

SECURITY OF PAYMENT REFORM

Workshop 1 submission



Security of Payment

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is www.masterelectricians.com.au.

Master Electricians appreciates the opportunity to comment on the discussion paper for proposed changes to the Security of Payment Reforms. Master Electricians, in reviewing the document, has done so based on the experience of what an electrical contractor and/or consumer may experience.

Master Electricians has contributed to a number of reviews and reports concerning security of payment and we agree with the discussion paper's premise for change and agree with the historical difficulties and problems still facing the industry.

Initially MEA would suggest that this problem is not isolated to Western Australia (WA) and is a national issue. We understand that the Murry Review being conducted by the Federal Government is close to publication. We would certainly encourage the WA Government to take into account the changes and suggestions that may arise from the Murry review findings.

MEA being a single autonomous national association also brings our experience to the IAG from other jurisdictions and participation in most recently the Queensland changes brought in by Minister Mick De Brenni and we have also been heavily involved in the NSW current IAG process which we believe is close to releasing a draft legislation with significant changes.

SMALL CLAIMS

MEA strongly agrees with the discussion paper's finding concerning cost and access to adjudication being a barrier for small claims. MEA also agrees with the discussion paper's finding concerning the attitude of writing off small debts due to the time and costs involved. MEA experiences; however, also identify that a significant deterrent for subcontractors making claims against larger Contractors and Principals is the threat of loss of future work. Many many members from across the country state to us that they regularly don't pursue claims due to a historical and future long-term relationship that they do not want to spoil. This is particularly relevant where some subcontractors have made the mistake of not diversifying their clientele or are particularly reliant on one form of work with perhaps one or two companies.

MEA submits that the current system cannot continue. In considering the discussion paper and IAG meeting we strongly suggest that a combination of options 2, 3 and 4 is required to rebalance the scales and access to payment. MEA points to Queensland as an example of set fees for small adjudications. Whilst this process does not solve the threat, perceived or otherwise, of loss of future work; it removes a significant barrier for small contractors.

Queensland currently has set fees on adjudication and limits on application fees. These can be found here:

<http://www.qbcc.qld.gov.au/get-help-getting-paid-bcipa/adjudication-fees>

MEA strongly supports more discretion of adjudicators to award costs. Again, as an example, in the current Queensland system, i.e. before the recent amendments, adjudicators can already proportion costs based on their adjudication. The above website reference contains the following information from the Queensland Building and Construction Commission:

Adjudicator fees - How are they allocated?

Both the claimant and respondent have equal responsibility for paying the adjudicator fees. However, their share of the fees is dependent on a range of issues and the adjudicator will consider the following:

- *how successful the claimant or respondent has been in their application. For example, if the outcome of the decision was 100% in favour of the claimant, then 100% of the fees will most likely be allocated to the respondent and vice versa;*
- *whether the claimant or respondent applied for adjudication for an inappropriate reason;*
- *whether the claimant or respondent acted unreasonably leading up to or during the adjudication;*
- *the reasons given by the respondent for not making the progress payment;*
- *whether the respondent included additional reasons for withholding payment in the response, that were not included in the payment schedule;*
- *whether the application is withdrawn;*
- *the services provided by the adjudicator in adjudicating the application.*

MEA also supports changes in the appointment of Adjudicators. In examining the current system whereby adjudicators are “agreed” between the parties, it is inherent in the process that the party with the largest purchasing power, usually the builder, will have more say as to who is appointed. Whilst there is no evidence to say that any adjudicator is biased, statutory systems must address power imbalances and conflicts of interest, perceived or real. As such the appointment of adjudicators by an independent third party, namely a statutory authority such as a Building Commissioner, would address this imbalance and also give more control over subsequent difficulties with the adjudicators that have been identified in the discussion paper.

MEA specifically supports CPD and a code for conduct / ethics for Adjudicators which is enforceable by a regulatory authority. In some jurisdictions CPD is determined by the regulatory authority and determines not only hours / course attendance but also content. This is a constant process throughout the year with some Building Commissioners utilising recent cases whereby an Adjudicator’s decision has been appealed through the courts and an Adjudicator’s decision overturned. This provides relevant and up to date information to Adjudicators to ensure others don’t make appealable decisions, which ultimately reduces trust and use of the system.

For small claims MEA recommends the use of the Small Claims court model whereby the parties must be self-represented, except where there is extenuating circumstances such as language and literacy barriers that may prevent this. Systems such as the Fair Work Commission have a process whereby legal representation is sought and its up to the adjudicator to determine if the case is significantly complex enough to warrant one party being able to have legal representation. Again, for smaller claims this should be set at a very high

bar, however this may become an area of appeal, so any legislation must highlight that this decision by an Adjudicator is not subject to appeal.

We do not think that conferences for small claims are necessary. If an adjudicator needs to seek more information, then normal business correspondence should suffice. Again, issues of conference leads to more cost and lost opportunity cost for small business to earn revenue for their business. The system in some jurisdictions do allow for conferences however these are usually for larger claims

ADJUDICATORS

We have already made submissions above regarding a number of these options, which we won't repeat however we say that we support:

- Bolstering the powers of the Building Commissioner to enforce a Code of Conduct
- Mandate CPD for all adjudicators
- Mandate continued and renewed registration and proof of CPD to maintain adjudication registration

CPD we believe in this area is a very specialised area and the curriculum of any CPD should be set by a relevant body. We do not believe that setting a specific number of hours is appropriate in these circumstances. We believe that a suitable qualified judicial officer may be able to review decisions and appealable decisions over time and develop key areas of education that Adjudicators need to undertake. In addition, Adjudicators need to demonstrate they are staying up to date with current practice in with their profession, this may be demonstrated based on their professional membership requirements. Combined these 2 areas of CPD should ensure that decisions reached are consistent with current professional standards and seen to be judicially correct.

If Adjudicators are subject to the above, then MEA sees no reason why multiple cases between common parties cannot be assigned to the same adjudicator. The Building Commissioner will become equivalent to a registry office and as such will be best placed to make decisions on where caseloads are managed.

MEA has no objection to the names of the parties being released to assist with other jurisdictional duties.

ADDITIONAL REQUIREMENTS

MEA thanks the IAG Secretariat for the offer for any other topics that would be of assistance. MEA would suggest that while meeting dates are advantageous an agenda, distributed in advance of the meeting would assist discussions and assist formulate positions on issues. We particularly say this on the basis that experience and learnings from other jurisdictions will be extremely helpful to many participants whom may not know in detail about processes in other states.

MEA also wishes to provide feedback that we support the introduction of the following terms into the legislation

- Payment schedule introduction with a 10-day time limit for response/ payment
- Introduction of a Retention Monies Trust account either controlled by Statutory Authority or trust account operated by Builder with full director's liability on its operation and use.
- Statutory right to one reference date at the termination of the contract for any reason similar to other jurisdictions
- Statutory recognition to serve documents via email and any mandated document portal for submitting payment claims
- Examination of the introduction of a statutory variation approval process that delivers similar outcomes as other payment schedules.



Jason ODwyer

Manager Advisory Services