LEADR & IAMA
Response to the

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Preamble


LEADR & IAMA has been formed as a result of integration by LEADR and IAMA.

IAMA is a recognised Authorised Nominating Authority for the building and construction security of payment legislation in South Australia, Western Australia, the Australian Capital Territory and New South Wales. LEADR is a recognised Authorised Nominating Authority in New South Wales, Victoria and Tasmania. Both were previously ANAs in Queensland, and IAMA was an ANA in Victoria.

IAMA has retained a business entity (including constitution, ABN, a Board of Directors and position holders) for the purpose of fulfilling its role as an ABN and to meet a range of existing business responsibilities. It is the intention soon, for LEADR & IAMA to apply to be an ANA in SA and in other jurisdictions.

LEADR & IAMA welcomes the SA Small Business Commissioner’s initiatives to review and enhance the effectiveness of the Building and Construction Industry Security of Payments Act 2009 (SA) to ensure that it achieves its objectives effectively. LEADR & IAMA endorses the emphasis that the Report places on the need to expedite the prompt resolution of matters.
Responses to specific questions

Definition of related goods and services

The Act defines what constitutes construction work under Part 1 (5) as follows... Is this current definition of construction work still current?

LEADR & IAMA considers that the definition of what constitutes construction work under the Act to be accurate and still current.

The Act defines what constitutes construction work under Part 1 (6) as follows... Is this current definition of related goods and services still current?

LEADR & IAMA considers that the definition of what constitutes construction work under the Act to be accurate and still current.

Application of the Act

A key measure of whether a construction contract is deemed to be covered by the Act is whether the work or related supply of goods or services fits within the definition of construction work (S.5 of the Act).

Is further refinement of this section required to specifically include those contracts that are not afforded the protection of the Act by virtue of “technicalities”, i.e. limitation of time, provision of goods/services for owner occupier via independent builder etc?

LEADR & IAMA considers that there is no requirement for further refinement.

Rights to progress payments

Is the Act clear in terms of the definition of the rights to progress payments, calculations of the Amount of the progress payment and Valuation of construction work and related goods and services?

LEADR & IAMA believes that it is generally clear. Further clarification could be made in relation to whether a contractor is entitled to claim up until the...
contract is terminated. There is an apparent distinction between the claimants entitlements to payment for their work which current legislation indicates is payable from the reference date. If there is specific revision on this definition to afford claimants protection of their construction work up until the point of termination this may satisfy issues generated by a final reference date.

Payment Claims
LEADR & IAMA are in favour of retaining the current system for payment claims.

Eligibility Criteria for Adjudicators
LEADR & IAMA agree that mechanisms should be in place to ensure that Adjudicators are properly trained and meet the requirements under the Act.

LEADR & IAMA favours amending the words currently in the 2011 Regulation which reads at (6) 2 b:

Pursuant to section 18(1)(b) of the Act, a natural person is eligible to be an adjudicator in relation to a construction contract if—

the person—

(ii) is, or is eligible to be, a member (other than a student member) of any 1 or more of the following professional bodies:

(A) The Royal Australian Institute of Architects;

(B) Engineers Australia;

(C) Australian Institute of Building Surveyors;

(D) The Institute of Arbitrators and Mediators Australia;

(E) The Australian Institute of Building;
LEADR & IAMA Suggest that (ii) reflect the following change:

“A member accredited as an adjudicator by at least one of the following professional bodies:”

The SABC could also consider a way of overseeing the eligibility of adjudicators by requiring adjudicators to provide:

- Information about their ongoing Continuing Professional Development
- Their completion of formal assessment conducted by the ANA of which they are a member or by the Authority in South Australia
- Feedback on an annual basis about the operation of the Act and changes which could be considered to improve its effectiveness. This might apply to all adjudicators who complete 3 or more adjudication during a given year.

By retaining ANAs, the Small Business Commissioner does not need to establish the administrative processes to manage a panel of adjudicators nor to make nominations.

Is the existing Code of Conduct for ANAs effective and rigorous? Should it be directly referenced in the legislation and the Code mandated by regulation – including penalties for non-compliance?

LEADR & IAMA supports the Code of Conduct being referenced within the legislation and would also support revision to require and monitor compliance by ANAs.

Currently ANAs report on the detail or outcome of adjudications and as such the effectiveness of the legislation is based on feedback currently provided. Should there be a legislated report back requirement?

LEADR & IAMA supports a requirement to report regularly (at least twice yearly) being part of the conditions of authorisation. LEADR & IAMA have found that templates provided by state authorities mean that all ANAs
provide the same types of information which assists ANAs in deciding what information to report and with Commission in meeting its reporting responsibilities. If the Commission chooses to develop such a template, LEADR & IAMA favour ANAs being consulted about the template to ensure practicability and effective implementation.

**Are the eligibility requirements in the Code of Conduct sufficient in terms of the “fit and proper” test?**

LEADR & IAMA considers that these eligibility requirements are sufficient for present circumstances.

**Should there be a requirement to immediately report to the Minister where an ANA is charged with an indictable offence?**

LEADR & IAMA considers that this should be a requirement.

The Code of Conduct currently states that “An ANA must not nominate an adjudicator that has been found, by a court in Australia, to have made technical errors in performing adjudications unless the ANA is satisfied that the cause of the error has been resolved.” Does this clause unreasonably restrict the pool of ANA’s /adjudicators available and are there other reasonable remedies?

LEADR & IAMA supports this inclusion in the Code of Conduct. LEADR & IAMA does not believe that this unreasonably restricts the pool of ANAs/adjudicators available. The words “the ANA is satisfied that the cause of the error has been resolved” provides ANAs with:

- the necessary obligation to monitor adjudicators’ determinations and
- the scope to review the circumstances in which the error was made, to offer advice, training or CPD to the adjudicator (and potentially to other adjudicators) as the ANA considers fit to minimize the likely future risk of a similar error being made

**Is it appropriate for the Small Business Commissioner to have investigative powers in relation to unfair tactics by unscrupulous contractors not paying sub-contractors on multiple occasions?**
LEADR & IAMA consider that investigative powers would be appropriate. LEADR & IAMA favour a clear statement of criteria for assessing ‘unscrupulous’.

**Consequences of Not Paying Claimant Adjudicated Amount**

Is the current recovery process using adjudication certificates too lengthy?

What changes could be made to timelines to ease the burden on the claimant but at the same time respecting the rights of the respondent to act?

LEADR & IAMA consider that the recovery process under the Act is sufficient for Claimants who use the Act appropriately. LEADR & IAMA identify the issues presented in relation to the potential impact of the timings as not significant enough to require legislative reform in this regard.

**Additional concerns**

LEADR & IAMA has identified a series of issues arising from the definition of service of documents particularly via digital service such as email. We therefore propose a revision of the current legislative framework regarding service of notices. We note that S 19 of the ACT Legislation Act provides a good template which is concise in its definitions regarding legislations. We believe that if a similarly formulated section was to be included in the legislation or additional regulations that this will be clarified for adjudicators, ANAs, Claimants and Respondents.

**General issues**

In general terms LEADR & IAMA considers:

- That the Act is achieving its objectives and helps to ensure timely and fair outcomes.
- That the process is streamlined and that the adjudication process is effective to the extent that the objectives are being achieved without undue complexity.
Conclusion

LEADR & IAMA would be very pleased to provide additional information on this response and/or to engage in a further consultation process.

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