

2nd August 2011

Mr Graham Close
Security of Payments Project Manager
Office of Consumer and Business Affairs
Chesser House, 91-97 Grenfell Street
Adelaide SA 5000

Dear Mr Close

Invitation to respond to Discussion Paper on Proposed Regulations and Administrative Arrangements of the Building and Construction Industry Security of Payments Act 2009

Thank you for providing *The Australian Institute of Building* (AIB) with the opportunity to provide comments on the discussion paper regarding the proposed regulations and administrative arrangements of the Building and Construction Industry Security of payments Act 2009.

The AIB is incorporated by Royal Charter and is the preeminent body for building professionals in Australia and the Asia-pacific region. The AIB has a long and proud history of supporting and serving the building profession. For more than 50 years the AIB has worked with the building and construction industry, governments, universities and allied stakeholders to advance the building profession and support the development of university courses in building, whilst promoting the use of innovative building techniques and a best-practice regulatory environment.

The AIB has a long standing policy of supporting the introduction of security of payment legislation in each state and territory of Australia. While the legislation differs from state to state, it is our assertion that central to the successful operations of the Act is the integrity of the authorised nominating authorities (ANA's), and the skill, education and experience of the adjudicator. As South Australia is the last state to implement this legislation, it has a unique opportunity to benefit from the experiences in other jurisdictions and establish a system that utilises the best aspects of the existing legislation. The AIB has consulted extensively with its interstate chapters to assist in the provision of feedback being sought.

In your correspondence you proposed several questions to which you sought the AIB's input. These questions have been reproduced on the following pages along with the AIB's recommendations/suggestions.



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1. Definition of recognised financial institution (Section 4). Is it appropriate to prescribe *bodies regulated by the Australian Prudential Regulation Authority* for the purposes of section 7 of the Act?

The AIB has expressed its concerns in previous submissions about the exemption of banks from the operations of the Act. This is primarily due to the frequent use of tripartite agreements where both the developer and the banks enter into a separate agreement with the builder. The developer and builder have a construction contract, whereas the banks and builder generally have a funding contract. Feedback from our members suggests that this form of contracting arrangement is specifically used to avoid the application of legislation such as security of payments.

Banks under tripartite agreements generally play a significant role in the control of the construction process, in particular approval of payments and variations. Banks generally engage a “Banks Engineer” or quantity surveyor to oversee this process, and will take direct action if they are unsatisfied with the construction process.

Insurance and Investment Institutions which are regulated by the Australian Prudential Regulation Authority (APRA) have and will continue to undertake significant construction developments themselves. Any exclusion of bodies regulated by APRA from the Act will have the effect of exposing the main contractor to claims from sub-contractors, but not provide the same rights for the main contractor to claim against the developer. This would have serious cash flow consequences for the whole contractual chain.

The AIB recommends there be no additional bodies prescribed as “recognised financial institutions”

2. Definition of construction work (section 5). Is there any need to modify the definition of *construction work* by regulation?

The AIB believes the definition of construction work in the Act is broad and inclusive and does not recommend any modification to the definition of *construction work* by regulation.

3. Definition of related goods and services (section 6). Is there any need to modify the definition of *related goods and services* by regulation?

The AIB believes the definition of related goods and services in the Act is broad and inclusive and does not recommend any modification to the definition by regulation.



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4. Contracts excluded from the Act (section 7). Is there any construction contracts, or classes of construction contracts, that should be excluded from the operation of the Act by regulation?

The AIB does not believe any existing construction contract or class of construction contract, including high value claims, should be excluded from the Act by regulation.

5. Eligibility criteria for adjudicators (section 18). Is there a need to prescribe minimum qualifications and experience for adjudicators within the regulations, and if so what qualifications and experience levels to prescribe?

Where it is suggested that qualifications should be prescribed by regulations, feedback is sought as to whether those qualifications could reasonably be available to, and be completed by, potential adjudicators by Jan 2011. If further time would be required to attain suggested qualifications, what date could this reasonably occur by?

The AIB believes the skills, education and experience of the adjudicator is critical to the successful operation of this Act. The issues that adjudicators are required to assess can be complex in nature and require practical construction, commercial and legal knowledge to successfully undertake this assessment.

The AIB supports the Western Australian qualification standards for adjudicators as it provides a rigorous set of criteria ensuring candidates are of high standing within the community, have relevant educational and industry experience and understand complex construction related matters.

The AIB would recommend that the reference to a builders licence as meeting the qualification requirements for adjudicators be set at the highest level or category of builders licence available in South Australia.

The Western Australian criteria cites that an individual complete an appropriate training course which qualifies the person to perform the function of an adjudicator under the Act, However, the AIB strongly supports the Queensland syllabus as the basis for this training.

The AIB is aware of at least eight people who are adjudicators and/or arbitrator/mediators, are reside in South Australia and are available to undertake adjudications from January 2012. Given their backgrounds, the training required for these people will be minimal and only require an understanding of the operation of this legislation. It is the opinion of the AIB that demand for these services will be slow and may take three to six months before industry fully utilises the legislation, by which time adjudicator training will be fully established.

The AIB also recommends that the Office of Consumer and Business Affairs (OCBA) maintain a public register of approved adjudicators.



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6. Adjudicators' fees (section 30). Is there a need to prescribe a maximum hourly rate for adjudicators? If so, what hourly rate should be set?

The AIB supports prescribing a maximum hourly rate for adjudicators in line with the Supreme Court scale of costs, unless otherwise agreed between the parties.

AIB has been made aware of cases where the losing party has refused to pay the adjudicators fee resulting in the adjudicator withholding their formal decision and payment certificate, thus forcing the successful party to pay the adjudicator to get the determination for payment.

The AIB would recommend provision be made for an upfront fee or deposit to be paid by both parties prior to the adjudication and that this fee be kept in trust until the final determination. The trust could be controlled by OCBA similar to the management of the bonds for residential tenancies.

7. Methods for delivering notices (section 34). Is there a need to prescribe additional methods of delivery notices?

Contractual arrangements often specify the method of communication between the parties or a method can be agreed between the parties, consistent with the legislation. This provides a satisfactory amount of flexibility particularly given the various methods of electronic communication currently being used i.e. email, Insite, Aconex.

The AIB believes there should be no additional prescription of additional methods of delivery notices.

8. Maximum fees that can be charged for adjudication applications (section 17 and section 29) Is there a need to set a cap for adjudication fees. If so, what levels should maximum fees be set at?

The AIB believes the fees charged for adjudication applications should be transparent and reflect an ANA's right to recover the costs of providing a service, and should not create a commercial entity motivated by profit, which has been the experience of some ANA's in the Eastern States.

The AIB is strongly opposes any percentage fee structure based on the value of the determination or an adjudicators fee as this results in a subservient relationship between the ANA and the adjudicator who becomes reliant on the ANA for work. It also lacks transparency.

The AIB recommends a fee structure similar to Western Australia where the nominating or appointers fees are in the order of \$200 + GST.



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Claims in excess of \$500,000 could be capped at \$500 + GST which would take into consideration the additional time to select and confirm the appropriate adjudicator for the larger claims.

The costs of copying and couriers etc. for multiple copies of documents would be dealt with directly between the adjudicator and the parties following the appointment of the adjudicator.

9. Authorisation of nominating authorities (section 29). Feedback sought on the suitability of proposed guidelines for the authorisation of nominating authorities.

The integrity of the authorised nominating authority (ANA) is paramount to the success of the operations of this Act. It is for this reason that the AIB supports a rigorous set of criteria and guidelines when assessing the suitability of ANA's.

The AIB is concerned about profit driven organisations operating as ANA's. Anecdotal evidence of activities within other jurisdictions indicates that a potential and real conflict of interest occurs when selecting adjudicators because the ANA's business growth model is based upon repeat clients. The repeat clients will only keep coming if they keep on winning and this puts pressure on the adjudicators to keep their client happy.

The AIB is supportive of the proposed guidelines in the discussion paper, but would recommend that relevant industry bodies be consulted prior to any recommendation being made to the Minister. The local industry must have confidence in the ANA's being appointed as they will have a significant impact on the health and prosperity of our industry.

The discussion paper has raised the issue of industry associations having a potential conflict of interest if they are to be ANA's. The AIB is supportive of strict disclosure protocol or conflict of interest procedure being examined prior to appointing an ANA by the Minister.

The AIB suggests that consideration be given to the use of the Building Industry Liaison Group (or subset of) to assist with the review of ANA applications.

The AIB believes that there can be no conflict of interest if the recommendations discussed in this submission are adopted because the independence and integrity of the qualified and registered professional adjudicator is protected and the fee structure of both the ANA and the adjudicator is transparent. The adjudicator is operating in their own right and upholding their own professional standing and the ANA is merely offering a service.

South Australia has had the unique opportunity to evaluate the operation of Security of Payment systems in other jurisdictions.



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While the Act and proposed regulations are heavily based on the East Coast model, the AIB believes that if the issues raised in this submission were incorporated into the regulations then a satisfactory compromise would be reached that included the best aspects of each system.

The AIB is grateful for the opportunity to comment on the Act and proposed regulations and would welcome the opportunity to provide further comment or clarification should it be required.

Yours sincerely

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Senior National Vice President

Robert Hunt CPA
Chief Executive Officer