Authorities*

- 7.4 Queensland has effectively abolished the role of Authorised Nominating Authorities (“ANAs”). Adjudication applications in Queensland will now be made to a State Government registry, which will be responsible for selecting, training and supervising adjudicators.
- 7.5 The Issues Paper acknowledges complaints about adjudicators and ANAs in South Australia and suggested improvements, including an adjudication panel run by the Small Business Commissioner. The Issues Paper did not expressly propose abolishing the role of ANAs.
- 7.6 As noted above, there can be problems with commercially-driven private ANAs. In particular, some ANAs charge unregulated commissions or fees which add costs to the payment dispute process. Concerns have also been raised by members about competence and perceived bias of adjudicators nominated by commercially motivated ANAs.<sup>2</sup> Erroneous decisions, or decisions made by adjudicators with apprehended bias, can potentially be set aside. A perception of bias, whether or not that perception is correct, can interfere with the goals of the Act. These concerns would be mitigated by the establishment of an independent body backed by the State Government, developing a functional and coordinated relationship with services provided by not-for-profit ANAs.
- 7.7 On the other hand, private ANAs (and perhaps especially not-for-profit industry associations such as Master Builders SA) can take steps to limit these problems, are better positioned to ensure proper training and monitoring for adjudicators, and may be more proactive and effective in increasing industry awareness of the benefits of using the legislation. This awareness is still developing.
- 7.8 There could also still be perceived bias if appointment by the State Government is not transparent, or where the State Government itself is a party to a payment dispute.
- 7.9 Accordingly, Master Builders SA is in favour of a government-backed ANA with specific provisions to limit bias and overcharging. However, the effective abolishment of the roles of ANAs is not endorsed.

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<sup>2</sup> See, eg, *BUILT ENVIRONS PTY LTD v TALI ENGINEERING PTY LTD & ORS* [2013] SASC 84 (3 June 2013).

7.10 It is noted some members were in favour of abolishing ANAs altogether.

*“Standard” and “complex” payment claims*

7.11 Queensland now distinguishes between “standard” and “complex” payment claims.

7.12 Claims in Queensland previously were treated the same under the Act whether they were for \$500 or \$5 million. In South Australia, this is still the case.

7.13 Under the amendments, “complex” payment claims are those for amounts in excess of \$750,000 (exclusive of GST). In an earlier version of the amendments the definition also included claims relating to latent conditions or “time-related costs”, which obviously can lead to very complex disputes.

7.14 The amendments allow more generous timeframes to respond to complex payment claims and adjudication applications than allowed for standard claims. Further, when responding to an adjudication application relating to a complex payment claim under the amended Act the person responding may raise new issues or reasons that were not included in their earlier payment schedule response. Raising new reasons disputing the claim in an adjudication response is normally not permitted under South Australian or Queensland legislation.

7.15 Generally this amendment could be helpful for head contractors with complex payment claims, and similar amendments have previously been advanced by Master Builders Australia. The Queensland second reading speech suggested that the amendment could also help to limit the scope for claimants to issue very large, carefully prepared ‘ambush claims’ to which recipients have little time to respond. A number of commercial contractor members have complained about such claims – and similarly large, poorly timed claims prepared in a sloppy manner – as being unfair and an undue burden on personnel.

7.16 Head contractors, and a number of subcontractors, generally are in favour of this amendment. Indeed, subcontractor members have suggested further amendments to better manage treatment of smaller payment claims. Master Builders SA is not particularly aware of any complaint that the Act is too complex generally for “simpler” claims, but the distinction may allow a streamlined process for smaller claims. The specific amendments proposed are discussed below at paragraph 8.10 ff. They are unlikely to be met with approval by head contractors.



- 7.17 Under the Queensland amendments, adjudicator decisions in complex adjudications can take more than 21 weeks from service of a payment claim, which some may consider to be too long given the Act's aim to ensure swift payment. This may contribute to a situation where head contractors working with complex payment claims could run into cash flow issues where subcontractors can make standard payment claims on shorter time frames than the head contractor's complex claims.

### *Jurisdictional error*

- 7.18 Queensland now limits the impact of adjudicators making jurisdictional errors by giving Courts the discretion to sever the affected parts of the decision, preserving the rest.
- 7.19 While the view among the membership is not quite unanimous, Master Builders SA cannot see a valid reason why this amendment should not be made.

### *Business day definition*

- 7.20 Queensland has also amended the definition of "business day" by adding specific days for a Christmas shutdown.
- 7.21 This amendment may be helpful in South Australia and is generally supported in member comments to Master Builders SA. Master Builders SA received a number of queries from members and other stakeholders late last year in relation to the South Australian Act's definition of "business days", which refers to "State-wide shutdown" periods without specifying particular dates for periods such as the Christmas shutdown.

### *Extension of second chance provisions to recovery of payment claims by court proceedings*

- 7.22 Where no payment schedule has been served, Queensland now requires claimants to allow a five business day 'second chance' to serve a payment schedule before a claimant can start court proceedings or adjudication to recover their payment claim as a deemed debt.
- 7.23 Previously in Queensland, this 'second chance' to serve a payment schedule only applied if the claimant wanted to recover their payment claim by way of adjudication. No second

chance needed to be allowed before proceeding in Court for the whole payment claim. This remains the current position in South Australia.

7.24 Head contractor members favour this amendment, whereas some subcontractor members oppose this. Indeed, some subcontractors consider that the ‘second chance’ prior to serving an adjudication application under the Act should be repealed generally, as is further discussed at paragraph 8.17 below.

7.25 Stakeholders have also identified a technical legal issue which exists in relation to the prohibition on defences to payment claims by way of court proceedings under the Act – see paragraph 11.1 below.

### *Supporting statements provided by head contractors making payment claims*

7.26 New South Wales now requires a supporting statement to be provided by head contractors making payment claims declaring the head contractor has paid amounts due to subcontractors and suppliers for the work concerned.

7.27 In Queensland, failure to do so when making a payment claim, or making a false statement, is an offence that gives rise to penalties up to \$22,000 and up to three months’ imprisonment.

7.28 These amendments appear to incentivize head contractors to pay subcontractors or to settle fundamental factual issues relating to the dispute.

7.29 Master Builders SA has received one submission stating “subcontractors view this as an important step in defeating poor payment practices”.

7.30 However, this requirement may prove to be an administrative burden to head contractors. While more sophisticated construction contracts often already require contractors claiming payment to include a statutory declaration under the Oaths Act – where deliberate breach of the Oaths Act can lead to criminal penalties – anecdotes suggest such breaches have rarely been enforced and that declarations are sometimes amended to hide breaches.

### *Removal of requirement for payment claim to state it is a claim under the Act*

- 7.31 New South Wales has repealed the requirement that a valid payment claim must include words stating it is a claim made under the Act<sup>3</sup>. This allows any non-domestic invoice to serve as a payment claim.
- 7.32 Views on applying this amendment to South Australian legislation are polarized. Members higher up the payment chain are against the amendment. Members lower down are in favour.
- 7.33 Subcontractors favour the amendment because it expedites their claims and reduces their administrative load by dispensing with the need to issue a second invoice with complying phrasing. There is a view it would also provide relief against pressure not to rely on security of payment legislation.
- 7.34 Some stakeholders suggest the legislation may be underutilized because the use of the required phrasing sends a clear signal that there is a dispute between parties.
- 7.35 Head contractors are concerned that the amendment would elevate every invoice to a formal payment claim under the Act, including claims by domestic subcontractors. This is likely to increase business costs and may negatively impact goodwill in the industry with damaging repercussions in the domestic building sector. The amendment would require an extensive investment in sector education for those parties unaware of the repercussions, although commercial operators are likely to be more aware of their obligations under the Act.
- 7.36 Concerns have also been raised by head contractors about reliance on the Act to present insufficiently detailed invoices as payment claims, contrary to requirements under the applicable contract. Many head contractors want contractual requirements for eligibility to a payment claim to be preserved.
- 7.37 Master Builders SA notes that, as mentioned under the previous subheading, the New South Wales amendments also require a supporting statement to be provided with head contractor claims for those claims to be valid. This statement may effectively serve the same purpose as

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<sup>3</sup> This does not apply to subcontractors under domestic building contracts.

the old requirement for the 'magic words' in most cases. It is unclear from the Issues Paper whether this requirement will be adopted in South Australia. If it were, it may dilute the impact of this amendment for more sophisticated subcontractors.

### *Changes to cash retention*

- 7.38 New South Wales now allows for regulations requiring subcontractor retention monies to be held in a trust fund for the benefit of the subcontractor entitled to the funds. This requirement applies only in the case of large projects valued at more than \$20 million. Regulations have passed and will commence in New South Wales effective February 2015.
- 7.39 Head contractors criticize the changes as the valuation of a project could present difficulties, as may less commonly used project delivery methods. The required ADI account is also claimed to impose significant additional costs for head contractors.
- 7.40 Subcontractors have firmly expressed their support for the amendment, based on the principle that cash retention is not held for working capital purposes and should not be held by head contractors as general revenue. It is difficult for a subcontractor to achieve return of a cash retention, and the retention is often lost in the case of a head contractor becoming insolvent.

### *Maximum Payment Period Provisions*

- 7.41 New South Wales now requires progress payments to be made by recipients of a payment claim before set deadlines, irrespective of whether a contract provides for a later due date for progress payments. The deadline is 15 business days after head contractors submit payment claims to principals, and 30 business days after subcontractors submit payment claims to head contractors (or earlier if the relevant contract so provides in either case). The South Australian Act does not presently set a maximum payment period.
- 7.42 Subcontractors favour the amendment. Head contractors do not. Some head contractors suggest the provision should only apply if there has been no contractual agreement otherwise. Maximum payment period provisions will help the Act achieve its aim of ensuring prompt progress payments, although many subcontractors will already enjoy more favourable terms than the relatively long periods set by the NSW Act.

- 7.43 The maximum payment period in the NSW Act does not apply to residential subcontractors. While residential subcontractors can use security of payment legislation, residential head contractors cannot use the legislation at all against a principal proposing to live in the premises on which the work is to be carried out.

## 8 Other matters raised by subcontractors

- 8.1 Subcontractors have raised additional matters not expressly covered by the Issues Paper or major recent amendments to the NSW Act and Qld Act.

### *Removal of requirement that only one payment claim can be made per reference number each month*

- 8.2 Section 13(5) of the Act provides that only a single payment claim can be submitted in respect of each reference date.
- 8.3 Many payment claims are claims for project variations. Subcontractors claim that participants higher in the contractual chain demand separate invoices for variations, therefore excluding access to relief provided in the Act for all but one invoice each month. To secure access to the Act for all invoices subcontractors must wait for a new reference date and then summarise all works in one payment schedule, re-invoicing as a payment claim under the Act. This effectively claims the same work twice.
- 8.4 The Subcontractors Committee supports the removal of the requirement under the Act that only one payment claim can be issued per reference date.
- 8.5 It should be noted a blanket removal of the limitation is likely to be opposed by head contractors because it could invite abuse. A compromise amendment, consistent with the probable intention behind section 13(5) of the Act, would be to allow one payment claim per reference date, and one payment claim per separate variation or other event giving rise to a right to issue a separate invoice that is referable to the same reference date.

### *Comparable head contract payment terms*

- 8.6 Subcontractors contend that payment periods lower in the contractual chain should be compatible with those in the head contract.

- 8.7 Subcontractors acknowledge that participants higher in the contractual chain require administrative time to process payments and will find it difficult to offer identical terms, so the Subcontractors Committee advocates for the introduction of a provision where payment terms for subcontractors should be consistent with the head contract or a maximum of two business days longer.
- 8.8 This is likely to be opposed by head contractors.

### *Special rules for simple payment claims*

- 8.9 Under the Qld Act definition of “complex claims”, subcontractor claims are usually simple claims.
- 8.10 The Subcontractors Committee proposes amendment of the Act such that some of the Act’s requirements are lifted for standard claims as follows:
- 8.10.1 Remove the requirement to state a payment claim is made under the Act (as discussed above);
  - 8.10.2 Allow more than one payment claim per reference date (as discussed above);
  - 8.10.3 Increase the time in which an adjudication application can be made under section 17 to 60 business days;
  - 8.10.4 Remove the requirement under section 17(2) to provide a second chance to issue a payment schedule (see below);
  - 8.10.5 Provide a right for a claimant who has established the right to a payment to seek satisfaction of that claim from parties higher in the contractual chain (see below).
- 8.11 Many subcontractor members have complained they do not understand the Act, or that the Act is too cumbersome, complex and costly for smaller claims. Growth in the use of the Act may be affected by this lack of comprehension in industry of its requirements. These amendments will tend to streamline making a claim under the Act and thereby may help to address the comprehension problem.

- 8.12 However, it can be expected that head contractors would oppose these amendments. Some, such as that proposed at 8.10.4, may be contrary to other priorities of the Act such as prompt resolution of claims and certainty for parties.

### *Increase time bars to seek adjudication application*

- 8.13 Time bars to seek an adjudication application in the South Australian Act are currently 15 business days (sections 17(1)(a)(i) and 17(1)(b)) or 20 days (section 17(1)(a)(ii)). After this time, the claimant loses the ability to seek adjudication for the relevant claim.
- 8.14 Subcontractors argue these time frames are too short and to allow respondents to delay claims until the time expires; a new claim must then be made on a subsequent reference date. This may even mean that sufficient time has passed that the Act can no longer be relied upon in relation to the relevant progress claims.
- 8.15 The Subcontractors Committee supports increasing the time frame in which an adjudication can be made to 60 business days.
- 8.16 As indicated above, it can be expected that head contractors will strongly oppose this as contrary to the aims of the Act. This is especially so given that there have been amendments proposed by subcontractors to remove delays and streamline the adjudication process. The amendment also leads to uncertainty.

### *Second chance to serve a payment schedule*

- 8.17 The Act requires the claimant provide a respondent a second chance to issue a payment claim where they did not do so as required under section 16 of the Act: see section 17(2). This delays the ability to seek adjudication where a respondent has already failed to comply with the provisions of the Act.
- 8.18 Accordingly, subcontractors support the deletion of section 17(2).
- 8.19 Obviously, head contractors vociferously oppose such an amendment and argue that the second chance is a necessary failsafe against communication failures at first instance and should remain part of the Act.

### *Access up the contractual chain for payment*

- 8.20 Subcontractors advocate for a right under the Act to claim for payment further up the payment chain where their head contractor cannot pay as a means of securing their interests and as a means of protection for investment and expenditure made in good faith.
- 8.21 Head contractors will vigorously resist this proposal. The consequences for the solvency of head contractors higher up the payment chain represent a significant change from settled practice and may result in complex repercussions.

## **9 Other matters raised by head contractors**

- 9.1 Similarly to subcontractors, head contractors have raised additional matters.

### *Longer response times for claims*

- 9.2 Some head contractors say not enough time is presently allowed under the Act. More generous timeframes are sought.
- 9.3 It can be expected that subcontractors would oppose this.

### *Right of liquidator to use Act*

- 9.4 Some head contractors suggest that liquidators relying on the Act is not within the Act's intended scope given the liquidator is not continuing the work and making a progress claim. Subcontractors have not commented and are unlikely to be affected.

### *Frivolous claims*

- 9.5 Head contractors complain the Act encourages or permits frivolous and unjustified claims which disadvantage respondents. This is especially so in light of the common perception among head contractors that adjudicators are biased towards the claimants that engage them.
- 9.6 Subcontractors' submissions differ on the merit of claims being made under the Act.



### *Adjudicators interstate*

- 9.7 A head contractor has suggested that all adjudicators making an assessment on any claim should be based within South Australia and have the facility to receive hard copy documents delivered within the legislated time frame.
- 9.8 Some authorised nominating authorities have adjudicators based interstate. Head contractors consider it is unreasonable for a respondent to be provided only five days to respond and potentially deliver interstate. Head contractors request that only local service or local adjudicators be allowed.
- 9.9 Subcontractors have not commented, but may not have any particular reason to oppose this view.

## **10 Other matters raised by domestic builders**

- 10.1 Head contractors who carry out domestic building work (within the meaning of the *Building Work Contractors Act 1995*) on premises for people who reside in or propose to reside in those premises have indicated they are uniquely disadvantaged because they cannot presently rely upon the Act, due to the exclusion under section 7(2) of the Act.
- 10.2 The disadvantage lies in the fact that head contractors must pay subcontractors according to the Act but their incoming cash flow is dependent upon the private sector client/owner. Furthermore, subcontractors can rely upon the Act, which makes 'pay when paid' provisions illegal, so head contractors are far less able to ensure cash flow than their subcontractors.
- 10.3 While domestic head contractors acknowledge the policy imperatives behind this exclusion, they seek access to rely upon the Act.
- 10.4 Domestic head contractors are also particularly resistant to the treatment of every invoice as a payment claim under the Act and there is general concern about the impact of the amendment on industry goodwill. Domestic head contractors' concerns could be taken into account, even if the requirement is generally repealed, by maintaining the requirement for domestic subcontractor builds.

## 11 General comments by Master Builders SA

### *Defences and counterclaims*

- 11.1 Master Builders SA has had submissions from construction lawyers that it is appropriate for sections 15 and 25 to be amended to clarify that the sections are not intended to proscribe a defendant from pleading any defence or cross-claim in an action if that defence or cross-claim relates to matters arising from the contract entirely separate to the payment claim. This is relevant where the issues joined in an action are not limited to a consideration of the payment claim under the Act and also include, for example, a separate contractual issue brought by a plaintiff.<sup>4</sup>

### *Adoption of the Act*

- 11.2 Master Builders SA is an authorised nominating authority under the Act. Experience so far through this role, and provision by Master Builders SA of legal advice to members, is that understanding and adoption of the Act in the building and construction industry is still developing (especially among less sophisticated participants).
- 11.3 This also appears to be borne out by statistics provided in the Issues Paper prepared by the Office of the Small Business Commissioner, which shows adjudication amounts are growing but remain relatively small.
- 11.4 A simplification of some requirements of the Act could have merit, but may compromise the usability of the act for more complex claims. Differential treatment of simple and complex claims could be beneficial in this respect but concerns raised in paragraphs 8.11 ff remain relevant.

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<sup>4</sup> See *Linke Developments Pty Ltd v 21st Century Developments Pty Ltd* [2014] SASC 203

### *National harmonisation of security of payment legislation*

- 11.5 Master Builders Australia has previously advocated for national harmonisation of Security of Payment legislation following the East Coast model, as have a number of lawyers and major commercial contractors.
- 11.6 A multiplicity of different regimes results in higher costs and poorer understanding of the legislation for industry participants operating in multiple States, thereby reducing the ability of those businesses to expand at a time when the South Australian economy is focused on job development. It also limits the benefit available to South Australia from having established case law in Queensland and New South Wales on comparable legislation.
- 11.7 While acknowledging that national harmonisation may be beyond the ambit of this review, Master Builders SA takes this opportunity to emphasise the benefits of national harmonisation and a significant level of industry support for this. One lawyer has proposed that the question of harmonising security of payment legislation should be put on the agenda of the Standing Committee of Attorneys-General.
- 11.8 This raises the question as to which version of the legislation should be adopted nationally. It is clear that subcontractors will not support a harmonisation proposal based on the West Coast model.
- 11.9 Master Builders SA has had no comments in favour of adopting the West Coast model.

## **12 Conclusion**

- 12.1 Master Builders SA has based this submission on input from its members, leading industry figures and specialist staff, and thanks those parties for their valuable contributions. It is hoped that these perspectives will assist the Minister, the Small Business Commissioner and Mr Alan Moss in their review.
- 12.2 The complexity of the industry clearly warrants a targeted working group, with members of subcontractor and head contractor populations nominated by Master Builders SA, be convened to reach a pragmatic outcome on contentious issues.

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- 12.3 Master Builders SA is the peak body representing the State's building and construction sector and the 55,000 jobs it creates. We would appreciate every opportunity to contribute the benefit of that knowledge and experience in any ongoing industry consultation.
- 12.4 Please do not hesitate to contact Master Builders SA for further information or to clarify issues raised in this response.