

13 July 2018

Building Ministers' Forum Secretariat
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Dear Secretary,

Re: Murray Review - Security of Payment Laws in the
Australian Building and Construction Industry

We refer to the report prepared by Mr. John Murray AM in relation to security of payment laws in the building and construction industry (Murray Report) which was released by the Minister Laundy on 21 May 2018.

We understand the Murray Report will be considered at the forthcoming meeting of the Building Ministers' Forum (BMF) in August 2018. The purpose of this correspondence is to provide the BMF with the views of the ACTU on the recommendations set out in the Murray Report.

It is the longstanding view of the ACTU and its affiliates that there is an urgent need for reform of security of payment laws and practices in the Australian building and construction industry. Key amongst our concerns is that in the absence of significant change, smaller contractors will be denied their right to payment in full for the work they perform and their workers will continue to be denied their lawful accrued employee entitlements. If the status quo remains, the issue will continue to generate unnecessary payment-related commercial and industrial disputes in the industry. It will also increase cost burdens on Australian taxpayers.

We believe that simply modifying state and territory legislation at the margins will not resolve the longstanding structural issues that generate payment disputes, insolvencies and lost wages. More comprehensive reform is now long overdue.

The Australian Construction Industry

The Australian construction industry is a critical part of our national economy. Over the past decade the industry has accounted for between 8 per cent and 10 per cent of annual GDP and roughly the same proportion of total employment. More than one million Australians earn their living in the construction industry which also accounts for around one in every six small businesses in the country. The overwhelming majority of those in the industry, small subcontractors and workers, work in an environment where they have a constant concern about whether they will be paid in full for the work they undertake.

The construction industry is a national industry. Its participants, both large and small, routinely operate across state and territory borders. In this setting, there is a strong imperative for clear, effective and consistent laws to regulate and ensure security of payment for all those in the industry. At present this is not the case.

The Murray Report presents an opportunity for all Australian jurisdictions to come to terms with a major industry issue and regulate on a best practice basis for the benefit of the entire industry. It provides a blueprint not only for national harmonisation, but for a significant cultural change that would transform payment practices and make the industry a fairer and more secure one for everybody.

Past Inquiries and Regulatory Responses

The issue of security of payment and the related problem of corporate insolvency in the construction industry have been the subject of many reviews and inquiries over a number of years. The history of these inquiries is traversed in detail in Chapter 17 of the Murray Report. We do not propose to repeat that history in full here other than to highlight to the BMF the following points:

1. A system of statutory trusts was recommended by an industry-based group in NSW in the early 1990s but this recommendation was not acted upon by the NSW Government.
2. In Queensland, the 1996 Scurr Report recommended a designated amount be retained in trust by the principal contractor for the benefit of those below in the contractual chain. This recommendation was not implemented by the Queensland Government.
3. A system of statutory trusts was recommended by the WA Law Reform Commission chaired by Mr Martin QC (as he then was, now Martin CJ of the Supreme Court of Western Australia) in its 1998 report. That recommendation was not adopted by the Western Australian Government.
4. In 2003 the Cole Royal Commission concluded that objections to a statutory trust model were likely to be overstated but that the entrenched pockets of resistance to a trusts system in the industry would make implementation difficult. In the event, the Royal Commission final report included a model bill dealing with narrower security of payment processes. No such bill has been enacted at the Commonwealth level.
5. The 2012 Collins inquiry in NSW recommended the adoption of a statutory trust system and comprehensively disposed of the arguments advanced by opponents of that model. Since then, the NSW Government has responded in only a very limited way in relation to retention monies and by moving to a trial of a system of project bank accounts on nominated projects.

More recently, and even up to the present day, there have been reviews of and amendments to, state and territory security of payments laws. The issue remains in a state of flux. Disputes continue to be dealt with differently in each jurisdiction. Thousands of contractors and workers continue to lose money.

Security of Payment and Insolvency – The 2015 Senate Committee Report

In 2015 the Senate Economics References Committee conducted a comprehensive inquiry into the causes and consequences of insolvency in the construction industry. The Committee noted the following:

- (a) The structure of the commercial construction sector means that there are serious imbalances of power in contractual relationships in the industry. Commercial power and control of project funds is concentrated in the hands of the small number of major contractors whilst the physical work is undertaken by the large number of smaller subcontractors and their employees
- (b) Ordinarily, the entity being paid to deliver the project (principal contractor) will be receiving payments, which, for the most part, is for work being performed or materials supplied, by someone else.
- (c) Project funds are often misapplied to other projects or for private use or areas unrelated to the project in question.
- (d) Major contractors regularly deny subcontractors full payment for work done. Harsh, oppressive and unconscionable conduct and a growing culture of sharp business practices contribute to the situation where, every year, the industry is burdened by around \$3 billion in unpaid debts.
- (e) The industry is consistently ranked as having one of the highest rates of insolvencies in Australia, accounting for 22 per cent to 24 per cent of all Australian company insolvencies every year. This rate of insolvencies is out of all proportion to the size of the industry. Deliberate insolvency and ‘phoenixing’ of companies is also a major problem.
- (f) Insolvency and security of payment issues present a significant financial burden on the Commonwealth. This can take the form of direct losses through, for example, unpaid tax remittances (in 2013-14 alone an estimated \$487m) and indirect costs such as the Fair Entitlements Guarantee scheme (\$178m or 17.4% of the total paid out under that scheme from 2009-10 to 2013-14).
- (g) Despite the many inquiries and reviews that have been conducted at various levels, little or nothing has been done. To the extent that regulatory responses have been implemented, Australia now has a fragmented and disparate legislative regime covering security of payment in the construction industry.
- (h) The continued viability of the industry in its current structure requires Commonwealth intervention to ensure that businesses, suppliers and employees that work in the subcontracting chain get paid for the work they do.
- (i) Witnesses and submitters to the Senate inquiry expressed almost universal support for a single set of rules applying around the country for security of payment in the construction industry.

The final report of the Committee made a series of recommendations which it said would mark a 'sea change' in the Commonwealth's role in regulating payment practices in the construction industry. Foremost amongst these were the enactment of uniform, national legislation for a security of payment regime, rapid adjudication processes, the trialling of project bank accounts (PBAs) on major Commonwealth projects from July 2016 and the legislated extension of a best practice form of trust account to private sector construction.

Critically, the Committee's comprehensive report had bipartisan support save that Coalition members expressed some reservations about extending PBAs to private projects before the results of any trial were assessed.

Notwithstanding the level of political support and the force of the recommendations set out in Committee's final report, little progress has been made.

The Murray Report

The ACTU and affiliated unions support the general conclusion expressed in the Murray Report that it is now time to deal with security of payment related issues at a national level. As the 2015 Senate Committee report noted:

It is absurd that in this day and age there are eight separate security of payments regimes which differ markedly from one other. Some of the differences are small and some are large and significant, but what they all do is present manifold difficulties for construction industry businesses that routinely operate in more than one state. This has resulted in a great deal of wasteful litigation in which parallel points of law are raised in the different jurisdictions.

We are of the view that the Commonwealth, State and Territory Governments must work cooperatively to achieve a nationally consistent and effective set of laws. Allowing jurisdictions to pick and choose elements of the report may only exacerbate existing problems and inconsistencies. These laws must be developed on a 'best practice' or 'highest common denominator' basis. This must be done with the full and active participation of all industry stakeholders. Trade unions are central to this process. Ultimately it is workers who are most vulnerable to corporate failures and malpractice.

However, we make it abundantly clear that unions will not support a second rate or 'watered down' national version of security of payment laws. In the time available to us since the release of the Murray Report and without necessarily endorsing each and every one of the recommendations in their entirety, we have come to the preliminary view that the recommendations in the report represent the most comprehensive attempt yet made to draw together the positive aspects of the various security of payment regimes. Whilst there may be a need to more closely examine some of the details of the report, it appears to us that the recommendations provide a solid basis for moving the national discussion forward. The ACTU and its affiliated unions would look forward to participation and engagement in such a process.

We also make it clear that rationalising security of payment legislation will not, of itself, resolve the broader security of payment and insolvency problem. As the countless inquiries cited above - including the Murray Report - have concluded, there is a need to address not just the mechanisms for resolving

disputed payments when they arise; rather, we need to change the way project funds are regarded and treated by those at the top of the chain who receive those funds.

Changes are also required to insolvency laws to deal with 'phoenixing' and the deliberate use of corporate insolvency as a mechanism to avoid paying workers' entitlements, tax remittances and creditors generally.

It is in the interest of the Australian construction industry that a national system of statutory trusts be introduced to ensure that at each level of the contractual chain, monies are disbursed for the purposes for which they are received and not for some extraneous purpose. As the Murray Report (and the Collins Report before it) have pointed out, there are numerous trust models available from overseas jurisdictions and ample evidence to show that the trust model is a simple and effective mechanism to ensure that payments flow to those entitled to receive them.

A statutory trust system would impose minimal costs on industry. For government and taxpayers, the measure would be better than cost neutral. It would actually benefit Australian taxpayers and the general community by many hundreds of millions of dollars each year.

We urge the BMF to adopt the Murray Report as the basis for transformative positive change in the Australian building and construction industry. We suggest that the process be commenced as a matter of priority. Unions should be consulted at the outset of this process and be engaged as key members of an industry implementation group which would oversee the development and introduction of any changes.

We look forward to constructive participation in a process to bring about necessary reform to this important industry.

Thank you for the opportunity to raise these matters with the Building Ministers' Forum.

Yours sincerely



Sally McManus

Secretary

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