MASTER ELECTRICIANS AUSTRALIA

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REVIEW OF CONSTRUCTION CONTRACTS ACT 2004 (WA)

Master Electricians Australia submission

Review of the *Construction Contracts Act 2004 (WA)*

Introduction

Master Electricians Australia is grateful for the opportunity to the statutory review of the *Construction Contracts Act 2004 (WA).*

Master Electricians Australia (MEA) is a not-for-profit industry association representing electrical contractors. Originating as the Electrical Contractors Association in 1937, MEA has been representing electrical contractors for more than 76 years, making it one of the longest-standing industry associations of its kind as well as the leading voice for the electrical and communications industry.

MEA has a strong and rapidly growing membership in Western Australia and we understand the obstacles they can face in conducting their day to day business as electrical contractors. We have consulted our membership on the issues raised in the discussion paper and are optimistic that this review will result in positive outcomes for the whole of the construction industry in Western Australia.

Our responses to the questions posed in the discussion paper are below.

Question 1

a) *Should Section 26 of the Act be amended to extend the time limit in which the adjudication must be brought, or a payment claim can be made, from 28 days to 90 days from which a dispute arises?*

We would agree with extending the time limit to 90 days to bring a payment claim. This would better align the requirements in Western Australia with the other states and territories. The table below summarises the current disparity between the various states and territories around Australia.

State/Territory	Legislation	Timeframe
Queensland	*Building and Construction Industry Payments Act 2004*	12 months after the construction work was carried out.
New South Wales	*Building and Construction Industry Security of Payment Act 1999*	12 months after the construction work was last carried out.
Victoria	*Building and Construction Industry Security of Payment Act 2002*	3 months after the reference date. Reference date is 20 business days after the construction work was first carried out.
South Australia	*Building and Construction Industry Security of Payment Act 2009*	6 months after the construction work was last carried out.
Tasmania	*Building and Construction Industry Security of Payment Act 2009*	12 months after the construction work was last carried out.
Northern Territory	*Construction Contracts (Security of Payments) Act 2004*	90 days after the dispute arises. A dispute arises when the amount claimed in a payment claim is due to be paid under the contract.

A problem commonly encountered by contractors working across state lines is the lack of harmonisation when it comes to issues such as payment claims. While clearly, other states and territories have time limits as long as 12 months, extending the timeframe to 90 days will bring Western Australia more into line with the rest of Australia.

While we do support the 90 day time limit, it is important to be mindful of the risk that some builders may amend their contractual terms and conditions to in effect preclude progress payment claims through the Act being made by subcontractors. As subcontractors are in an inherently weaker bargaining position they may agree to this term in order to secure the contract and in so doing void their opportunity to make a payment claim. We suggest a statutory requirement be introduced to the effect that no party can sign away their rights to make payment claim and that any term to this effect in a construction contract is void.

Question 2

a) *Does the 14 day time limit, in which the respondent must prepare a written response to the application and serve it on the applicant and the adjudicator, allow sufficient time for this to undertaken adequately?*

For smaller payment claims this timeframe is sufficient. Any longer than 14 days and claimants would be forced to wait even longer to receive payment. Many smaller contractors cannot afford to have their cash flow stifled further with extended response periods being imposed. What may amount to a relatively small amount of money to the principal contractor can represent a large part of the income stream for a small business relying on timely payment. For principal contractors who are meeting their obligations and keeping the required documentation the 14 day response period should be sufficient to respond to a payment claim from a subcontractor.

However, we acknowledge that larger payment claims served on a contractor could necessitate more time to prepare a response. It may be the case that some claimants take advantage of the process and submit large payment claims right up to the end of the allotted 28 day period. This can become a particular problem over the Christmas period when there may be uncertainty around the counting of the days. As jurisdictions differ as to whether the traditional Christmas shutdown period is included in the calculation of the days, contractors working across state lines could unknowingly lose their opportunity to respond to a payment claim. We suggest that the traditional two week Christmas shutdown period be excluded from the counting of the days for the purposes of the payment claim/adjudication process.

b) *If not, what is an appropriate balance to facilitate rapid adjudication?*

See response at (c)

c) *In this instance, would you support a tiered approach to accommodate different time limits for payment claims of various levels of complexity and/or monetary threshold?*

We would support the tiered approach to payment claims as outlined by SoCLA with the response times being structured as follows:

- Amount claimed less than $10,000: 10 business days
- Amount claimed $10,000 to $100,000: 15 business days
- Amount claimed $100,000 to $1,000,000: 20 business days
- Amount claimed $1,000,000 to $10,000,000: 30 business days
- Amount claimed more than $10,000,000: 40 business days

Question 3

a) *Does the 14 day time limit allow sufficient time, in which the appointed adjudicator has to make a determination?*

   As with the time limits for responding to a payment claim, we would support a tiered approach that would reflect the size of the claim.

b) *If not, what is the appropriate balance to facilitate rapid adjudication?*

   See response at (c).

c) *In this instance, would you support a tiered approach to accommodate different time limits for payment claims of various levels of complexity and/or monetary threshold?*

   We would support the tiered approach to payment claims as outlined by SoCLA with the response times being structured as indicated above at our response to question 2(c).

Question 4

An Adjudicator can, pursuant to Section 32, with the consent of the parties, extend the time prescribed by Section 31(2) for making a determination. Many Adjudicators are finding that with the larger and more complex adjudications, parties are not consenting to any requested extension.

a) *If the time to make a determination remains at 14 days, should the Adjudicator be able to grant an additional 7 days extension of time, without the consent of the parties?*

   Yes

b) *Should the Adjudicator be able to then seek an additional 7 days extension of time with the permission of the parties?*

   Yes

<u>Underutilisation of the Act's Provisions for Payment Claims</u>

The average and total quantum of the individual claims has clearly indicated that the Act is not operating at the lower end of the contracting chain.
There are concerns about the attractiveness of utilising the Act for small claims.

Question 5

a) *Is the Construction Contracts Act 2004 a suitable vehicle for resolving some payment claims?*

   Feedback from our members has indicated that the adjudication process can be overly legalistic and cost prohibitive. Small businesses in particular may not understand how to best utilise the avenues of resolution available in the Act.

b) *Is there any way the Act could be modified to better facilitate the rapid adjudication of these claims?*

Many small businesses are put in the position of having to make a commercial decision about whether to invest time and money into pursuing the claim or simply writing off the debt and save on resources. It would be of benefit for Adjudicators to be able to direct disputes through to conciliation so that parties can avoid the costs and complexity of pursuing a more formal legal avenue. Such an approach would reduce the red tape burden for small business and save significantly on legal costs.

Development of Alternative Dispute Resolution Mechanisms

The Small Business Commissioner has recommended that the Building Commission's suite of dispute resolution legislation and services be reviewed.

Question 6

a) *Should the Building Service (Complaint Resolution and Administration) Act 2011 be amended to extend its provisions to allow the Building Commission to manage an alternative low cost adjudication service for subcontractors seeking payment from principals in relation to construction industry payment claims under $25,000 in value?*

Yes. In relation to construction industry, relevant states have in place legislation for building industry payments. These include tribunal and independent evaluators being engaged prior to involving the courts. We would certainly encourage WA to provide further education and information dissemination regarding these topics if established under the Act.

b) *If yes, should the adjudication service be fee-for-service, with administration costs partly funded by an increase in the Building Services Levy? Or, are there alternative means of funding this service?*

We would agree with the adjudication service being fee-for-service provided the fees charged are not cost prohibitive. Particularly for smaller contractors who may be discouraged from utilising alternative adjudication should the associated fees be excessive.

However, another option may be the creation of a system whereby payment claim monies go to Escrow pending completion of the relevant works. This system could be created by the *Construction Contracts Act* and enforced by adjudicators. The system would be similar to the process adopted by Consumer Protection WA in which the bond paid by a tenant at the start of a lease is refunded in full provided no damage or loss has been incurred by the owner. An industry or government trust style fund could be established for the building industry where these retention monies could be held pending project milestones. Introducing this system would undoubtedly involve establishment costs; however it would also create a more equitable balance between the interests of principal contractors and the subcontractors engaged on a project who are lawfully entitled to payment for the work they have performed. As is the case with landlords provided with some security for loss through Consumer Protection, this system would also continue to protect the rights of consumers by ensuring work is performed to a certain standard in order for funds to be released. The additional benefit to this system in relation to

adjudication service fees would be that the interest accumulated through the Escrow monies could be used to fund adjudications. This would avoid any additional fees being charged for adjudications and in so doing encourage claimants to pursue their rights when it comes to payment claims.

A similar scheme is currently the subject of legislation in NSW whereby retention monies are placed into escrow. These changes have only recently been enacted and we are monitoring the situation to see the effect this has on disputes.

c) *If not, what other alternative means should be explored by Government to address the issue of small claims? N/A*

Regulation of Adjudicators

The *Construction Contracts Regulations 2004* (WA) state that an adjudicator must have:

- a degree in a legal or construction industry related course
- eligible for membership of a professional institution
- at least five years' experience in administering construction contracts or dispute resolution relating to construction contracts
- must have successfully completed an appropriate training course which qualifies the person for the performance of the functions of an adjudicator

Question 7

a) *Are the registration requirements correct?*

In addition to the above criteria, we suggest that each Adjudicator be appointed relevant to their knowledge and experience in an area of construction, for example electrical. This would greatly reduce the amount of time that Adjudicators must dedicate to information gathering and in so doing further streamline the claim and adjudication process.

b) *Should adjudicators be registered for a finite time?*

We would agree with adjudicators being registered for a finite period of time. This would ensure that the adjudicators hearing cases have a fresh understanding of the realities of the construction industry and limits any concerns regarding impartiality becoming an issue.

c) *Should Adjudicators complete a post-graduate qualification such as a Graduate Certificate in Building and Construction Law, as a prerequisite?*

Yes. This level of knowledge is essential to the position of Adjudicator and may also lead to better outcomes and ultimately greater enforceability of decisions.

d) *Is there a need for continuing professional development (CDP)?*

Yes. Maintaining up-to-date knowledge of the workings of the construction industry is imperative.

e) *The average Adjudicator's fees are about $265 per hour. The fees range from $100 to $400 per hour. Should adjudicator fees be prescribed?*

We would support adjudicator fees being prescribed to ensure all parties understand their financial obligations up front. These fees are a major concern to smaller contractors whereby the amounts being sort are relatively small however as a percentage the fees make it unviable to pursue their claim.

f) *How should adjudicator performance be audited?*

The auditing of adjudicators should be a matter for an independant review body such as the Judiciary. Key features of the process may include:

1. Peer review of a one or two percent case sample every 12 months.
2. Feedback from claimants and respondents regarding their experience.
3. The number of adjudication decisions appealed discontinued resolved or turned over on appeal.

Exclusion of damages

Subsection 10B(2)(c) of Victoria's *Building and Construction Industry Security of Payment Act 2002* specifically excludes amounts related to damages claims for breach of construction contracts when progress payments are calculated.

There have been representations that the lack of a similar exclusion in the *Construction Contracts Act 2004* may be causing issues but no evidence exists that this is actually the case. Nevertheless, it may be prudent to include such a provision as part of other amendments to disallow liquidated damages to be included in a progress payment or payment claim.

Question 8

a) *Do you agree that a provision for the exclusion of liquidated damages from progress payments or payment claims is warranted?*

Yes we would agree. Security of payment laws are intended to promote cash flow throughout the contractual chain in the construction industry. These laws are not intended as an avenue to pursue claims for damages.

Inclusion of Domestic Building Contracts

Legislators in Western Australia did not exempt domestic building work from the provisions of the Act.

Question 9

a) *Should matters related to the Home Building Contracts Act 1991 be included in the Act?*

There may be scope for the *Construction Contracts Act* to cover matters relating to the *Home Building Contracts Act 1991*. However, before this is considered, there must be a review of the potential interaction between the two pieces of legislation.

For example, in relation to progress payments, there is a clear interaction between payments made down the contractual chain from the customer to head contractor and then to subcontractors. It may be unclear to consumers when the application of the *Home Building Contracts Act 1991* ends and the *Construction Contracts Act* begins.

Exclusion of Certain Mining Activities

Question 10

a) *Should the Act apply to the resources sector?*

MEA would support the *Construction Contracts Act* applying to the resources sector to a limited extent. It would be acceptable for the actual construction of a mine to be covered by the Act, however, we would oppose the operational activities of a mine once built being included under the scope of the Act.

Construction of Plant for the Purposes of Extracting or Processing

Question 11

a) *Should the Act apply to the construction of plant for the purposes of extracting or processing?*

As with mining activities we would support the construction of a mine being covered by the Act, but not the operational activities once a mine is constructed.

Question 12

a) *Should the Act apply to artworks?*

No comment

National Uniformity and 'Harmonisation'

The Society of Construction Law has proposed the adoption of a national approach to security of payment laws and the process of rapid adjudication.

Question 13

a) *In terms of 'harmonisation', should Western Australia consider the Society of Construction Law Australia's proposal for a national approach to security of payment legislation?*

There is certainly scope to consider harmonisation of security of payment legislation considering the growing number of contractors working across state lines. Something as basic as calculating the cut off date for lodging a payment claim is complicated by the current timeframes of between 28 days and 12 months, depending on the particular state/territory the work was performed in. This becomes a problem when a subcontractor working interstate intends to lodge a payment claim but is unsure of the timeframe they have available.

SoCLA indicates strong support for the "West Coast" model for security of payment legislation. MEA would agree with this, particularly considering the East Coast model requires claimants to endorse a payment claim as being made under the Act. This requirement can disadvantage subcontractors who may feel pressure not to include this endorsement for fear of losing a contract with a builder. However, we do recommend that government undertake a comprehensive consultation process, including targeted discussions with industry groups, before implementing any harmonised security of payment legislation.

b) *In terms of 'harmonisation' should Western Australia consider adopting the Construction Contracts (Security of Payments) Act 2004 (NT)?*

Given the only minor differences between the Western Australia and Northern Territory legislation, we have no strong objections to Western Australia adopting the Northern Territory Act. As indicated in our response to Question 1(a), we do support an extension to the time permitted to make a payment claim from 28 days to 90 days which would align with the Northern Territory legislation.

c) *Should Western Australia maintain its version of the current 'West Coast model', with minor amendments?*

Yes, provided our recommendations detailed above are considered amongst the amendments.

General Comments

Conduct of Matters

Feedback from MEA members has also highlighted key issues concerning matters that are raised in response to claims. Members have described situations whereby principal contractors submit responses that include misleading or in some case false details concerning the dispute. Members have then detailed that they have little or no ability to counter these claims and concern is raised that these matters are weighing heavily against them. We would recommend that there be avenues for subcontractors and adjudicators to ensure that a decision is determined based on accurate circumstances. It is currently impossible for subcontractors to anticipate principal contractors' responses without a formal right of reply to their opening submissions.

Variations

One of the key concerns raised by our members relating to construction contracts is the issue of variations. Our members have reported that the variations processes in construction contracts, most often notification and acceptance, are heavily weighted in the principal contractor's favour. Given the subcontractors inherently weaker bargaining position they are more inclined to agree to these less than favourable terms in order to secure a contract.

An example of the problems that can arise concerns builders/principal contractors raising purchase orders for variations relating to the work of an electrical contractor. Principal contractors have then been known to subsequently cancel the purchase order upon commencement of works, leaving the electrical contractor out of pocket. As the *Construction Contracts Act* allows parties to make their own written provisions regarding variations, subcontractors may unwittingly agree to perform variations without prior agreement on the

nature or cost of the varied work. In order to overcome this problem, we recommend that variations clauses be prescribed in statute and unable to be varied or contracted out of.

The *Home Building Contracts Act 1991* at section 7 provides protection to consumers by requiring variations to be agreed to in writing and be dated and signed by both parties before the work is carried out. A similar provision should be included in the *Construction Contracts Act* to ensure principal contractors obtain signed agreement from a subcontractor prior to variations commencing. The provision should also require the variations to be detailed and include the associated costs and timeframe for completion with any breaches of this legislated process incurring a penalty.

Retention monies

As discussed above in our response to Question 6(a), the construction industry in Western Australia could benefit from the creation of a construction retentions trust scheme which would see retention monies go to Escrow pending completion of the relevant works. Retention monies would be held by a third party entity and paid back to the subcontractor at the completion of the defects liabilities period. This system would overcome the current disparity whereby principal contractors can earn interest off the retention monies held and delay repayment based on their opinion as to whether a sub-contractor's work is complete. Similar schemes operate effectively in New Zealand and the United Kingdom.

Yours sincerely,

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