The Law Society of Western Australia
The voice of the legal profession in Western Australia

10 December 2021

Attention: Security of Payment Implementation Team
Policy and Legislation Branch
Building and Energy
Department of Mines, Industry Regulation and Safety
Locked Bag 100
EAST PERTH WA 6892

Email: SoPReform@dmirs.wa.gov.au

Dear Sir/Madam

CONSULTATION DRAFT ON SECURITY OF PAYMENT REGULATIONS

Thank you for providing the Law Society with the opportunity to comment on the *Consultation Draft of the Building and Construction Industry (Security of Payment) Regulations 2022.*

It is noted that the Draft Regulations have been accompanied by an Explanatory Statement outlining the policy intent of those proposed regulations and pose a series of Questions for Consultation. The Law Society has limited its comments to matters of particular concern in the Draft Regulations and Questions for Consultation and these are set out in the submission attached to this letter.

The absence of comments on the balance of the Draft Regulations, and on the draft Building Services (Registration) Amendment Regulations 2022, should not be taken as an endorsement of them by the Law Society.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely

Jocelyne Boujos
President

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Submission: *Building and Construction Industry (Security of Payment Regulations 2022) – Consultation Draft*

Wednesday, 8 December 2021

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Introduction

The Law Society of Western Australia (the Law Society) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

Please see below responses to particular regulations in the *Consultation Draft of the Building and Construction Industry (Security of Payment Regulations 2022).*

Responses to Draft Regulations

Topic	Reg	Law Society Response
Electronic lock box service of documents on authorised nominating authority	21	Given the confidential nature of the adjudication process, it is essential that access to the lock box should be limited to personnel of the authority who are properly authorised to deal with adjudication matters under the Act. In addition, ease of service of documents appears to be a key tenet of the Draft Regulations. At the moment, service by lock box is only an option if the nominating authority has provided a cloud-based or other electronic medium for accepting the electronic delivery of documents. Nominating authorities should be mandated to provide this option to claimants and respondents. This issue of confidentiality would apply equally to service of hard copy documents in person, service by post and by email. Under the proposed code of practice (clause 9) the nominating authority must take all reasonable measures to ensure the security of confidential information. This may also be a matter that could be the subject of a practice note issued by the Building Commissioner under Regulation 31.
Limitations on submissions to adjudicators	6(2)(a)	This Regulation applies to low value payment claims (not more than $50,000). A submission must not exceed 10 pages. A number of issues arise relating to this restriction. First, the Regulation is very detailed, and out of keeping with the low value claim involved. It may be reasonably anticipated that either one or both of the claimant and respondent will be relatively unsophisticated parties. The detailed nature of the requirements may be onerous for such parties and, for claimants, a disincentive to adjudicating when the opposite is the intent of limiting submissions.

		Second, it is unclear how the prohibition on submissions exceeding 10 pages will work. Would a submission that exceeds 10 pages be wholly disregarded, or the excess pages only disregarded; can the party elect which of the pages it will rely on or can the adjudicator rule on which pages it will accept? Third, the 10 page limit could be sought to be circumvented by what are effectively submissions in the permissible statutory declaration (which has no page limit). A submission may be accompanied by 'a' statutory declaration. It appears that only one is permissible, which seems unduly restrictive. Further, there is no allowance for a factual summary or witness statement that does not meet the legal formalities of a signed and correctly witnessed statutory declaration. In circumstances where the adjudication is low value and the parties are likely to be relatively unsophisticated, this limitation seems inappropriate.
Code of Practice for Authorised Nominating Authorities	18(5)	The nominating authority is obliged to suspend an adjudicator if found by a court, within the last 5 years, to have made technical errors in undertaking adjudications and the nominating authority is not satisfied that the cause of those errors has been resolved. The concerns the Law Society has with this proposed regulation are as follows: 1. Section 106 of the Act provides that the Building Commissioner may suspend for a period of not less than 3 years the registration of an adjudicator for one or more of three grounds: providing false information, no longer being registered, or contravening a condition of registration. Merely making a 'technical error' is not one of them. There is a process to be followed, which includes giving the adjudicator notice. A decision by the Commissioner to suspend registration may be reviewed by the State Administrative Tribunal. 2. Item 18(5) of the Code for Nominating Authorities expands the circumstances in which an adjudicator may be suspended. Suspension under Item 18(5) is likely to mean that a suspension under Item 18(5) is a 'general' suspension from practice because it is likely that most adjudicators under the Act will be appointed by nominating authorities and are likely to be on the panel for more than one nominating authority. Accordingly, if an Australian Court (even a Magistrate's Court) finds that an adjudicator made 'technical errors', this may lead to suspension by all the nominating authorities. The obligation to suspend is not confined to the nominating authority which happened to appoint the adjudicator of the erroneous determination. If it is a court judgement, all the

		nominating authorities will become aware of it. 3. Suspension under Item 18(5) is not subject to SAT Review. An adjudicator has no protection against the unfair exercise or non-exercise of powers under Item 18(5). 4. The expression 'technical error' is unclear. It is not a category of error known to the law. What does it mean? Does it include: a. Computational errors; b. Errors in relation to 'technical' matters – eg the adjudicator considers that concrete has cracked because it was not reinforced correctly, when that is not the case; c. Errors of law in the interpretation of the contract; d. Jurisdictional errors eg failure to take into account one of the mandatory considerations under section 16 about a mandatory time bar; e. Non-jurisdictional errors in relation to the operation of the Act eg that a time bar is or is not reasonable? f. Errors in relation to the interpretation of security of payment legislation in another State (eg Queensland or Victoria) which are significantly different from WA? 5. It is not clear whether a single 'technical error' is sufficient. Section 10(c) of the *Interpretation Act, 1984* suggests it would be. It is not clear what should be done if an adjudicator makes more than one error in a single determination. It is not clear whether the 'technical error' needs to have any impact on the outcome of the determination. There is nothing to suggest that it does, and nothing to suggest that an authorised nominating authority would not be obliged to suspend because of a trifling technical error which had no impact on the determination. Item 18(5) uses the expression 'must'. 6. Further, the circumstances in which the suspension might be lifted are opaquely expressed. If, for example, an adjudicator made an error in the counting of days, how would an authorised nominating authority identify the 'cause of that error'. Do all 'technical errors' have a 'cause'? How can a nominating authority be satisfied that 'cause' of an inadvertent errors has been fixed? Further, what is the position if there is more than one cause? 7. The notion that every time a court finds that a determination is wrong, the adjudicator has committed a 'technical error' is misconceived. Some examples in support of this view follow: a. *Total Eden v Charteris* [2018] WASC 60. The judge found that the adjudicator misconstrued clause 7(3). However, the approach to clause

		7(3) which the adjudicator took was entirely in accordance with the received wisdom at the time. The judge adopted a novel approach to clause 7(3). Although the adjudicator's decision was set aside, it is not clear that he made an error, technical or otherwise. b. In *Samsung C & T Corporation v Loots* [2016] WASC 330, Beech J (as he then was) held that Mr Machell exceeded his jurisdiction in making his determination. That might well be a 'technical error' which would warrant suspension, an investigation and possibly re-education of Mr Machell so he would not make the same mistake again. However, on appeal, the majority of the Court of Appeal decided that Beech J was wrong on this point (refer *Duro Felguera v Samsung C&T* [2018] WASCA 28). Item 18(5) would not have fairly dealt with this situation. 8. The operation of the item depends on the matter being the subject of judicial review. If a review adjudicator finds that the 'first instance' adjudicator made substantial jurisdictional errors affecting outcome, the first instance adjudicator suffers no consequences. 9. If it is desired that adverse findings by a Court about an adjudicator's determination should be a ground for suspending an adjudicator from practice, section 106 should be amended. Adjudicators would then at least have the protection of independent review by the SAT. The same issues arise with clause 20(5), which applies to review adjudicators. It is noted that there is no equivalent suspension power in either the NSW or Queensland security of payment legislation.

Responses to Questions in Explanatory Statement – 'Other policy matters'

Question		**Answer**
Definition of construction work and related goods and services	Do you support the existing definitions of construction work and related goods and services in the Act? Are there other	The Law Society does not suggest any other types of work or supply, or exclusions.

	types of work or supply that should be included, or excluded, by regulations?	
Model forms of construction contracts	Do you support the preparation and publishing of simple form construction contracts? What types of terms would you like to see included in these contracts?	The Law Society supports the publication of simple forms of construction contract as model forms that are not mandatory. The Law Society would consider commenting on any draft model form that is prepared by the Building Commissioner and suggests each model form should be open for public comment at that time.
Prohibited terms	Are there certain types of contractual terms that should be prohibited by regulation? Should the prohibition only apply to certain classes of contract (ie contracts for building works or where the contract value is below a certain monetary threshold)?	In response to the specific examples provided in the Explanatory Statement: *Termination for convenience (**TFC**)* It is assumed the question relates to a termination for convenience of the contract (ie the whole of the remaining work under the contract will cease), and not termination for convenience of part of the work under the contract. It is unclear what a prohibition on TFC clauses is seeking to address other than to avoid the assumed 'mischief' that TFC clauses may operate in an unfair or restrictive way to the disadvantage of contractors. In the Law Society's view, there should not be a blanket prohibition on TFC clauses. It would always be necessary to consider all the surrounding circumstances of each case, including the particular drafting of the clause, to determine if a TFC clause would operate unfairly or restrictively so as to justify any prohibition. The drafting of TFC clauses is critical to any consideration of whether it would operate in an unfair or restrictive way. For instance, there may be a long period of prior notice that is a pre-requisite to such termination and adequate compensation allowed to a contractor in the event of such termination. There are also legal arguments and legal relief potentially available to a contractor should the TFC clause be inappropriately or improperly invoked. As well, construction contracts typically contain a variations clause that allows a principal to omit work. The omission of

		work, especially a substantial omission such as the deletion of a significant separable portion, can operate as a partial termination for convenience. Sometimes there are TFC clauses that allow termination for convenience of part of the remaining work rather than the whole of the remaining work. If TFC clauses are to be prohibited, then it is reasonable to ask where, in principle, the prohibition should stop. The Law Society notes that governmental entities often include TFC clauses in their head contracts. It may be inconsistent of government to seek to prohibit such clauses when at the same time public works head contracts adopt them. Of course, a TFC clause in a subcontract may not be unfair where it is back to back with a TFC clause under the head contract. Put more broadly, it may be that there are good commercial reasons for the insertion of the TFC clause. The Law Society does not presently see the need for any prohibition on TFC clauses for any types of contract that would outweigh the principle of freedom of contract. Jurisprudence may develop under existing laws dealing with unfair contract terms (for example, the Australian Consumer Law and unfair contract terms legislation in other jurisdictions) that will clarify whether TFC clauses may constitute an unfair term and be invalidated. The Society suggests that this jurisprudence be first monitored and considered before amplifying the operation of the Act to deal with TFC clauses. *Uncapped liquidated damages* The significance of a cap on liquidated damages should be considered in context. For instance, there could be an overall cap on liability under the contract that would include liability for liquidated damages and make the liquidated damages cap redundant or of much less impact. Any contractual exclusion of consequential loss is also relevant to a consideration of uncapped liability. If the absence of a cap on liquidated damages were to be the subject of prohibition, then that could be sought to be circumvented by a demand for a very high cap. Another response to this proposed prohibition could be the inclusion of a term that liquidated damages are not the sole remedy. If uncapped liability is the policy concern, then this could logically lead to a prohibition on uncapped liability generally and the implied inclusion of a term to the effect that consequential loss is excluded. There would likely be

		difficulties in determining, in any regulation, how an appropriate cap should be arrived at and what should constitute consequential loss. Overall caps and consequential loss clauses are typically a matter for private negotiation. The Law Society also notes that under general law, there is equitable relief available from 'penalties'. As for TFC clauses, the Law Society does not presently see the need for any prohibition on uncapped liquidated damages clauses and repeats its comments regarding the development of jurisprudence under the ACL and unfair contract terms legislation in other jurisdictions. *Compulsory dispute resolution before making payment claims* Although such a term would be objectionable, the Law Society is unaware of the prevalence of such terms. It is aware of terms requiring agreement of the parties on matters such as the extent or value of work performed before a payment claim can be made, but such terms have been determined to not prevent the making of payment claims under the Construction Contracts Act, and it is yet to be seen whether this will be different under the Act. It is noted that the Act does not allow contracting out. Accordingly, the Society does not presently see the need for this prohibition. *PPSA limits* The Law Society is unaware of the specific concern that is driving consideration of this prohibition. If the concern is a small business contractor is presented with a contract which contains a restriction on its right to register a security interest over its unfixed pant and materials to its clear detriment as it would otherwise have that right under the PPSA, then the Law Society can understand that this term may be unfair. However, as with all the above prohibitions, it will always depend on the circumstances, including the precise restriction and the drafting of the clause. The Law Society does not presently see the need for this prohibition.