



**79 Constitution Avenue
Canberra ACT 2612
t (02) 6245 1300
f (02) 6257 5658
hia.com.au**

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General Manager
Small Business and Deregulation Branch
Department of innovation, Industry, Science and research
GPO Box 9839
CANBERRA ACT 2601

Via email: smallbusiness@innovation.gov.au

Dear Sirs

Options Paper – Resolution of Small Business Disputes

HIA welcomes the Commonwealth Government's interest in exploring ways to assist small businesses resolve their disputes with other businesses (business to business disputes).

HIA is Australia's largest building association with over 43,000 members. HIA members include builders, trade contractors, suppliers, manufacturers and building consultants.

The majority of HIA's members are small businesses operating exclusively within the residential construction market. In fact, HIA estimates that more than 90% of the residential building industry is comprised of small business and sole traders.

A key focus of the Options paper is in identifying affordable and accessible options that have the capacity to directly benefit those small businesses that would otherwise not pursue their claim for fear of cost or a lack of awareness. HIA agrees that affordability and accessibility are key objectives of dispute resolution, as are efficiency, probity and accountability:

1. Promptness - protracted disputes may compromise project objectives, cause ongoing undue financial hardship, affect productivity, interfere with the day-to-day relationships and lead to further disputes.
2. Probity and accountability - the dispute resolution process should be transparent, accountable and conducted by an independent and impartial body.

In this regard, one of the key objectives is that the dispute resolution mechanism should be both procedurally and substantially fair, so that if a party is aggrieved with the ultimate result they may still draw some satisfaction from the resolution's fairness.

Dispute resolution in the residential building industry

HIA understand that the Options Paper has been pitched at a “high-level” and does not explore state based or industry specific dispute resolution scheme or practices already in place.

For this reason, HIA suspects that some of the Options proposed will have little limited application to small businesses in the residential building industry.

For the most part, disputes between building and contractors are not considered to be a big problem for the residential building industry. Most are involved informally.

Where disputes arise they are usually focused on the following types of matters - variations to building contracts, the nonpayment of monies to subcontractors, time and cost overruns, claims of defective construction and the suitability or quality of materials supplied,.

Many disputes are managed by agreed dispute resolution provisions set out in the contract between the parties.

Notably, security of payment legislation for the construction industry provides a unique avenue of dispute resolution (for subcontractors) not found in other industries such as retail or manufacturing.

Security of payment laws

Over the past decade, security of payment legislation for the construction industry has been progressively introduced into each state and territory¹. The common objective of this legislation has been to improve cashflow down the contractual chain.

Currently, the regime is generally divided into what are colloquially known as the West Coast and the East Coast Models. The East Coast Model has been the most widely adopted model to date, with New South Wales, Queensland, Victoria, South Australia and Tasmania implementing broadly similar versions of this model. The West Coast Model has been implemented in Western Australia and Northern Territory.

The East Coast model of legislation has the following common features:

- Preventing the practice of contractors withholding payment from subcontractors while awaiting payment from the principal;
- Providing a right to progress payments;
- Providing an expedited adjudication procedure by which disputes concerning payment are resolved, usually by way of written submission, within a very short period of time;
- Providing for enforcement of adjudication determinations as court judgments;
- Providing a statutory right to suspend work for non-payment.

There are mixed views on the success of security of payment laws in resolving disputes.

The main advantages of statutory adjudication is that it provides a speedy and relatively inexpensive method of at least provisionally resolving a payment disputes in a way that is biased to maintaining cash flow for contractors and subcontractors.

However some commentators have remarked that whilst security of payment legislation establishes a default entitlement to payment (particularly under the East Coast model) it does not really resolve disputes. The principle has been succinctly stated as “pay now and argue later”.

As it is biased on ensuring cash flow to contractors/subcontractors, there is little determination of a dispute on its merits or in a fair manner. Timeframes favour claimants, hearings are restricted allowing for little probity of an adjudicator’s decision making processm, and an adjudicator’s decisions lacks legal finality (thereby necessitating further litigation).

The remedy of rapid adjudication is also not available to a principal contractor or builder for disputes with contractors over issues such as defective work.

¹ Legislation has passed in South Australia in 2009 but has not yet received a commencement date.

Specific comments on the Options in the Paper

Option 1 – National Information and Referral Service

HIA consider that it is unlikely that many businesses in the construction sector will use such a service.

Disputes in the construction sector can be complex, arising from the terms of a lengthy standard form contract and can be influenced by a range of factors, including the availability of statutory rights under security of payment laws.

For these reasons, HIA queries whether these types of matters are likely to be understood or easily conveyed through either a website or call center.

HIA assumes similar idiosyncrasies would exist with other industries.

In any event, based on our experience as a representative of small, medium and large business, it is typical for a business confronted with a dispute to turn to their industry association for tailored advice as to the dispute resolution options available to them.

If this advice is not available, or does not satisfy their needs, then the next avenue is typically a lawyer.

Option 2 – National Dispute Resolution Service

HIA notes that the types of mediation services that work with civil disputes between individuals will not necessarily be successful in the commercial world.

In the construction industry, mediation processes can be undermined by a security of payment claim, which typically favors the claimant.

However there is a dispute resolution service gap with respect to business-to-business disputes for claims by a principal contractor against a sub-contractor for defective work.

A mediation service for these purposes might have some merit, but absent of “a carrot or a stick”, it is unlikely that a sub-contractor will voluntarily submit themselves to an ADR process.

From HIA’s experience, the nature of most construction disputes demand that the mediator understands basic technical building requirements.

Option 3 – National Small Business Tribunal

HIA notes that this proposal envisages the creation of a National Small Business Tribunal (NSBT) dedicated to the resolution of business-to-business disputes, underpinned by Commonwealth legislation and subsidised by the Commonwealth.

In comparison, New Zealand established its Dispute Tribunal in 1988 and this Tribunal has wide jurisdiction for civil disputes including damage to property, fencing, sale of goods, defective work and contract disputes generally up to \$15,000 (or \$20,000 by agreement). It appears this Tribunal is very accessible.

The NZ Tribunal proceeds with little formality in that the parties are not represented by lawyers with the finding of the referee capable of being enforced by the courts. Appeals of the referee are permitted on a point of law only.

The Tribunal appears to be a very successful system that is backed up the courts by generally upholding the referee’s decision on appeal.

However it is questionable whether a similar model (at the federal level) is possible in Australia given the existing layers of judicial process that exist within each state’s jurisdiction.

Whilst the stated objective of the Commonwealth’s proposal to create the NSBT is namely, “...to solve disputes in a fair, economic, informal and expedient manner...” appears to have some merit, unfortunately the Options Paper fails to provide substantive detail on the implementation and scope of this proposal. In particular, the following issues require further attention:

- Constitutional implications of this proposal?
- Legislative considerations in implementing the NSBT, either via referral of State powers or passing of mirror legislation through each jurisdiction's Parliament?
- How would the NSBT interact with existing judicial systems? HIA queries the economic rationale in implementing an NSBT absent of administrative cost savings in administering the State regimes;
- How will forum shopping be prevented? Given the considerable investment involved in creating such a Tribunal the NSBT would require exclusive jurisdiction with respect to matters within its ambit;
- Would the NSBT have a threshold?
- What type of disputes would fall within the jurisdiction of the NSBT?
- Qualifications and experience of the conciliators?
- Enforcement powers?
- Standing?

It is important that small business people not be confused on where to go.

Option 4 – Small Business Advocate

HIA notes that Victoria has a Small Business Commissioner and South Australia is currently proposing one as well.

In HIA's experience small business people are often reluctant to voluntarily include government authorities and representatives in their business dealings, even if Government is offering assistance to that business.

There is a natural fear and aversion to Government and public bodies.

With this in mind, HIA is informed that the Victorian Small Business Commissioner has had minimal uptake or influence with respect to business-to-business disputes occurring in the construction sector.

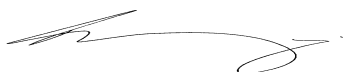
HIA queries whether the establishment of a similar advocate at the Commonwealth level will deliver value for money.

If a Small Business Advocate is established then HIA supports light handed approach rather than activist regulatory intervention.

The Advocate must operate with a goal to ensuring minimal disruption to business.

HIA would be happy to expand on these submissions in person.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LIMITED



David Humphrey
Senior Executive Director – Business, Compliance & Contracting