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Resolving Building and Construction Disputes

9th July 2017

Hon Craig Laundy MP
Minister for Small and Family Business, the Workplace and Deregulation
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600

Email: SecurityofPayment@industry.gov.au
Attention: Daniel Kirby, Assistant Manager, Building Industry
Department of Industry, Innovation and Science

Dear Minister

Re: Adjudicate Today Response to Murray Review of Security of Payment Laws

Adjudicate Today supports the 86 recommendations made in the Murray Review for the reasons provided by Mr Murray. The Review is well written and views persuasive. The Review is a consolidated and balanced package which should prevail against sectional interests.

Adjudicate Today supports Mr Murray conclusion at page 318 section 18.2 "Consideration":

> "…what is clear is that the adoption of a nationally consistent and effective set of security of payment laws will require Commonwealth involvement. The issues of poor payment practices and insolvency have plagued the construction industry for decades, and despite the best intentions of the various jurisdictions in enacting their own security of payment legislation to deal with these issues, the different approaches are not serving the industry well. Leaving it to the states and territories to implement the recommendations of this Review will only result in cherry-picking and further divergence in the security of payment legislations operating across the nation.
>
> Ultimately it is imperative that Commonwealth, state and territory ministers work together to implement the best practice recommendations I have made throughout this report and I urge all parties to do so. It is time that this issue is dealt with at a national level in a cohesive and cooperative manner. We cannot afford to 'kick the can' any further down the road.
>
> If the states and territories are unwilling to come together with the Commonwealth to address the issue, then the Commonwealth must take a leadership role in spearheading change and be a driving force to galvanise action. In this respect, I support the recommendation of the Cole Royal Commission for nationally consistent security of payment legislation."

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Adjudicate Today supports your initiative for the development of a common approach to harmonisation through the Building Minister's Forum (BMF).

In the event, BMF is unable to agree, or does not proceed towards harmonisation promptly, Adjudicate Today supports the Commonwealth legislating for a nationally consistent security of payment Act.

Mr Murray and Mr Kirby consulted with Adjudicate Today adjudicators on 8th June 2018. After Mr Murray concluded his presentation and lengthy discussions, the 50 adjudicators at the Seminar endorsed the 86 Murray Review recommendations unanimously.

Adjudicators were sceptical that all State and Territory governments would be able to reach an agreement with the Commonwealth for harmonised legislation. Despite many calls for harmonisation from all industry tiers, the last six years have witnessed States amending their Acts in all manner of ways without regard to a harmonised theme or, at least, common procedures. However, adjudicators were confident that, in the absence of Agreement through BMF, the Commonwealth will provide the necessary leadership.

At 30th June 2018, Adjudicate Today administered more than 12,000 adjudication applications. Currently we have 58 accredited adjudicators available for nomination in New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory. We are agent for 26 adjudicators in Queensland.

Our comments draw on a wealth of experience in managing adjudication applications, nominating and training adjudicators since 2000 and responding to more than 50,000 telephone enquiries. This submission focuses on practical issues in support of the thrust and direction of the Murray Model, as identified by the Review.

Harmonisation

All recent Reviews of security of payment legislation recognise that intimidation and retributive conduct of industry parties, who seek payment in a timely manner under security of payment (SOP) legislation, must be addressed.

A single national approach, overseen by officers of the Regulator and similar to the scheme of the NSW Office of Fair Trading, will make policing of intimidation and retributive conduct simpler and more effective. Those who victimise or threaten victimisation must realise that there are serious Australia-wide criminal consequences for intimidation and retributive conduct (as proposed by Mr Murray at Recommendation 76), including large fines and, we suggest, loss of access to government work.

Harmonisation brings other significant benefits, including:

- Removal of confusion and uncertainty for industry users from legislature to legislature (for those working across borders) in the application of the security of payment system procedural requirements;

- Improvement in interpretation and application of the legislation by Adjudicators, resulting in efficiencies and greater consistency in the adjudication process and outcomes;

- Greater consistency and certainty in the legal interpretation of the legislation;

- More effective training and development of industry users, resulting in improved cross legislature transportability of knowledge of the application of security of payment; and

- A resultant reduction in costs for the industry users of the security of payment system.

Chapter 13: Adjudication of Disputes

Our comments focus on practical issues for the management of adjudication or correct typographical errors.

13.1 Page 167 Under the heading "Queensland", last sentence of the first paragraph.

> "In other words, this change eliminates the need for the respondent to provide the claimant with a notice of its intention to either recover the unpaid portion of the claimed amount as a debt through the courts or by adjudication."

This is a typographical error. The claimant provides the notice of intention to the respondent.

13.2 Page 183, Recommendation 36.

> "The legislation should provide that a function of the Regulator is to appoint adjudicators (whether nominated by the authorised nominating authority, or otherwise) to determine an adjudication."

However, in the last complete paragraph of page 182, Mr Murray says:

> "If the parties are unable to agree within that period, the claimant would then be required to forward its adjudication application to an adjudicator of its choice in order for the adjudication process outlined above to proceed."

The sentence is inconsistent with the recommendation. The sentence refers to the claimant forwarding its adjudication application to an adjudicator of its choice in order for the adjudication process to proceed. The underlined term "adjudicator" should be "ANA" so that the new sentence reads: "If the parties are unable to agree within that period, the claimant would then be required to forward its adjudication application to an ANA of its choice in order for the adjudication process outlined above to proceed. In discussion, Mr Murray accepts this is a typographical error.

13.3 Page 183, Recommendation 38.

> "The legislation should provide that the parties to a payment dispute may agree on an accredited adjudicator, but such agreement may only be made:
> a) at the time when the dispute arises
> b) within 2 business days of the claimant serving a notice of adjudication and a copy of the adjudication application on the respondent, and
> c) where the dispute relates to a payment claim of more than $250 000."

In most instances, the claimant will have spoken to an ANA about the availability of an adjudicator before providing a proposed name to the respondent. Also, the respondent will probably have spoken to an ANA about an alternative adjudicator. In either case, an ANA will be involved. Therefore it makes administrative sense for an ANA to also have the capacity to nominate the agreed adjudicator to the Regulator along with a notation that both parties have agreed to the adjudicator and such agreement is in writing. However, as proposed by Mr Murray, this would not prevent both parties directly requesting the Regulator to appoint their agreed adjudicator. We recommend the Regulator require the written agreement of the parties.
We recommend that a respondent should not be permitted to nominate an adjudicator where no payment schedule was served.
We assume that a payment claim of more than $250,000 is inclusive of GST.

13.4 Page 194, Recommendation 42.

"The legislation should provide that the timeframe for an adjudicator to make an adjudication decision is:
a) 10 business days after the respondent has lodged an adjudication response, or
b) such further time as agreed to by the parties, subject to the total timeframe for the adjudicator to make a decision being not more than 30 business days."

Some high-value adjudication applications involve extremely complex contractual relationships which need detailed analysis before the adjudicator commences the determination/decision. In some instances, it is impossible for an adjudicator to commence promptly because there is an earlier adjudication application in progress between the same parties and on similar issues where the first adjudicator has had an extension of time. The second adjudicator must give work valued by the first adjudicator the same value. The practical consequence of this is the second adjudicator can't commence work until the first adjudicator's determination/decision is released to the parties. We recommend that parties to adjudication applications involving payment claims exceeding $250,000 be exempt from the 30 business days threshold.

13.5 Page 205, Recommendation 48.

"The legislation should require the Regulator to appoint the most senior registered adjudicator available to conduct the adjudication review."

We recommend that a review adjudicator not deal directly with the parties and that an agent must be appointed by the review adjudicator to deal with administration and any procedural queries. The appointed agent may be an ANA.

13.6 Page 207, Recommendation 50.

"The legislation should provide that where an application for review of an adjudicator decision is made and the adjudication review decision differs from the original adjudicator decision, the party required to make payment as a result of the adjudication review decision must pay that amount:
a) within 5 business days after the adjudication decision is served on that party, or
b) if the review adjudicator has decided that payment may be made on a later date, then on or before that date."

Mr Murray's commentary at pages 206 – 207 makes the important observation that the adjudicated amount must be paid into the trust account administered by the Regulator.

"… a respondent aggrieved with an adjudication decision would not want to pay the adjudication amount only to then request for all or part of that amount to be refunded if it were to succeed in the adjudication review. It therefore seems obvious that the most sensible manner to deal with this scenario is to require the respondent to pay the adjudicated amount into the trust account administered by the Regulator. In the event that the adjudicator's decision is upheld by the adjudication review, then the amount held in the trust account can be released and forwarded to the claimant."

This commentary is not reflected in the Recommendation and we suggest that words to the effect "the adjudicated amount must be paid into the trust account administered by the Regulator" be inserted.

13.7 Page 209, Recommendation 52 b).

"The legislation should provide that where the parties have the right to apply for an adjudication review, a claimant's notice of intention to suspend work (or the supply of related goods and services) can only be made:
a) …
b) if an adjudicator's decision has been referred for an adjudication review and the respondent has not paid the amount determined by the review adjudicator by the due date, after the due date for payment has passed."

If, as suggested at point 13. 6 above, an adjudication review can only be made following payment of the adjudicated amount into the trust account administered by the Regulator, the circumstance of the recommendation can't arise. It is for the Regulator to pay the amount determined by the review adjudicator.

13.8 Page 210, Recommendation 53.

"Absent implementation of a statutory trust (see Recommendation 85), the legislation should provide that:
a) a claimant may serve a payment withholding request on the 'principal contractor' to require it to withhold sufficient money from payment that is, or becomes, payable by the principal contractor to the respondent to cover the claimed amount, and
b) a principal contractor who fails to comply with such a request will become jointly and severally liable with the head contractor.

Sections 26A · 26F of the NSW Act provide a suitable model."

We agree that absent a statutory trust, the recommendation is important. However should the recommendation proceed, we bring to attention a major problem with the practical operation of existing NSW provisions. The problem arises when a determination is not made within time and times out. The obligation on the principal contractor to retain the money continues until one of the four circumstances provided by Division 2A to Part 3 of the NSW Act is satisfied. Timing out is not one of the four circumstances. This has led to many real difficulties as principal contractors must protect their legal interest and not knowingly offend against the Act.

13.9 Page 214, Recommendation 54.

"The legislation should provide that a claimant may withdraw its adjudication application and make a new application if:
a) the claimant has not received notice that an adjudicator has accepted its application within 4 business days after the application was lodged, or
b) an adjudicator has accepted the claimant's application but failed to decide the application within the prescribed timeframe; or
c) the adjudicator has given notice of their withdrawal from the adjudication.
Section 26 of the SA Act provides a suitable model."

However at page 182 of the Review, Mr Murray proposes a two-stage process of appointing adjudicators. He says:

"I consider that the legislation should require the ANA to submit the names of the three nominated persons to the Regulator within 2 business days of an adjudication application being lodged. The Regulator would then be required to advise the ANA of the appointed adjudicator no later than 2 business days after receiving the names of the nominated persons. Once the ANA has received advice from the Regulator it will be required to notify the parties within 2 business days. The increase of an additional 2 business days associated with the appointment process is a small price to pay for the enhancement of the overall integrity of the legislative scheme."

This is a total of 6 business days. Recommendation 54 a) needs to be amended from 4 business days to 6 business days.

13.10 Page 214, Recommendation 56.

"The legislation should provide that a claimant is taken to have withdrawn its application if:
a) it serves a notice of discontinuance on the adjudicator and the respondent, or
b) the respondent pays the claimed amount, which is the subject of the adjudication application, to the claimant.
Section 35B of the Queensland Act provides a suitable model."

The collection of statistics will be most important for the Regulator and policy makers in assessing the success of any new harmonised legislation. The fall-over rate (refer page 172 of the Review and footnote 479) is one of the most important statistics available. The reason for withdrawal of an application is crucially important to improving the accuracy of this statistic.
We recommend the claimant be required to provide a reason for withdrawal of an application. A new sub-clause c) could require "the claimant provides a reason for withdrawal of its application".

Chapter 14: General provisions relating to adjudicators

14.1 Page 234, Recommendation 62.

"The legislation should include specific provisions dealing with an adjudicator's disqualification due to conflict of interest. A suggested provision is provided in Section 14.2 of this Report."

The suggested provision dealing with an adjudicator's disqualification due to a conflict of interest is found at page 232. If an adjudicator voluntarily disqualifies him/herself for a conflict of interest i.e. the Regulator was not requested to determine the issue of conflict, than it will be administratively time consuming and cumbersome not to permit the ANA to which the application was made to nominate to the Regulator a further three adjudicators. The three nominated may include two adjudicators who were previously nominated and not appointed by the Regulator.
We assume these provisions will also apply to review adjudicators.
Further at page 234, Mr Murray states:

"ANAs and the Regulator should ensure that they do not nominate/appoint an adjudicator who has already been appointed on another matter. The proposition put forward by some adjudicators that they are able to adjudicate on more than one matter at the same time should be viewed with some scepticism. More often than not an adjudicator's acceptance of more than one matter inevitably leads to the adjudicator requesting the parties to extend the time for the making of their decision(s). The object of this exercise is to ensure that adjudication decisions are made as quickly as possible and therefore appointing an adjudicator to more than one matter risks overloading the adjudicator with work. If an adjudicator claims they are able to make two decisions within 10 business days, then they should be told that they must first complete a matter before being in a position to accept another."

This commentary, which is not contained as a formal recommendation, proposes that ANAs and the Regulator should not nominate/appoint an adjudicator who has already been appointed on another matter. Respectfully this commentary is not practical for a number of reasons:

a) there are instances where multiple adjudication applications are received on the same day involving construction contract(s) between the same parties. An example is hire purchase contracts for multiple items. Refer Class Electrical Services v Go Electrical [2013] NSWSC 363. The issues raised by the applications may be the same or overlap and, without incurring massive additional costs to the parties, they should be referred to the same adjudicator.

b) there is utility in having successive payment claims going to the same adjudicator for valuation purposes as well as established background knowledge of the contact/disputed issues etc. If an extension of time has been granted, there will be an overlap.

c) extended timeframes for adjudications, where additional reasons are provided and extensions of time granted, leave an Adjudicator with available time.

14.2 Page 245, Recommendation 67.

> "Where an adjudicator has been found, by a court in Australia, to have made technical errors in performing adjudications, an ANA must not nominate the adjudicator unless it is satisfied that the cause of the error has been resolved."

An ANA may not be aware that an adjudicator has been found, by a court in Australia, to have made technical errors in performing adjudications.
We suggest the recommendation be expanded to provide an onus on the adjudicator to advise both the ANA and the Regulator of such finding. Additionally matters go on appeal and are reversed by a higher court. In such a circumstance, the adjudicator should also advise both the ANA and Regulator.
If the adjudicator does not fulfil their obligation to notify a finding, an ANA should not be liable for committing an offence.

14.3 Page 249, Recommendation 70.

> "The legislation should provide that in the case of adjudication applications involving payment claims of **over $25 000**, the fees that an adjudicator may charge should not exceed a capped rate

The termed "capped rate" is ambiguous.
We suggest it be replaced with the term "capped hourly rate".

Chapter 17: Statutory Trusts

17.1 Page 314, Recommendation 85.

> "A deemed statutory trust model should apply to all parts of the contractual payment chain for construction projects over $1 million. The deemed statutory trust model outlined in the Collins Inquiry provides a suitable basis."

At page 313 Mr Murray comments, but does not recommend, that:

> "Given that any disputes between the head contractor and subcontractor relating to payments (or between subcontractor and sub-subcontractor) may be referred to adjudication, appropriate protection will need to be given to the head contractor/trustee (or the subcontractor/trustee) where an adjudicator has determined an adjudication amount."

It is most important that a trustee acting in compliance of an adjudication determination/decision is assured they can't face a future potential liability if the adjudication determination/decision is quashed by a Court.
We recommend that Mr Murray's comments be incorporated into Recommendation 85 or subject to a new recommendation.

Conclusion

The expertise and resources of Adjudicate Today are offered to the Commonwealth to assist with the development of a security of payment bill which is practical, efficient, cost effective and reflects the Murray Model.

Yours sincerely

Bob Gaussen
Owner