

# Submission: Security of Payment Reform – Workshop 2

## To

IAG SECRETARIAT  
DEPARTMENT OF MINES INDUSTRY REGULATION AND SAFETY

## Law Society Contact

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## Date

FRIDAY, 18 MAY 2018

## Introduction

In February 2018, the WA Government established an Industry Advisory Group (**IAG**) to advise the WA Government on reform of security of payments laws in the building and construction industry.

The IAG determined it would conduct a series of workshops with industry stakeholders and invite written submissions. The Law Society of WA (the **Society**) was invited to be a stakeholder and has accepted that invitation. The first workshop (**Workshop 1**) was held on 26 March 2018. The Society made a written submission in relation to Workshop 1 on 6 April 2018.

The Society's Construction and Infrastructure Committee (**WA Committee**) has considered the IAG's Discussion Paper relating to Workshop 2. Representatives of the WA Committee attended Workshop 2 held on 7 May 2018 and participated in that workshop, expressing views that were qualified as not necessarily representing the views of the Society given that formal submissions of the Society require the approval of the Executive of the Society.

The Society now submits these written submissions in relation to the matters the subject of Workshop 2, which submissions have been approved by the Society's Executive.

## 1. Introducing a Demerit Point System and other sanctions to improve behaviour in the industry

Option 1 – Do nothing

Option 2 – Amend the BSR Act to make it a disciplinary matter

Option 3 – Amend the CCA to create a civil penalty

Option 4 – Amend the BSR Act to make it a disciplinary matter for a building contractor to fail to pay an undisputed judgment or adjudication debt

Option 5 – Amend the BSR Act to create a 'demerit point' system to ban building contractors that continually fail to comply with contractual payment obligations

### Discussion Questions

1. Do you think there is a need for reform to the current registration framework to impose standards for the appropriate and timely payment of debts owed under contracts? If not, why not?
2. Do you support the SERC Inquiry Report recommendation for a statutory offence to sanction those who engage in behaviour to intimidate, coerce or threaten another person against using security of payment legislation? If not, why not?
3. If such an offence is introduced in WA, do you support Option 2 or 3, or both Option 2 and 3, or an alternative option?
4. Do you support the BSB having the powers to take action against building contractors that fail to pay a debt ordered by a court, or an adjudicator under the CCA? If not, why not?

5. Should the BSB have the power to take action against all building service contractors (i.e. building, painting, plumbing and building surveyor contractors)?
6. Should the power apply for debts owed under all construction contracts, or certain types of construction contracts?
7. Under Option 4 and 5, should the BSB discontinue any action if the debt is subsequently paid?
8. Do you support the introduction of a demerit point system for building contractors as contemplated in Option 5? If not, why not? What, if any, benefits or costs do you foresee?
9. How many demerits should be accrued before a building contractor's registration is suspended?
10. Should demerit points be accrued for other breaches of the Building Act, BSR Act, BSR Regulations or HBCA?
11. Should the decision of the BSB to impose a demerit point be subject to review by the SAT?

#### **Submission**

1. There is a need for reform to the current registration framework to impose standards for the appropriate and timely payment of debts that are not genuinely disputed and owed under contracts – broadly, for the reasons given in the discussion paper.
2. The creation of a new statutory offence to sanction those who engage in behaviour to intimidate, coerce or threaten another person against using security of payment legislation is not recommended, because:
  - a. there is (as conceded in the discussion paper) limited evidence of the extent of bad behaviour in the industry to warrant the creation of an offence;
  - b. this matter should first be dealt with as a disciplinary matter with the ultimate sanction of suspension or termination of registration or other appropriate sanction; then if upon enquiry it was determined that this was inadequate, the introduction of an offence could be reconsidered;
  - c. there is doubt about the ambit of the new offence and whether the drafting of contracts that purport to restrict rights in relation to security of payment could be caught;
  - d. concerns about bad contracting behavior might be addressed by strengthening the contracting out provisions of the CCA;
  - e. serious cases of threats etc would already be subject to criminal penalties and breach industry codes;
  - f. no other state or territory appears to have such an offence.
3. The Society prefers Option 2 in the discussion paper be adopted. Under that option, the BSR Act would be amended to make intimidation, coercion or threatening behaviour a disciplinary matter. This will involve amendments to regulation 18 of the BSR Regulations and section 53 of the BSR Act so as to add this matter to the list of disciplinary matters that are prescribed. The current disciplinary powers of the BSB and the system of referral to the SAT are considered appropriate for dealing with this behaviour. Suspension or cancellation upon referral to the SAT under 56 of the BSR Act should be amended to include this additional matter.

4. The BSB or Building Commissioner should also have the additional power to deal with building practitioners or contractors who consistently fail to meet their contractual payment obligations or fail to make payments ordered by a court, tribunal or adjudicator – see the responses 1 and 3 above.
5. This power should apply to all building service contractors (building, painting, plumbing and building surveyor contractors). There is no apparent reason in principle why all such building industry participants should not be treated the same.
6. The power should apply to all construction contracts, not just certain types of construction contract. There is no apparent reason in principle why all construction contracts should not be caught.
7. If the debt is subsequently paid, the BSB or Building Commissioner should have a discretion to discontinue any action but not be obliged to do so – this allows the BSB or Building Commissioner to take into account all the circumstances of the case and act with flexibility. This would also allow for an appropriate response to recalcitrant building industry participants who might delay payment until after a complaint is made knowing late payment would avoid any disciplinary action.
8. Proposed demerit system: this is not supported, because it has an element of arbitrariness and may not work effectively. For instance, the system may not properly distinguish between a very active building contractor with a high number of minor 'offences', and a much less active contractor with fewer 'offences' but ones that are serious. No other state except Queensland appears to have adopted a demerits system, despite Queensland having one since 2003.
9. Not applicable.
10. Not applicable.
11. Not applicable.

## 2. Banning persons with a history of insolvency or bankruptcy

Option 1 – Do nothing

Option 2 – Provide the BSB with the power to refuse registration where an insolvency event has occurred, and to issue a 'show cause' notice

Option 3 – Permanent exclusion where 2 separate insolvency events have occurred

### Discussion Questions

1. Do you support the exclusion of a company or an individual from the building and construction industry in circumstances where:
  - a. In the case of a company – its officers have previously been involved in the management of a company, which has experienced an event of insolvency?
  - b. In the case of an individual – the individual has experienced a personal bankruptcy, or was an officer of a company which experienced an event of insolvency?

2. Further to Question 1(a) above, should the exclusion also apply where the company entered into a Deed of Company Arrangement with its creditors?
3. What benefits/costs do you foresee with Option 2?
4. If the BSB were to be given the powers in Question 1:
  - a. Should the BSB still have the discretion as to whether to register or renew the registration of an applicant, or should the BSB be prohibited outright from granting the registration or renewal?
  - b. should the relevant event that triggers the exclusion – that of bankruptcy or insolvency, be limited to bankruptcy or insolvency in connection with the running of a construction business, or should it be any business at all?
  - c. should the exclusion be confined to applicants for the grant or renewal of a building contractor registration, or should it also be applied in relation to the other occupations that the BSB registers – painting contractors, building surveying contractors, and plumbing contractors?
5. How long after the bankruptcy or insolvency event occurred should a new registration be refused by the BSB?
6. Should the BSB have the power to permanently deny registration where the same individual or officer has been involved in two or more failed businesses, within a short period of time?
7. What benefits/costs do you foresee with Option 3?

#### **Submission**

1. Banning companies and individuals – option 2 (provide the BSB with power, reviewable by the SAT, to refuse registration where an insolvency event has occurred and to issue a show cause notice) is the Society's preferred option, subject to 4 below.
2. Banning should not apply to Deeds of Company Arrangement – this could cut across the intention of creditors in agreeing to the DOCA.
3. The benefits of option 2 are broadly as outlined in the discussion paper.
4.
  - a. The BSB should still have the discretion whether to renew or register – to properly allow for the particular circumstances of each case;
  - b. The relevant event should be limited to an insolvency in a construction business and not extend to other businesses – other businesses could include family businesses that fail for reasons that are irrelevant;
  - c. The exclusion from the construction industry should apply to all building industry occupations – there is no reason in principle not to do so.
5. The Society makes no recommendation as to how long after insolvency a new registration should be approved, nor the period of exclusion. These are matters for the direct industry participants.
6. The BSB should not have the power to permanently deny registration, even where the person or company has been involved in two or more failed businesses. This should remain with the SAT under the existing regime given

the seriousness of the sanction.

7. Option 3 benefits – Not applicable.

### 3. Improving business skills in the industry

Option 1 – Do nothing

Option 2 – Voluntary education (building contractors)

Option 3 – Amend the BSR Act/BSR Regulations to prescribe minimum defined level of relevant business education (building contractors)

#### Discussion Questions

1. Do you agree with the proposition that there is a need to improving the level of business skills of participants in the building and construction industry? If not, why?
2. If a voluntary or mandatory education program was to be introduced, what topics would be of the most benefit for building contractors? And for sub-contractors? (e.g. business planning, management account, risk analysis and management, and business law)
3. If mandatory business education requirements were to be imposed, should these requirements apply to all registered building contractors renewing their building contractor registration, or only to new applicants for building contractor registration?
4. What benefits/costs do you foresee if mandatory business education requirements were to be imposed?

#### Submission

1. There is a need to improve the level of business skills of participants in the building and construction industry. Professor Evans thought so and the SERC Inquiry Report recommended it.
2. Topics of such a program: they should include those listed in the discussion paper and awareness of the BSB's powers including the additional powers arising out of these reforms.
3. Any mandatory requirements should be flexible so that experienced or qualified individuals are not required to undergo the training. For instance, re-training should not be required where directors have university-awarded commerce degrees or MBA qualifications.
4. The Society makes no submission in relation to the cost benefits in any imposition of mandatory business education requirements.



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**President**