4 February 2022

Mr Daniel Kearney
General Manager
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Department of Mines, Industry Regulation and Safety
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Sent via email: SOPReform@dmirs.wa.gov.au

Dear Daniel

DRAFT BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) REGULATIONS 2022 AND ASSOCIATED MATTERS

The Chamber of Minerals and Energy of Western Australia (CME) is the peak representative body for the resources sector in WA. CME is funded by member companies responsible for up to 47 per cent of WA's gross state product[1] and 58 per cent of Australia's mining new capital expenditure in 2020-21.[2]

Overview

CME welcomes the extension of opportunity to provide feedback to the Department of Mines, Industry Regulations and Safety (DMIRS) on the proposed *Building and Construction Industry (Security of Payment) Regulations 2022*, *Building Services (Registration) Amendment Regulations 2022* and ancillary policy matters outlined in the Explanatory Statement (the SOP regulations). We also appreciate efforts to date by DMIRS and the Minister's office to consult with CME out of session, including presentations to our members and the provision of written advice in response to member concerns.

CME member companies continue to support the intent of the SOP laws and have publicly committed to better payment times, practices and transparency in their supply chains with small, local and Indigenous businesses. As these reforms are a significant overhaul, however, there is considerable uncertainty how this will affect the commercial dynamics of private sector investment in WA. In particular, members are concerned of the capacity of the adjudication process to fairly cater for high-value, large and complex payment claims and contractual entitlements unique to WA. Although the statutory process is intended to be a rapid process to ensure payment is not held up in the interim, members are concerned this will not necessarily streamline outcomes. In practice, it could reduce the likelihood of privately-held commercial dispute resolutions and not preclude costly and protracted escalation to the State Administrative Tribunal (SAT).

The remainder of this submission is structured in response to the heading themes listed in the Explanatory Statement, and where relevant, reiterates views previously expressed in communications with DMIRS and the Minister. It is important to note the concerns raised in this submission relate to payment claims on high-value, large and complex construction contracts where supply chain insolvency and illegal phoenixing is rare.

Limitations on submissions for adjudication applications

DMIRS should consider providing guidance on documentation in support of payment claims on high-value, large and complex contracts. Like the limitations on submissions for low-value payment claims of $50,000 or less to limit the volume of submissions an adjudicator needs to consider, which we support in-principle, DMIRS should investigate feasibility of something similar to be trialled for claims at the upper end.

As noted in advice received from DMIRS dated 6 May 2021, CME would support publishing of a recommended payment claim and adjudication application form for high-value, large and complex contracts

[1] Australian Bureau of Statistics, *5204.0 Australian National Accounts: State Accounts*, 2020-21 financial year reference period, 19 November 2021 release.
[2] Australian Bureau of Statistics, *5625.0 Private New Capital Expenditure and Expected Expenditure, Australia*, June 2021 reference period, 26 August 2021 release.

under clause 114 and acknowledges this may not be approved for mandatory use and could be subjected to the prohibited term provisions. Illustrative examples of these model forms could be used to demonstrate an expectation regarding the level of detailed documentation required to support a payment claim to a high-value, large and complex contract as compared to a lower value claim.

As noted in the Action Plan for Reform,[3] such guidance will assist head contractors and principals build capacity and adjust their internal contracting management processes to meet the new requirements without unintended consequences. This guidance will also benefit the smaller end of the supply chain such as subcontractors without ready access to legal expertise looking to mature and provide construction goods and services to major multi-million- or billion-dollar infrastructure and resource sector projects, especially where navigating documentation requirements can already be challenging. In the WA resources sector, it is common for legal counsel to be engaged inhouse to prepare responses and applications which includes statutory declarations and subject matter expert technical reports. This is largely due to the volume of construction and adjudication case law. CME notes the SOP laws currently specify minimum requirements but do not seek to encourage or recommend best industry practices for sophisticated claims.

CME also notes the cost-benefit analysis prepared by Deloitte in 2020 did not assume significantly higher ongoing administration and compliance costs for principals and owners on engineering projects such as mining and heavy industry, nor did it test this factor through sensitivity testing. The level of substantiation required on engineering projects to support and verify payment schedules on high-value, large and complex projects far exceed those of other modelled sectors (more than an assumed two hours per project per month).

CME notes the highest single payment claim in WA was $169.9 million in 2015-16 and 86.1 per cent of all claims by value were on mining projects in the same year. See figures 1 and 2 below on adjudication statistics since mining became a new reporting category under the *Construction Contracts Act 2004* (CCA). It highlights the historic average value of mining payment claims in WA ($4.9 million, Figure 2), which materially exceeds historic claim averages across QLD ($1 million), SA $1.6 million), NSW ($1.2 million) and VIC ($346,965).

Figure 2. Proportion of payment claims by value in WA on mining projects has ranged from 17.2 to 86.1 per cent. Since 2010-11, 57.2 per cent of claims by value were on mining projects.

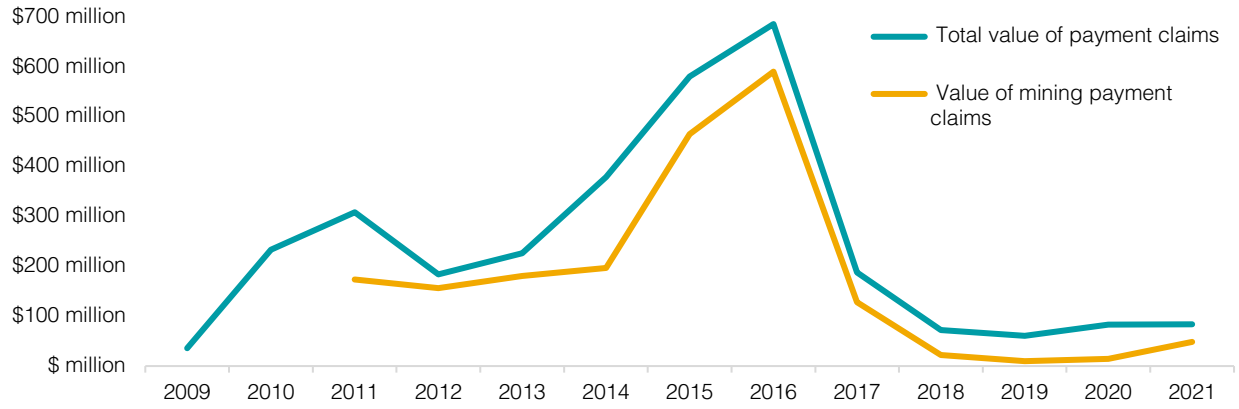
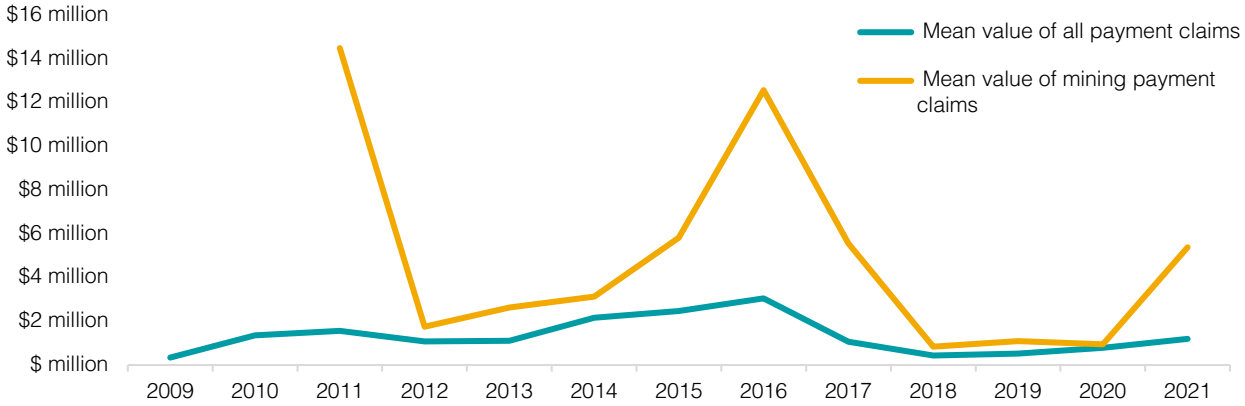


Figure 1. Average value of payment claims on mining projects has ranged from 1.2 to 9.2 times higher. Since 2010-11, the average value of a mining payment claim was $4.9 million.



[3] Government of Western Australia, *Action Plan for Reform: Better Payment Protections for Contractors in the WA Building and Construction Industry*, DMIRS, 21 September 2021.

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Based on feedback received from DMIRS, CME understands setting an arbitrary threshold based on monetary amount alone is not preferred by the government as this does not (a) fully consider the contracting and legal complexity and, potential for jurisdictional arguments, nor (b) does this reflect commitments by the Building Ministers' Forum to improve the national consistency of security of payment regimes between jurisdictions. However, despite the 2017 Murray Review recommending avoiding a two-tier structure, the following discretions currently exist in other jurisdictions:

- QLD defines a complex payment claim as more than $750,000.
- NT prescribes a high value construction contract amount as 500 million monetary units. The opt-out provisions allow for 'sophisticated parties with equal bargaining power [to expressly use] their own tailored dispute resolution mechanism'.
- VIC specifies valid payment claims must exclude non-claimable variations or excluded amounts (e.g. breach of contract, latent conditions, delays or changes in regulation). VIC also requires disputed variations for original contract values of more than $5 million to be resolved by the dispute resolution methods specified in the contract.

CME strongly recommends DMIRS consider adopting variations of some of the above discretions to reflect the relevant differences and complexities of commercial practices in WA.

Given the average payment claim value for WA mining projects far exceeds other jurisdictions and the fundamental shift from a West Coast to an East Coast model, there is sufficient cause for concern amongst CME members the new SOP laws and regulations will give rise to unintended consequences, particularly during the transition period. There are also existing concerns the East Coast model is 'pro-claimant' without necessarily considering contractual entitlement. Although DMIRS noted in its written advice that it would be unlikely the SOP laws will be used in favour of preserving commercial relationships, claims originating from the head contractor to the owner range from 1.3 and 24.5 per cent interstate.

As there is no head of power for legislating thresholds in WA, CME recommends discretion is built into the SOP regulations to prevent the likelihood of unsophisticated and ingenuine submissions to high-value, complex contracts that may otherwise be dismissed or resolved prior by the parties under the dispute terms of the contract. It could be a requirement a higher standard of documentation, Grade 2 adjudicator, review adjudicator or dispute resolution mechanism is needed in these circumstances. It could also include stronger protections and enforcement of clause 36 in the SOP laws. Alternatively, a penalty could be introduced to prevent the likelihood of improper or spurious payment claims. For example, SA is proposing more extensive requirements for the contents of payment claims and schedules to be in approved forms, including:

- Penalty of up to $110,000 if a head contractor fails to serve a payment claim on the principal without the accompanying supporting statements.
- Penalty of up to $110,000 if a head contractor serves a payment claim accompanied by a supporting statement that is false or misleading in the given circumstance.[4] In QLD, the equivalent penalty is up to 100 penalty units, while in NSW this offence can include a three-month imprisonment for individuals.

In the absence of similar guidance or penalties in WA, there should be discretion to make an application for additional time to submit a payment schedule, an adjudication application or issue a determination during the transition period. By international comparison, adjudicators are awarded more generous time limits in overseas jurisdictions than those set in Australia. For companies without WA-based headquarters, it may not be possible to respond with the requisite payment schedule and tax invoice within 15 business days, particularly where there may be the following instances during the transition period:

- Claims served by multiple contractors for the same project, often exceeding the assumed two-year project timeframe in the Deloitte modelling
- Multiple crossclaims served by a single contractor for different projects.

There should therefore be an allowance given if timeframes cannot be reasonably met during the transition period. As with most new laws, it is common for compliance and enforcement powers to have a delayed commencement to address teething difficulties.

There is a risk a rapid adjudication process could reduce procedural fairness if there is no onus of proper substantiation required before making a claim. Providing improved clarity of the requisite documentation and

[4] Government of South Australia, *Building and Construction Industry Security of Payment (Review Recommendations) Amendment Bill 2021* (SA), 26 May 2021.

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information flows between parties should also help reduce spurious claims, prior to commencement and during the statutory pathway. Further to the written advice dated 6 May 2021, CME therefore strongly supports DMIRS publishing a range of payment schedule model forms. CME would also like to recommend clearer guidance is published to clarify what substance constitutes both a duly made payment claim and payment schedule in response (i.e. model forms of properly documented reasons for withholding payment). This is especially important if the opportunity to present a full case to the adjudicator is now deprived. It would be suboptimal if the adjudication process for managing high-value, large and complex payment claim disputes became more costly and time consuming than litigation or arbitration.

Threshold value for review of adjudication determinations

CME supports introducing a new review adjudication mechanism for payment disputes. This should address most instances of dissatisfaction and preclude subsequent challenges. In addition to monitoring the number and type of applications for review of adjudication determinations, DMIRS should monitor for any increase or decrease in the volume of challenges escalated to SAT.

CME however recommends the proposed minimum threshold value of $200,000 is reviewed to ensure it is appropriate in reflecting adjudication experience in WA and does not encourage misuse of the process by either aggrieved party. As this will be a relatively new legislative mechanism in Australia (currently exists in VIC only and the highest single payment claim there was $70.6 million in 2019-20), careful consideration should be given on what payment disputes of significant value should warrant a review mechanism.

The senior adjudicator should also be able to request an extension of time beyond the five business days if the review is deemed complex (technically or legally) or there is a large volume of review applications.

Threshold for retention money trust scheme – $1 million for phase 1 and $20,000 for phase 2

Although the use of bank guarantees is more common in the WA resources sector, CME supports the use of retention money trust schemes to enable access to contractual entitlements. However, for CME's smaller to mid-tier members that will rely on the use of cash retentions, CME is concerned the proposed implementation timeframes and lower threshold may be aggressive and should be pushed out to allow for a smoother transition. For example:

- In QLD, retention trusts will be gradually implemented across different types of projects between 1 March 2021 and 1 January 2023. Initially $10 million or more for public and private sector projects and then reducing to $1 million by the fourth phase.[5] Before this, project bank accounts have been a requirement for government projects between $1 million and $10 million since 2018.
- In NSW, the threshold was lowered to $10 million under new laws. Before this however, it had been set at $20 million since 2008. Industry has had a dozen years to be accustomed to the practice of holding retention monies.

Like these jurisdictions above, CME recommends consideration of additional phase-in arrangements to be introduced for higher thresholds initially at $20 million and then lowering to $10 million and $1 million across a longer timeframe.

CME notes the lower threshold for project bank accounts for WA government projects is set at $20,000 and has been trialled for use since 2016. However, CME notes this $20,000 threshold is significantly lower than other jurisdictions and recommends it is reviewed to ensure it is suitable for practical application to the broader WA private sector and accompanied by a longer transition period.

Withdrawal of interest earned from retention trusts

CME supports the ability to lawfully withdraw interest once every six months and has no further comments.

[5] *Building fairness: An evaluation of Queensland's building industry fairness reforms*, Department of Energy and public Works, March 2019, p. 5.

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Redaction of other beneficiary information from retention trust records

CME supports redaction of names and other identifying information from the accounting records, but is concerned with the privacy, commercial confidentiality and competition issues it may raise. A sophisticated party could potentially (and illegally) misuse the provided trust account information for use in fixing prices or bids for other contracts where there is little market competition. Careful consideration of commercially sensitive information will be required as this may differ for different types of construction work.

Qualifications and experience for registration as adjudicator or review adjudicator

CME supports mandating qualifications and experience requirements for registration as an adjudicator or review adjudicator as per regulations 17 and 18. It is reasonable to expect review adjudicators should be held to a higher standard with knowledge on commercial and construction quality issues.

Adjudicator grades

CME supports different grades for adjudicators in regulation 19 but recommends increasing the condition imposed on their registration that a Grade 1 adjudicator cannot accept appointments where the payment claim is greater than $200,000 (noting similar views were expressed by other stakeholders during the public forum held on 2 December 2021).

CME supports the experience requirements for Grade 2 adjudicators and, as such, recommends additional minimum legal training and relevance experience requirements be adopted. These adjudicators will be expected to navigate detailed legal issues characteristic of high-value, large and complex contracts in industries characterised by significant scale and specialisation. Ensuring high calibre and experienced adjudicators should reduce the likelihood of referring matters to the courts due to jurisdictional error – which will result in substantial and potentially unnecessary cost and time. Members would also prefer for Grade 2 adjudicators to have an upper payment claim limit where an appointment should not be accepted and should instead be referred to the dispute mechanism specified in the contract (i.e. as per the Victorian discretion on contract values exceeding $5 million).

As per the forum held between industry and DMIRS on 18 May 2021, we recommend the information on the number of adjudications that have been specifically dismissed due to complexity of the referred matter under section 31 of the CCA be used to inform requirements for both review and Grade 2 adjudicators. Given the highest number of claims that was dismissed was in 2012-13 during the peak of the mining boom, learnings which can be drawn on claim complexity would help prepare adjudicators, review adjudicators and authorised nominating authorities on what to expect for claims on high-value, large and complex contracts.

Code of practice for adjudicators, review adjudicators and authorised nominating authorities

CME supports the provisions in the Code of Practice as per Schedule 2 and 3.

Members are concerned, however, that contractual arrangements and risk environments will continue to increase in complexity as construction projects become more integrated, brownfields in nature or relate to new and emerging infrastructure asset classes. With an increasing volume of variation claims being observed across Australia for cost overruns, delays and COVID-19 related disruptions, duties under the Code of Practice must therefore encourage proactive due diligence, skill and professionalism to enable adjudication processes and outcomes to be effective. For example, there has been a ninefold increase in complex and major infrastructure projects over $1 billion in size across Australia.[6] CME therefore recommends DMIRS consider imposing limits on referred adjudications an authorised nominated authority can accept to ensure quality outcomes, particularly if there are multiple payment claims made during a short timeframe. This could help to address concerns the East Coast model is 'pro-claimant'.

Electronic lock box – service of documents

CME supports the methods of service to authorised nominating authorities and has no further comments.

[6] Infrastructure Australia, *A national study of infrastructure risk*, October 2021, p 18.

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Time of service of documents

CME supports the time for service for the various methods prescribed in regulation 22. However, some members with multinational operations hold concern with how documents uploaded to an online supply chain platform expressly consented to be used by both parties (such as SAP Ariba and Oracle Procurement) will be treated for the purposes of 'starting the clock' under the SOP laws. As these are global integrated cloud platforms, companies will have limited functionality to customise to explicitly include a checkbox that the payment claim is made under the SOP laws as per section 24(1)(d). It would be inefficient to require parties to duplicate an existing communication method with a separate lock box for the purposes of the SOP laws and regulation 21.

In these circumstances, the document is taken to be given to the corporation and not a 'person'. As per contractual agreements, these online payment claims reference a purchase order. These documents are thus 'unaddressed' so there is no person who is intended to receive the communication as per the *Electronic Transactions Act 2011.* For example, it was determined in *MGW Engineering v CMOC Mining* [2021] NSW the payment claims delivered on the online platform Aconex had taken to be served on that date but not the payment claims served the date before which were unaddressed via email.[7]

In the absence of clarity, CME therefore recommends an additional written notification mechanism, that is properly addressed, accompany any unaddressed electronic process for it to be treated as made under the SOP Act. In addressing the cited NSW case decision above, the date of service would be taken to be the date of the follow up letter or email, rather than the online claim itself. Should there be a delay in sending proper notice, there may be two different timeframes perceived of when the clock starts. This can create ambiguity for the internal tracking of hundreds of payments under large scale projects with multiple contractors.

QLD allows for service of notice to be given 'in the way, if any, provided under the relevant construction contract' and NSW specifies 'in the case of service by a party to a construction contract on another party to the construction contract – in the manner that may be provided under the construction contract'. CME notes section 113(3)(e) of the SOP Act allows for 'any other method' and recommends corresponding clarity in the WA regulations for contractually specified online methods is instilled to ensure long-standing existing processes prevail without complication.

Other policy matters

Definition of construction work and related goods and services

To ensure continued certainty and stability, CME recommends the following types of work or supply are also excluded for clarity:

- *Maintenance and plant shutdown activities*. For example, QLD exempts contracts for maintenance work or works with less than 90 days until practical completion from requiring a project trust. In the resources sector, planned and unplanned maintenance is typically executed in compressed timeframes. The application of SOP laws will impose undue burden during production outages, especially when entitlement to payment is generally not a concern as these works are carried out by specialist contractors.
- Where it is irrelevant, insufficient (insubstantial) connection or lack of real nexus to the State and therefore does not contribute to the 'peace, order and good government', for example –
    - Construction work does not include drilling for the purposes of discovering, extracting or processing of oil or natural gas in Commonwealth waters.
    - Related goods and services do not include the supply of related goods or services for use in connection with the carrying out of construction work in Commonwealth waters.

Furthermore, it is unclear how the installation and commissioning of floating platform facilities, export pipelines and underwater systems involving anchoring to seabeds (i.e. the offshore water equivalent of constructing underground works on land) will be captured under the new SOP laws. As the global energy transition continues to occur with technological developments, there will be more projects located offshore tying into onshore facilities adjacent or fringing territorial waters or seabeds. There is significant uncertainty on how

[7] *MGW Engineering Ltd t/a Forefront Services v CMOC Mining Pty LTD* [2021] NSWSC 514, 2021/62011, 11 May 2021.

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and when extraterritorial legislative powers will be triggered in these circumstances, CME requests clarity on the terms like 'adjacent' and 'territorial limits' is therefore recommended.[8]

Model forms of construction contracts

CME in-principle supports the preparation and publishing of simple form construction contracts for specific low risk industry sectors.

However, CME does not support model forms for multi-million or billion-dollar contracts such as infrastructure and WA resources sector projects as these carry higher and different levels of risk. It will be challenging to have a one-size-fits-all form that caters for varying private sector and industry risk appetites on matters such as liability and indemnity. The application of simple form contracts in these higher risk sectors would be inappropriate.

Prohibited terms

CME notes the provided examples of contractual terms that should be prohibited by regulation. CME recommend DMIRS consider how sophisticated parties make use of termination for convenience for high-risk circumstances, catering for breach of anti-bribery, competition, trade control and other applicable laws such as COVID-19 related government mandates. This is beneficial to either aggrieved party to the contract as it avoids lengthy legal disputes in demonstrating breach of contract due to termination for cause. Therefore, prohibited terms should not apply on high-value, large and complex construction contracts where there is unlikely to be a small business subcontractor.

Prohibited terms should apply instead to certain classes of contract more likely to have unsophisticated parties with unequal bargaining power. Determining this threshold will therefore require thorough stakeholder consultation and is outside of the scope of our members.

Building service registration amendment regulations

CME supports the list of director information required under the new regulations, enabling alignment with corporate requirements.

Other matters not raised in the Explanatory Statement

As part of educating and supporting industry during the transition, DMIRS could provide guidance on contractual rights, prompt and correct invoices[9] and whether the statutory process is suitable for specific instances like claiming variations. Improving awareness will reduce the incidence of improperly pursuing the statutory process.

It is unclear how sections 25 and 26 will apply to tax compliance requirements for responding to a payment claim with a payment schedule that has a lesser scheduled amount than the amount claimed. This will require the separate issuing of a valid tax invoice to reflect the scheduled amount, consuming a large proportion of the prescribed 15 days to respond with a duly given payment schedule. Even in instances where the respondent intends to pay the scheduled amount, they may be hamstrung due to administrative compliance matters. CME considers this should not automatically give rise to section 27 consequences.

It appears that the increased internal burden to comply with the SOP short timeframes has not been considered in the context of increased and multi-layered corporate reporting obligations under the Payment Times Reporting Scheme. The objective of that scheme is consistent with the SOP laws, that is, to improve payment outcomes in the supply chain but through transparency and industry self-regulation. Large businesses with an annual turnover exceeding $100 million are required to biannually report on payment times and practices to small businesses, capturing over 6,000 large businesses. CME also has nine member companies who are voluntary signatories to the Business Council of Australia's 30-day Australian Supplier Payment Code, with some members offering seven days to small, local businesses.

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[8] *Coastal Waters (State Powers) Act 1980* (Cth) subsection 5(b).
[9] Incorrect invoices are the biggest cause of late payments. Australian Small Business and Family Enterprise Ombudsman, *Payment times and practices inquiry – Final report*, April 2017.

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Conclusion

Due to the significant shift from a West Coast to an East Coast model, CME recommends greater discretion for managing payment claims on high-value, large and complex contracts is allowed to accommodate changes to administration practices during the transition period.

For further information regarding this letter, please contact Adrienne LaBombard, Manager – Industry Competitiveness.

Yours sincerely

Robert Carruthers
Director – Policy & Advocacy

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