
ABI submission to the Department of Services, Technology & Administration

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Australian Business Industrial (ABI) would like to thank the Department of Services, Technology & Administration for the opportunity to comment on the “NSW Building and Construction Industry Security of Payment Act 1999 & Contractors Debts Act 1997 Discussion Paper”.

ABI is the registered industrial relations affiliate of NSW Business Chamber, and is responsible for NSW Business Chamber’s workplace policy and industrial relations matters.

ABI is registered organisation under the Fair Work (Registered Organisations) Act 2009. It is also registered under the Industrial Relations Act 1996 and a Peak Council for employers in the NSW industrial system.

ABI is a successor to the Chamber of Manufacturers of NSW which was established in 1886 to promote the interests of its members in trade and industrial matters. The Chamber was registered in 1926. Since its inception the Chamber and its successor industrial organisations have played a major representational role in industrial relations in NSW.

NSW Business Chamber is an independent member-based company, and is the largest business association in NSW. Through its membership and affiliation with 129 Chambers of Commerce, NSW Business Chamber represents over 30 000 employers throughout NSW.

ABI in conjunction with NSW Business Chamber represents the interests of not only individual employer members, but also other Industry Associations, Federations and groups of employers who are members or affiliates.

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ABI thanks the Department for the opportunity to comment. ABI has been a strong supporter of the BCISoP Act since its inception, and it remains so.

The BCISoP Act’s focus on a simple speedy interim remedy to keep progress payments flowing should remain paramount and it should be accepted that there will be a certain amount of rough justice as a result. The BCISoP Act is not intended and does not operate to resolve contractual outcomes or disagreements. Nor, except where the overriding policy of the Act demands, does the BCISoP Act regulate contracts: the BCISoP Act is intended to keep progress payments flowing when they fall due.

The fact that the BCISoP Act has given rise to very extensive litigation in the Supreme Court (and higher) is not surprising given its primary purpose, the importance of cash flow in the industry and common industry practices which existed when the Act commenced. As the (then) Minister, the Hon. M Iemma, said in his second reading speech for the Building and Construction Industry Security of Payment Amendment Bill 2002:

Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act. To reinforce this determination, the bill provides that after an adjudication the respondent must pay the claimant the adjudicated amount.

This being so, it would be surprising if the BCISoP Act had not given rise to sustained testing. Money, sometimes a lot of money, is at stake. It would also be surprising if all litigants were equally motivated to achieve prompt resolution of payment disputes.

It is therefore not a measure of the BCISoP Act that there continues to be a flow of matters to the Supreme Court and that when precedent is laid down it sometimes takes a long while until it affects the behaviour of all disputants. For example, in Brodyn Pty Limited (trading as Time Cost and Quality) v Phillip Davenport and Ors, the Court of Appeal identified the requirements on an adjudicator to make a valid adjudication. This judgment also confined the circumstances under which there could be an injunction. Brodyn also drew attention to the capacity for a stay under s

1 P 2 Hansard Extract - Legislative Assembly - 12/11/2002 - Building And Construction Industry Security Of Payment Amendment Bill 2002
2 Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor [2004] NSWCA 394, paras 51 - 61
25 of BCISoP, and thus, the fact that it was not necessary to seek to prevent the filing of an adjudication certificate. In *Brodyn* the Court said:

"[84] ...However, this will not necessarily mean that Brodyn is without any remedy.

[85] A court in which judgment for recovery of money has been given can stay execution of that judgment. A party against whom there was a substantial judgment could apply for a stay of execution on the grounds that it had a greater claim against the judgment creditor, for which it would shortly obtain judgment, and that, if the judgment money was paid, it would be irrecoverable; and the court could in its discretion grant a stay, on terms if it thought appropriate. I see no reason why a judgment under s.25 of the Act could not be stayed on that kind of basis, although the policy of the Act that progress payments be made would be a discretionary factor weighing against such relief."

Subsequently, Palmer J identified the consequences of *Brodyn* and the desirable policy outcome from the Court’s decision:

"[8] The Act is designed to ensure prompt and timely progress payments under building contracts: s.3; *Musico v Davenport* [2003] NSWSC 977, para.20. It requires the parties in dispute to act on a very tight timetable. Nevertheless, even allowing for such constraints, to bring an application of this character at the very last moment before the permitted time for filing of an adjudication certificate deprives the Court and the other party of any reasonable opportunity to consider the questions in issue with any degree of care and attention. In effect, it puts the Court in an impossible position: it requires the Court to act under the suggestion, almost under a threat, that unless the Court grants the injunction irretrievable consequences will follow immediately. I do not think this sort of application should be encouraged. Indeed, in my opinion, the policy of the Court should be to discourage it.

[9] An injunction granted by this Court to restrain the filing of an adjudication certificate as a judgment under s.25(1) of the Act is not the only chance which a party has to prevent enforcement of an adjudication determination which is said to be void for non-compliance with an essential requirement of the Act. A party may apply to the court in which a judgment has already been entered pursuant to s.25(1) to have that judgment set aside on the ground that the adjudication founding it was not in law an adjudication at all: *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394, para.42. The dire and irreversible consequences thought to attach to the filing of an adjudication certificate prior to the decision in *Brodyn* should no longer be invoked in an endeavour to induce this Court to intervene where a party, at the last moment, seeks an ex parte injunction to restrain the filing."

Nonetheless disputants continued to seek injunctions to stop either an adjudication certificate from being issued or its filing. Five years after *Brodyn*, in July 2009, Steven Goldstein is able to observe:

“Section 24 of the Act [BCISoP] provides that if the respondent commences proceedings to have the judgment set aside, the respondent is not entitled to bring any cross-claim against the claimant nor is entitled to raise any defence in relation to matters arising under the construction contract nor is it entitled to challenge the adjudicator’s determination and it is required to pay into the court as security the unpaid portion of the adjudicated amount pending final determination of those proceedings. Although some respondents have sought to commence proceedings before judgment has been obtained in order to avoid paying the adjudicated amount into Court, it is the writer’s experience that the court often exercises its

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3 *Op cit*, paras 84 - 85
4 Co-ordinated Construction Co Pty Ltd v J M Hargreaves Pty Ltd [2004] NSWSC 1206, paras 8 - 9
The reality is also that most progress payments are not claims made under the Act and that subcontractors do not usually claim payment under s 13 as soon as there appears to be a problem. Notwithstanding the BCISoP Act's provisions, commercial considerations also temper the use of s 13.

Finally, ABI wishes to note that it is difficult to gauge the overall operation of the BCISoP Act because so far as it is aware there are few contemporary statistics publicly available. Statistics have issued from time to time, but to the best of ABI's knowledge, not recently. It means that the observations below are more based on impression than they might otherwise be.

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Part 1

The Discussion paper is divided into three parts. Part 1 deals with improvements to adjudication. Briefly, it is proposed to amend the criteria for authorising nominating authorities and for the appointment of adjudicators and to develop adjudication guidelines. Part 1 is provided for information rather than comment.

However, ABI does wish to make two observations about the administration of adjudication. Clearly, more informed adjudicators, greater consistency of adjudications and adjudications which are closer to any finally determined court resolution are highly desirable, but this goal should not outweigh the BCISoP Act’s objective of providing a quick and relatively cheap method for subcontractors to recover progress payments. To the extent that the BCISoP Act’s capacity to provide quick and relatively cheap recovery is obscured or weakened, so too, the policy objective that a subcontractor is entitled to receive progress payments is weakened.

The first comment is brief. The development of adjudication guidelines is strongly supported and might be usefully complemented by better information to applicants and respondents about what is required of them. Earlier Information about the system which used to be available seems no longer accessible.

The second observation is that it seems reasonable to ask why the adjudication process is structured as it is.

Section 28 of the BCISoP Act provides that the Minister may authorise applicants to be nominating authorities. A number have been authorised. A subcontractor wishing adjudication must apply to a nominating authority and the nominating authority allocates the application to an adjudicator who decides, on the basis of the application, whether or not to accept it.

Nominating authorities may, and do, charge, although the charge may not be obvious because it may be levied as a percentage of the adjudicator’s fee. Adjudicators may be on more than one nominating authority’s panel and they may charge different fees on different panels. Although nominating authorities may allocate simpler matters to adjudicators with lower hourly rates nominating authorities are not required to.

This system is clearly not as transparent as it might be. It does not support outcomes such as transparency, nor in any obvious way does it support adjudicator skills improvement and consistency. Moreover, from a disinterested observer’s perspective, it is difficult to see any sound contemporary policy reason for such a system.

Authorised nominating authorities are either professional dispute settlement bodies or industry organisations. At the time of the BCISoP Act’s enactment providing for authorised nominating authorities built on then current dispute resolution practices. It may be that when the BCISoP Act was enacted it was perceived that involving specialist industry organisations would encourage

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6 ABI is not an authorised nominating authority. It has never sought to become a nominating authority and has no intention of seeking authorisation. Nor has NSW Business Chamber.
subcontractors to exercise their rights or encourage adjudicator panels with industry specialist skills, but these do not seem to be the outcomes.

Authorised nominating authorities face moral hazard, or at the very least, the perception there is a conflict of interest. Members using industry organisations to nominate may well want assistance with claim preparation as well as the selection of an adjudicator. There can easily be the perception that the selection of the adjudicator is not at arm’s length. However, these moral hazards, or the appearance of them, are not confined to industry organisations. Commercial dispute settlement bodies have an interest in providing assistance to claimants and also in establishing longer term relationships with claimants.

All this raises the question of why authorised nominating authorities should be retained.

It seems reasonable to suppose that improving adjudications, adjudicator qualifications and transparent allocation would be better served if there was a single “nominating” body. This might be best achieved by a state established registry where adjudication applications are lodged and matters are then allocated to a panel member by an officer of the registry. Complexity and importance of industry specific knowledge could shape how applications are allocated. The registry could charge, either by way of a filing fee (perhaps graduated) or an identified percentage of the adjudicator fee attracted by the matter.

ABI raises this for possible further consideration by the Department and user parties. However, ABI is not proposing that there should be a single non-government nominating authority nor, if so long as non-government nominating authorities are retained as part of the system, that there be a significant reduction in their number. Nor would ABI support regulations which had this effect.
Part 2 comprises a number of proposals. They are discussed in order, but in some cases different proposals are more linked than this approach suggests.

### 4. Proposal - Reference date

Specify that the maximum period allowable between the commencement of work and the reference date is 90 days.

A reference date is created by specification of the contract or by implication under the BCISoP. The majority of construction contracts of which ABI is familiar provide for regular progress payments or for payment, for short jobs, on completion of the work. Arrangements such as work or supply under purchase orders usually specify terms of trade which are usually similar to those applying outside the industry.

As ABI understands the proposed amendment it would prevent a contractual term which provided for a payment date (creating the first reference date) later than 90 days from the subcontractor’s commencement of the work or supply. In some cases a construction contract may provide for milestone payments - ie payment when an identified amount of work is completed. Legitimate milestone payments seem more usually associated with construction projects than building and arguably they may be important in large, technically diverse projects because of the importance of milestone achievement on sequencing.

Nonetheless, it does not seem reasonable for there to be no payment for work undertaken, or supply made, for in excess of three months. As stated, the proposed amendment does not appear to affect retentions.

While the BCISoP Act is not directed towards regulating contracts, its provisions can influence the terms of construction contracts and may encourage contractual terms which frustrate the primary aim of facilitating cash flow down the contract chain. It is appropriate that where this occurs detrimentally for the BCISoP Act for the Act to regulate the offending class of provision.

The proposal is supported.

### 5. Proposal - Payment date

Amend the Building and Construction Industry Security of Payment Act 1999 to ensure that the due date for payment does not extend beyond 30 days from the reference date.

Providing for payment within 45, 60 or 90 days of invoice is not confined to the building and construction industry, but it is antithetical to the object of the BCISoP Act, and it may be more widespread in the industry than elsewhere. As noted in the discussion paper, it may also be in breach of s 34.
The proposal is supported.

6. **Proposal - Explicit 10 days for adjudication**

It is proposed to amend the Act so that the time for adjudication of the application commences when the adjudicator has received both the adjudication application and the response, if any, or the end of the period within which the respondent may lodge an adjudication response. This would allow a full ten-day period for the Adjudicator to consider the adjudication application and response, if needed.

Currently the timing of the adjudication is triggered some time after the applicant has lodged an adjudication application with an authorised nominating authority. The authorised nominating authority must refer the application as soon as practicable to an adjudicator (on its panel). The adjudicator can accept or decline the adjudication, but if (s)he accepts the adjudication (s)he must serve notice of acceptance on the applicant and the respondent.

The applicant cannot lodge until it has given notice to the respondent of its intention to lodge an application, and must serve the respondent with the application. The respondent has the later of 5 business days from when it received the copy of the adjudication application or 2 business days from receiving the notice from the adjudicator that (s)he has accepted the adjudication to file a response (if there is to be one).

The timing of referral by the nominating authority and acceptance by the adjudicator is not prescribed, but seems usually to be 2 or 3 business days. Presumably defects in an application can be identified in this process and before formal acceptance of the proposed adjudication.

The adjudicator’s adjudication time commences from when (s)he notifies the applicant and respondent of her/his acceptance of the adjudication. The adjudication usually must be made within 10 days. In considering the proposal it is important to bear in mind that there has usually been an amount of time since the initial claim was made and that it is important to not sacrifice the objective of flowing payment down the subcontract chain.

Many, perhaps most, adjudications do not seem to be damaged by the current arrangements. Problem adjudications seem to usually be associated either or both large claims and/or excessive documentary material. As well, the development of guidelines may assist in facilitating adjudication.

ABI is not inclined to support the proposal, but if there is perceived to be a continuing problem, it may be that a modification - that where there is an entitlement for an adjudication response and the claim is above an identified amount that the adjudication time commences from receipt of the response or after the time limit for the response.
7. Proposal - Providing documents simultaneously

To ensure procedural fairness, it is proposed that the adjudication application and the adjudication response, if any, be provided (by the nominating authority) to the adjudicator at the same time. This will remove any potential for the adjudicator to be influenced by the reasons and arguments included in the claimant’s application prior to reviewing the response.

The allocated time for a respondent’s response would in all cases be five days, removing the alternative time of two days after receipt of the adjudicator’s acceptance.

This proposal is not supported. Apart from the delay it would introduce into the adjudication process it seems likely that in operation this would lead to distorting the decision of the adjudicator about whether to accept the application. This, in turn, can also give rise to delay.

8. Proposal - Amending payment claims

It is proposed that, in addition to the current requirement that the payment claim make clear that it is a claim under the Building and Construction Industry Security of Payment Act 1999, payment claims also contain a statement to the following effect:

*If the claim is not paid or otherwise dealt with in accordance with the procedures or periods prescribed by the Act, the claimant will be legally entitled to pursue the claim under the adjudication process, or in certain circumstances, judgment may be entered against the principal for the full amount of the claim.*

The statement and warning be presented in lettering of a sufficient size to be easily legible to a person of normal vision but not less than 8 point and placement on the claim and in a normal roman face to ensure it is visible to a respondent.

This warning will alert those respondents to the possible consequences of failing to respond to a payment claim in accordance with the requirements of the Act. It may also benefit claimants by prompting payment of claims where there is no genuine dispute over the claim but the respondent has, for some reason, failed to pay the claim.

ABI has no objection to the principle that a respondent is aware of his or her rights and the consequences of not exercising those rights. It would not want to see technical requirements which operate to invalidate claims unnecessarily, however, especially as the consequence of not providing the words on the payment claim signals to the respondent that the claimant has not made a claim under the BCISoP Act. Until the claimant discovers that the claim is defective and not under the Act and makes a proper claim nothing follows from the respondent’s non-payment. The claimant will usually have experienced delay in the progress payment for the payment claim to have been triggered in the first place.

Perhaps, more importantly, the claimant might mistakenly exercise rights following the service of a payment claim (such as, for example, unlawfully serving notice to suspend work or supply purportedly under s 15(2)(b) and giving effect to the notice).
ABI does not support this proposal.

Despite these concerns, were it decided that there should be additional standard wording on a payment claim there might be further consideration given to the actual wording. The proposed wording may not be as helpful as it could be. For example:

- the claimant may be entitled to cease work or supply without attracting contractual penalties;
- “principal” may have a different meaning to the respondent reader than it does to the claimant and it is not a term used in this context in the BCISoP Act.

8. Proposal - Amending payment schedules

Amend sections 14(2) and (3) of the Act by requiring the respondent in its payment schedule to:
- State that it is a Payment Schedule under the Building and Construction Industry Security of Payment Act.
- Identify the payment claim to which the Schedule relates.
- State the amount to be paid.
- State the amount not to be paid.
- State reasons for not paying any amount so as to reasonably allow the claimant to understand the basis for rejecting the amount claimed.

Section 20(2B) will be amended to make clear that the further detailing, evidencing, or explaining of a basis for rejecting a claim, is not to be considered a ‘new’ reason.

While ABI understands the benefit in confining the information and supporting material in a payment schedule to what is needed to the purposes of the BCISoP Act, again, the need to state that the payment schedule is a payment schedule under the BCISoP Act seems to create the capacity for a technical defect which could put a responding respondent into the position of not having responded. This significantly alters the respondent’s rights, and given the current requirement to identify the payment claim that the response is replying to, seems unnecessary. It appears to open some proceedings to natural justice challenges.

ABI does not support this proposal.

Requiring specification of the amount to be paid, and not to be paid, and the reasons for non-payment are supported and should assist

- better resolution of differences before an adjudication application is made
- better understanding of the matter if an application is made
- response where an adjudication application is accepted.

ABI supports this proposal.

The proposal to amend s 20(2B) is supported in principle, subject to the drafting of any consequential amendment.
9. Submissions invited - Predatory claiming practices

The Department invites submissions on preferred options for discouraging predatory claiming practices and dealing with complex claims, including whether the prohibition on certain heads of claim will have a significant impact on subcontractors.

ABI is not in a position to comment at any length on this matter. However, it is clear that, over time, the types of provisions which come into contracts, particularly at the high end of the contract chain, are influenced by the BCISoP Act and the Court’s judgments - although it may take time for the effect to flow. For example, the Court’s understanding of what is meant by “for construction work” will shape contracts over time. The principle that payments potentially available under the contract should be paid when due, and that this right should be facilitated by the BCISoP Act, should not be lightly departed from.

Restricting types of contractual payments from the reach of the BCISoP Act (creating “prohibited amounts”) risks creating jurisdictional challenges to payment claims and making applications for adjudication more difficult. There would need to be very compelling reasons to consider defining and excluding prohibited amounts from payment claims.

ABI is not generally supportive of this type of proposal. In the event that the Department is minded to propose amendments, ABI would like the opportunity to comment upon them.

10. Proposal - Time limit for claims

It is proposed to clarify that all construction work claimed in the payment claim must have been performed within the preceding 12 month period.

The majority of claimants do not withhold claims, as they need regular and prompt payment for work performed to support the operation of their business. While there may be a small number of claims affected due to oversight by claimants, it is not anticipated that clarification of the time for service of a payment claim will disadvantage the majority of subcontractors.

ABI has no strong view about this proposal. The discussion paper notes the possibility of excluding overlooked progress payments, or overlooked components of a progress claim, if the proposal is proceeded with. Where relatively small amounts are overlooked a small subcontractor is unlikely to pursue the amount though the court.

Retention payments are often held for 12 months and ABI notes that there are retention payment provisions which date the start of the retention period from the completion of the project rather than completion of the particular subcontract. Providing a 12 month limit on a payment claim under the BCISoP Act may encourage more of these provisions.
11. Proposal - Set off

It is proposed that the Act be amended to make clear that any dispute resolution mechanism which could be the final arbitrator of a claim involving payment will have the jurisdiction to consider claims involving the overpayment of monies pursuant to an adjudication and will be empowered to include such overpayment as damages in its final determination.

It is not clear how widespread a problem this is, particularly when a small subcontractor is involved. Also it is proposed to undertake a number of changes to improve the accuracy of adjudication. If effective these changes should reduce the likelihood of overpayments. However, recognising that parties would not by this lose the right to go to court where the contractual dispute mechanism yielded an unjust result, ABI supports moves to make the resolution of differences easier and cheaper.

It may be preferable to allow reforms to adjudication to have effect. If there is to be an amendment of this kind, it may be useful to monitor its effect on both contractual clauses and outcomes.

12. Proposal - Interest on overpayments

In rectifying this situation, it is proposed that interest be paid on all overpayments. It is proposed the interest rate be as stated in the contract or if no such provision is present, either that interest be fixed at a statutory rate included in the Act, or aligned with rates as prescribed under section 101 of the Civil Procedure Act 2005.

Making interest available for overpayments may seem equitable but in the context of the BCISoP Act it seems likely to yield counter-productive outcomes. Its first effect is to call into doubt adjudicated amounts and raise the need for provisioning for possible error. The possibility of overpayment may not always be apparent at the time of an adjudication.

This risk would lead to changes in both the formulation of claims and also what is put by way of payment claim, payment schedules and adjudication responses. It also seems likely to affect the way the adjudicators value outcomes.

ABI does not support this proposal.
13. Proposal - Joining the principal

The Government invites submissions on this proposal.

ABI believes that the potential complexity of circumstances which could arise if there was capacity to join the principal outweigh the likely benefits, even in the event that joinder were confined to monies not paid to the head contractor, or monies not paid by the head contractor. As noted in the discussion paper the idea raises the question of whether there would be a responsibility on the principal/head contractor to ensure lower subcontractors have been paid, which would seem to raise the spectre of a pay when paid chain starting with the lowest subcontractor-claimants in the hierarchy.


The Government seeks feedback on a proposal to amend the framework under the *Contractors Debts Act 1997* so as to:

- Permit a subcontractor-claimant to give a notice of charge to the principal before any enforcement action is commenced. In this way it would not be necessary for a subcontractor-claimant to commence legal proceedings to seek an attachment order to secure monies owed and would provide certainty in pursuing the claim (that is, a subcontractor-claimant will know that funds are available before it expends resources to make a security of payment claim or commence legal proceedings).

- Require a principal to retain money owed to the non-paying contractor, or to pay that money into court, to be held for the benefit of the unpaid subcontractor-claimant until a charge can be placed against the money. The amount retained or paid into court would only be held for a relatively short period of time to ensure the subcontractor-claimant makes any claims against the funds expeditiously.

- Require a non-paying contractor to respond to a notice of charge, within a specified time limit, to either accept the claim made by the subcontractor-claimant for monies owed or to dispute the claim.

- Require a third party, including a non-paying contractor, to provide detailed and sufficient information to identify money owing to the non-paying contractor, and therefore to permit a subcontractor-claimant to give such a notice of charge.

Consideration should be given to whether this process should be in addition to, or as an alternative to, a claim being made under the *Building and Construction Industry Security of Payment Act 1999*.

Further consideration should be given to whether this reform should apply only to smaller claims (< $100,000), and views are specifically sought on the risks such a proposal presents for the industry.
ABI is not in a position to comment on the effectiveness of the Queensland Subcontractors’ Charges Act 1974 provisions nor the extent to which they give rise to the unwonted outcomes identified in the discussion paper. There clearly is a risk of claims inflation or payment disruption under its scheme.

As ABI understands the possible amendment of the CD Act, the capacity to give notice of charge, and therefore freeze money with the principal would require the existence of a judgment in favour of the subcontractor-claimant without the necessity to obtain the debt certificate. Thus, for example, an adjudication certificate issued under the BCISoP Act could trigger a notice of charge.

Were the capacity to serve a notice of charge independent of the BCISoP Act, that is, a subcontractor-claimant could serve a notice of charge on the principal without having pursued an adjudication, it is not clear what the trigger to allow a subcontractor-claimant to serve notice would be. If the capacity to serve notice were triggered by the intention to bring a matter under the CD Act, statutory timeframes would need to balance the need to discourage unwarranted claims and disruption to the payment stream, against the need for time to prepare the action under the CD Act, since, presumably, this work would only commence when the subcontractor-claimant knows there is money to meet the debt.

ABI supports further consideration being given to this proposal. It may be that any amendments to the CD Act of this kind might be subject to review after a period of operation. This also suggests that any change of this kind might be subject to a cap, which itself might be subject to review. Members who have commented on this proposal have noted that unpaid amounts of $100,000 are relatively quickly reached, particularly in trade areas where there is supply as well as labour, and that where there is supply of standard materials there is little margin on the supplied material - so that losses are in areas of expenditure, rather than profit.

15. Submissions invited - improved processes for recovery

Given the availability of relatively low cost and fast procedures available in the local court, the Government seeks feedback on what, if any, further reforms should be made to improve the ability of small, subcontractor-claimants operating as SMEs or sole traders to use the court system to pursue unpaid progress payments. Regard should be had to the process, cost and time required to secure payment through this process.

Particular input is sought on whether smaller claims (under $100,000) should be able to be commenced by subcontractor-claimants under the Contractors Debts Act 1997 in an alternative dispute resolution forum such as a tribunal similar to the CTTT.

It is clear that many small subcontractor-claimants do not pursue entitlements through the court.

There seems to be a number of factors at play. First, commencing court action may be perceived as being too difficult, especially for smaller sums of money. Because even obtaining advice generally costs money, small subcontractors may be unsure of their rights and fear being caught out in the wrong as a result of starting a process. Third, subcontractors also make commercial decisions about making a fuss. Concern about their commercial relationship with the contractor
affects their propensity to make payment claims under the BCISoP Act in the first place, but also affects their propensity to bring a debt to court. Particularly in small markets subcontractors do not seek to get a reputation for being difficult.

The proposal to provide a “small claims” jurisdiction for recovery of unpaid progress payments will address some but perhaps not all of the identified barriers.

ABI supports further consideration. Obviously the size of the cap needs consideration.

16. Submissions invited - holding retention monies and securities on trust

Views are sought on whether a trust system (in relation to security and retention monies) established by statute which deems that retentions and securities are held for the benefit of subcontractor-claimants until they are payable, should be established. Views are sought on the impact of compliance on the industry.

There is no doubt that the loss of a retained payment because the entity holding it becomes insolvent strikes hard when it occurs. The lost money is money straight off the bottom line, and too many subcontractors can tell stories about such losses. There is subcontractor support for requiring this money to be held in a way so that it is not vulnerable to events which are unrelated to the job for which the security or retention is held.

Money held in security or on retention should not be the working capital for the remainder of a project or another project, it is money which has been earned (but withheld) for work or supply already undertaken.

Nonetheless ABI would not want to see a trust system which adds significant costs to building and construction projects. The impact of any proposed trust or retention guarantee system should be closely analysed, and its costs should be a factor in any decision about whether to implement.

If a trust system, or some other guarantee system, is regarded as desirable, it may be more appropriate to require a proportion of the security or retention to be subject to the mechanism, rather than the full amount. The “held” amount of the retention or security would be the last component to be paid out when the security or retention is discharged.

Again, if any provisions of this kind are enacted they should be subject to review. ABI agrees with the view expressed in the discussion paper concerning insurance, and it does not support introducing such a scheme.
18. **Proposal - Pre-qualification**

The NSW Government will continue to encourage the private sector to engage in continuous improvement through the adoption of Government initiatives such as prequalification in an effort to ensure that the parties involved along the contracting chain in construction exhibit the standards of capability and behaviour required for the satisfactory delivery of projects, including financial capability and stability.

Noted.

19. **Proposal - Streamlining the BCISoP Act timetable**

Although the Government does not consider that the processes and timetable under the *Building and Construction Industry Security of Payment Act 1999* should be further streamlined, comments are sought on whether there are any options which should be considered in this area.

ABI notes that there is no prescribed time for the process from the lodgement of an adjudication application and an adjudicator notifying his or her acceptance of the adjudication. It also notes its suggestion (Part 1 above) that the authorised nominating authority mechanism may have become outmoded and irrelevant and seems unhelpful for improving adjudication and transparency.

20. **Proposal - regulating adjudication costs**

The Government proposes to review and regulate the service costs associated with the determination of small claims. This includes the costs of submitting a claim to a nominating authority and also the fees charged by the adjudicator. It excludes the professional costs of preparing and responding to a claim (such as legal fees or fees for quantity surveyors). Small claims are those claims below $100,000. Views are sought on the appropriateness of the threshold for determining low value claims.

ABI supports reducing the costs of making, and responding to, claims. The principle underlying this proposal is supported, but the comments about the role of authorised nominating authorities above (Part 1) are relevant to this matter. Were there a single registry replacing authorised nominating authorities costs could be more easily regulated as appropriate and also made more transparent.