Master Builders' response to the BIF Reforms Implementation and Evaluation Panel Discussion Paper

PART 1: PROJECT BANK ACCOUNTS

1. Is there sufficient information about the project bank account reforms for industry to understand how they will apply?

No, based on our experience with the payment process and adjudication reforms, industry needs six months from when the legislation is finalised (passed by Parliament) before commencement, that is six months from when industry will know for certain what the new regime will look like.

Subcontractors, in particular, have received information that simply does not reflect how project bank accounts will operate. This has resulted in a false sense of security. Our experience is that many subcontractors are unaware that the builder operates the project bank account trust accounts, and subcontractors are still required to take legal action to enforce payment or to resolve payment disputes. We believe this will lead to subcontractors not protecting their own interests through their contracts and direct actions.

2. Will the PBA reforms improve payments to subcontractors?

No because the new reforms have forced builders to make changes to subcontracts by:

- extending payment timeframes to the maximum permitted under the QBCC Act;
- reducing reference dates; and
- changing security provisions to remove cash retention.

Builders are making these changes to mitigate the risks that are inherent in the current PBA model (as well as dealing with the general unworkability of the current arrangements). This does not benefit subcontractors; and it is certainly not improving payments to subcontractors.

3. Will the PBA reforms improve the receipt of retentions by subcontractors?

The PBA reforms may improve the likelihood of subcontractors receiving cash retentions from contractors; however, this remains to be seen.

The September 2018 changes to the PBA model are likely to create more conflict at the end of the Defects Liability Period as the builder will be the beneficial owner of some of the money that is held in the Retention Trust Account. If there is a dispute with the builder, the subcontractor may need to take action to prove that they are the beneficiary of some of the money in the Retention Trust Account. We believe that these requirements will result in contractors insisting on other forms of security, which will be difficult for small/mid-size subcontractors to provide.

4. Do you believe that the project bank account reforms could be improved?

Yes. We are recommending the following:

a. Apply PBAs across the entire supply chain to improve security of payment for all the parties involved – from principals/developers through to suppliers.

b. Change the requirement for three accounts for each PBA project to a single account for multiple projects (consistent with Murray's recommendation) to take account of the enormous cost of administering PBAs, particular for smaller/mid-size builders.

c. For phase 2, limit PBAs to projects over $10m in the private sector. The $1m threshold would continue to apply for state government projects.

d. Provide a minimum subcontract price for subcontracts to fall within a PBA. This is similar to the WA PBA model where it only applies to subcontracts with a value of $20k or more.

e. Provide a minimum payment to be made out of the PBA. Currently all payments to a subcontractor must be made out of the project bank account no matter how small.

f. Include 'reasonable excuse' provisions for the head contractor so that if there are reasonable attempts made to comply, the fines and other penalties do not apply e.g. not providing subcontractor bank account details within 5 business days of entering into the subcontract. If the subcontractor does not provide this information to the head contractor when requested, the head contractor should not be penalised;

g. Remove the principal's viewing rights. Providing principals with a clear view of the builders' business costs & profit margins is an intrusion into commercial-in-confidence information. This would be a disaster in the private sector.

h. Remove the requirement for bank accounts to list the transactions for the retention account. The head contractor is required to provide details to the principal and the subcontractors identifying any amounts that are held in retention so it is unnecessary for the actual bank account to also list each individual amount held as a separate transaction. This is completely unnecessary & adds significant time and cost for no benefit whatsoever.

5. What impact (positive or negative) will the PBA reforms have on your business?

We expect the cost of construction to increase significantly. Many small/mid-size builder members have grave concerns about the impact of phase 2 PBAs on their cashflow, and their ability to manage the extensive administrative obligations required under the legislation.

Subcontractor members are also concerned about the negative impact the PBA reforms will have on the terms of their subcontracts. Subcontractors are likely to lose the flexibility for early/interim payments due to the additional administration required for all payments out of PBAs.

Builder members are concerned about the additional administration required to simply manage the head contract and subcontract payment process even when payment is not disputed. This adds unnecessary cost to projects and will impact on the financial position of the contractor. They are also greatly concerned about the impact of an inadvertent non-compliance with chapter 3 on the project bank accounts. This is exacerbated by the issues with chapter 3 (which are discussed in Part 2) and the September 2018 changes to the Act in terms of when an amount that is in the Disputed Trust Account can be released to the contractor.

The Act now provides that even if a builder is successful in a dispute, they are not permitted to withdraw that amount from the Disputed Trust Account on completion of that process. This is grossly unfair and will force builders to issue payment schedules for zero dollars if they are unable to meet the strict time requirements provided by chapter 3. (The entitlement of the builder to receive an amount from the trust account that was decided through adjudication in the builder's favour is supported by the Murray Review.) This requirement will impact negatively on the builder's financial position which will not benefit subcontractors.

PART 2: PROGRESS PAYMENTS & ADJUDICATION

1. Does industry have sufficient information about the payment process and adjudication reforms to understand how they will apply?

No. The industry is a long way short of properly understanding the new requirements. Part of the problem is that there is a lot of incorrect information being provided to industry by a range of parties (including the QBCC, law firms and other industry associations). These errors are confusing contractors (claimants and respondents) as to their rights and responsibilities.

As a result, we are aware of cases where contractors have lost their rights to use the new reforms to deal with payment disputes; and/or lost the right to challenge payment claims.

It is clear that a large section of the industry (subcontractors, sub-subcontractors and suppliers etc) are not aware that the requirements of chapter 3 apply to them in the same manner as they apply to builders. The result being subcontractors exposed to breaches of chapter 3, and liability for payment claims that they did not realise they were required to respond to.

Furthermore, we have talked to many contractors who mistakenly believe that the BIF Act only applies to those involved in contracts between $1M and $10M for state government projects.

More needs to be done to raise awareness that PBAs are only one component of the BIF Act and that the majority of the reforms apply to the entire industry.

2. Will the payment process and adjudication reforms improve the ability for claimants to use the payment processes in the Act to resolve disputes? Why?

No. Claimants will inadvertently make a payment claim under chapter 3 without consciously deciding to do so. This will mean claimants using up a reference date and starting the clock without appreciating what they have done. This is what happened in New South Wales when changes were made to the *Building and Construction Industry Security of Payment Act* (BCISOPA) in 2015 to remove the requirement for a payment claim made under the BCISOPA to refer to that Act. The NSW government recognised the negative impact that this change had on claimants and an amendment to reinstate the requirement for payment claims to refer to that Act was passed in late 2018.

Queensland should not make the same mistake; we should learn from the NSW error.

The payment process and adjudication reforms exist to assist claimants to resolve payment disputes and to get paid. Accordingly, claimants should have a fundamental right to decide when the Act will apply. This will ensure that the claimant is ready for the requirements of the Act to kick in and to make a conscious decision to use up a reference date under the contract. There are limited reference dates available for payment claims to attach to; it is imperative that claimants consciously decide to do so. This view is supported by the Murray Review (Recommendation 23).

The result of the 2015 reforms in New South Wales is that claimants often did not have the ability to make a payment claim under the BCISOPA when they wanted to, simply because they had inadvertently made a claim under the Act at a previous time. And they did not have another reference date from which a new payment claim could be made.

A similar situation arose often under the BCIPA due to claimants being advised by various industry groups to put the "BCIPA words" on their invoice templates just in case they wanted to use the BCIPA to get payment. This resulted in many in the industry not being able to use the Act to get paid because there were no more reference dates available.

The process under chapter 3 is very complex and there is a lack of understanding within the industry of the various requirements to protect the parties, whether claimants or respondents. It is extremely important for claimants to have the option to decide when they make a claim under the Act, and for claimants to have the opportunity to seek advice prior to making a claim for payment, to ensure that the Act is actually able to assist them.

3. Will the payment process and adjudication reforms improve the quality of decision making of adjudicators? Why?

No. Unfortunately, some adjudicators make incorrect decisions which are enforceable, having a negative impact on both claimants and respondents. The new powers given to the Adjudication Registrar to mandate continuing professional development and training of adjudicators, as well as the powers to deregister or limit the scope of an adjudicator's registration based on performance, will go some way to improving the quality of adjudication decisions.

However, many of the changes to the wording in chapter 3, from what was previously provided under BCIPA, have created uncertainty which will not help adjudicators to make good decisions. For example, the change replacing the requirement for payment claims and payment schedules to be served with the requirement for such documents to be given has wiped out nearly 20 years of case law which provided some certainty as to what was required to meet the legislative requirement of service.

There are also other key requirements which have not yet been considered by the Courts so there is no case law on which adjudicators can rely to ensure that their interpretation of the new legislation is correct. This increases the likelihood of different interpretations being made by different adjudicators, until the Courts have considered the new provisions. Ultimately, this situation will result in uncertainty for claimants as to what their rights and obligations are which, in turn, will reduce the chance of the new legislation having a positive impact on claimants or respondents. Another examples of these provisions is the requirement of a payment claim to include a request for payment.

4. Do you believe that the payment process and adjudication reforms could be improved?

Yes. We are recommending the following:

a. Reinstate the requirement that payment claims must state that it is a payment claim made under Chapter 3. NSW are changing the BCISOPA to undo this mistake and we should follow suit. The Murray review also recommended that this requirement be included in any payment dispute process.

b. Remove the restriction for resident owners in chapter 3. This would ensure fairness across the entire industry; would mean that the adjudication applies to all respondents. The Murray review has recommended this approach (refer Recommendation 12).

c. Fix the discrepancy that exists between the definition of 'business day' under the QBCC Act and the BIF Act. This creates significant issues when determining the Due Date for Payment under chapter 3 which, in turn, has a significant impact on whether an offence has been committed by a respondent in relation to payment schedules. It is also a matter that is often miscalculated by claimants which affects the time within which they may make an application for adjudication.

d. Include 'reasonable excuse' provisions for respondents responding to payment claims. Such an excuse might be where payment was not made or a payment schedule was not given because the respondent did not receive the payment claim e.g it was an email that went to 'junk' or was quarantined.

e. Delete the provision that a written document bearing the word 'invoice' is taken to be a request for payment. Many claimants will inadvertently make a payment claim due to this provision which will use up their reference date and increase their risk of making an invalid payment claim when they subsequently issue an invoice and want to take action to get paid.

5. What impact (positive or negative) do you believe the payment process and adjudication reforms will have on your business?

Claimants are already finding that they have given a payment claim without realising it or intending to do so. This means that they may be forced to take action without being ready to do so, simply because there are no further reference dates available for a subsequent claim. Further, claimants may be forced to take action for a payment claim that does not include all outstanding money, simply because they made a payment claim without realising what their options were. We have seen cases where the new provisions are a detriment to claimants.

Respondents are finding they are required to issue payment schedules in response to documents that appear to be payment claims, but may not have been intended. This is resulting in additional administration effort for claims that are not in dispute between the parties. Further, respondents are being forced to change the provisions of their contracts in order to manage the additional and unnecessary administration costs and to reduce their exposure to the penalties provided under the legislation, even if the claimant does not wish to take any action and did not intend for the legislation to apply. This is creating conflict between parties where there was not previously any conflict.

PART 3: RETENTIONS AND SECURITY OF PERFORMANCE REFORMS?

1. Does the industry have sufficient information about the retention and security of performance reforms to understand how they will apply?

No. Again there is a lot of incorrect information being distributed to the industry which is creating confusion. Further, the impact of the September 2018 changes to the BIF Act are serious. It is clear that industry is not aware of these changes, which impact on chapters 2 and 3 of the BIF Act as well as the QBCC Act.

Many subcontractors believe that their retentions are protected and cannot be accessed by the builder under a PBA. (This is not correct.) As a result, we are concerned that subcontractors may decide not to take active steps to improve their position under the contract and/or the legislation.

Similarly, builders need to understand their obligations and the restrictions under the legislation to ensure that they can manage their financial position.

The complexities surrounding retention moneys and beneficial interests under the legislation is confusing builders and subcontractors. For example, the uncertainty surrounding when retentions are due to be released under the QBCC Act will not assist subcontractors or builders. The entire industry needs to understand the correct legal position so that they can protect their own interests. Misinformation leads to mistakes as to entitlements which, in turn, leads to unnecessary disputes.

There has not been a lot of focus on the changes that have been made to the QBCC Act and many in the industry are simply not aware that anything has changed in this regard.

2. Will the retention and security for performance reforms result in retentions being returned to the contracting party they have been withheld from more often?

The QBCC Act changes may improve the likelihood of subcontractors receiving cash retentions from contractors; however, this remains to be seen. It is quite likely that subcontracts will be amended to insist on other forms of security rather than cash retentions in order to protect builders from inadvertent breaches of the new requirements. This will not benefit subcontractors.

Subcontractors often do not comply with their contractual obligations to make a claim for payment of the retentions. The new provisions will not affect this. Subcontractors must be aware of their rights and obligations to protect themselves. The changes to the QBCC Act cannot assist with this.

3. Could the retention and security for performance reforms be improved?

Yes. We are recommending the following:

a. Allow retentions to be accessed by the head contractor when permitted to do so under the subcontract i.e. reverse the recent amendment to the BIF Act.

b. The QBCC should ensure that subcontractors are held accountable for their building work. Many arguments between subcontractors and builders regarding retentions arise because subcontractors do not rectify their defective work or do not comply with their obligations under the subcontract.

4. What impact (positive or negative) do you believe the retention and security for performance reforms will have on your business?

In order to protect their right to have recourse to security for the very reason that it is provided, builders are likely to insist on other forms of security rather than cash retentions. This will not assist subcontractors who often find it difficult to obtain bank guarantees.

We believe the reforms are unnecessary given that there are already strict provisions in the QBCC Act limiting the amount of security that can be withheld/provided under a subcontract (s67N QBCC Act). There are also provisions restricting when a builder is permitted to have recourse to security/retention (s67J QBCC Act). Further, subcontractors can seek the release of cash retention through adjudication if necessary.

It is likely that builders will impose additional obligations on subcontractors in order to protect their rights to use security for the purpose for which it is provided. We are aware that subcontractor members are already seeing this in the terms of their contracts with head contractors.

PART 4—TIMING FOR COMMENCEMENT OF THE SUITE OF REFORMS

1. Will the staged commencement of the suite of reforms assist industry to adjust to the changes?

No. The reforms that have been introduced all commenced too soon. There was insufficient time from when the legislation was finalised (Act and any associated regulation) to when the changes commenced.

For example, phase 1 PBAs commenced on 1 March 2018 but regulations relating to chapter 3 were not released until a short time prior to the commencement. Once released, the regulations amended some of the requirements of chapter 2 of the BIF Act. To add further confusion, transitional regulations were released which further amended the requirements of chapter 2 of the Act.

Then in September 2018, chapter 2 of the BIF Act was amended yet again by incorporating the transitional regulation and the regulation into the Act but not in its original form. As a result, the legislation affecting PBAs was effectively amended three times in the first 6 months of operation.

The payment process and adjudication reforms commenced on 17 December 2018 but the Act was amended mid-September 2018 and the regulation passed in early December 2018.

The same applies to the new provisions relating to retentions and security for performance. The requirements in the BIF Act did not change once passed in November 2017; however, the September 2018 changes to chapter 2 BIF Act in relation to the retention fund trust account changed how the QBCC Act changes would apply.

And lastly, the first phase of the MFR reforms commenced on 1 January 2019 and the first time we saw the regulation was 30 January 2019.

2. What changes should government make to the timeframes for commencement of the suite of reforms?

We are recommending that Phase 2 for PBAs commences no earlier than six months after the legislation is finalised, that is six months from when industry knows for certain what the new regime will look like.

This legislation affects all sectors of the industry and all parties need to understand the impact it will have on their businesses. Without adequate lead time, contracting between the parties becomes very problematic.