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Attn: Security of Payment Implementation Team
Policy and Legislation Branch
Building and Energy
Department of Mines, Industry Regulation and Safety
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CCF WA SUBMISSION

Consultation draft of the Building and Construction Industry (Security of Payment) Regulations 2022 (Draft Regulations)

Thank you for the opportunity to comment on the Draft Regulations.

CCF WA welcomes the introduction of beneficial reforms to improve payment timeliness and security for contractors and subcontractors in the civil construction industry, as initiated by the *Building and Construction Industry (Security of Payment) Act 2021*.

Below are comments addressing the key elements of the Draft Regulations.

Value for certain contracts to be in writing - \$20,000

We agree with the threshold.

Homeowner's notice

No position.

Limitations on submissions for adjudication applications – payment claims \$50,000 and below

The 10-page limit on written adjudication applications is supported. We note that a superintendent's certification of payment may have occurred as part of the payment claim process and along with the supplementary documentation able to be provided with the adjudication application, a 10-page written statement should be sufficient.

This honours both the adjudicators limited statutory function and the wider intent of the legislation for adjudications to be fair, transparent, quick and affordable. For these reasons, it may be worthwhile to consider a 10-page adjudication application to be applied more widely to all payment claim values.

Threshold value for review of adjudication determinations

Threshold values for review of adjudication determinations is not supported. By determining threshold values for this purpose it will unreasonably transfer the responsibility of smaller adjudication determinations to tribunal or court proceedings, and potentially make the adjudication review process significantly and unfairly more labourious and expensive for lower valued contracts.

Maximum fees and expenses for adjudication applications – payment claims \$50,000 and below

The cap on maximum fees and expenses for adjudications on payment claims of \$50,000 and below is supported. The various thresholds for adjudication fees are seen a proportional and provides certainty of adjudication costs for contractors, in particular smaller contracting companies who are more likely to have lower value payment claims. This regulation again supports the intent of the legislation for adjudication to be affordable and quick, and we note the fee caps have been researched, recommended and determined to cover adjudication fees for smaller claims.

Minimum credit rating for compliant performance bonds - AA

We strongly oppose a minimum credit rating of AA under the Standard and Poor's Long Term Issuer Credit Rating for compliant performance bonds. Requiring a minimum AA credit rating will effectively limit the issuing of performance bonds as Bank Guarantees to the big four banks. It should be duly noted that the big four banks (CBA, ANZ, Westpac and NAB) are all currently rated as AA-, which is a lower rating than AA. Even if reduced to AA-, this requirement would exclude strong and reputable Australian banks active in the performance bond market.

We do not agree that an AA credit rating provides the right balance between the right to substitute and adequacy of the performance bond being provided. It is anti-competitive and would be burdensome for contractors needing to open an additional bank account with a bank they do not currently bank with. A rating of A+ should be acceptable.

Threshold for retention money trust scheme - \$1 million for phase 1 and \$20,000 for phase 2

We agree with the thresholds and commencement dates.

Excluding small scale residential contracts from retention trust scheme

No position.

Withdrawal of interest earned from retention trust accounts

We do not agree that the party who establishes and operates the retention money trust account (the trustee) should be entitled to any interest on the money contained therein. This interest should belong to the contractor who has performed the work related to the retention. Money held in retention trust accounts is a part of the agreed price for labour and materials that, at the time of

each payment into that account, was actually delivered by the contractor from whom that money is being withheld.

Redaction of other beneficiary information from retention trust records

We support the redaction of information from retention trust account records, excluding amounts of money, that identify another beneficiary to the account. We note that a simple, alternative method of providing accounting records to beneficiaries is to produce separate trust statements to individual entities, rather than a group transaction statement, and so also support this method.

Code of practice for authorised nominating authorities

We agree with the Code of Practice in its current form.

Qualifications for registration as adjudicator or review adjudicator

Agree with reservations. A degree in architecture or built environment may not be an appropriate qualification to adjudicate a complex civil construction dispute. This could be addressed by stating clearly in the code of practice for authorised nominating authorities that an adjudicator's qualifications should be relevant to the nature of the dispute.

Experience for registration as an adjudicator or review adjudicator

We agree with prescribed experience requirements for adjudicators and review adjudicators.

Adjudicator grades

We agree with the grading system.

Code of practice for adjudicators and review adjudicators

Further to our concerns above regarding adjudicators being appropriately qualified to adjudicate civil construction disputes, we suggest that under Clause 16 of the Code of practice for adjudicators and review adjudicators, 'acceptance of appointments' should include that adjudicators must also satisfy themselves that they have the necessary qualifications and experience to adjudicate the particular dispute.

Electronic lock box – service of documents

We agree with an electronic lock box to facilitate the service of documents, with an electronic lock box being the preferred method.

Time of service of documents

We agree with the times of service of documents.

Definition of construction work and related goods and services

We support the existing definitions.

Model forms of construction contracts

We support the principle of fair, standardised construction contracts and have advocated this view to government. This is a complex area and further engagement with industry is needed.

Prohibited terms

We support the principle of prohibiting certain types of terms in certain classes of construction contracts. Again, this is a complex area and we propose further separate engagement, with more time to consider options.

Please contact me if you have any enquiries regarding this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Andy Graham', with a long horizontal stroke extending to the right.

Andy Graham
Chief Executive Officer (WA)