



3 August 2011

C39, 77.1

RB; rp

The Honourable Gail Gago MLC
Minister for Consumer Affairs
GPO Box 1719
ADELAIDE SA 5000

Attn: Mr Graham Close

Dear Minister

**Discussion Paper on Proposed Regulations and Administrative Arrangements-
*Building and Construction Industry Security of Payment Act 2009***

I refer to an email of 5 July 2011 from the Project Manager for the implementation of the Building and Construction Industry Security of Payments Act 2009, Mr Graham Close, and thank you for providing the Society with the opportunity to review the above Discussion Paper.

The Paper was referred to the Society's Alternative Dispute Resolution Committee, and its Property Committee, for comment. Accordingly, we provide the following comments.

Definition of recognised financial institution (section 4)

We agree that it would be appropriate to extend the definition of "recognised financial institution" by regulation to institutions in addition to banks as proposed. The use of APRA prescribed bodies would appear to be appropriate.

Definition of construction work (section 5)

We agree no extension of the definition is necessary.

Definition of related goods and services (section 6)

We agree that no modification of the definition of 'related goods and services' is necessary.

Contracts excluded from the Act (section 7)

It is our view that certain contracts should be excluded. We suggest:

- 1 The Regulations should exclude contracts with a Contract Sum greater than \$500,000 (excluding GST, levies, rates, etc.) as it would appear to be inappropriate to remove a party's right to access the courts for disputes of this magnitude.

- 2 Alternatively, it could be that the parties be given a discretion to use an adjudicator for disputes involving contracts with Contract Sums between \$500,000 and \$1M.
- 3 'Contract Sum' will need to be defined for the purpose of the exception due to the various ways in which construction contracts calculate the same, together with the inevitable variations to the contract sum that is specified in contracts at execution. Especially given that the validity of claims for variations are often the cause of disputes.

To avoid duplication, the Regulations should provide that claims under the Act should be excluded if a claim has been commenced in a court.

Eligibility criteria for adjudicators (section 18)

The Society considers that minimum eligibility criteria should be imposed on adjudicators **in addition** to imposing an obligation on the nominating authorities to ensure that suitably qualified and competent adjudicators are appointed.

The Western Australian criteria appear to have some support.

It would be prudent to incorporate into the Act a provision that an act undertaken in good faith by a person believing that they are a qualified adjudicator is not invalidated but a technical deficiency in that person's qualifications.

Adjudicator's fees (section 30)

The Act envisages a "default rate" rather than a maximum rate (section 30 (1) (b)). In fact, it may not be possible to prescribe a "maximum rate". We note the concerns expressed about certain practices interstate.

The Society considers the Supreme Court scale rate of \$30 per 6 minute unit or \$300 per hour is appropriate as the default rate. If the rate is defined by reference to the Supreme Court scale it has the added advantage that a change in the scale will also change the rate.

Methods for delivering notices (section 34)

There is no need for any change.

Maximum fees that can be charged for adjudication applications (section 17 and section 29)

We do not consider that these fees should be capped. Different nominating authorities will have differing costs structures and levels of organisational resources as well as the fact that the amount of work required may vary from matter to matter.

Full and frank disclosure of all fees, including all relationships with the nominating authorities' adjudicators, to enable users to make an informed opinion is essential.

Authorisation of nominating authorities (section 29)

The Society supports the proposals as listed in the Discussion Paper. In addition, we consider that it is important that nominating authorities should be restricted to not for profit bodies to avoid forum

shopping for adjudicators, and the development over time of preferred adjudicators to achieve particular outcomes.

I trust these comments are of assistance. Please do not hesitate to contact me, should you wish to discuss any matter relating to this submission.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Ralph Bönig', written in a cursive style.

Ralph Bönig
PRESIDENT