



QUEENSLAND MAJOR
CONTRACTORS ASSOCIATION

Queensland Major Contractors Association

Security of Payment Discussion Paper

Submission

30 March 2016

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Executive Summary

This submission is based on a workshop QMCA Members attended on 14 March 2016 and is provided by QMCA to the Department of Housing and Public Works for consideration as part of its review of security of payment in the building and construction industry.

Summary of general observations on the Discussion Paper by QMCA:

- There is no evidence of a systemic problem of subcontractors not receiving payment.
- Any perceived issues of subcontractors not being paid is limited to lower tier projects, rather than major building or construction work.
- The introduction of Project Bank Accounts, a Retention Trust Fund Scheme, or an Insurance Scheme will result in additional administrative costs for contractors.
- The options proposed in the Discussion Paper are unlikely to solve the major causes of payment problems in the building and construction industry.
- There is no evidence to suggest that the major insolvencies in recent years (Walton Construction, Carmichael Builders Pty Ltd and Glenzeil Pty Ltd) would have been prevented by any of the proposed options.

Summary of recommendations:

- Project Bank Accounts are not necessary and will not improve security of payment.
- However, if a trial of Project Bank Accounts were introduced, it should be limited to managing contractor style contracts less than \$50 million. If this trial was successful, any legislative implementation of Project Bank Accounts should then be restricted only to those style of contracts.
- A Retention Trust Fund Scheme may provide a viable option for improving the security of payment of retention monies. Any Queensland scheme should be modelled on the New South Wales regime, applying only to cash retention on building projects greater than \$20 million. A Retention Trust Fund Scheme should be administered by the contractor through a single trust account.
- No Insurance Scheme is currently available in the Australian market. Greater detail is required as to the form and substance of any Insurance Scheme before any meaningful submissions can be made.
- If subcontractors are to be considered priority creditors, this should be achieved through uniform changes to federal legislation, to ensure consistency between the other states and territories.
- The introduction of a mandatory education program in relation to financial literacy and rights under the security of payments regime, limited to lower tier contractors, subcontractors and office holders who control the financial decisions of a company.

Introduction

This submission is provided by the Queensland Major Contractors Association Inc. (**QMCA**) to the Department of Housing and Public Works for consideration as part of its review of security of payment in the building and construction industry in Queensland.

Most QMCA Members have had experience with the *Building and Construction Industry Payments Act 2004* (Qld) ('**Act**' or '**BCIPA**'), as well as the *Subcontractors' Charges Act 1974* (Qld). QMCA Members have been the recipients of payment claims under the Act and the respondents in adjudications. QMCA Members have also occasionally submitted payment claims under the Act and used it to pursue claims in adjudications against principals. QMCA Members are also usually the contracting party that occupy the 'middle position' in the contractual chain – that is, they are often the party that sits between the principal and subcontractors on a project. This makes QMCA Members uniquely qualified to comment on the security of payment system in Queensland.

In this submission the QMCA sets out its position on the options proposed, and specifically addresses the 26 questions set out in the Security of Payment Discussion Paper. QMCA has been mindful of providing a well balanced and considered perspective on the issues raised in the Discussion Paper.

QMCA

QMCA is an incorporated association with members who represent the major general construction contractors of Queensland. Those members comprise local and national organisations that bring with them a diversity of services in the civil and building construction, resource and specialist services fields.

QMCA is dedicated to improving the efficiency and sustainability of the construction industry in Queensland and believes that this will be achieved by working closely with Government, strategic partners and industry organisations to shape the future of the Queensland construction industry and drive innovation and improvement.

A list of QMCA Members is attached at **Annexure 1**.

Submissions

The following submissions are made by QMCA in response to the questions posed in the Discussion Paper.

As an introductory comment, QMCA notes that ASIC statistics indicate that between 1 July 2013 and 30 June 2014, nearly 68% of companies that became insolvent had five employees or less. This statistic suggests that any head contractors at risk of insolvency are unlikely to be responsible for high value construction projects.

The fundamental test of the options being considered by the Department of Housing and Public Works must be the effectiveness of the options to address:

- (a) the real causes of insolvency in the building and construction industry; and
- (b) the proper and timely payment of subcontractors (and contractors) in the building and construction industry.

Option 1 – Project Bank Accounts

1. Would you support a project bank account trial on Government projects? Why?

- (a) QMCA does not support the introduction of project bank accounts (**PBA**) for the following reasons.
 - (i) PBAs are not necessary. The Discussion Paper has not pointed to any evidence of systemic problems of underpayment or non-payment of subcontractors, particularly in relation to larger projects. There is no evidence that subcontractors are not receiving payment under the timeframes provided by BCIPA.
 - (ii) PBAs are very complicated arrangements. They will require amendments to the general terms and conditions of standard contracts, and will involve, at the very least, an additional PBA agreement and PBA deed in relation to all contracts used in relation to the project (and banks will likely need to become parties to at least the PBA agreement). Banks may not broadly be willing to offer PBAs in the marketplace, or on acceptable terms.
 - (iii) PBAs will lead to additional administrative costs which contractors will have to bear. Banks are also likely to impose a fee on the administration of the PBA which will then increase the projects costs by that sum.
 - (iv) The Discussion Paper does not:
 - (A) address the interaction between PBAs and BCIPA. Issues may arise regarding mixed or comingled monies, particularly if there is a portion of a payment claim that is disputed;
 - (B) consider the consequences of the insolvency of a subcontractor on the operation of the PBA; and
 - (C) address the interaction between PBAs and the *Personal Property Securities Act 2009* (Cth).
 - (v) In the event of insolvency, PBAs appear to create a system whereby subcontractors are treated as priority creditors. There is no detail provided as to how this system interacts with the existing hierarchies in the insolvency framework and whether subcontractors will rank higher than, for example, the contractor's employees. Changes to priorities are better

dealt with under federal legislation, to ensure conformity with the other states and territories.

- (vi) Even if subcontractors are deemed to take priority over other unsecured creditors, in the event of an insolvency of a higher order contractor, subcontractors would usually still have to wait a year or more for a receiver or liquidator to determine what monies they are entitled to. This delay would result in financial stress on affected subcontractors and an increased risk of insolvency for those subcontractors.
- (b) Despite this, QMCA would support a limited trial of PBAs. The trial should be restricted to:
 - (i) building projects (not construction projects);
 - (ii) managing contractor style contracts (where 100% of the work is subcontracted); and
 - (iii) contracts for less than \$50 million.
- (c) If that limited trial is successful, QMCA would support the expanded use of PBAs on contracts for the type of projects, the type of contracts and value of contracts as specified in paragraph 1(b).

2. Do you think the use of PBAs in the private sector is feasible in Queensland? Why?

- (a) QMCA does not consider that PBAs are feasible in the private sector.
- (b) Any mandated use of PBAs in the private sector would significantly affect the ability of parties to resolve payment issues that arise under contracts on a commercial basis. For example, there are times where a subcontractor may require payment earlier than is prescribed under a contract, for cash flow reasons. PBAs would prevent contractors being able to approach subcontractor cash flow issues commercially (for example, by making early payment) because the relevant money would be tied up in the PBA.
- (c) PBAs would also not solve the common insolvency problems caused by the flow on effects of when an interrelated, interstate contractor entity enters into insolvency, with the flow on effect being to cause the broad contractor group to fold.

3. Do you think that the use of PBAs in the private sector would improve security of payment? Why?

- (a) PBAs in the private sector would not improve security of payment.
- (b) PBAs are not the appropriate model in the private sector because managing contractor style contracts are rarely used. PBAs will exacerbate existing problems and have an adverse impact on the solvency of contractors which will have a flow on effect to subcontractors.

4. Should there be a minimum amount necessary to use a PBA? If so, what value?

- (a) There should be a *maximum* amount for the use of PBAs to reflect the fact that most security of payment problems occur on lower value projects.
- (b) PBAs should be limited to those projects below \$50 million.

Option 2 – Retention Trust Fund Scheme (RTFS)

5. Would you support a RTFS? Why?

- (a) QMCA does not consider that any evidence has been provided to suggest that major head contractors are inappropriately using retention monies provided by subcontractors or that a RTFS is necessary to protect subcontractors against head contractor insolvency.
- (b) Further, QMCA is concerned about the additional administrative burdens and fiduciary duties that would be placed on contractors as trustees, many of whom may not have the capabilities to perform these functions.
- (c) However, if a RTFS model was to be adopted in Queensland, QMCA has the following views as to its structure and application:
 - (i) it should align with the New South Wales model which only applies to contracts with a value greater than \$20 million between the head contractor and principal;
 - (ii) it should allow accounts to be set up in a similar way to the New South Wales scheme so a head contractor can choose between establishing:
 - (A) a separate trust account for the retention money held in respect of a particular subcontractor;
 - (B) a separate trust account for all retention money held in connection with a particular construction project of the head contractor; or
 - (C) a separate trust account for all retention money held in connection with two or more (or all) construction projects of the head contractor.

Any requirement to establish a separate bank account for each individual project will be too cumbersome on contractors. The above options provide flexibility to head contractors in choosing the account system that best suits their current projects and circumstances; and

- (iii) any RTFS should be limited to head contractors and subcontractors. It should not be extended to include secondary sub-subcontractors.
- (d) QMCA believes that if a statutory RTFS is introduced it would be appropriate to introduce those changes through amendments to the *Building and Construction Industry Payments Regulation 2004* (Qld).

6. Should a minimum contract value be required before mandating the use of a RTFS? Why?

- (a) The use of RTFS should be limited to a minimum contract value of \$20 million similar to New South Wales. This is because small operators will find trust and fiduciary duties difficult to understand and administer.
- (b) Any RTFS model should only apply to cash retention.

7. How would this scheme be best administered, and by who? Please provide your reasons.

- (a) QMCA is of the view that Option 2.2 of the State's proposal for a RTFS model to be administered by head contractors, and not the Government, should be adopted.

- (b) Having a State Government administered trust under Option 2.1 would introduce an unnecessary level of regulation in an already heavily regulated space. If the RTFS were administered by Government, contractors would have to seek approval from the Government every time they needed to validly have recourse to retention money under a subcontract (for instance under a right of set off). This extra administrative burden would delay the timely payment of retention monies to subcontractors.

Option 3 – Insurance Scheme

8. Is this a viable option for industry? Why?

- (a) QMCA cannot offer meaningful comment on whether this is a viable option for industry without any knowledge of whether this insurance product is available at all. The Discussion Paper does not point to any discussions that Government has had with the insurance industry as to whether this product is available in the current market. From the information provided, QMCA has significant concerns about the utility of this option in resolving the perceived problem of contractor insolvency. Further, as this model is not being used in any other Australia jurisdiction there is a risk that the changes would further fragment the security of payment landscape in Australia.
- (b) If the Government was minded to mandate an Insurance Scheme, QMCA considers that such a scheme should apply only to retention monies, and not to all payments owed to subcontractors. The effect of this is that insurers would then only be insuring (generally) less than 5% of the contract value, which would reduce risk and premiums.
- (c) Legislation will be required to implement a retention monies insurance policy. There is no detail as to whether an Insurance Scheme would apply only to Government projects, or the construction industry as a whole. QMCA considers that the Government is best placed to coordinate this Insurance Scheme by approaching the insurance industry directly. The Government ought to take out the insurance, meet the premium, and pass the costs on to the relevant project.
- (d) QMCA considers that a viable alternative to the Insurance Scheme option would be a levy. This levy would be imposed on all developers, including Government, and operate in a similar manner to the Portable Long Service Leave levy. This option would offer an extra layer of protection for all subcontractors who are unable to access their retention monies because of contractor insolvency.

9. Is a head contractor insurance scheme a viable option? Why?

In QMCA's opinion, a head contractor insurance scheme is not a viable option in the current market.

Option 4 – Review of Federal Legislation

10. Do you support a review of legislation including the *Corporations Act 2001 (Cth)* and the *Bankruptcy Act 1966 (Cth)*? Why?

- (a) The QMCA does not consider that subcontractors should be given priority over any other unsecured creditors.
- (b) However, if the Government considers that subcontractors should take priority, the most appropriate way to achieve this is through changes to federal legislation.
- (c) Through consultation with the other states and territories, a uniform approach to subcontractor priorities would be achieved without the need for a PBA, RTFS or Insurance Scheme.

11. Do you see any major barriers to these changes operating effectively?

The most significant barrier to these changes is achieving federal consensus in relation to prioritising subcontractors over other unsecured creditors.

Option 5 – Education

12. Do you think an education program is needed? For what in particular?

- (a) An education program would be worthwhile but it should be aimed at the subcontractor industry. The existing licensing regime means that head contractors must demonstrate a greater level of financial credentials and professional business practice before they can obtain a contractor's licence.
- (b) The QMCA would support an education program in relation to financial literacy limited to smaller contractors and subcontractors.
- (c) The QMCA would also support a broader education program, not limited to insolvency, which seeks to educate subcontractors about their rights under BCIPA and the *Subcontractors' Charges Act 1974* (Qld). This would assist subcontractors to better understand what they are required to do under contract and under BCIPA to be paid in a more timely manner.

13. Should the education program be voluntary or mandatory? Why?

The education program should be mandatory. Subcontractors should have to establish at the time they apply for renewal of their licences, that they have participated in the education program.

14. Who do you think should take part in the education program? Why?

Lower tier contractors and subcontractors, and in particular the office holders that control the financial decisions of those entities.

15. How do you think an education program should be implemented, and by whom?

The preferred model is an online module which tracks whether the person has completed the program. This would allow program participants flexibility whilst reducing the costs on the industry.

Building and Construction Industry Payments Act 2004 (Qld)

16. Do you think the 2014 amendments to the BCIP Act improved security of payment? Why?

- (a) QMCA considers that the 2014 amendments to BCIPA have resulted in the Act working more efficiently by improving the payment claim processes. However, it has not led to greater security of payment and the Act is still overly claimant friendly.
- (b) The Act has become more workable through the following changes:
 - (i) the reallocation of responsibility for assigning adjudication applications;
 - (ii) requiring adjudicators to decide if they have jurisdiction;
 - (iii) providing claimants with an opportunity to withdraw their adjudication application;
 - (iv) changing the definition of 'Business Day' to exclude the Christmas/New Year period; and

- (v) reducing the amount of time a payment claim can be made from 12 months to 6 months following completion of a contract.
- (c) QMCA is not convinced that the extension of statutory time periods in relation to complex claims has improved the process. Although the additional time periods allow more time to gather necessary evidence to respond to a claim, it does not address the imperfect nature of the adjudication process where inconsistent evidence cannot be tested.

17. Could the BCIP Act be improved? How?

The QMCA considers that the Act could be improved in the following ways:

- (a) the adjudicator should be required to decide claims in accordance with the terms of the contract, including allowing for set off or damages. The Act currently provides that the adjudication only has to 'consider' the terms of the contract, not 'apply' them.

For example, the adjudicator should only have jurisdiction to decide claims for variations and extensions of time in accordance with the contract.

- (b) the Act should be amended to remove the capacity of parties to submit expert reports to an adjudication application. It cannot have been the purpose of the Act to allow a party to 'ambush' a respondent with voluminous expert reports, whose evidence is not able to be tested.

Minimum Financial Requirements policy – Queensland Building and Construction Commission Act 1991 (Qld)

18. Should the NTA reduction trigger remain at 30%? If no, what is a reasonable figure?

QMCA does not have a view on this.

19. Do you think the trigger event for reporting to the QBCC should continue to be defined by reference to a comparison of the licensee's NTA position from time to time with its last advised and QBCC accepted NTA position?

QMCA does not have a view on this.

20. Would some other comparison be more appropriate? What and why?

QMCA does not have a view on this.

21. Would you support a review of the effectiveness of prompt payment provisions in the QBCC Act? Why?

The QBCC Act is working well and the prompt payment provisions are generally understood and complied with. It would be useful for any review to clarify the interaction of these provisions with the timing periods for complex claims under BCIPA (i.e. a respondent is given 15 Business Days to respond to a complex claim, but at the same time the QBCC specifies a maximum payment period of 15 Business Days between a principal and head contractor).

22. Would you support harsher penalties for late or missing payments to subcontractors?

No. Penalties will not improve the insolvency position of contractors who are late or miss payments to subcontractors. If contractors are unable to pay their subcontractors, they are unlikely to be able to pay any penalty, no matter how harsh.

Subcontractors' Charges Act 1974 (Qld)

23. How do you think the *Subcontractors' Charges Act 1974* is working?

Since the amendments to BCIPA, the *Subcontractors' Charges Act* has reverted to being used for its core purpose as a mechanism for general insolvency protection.

24. What changes are necessary, if any, to the *Subcontractors' Charges Act 1974*?

QMCA does not have a view on this.

Other Suggestions

25. Do you think we should consider other options? If so, what are these?

- (a) Overall, QMCA considers that the Government should look at reducing red tape across the industry.
- (b) Insolvency in the building and construction industry is complex, and greater investigation into the specific causes of insolvencies is needed.
- (c) If the Government is serious about protecting payments to subcontractors, the State Government should lobby the Federal Government to implement uniform, national changes to the federal legislative scheme.

26. Do you have ideas about implementation of an option?

- (a) QMCA is unable to offer a detailed response because of the lack of detail provided in the Discussion Paper. When the Government has decided on any preferred option (if any), it should return to industry to seek further input.
- (b) The most effective option in relation to protecting retention monies is to introduce the New South Wales RTFS model in Queensland, limited to building work and not construction work. However, the RTFS model must have the option of providing bank guarantees and insurance bonds and should not insist on cash retention. In cases where retention monies are held in cash, they should be administered through a trust account model selected by the contractor.

Conclusion

QMCA considers that there is no evidence of systemic problems in the building and construction industry relating to underpayments or non-payments of subcontractors. More investigation is needed to uncover the specific causes of insolvencies and develop options that specifically address those issues.

QMCA would urge the Department of Housing and Public Works to consider the issues and recommendations raised in this submission and take appropriate steps to see that these are considered by the responsible Minister and other interested stakeholders within the Queensland Government.

Queensland Major Contractors Association

30 March 2016

Annexure 1

QMCA Members

- (a) Acciona Infrastructure Australia
- (b) BGC Contracting Pty Ltd
- (c) BMD Constructions Pty Ltd
- (d) Clough Limited
- (e) CPB Contractors
- (f) Fulton Hogan Pty Ltd
- (g) Golding Contractors Pty Ltd
- (h) John Holland Pty Ltd
- (i) Laing O'Rourke
- (j) Lend Lease
- (k) McConnell Dowell Constructors (Aust) Pty Ltd
- (l) OHL Construction Pacific