

17 Aug 2016

Mr John Chapman
Small Business Commissioner
GPO Box 1264
ADELAIDE SA 5001



Business SA
Chamber of Commerce
and Industry South Australia

ABN 000 14 725 309 328
Level 1, 136 Greenhill Road
Unley South Australia 5061
T: +61 8 8300 0000

Dear Mr Chapman

I write in response to your request for submissions on proposed changes following the Moss Review of the *Building and Construction Industry Security of Payment Act 2009* (the Act).

Working for your business.
Working for South Australia

Executive Summary

- Business SA acknowledges that small business sub-contractors should be able to claim under the Act without fear of retribution from major builders and the insertion of a penalty provision in the Act for intimidation should act as a deterrent to this behavior.
- Business SA supports the Small Business Commissioner becoming the sole Authorised Nominating Authority under the Act to ensure that the appointment of an adjudicator is not subject to the potential for bias and there is increased independence in the entire process.
- Business SA would not support adjudications being published although it might be useful to publish some anonymous case studies as is done interstate.
- Business SA recognises there should be a focus on Government projects, including Local Government projects, but any move to implement additional processes and procedures needs to occur without imposing duplicate regulation on the private sector who are otherwise complying with the Act.
- Business SA provides in-principle support for the development of a Building and Construction Industry Code to provide alternative dispute resolution clauses under the Act but this should come once the Small Business Commissioner is satisfied that sub-contractors are able to claim under the Act without retribution.

Should you require any further information or have questions, please contact Andrew McKenna, Senior Policy Adviser, on (08) 8300 0000 or andrewm@business-sa.com.

Yours sincerely,

Anthony Penney
Executive Director, Industry and Government Engagement





Why this matter is important to South Australian businesses

As South Australia's Chamber of Commerce and Industry, Business SA is the peak business membership organisation in the State. Our members are affected by this matter in the following ways:

- The vast majority of Business SA members are small businesses, employing less than 20 people, and require appropriate legal protections when dealing with large businesses to offset against power imbalances.
- Expanding South Australia's economy benefits businesses large and small and Business SA advocates for balance in regulation to ensure all businesses can deliver construction projects in a cost-effective manner, particularly to deliver the infrastructure which South Australia needs to grow.
- For the *Building and Construction Industry Security of Payment Act 2009* to achieve its intended purpose, it must be seen as imposing the least impost on all impacted businesses.

Key Policy Points

1. Feedback provided to Business SA has highlighted concerns raised by Mr Moss in relation to the reluctance of some sub-contractors to claim under the Act for fear of losing work, particularly when dealing with major builders. Accordingly, while the intention of the Act may be sound, if it does not have industry wide support then future advancements such as a Building and Construction Industry Code may be undermined.

Notwithstanding Business SA only favours a heavy handed regulatory approach as a last resort, there may be a need to induce major builders to support the Act through a penalty provision for intimidation against sub-contractors who attempt to claim under the Act.

2. Business SA cannot see the need to have an intermediary between the Small Business Commissioner and adjudicators under the Act and supports streamlining this process to ensure the Small Business Commissioner appoints adjudicators directly. Improving independence in this process should help to allay any concerns that adjudicators are being chosen for their claims bias.
3. Increased transparency in relation to adjudications under the Act may be desirable but this must be balanced with the privacy concerns of both small and large businesses alike. Considering the information generally available through interstate small business commissioner websites, the South Australian Small Business Commissioner should limit online publishing to case studies which articulate the general nature of disputes and how they might be settled through the adjudication process. While the pertinent details of many court cases are published on-line, this depends on the level of the court and the relationship to how such decisions might set legal precedent. Accordingly, we do not consider there is sufficient grounds to publish adjudications under the Act online.



4. Business SA recognises that Stage 2 and 3 recommendations would only be required if Stage 1 failed to appropriately deliver predicted outcomes however as per your request, we provide the following feedback:
 - applying this type of Act to home owner builders would seem unnecessary given the relative power of parties to a transaction.
 - inserting a provision in the Act requiring Directors of principal contracting firms to sign statutory declarations of sub-contractor payments will not necessarily provide better outcomes for subcontractors but will add to contract compliance costs which ultimately adds to the cost of doing business in South Australia.
 - Business SA has received mixed views on retention payments but considering the trend towards bank guarantees, perhaps this is a more relevant area of focus for the Small Business Commissioner.
 - While a project bank account for Government projects might sound beneficial for small businesses getting paid, it would invariably introduce a range of complexity and associated costs for builders which again, only serves to add to the cost of doing business in South Australia.
5. If the Small Business Commissioner is looking for alternative ways to promote use of the Act, we support a focus on the State Government's own procurement processes by asking tenderers to demonstrate where they have used the Act in past projects. However, there should not necessarily be a prescriptive influence on a procurement decision as it is not always a case of 'good or bad behaviour'; some builders and their sub-contractors may not have any requirement to use the Act and as such these builders should not be unfairly prejudiced. Notwithstanding, it does highlight that the Government is mindful of how the Act is being used, or not; providing a subtle signal that builders should not avoid the Act if sub-contractors wish to claim under it.