

Parliamentary Joint Committee on Corporations and Financial Services

ANSWERS TO QUESTIONS ON NOTICE

Oversight of the Australian Securities and Investments Commission, the Takeovers Panel and the Corporations Legislation No. 1 of the 46th Parliament

Agency: Australian Small Business and Family Enterprise Ombudsman
Question No:
Topic: Security of Payment
Reference: Spoken p.4 (18 June 2021)
Chair: Andrew Wallace

Question:

CHAIR: In a past life I was in the building industry for some 30 years as a builder and also a barrister, and I was very intimately involved in the drafting of the security of payment legislation. The building industry is notorious for slow payers, but each of the states and territories has one form or another of what's loosely called security of payment legislation. Are you seeing an improvement in payment times in the building industry? Are you, particularly post-COVID, seeing it remaining static, or getting worse?

Mr Billson: The non-residential building segment was called out in the recent CreditorWatch report as an area of particular blowout, so that would accord with your sense of things. There's been legislative action in South Australia and Western Australia. I think the South Australians may have passed a security of payments legislative framework in the last week or so, but we can provide the committee that information.

CHAIR: They've had one in place for probably 12 years or so but they may have amended it. I wasn't aware.

Mr Billson: There's a refresh of that based on their experience. In Western Australia there's also been some legislative action. If it's of service to you I can certainly liaise with John Chapman, the South Australian Small Business Commissioner, who's been very actively involved in this, and David Eaton, who is the Western Australian equivalent, and get some information for the committee if that's of interest.

CHAIR: Yes it would be.

Answer:

1. In South Australia the existing Building and Construction Industry Security of Payment Act 2009 ensures that a person who undertakes to carry out construction work (or supply related goods or services) under a contract is able to recover a progress payment by establishing a procedure that involves:
 - the making of a payment claim by the person claiming payment; and
 - the provision of a payment schedule by the person by whom the payment is payable; and
 - the referral of any disputed claim to an adjudicator for determination; and
 - the payment of the progress payment so determined.

The South Australian Government introduced legislation in the House of Assembly on 26 May 2021 to further strengthen the adjudication system for payment disputes in the building industry, the *Building and Construction Industry Security of Payment (Review Recommendations) Amendment Bill 2021*.

The more significant changes include:

- extension of the Building and Construction Security of Payment Act 2009 (the Act) to include construction contracts relating to domestic building work; and
- new provisions clarifying that the Small Business Commissioner is responsible for the administration of the Act and outlining the Small Business Commissioner's functions.

Further amendments were also applied to the Act in relation to:

- progress payments;
- due dates for payment;
- the appointment of and registration for adjudicators; and
- adjudication process.

The Office of the South Australian Small Business Commissioner provided the following:

The Office of the Small Business Commissioner, South Australia has seen less complaints under the Security of Payment legislation in this last financial year. In 2019/20 we received 116 enquiries regarding Security of Payment, in 2020/21 we received 69 enquiries. There has also been a reduction in the number of adjudications under the Security of Payment legislation:

Adjudications 2019/20

Claimed: 63	Amount claimed:	\$47,187,609.10
Awarded: 41	Amount awarded:	\$18,853,121.72

Adjudications 2020/21 (July 2020 – March 2021)* (figures not yet available for last quarter)

Claimed: 22	Amount claimed:	\$105,579,901.89
Awarded: 15	Amount awarded:	\$ 17,510,590.01

The South Australian Small Business Commissioner, Mr John Chapman has made the observation that the building and construction industry in South Australia has a very full order book at the moment. This may be encouraging businesses to make timely payments to subcontractors in order to engage their services for future projects. Not paying subcontractors promptly exposes contractors to the risk of losing subcontractors to alternative contractors who are prepared to pay their subcontractors promptly. In the current environment where work is plentiful, subcontractors have an increased capacity to select which contractor they work for.

2. The Western Australian Government has passed the *Building and Construction Industry (Security of Payment) Bill 2021* (the Bill). The Bill received Royal Assent on 25 June 2021 and was introduced to provide new security of payment laws that are more consistent with those in other Australian states and territories, including some of the best practice recommendations from the Federal Government National Review conducted in 2017.
 - Significantly the Bill includes the implementation of mandatory **retention money trusts**, which complements measures already delivered through the expanded use of Project Bank Accounts on government projects. Retention money trusts hold

the money that is payable to the other party (or parties) under the construction contract and gives contractors a right to claim minimum monthly progress payments.

- While retention money under a construction contract is held on trust:
 - i. it is not available for payment to a third-party creditor of any of the parties to the contract (i.e. at each level of the contracting chain); and
 - ii. it is not liable to be attached or taken in execution for satisfying a monetary judgment entered in favour of a third-party creditor of any of the parties to the contract.
- The Bill also establishes a more effective rapid dispute resolution process to speed up the receipt of outstanding payments.