

# Master Builders' Response

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QUEENSLAND BUILDING PLAN DISCUSSION PAPER

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## INTRODUCTION

The state government's Queensland Building Plan targets a number of key areas within the building and construction industry. It includes proposed changes to various policies and legislation with the intent of creating a safer, fairer and more sustainable industry with increased job opportunities and economic growth.

Master Builders' response to the Queensland Building Plan follows and addresses the following topics:

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## A. Security of payment

For the building industry to be as efficient and productive as possible, all parties involved in a building project need to be confident they will be paid what is owed under their contract. As in our previous response to the government's December 2015 Security of Payment discussion paper, we continue to emphasise the following principles when considering additional regulation of payments within the industry:

1. Proposed solutions **MUST** cover the entire building chain, from the principal/owner to the builder, subcontractors, sub-subcontractors and suppliers. The structure of our industry is such that all parties are mutually dependent upon each other.
2. Legislative controls and protections should not be introduced for one party at the expense of another.
3. Legislative controls and protections should not be unduly disruptive or impose additional costs.

Master Builders has addressed the government's specific questions below. For Master Builders' full and detailed response, please refer to Appendix A.

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### Project bank accounts

For the reasons detailed in full at Appendix A, Master Builders does not support the implementation of a mandatory payment mechanism such as Project Bank Account (PBA) model.

Master Builders supports payment to all levels of the industry but does not believe that the government's proposed PBA model will achieve the government's objectives of "every Subcontractor paid on time, every time" or that it can in any way "guarantee payment" to Subcontractors.

PBAs will add cost and complexity to the building and construction industry whilst not achieving the government's objective of improving payments within the industry. As a regulatory intervention, it is poorly targeted and the costs far outweigh any benefits that may be realised.

## Do you have any suggestions about how the Project Bank Account model discussed in the fact sheet could be improved?

Master Builders does not support a Project Bank Account model. The matters identified in our submission (Appendix A) should be addressed, and further the information about PBAs, as identified in our submission, should be made available to the industry for comment.

## What would be the most effective way of implementing the model for head contractors?

Master Builders does not support a PBA model.

## Do you have any other suggestions about how the proposed PBAs should be implemented in practice?

Master Builders does not support a Project Bank Account model. The matters identified in our submission (Appendix A) should be addressed, and further the information about PBAs, as identified in our submission, should be made available to the industry for comment.

## What support should government provide to assist the building and construction sector transition to PBAs for all projects (excluding engineering projects) valued over \$1 million?

Master Builders does not support a PBA model.

## How could the PBA model be adapted to private single residential construction over \$1 million?

Master Builders does not support a PBA model.

## Should the PBA model also be applied to private residential construction?

No, Master Builders does not support a PBA model.

Should PBAs be expanded to large residential projects and developments, such as retirement villages?

No, Master Builders does not support a PBA model.

Do you have any other feedback to assist the department to ensure effective implementation of PBAs in the building and construction industry?

See Part B of our submission at Appendix A.

## BCIPA amendments

### 1. What are your views on the proposed amendments to the BCIPA?

#### Strengthen impartiality and independence of the Registry

Yes, it is critical to the objective of the BCIPA that the Adjudication Registry is impartial and independent from both parties to a payment dispute. Whilst we support the government's intent, no detail has been provided in the discussion paper as to what measures are proposed to achieve this strengthening of the Registry.

#### Adjudication Registrar and officers of the Registry are to solely perform functions related to the operation of the BCIPA

It is extremely important that the QBCC Registry staff are focussed on administering the BCIPA and that their roles are dedicated to this purpose. Resources should be allocated by the QBCC to solely perform functions related to the operation of the BCIPA.

#### Advice regarding the BCIPA must only be provided by the officers of the Adjudication Registry

It is critical to the objective of the BCIPA that the parties understand their rights and obligations. However, given the complexities associated with the BCIPA process, the QBCC Registry must have resources available that understand all aspects of the process and the requirements of the Act, and are able to provide advice and support to all parties i.e. claimants, respondents and adjudicators. This requires the QBCC resources to be well educated in all aspects of the process and limiting the resources that provide that support to the parties only to those who have a sufficiently high level of understanding, is fundamental to the success of it.

#### Adjudicators must maintain and develop their skills and knowledge through Continuing Professional Development (CPD) both to retain and renew their registrations as adjudicators

Yes, it is critical to the objective of the BCIPA for all adjudicators to be of a high standard. They must be sufficiently trained in, and have experience with, all types of construction contracts and the relevant areas of construction law. This will ensure that their decisions are of a high standard and their duties are exercised in accordance with the BCIPA. If a high standard is not achieved and maintained, parties

will lose trust in the adjudication system, resulting in increased disputes and ultimately more insolvencies within the industry.

#### Limits to be imposed on adjudicator's fees

No, as for the item above, we must ensure that the quality of the BCIPA adjudicators continue to operate at a high standard. If the adjudicator's fees are reduced by too much, it will force good adjudicators out of the industry and poorer quality adjudicators will remain. This will lead to poor quality decisions, increased disputes and more insolvencies.

## 2. What amendments to the BCIPA could further enhance the claims process?

### All payment claims made under a construction contract to be payment claims made under the BCIPA without the need to include a notice on the payment claim itself

No, Master Builders does not support this proposed change for the following reasons:

- It will be to the detriment of claimants. Claimants will 'use up' reference dates without conscious thought and when they may not want to do so. This will remove the opportunity to use the BCIPA to obtain payments due.
- It will remove the flexibility that currently exists for the parties to resolve the dispute amicably.
- It will increase the discord in the industry between the claimants and respondents as the respondents will be required to incur additional administrative time, effort and cost to respond to every payment claim as if it is one that will go to adjudication even though the claimant may not intend to do so.
- It does not remove the step that places the most pressure on claimants, the need to make an application for adjudication.
- Claimants may inadvertently make a payment claim without intending to do so as an email may be a valid payment claim under the BCIPA – thus taking a reference date away.
- Claimants may suspend works under the BCIPA if a payment schedule has not been provided in response to a payment claim. A respondent may simply have responded as if the payment claim was a contractual payment claim and yet work suspended simply because it was not aware that the claimant intended the claim to be a BCIPA payment claim. This will impact on the project and affect entitlement to payments under the head contract.

### Claimants are to have 30/40 business days to submit an application for adjudication of a Standard Payment Claim/Complex Payment Claim

No, Master Builders does not support this proposed change. The BCIPA process should afford both parties an equal opportunity to take steps under the BCIPA and should not offend the principles of natural justice any more than it currently does. Further, the main objective of the BCIPA is for rapid adjudication of a payment dispute. Extending the time to submit an application for adjudication does not support this objective.

### If a contract does not deal with payment claims made after termination of a contract for convenience, then the BCIPA will set that a reference date arises on the date of termination of the contract

Yes, Master Builders supports a change that permits a reference date to arise at the date of termination for convenience of a contract in circumstances where the contract is silent on this matter.

### Adjudicator has the discretion to order the reimbursement of the adjudication application fee as part of the adjudicator's decision

Yes, Master Builders supports a change that extends the adjudicator's discretion to include an amount in the adjudication decision for reimbursement of the adjudication application fee provided that such discretion is to be exercised by taking into consideration the matters listed at s35A of the BCIPA.

### Adjudicator has the discretion to order that the respondent pay interest on the adjudicated amount from the date of the payment claim as part of the adjudicator's decision

No, Master Builders does not support this proposed change. Fact Sheet 2 notes that this proposal is directed at compensating the claimant for pursuing payment through the adjudication process. However, an award of an adjudicated amount is not necessarily an entitlement to payment under the contract. The claimant has the option of what process it elects to use to pursue a payment due under a contract but no option should permit it to recover costs where it may not be entitled to the payment in the first instance. Further, there is no entitlement under the contract for interest to be calculated from the date of the payment claim and the BCIPA should not give that entitlement.

## 3. Please provide any other feedback you consider will assist the government in implementing these reforms.

### A. Review the BCIPA

Master Builders recognises that the object of the BCIPA is to "ensure that a person is entitled to receive, and is able to recover, progress payments if the person undertakes to carry out construction work under a construction contract or undertakes to supply related goods and services under a construction contract". However, primacy of contract should always remain the basis for consideration of any entitlement to payment under a contract. The contract reflects the terms of the agreement reached between the parties regarding a particular project. The terms of that agreement should not be dismissed too quickly otherwise disputes will arise between the parties and the financial stability of both parties will be undermined.

To that end, Master Builders submits that consideration should be given as to how the rapid adjudication process could best serve the interests of both parties to the contract, and the industry as a whole. In particular, consideration should be given to changing the BCIPA to reflect the evaluative model adopted in Western Australia, the Northern Territory and many other parts of the world.

Key elements of the 'west coast model' include:

- timeframes to make an application for adjudication under the Act do not start to run until a dispute arises regarding payment i.e. it is not linked to the date the payment claim was made or the payment schedule was provided;
- either party may make an application for adjudication;
- the parties are not restricted as to what matters they raise in their adjudication application or response;
- the adjudicator must consider all parts of the contract and not just those raised by the parties;
- the adjudicator may dismiss an application if the dispute involves complex matters of law which cannot properly be dealt with within the short timeframes provided by the Act; and

- the adjudicator may inform himself/herself in any way he/she thinks fit.

The 'west coast' model upholds the laws of natural justice and, in turn, is a fairer system for both parties to the dispute. As a result, there is less angst within the industry when adjudication is initiated because the process is fair to both parties. Parties to a dispute are also more inclined to accept the adjudicator's decision as final for that particular dispute if they believe the process to be fair.

Further, it is imperative that adjudicators do not award payment of moneys to a claimant to which it is not entitled under the contract. This does not assist either the claimant or the respondent. The claimant will use the money received assuming that it is entitled to it, however, if the respondent recovers the overpayment at some point in the future, the claimant's financial position will be adversely affected. Similarly if a respondent is required to pay moneys to the claimant that it is not contractually required to pay, it will adversely affect its financial position. Neither outcome benefits the parties or the industry.

Entitlement to payment must always take into consideration the whole of the contract between the parties. Amending the BCIPA to reflect primacy of contract will ultimately assist both parties to get paid moneys they are entitled to be paid, thus meeting the objective of the BCIPA.

#### **B. Adjudicators' decisions to be subject to review**

An adjudicator's decision has a significant effect on the solvency of a contractor whether they are the claimant or the respondent and, as such, it is critical that the decisions are correct and based on the sound application of the relevant laws.

Whilst the Supreme Court of Queensland can review an adjudicator's decision, it is limited to only those matters which affect the adjudicator's jurisdiction or natural justice. This leaves a significant number of adjudicators' decisions unable to be reviewed because of errors that are made by the Adjudicator that fall within its jurisdiction. This lack of oversight negatively impacts the trust and confidence of parties involved in the adjudication process.

Master Builders recommends that changes be made to the BCIPA to grant the Adjudication Registrar the power to review, or appoint a person or panel to review, the decisions of the adjudicators. Such a review would involve consideration of whether the adjudicator has, among other things:

- a good understanding of the laws relating to construction contracts;
- the ability to apply those laws to the facts that are the subject of the adjudication application;
- discharged its obligations under the BCIPA appropriately; and
- afforded both parties natural justice.

Such reviews should be undertaken regularly to ensure that each adjudicator remains a "suitable person" to be an adjudicator. The results of such reviews should also be used by the Adjudication Registrar to determine what, if any, additional training should be undertaken by the adjudicator to maintain his/her registration as well as whether an application should be referred to a particular adjudicator given their understanding and application of the law.

Greater transparency and oversight of the adjudication decisions being handed down through the BCIPA process will benefit the industry and reduce the reluctance of parties to accept the decisions of adjudicators.



### C. Adjudication to include right to order return of non-cash security

The BCIPA currently permits a Claimant to include an amount in its payment claim for the return of cash retentions held pursuant to the construction contract. Master Builders encourages the government to consider granting the adjudicator the right to order the return of non-cash security if the payment claim includes such an item and the contract provides for the release of the non-cash security as at the reference date applicable to the payment claim. The matters the adjudicator must consider before ordering a release of a non-cash security must also be determined. Master Builders will welcome an opportunity to provide further input, should the Government decide to adopt this proposal.

### D. “Second Chance” Payment Schedule (Media Release, 11 February 2017)

Master Builders does not support the removal of the ‘second chance’ notice requirement in the absence of a payment schedule, and particularly if the government elects to remove the requirement to provide a notice on the payment claim itself that it is a claim made under the Act. The combination of these two proposed changes to the BCIPA process would be grossly unfair to the respondent, and increase the number of disputes that arise within the industry.

The government issued a media release on 11 February 2017 proposing to remove the “second chance” rule from respondents. This is a reference to s19(5) and s20A of the BCIPA. No details have been provided by the government as to the reason behind this proposal, nor has it been included in the Discussion Paper.

The ‘second chance’ rule has been in place since the commencement of the BCIPA in 2004 in relation to adjudication applications. Previously, before a claimant could file an application for adjudication in the absence of a valid payment schedule, the claimant was required to serve a notice on the respondent advising it that the claimant intended to file an application for adjudication. This provided the respondent with a ‘second chance’ to serve a valid payment schedule. No such ‘second chance’ was required if the claimant elected to start court proceedings to recover the debt rather than through adjudication.

A change was made to the BCIPA in December 2014 which provided that a ‘second chance’ notice was required for both situations, that is whether the claimant intended to commence court proceedings or adjudication in relation to its payment claim. The change was made to provide a level of fairness in circumstances where there were dire consequences for the respondent when a payment schedule was not issued. Often a respondent may simply not be aware that the claimant intends to pursue the payment claim through the court or adjudication. The ‘second chance’ rule provides the respondent with the opportunity to properly respond with the knowledge that the claimant intends to formally pursue the claim under the BCIPA.

## Other legislation

### Other than the language of the SCA, are there other improvements to the Act that you think should be made?

In our 2016 submission to the Government, Master Builders proposed the following regarding the SCA:

The SCA could be made more accessible if the provisions of legislation were simplified and made easier to understand; and there was greater industry awareness of the protection afforded by the SCA and the practical steps involved in using the SCA.

The SCA only provides security for a subcontractor if there is a payment still owing (from a Principal) to the Head Contractor; and/or the Principal under a head contract still holds retention monies or security (which it will not require access to itself to satisfy its own losses).

Often subcontractors only resort to the SCA once a Head Contractor has become insolvent, typically after a Subcontractor has already not been paid for an extended period. By this time, the opportunity for a notice of charge to attach against monies owing to a Head Contractor in many cases will be lost.

Subcontractors need to be made aware that the SCA will provide meaningful protection if a notice of charge is issued:

- immediately upon the Subcontractor becoming aware that there is a potential solvency issue with its Head Contractor (regardless of whether, and how long, invoices have not been paid); and/or
- whenever an invoice is not paid by the due date.

From the point of view of a Principal who receives notice of charge from a Subcontractor under the SCA, the process could be improved by clarifying the Principal's role in subsequent court proceedings under the SCA (i.e. that they are only joined to ensure they discharge their obligations under the SCA and confirming that they are not required to appear at hearings unless ordered to do so by the court). This would avoid the need for a Principal to expend unnecessary time and money in seeking advice and making appearances where they receive a notice of charge and are joined in subsequent proceedings. We believe that this would encourage Principals to proactively engage with Subcontractors who are seeking to secure their entitlements using the SCA.

In addition to the above, while the SCA is often considered too costly to be a viable avenue for subcontractors to pursue, it does bring a final determination of the claims raised in the charge.

The SCA process could be made more attractive to subcontractors through both of the following:

- Requiring the Principal to provide the Subcontractor with confirmation that moneys are owed to the Head Contractor under the head contract agreement at the time of receipt of the notice of Subcontractor's charge. This could be required to be provided within five business days of receipt of the notice of charge and a failure to respond creating an obligation on the Principal to secure the amount of the charge. At present, there is no such obligation on the part of the Principal and a Subcontractor runs the risk of there being no money to which a charge can attach even though a successful decision may have been awarded by the tribunal or court.
- Requiring the Head Contractor to respond to the notice of charge and, if no response is given within the timeframes already provided in the SCA, then the claim is deemed to be accepted and the Principal must pay the amount of the charge to the Subcontractor. There is currently no penalty for the Head Contractor not acknowledging the Subcontractor's notice of charge. As a result, the

Subcontractor could incur additional legal fees to pursue a claim that the Head Contractor may simply later decide to pay. There should be some motivator for the Head Contractor to nominate if the claim is accepted or disputed prior to the Subcontractor being required to commence proceedings and incur legal costs.

## Do you have any concerns with a single new Act, combining legislation required to implement PBAs, the BCIPA and the SCA?

Master Builders supports the proposal to combine all legislation that deals with payments under building contracts in the one piece of legislation. Since the BCIPA was introduced, the due date for payment provision has been in conflict with the equivalent provisions in the QBCC Act. This conflict has caused a significant degree of confusion across the industry. It has led to delays to payments caused by confusion as to which provision applies. The definition of business day has similarly caused confusion as it has a different meaning in different pieces of legislation.

An amalgamation of all these Acts will require careful consideration because they do not all relate to the same contracts.

## What contract provisions can operate to delay, avoid or adversely affect payment to subcontractors, i.e. 'unfair' provisions? How can this problem be best addressed?

The QBCC Act already deals with some contract provisions which affect payment to subcontractors, including setoffs or deductions from security / retention moneys, maximum security / retention moneys to be held, late progress payments and payment timeframes. Master Builders does not support any further changes to the legislation that has the effect of overriding the right of the parties to agree to terms that it considers appropriate and acceptable for a particular project. Further, the recently implemented federal legislation relating to unfair contract terms is likely to apply to the majority of subcontract agreements in the construction industry. No further legislative oversight is necessary.

## Education Program

### Do you think an education program is needed?

Yes, an education program for QBCC licensees is vital and Master Builders has been appealing to government to address this critical aspect of its regulatory response for some time now. Many contractual disputes and business failures can be avoided through a better understanding of contractual management and financial matters.

On average, Master Builders fields around 3,000 calls annually from our members seeking assistance with contract administration, payment claims and navigating the regulatory requirements. A recurring theme is the lack of understanding of measures that already exist to assist parties to resolve disputes, such as the BCIPA, the SCA and the QBCC moneys owed process.

## Should the education program be voluntary or mandatory?

Mandatory. This is a core component of being able to run a successful contracting business. Many disputes and business failures could be avoided through a better understanding of contractual and financial management.

## Who do you think should take part in the education program?

The education program needs to be targeted at specific problems and specific types of contractors.

## How do you think an education program should be implemented and by whom?

On two fronts: as part of the licensing requirements when contractors enter the industry; and ongoing education through mandatory CPD, administered by the QBCC and delivered by accredited providers.

Master Builders has provided a more detailed response on the issue of CPD at Section J. Licensing Reforms.

## Other options

### Are there any other issues you want to raise in relation to the proposed package of reforms?

#### 1. Financial Reporting Requirements

We encourage the government to reintroduce contractor reporting on meeting Minimum Financial Requirements, as well as reviewing the QBCC's role in obtaining financial information from licensees.

We believe these measures are critical in ensuring that building industry participants do not financially over extend themselves when bidding for work, and thereby create risks for other parties in the contractual chain.

We are aware that many contractors are hesitant to report incidences of under payment or late payment to the QBCC for fear of "sending a contractor over the edge" because they believe QBCC may cancel the contractor's license. A balance must be found between early intervention by the QBCC and ensuring contractors who are able to trade solvently are afforded the opportunity to do so.

Master Builders would be generally supportive of an increase in the QBCC's powers to investigate the financial affairs of licensees, if appropriate checks and balances are in place to afford a licensee a fair opportunity to respond to QBCC's powers.

## 2. Alternatives to Project Bank Accounts

PBAs are poorly suited to address the issue of late payments within our industry. PBAs will introduce costs on every participant, yet will not provide relief to Subcontractors where a Head Contractor deliberately decides to do the wrong thing.

There are other mechanisms that have been floated to address late payments<sup>1</sup>, including the use of Trade Creditor's insurance. Such a mechanism has the potential to provide real and full recovery to a Subcontractor in the event of non-payment because a Head Contractor is in breach of its contractual obligations. We are aware that this type of insurance product is already used in some sectors of the construction industry. The insurance market may be an efficient way for unscrupulous participants to be effectively pushed out of the market due to becoming uninsurable.

We therefore recommend the government investigate the costs and benefits of an insurance based solution in lieu of PBAs, including considering:

- the structure and costs associated with such a scheme;
- whether it should be mandatory or voluntary;
- whether it should be provided through the private insurance market or through a government controlled scheme; and
- the efficacy of such schemes in other jurisdictions.

## 3. Amendments to the QBCC Act

Master Builders encourages the government to also consider amendments to the QBCC Act in the following areas:

- Clarify the intent of Section 67L QBCC Act which provides a maximum retention and/or security amount to be withheld from a subcontract. The provision refers to 'practical completion of building work'. It appears that this is a reference to practical completion of the *subcontract works* and not the *head contract works*, but the section is often misinterpreted within the industry and leads to disputes about retention moneys and/or security that is to be released at practical completion of the subcontract works.
- Clarify the intent of Section 67N for the same reasons as Section 67L above.
- Add a new provision mandating when final retention money and/or security is to be released under a building contract and a subcontract. This is currently not covered by the QBCC Act and often leads to disputes. It is typically due for release under the terms of the head contract/subcontract at Final Completion, that is the end of the Defects Liability Period. However, clarity regarding when the head contract and the subcontract reach Final Completion will be required for the same reasons discussed above regarding s67L and s67N in relation to practical completion.

## 4. Removal of retentions

There has been some discussion during the Building Plan Consultation Sessions with the government regarding the removal of retentions from subcontracts, even though the Government's discussion paper does not deal with the matter. The discussion appears to stem from a misunderstanding that retentions

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<sup>1</sup> Royal Commission into the Building and Construction Industry (Cole Royal Commission), 2003

are held on contracts after completion of the contract and that retentions are only for the purposes of ensuring rectification of defective works.

Master Builders does not support the removal of retentions from subcontracts for the following reasons:

- Subcontracts (like head contracts) do not come to an end until Final Completion of the subcontract. This does not occur until the end of the Defect Liability Period. As such, retentions are NOT being withheld after completion of the subcontract as completion of the subcontract obligations are not achieved at Practical Completion but, rather at Final Completion;
- Retentions are withheld to ensure performance of the whole of the subcontract works – not just rectification of defects. Performance of the obligations under a subcontract (similar to those under the head contract) include:
  - rectification of damage caused by the subcontractor,
  - payment of moneys owed under the subcontract to the head contractor,
  - payment of liquidated damages for delays in the completion of the subcontract works,
  - rectification of defective works and/or defects.

Retention moneys recognise that the subcontractor bears the risk of not performing the works to which the subcontract relates. As the subcontractor is the only party who is in a position to ensure that it performs all of its obligations under the subcontract, it is the only party who can provide the related security.

## 5. Provide a system of rapid adjudication in the housing sector

There is a need for a fairer and more timely process for resolving payment disputes between owners and builders in the housing sector. The adoption of a BCIPA style rapid adjudication process in the housing sector would help address the impact of non-payment that weighs so heavily on businesses.

Builders are frequently required to pay substantial amounts for the products and services used in the construction or renovation of a home well before they receive payment from the customer. While they have sufficient capital or financing arrangements to deal with the contractual lag in payment, non-payment can create substantial cash flow difficulties. Some consumers are aware of this situation and withhold funds to improve their leverage in a dispute. Our experience is that many consumers are withholding amounts from the final payment under the contract that far exceed the cost of rectifying any defects. While this is a breach of the contract, it not against the law.

We recognise that the QBCC's current process of early dispute resolution attempts to deal with payment disputes between the owner and the builder. However, the mediated outcomes are not enforceable. Builders in the housing sector are then forced to take action through QCAT and this can be a drawn out and costly process.

To ensure that fair outcomes are achieved, the process would require some tailoring to suit the circumstances and requirements of both consumers and builders. Master Builders believes this is achievable and strongly encourages the Queensland Government to introduce a form of rapid adjudication in the housing sector.

## B. Home Warranty Insurance

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### What aspects of the current Scheme would you change and why?

#### A. Premium calculations for variations

The building contractor should be allowed to make a single payment for the combined total of variations just prior to submitting the final invoice at practical completion.

Recent changes mean that if the value of the residential construction works increases by \$5,000 or more during the course of the contract, the building contractor must pay an additional insurance premium before the work commences. This requirement adds an unnecessary administrative burden on the building contractor.

#### B. Timing of premium payment

As was previously the case, the premium should be paid prior to the commencement of the building works.

The recent changes mean that it now must be paid prior to the earlier of the following:

- 10 business days after the contract date
- commencement of the work

In cases where the contract is signed subject to conditions such as “subject to finance”, the additional strain on the contractor’s cash flow is unwarranted. In some instances, it might take up to three months before a financial institution approves finance. This leaves the contractor to carry the large insurance premium upfront and wait a significant time before the consumer’s finances are approved before receiving the initial 5% deposit. As the builder can only receive reimbursement from the deposit monies, there is no option for an alternative payment mechanism, even when the delays are lengthy.

First homebuyers, who nearly always have a contract “subject to finance”, will be disproportionately caught by the new provision.

It is unclear how the government can justify the early payment. Until the deposit is paid and work commences there is nothing for the insurance to cover.

#### C. Expiry of insurance cover

The Scheme’s current coverage of 6 years and 6 months should be changed to align with the contractor’s statutory warranty timeframe, that is 6 years from the completion of the works. The *Queensland Building and Construction Commission Act 1991* (QBCC Act) should be amended to include the requirement that a contractor must be given every opportunity to complete defective work before the QBCC can commence action to recover the cost of the defective work under the Scheme.

The method for working out the current timeframe for the commencement and expiry dates of cover (6 years and 6 months) is a source of confusion for both consumer and contractor alike. Even experienced QBCC staff are at odds to explain the Scheme's relevant timeframes in plain language. The 6 years and 6 months also unfairly exposes contractors to financial recovery action from the QBCC without the QBCC needing to issue a direction on the contractor to rectify. In addition, after the 6 years and 3 months' period the consumer can simply request the QBCC to have any necessary defects repaired under the Scheme without giving the contractor an opportunity to rectify the issue. Provision in the *Limitations of Actions Act 1974* also mean that after 6 years contractors cannot pursue subcontractors to rectify any defects.

#### **D. Higher premiums for certain contactors**

Master Builders supports a payment differential between licensed contractors who have a high level of claims or directions to rectify against them compared to those with a clean record. This will help create a level playing field, benefiting those contractors who comply with the statutory requirements.

We believe that as well as focusing on those who have performed badly, it would be effective to also take a positive approach and reward those who are performing well. A "no-claims" bonus could have the effect of serving to reduce costs for those builders who deliver on their projects, levelling the playing field. It could also motivate all contractors to do better.

The option of a voluntary excess should also be explored. This would have the benefit of lowering costs for those consumers who have a low risk project or are willing to do their research and choose their contractor carefully.

It is also important that the system has a high degree of transparency and that consumers are directly informed, up front as to the track record of a contractor before signing any contract documentation.

#### **E. Allow disputes to be resolved first**

In cases of defective work, where there is an ongoing dispute between the builder and the sub-contractor, the QBCC should allow time for the dispute to be resolved before deferring to the home warranty insurance scheme.

This approach would see defects rectified more quickly and without cost to the scheme. A time limit cap would ensure that consumers are still protected. The QBCC should still take immediate action where the defect was causing ongoing damage or putting people's safety at risk.

#### **F. Non-structural defects time period**

The time in which the QBCC can address non-structural defects should align with the time for which these defects are covered by the Home Warranty Insurance scheme, that is 6 months.

In a recent review of QBCC procedures, the time for which non-structural defects can be addressed by the QBCC was extended out to 12 months. No reason was given for this change and the inconsistency it creates with the Home Warranty Insurance Scheme is problematic.



## Do you feel the current Scheme provides sufficient coverage (both the amount of cover and the type of work covered)?

The Scheme's cover for swimming pools should be extended to include the rectification or renovation of a swimming pool. There is no identified rationale for excluding these works or any renovations from the Scheme's coverage. Requiring a premium to be paid on all pool works would ensure consistency and fairness in the treatment of all residential building work covered under the Scheme. Currently, if the QBCC were to rectify a pool covered under the Scheme the rectification contractor would not have to pay a premium on their work.

The coverage for prefabricated homes should include defects in off-site manufacture where a licensed contractor has supplied and installed the home. Consumers should have their building project covered regardless of how or where it was built.

## Do you have any issues with the present premium calculation method, particularly for common property?

Master Builders does not support the current method of calculating insurance premiums payable on common property work.

The value of the insurance premium for common property works should be based on the contract price for the affected dwellings and not be extended to cover dwellings not included in the contract. For example, if the complex has 20 townhouses and the contract only relates to 4 townhouses the contract price should not be divided by 20 and the premium paid 20 times; it should only be based on 4 townhouses. There is no justification for making the body corporate pay the additional 16 premiums. Neither will the body corporate be able to claim for "no work" done on the other 16 townhouses. There are numerous areas of renovation works this is applicable to, for example, replacement of guttering and roof sheeting.

The premium should be based solely on the contract price. The value of materials supplied by the owners should not be included in the insurable amount.

This requirement is adding an administrative burden to contractors in having to chase owners for the dollar amount of their building materials to include in the insurable amount. In the rare event the owner's materials are damaged by the contractor, the contractor can claim on their own insurance or if the contractor is unable or unwilling to address the situation there is already an adequate amount of insurance cover that can be called upon to cover any associated costs.

## Should the contract threshold remain at \$3,300 before a premium is required or should it be raised? What would be the implications if the threshold was raised?

The contract threshold level should remain at \$3,300.

While the \$3,300 threshold has not been increased for some time, the new requirements for more trades to pay insurance premiums, such as painters and tilers, present a need to maintain the current threshold and to offer appropriate consumer protection for consumers contracting for these lesser valued jobs.

If the \$3,300 threshold was raised some trade works, such as painters and tilers, might not be covered under the Scheme. This outcome would seem to be in direct conflict to the recent changes to the Scheme in offering an increase of protection for consumers contracting in the residential sector.

The contract threshold for Home Warranty Insurance should remain pegged to the threshold for needing a licence for ease of compliance.

## C. Plumbing and Drainage Act review

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### Key Reform 1: Streamlining regulatory processes – save time and money

1. Do you support the proposal to reform the permit stage of the current approval and inspection process?

<input checked="" type="checkbox"/> <b>Yes</b>	<input type="checkbox"/> <b>No</b>
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2. Do you agree that the proposed reforms will result in faster construction times and deliver benefits to the plumbing industry and consumers?

<input checked="" type="checkbox"/> <b>Yes</b>	<input type="checkbox"/> <b>No</b>
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3. Do you agree with the nominated list of exclusions from the fast track application process?

<input checked="" type="checkbox"/> <b>Yes</b>	<input type="checkbox"/> <b>No</b>
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4. Should other types of plumbing work be excluded from the fast track application process e.g. buildings with a dual reticulated water supply?

<input type="checkbox"/> <b>Yes</b>	<input checked="" type="checkbox"/> <b>No</b>
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### Key Reform 2: Structural reform initiatives – to make the laws easier to understand

1. Do you agree that the proposed structural changes will make the laws easier to locate and understand for both industry and the community?

<input checked="" type="checkbox"/> <b>Yes</b>	<input type="checkbox"/> <b>No</b>
--	------------------------------------

There also needs to be a support mechanism to help the community with any enquires.

2. Do you support replacing the term 'compliance assessable work' with 'permit work'?

<input checked="" type="checkbox"/> <b>Yes</b>	<input type="checkbox"/> <b>No</b>
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3. Do you support the proposal to introduce the ability to appeal a 'rectification notice' at each stage of 'permit work' rather than at the end of the process?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
---	-----------------------------

4. Do you support aligning terminology, timeframes and processes (where possible) across categories of work?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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## Key Reform 3: Promote best practice and facilitate innovation

### Facilitating off-site construction of bathroom pods

1. Do you support maintaining status quo (i.e. continue to allow installation of WaterMark bathroom pods)?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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2. Do you support amending Queensland legislation to prevent WaterMark bathroom pods from being installed in Queensland?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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3. Do you support amending Queensland legislation to facilitate Queensland production of bathroom pods under the notifiable work regime, thereby enabling off-site construction by licenced plumbers?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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4. Do you support amending Queensland legislation to only allow pods to be installed in Queensland if a full inspection has been undertaken prior to covering the plumbing or drainage?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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5. Do you support the proposal to amend Queensland legislation to facilitate bathroom pods manufactured interstate to be lawfully installed in Queensland if the plumbing component has been completed by a suitably qualified plumber?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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As is currently accepted practice in Queensland, a plumber should be required to complete the plumbing component, except in cases where the pod is fully Watermark'ed.

## On-site sewage and grey water treatment plants

### 1. Reform options – monitoring the maintenance of on-site sewage and grey water treatment plants

- 1a. Do you support the introduction of a mandatory servicing form which must be completed by the service agents of on-site treatment plants, and lodged with all relevant parties?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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- 1b. Do you support the introduction of a mandatory smart application to allow service agents of on-site treatment plants to electronically lodge their service reports to stakeholders?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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- 1c. Do you support the implementation of a communication campaign at the local government level to remind homeowners of the need to maintain and service their treatment plants?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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- 1d. Do you support the transfer of the responsibility for the oversight of maintenance regimes for treatment plants from local government to the QBCC?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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- 1e. Do you support the introduction of a fee to allow local government to audit work that has been performed, similar to the current Form 4 – NW process?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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- 1f. Are there any other options that should be included in the proposed cost benefit analysis? Please provide a detailed response.

We would support a voluntary smart application being implemented.
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## 2. Reform options—Building work associated with on-site wastewater management system

2a. Do you support maintaining the status quo?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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2b. Should all building work undertaken on a lot with an OSTP be referred to the local government as a concurrence agency to ensure the facility is adequate to cater for the proposed use, and the land application area is not affected by the proposed building works?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
------------------------------	--

2c. Are there any other options that should be included in the proposed cost benefit analysis? Please provide a detailed response.

We suggest local councils maintain a register of all OSTP sites. A certifier or designer can then request the existing approved site plan from the owner. The certifier would need to assess the new building work, to ensure it does not encroach the existing OSTP land application area.
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## 3. Reform options—On-site wastewater management for small commercial/industrial sites

3a. Do you support maintaining the status quo?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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3b. Do you support amending the Queensland Plumbing and Wastewater Code (QPW code) to enable trade waste from small-scale commercial/industrial sites to be discharged into an OSTP?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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3c. Are there any other options that should be included in the proposed cost benefit analysis? Please provide a detailed response.

No
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## 4. Reform options—Regulation of greywater on premises producing less than 3kL a day

4a. Do you support maintaining the status quo?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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4b. Do you support implementing the requirement for a compliance permit for a GTP to 1kL a day?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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4c. Are there any other options that should be included in the proposed cost benefit analysis? Please provide a detailed response.

The government needs to provide evidence of the amount grey water that is generated by an average home prior to undertaking any cost benefit analysis. That is to confirm that 3kL a day is not an appropriate minimum threshold.
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## Improving plumbing installations for buildings constructed on reactive and unstable soils

1. Do you support maintaining the status quo?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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2. Do you support amending the QPW code to adopt standardised solutions for the articulation of plumbing, drainage and stormwater for sites located in reactive and unstable ground conditions?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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## Facilitating the use of innovative plumbing products and solutions

1. Do you support maintaining the status quo?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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2. Do you support amending the QPW code to allow products with WaterMark certification to be considered for a DTS for the purposes of the PCA?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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If you have answered yes to Question 2, do you support amending the QPW code to allow:

a) specific products to be considered on a case-by-case basis?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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b) any plumbing product with a WaterMark certificate to be considered a DTS for the purposes of the PCA?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
---	-----------------------------

3. Do you support amending the plumbing regulation to allow performance solutions to be performed under notifiable work or minor work where Local Government has endorsed the alternative solution prior to the work being carried out? (Note: Implementation may involve a cost recovery fee).

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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## Restricting the sale of certain plumbing products that are not WaterMark certified

1. Do you support maintaining the status quo?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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2. Do you support restricting the sale of particular types of plumbing and drainage products which are not WaterMark certified?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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3. Do you support the proposal to require retailers and wholesalers to display warning signs for the sale of particular types of plumbing and drainage products?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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4. Do you support the proposal to implement a voluntary scheme to display DIY warning signs at point of sale as an interim measure until changes are incorporated into the Standard Plumbing and Drainage Regulation 2003?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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## Reform around requirements for temperature control devices

### Key Reform 1—Temperature control of heated water systems for fixtures used primarily for the sick or people with disability

Master Builders supports clarity and consistency in regulation and agrees that there is currently a lack of clarity around the requirements for temperature control of heated water systems. We therefore support the proposal to amend the Queensland Plumbing and Water Code to remove this ambiguity. The other options (3a maintain status quo and 3b address via an industry newsflash) will not address the root cause of the problem and as such will allow the ambiguity to continue.

1a. Do you support maintaining the status quo?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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1b. Do you support addressing the issue solely via an industry newsflash?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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1c. Do you support amending the QPW Code to provide clear direction that heated water temperature delivered to sanitary fixtures intended for use by older people, the sick, children or people with disability should not exceed 45°C?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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### Key Reform 2—Introduce a register for the testing and maintenance of Temperature Control Devices fitted to heated water systems

2a. Do you support maintaining the status quo?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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2b. Do you support mandating a register to record the installation, testing and servicing of TCDs for all high-risk installations e.g. schools, childcare facilities and private residential care buildings, based on existing backflow register and testing requirements?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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2c. If you support the proposed register (Option 2b), who should be responsible for administering the register—QBCC or each local government?

N/A
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### Key Reform 3—Requirements for temperature control devices to be fitted to heated water systems

Master Builders supports clarity and consistency in regulation and agrees that there is currently ambiguity around the requirements for temperature control devices. We therefore support the proposal to amend the Queensland Plumbing and Water Code to remove this ambiguity. The other options (3a maintain status quo and 3b address via an industry newsflash) will not address the root cause of the problem and as such will allow the ambiguity to continue.

3a. Do you support maintaining the status quo?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
------------------------------	--

3b. Do you support addressing the issue solely via an industry newsflash?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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3c. Do you support amending the QPW Code to provide acceptable solutions for the requirement of temperature limiting devices including the repair, replacement, relocation or extending and modifying an existing heated water system?

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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### Key Reform 4—Requirement of delivered heated water temperature in building class 5,6,7,8,9,10

4a. Do you support maintaining the status quo?

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
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4b. Do you support deletion of SPDR Section 12?

<input checked="" type="checkbox"/> <b>Yes</b>	<input type="checkbox"/> <b>No</b>
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## Orientation of collectors for solar heated water systems

1. Do you support keeping the requirements to orientate collectors for solar heated water systems within 45 degrees of north?

<input type="checkbox"/> <b>Yes</b>	<input checked="" type="checkbox"/> <b>No</b>
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2. Do you support allowing the solar collectors of solar heated water systems to be installed within 90 degrees of north?

<input checked="" type="checkbox"/> <b>Yes</b>	<input type="checkbox"/> <b>No</b>
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3. Do you support developing an acceptable solution that takes into consideration the number and type of solar collectors utilised for a solar heated water system?

<input type="checkbox"/> <b>Yes</b>	<input checked="" type="checkbox"/> <b>No</b>
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4. Do you support allowing the solar collectors of solar heated water systems to be oriented in accordance with the manufacturer's instructions?

<input checked="" type="checkbox"/> <b>Yes</b>	<input type="checkbox"/> <b>No</b>
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## D. Queensland Housing Code

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**Do you believe that the proposed Queensland Housing Code promote greater affordability for people buying a new home in your local area?**

Yes, the Code is an opportunity to facilitate best practice and to realise efficiencies in the planning and building processes, helping to make housing more affordable.

**Do you agree that smaller lots are necessary to make homes more affordable in your area?**

Yes in some areas. A variety of lot sizes also increases the opportunity for consumer choice.

**When buying a new home, what factors do you consider most important? (Rate each option from 0 to 5 with 0 being the least important and 5 being the most important)**

From the builder's perspective the most important factors are:

- 5 Affordability
- 5 Covered outdoor entertainment area
- 5 Space between my house and my neighbour's house at the sides and back

**Do you think all the houses in a particular suburb should be set back the same distance from the street?**

No, flexibility in setbacks provides the opportunity to be responsive to individual site characteristics and consumer preferences.

**Do you think one set of rules for setbacks and other siting aspects of new housing should be applied across the whole of Queensland regardless of the location?**

Yes, this will give clarity and certainty when looking at purchasing land and choosing the house design that will suit the land.

**Do you think your local council should have the choice to decide on the siting and design rules that suit your local communities?**

No, if the benefits of a Queensland Housing Code are to be realised, it must be mandatory across the state.

**What are the factors the government needs to think about when deciding which siting rules should apply in any particular area? (Rate each option from 0 to 5 with 0 being the least important and 5 being the most important)**

- 2 The existing character of the area (i.e. heritage or more modern)
- 1 Making room for trees on lots
- 1 Making room for trees on the streetscape
- 1 The climate of the region
- 5 Whether housing in the area is affordable to local people
- 5 Making it easier for people to get a building development approval

Other:

N/A

## E. Reconfiguring a Lot Code

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1. Do you support the proposed RaL Code proposal?
  - A. Would support innovative approaches to housing?
  - B. Would support greater housing diversity?
  - C. Would support greater housing affordability
  - D. Other?

Master Builders supports the proposed RaL Code as a mechanism to help realise innovative approaches to housing, greater housing diversity and greater housing affordability.

Rate your level of support between 1 to 5, with '1' being a low level and '5' being a high level.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 5
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2. How can we achieve a clearer understanding of the roles of the planning and building systems? Will the Queensland Housing Code and RaL Code together help achieve this?

Yes, the Queensland Housing Code and the RaL Code will help achieve a clearer understanding of the roles of the planning and building systems.

3. Do you think the RaL Code should be mandatory or optional? Why?

Mandatory as it is working together with the Housing Code which also needs to be mandatory.

4. Do you think the RaL Code should be applied everywhere or just in new urban release areas? Why?

The RaL Code should be applied everywhere. Variations could be accommodated by way of the subdivision application.

5. Have you experienced inconsistent requirements between a development approval issued by a council and a building approval issued by a certifier? If YES please provide examples?

No

- 6. Do you support introducing a requirement that, in relation to defined categories of significant development, certifiers must obtain advice from the local government in relation to the consistency of the building plan with the planning approvals and planning scheme requirements generally? This will provide an opportunity to provide clarity and guidance to council and industry (including certifiers) about the respective roles of a planning scheme and building controls such as the Queensland Development Code (which includes the Housing Code).**

No certifiers should not be required to obtain local government advice but local governments should provide timely advice about planning scheme compliance when requested.

The QBCC currently responds to complaints concerning private certifiers misinterpreting planning schemes. Timely advice from local governments would provide certifiers certainty that the development is in accordance with the planning scheme. Importantly it would reduce the number of complaints to QBCC about certifiers misinterpreting planning schemes.

**If YES, please indicate what categories of significant development should be referred to local government.**

N/A

- 7. Do you think any other changes are needed to the building or planning framework to address these issues? If YES, please provide suggested changes?**

No

## F. Building certification

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### 1. Do you support these proposals?

#### **A. Owners to obtain more inspections and call for a final inspection**

Master Builders is opposed to owners engaging certifiers to undertake more than the minimum mandatory inspections.

Building certifiers perform an important and clearly defined regulatory function. These responsibilities should not be mixed or diluted. Issues of quality control should be kept separate. Architects and builders are well qualified and experienced to undertake this role.

Where the builder has engaged the certifier, the builder should be solely responsible for notifying the certifier to carry out the mandatory inspections.

Under the terms of building contracts, (residential and commercial) builders control the building site and the execution of the building works. It would therefore be costly and disruptive to allow an owner to call for a final inspection when possibly, particularly in a commercial project, the works were not completed. The primacy of the written contract should be maintained and allowed to continue to serve as the tool where both parties (owner/builder) establish each other's responsibilities.

#### **B. Restrictions on the use of 'competent persons'**

No further restrictions on the engagement of competent persons are required.

What is needed to restore confidence in competent persons is a mix of industry education, auditing and appropriate penalties. All QBCC licensees, including relevant building professionals such as engineers and cadastral surveyors, should be required to attend education programs targeted at improving their knowledge and understanding on the use of Forms 15 and 16.

Certifiers should also be held more accountable for ensuring a competent person is in fact competent. The education program should therefore also include additional training for certifiers to help them better assess competent persons.

Master Builders also supports a demerit point system for certifiers similar to the one that exists for other licensees as another means for the Commission to address misconduct by certifiers.

#### **C. Requirement for a certifier to physically attend mandatory inspections**

Certifiers should not be required to physically attend mandatory stage inspections where a competent person is attending (excluding the final inspection).



The current legislative requirements for mandatory inspections are adequate if the schedule is set by the certifier, builder and competent persons. To require both the certifier and their competent person carry out a site inspection is duplicating the inspectorate regime and increasing cost for the consumers with no benefit for building owners or the industry.

The building certification system would not be able to operate effectively without the assistance of competent persons. There are just not enough certifiers available to attend every mandatory inspection without causing delays. Forcing certifiers to attend every mandatory inspection will have the effect of increasing construction schedules, delaying completion and forcing up building costs, while delivering no real benefits.

While it has been suggested that a fourth “inspector” level be created to undertake building inspections, a suggestion Master Builders supports, it nevertheless takes time to gain the technical and practical skills to perform a certifier’s role competently. While an increase through this level will assist these “inspectors”, they will still not be qualified to carry out inspections on all classes of buildings and structures. It will not alleviate the need to continue to use competent persons who are specialists in particular aspects of construction.

#### **D. Mandatory inspections for fire separation in duplexes and townhouses**

Master Builders supports the requirement for including passive fire separation elements (fire separating walls, floors and penetrations/collars) in the mandatory minimum inspections requirements for duplexes and townhouses and indeed for all classes of buildings. However, given the various nature of the materials used in the construction of separating wall (fire wall and smoke walls) systems it would not be feasible to require a certifier to physically undertake these inspections.

The installation of the components of the system should be self-certified by the licensee installing the system. On completion of the separation wall, it should be inspected and certified by a competent person.

It is also important at the final inspection of the completed building, for there to be a re-inspection of the separation wall and other passive fire elements prior to issuing a final certificate or a certificate of classification. This will ensure the separating wall system has not been compromised during the installation of other services.

#### **E. Local government sole responsibility for taking enforcement action**

Master Builders supports the proposal to allow local government to have sole responsibility for taking enforcement action, so certifiers are no longer required to do this.

Further consultation is required, however, on the proposed obligation for the certifier to notify the QBCC about particular defect-related items. Certifiers should not be expected to fulfil the role of a builder’s “supervisor”. Any items referred by the certifier to the QBCC should be restricted to the certifier’s proposed enforcement actions only.

#### **F. Tightening the rules for engaging a certifier**

Master Builders strongly supports retaining the current private certification system. The builder has the right expertise to engage and coordinate the certifier for the building works being undertaken.

Allowing the builder or the owner to engage the certifier (private or local government) has reduced the time and cost of building approvals. Better communication, through the timely sharing of information, will lessen the perception of conflict about who “owns the certifier”. Irrespective of who engages the certifier, the builder and the owner should therefore be given a full copy of the approved drawings and any other documents relevant to the building development process (including inspection certificates and the contract of engagement for certification services).

#### **G. Tightening the rules for disengaging a certifier**

Master Builders does not support the requirement to have QBCC approval to disengage a certifier.

While recognising the role of the certifier as the regulator, there to protect the public interest, adding QBCC approval would only add delays and costs to construction. As an alternative, we recommend that the QBCC monitor whether there are contractors abusing their role and require that certifiers notify the QBCC when they are disengaged.

#### **H. Waterproofing**

Master Builders supports the proposal to require licensed building contractors to install all waterproofing regardless of the value of work performed. That is the threshold for requiring a license should be set at \$0.

Licensed builders should be able to complete waterproof work on their own projects.

#### **I. Clarify the role of the building certifier in ensuring planning requirements have been met as part of a building development application**

Master Builders supports the proposal for local governments to provide timely advice to private certifiers about planning scheme compliance prior to the certifiers issuing their approval.

The QBCC currently responds to complaints concerning private certifiers misinterpreting planning schemes. Timely advice from local governments would provide certifiers certainty that the development is in accordance with the planning scheme. Importantly it would reduce the number of complaints to QBCC about certifiers misinterpreting planning schemes.

#### **J. Introducing a single ‘Certificate of Occupancy’ model for all buildings**

Master Builders supports a single ‘Certificate of Occupation’ for all buildings so long as the restrictions on occupation prior to obtaining a certificate (currently only for class 2-9 buildings) will not apply to houses (detached class 1a buildings). There is no identified risk that would be addressed by delaying access for people to their own homes.

## **K. Limit civil action to 10 years**

Master Builders supports limiting liability to ten years for building certifiers and further recommends that this be extended to all licensed contractors.

Currently contractors can be sued in perpetuity for defective building work. Queensland is one of the few jurisdictions where uncapped liability remains. Just the prospect of being sued can cast a shadow over a business, causing significant angst and driving perverse and costly outcomes. The issue has a disproportionate effect on smaller family business, which make up the largest proportion of the industry.

The current situation encourages the calculated use of business structures, where companies fold and new companies form. For a family looking to pass on the business to the next generation but without passing on an unknown liability, this comes at a significant cost (in the order of \$20,000 or \$30,000).

Amending the *Limitations of Actions Act 1974 (Qld)* to limit a contractor's liability to a period of 10 years will bring Queensland into line with the majority of other states and territories, while still providing reasonable accountability for defective building work.

## **L. Accreditation of certifiers**

The QBCC should take on responsibility for the accreditation of building surveyors and building certifiers. The requirements for accreditation must be rigorous and transparent. They must be applied impartially and consistently. An industry association cannot be sufficiently removed from the eventual licensees and future members to ensure that the accreditation process is completely independent of their other functions. Any accreditation scheme is therefore best left with the government regulator who will also issue a licence, the QBCC.

Several other jurisdictions already require the regulator to assess qualifications and experience prior to issuing a license, namely New South Wales, Victoria, Western Australia, the Northern Territory and Tasmania.

Further, QBCC accreditation of certifiers will help the government to achieve outcomes under a number of policy themes identified in the government's proposals at Attachment 1.

- a. 'Supporting building certification' by encouraging more people into the profession. It will put the government in a better position to take a "leadership or coordination role to ensure that that there is an overarching strategy for ensuring the ongoing viability of the profession".
- b. 'Increasing accountability' by improving CPD for certifiers. The current lack of regulator review and oversight of the CPD program is a concern. The loophole for those becoming licensed by way of mutual recognition and therefore not being required to undertake CPD must be closed. A seamless CPD administration by the QBCC across all the license classes would be the most effective and efficient approach.
- c. 'Improving processes' by increasing transparency in the licensing and accreditation framework. Devolving responsibility for assessing qualifications and experience to third parties creates a lack

of transparency in the accreditation process. This can only ever be comprehensively addressed through accreditation by the regulator.

### **M. Lapsing building approvals**

Master Builders supports the introduction of standard lapsing times for building approvals and the ability for a certifier to extend or reinstate an approval.

Currently, there are provisions governing the lapsing of building approvals under the *Planning Act 2016* and the *Building Act 1975*. While the Planning Act allows building approvals to continue indefinitely provided the work has been started, the Building Act gives the certifier discretion about whether to set and enforce a time limit. This discrepancy can result in an inconsistent approach being taken among certifiers.

Amendment to the legislation will bring clarity to the current provisions, while still allowing flexibility for specific circumstances.

## **2. What do you think about a model that uses a systematic allocation of building certifiers?**

- a. If you support that proposed model, should there be a standardised fee structure for certification services?
- b. Do you think the proposed model will result in additional costs or delays for property owners or industry? If so, what sort of costs and delays might be involved?
- c. Do you agree that the QBCC is the most appropriate entity to be responsible for allocating certifiers to projects?

Master Builders supports retaining the current private certification system and is strongly opposed to the 'cab rank' model for allocating certifiers.

Allowing the builder or the owner to engage the certifier (private or local government) has reduced the time and cost of building approvals. The Commission's own records of complaints against certifiers suggest that the private certification system in Queensland is operating at a very high level. There is no evidence to support the assumption that a perceived conflict of interest for certifiers is causing the current system to fail.

Of the current complaints, a high percentage are from local authorities and concern private certifiers allegedly misinterpreting planning schemes. Importantly there have been few issues with non-complaint building work overall. A new 'cab rank' style model will not address planning matters. It will only go so far in dealing with conflict of interest as the under the proposal, even though the QBCC nominate the certifier, the builder or owner will still pay the certifier.

Furthermore, the new system will add delays and cost to construction. Additional time for the lodgement and out sourcing to certifiers will be added to the overall certification process for each project whether that be a swimming pool, carport, a major commercial build or a new international air terminal. It will also present logistical difficulties, particularly in remote locations. The significant resource implications for the QBCC must also be considered.

There will be decreased service levels due to the lack of competition in the market. With each certifier, being handed a job as it turns up to the "rank" there will be no motivation to improve the quality of the service. There is also a concern that certifiers who lack the right experience for a particular construction type might be assigned to the job. A strong relationship with the certifier is important in delivering a quality project. This proposal will sever those relationships and make it more difficult to get answers to questions as they arise, leading to issues being ignored or avoided.

There will be significant negative impacts for existing private certifiers and certification companies, perhaps affecting the viability of their businesses. Relying on the QBCC to hand out work will create a greater level of uncertainty on the amount of work coming to the company, putting into question the need for staffing levels and other vital resources.

## G. Non-conforming building products

It is clear that there needs to be improvements to the regulatory framework around non-conforming products. The lack of an effective and overarching mechanism for identifying and addressing non-conforming products is key concern for industry.

Removing non-conforming products from our buildings and construction sites is too late. Our efforts must be front loaded and focused on supply. More must be done to remove non-conforming products at the point of sale.

More must be done to provide specifiers, purchasers, installers and certifiers with a clear mechanism to determine whether those products which continue to be sold are fit-for-purpose.

Going forward it is important to better understand the regulatory framework of the whole building supply chain. It is not appropriate to have the building compliance framework do the work of the manufacture/supplier compliance framework.

Similarly, a national approach is needed. Products are rarely manufactured, supplied and installed in one state jurisdiction. State based solutions will always be limited in their effectiveness in tackling this borderless problem.

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### 1. Do you support the proposals for the QBCC to have the following powers?

#### A. Auditing and investigating buildings that are not active building sites

It is not clear what additional powers are being sought here. The QBCC already has the power, at the owner's request to investigate completed buildings and has a responsibility up the 6-year warranty period. Does the QBCC want the power to investigate buildings after the 6-year period? The power to audit buildings without the owner's permission?

Before expanding the powers of the QBCC, further consideration should be given to the existing powers of the Office of Fair Trading, the Electrical Safety Office, Workplace Healthy and Safety Queensland and Queensland Fire and Emergency Services. From the Department's fact sheet – "the Office of Fair Trading can take action when false or misleading information is given about building products. Any action could be coordinated through the Queensland Building and Construction Product Committee which is also already in place.

Auditing completed buildings without taking steps to prevent non-conforming products entering the supply chain will be tackling the problem 'after the horse has bolted'. Many problems, like structural issues for example, will be difficult to identify at this late stage.

### **B. Entering a building, taking samples for testing and seizing evidence**

Yes, Master Builders supports the QBCC entering a building, taking samples for testing and seizing evidence.

In addition, the existing powers of the Office of Fair Trading, the Electrical Safety Office, Workplace Healthy and Safety Queensland and Queensland Fire and Emergency Services could be used and any action coordinated through the Queensland Building and Construction Product Committee.

### **C. Requiring parties other than building industry licensees, such as retailer or manufacturers, to produce information about alleged NCBPs**

This is critically important. More must be done to tackle non-conforming products at the beginning of the supply chain. Suppliers must be held to account and know that non-conforming products cannot be supplied without recourse.

This task will continue to be beyond the reach of any one agency and must be coordinated across government and nationally, making the work on the Queensland Building and Construction Product Committee important.

### **D. Declaring a building or building site unsafe**

Yes, Master Builders supports the QBCC declaring a building or building site unsafe.

In addition, the existing powers of the local authority, Electrical Safety Office, Workplace Healthy and Safety Queensland and Queensland Fire and Emergency Services could be used and any action coordinated through the Queensland Building and Construction Product Committee.

### **E. Directing rectifications of an unsafe building or building site**

The QBCC already has the power to direct rectifications of defect work. Is the proposal to extend these powers? And if so in what way? It is not possible to comment until the scale and scope of the additional powers is clear.

### **F. Prosecuting offences related to supplying or installing an NCBP**

Yes, Master Builders supports regulators prosecuting offences related to supplying or installing a non-conforming product.

The QBCC could undertake this role is adequately resourced. Alternatively, the Office of Fair Trading already has this role for consumer products, which could be expanded to cover building products. The QBCC's expertise would be provided by way of the Queensland Building and Construction Product Committee.

It would be important to demonstrate how the regulator can be effective in tackling the beginning of the supply chain and how it would be effective across other state jurisdictions.

### **G. Applying to charge a cost recovery fee for any evidence-gathering and testing of proven NCBPs**

We recommend that the same framework that is currently used by the Office of Fair Trading for consumer products be adopted. As under Australian Consumer Law the supplier is responsible for supplying products that are 'fit for purpose' that any cost recovery fee should be borne by the supplier.

### **H. Enshrining the Queensland Building and Construction Product Committee (or similar) in legislation**

While we have no objection to the Committee being enshrined in legislation it is not yet clear what this would be achieve.

From an industry perspective, it is important that this group has clear roles, responsibilities and processes. That is, it effective and transparent – sending out a clear message of “not on our watch”. These are issues of governance and resourcing.

### **I. Giving the Minister or the QBCC power to ban or prohibit an NCBP**

There should be a mechanism for banning and recalling NCBP's. Master Builders supports either the QBCC or the Minister having this power.

In addition, the Office of Fair Trading and the ACCC already have this power for consumer products, which could be expanded to building products. They have shown an ability to do this in the case of the high profile failure of Infinity Cable. Action by these agencies could be coordinated through the Queensland Building and Construction Product Committee. They are also well placed to coordinate any action nationally.

## **Have we missed anything?**

Removing non-conforming products from our buildings and construction sites is too late. Our efforts must be front loaded and focused on supply.

More must be done to remove non-conforming products at the point of sale. More must be done to provide specifiers, purchasers, installers and certifiers with a clear mechanism to determine whether those products which continue to be sold are fit-for-purpose as defined under the National Construction Code.

### **Third-party certification**

Over time an incredible patchwork of resources has evolved to address different parts of the wider problem. These resources are the best opportunity we have for making a start in tackling the problem. While extensive, the current patchwork system is unwieldy. At last count, the Australasian Procurement and Construction Council<sup>2</sup> reported on 34 different schemes and sources of information to establish product conformity. There is then, the great disparity amongst the schemes as to the quality of assessment, level of auditing and checking for fraudulent documentation.

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<sup>2</sup> Procurement of Construction Products: A guide to achieving compliance, 2<sup>nd</sup> Edition, December 2015



The complexity of the existing arrangements makes it impossible to navigate with confidence. Similarly, it is unreasonable and unrealistic to expect that those in the construction industry will be able to test and evaluate each product that they are responsible for procuring. Construction would come to a halt. There is a role for Government to ensure that the current suite of individual certification schemes work within an overall product certification system that has a regulated framework, is better coordinated and is easier to assess the validity of compliance. There is a role for Government to ensure that the individual schemes are meeting an agreed minimum benchmark and to make it easier to recognise when that benchmark has been met.

We therefore continue to advocate for Government endorsement and common labelling of existing third party product certification schemes that meet the following minimum requirements:

- a. accredited through the JAS-ANZ;
- b. includes product conformity requirements for type or batch (ongoing) testing to Australian or international Standards as appropriate, as well as a process for ongoing, periodic auditing; and
- c. undertakes market surveillance to identify and weed out fraudulent activity.

The development of new schemes within an overall certification system, both by Government and industry, should be supported and encouraged until we have a comprehensive system that covers all the key product types. CodeMark, WaterMark and the Electrical Equipment Safety System should be seen as being part of the overall product certification system and should be resourced to provide effective certification for the products that they cover.

Such an approach is illustrated in the following diagram:



We stand ready to contribute a user’s perspective to this effort and direct members to the new resource.

We understand from the most recent Building Ministers’ Forum Communiqué that the Senior Officers Group has now been tasked with exploring “the practicality and benefits of a third-party certification for building product conformity”. We are keen to see the outcome of this work. Similarly, we are keen to see the outcome of the Senior Officers Group work to be published during the first half of 2017.

A ‘one-stop-shop’ the form of a national website as originally proposed in the “Strategies to Address risks Related to Non-conforming Building Products” by the Seniors Officers Group could be an important first step in bringing the current system together as a coherent whole. We recommend therefore that you undertake this task as a priority.

### National reporting

We recommend that the Government consider a centralised, reporting system to identify and report failures of construction products in Australia.

The Queensland Building & Construction Product Committee is currently the only centralised reporting mechanism for non-conforming products in Queensland (maybe even Australia) and as such, it has the potential to serve as a tool in capturing and sharing instances of non-conforming products. Queensland is not a closed market however, and to be fully effective we need to be able to share and act on information across all Australian and even international jurisdictions.

There is an opportunity to model any proposed scheme on the international CROSS (Confidential Reporting on Structural Safety) scheme operating out of the United Kingdom. The scheme, international in scope, collects, analyses and publishes reports about failures and the safety of structures so that engineers can learn from the experiences of others. Names of authors are confidential and identifying features are removed. When a trend is detected, action is taken to influence changes in culture and, when possible, in UK standards or legislation. A search of the CROSS database already returns examples of product failures that have occurred in Australia. Engineers Australia has undertaken research into the application of CROSS in an Australian context and is happy to share its findings.

The Australian Government already operates a confidential reporting scheme for the aviation industry. REPCON is the Aviation Confidential Reporting Scheme run by the Australian Transport Safety Bureau. It could serve as an example for a similar scheme covering construction product failures.

## **Penalties**

Further consideration should also be given to increasing the penalties for non-compliance, in particular deliberate misrepresentation by suppliers. There are examples in the United States of self-funding surveillance programs that could prove useful in Australia. Once again, the Office of Fair Trading with experience in consumer products would be well placed to undertake this role.

## **Review of Australian Standards**

Currently, many Australian Standards, including those referenced in the National Construction Code, include only 'informative', broad guidance for demonstrating product compliance. Currently two thirds of product Standards are 'unregulated' which means that there is no requirement in the standard to test a product to ensure that it meets the standard. The Standards should be explicit and 'normative' in the case of safety critical or structural products. For these products, it would mean the introduction of third party certification and would impose a cost that is already being carried by reputable manufacturers.

Australian Standards have an existing review process involving industry working groups. It is important that the industry representation on these groups include not only manufacturers but also those in the construction industry who specify, purchase, install and certify products that go into buildings to ensure that issues of product compliance are appropriately addressed. Any review should also address the interrelations between Australian and international standards.

There may also be an opportunity to improve the conformance framework through changes to the National Construction Code (evidence of suitability) and Workplace Health and Safety Codes. We suggest that this be considered in more detail.

## 2. Are there any concerns with increasing the powers of the building regulator as proposed? If not, are there particular powers you think should be introduced or strengthened?

While Master Builders supports the building regulator having the powers to tackle this important issue, we holds concerns with the building compliance framework being put forward as the sole response. At best, this will only ever be able to tackle the problem at the back-end, after products have been found to fail in our buildings. NCBP's must be stopped at the point of supply, before they reached our worksites and before they are installed in our buildings.

Similarly, it is important that as a problem of product supply, that suppliers and manufacturers be held to account. To do this effectively will require cooperation across a number of agencies increasing the need for an effective Queensland Building and Construction Product Committee. Further, in addition to the QBCC being empowered to prosecute suppliers of NCBPs, the regulators charged with product safety, the Australian Competition and Consumer Commission and the Queensland Office of Fair Trading must also be properly and adequately resourced to enable them to play their role in tackling the supply of non-conforming products.

There needs to be a national response to this borderless issue. If the response is to be effective, the QBCC, as a state agency, must find ways to work across borders.

## 3. Who should pay to cover the costs of testing any suspected non-conforming building products?

As under Australian Consumer Law the supplier is responsible for supplying products that are 'fit for purpose' and any cost recovery fee should be borne by the supplier.

## 4. Do you think the Minister should be able to ban a NCBP? Or do you think this power should rest with Queensland's building regulator?

There should be a mechanism for banning and recalling NCBP's. Master Builders supports either the QBCC or the Minister having this power.

In addition, the Office of Fair Trading and the ACCC already have this power for consumer products, which could be expanded to building products. They have shown an ability to do this in the case of the high profile failure of Infinity Cable. Action by these agencies could be coordinated through the Queensland Building and Construction Product Committee. They are also well placed to coordinate any action nationally.

## H. Inclusive communities

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Master Builders would support any proposal where the net benefit to the community have been demonstrated by way of a rigorous cost-benefit analysis.

It would also be essential that any requirements were clearly defined and applied consistently by way of the National Construction Code or an Australian Standard.

# I. Liveable housing design

## Voluntary options

### Option 1 - Providing a financial incentive to new homebuyers to include a minimum 'Silver Level' of design features in new dwellings

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would provide financial support for new homeowners to include liveable housing design	No need to provide financial support to new homeowners to include liveable housing design
Would encourage uptake of liveable housing design in new dwellings	Only supports new homeowners, not existing homeowners
Would save new homeowners with potential retrofit costs in the future	Would be an additional cost to government
Would assist to reduce need on community support services	

Rate your level of support between 1 to 5, with '1' being a low level and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 5
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### Option 2 - Updating Economic Development Queensland's Accessible Housing Guideline to include increased requirements for liveable housing design in new dwellings in its Priority Development Areas

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would potentially increase the proportion of new dwellings with liveable housing design delivered by EDQ	No need for EDQ to increase the proportion of new dwellings with liveable housing design
Would signal the growing importance of liveable housing design to industry	Would add cost to the delivery of EDQ's new dwellings
Could promote wider industry adoption given EDQ's role as a major housing provider	

Rate your level of support between 1 to 5, with '1' being a low level and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input checked="" type="checkbox"/> 4	<input type="checkbox"/> 5
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**Option 3 - Developing case studies and display homes in partnership with industry to promote liveable housing design to builders and consumers**

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would increase industry's practical understanding about liveable housing design	General interest may not result in widespread uptake of liveable housing design
Would increase community awareness about liveable housing design	May only generate limited engagement from housing providers
Would provide opportunities to visit and experience homes with liveable housing design features	Display homes would only be available to visit in certain locations

Rate your level of support between 1 to 5, with '1' being a low level and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input checked="" type="checkbox"/> 4	<input type="checkbox"/> 5
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**Option 4 - Building a partnership to raise awareness of liveable housing design and build industry capability to deliver houses to a minimum Silver Level of liveable housing design**

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would engage with motivated stakeholders and practitioners	General interest may not result in widespread uptake of liveable housing design
Would be able to increase industry awareness through partner's established networks	Partnership would rely on motivation and resources of interested parties
Would promote a collaborative approach through shared experiences and understanding	Uncertain roles, responsibilities and budgets of multiple parties

Rate your level of support between 1 to 5, with '1' being a low level and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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**Option 5 - Work with the real estate industry to develop a recognisable icon for real estate marketing of houses that already include liveable housing design features so they are readily identifiable to consumers.**

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would be able to easily identify dwellings with liveable housing design features	Not seen as a priority
Could be used as a tool to promote market advantage	Would need ongoing resources to maintain promotion and awareness
Would increase community and industry awareness about liveable housing design	May only be used by a limited number of real estate agents

Rate your level of support between 1 to 5, with '1' being a low level and '5' being a high.

<input type="checkbox"/> 1	<input checked="" type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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## Mandatory/regulatory options

**Option 6 - Mandate a minimum standard (Silver Level) of liveable housing design for all new residential dwellings by 2020 by developing a new mandatory part of the Queensland Development Code (QDC). Some exemptions could be considered e.g. steep properties and very small lots.**

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Recognises the need for more inclusive communities and ageing population	Would add to the cost of new dwellings
Would support the original agreement to achieve 100 per cent uptake by 2020	May not be able to include liveable housing design with all new dwellings e.g. steep sites
Would save new homeowners with potential retrofit costs in the future	Should only be a consumer choice
Would assist to reduce need on community support services	Industry does not have widespread capacity to adjust to such a requirement
	Other: There will also be the additional cost of revising house designs and marketing material

**Option 7 - Require all Livable Housing Australia compliant properties to be registered on a publicly available centralised database to enable consumers seeking liveable housing to easily locate suitable properties.**

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would be able to easily identify dwellings with liveable housing design features	Not seen as a priority
Could be used as a tool to promote market advantage	Would need ongoing investment to maintain awareness and database
Would increase community and industry awareness about liveable housing design	Should be choice to register the dwelling, not a requirement
	Other: Will create additional certification costs



## J. Licensing reforms

In addition to our response to the questions provided below, we ask that the review be expanded to ensure that all current license classes (including Scope of Work & Technical Qualifications) reflect modern building techniques and practices. This would serve to address the anomalies in the current system of which the following are just a few examples:

- Builder Medium Rise is restricted to a 3-storey walk up project. In practice, however a medium rise project would be considered any building up to 15 storeys.
- The technical requirement for the Passive Fire Protection – Fire and Smoke Walls and Ceilings Occupational is for the license holder to hold a Certificate III in wall and ceiling lining. However, the relevant unit of competency specifically relating to this work is an elective unit of competency and is rarely delivered.
- Builder Project Management Services License requires the Advanced Diploma of Building & Construction. This qualification does not contain any project management units of competency and does not include units relating to the administration of building contracts.

Licensing reform should also look to ensure that each of the technical and business core competencies are addressed in the builder qualification. As has been done in other state jurisdictions, the QBCC should assess the technical and business competencies included in the Certificate IV in Building and Constructions (Building) and Diploma of Building & Construction (Building). Where these are found to be lacking, the QBCC should require additional training and/or competency evidence from license applicants.

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## Roofing (stormwater)

### 1. Do you think there is a need to introduce a new roofing (stormwater) licence class in Queensland requiring a plumber's licence?

No, there is no identified need to introduce a new roofing (stormwater) license in Queensland. The work is adequately regulated by way of the existing licensing arrangements. Further, restricting the license classes able to do this work will increase the cost of work and increase wait times, potentially exposing buildings to further water damage.

The precedent drawn from Victoria is an unfair equivalent. Victoria does not license all trade classes. They do however, license plumbers. To ensure that roofing work is undertaken by a licensed person, it has therefore been necessary to include this category of work under a class that is licensed – plumbers.

In Queensland, consistent with Modern Award coverage and definitions, the QBCC regulates roof fixers across a number of discrete licence categories, and none requires a plumbing trade outcome. Competencies are identified in the licence and reflect the skills required to perform work under the licence. This system of recognition is profoundly important.

QBCC licencing reflects the progression of competency based training packages in all industries and follows on from twenty years of workplace reform and job design. Long gone is the view that a person needs to hold a raft of unnecessary competencies - 'the full trade' - in order to perform the set tasks with skill and recognition.

It makes no sense to undo the current framework of compatible training, awards, and licencing which has eliminated narrow, artificial demarcations of the past.

Prior to any change in the licensing requirements, the QBCC must first undertake an analysis of its defects data to understand the exact nature of the problem and pin point the current failings. Any recurring problem, once identified, could then be addressed by way of the relevant roofing competencies. That is requiring an additional roofing competency that could be undertaken by each of the license classes able to undertake this work.

Should the government continue with this proposal, it must be underpinned by a full cost benefit analysis.

**1. If a roofing (stormwater) licence is introduced in Queensland:**

**a. what should the scope of work include?**

**b. what technical qualifications should be required to obtain the licence?**

It should not be introduced.

**2. What impact will the introduction of a roofing (stormwater) licence have on:**

**a. industry**

**b. current licensees**

**c. current unlicensed individuals.**

Restricting the work to a separate roofing license class, requiring a plumber's license, would significantly restrict the number of license holders who could undertake the work. This would jeopardise successful businesses who have been carrying out this work without fault, perhaps require them to cut back on staff.

It will reduce flexibility, reduce productivity, and increase costs in training and contracting.

On commercial construction sites, the introduction of the license will lead to more costs and disputes on who is the 'most' licenced to perform roofing work.

**3. Any other feedback?**

Nil

## Mechanical Services

**1. Should a new mechanical services licence class be introduced in Queensland?**

This work is adequately covered by existing license classes and there is no identified need for any change.

**4. If a mechanical services licence was introduced in Queensland:**

**a. What should the scope of work include e.g. refrigeration systems in a building, which relate to installing and commissioning air-conditioning systems, testing air-conditioning systems for leaks, repairing, altering and maintaining air-conditioning systems and components and the completion of any compliance documentation regarding the handling of gases?**

**b. What technical qualifications should be required to obtain the licence?**

N/A

**5. What impact would the introduction of a mechanical services licence have on:**

**a. industry**

**b. current licensees**

**c. current unlicensed individuals.**

It will prevent a number of qualified licensees from undertaking work that they have been carrying out without incident. This will undermine their businesses and perhaps require them to cut back on staff.

**6. Any other feedback?**

N/A

## Continuing Professional Development

**1. How can QBCC encourage widespread industry participation in the CPD scheme?**

Master Builders supports the implementation of a mandatory, industry wide CPD scheme.

Such a scheme, if relevant and targeted could successfully raise industry standards and tackle ongoing problems.

Any CPD scheme should be mandatory for all license holders in all license classes, including the Supervisor License Classes. The construction industry is compliance driven, therefore opt-in or voluntary schemes are not appropriate. The scheme should include penalties for failure to complete the minimum requirements.

**2. How many CPD points should a licensee be required to obtain each year? Should certain licence types or classes be required to obtain more points than others?**

As a start, Master Builders recommends a range of six to twelve points per year where one point equals one hour.

The number of hours needs to be able to be broken down so that licensees can undertake a small amount each month. The CPD requirement should be the same across all license classes, however the content of the actual CPD material should be targeted for builders and contractors.

**3. What topics should the CPD scheme include? What is the best approach for your licence?**

The annual CPD requirement should be split between technical and business CPD. CPD requirements should be targeted to the specific license class.

**4. What type of activities should be eligible for CPD points e.g. seminars, training courses, industry events, tertiary study?**

There should be a wide variety of options for licensees to gain CPD points. This includes membership of an industry association, training courses (nationally recognised, non-recognised and higher education), attendance at industry events and business coaching.

It is also important to learn from the lessons learned from the CPD programs in other states.

**5. What is the best way to deliver CPD activities e.g. online, face-to-face?**

The best way to deliver CPD is via face-to-face delivery. Master Builders understands this may have implications for regional and remote areas.

It is important to learn from the lessons learned in the National White Card Review. The review found significant issues with identity verification of the person undertaking the study. It is critically important that the actual license holder is the person undertaking the CPD activity.

**6. Who should deliver the CPD activities e.g. QBCC, industry groups, RTOs?**

Industry associations are best placed to deliver technical CPD, while business CPD could be delivered by both industry associations and RTOs. It would be a conflict of interest for the QBCC, as the regulator, to deliver CPD activities.

Industry associations represent and are led by those working in the industry. They therefore have first-hand knowledge of the challenges that need to be overcome and how best to address them. Industry associations also employ and have access to the industry's preeminent experts across many

aspects of building and construction. Industry associations share the government's objective to tackle the causes of defects and disputes, which can undermine our members' businesses.

All CPD activities should undergo an approval process by the QBCC. This allows the QBCC to control the CPD that is being undertaken as well as direct the relevant providers to develop a program based on data it collects, such as defects and BCIPA claims.

#### **7. What is the best way to record and report CPD activities?**

It should be the responsibility of the license holder to prove they have completed their CPD requirement at the time of their license renewal. Industry associations are well placed to support license holder with their annual submission. For example, Master Builders would be able to provide a certificate at the completion of each course with the number of points earned and a summary of total points earned within any given year.

## Automatic Mutual Recognition

#### **1. Should AMR be introduced in Queensland for selected building and construction licences?**

To maintain the integrity of our system in Queensland there should be no automatic Mutual Recognition for any license classes.

The proposed reform outlines the implementation of a system where a NSW contractor will still need to apply for registration/endorsement, effectively creating no real change.

#### **2. How likely would you be to work in other jurisdictions under the AMR model?**

N/A

#### **3. Are the proposed licence classes suitable for consideration for AMR?**

N/A

#### **4. What additional licence classes could be considered for AMR?**

N/A

#### **5. Are there any risks associated with adopting AMR in Queensland?**

Scopes of work are not exactly the same creating the potential for interstate contractors to undertake work in Queensland that is outside their scope.

Queensland would become reliant on other jurisdictions to manage the license holder. There is a risk that if NSW cancel or suspend a license they could still potentially operate in Queensland.

Training requirements across all states and territories for contractors to obtain their license is different. If approved, there will be contractors operating in Queensland with various levels of skills and knowledge yet are allowed to operate under the same scope of work.

## QBCC powers & functions

### 1. Should the QBCC's investigation powers be standardised for all license classes?

Master Builders would support the standardisation of investigation powers across all license classes.

### 2. Should the QBCC's investigator and investigator powers be:

- a. Standardised across PDA, BA & QBCC Act or
- b. Consolidated under a single Act i.e. the QBCC Act?

All powers should be standardised across legislative instruments but Master Builders has no opinion on what form they should take.

### 3. Are there any other aspects of the QBCC powers and functions that could be standardised?

No

### 4. Should the powers and functions of the STC be expanded to include other license classes?

No. The STC is already duplicating the powers and functions of the QBCC. There is no identified need to extend the duplication further.

### 5. If so, which license classes should be included in the STC's oversight?

N/A

## Gas licensing & administration

### 1. Would you support the proposal to transfer Type A gas work licensing and compliance functions to the QBCC?

Yes. Consolidating compliance into one regulator would be more efficient.

### 2. If Type A were to be transferred to the QBCC, would you support Type B remaining with the Department of Natural Resources & Mines?

No. It would be more efficient to bring all gas work licenses into the remit of just one regulator. As this is plumbing work, the QBCC should be that regulator.

**3. Would consolidating certain gas work licensing functions make the application process easier?**

Yes. It would remove the need to apply to two bodies.

**4. Should a license be required to undertake medical gas work?**

Yes. It is a component of building work.

**5. Is the QBCC best placed to regulate medical gas work or should this be done by another agency, e.g. Queensland Health?**

QBCC is the best placed to regulate medical gas work as it is a component of building work.

**6. What competencies and experience should be required to obtain a license for medical gas work?**

The current Gas License and four years' experience working under a license holder in the medical field.

## Monetary threshold

**1. Should the license work threshold be increased to \$5,000? Is there another amount for the threshold that may be more appropriate?**

Master Builders does not support the increase in the licensed work threshold to \$5000. Further, the general licence threshold should remain pegged to the threshold for Home Warranty Insurance for ease of compliance.

There is evidence in the number of defects and associated costs of rectification that support maintaining the current licensing threshold. Further, Master Builders believes that construction waterproofing that should be reduced to \$0.

**2. Should the threshold for incidental work and the Scheme also be revised to align with the threshold for licensed building work?**

The incidental work threshold should remain at \$3,300.

**3. What are the potential benefits and disadvantages for increasing the monetary thresholds under the QBCC Act?**

Increasing the monetary threshold will lead to more unlicensed building work. This could result in more defects, greater rectification costs and leave more consumers unprotected. This outcome would seem to be in direct conflict to recent moves by the government to offer an increased level of protection for consumers contracting in the residential sector.

## Plumbing

### 1. Do you support the removal of provisional licences?

Yes, the licensing system should be the same across all license classes.

### 2. If not, why should provisional licences be retained?

N/A

### 3. Do you support the introduction of an apprentice licence?

Master Builders does not support the introduction of a plumbing and drainage apprentice license.

The licensing system exists to define the work a licensee can carry out and take responsibility for, given their level of training and experience. Introducing a license class for plumbing and drainage apprentices would therefore need to define the work that an apprentice can undertake independently and be responsible for. This runs counter to WorkCover requirements for an apprentice to never work unsupervised. It will also muddy the distinction of who is responsible for their work and liable for addressing defects. Apprentices are not subcontractors and should not be treated as such.

Further, with the high dropout rate of apprentices, such a system would be difficult to administer. At what point in an apprenticeship do you issue a license? How do you license a 16 year old? How does a license system recognise evolving skills and learning?

### 4. Do you consider the inability to identify apprentices on building sites a problem that needs addressing?

The easy identification of an apprentice onsite has its merits but within the overall context of this review, it is a minor issue. Being an apprentice indicates that you lack experience on a building site. Building sites are dangerous workplaces. Physically identifying them highlights their lack of experience to the rest of the site and may keep them safer. However, culturally within the industry this may cause retention issues.

If identifying apprentices is the issue, they should be required to hold an apprentice card, similar to a student card. The card could be issued by the apprenticeship training provider or industry association and must be on their possession while working onsite.



## K. Sustainable buildings – new houses & units

The best sustainable building outcomes for Queensland will always be realised through effective building design, well researched technologies and efficient assessment tools.

We should be careful in limiting sustainability options to the closed box solutions of rating tool check boxes and the assumption that tools, products and solutions that work in other states will be effective here in Queensland. A considered balance amongst the passive design principles of cross ventilation, shading and orientation will always deliver a more sustainable building that responds effectively to our unique Queensland climate.

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### Reform Options - building aspects

#### Option 1- Adopt the national 6-star (out of 10) standard for new residential units (class 2 buildings)

The current rating system provides a star rating that is averaged over the entire building complex (i.e. is not on a unit-by-unit basis). If there is a move to 6-star ratings for each individual unit, there will need to be different products, treatments, facades and building methods used on different parts of the building in order to accommodate the orientation, heating and cooling requirements. This is one example of complexity, and others include solar panel location, outdoor living space sizes, ventilations requirements and floor planning and design.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would align Queensland with the national standard	There is no need to adopt the national standard
Would match the standard for new houses	Would be an additional cost to new unit buildings
Could provide ongoing savings with electricity bills and improve occupant comfort	There is no need to match the standard for new houses
Would support carbon reduction initiatives	May only provide marginal benefit with ongoing costs and occupant comfort

**Option 2 - Investigate Queensland's 'optional credits' available for sustainable housing, including:**

**2a. Extending the credit for photovoltaic (solar) energy systems to new unit buildings (class 2)**

The reduction in carbon emissions that can be attributed to this change to the credits is negligible.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would reflect current market conditions for the minimum size of systems installed	Larger sized systems cost extra
Would provide greater ongoing savings with electricity bills	There is no need to increase the minimum size of systems to receive 1-star credit
Would support carbon reduction initiatives	

**2b. Increasing the minimum size of the photovoltaic (solar) energy system to gain 1 star credit with new houses**

There are design and cost implications, particularly in relation to the location of additional systems on roofs and the additional engineering to take additional weight. The increased carbon emissions required to manufacture and transport the additional products is also likely to outweigh any reductions.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would reflect current market conditions for the minimum size of systems installed	Larger sized systems cost extra
Would provide greater ongoing savings with electricity bills	There is no need to increase the minimum size of systems to receive 1-star credit
Would support carbon reduction initiatives	

**2c. Extending the credit for outdoor living areas for new unit buildings to all climate zones in Queensland**

Balconies that are currently being built are much smaller than the current required sizes to meet the credit requirements. To increase the credit would result in an increase in balcony sizes in a current market where balcony sizes are becoming trending smaller.

The suspended ceiling slab of the patio does not meet the required R-value of the credit. To add the extra insulation and ceiling lining would increase the cost and façade finish on the overall building, with the possibility of losing a level.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would provide consistency in how the credit can be used with all new units across Queensland	Extending the credit may not appropriately reflect potential energy savings in these climate zones
Would match the standard available for new houses	There is no need to match the standard for new houses

## 2d. Providing a credit for the inclusion of a solar hot water system with a new house

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would provide ongoing savings with electricity bills	Would be an additional cost to new homes buyers as they are the most expensive hot water system
Would promote the benefits of solar hot water systems	Limited life as a fixture so they should not be part of the house's energy efficiency rating
Could increase the uptake of solar hot water systems with new houses	Can easily be replaced by a less energy efficient hot water system
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with '1' being a low and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input checked="" type="checkbox"/> 4	<input type="checkbox"/> 5
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## 2e. The potential of a 'living roof' to improve the sustainability performance of new unit buildings

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would provide a better understanding about the benefits of living roofs for Queensland	The benefits of living roofs are already available from national and international studies
Could increase the uptake of living roofs with unit buildings	Not seen as a priority
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with '1' being a low and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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## Option 3—Establish a design review panel to assess the quality of new unit buildings

This is already the role of the architect. Introducing the additional requirement of a design review panel will add uncertainty, delays and possible cost to the process without any identified gain. There is no overwhelming issue with the current process that would justify this change.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Could provide improvements to the units building's design and construction based on expert review	Would be an additional cost to new unit building providers and home buyers

Could provide ongoing savings with electricity bills and improve occupant comfort	There is no need to establish a design review panel
Could provide greater amenity and aesthetic value for residents	Would slow down the building application process
Could support carbon reduction initiatives	

#### Option 4—Provide facilities for natural clothes drying with new unit buildings

This needs to be implemented on a voluntary basis. It will need to take into account the practicality of designing in such a feature on buildings that do not have the necessary space.

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would provide ongoing savings with electricity bills	Would be an additional cost to new unit buildings
Provides choice to residents for clothes drying	Will need extra space with the building
Takes advantage of Queensland’s warm climate	Could be difficult for body corporates to manage
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with ‘1’ being a low and ‘5’ being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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#### Option 5—Work with Economic Development Queensland (EDQ) to promote sustainable housing outcomes

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would provide practical learnings based industry’s experience with EDQ	There is already enough information available about sustainable housing
Would increase industry capability to deliver sustainable housing and gain market advantage	Takes time and resources to adjust house and unit designs
Would provide ongoing savings with electricity bills and improve occupant comfort	Not seen as a priority
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with ‘1’ being a low and ‘5’ being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 5
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**Option 6—Provide supporting information to promote the uptake of energy efficiency (passive design) principles for new houses and new unit buildings**

This information also needs to target the homeowner as well who will be responsible for the ongoing running and therefore energy use of the dwelling.

<input checked="" type="checkbox"/> <b>Yes</b>	<input type="checkbox"/> <b>No</b>
Would increase industry’s awareness about energy efficient design	There is already enough information available about energy efficient dwellings
Would increase industry capability to deliver sustainable housing and gain market advantage	Takes time and resources to adjust house and unit designs
Would provide ongoing savings with electricity bills and improve occupant comfort	Not seen as a priority
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with ‘1’ being a low and ‘5’ being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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**Reform Options - appliances and fixtures**

**Option 1—Adopt the national standard for energy efficient hot water systems (solar, gas or heat pump) to be installed with new houses (class 1 buildings)**

As the majority of Queensland properties do not have access to reticulated gas, gas hot water systems cannot be relied on to provide ongoing savings due to the additional cost of having to use and refill gas bottles.

<input type="checkbox"/> <b>Yes</b>	<input checked="" type="checkbox"/> <b>No</b>
Would align Queensland with the national standard	There is no need to adopt the national standard
Would re-instate the previous requirement for energy efficient hot water systems	Solar and heat pump systems are expensive to purchase
Some energy efficient hot water systems can provide ongoing savings with energy bills	Gas hot water systems do not provide ongoing savings with energy bills
Would support carbon reduction initiatives	Reduces choice of hot water systems

**Option 2—Provide supporting information to promote the installation of energy efficient hot water systems (solar, heat pump or gas) with new unit buildings (class 2), and at time of replacement in existing dwellings**

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would increase consumer’s awareness about energy efficient hot water systems	Some energy efficient hot water systems are expensive to purchase
Some energy efficient hot water systems can provide ongoing savings with energy bills	Some energy efficient hot water systems do not provide ongoing savings with energy bills
Would identify issues associated with energy efficient hot water systems and types of dwellings	Can be difficult to install an energy efficient hot water system in some dwellings
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with ‘1’ being a low and ‘5’ being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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**Option 3 - Promote connection of electric hot water systems on an economy tariff (i.e. an 'off-peak' electricity tariff)**

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would increase industry and consumer’s awareness about connecting to an off-peak tariff	Would be an additional cost to connect to an off- peak tariff
Connecting to an off-peak tariff can provide ongoing savings with electricity bills	Can be difficult and/or expensive to connect an off-peak tariff with an existing dwelling
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with ‘1’ being a low and ‘5’ being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 5
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**Option 4 - Require the installation of an expansion control valve on the cold water inlet of all new pressurised hot water systems**

Whilst these valves are generally inexpensive to install or retrofit in the first instance, the ongoing maintenance of these and the labour costs to replace them (on average every 3-4 years) are greater than the gain that comes from having them installed. There is also a high cost consequence should a consumer not keep the valve maintained and it leaks causing water damage.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would provide ongoing savings with energy bills	Would be an additional cost with the installation of hot water systems
Would save energy and water	Householder should be able to choose if they want to include it or not
Would act as an additional safety measure and can extend the life of hot water systems	May only provide marginal benefit with energy and water savings
Would support carbon reduction initiatives	Other: The valve will need to be replaced every four years, making the ongoing maintenance costly. If the valve is not replaced and adequately maintained it can fail and cause massive water damage to the house.

### Option 5 - Undertake an assessment of the impacts of rainwater tanks

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would enable consideration of information and findings from recent studies	Previous study was conclusive and there is no need to re-consider this issue
Would inform understanding of how rainwater tanks could complement water saving initiatives	Not seen as a priority
Could be used to identify specific issues for further investigation	

## Other options

**Do you have any other options to suggest that are not included above?**

No

## L. Sustainable buildings - existing houses & units

### Option 1 - Investigate the introduction of a voluntary residential disclosure scheme at point-of-sale and lease to inform prospective owners and tenants about the dwelling's sustainability features and performance

This option has been trialled before on a voluntary basis and was not successful due to the poor understanding by the consumer of what the disclosure meant and which sustainability features were relevant. To get an expert to undertake this assessment would be expensive for the consumer and may result in new unqualified people entering the market and oversaturating it. It also has not been demonstrated how effective this would be in changing behaviour. Would more sustainability features be installed as a result of having this information to hand?

If re-introduced it needs to be on a voluntary basis only, and introduced as part of the pre-purchase inspection, thus passing the onus to the purchaser.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would identify disclosure scheme issues specifically for Queensland	There is no need to consider a disclosure scheme for Queensland
Would provide potential for Queensland to adopt national arrangements	Sustainability declaration (disclosure scheme) was previously removed as a requirement in
Programs need to support the sustainability performance of existing dwellings	Not seen as a priority
A voluntary scheme would allow property owners the choice to disclose or not	

### Option 2 - Promote the installation of energy efficient hot water systems (solar, heat pump or gas) at time of replacement

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would increase consumer's awareness about energy efficient hot water systems	Solar and heat pump systems are expensive to purchase
Some energy efficient hot water systems provide ongoing savings with energy bills	Gas hot water systems do not provide ongoing savings with energy bills
Would identify issues associated with energy efficient hot water systems and types of dwellings	Can be difficult to install an energy efficient hot water system in some dwellings
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with '1' being a low and '5' being a high.



<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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**Option 3 - Develop a home renovation guideline to increase practitioners and consumers' awareness of how to include passive design features**

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would increase industry and consumer's awareness about energy efficient renovations	Would be an additional cost to new houses and units
Would assist industry to deliver energy efficient renovations and gain market advantage	Takes time and resources to learn and adjust designs
Would provide ongoing savings with electricity bills and improve occupant comfort	Not seen as a priority
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with '1' being a low and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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**Option 4 - Promote economy tariff connections (i.e. an 'off-peak' electricity tariff), where feasible, for electric hot water systems**

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would increase industry and consumer's awareness about connecting to an off-peak tariff	Would be an additional cost to connect to an off-peak tariff
Connecting to an off-peak tariff provides ongoing savings with electricity bills	Can be difficult and/or expensive to connect an off-peak tariff with an existing dwelling
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with '1' being a low and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 5
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**Option 5 - Require the installation of an expansion control valve on the cold water inlet of all replacement pressurised hot water systems**

Whilst these valves are generally inexpensive to install or retrofit in the first instance, the ongoing maintenance of these and the labour costs to replace them (on average every 3-4 years) are greater

than the gain that comes from having them installed. There is also a high cost consequence should a consumer not keep the valve maintained and it leaks causing water damage.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would provide ongoing savings with energy bills	Would be an additional cost with the installation of hot water systems
Would save energy and water	Householder should be able to choose if they want to include it or not
Would act as an additional safety measure and can extend the life of hot water systems	May only provide marginal benefit with energy and water savings
Would support carbon reduction initiatives	Other: The valve will need to be replaced every four years, making the ongoing maintenance costly. If the valve is not replaced and adequately maintained it can fail and cause massive water damage to the house.

#### Option 6— Provide user-friendly information to support awareness about the energy and water efficiency performance of household appliances

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would increase consumer’s awareness about energy and water efficient appliances	There is already enough information available about energy and water efficient appliances e.g. star rating
Would support carbon reduction initiatives	Not seen as a priority
Would complement energy and water efficiency initiatives	

Rate your level of support between 1 to 5, with ‘1’ being a low and ‘5’ being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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## M. Sustainable buildings - commercial

### Reform options – building aspects

#### Option 1 - Develop a building code for 'living roofs' (also referred to as 'green roofs') and 'living walls' (or 'green walls') that would apply if a building owner chose to include them with their building

Master Builders supports this proposal provided the Australian Standard is not a deemed to satisfy solution under the Building Code. This document needs to give guidance and used as an alternative solution.

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would provide a consistent building standard	The is already enough reference information available nationally and internationally
Could act to encourage building owners to include them	Concerns with their ongoing maintenance
They can provide multiple benefits e.g. occupant comfort and reduced energy use	Not seen as a priority
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with '1' being a low and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input checked="" type="checkbox"/> 4	<input type="checkbox"/> 5
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#### Option 2- Develop a Maintenance Code for the energy features of commercial buildings

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would increase industry awareness about how to maintain the energy performance of buildings	Building maintenance can add to operating costs
Would encourage building owners and managers to maintain their building	The is already enough reference information available nationally and internationally
Would assist with minimising ongoing energy bills and maintain occupant comfort	Not seen as a priority
Would support carbon reduction initiatives	

Rate your level of support between 1 to 5, with '1' being a low and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
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## Reform options – appliances and fixtures

### Option 1 - Undertake an assessment of the impacts of rainwater tanks

There is no need to undertake a new assessment on the impacts of rainwater tanks. The previous conclusive study, demonstrated that there was no net benefit and resulted in the requirement for rainwater tanks being removed. Local government now needs to apply to the Minister for an approval to mandate rainwater tanks for class 1 or 2 building if a case can be demonstrated. Only one local government (Toowoomba) has sought to do this in four years.

Rainwaters tanks are now being installed by homeowners voluntarily if space and costs permit.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would enable consideration of information and findings from recent studies	Previous studies were conclusive and there is no need to re-consider this issue
Would inform understanding of how rainwater tanks could complement water saving initiatives	Not seen as a priority
Could be used to identify specific issues for further investigation	

### Option 2 - Require 4-star (out of 6) WELS-rated toilets in all new commercial buildings

This option will result in ongoing maintenance implications as reducing the amount of water used to flush the toilet will increase the likelihood of waste blocking the pipes. There are already cases where this is occurring at the current ratings for commercial buildings.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would match the standard for new houses	Could be an additional cost with new commercial buildings
Would reduce water use in commercial buildings	There is no need to match the standard for new houses
Would complement water efficiency initiatives	Not seen as a priority
	Other: There will be ongoing maintenance implications as reducing the amount of water used to flush the toilet will increase the likelihood of waste blocking the pipes.

## N. Sustainable buildings - compliance

### Dwellings

#### Option 1- Provide a requirement for house energy assessors to be accredited or licensed.

While the introduction of an oversight requirement for house energy assessors in Queensland could potentially improve industry practice, it is important to clearly understand the cost benefit relationship before introducing new regulation.

Master Builders will reconsider its support should a cost benefit analysis show that there would be a net gain to the community following a full assessment of the costs of the new regulation.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would provide a level playing field	No need to change current arrangements
Would provide minimum professional standards	Would add to operating costs for house energy assessors
Would provide greater consistency and reliability of star ratings	
Would provide greater confidence for building industry and consumers	

#### Option 2 - Improve the documentation requirements on house plans to clearly identify the energy efficiency features, including any variations made to approved plans.

There should be a requirement for the energy assessment to be produced at the design stage not just purely to obtain the building approval. This will then give the builder and client a clear understanding on what is to be priced and built.

<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Would provide a minimum standard for what is to be shown on house plans	No need to change current arrangements
Would provide greater certainty for practitioners	May add to the cost of house plans
Would allow consumers to easily identify the dwelling's energy efficiency features	Not seen as a priority
Can assist with any future changes to the dwelling	

Rate your level of support between 1 to 5, with '1' being a low and '5' being a high.

<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 5
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**Option 3— Develop auditing and inspection systems to check that the design and construction of new dwellings comply with the relevant energy efficiency provisions of the QDC and National Construction Code.**

Implementing this requirement will add costs and will slow down the process. No other aspects of the build process require checks under the Queensland Development Code or the National Construction Code, only the reliance of the competent person. Unlike fire separation requirements, energy efficiency will not cause a fatal injury.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would better ensure that new commercial buildings are constructed as designed	May slow down the building application process
Would assist with improving the level of compliance	Could add to industry costs
Would provide greater certainty and confidence for building industry and consumers	Other: No other aspects of the build require checks, only the reliance of the competent person. Unlike fire separation requirements, energy efficiency will not cause a fatal injury. This will add costs and will slow down the process.

**Option 4 - Investigate the consistency of results from the BCA 2009 glazing calculator compared to the other QDC compliance methods of 6-star houses.**

This requires clarification on the intended outcome. If the intent is to change Queensland over to the BCA 2010 glazing calculator, it will result in costly glazing being required across almost all new houses. This also has potential to impact safety (during installation) and design due to the increase in the weight and size necessary to meet the sustainability requirements.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would clarify consistency between the compliance options	There is no need to undertake an investigation

## Buildings

### Option 1 - Develop auditing and inspection systems to check that the design and construction of new commercial buildings comply with the relevant energy efficiency provisions of the National Construction Code (Volume One – ‘Section J’).

Implementing this requirement will add costs and will slow down the process. No other aspects of the build process require checks under the Queensland Development Code or the National Construction Code, only the reliance of the competent person. Unlike fire separation requirements, energy efficiency will not cause a fatal injury.

<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Would better ensure that new commercial buildings are constructed as designed	May slow down the building application process
Would assist with improving the level of compliance	Could add to industry costs
Would provide greater certainty and confidence for building industry and consumers	Other: No other aspects of the build require checks, only the reliance of the competent person. Unlike fire separation requirements, energy efficiency will not cause a fatal injury. This will add costs and will slow down the process.

## APPENDIX A: Security of Payment

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For the building industry to be as efficient and productive as possible, all parties involved in a building project need to be confident they will be paid what is owed under their contract.

As in our previous response to the government's December 2015 Security of Payment discussion paper, we continue to emphasise the following principles when considering additional regulation of payments within the industry:

1. Proposed solutions MUST cover the entire building chain, from the principal/owner to the builder, subcontractors, sub-subcontractors and suppliers. The structure of our industry is such that all parties are mutually dependent upon each other.
2. Legislative controls and protections should not be introduced for one party at the expense of another.
3. Legislative controls and protections should not be unduly disruptive or impose additional costs.

### Scale and scope of the problem

Master Builders understands the devastating effect that financial failure can have on the whole contractual chain and all individuals involved. Each failure can have significant repercussions throughout the building chain. In representing our members who are from all segments of the construction industry, we are committed to everyone being paid on time and in full.

In order to find effective solutions there first needs to be a full understanding of the scale and scope of the problem. Master Builders remains concerned that the government has not clearly defined the scale and scope of the problem it is attempting to address through regulatory intervention.

In December 2015, the government's focus was on providing relief to building industry participants affected by insolvency within the industry. The statistical evidence, however, does not support the contention that financial failure affects a large part of the industry nor that it is a growing problem.

According to the QBCC's 2015-16 annual report, there were 85 companies and 152 individuals excluded from holding a QBCC contractor or nominee supervisor licence due to their involvement in a financial failure.<sup>3</sup> That figure represents less than 1% of the 87,000 companies and individuals licensed by the QBCC.<sup>4</sup> It is also apparent that there has not been a recent spike in exclusions for financial failure and, if anything, there appears to be a consistent downward trend from 410 licenses cancelled in 2011-2012 down to 237 in 2015-2016.<sup>5</sup>

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<sup>3</sup> QBCC Annual Report 2015-2016 p. 38

<sup>4</sup> QBCC Annual Report 2015-2016 p. 29

<sup>5</sup> Ibid.



## Failure to assess current regulatory framework

In the government's latest discussion paper, the Queensland Building Plan, the focus has moved to late payments. In Queensland, in stark contrast to the other states, there is already a significant number of legislated mechanisms in place to improve payment issues, as illustrated below.



We note that the government's latest proposals do not focus on improving these existing mechanisms, as proposed by Master Builders and numerous other organisations within the industry. The government has not provided the industry with *any* analysis of the efficacy of its existing mechanisms, such as:

- frequency of use of the various existing mechanisms;
- the impact of recent legislative changes to improve some of the mechanisms (for example the 2014 changes to the Building and Construction Industry Payments Act 2004 (the BCIPA));
- real or perceived shortcomings of the various existing mechanisms;
- the activity and efficacy of the regulator (QBCC) in enforcing its existing mechanisms, for example: number of interventions by the QBCC, demerit points issued, number of contractual investigations undertaken, number of adjudications conducted, the value of claim adjudicated etc.

We believe that the majority of the above information is, or ought to be, readily available to government.

For example: the QBCC reported that as at 30 June 2016, 702 adjudication applications under the BCIPA were lodged at the Registry in the preceding financial year; 669 of the applications were standard claims (claims for less than \$750,000 excluding GST) and 33 were complex claims (claims for more than \$750,000 excluding GST)<sup>6</sup>. Bearing in mind the thousands of contractual arrangements entered into by industry participants every year that is a very small number. Does this mean that there are few disputes over payments, or that industry participants choose not to use the BCIPA? If it is the latter (which is Master Builders' practical experience with its members), why is that the case?

## Current proposal

Instead of thorough analysis, it appears the government is focussed on the introduction of yet another legislative mechanism, Project Bank Accounts (PBAs). This new mechanism will require the vast majority of building industry participants to follow a new payment system, which will have far-reaching consequences for the whole industry.

The introduction of PBAs will be the most sweeping and costly change imposed on the industry in decades, yet the government has provided no evidence to support that this is an appropriate regulatory response nor that it is commensurate to the problem government is trying to address. The government has not provided the industry with even a basic analysis of the size, scale and causes of the problem it is trying to address.

Any serious attempt by government to address payment issues in the industry requires the government to take a holistic view of the regulatory mechanisms it has already put in place and their efficacy.

Regulatory intervention should be evidence based, especially in an environment where the government's existing regulatory attempts appear to be failing. The vast majority of Master Builders' membership are small and medium size enterprises (SMEs), with limited resources and a reduced capacity to respond to complex regulation. Poorly designed legislation and regulation therefore has a disproportionately higher impact on our members.

Under the Working Queensland Plan, the government committed to addressing business red tape, and creating a balanced regulatory environment conducive to strong, profitable, and globally competitive businesses. The regulatory response proposed by government is, unfortunately for the industry, a good example of regulatory creep, where compliance requirements are extended to exceed the minimum level necessary to achieve a regulatory objective.

## Structure of this submission

As described above, Master Builders is of the opinion that a holistic view is required when assessing regulation relating to payments in the industry. Therefore, our submission includes not just answers to the specific questions detailed in the government's Queensland Building Plan, but also an analysis of the complex issue of payments in our industry.

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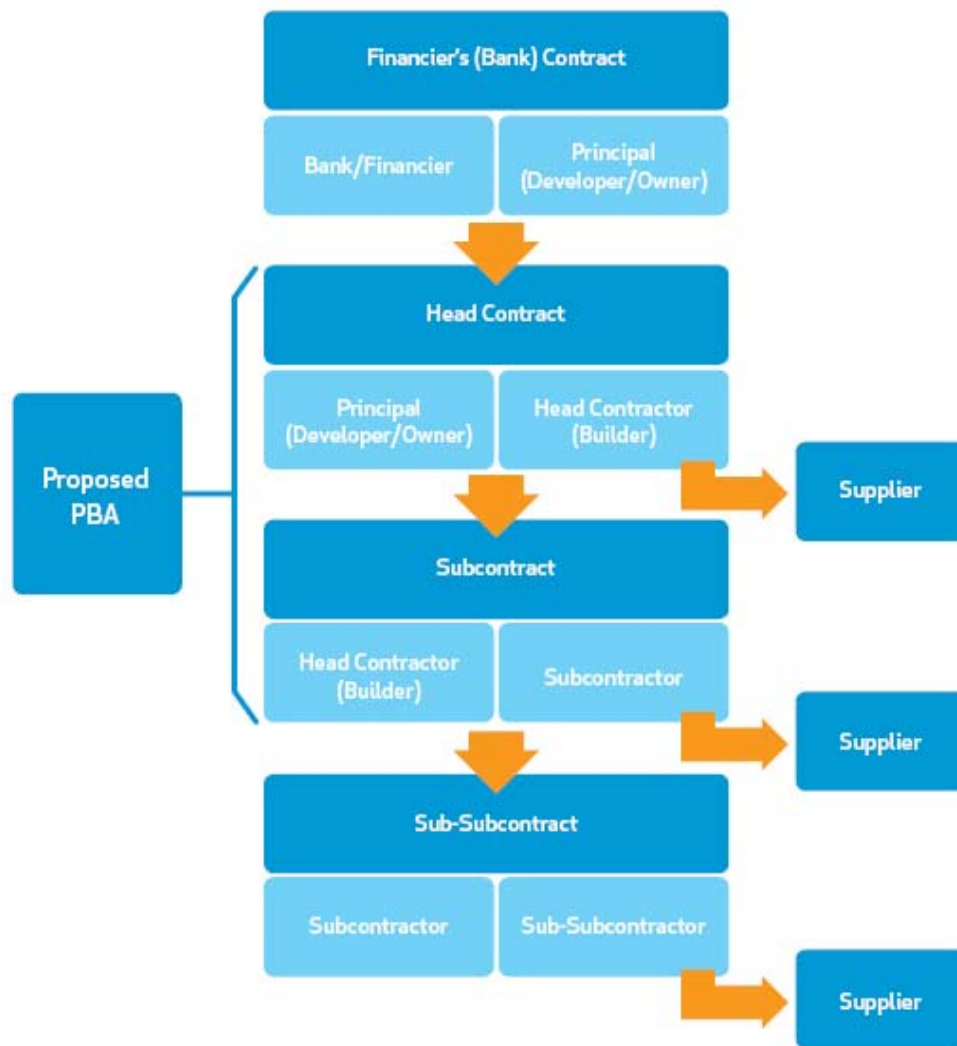
<sup>6</sup> QBCC Annual Report 2015-2016 p. 44 and further.

In **Part A** we have provided four main “case studies” which could lead to a Subcontractor not being paid for work performed. After a short description of each case study (including examples), we provide an analysis of the current legislative mechanisms available to a Subcontractor to achieve payment, followed by an evaluation of the effectiveness of the current regulations. At the end of each case study, we provide an assessment on whether the proposals put forward in the Queensland Building Plan will improve the payment outcomes in each case study.

**Part B** of this submission deals with the proposals contained in the Queensland Building Plan as they relate to security of payment and provides answers to the specific questions detailed in the government’s Queensland Building Plan.

**Part C** of this submission deals with further proposals or areas of concern Master Builders encourages the government to consider.

### Terminology and definitions used



## PART A: CASE STUDIES

The issue of late payments is a multi-faceted one and range from circumstances where late, partial or no payment is entirely lawful under the contract between the parties (because one party did not meet their obligations under their contract), to the scenario where payment is unjustifiably delayed by one party, in breach of their contract. The anecdotal evidence from our members is that the vast majority of late payments within the industry come about due to a dispute between the parties. This could be a dispute between the Head Contractor and Principal, Subcontractor and Head Contractor or Subcontractor and sub-subcontractor.

Payment obligations, and subsequent disputes, between the various parties always arise from the terms of their contract. A contractor who has not been paid has not necessarily been wronged under the terms of the contract. Any regulatory intervention focussed on payments can only operate subject to the commercial contract between the parties.

### Case Study 1: Subcontractor fails to make an enforceable payment claim

The Subcontractor is not paid because the Subcontractor did not provide the Head Contractor with an enforceable payment claim.

#### **Example 1 - Parties fail to enter into a written agreement**

Despite the introduction of rigorous licensing requirements and formal regulation of contractual arrangements within the construction industry, our anecdotal evidence is a significant portion of building industry participants still do not have written contracts for undertaking building work. In practical terms, the absence of a written contract between the parties means that there is no evidence of agreement between the parties regarding important matters impacting payment for work completed by the Subcontractor including: an absence of agreed payment terms, processes to be followed in the case of variations, dispute resolution processes and retention payments applicable.

In the absence of a written contract, the Subcontractor may be unable to substantiate its payment claim.

#### **Example 2 - Parties do not comply with their written agreement**

The Subcontractor submits a payment claim that does not comply with the requirements of the written contract, which may require the payment claim to be in writing, submitted within a specified period, submitted with sufficient detail regarding the work being claimed, etc. The terms of the contract provide the Head Contractor with the right to withhold payment until a compliant payment claim is received from the Subcontractor.

### Current legislative remedies

At present, the QBCC Act requires that when building contractors and subcontractors carry out building work that falls within the ambit of the QBCC Act, they must have a written building contract. Further, the QBCC Act sets out the items that must be covered in a building contract including the scope of work, completion date, payment amounts and timing, retentions and securities. It is an offence for both parties if they do not have a written contract that complies with the requirements of the QBCC Act.

Additionally, the BCIPA permits consideration of a payment claim for construction work done under a contract whether in writing, verbal or a combination of both.

The table below summarises the existing regulation relevant to this case study:

Legislative provision	Brief description	Comments
S67G(1) QBCC Act	A building contract between a building contractor and an owner, as well as a building contractor and a subcontractor, must be in writing for all building work that falls within the definition of the QBCC Act.	The existence of a written contract confirming the terms of the agreement between the parties would reduce the occurrence of subcontractors making unenforceable payment claims.
S67G(4) QBCC Act	A building contract must meet the formal requirements of a building contract including: (a) scope of the building work the subject of the contract; (b) when the building work is to be completed; (c) the amount to be paid for carrying out the building work or, if appropriate, how the amount to be paid for carrying out the building work is to be worked out; (d) the parties' agreement about retention amounts and securities to be held; (e) the name of the building contractor who is the contracted party for the building contract; (f) the licence number of the building contractor mentioned in paragraph (e), as it appears on the building contractor's licence card; (g) the address of the land where the building work is to be carried out.	A written contract that complies with this requirement would set out what was required for a valid payment claim under the contract.
S3(1) BCIPA	BCIPA applies to construction contracts whether written or oral, or partly written and oral.	BCIPA provides a statutory entitlement to payment for written or oral contracts provided the claimant can prove that it is entitled to payment under the terms of that written or oral contract.
SCA	SCA applies to contracts between a Head Contractor and a Subcontractor.	SCA provides a Subcontractor with the right to access moneys owing to the Head Contractor under a Head Contract provided it proves its entitlement under the subcontract to the moneys claimed.

## Queensland Building Plan proposals

Proposal	Will it address this problem?	Comments
Project Bank Accounts	No	As there is no enforceable entitlement to the Subcontractor for payment under the subcontract, the Head Contractor will not include the payment in the PBA Payment Instruction and no payment will be made to the Subcontractor from the PBA.
BCIPA changes	No	The proposed changes to BCIPA will have no impact on this case study.
SCA redrafting	No	The proposed changes to SCA will have no impact on this case study.
QBCC licensee education programs	Yes	Education programs that improve a Subcontractor's financial and contractual management skills will help Subcontractors to understand that they are required by the QBCC Act to have a written contract which sets out the terms of the agreement reached between the parties. This, in turn, will help the Subcontractor to ensure that he/she submits enforceable payment claims.
Combining Acts	Possibly	The proposed changes to combine the payment provisions of the BCIPA, the SCA and the QBCC Act may assist with removing conflicts across the BCIPA and the QBCC Act with regard to payment timeframes and what is a valid payment claim.
Unfair contract terms	Possibly	The legislating of additional terms that would be void if included in building contracts may assist with this case study if such terms related to what may be required under a contract for a valid and enforceable payment claim. It will not, however, be possible to legislate that every payment claim made by a Subcontractor is enforceable. The contract must always remain as the determiner of entitlement to payment.

## Case Study 2: Head Contractor withholds undisputed payment from Subcontractor

This case study assumes that the Subcontractor has made a payment claim that complies with the requirements of the contract, there is no dispute regarding the works completed by the Subcontractor and the Head Contractor fails to make the payment by the due date for payment or at all. The payment claim may be for a progress payment or a final payment including for the release of cash retention moneys.

### Current legislative remedies

At present, there are a number of remedies available to a Subcontractor who has not been paid under a subcontract.

The table below summarises the existing regulation relevant to this case study:

Legislative provisions	Description	Comments
Part 9 QBCC Minimum Financial Requirements Policy	It is a financial requirement that a licensee must at all times pay all undisputed debts as and when the debts fall due and within industry trading terms	QBCC has a "Moneys Owed" process in place which permits the QBCC to investigate overdue moneys once a Subcontractor lodges a notice with the QBCC providing details of the overdue moneys. QBCC can suspend a licensee's licence until the debts have been paid. This process is available free of charge to Subcontractors.
S67P QBCC Act	Contractors are required to pay penalty interest on amounts that remain unpaid after they become due under the building contract.	Subcontractors are entitled to charge a penalty rate of interest on overdue moneys.
S67O QBCC Act	A Subcontractor can suspend work in the event they are not paid an undisputed amount under the building contract.	If the payment is not disputed, Subcontractors can suspend works in accordance with the requirements of s67O QBCC Act until moneys are paid.
S67U QBCC Act	A subcontract cannot contain payment timeframes longer than 25 business days after submission of a payment claim.	The maximum time for payment of a Subcontractor's payment claim is 25 business days after submission.
S33 BCIPA	A Subcontractor can suspend work in the event that a BCIPA payment claim has not been paid by the due date for payment and a Payment Schedule has not been served or, if a Payment Schedule has been served, payment of the Scheduled Amount has not been made by the due date for payment.	If the payment claim is a valid BCIPA payment claim, the Subcontractor can suspend works until moneys are paid.
SCA	A Subcontractor can charge money owed to the Head Contractor under the head contract to recover moneys owed under the subcontract agreement.	A Subcontractor can serve a notice of charge on the principal/owner under the head contract for the moneys owed under the subcontract. Once the Subcontractor proves its entitlement under the subcontract to the moneys claimed, the court can order the principal/owner to pay the amount owed to the Subcontractor out of moneys owed to the Head Contractor under the head contract.
QCAT legislation	A Subcontractor can commence debt recovery proceedings in QCAT for disputes relating to building contracts.	A Subcontractor can file a claim for moneys owed in QCAT for amounts owed up to \$50k. Proceedings for debt recovery for amounts > \$50k can be heard by QCAT with the consent of both parties. If the Subcontractor meets

Legislative provisions	Description	Comments
		the requirements for an expedited hearing (e.g. debts < \$10k), the matter can be dealt with quickly.

### Queensland Building Plan proposals

Proposal	Will it address this problem?	Comments
Project Bank Accounts	No	A Head Contractor who decides not to pay an undisputed amount to the Subcontractor will still be able to omit that Subcontractor from the PBA Payment Instruction and no payment will be made to the Subcontractor from the PBA (see Part B discussion on PBAs below).
BCIPA changes	Possibly	The existing provisions of the BCIPA provide the Subcontractor with the opportunity to seek payment of the moneys owed through the BCIPA adjudication process including cash retention monies. The proposed changes to the adjudication process under the BCIPA could improve the fairness of the adjudication process. The proposed changes to the BCIPA claims process may negatively impact the Subcontractor (see Part B discussion on BCIPA changes below).
SCA redrafting	Possibly	The existing provisions of the SCA provide the Subcontractor with the opportunity to serve a claim over moneys owed to the Head Contractor under the head contract. We have no detail as to the proposed changes to the SCA but it may enhance the process.
QBCC licensee education programs	Yes	Education programs that improve a Subcontractor's financial and contractual management skills will help Subcontractors to understand what remedies are available to it to enforce payment of an undisputed amount due under a subcontract.
Combining Acts	No	The proposed changes to combine the payment provisions of the BCIPA, the SCA and the QBCC Act will have no impact on this case study.
Unfair contract terms	No	The legislating of additional terms that would be void if included in building contracts will have no impact on this case study as the moneys claimed are not in dispute.

### Case Study 3: Head Contractor withholds disputed payment (in part or in full) from Subcontractor

The Head Contractor disputes the moneys claimed by the Subcontractor in the payment claim, and the Head Contractor withholds the disputed moneys.



An entitlement to payment of moneys under a contract is always determined by reference to the terms of the contract. The subcontract will set out what the Subcontractor is entitled to claim as a progress payment during the project. Subcontracts commonly include terms that permit the Head Contractor to deduct amounts from moneys owed to the Subcontractor, as explained in the examples below.

**Example 3 - Subcontractor has claimed for work not yet completed**

The Subcontractor has submitted a payment claim for work not yet completed as at the date of the payment claim. The Head Contractor values the work completed to the date of the payment claim at a value less than that claimed by the Subcontractor. In accordance with the subcontract, the Head Contractor pays the Subcontractor the value of the work completed to date, which is less than the amount claimed by the Subcontractor.

**Example 4 - Head Contractor is entitled to withhold retention from the progress payment**

The subcontract permits the Head Contractor to withhold 10% of each progress payment from the Subcontractor to secure performance of the terms of the subcontract. The maximum that can be withheld under the subcontract is 5% of the subcontract sum. The Head Contractor deducts the retention amount from the progress payment due to the Subcontractor.

**Example 5 - Head Contractor is entitled to withhold moneys for defect rectification**

The Subcontractor has claimed for the work completed, but there are defects in the works. Under the terms of the subcontract, the Head Contractor is entitled to deduct moneys from the progress payment due to the Subcontractor for the cost to rectify the defective works. The Head Contractor pays the balance of the moneys owed to the Subcontractor.

**Example 6 - Head Contractor is entitled to withhold moneys for breach of contract**

The Subcontractor is in breach of the subcontract – for example, causing damage to the works under the subcontract that has not been rectified, suspending work without approval or entitlement under the subcontract, not completing work under the subcontract, etc. Under the terms of the subcontract, the Head Contractor is entitled to withhold payment of moneys due to the Subcontractor pending remedy of the breach.

**Example 7 - Head Contractor is entitled to withhold moneys for liquidated damages**

The Subcontractor has not completed the works by the Date for Practical Completion and the cause of the delay was the responsibility of the Subcontractor. The subcontract permits the Head Contractor to deduct liquidated damages for every day after the Date for Practical Completion until the works are completed.

### **Current legislative remedies**

At present, there are a number of remedies available to a Subcontractor if there is a dispute between the parties as to whether the Subcontractor is entitled to the amount claimed.

Ensuring that the parties have a written contract that addresses what happens in the event that a breach of contract arises (for example for defective works, damage, delays, retention etc) will reduce the number of disputes that occur.

The table below summarises the existing regulation relevant to this case study:

Legislative provisions	Description	Comments
S67G (4) QBCC Act	Subcontracts must be in writing and must include, among other things when the building work is to be completed and how retention amounts and securities are to be held.	The existence of a subcontract confirming the agreement between the parties regarding these matters will reduce disputes.
S67J QBCC Act	A Head Contractor may use a security or retention amount to obtain an amount owed under the contract but only if the Head Contractor has given notice in writing to the Subcontractor advising of the proposed use and of the amount owed. Notice must be given within 28 days of becoming aware of the right to obtain the amount owed.	<p>A Head Contractor is required to notify the Subcontractor PRIOR to using a retention or security amount to recover moneys owed under the subcontract from the Subcontractor. The Subcontractor then has the opportunity to prevent the Head Contractor from using the retention by, for example, rectifying defective works.</p> <p>Further protection is also given to the Subcontractor by S67J(5) of the Act because the Head Contractor is only permitted to use a retention or security amount to recover debts owed under the subcontract because of acts of the Subcontractor in performing the work under that particular subcontract. That is the Head Contractor is not permitted to use retention moneys to repay debts that may be owed under a completely separate subcontract.</p>
S67L QBCC Act	The maximum retention or security that can be held for performance of the subcontract prior to Practical Completion is 5% of the subcontract sum.	A maximum of 5% of the subcontract sum is used to secure the performance of the Subcontractor of its obligations under the subcontract. If the Subcontractor performs its obligations properly, then it is entitled to receive the withheld amount at the end of the subcontract which is at the end of the Defects Liability Period.
S67M QBCC Act	The maximum percentage that can be withheld from a progress payment to the subcontractor is 10% of the amount payable.	This provision sets a maximum percentage of 10% that can be withheld from a progress payment for the purposes of retention.
S67N QBCC Act	The maximum retention or security that can be held for performance of the subcontract after Practical Completion is 2.5% of the subcontract sum.	If the Subcontractor has performed its subcontract obligations properly prior to Practical Completion and has no further liability during Defects Liability Period for anything other than rectification of defects, then the Subcontractor is entitled to the return of half of the retention

Legislative provisions	Description	Comments
		withheld prior to Practical Completion i.e. 2.5% of the subcontract sum. However, if the Subcontractor owes money for other matters under the subcontract and has not paid prior to Practical Completion, then the Subcontractor may not be entitled to the release of any retention moneys at Practical Completion.
BCIPA	BCIPA provides for the review of amounts claimed by the subcontractor under a construction contract.	BCIPA provides for an adjudicator to review the amounts claimed by a Subcontractor and the amounts deducted by the Head Contractor to arrive at a decision as to how much is due to the Subcontractor under its payment claim. The matters that may be considered by the adjudicator is covered by the BCIPA and not all of the provisions of the subcontract can be considered.
SCA	A Subcontractor can charge money owed to the Head Contractor under the head contract to recover moneys owed under the subcontract agreement.	<p>A Subcontractor can serve a notice of charge on the principal/owner under the head contract for the moneys owed under the subcontract. Once the Subcontractor proves its entitlement under the subcontract to the moneys claimed, the court can order the principal/owner to pay the amount owed to the Subcontractor out of moneys owed to the Head Contractor under the head contract. Under the SCA, the Subcontractor must prove that it is entitled to the moneys claimed and any deduction or setoff claimed by the Head Contractor will also need to be reviewed by the court. If the Head Contractor is not permitted under the subcontract to the deduction or setoff, then the court will reject those amounts and order payment of the balance to the Subcontractor.</p> <p>Any monies to which a charge attaches is secured for all subcontractors who may subsequently serve a notice of charge and not just for the first subcontractor who files a notice.</p>
QCAT legislation	Debt recovery proceedings can be commenced in QCAT for building disputes relating to building contracts.	A Subcontractor can file a claim for moneys owed in QCAT for amounts owed up to \$50k. Proceedings for debt recovery for amounts > \$50k can be heard by QCAT with the consent of both parties. If the Subcontractor meets the requirements for an expedited hearing (e.g. debts < \$10k), the matter can be dealt with quickly.

Legislative provisions	Description	Comments
		Similar to the SCA process discussed above, the tribunal will consider the submissions of both the Subcontractor and the Head Contractor and determine what moneys are owed to the Subcontractor.
QBCC Early Dispute Resolution Process	QBCC can assist to resolve a dispute between a Head Contractor and a Subcontractor.	This is a free service in which the QBCC can mediate a dispute between a Head Contractor and a Subcontractor on matters relating to defective works, incomplete works, contractual disputes. This service is available to both parties as long as the subcontract is not at an end.

### Building Queensland Plan proposals

Proposal	Will it assist this problem?	Comments
Project Bank Accounts	No	If the Head Contractor disputes the amount claimed by the Subcontractor, the Head Contractor will simply note the amount that is undisputed on the PBA Payment Instruction and only that amount will be paid to the Subcontractor from the PBA. The government's proposal states that contractual rights between the parties will remain unaffected.
BCIPA changes	Possibly	The existing provisions of the BCIPA provide the Subcontractor with the opportunity to seek payment of the moneys owed through the BCIPA adjudication process. The proposed changes to the adjudication process under the BCIPA could improve the fairness of the adjudication process. The proposed changes to the BCIPA claims process may negatively impact the Subcontractor (see Part B discussion on BCIPA changes below).
SCA redrafting	Possibly	The existing provisions of the SCA provide the Subcontractor with the opportunity to serve a claim over moneys owed to the Head Contractor under the head contract. We have no detail as to the proposed changes to the SCA but it may enhance the process.
QBCC licensee education programs	Yes	Education programs that improve a Subcontractor's financial and contractual management skills will help Subcontractors to understand what their subcontract means and what they are liable for if they are in breach of the subcontract. A breach may arise from defective works, damage, late completion, debts owed and retention withheld among other things.
Combining Acts	No	The proposed changes to combine the payment provisions of the BCIPA, the SCA and the QBCC Act will have no impact on this case study.
Unfair contract terms	No	The legislating of additional terms that would be void if included in building contracts may have an impact, however, no detail has

Proposal	Will it assist this problem?	Comments
		been provided in the Discussion Paper with the exception of termination for convenience clauses which would not affect this case study. Additional prohibitions on contract terms may reduce the liabilities of the Subcontractor under a subcontract, however, when the Subcontractor is in breach of their subcontract, the Head Contractor will still have the right to recover its losses caused by the Subcontractor's breach.

## Case Study 4: Head Contractor unable to make payment to Subcontractor due to Head Contractor insolvency

Non-payment arises because the Head Contractor has become insolvent. The cause of insolvency of Head Contractors varies and includes, but is not limited to:

- non-payment by one or more Principals/Owners of an undisputed amount;
- non-payment by one or more Principals/Owners of a disputed amount due to a breach of a subcontract by a Subcontractor or the head contract by the Head Contractor;
- recovery of an amount due to a financier under a Tripartite Agreement between the Principal/Owner, the Head Contractor and the finance company;
- mismanagement of the Head Contractor's business.

### **Example 8 – The Principal did not pay the Head Contractor an undisputed amount**

The Head Contractor has submitted a valid payment claim to the Principal under the head contract. The payment claim is not disputed but the Principal has not made the payment. The Head Contractor does not have additional funds to cover the cashflow short fall and continues to use moneys from other projects to float the business until the Principal makes the payment due to the Head Contractor. If all projects are using PBAs, the Head Contractor will not have the funds to cover this shortfall. This case study may occur on projects other than the project on which the Subcontractor is requesting payment. Eventually, if payment is not made on multiple projects, the Head Contractor becomes insolvent.

### **Example 9 – The Principal has not paid the Head Contractor due to defective works or breach of contract by the Subcontractor**

A Subcontractor is in breach of its subcontract and/or has defective works and/or does not return to site to remedy defective works. Under the terms of the head contract, the Head Contractor is responsible for all work undertaken by its subcontractors. Therefore, the Principal will not pay the Head Contractor until the defective work and/or breach by the Subcontractor has been remedied. The Head Contractor is required to engage another subcontractor to remedy the defects and/or breach. The Head Contractor incurs more costs than expected, is unable to pay all of its debts and becomes insolvent.

### **Example 10 - Principal or its financier pays a disputed amount to the Subcontractor and recovers cost from Head Contractor**

The head contract contains a provision that permits the Principal to pay moneys claimed by the Subcontractor directly to the Subcontractor on behalf of the Head Contractor even though the Head

Contractor disputes that the moneys are owed to the Subcontractor under the subcontract. The Principal does not have visibility of the subcontract conditions and cannot determine if the moneys are, in fact, owed but in order to prevent the Subcontractor from suspending work, the Principal pays the moneys claimed and deducts the payment from the next payment to the Head Contractor. The Head Contractor loses the right to resolve the dispute with the Subcontractor and, instead, suffers a loss due to the Principal's actions.

A similar situation arises where Tripartite Agreements provide similar rights to the Principal's financier. Tripartite Agreements are effectively side deeds between the Principal, the Head Contractor and the Principal's financier. They provide rights (outside of the head contract) to the financier to withhold payment to the Head Contractor at certain times notwithstanding that the Head Contractor is entitled to receive the payment under the head contract.

### Current legislative remedies

Where a Subcontractor is being paid late or not at all and the Subcontractor has concerns regarding the solvency of the Head Contractor, there are remedies available to the Subcontractor to obtain payment, as described in Case Study 2 above. Once a Head Contractor is placed under administration, the QBCC will cancel the Head Contractor's licence, resulting in the Head Contractor having to cease all building works.

The table below summarises the existing regulatory requirements relevant to this case study:

Legislative provisions	Description	Comments
QBCC Act	A Subcontractor can alert the QBCC to concerns regarding late payment and solvency of a Head Contractor. The QBCC can suspend a Head Contractor's licence.	The QBCC has the authority to request a Head Contractor provide financial statements and other information to satisfy the QBCC that its financial position is sound. If not satisfied the QBCC may suspend or cancel a licence.
SCA	A Subcontractor can charge money owed to the Head Contractor under the head contract to recover moneys owed under the subcontract agreement.	A Subcontractor can serve a notice of charge on the principal/owner under the head contract for the moneys owed under the subcontract. Once the Subcontractor proves its entitlement under the subcontract to the moneys claimed, the court can order the principal/owner to pay the amount owed to the Subcontractor out of moneys owed to the Head Contractor under the head contract. Any money that has a charge attached to it remains available to the Subcontractor even if the Head Contractor becomes insolvent after the notice of charge has been served.  Any monies to which a charge attaches is secured for all subcontractors who may subsequently serve

Legislative provisions	Description	Comments
		a notice of charge and not just for the first subcontractor who files a notice.

#### Building Queensland Plan proposals

Proposal	Will it address this problem?	Comments
Project Bank Accounts	Limited to retention moneys only	<p>The progress payment PBA is effectively a 'zero balance' account which means that money is paid into and out of the PBA on the same day. Therefore, there is no money retained in this PBA if the Head Contractor becomes insolvent.</p> <p>The Retention Money PBA will still have money provided the Head Contractor has correctly noted the amounts that should be held for each of the Subcontractors on each of the Retention Money Payment Instructions issued over the course of the project. The Subcontractors will therefore, be able to access the amounts that have been noted against their names on each Retention Money Payment Instruction and will be entitled to that money at the times provided in their subcontracts.</p> <p>It is uncertain, however, if the retention moneys will have the status of secured funds for purposes of insolvency.</p>
BCIPA changes	No	The proposed changes will have no impact on this case study.
SCA redrafting	Possibly	The existing provisions of the SCA provide the Subcontractor with the opportunity to serve a claim over moneys owed to the Head Contractor under the head contract. This is still available in circumstances where the Head Contractor becomes insolvent. However, the proposed changes to the SCA may enhance the process but we have no detail in this regard.
QBCC licensee education programs	Yes	Education programs that improve a contractor's financial and contractual management skills will help Head Contractors to understand how to properly respond to a payment claim submitted by a Subcontractor and how to properly respond to disputes with a Principal. Education programs will also help a Head Contractor to understand what remedies are available to it to enforce payments due under the head contract so as to avoid insolvency in the first instance.
Combining Acts	No	The proposed changes to combine the payment provisions of the BCIPA, the SCA and the QBCC Act will have no impact on this case study.

Proposal	Will it address this problem?	Comments
Unfair contract terms	Possibly	The legislating of additional terms that would be void if included in building contracts may have an impact on this case study. However, we have no detail in this regard.

## PART B: QUEENSLAND BUILDING PLAN PROPOSALS

The Queensland Building Plan Discussion Paper and Fact Sheets 1 and 2 discuss a number of proposals that deal with Security of payment. There are some anomalies between the Discussion Paper and the two Fact Sheets. For the avoidance of doubt, we have first summarised our understanding of the proposals included across these documents. We then provide our responses to the questions listed in the government's documents.

### 1. Project Bank Accounts

#### Concerns with information released by government

The scant details provided in Fact Sheet 1 is a significant concern and hampers our ability to understand the ultimate impact of PBAs on the industry. In recent public consultation sessions, the government has, on an ad hoc basis, been releasing further details about the proposed PBA model, some of which conflict with the information in Fact Sheet 1.

Given the complexity of payment arrangements in our industry (as illustrated by the Case Studies above) and the enormity of the change being proposed, it is disappointing that the government has failed to provide clarity and detail on PBAs. We have provided a list of questions that have yet to be formally addressed by the government (refer to page 93 "Further information required on PBAs"). In the absence of these critical details, it remains difficult for the industry to respond in full to the government's proposal.

#### Government's PBA Proposal

From the information that has been provided, we understand that the proposed PBA process will operate in the following manner:

- Two PBAs will be opened by the Head Contractor – one for retention moneys and one for progress payments.
- Only the Head Contractor and first layer of Subcontractors are parties to the PBA, i.e. principals, sub-subcontractors and suppliers are not part of the PBA.
- The Principal has no oversight of the PBA.



- Payment claims under the Head Contract will be dealt with as follows:
  - Head Contract will be administered by a Superintendent appointed by the Principal;
  - Head Contractor will submit its payment claim to the Superintendent for assessment under the terms of the head contract;
  - Superintendent will issue a Payment Certificate / Schedule to the Principal and Head Contractor setting out the amount that it certifies is to be paid by the Principal to the Head Contractor;
  - Head Contractor will issue a PBA Progress Payment Instruction to the bank setting out the amounts to be paid out of the PBA. The PBA Progress Payment Instruction will set out how much is to be paid to the Head Contractor and to each of the Subcontractors listed on the PBA Progress Payment Instruction. The total of the PBA Progress Payment Instruction must match the total amount certified by the Superintendent's Payment Certificate / Schedule.
  - Principal pays the amount certified by the Superintendent's Payment Certificate / Schedule into the PBA.
  - On the same/next day that payment is made by the Principal into the PBA, the bank electronically transfers funds out of the PBA in accordance with the amounts and names listed on the PBA Progress Payment Instruction.
- Payment claims under each Subcontract will be dealt with as follows:
  - Subcontractors will each submit a payment claim to the Head Contractor for assessment under the terms of the relevant subcontract;
  - Head Contractor will issue a Payment Certificate / Schedule to each Subcontractor setting out the amount that it determines is to be paid by the Head Contractor to the Subcontractor.

However, the Discussion Paper and Fact Sheet 1 do not explain how the above two distinctly separate contractual processes link except to say Subcontractors will be paid in accordance with the Head Contractor's PBA Progress Payment Instruction and that the proposed PBA process will not change contractual rights and obligations.

## Master Builders' response to PBA proposal

Master Builders supports payment to all levels of the industry but does not believe that the government's proposed PBA model will achieve the government's objectives of "every Subcontractor paid on time, every time" or that it can in any way "guarantee payment" to Subcontractors. Our reasons are below:

### 1. PBA addresses only one part of contractual chain

Master Builders does not support a payment mechanism which is aimed at protecting only one layer of the building and constructing industry. As is clear from the Case Studies in Part A of this submission, payments in one part of the contractual chain affect payments in another part. All building industry participants are entitled to payment for work that they have undertaken, that is Head Contractor, Subcontractor, Sub-subcontractor and supplier – not just the first layer of Subcontractors.

Generally, for every two large subcontractors engaged on a commercial construction project, at least one sub-subcontractor is engaged. Sub-subcontractors are a particularly vulnerable group of subcontractors in that they are "last" in the contractual chain. It is unclear why the government's

proposal seeks to exclude this category of subcontractors. Similarly, suppliers are a critical part of the contractual chain and have also been excluded in the government's proposal.

## **2. PBA is simply a payment mechanism**

The PBA cannot guarantee that a Subcontractor will be paid the full amount it claims every time it submits a payment claim to the Head Contractor. The contractual arrangement between the parties determines whether moneys are owed to the Subcontractor for work performed by the Subcontractor under that contractual arrangement.

An assessment of all of the terms of the subcontract is required to determine if a Subcontractor is owed the amount claimed. Equally, the subcontract determines if the Head Contractor is entitled to withhold an amount from a progress payment due to the Subcontractor. Both assessments are of equal importance and the nett position determines which party is entitled to payment at that particular time. A PBA plays no role in this contractual assessment, and at most is simply an alternative payment system.

## **3. Not all head contracts have a Superintendent**

Under the proposed PBA model, the Superintendent assesses the amount due to the Head Contractor under the head contract. However, whilst a Superintendent may be appointed by a Principal to administer the head contract, one is not always appointed for private projects over \$1 million (commercial and residential projects). In circumstances where a Superintendent is not appointed, the Principal assesses the Head Contractor's payment claim, determines the amount due to the Head Contractor and issues the Payment Certificate / Schedule. In those circumstances, there is no independent assessment of the Head Contractor's payment claim under the head contract.

## **4. Subcontractor payment claims versus Head Contractor payment claims**

The graphic provided in Fact Sheet 1 appears to indicate that the Head Contractor assesses the payment claims submitted by all Subcontractors prior to submitting its payment claim to the Principal under the head contract. However, payment claims made under a head contract rarely, if ever, correlate with payment claims made under a subcontract. Head contracts are typically based on a trade package breakdown. The progress achieved for each trade package determines the amount due to the Head Contractor at the time of the payment claim.

However, subcontracts are typically based on a particular scope of work. The progress made by the Subcontractor in the preceding payment claim period e.g. month, determines the amount due to the Subcontractor at that time. Further, the scope of work in any one particular subcontract may fall within more than one trade package under the head contract.

Therefore, it is not simply a matter of including the total amount claimed by each Subcontractor in the head contract payment claim. The amount due to a Subcontractor under a subcontract has no bearing at all on the assessment of the Head Contractor's payment claim under the head contract because the basis of assessment differs for each contract. Further, each contract may contain different rights regarding setoffs, damages, termination etc. and the assessment of each payment claim will differ because the contractual basis of entitlement to payment typically differs between head contracts and subcontracts and between different subcontracts.

There is generally only one person involved on a project that is privy to both the head contract and the subcontract and that person is the Head Contractor. No other person (in the government's model) can

determine whether an amount due to the Subcontractor under a subcontract is an amount that corresponds at that time to an amount claimed under the head contract.

#### **5. Only the Head Contractor can provide payment instructions**

The Head Contractor determines the amount to be paid out of the PBA to each Subcontractor, in accordance with the terms of each subcontract. There is no independent assessment of the Subcontractor's claim under the subcontract. Where a Superintendent is appointed for a project, the Superintendent administers the head contract, not the subcontracts. Therefore, the Superintendent cannot assess claims under the subcontract.

A PBA Payment Instruction is simply an instruction issued by the Head Contractor to the bank to make the payments noted on the PBA Payment Instruction to those listed for the corresponding amounts. Those payments are to be made from money that will be paid to the Head Contractor by the Principal under the head contract and as such, the Head Contractor is the only person who can give that instruction to the bank.

#### **6. Subcontractor may not be entitled to payment at the time of issuing the PBA Payment Instruction**

Subcontracts typically provide dates for the submission of payment claims and payment dates that differ from those provided under the head contract. The QBCC Act provides a maximum payment period of 15 business days for head contracts and 25 business days for subcontracts. Therefore, at the time the Head Contractor submits a claim for payment to the Principal, the Subcontractor may not be entitled to submit a claim for payment to the Head Contractor. Similarly, at the time that payment is required to be made to the Head Contractor, payment may not be due to the Subcontractor. This out-of-alignment of both payment claims and payment timeframes means that the Head Contractor is able to elect not to include a particular payment to a Subcontractor in the PBA Payment Instruction because it is not legally required to make that payment until sometime after the PBA payment is made.

Conversely, where the Head Contractor is required by the terms of the subcontract to make a payment to the Subcontractor prior to receiving payment under the head contract from the Principal, the Head Contractor must make the payment. It is not permitted to simply withhold payment to the Subcontractor until it receives payment from the Principal.

#### **7. Delays to Subcontractor's payments**

The proposed PBA model is akin to the "pay when paid" arrangement that has previously plagued the industry and is a significant step backwards for our industry. A number of Subcontractors are currently paid on contractual terms that are more favourable than those that apply under the head contract. For those Subcontractors, the proposed PBA model will mean that they are waiting longer for payment than they currently do which is of no benefit to them.

#### **8. Money held in trust and 'zero balance' account**

The proposed PBA model provides for the creation of a trust with the Head Contractor and Subcontractors as the beneficiaries of that trust. However, the amount that is held in trust for each of the Subcontractors is the amount that is noted by the Head Contractor on the PBA Payment Instruction. If the PBA Payment Instruction does not correctly reflect the moneys due and payable to the Subcontractors at that time, then the Subcontractors will not have a beneficial interest in any moneys that may subsequently be paid into the PBA.

In any event, payments out of the PBA are processed on the same/next day as the payment is made into the PBA by the Principal. Therefore, the Progress Payment PBA is a 'zero balance' account. In the event of insolvency of the Head Contractor, there will not be any money in the Progress Payment PBA for payment to the Subcontractors.

### **9. Disputed payments**

The government's proposal indicates that the PBA will not impact upon the contractual rights between parties. On that basis, the PBA can only be used as a payment mechanism for undisputed payment claims. If there is a dispute about a Subcontractor's payment claim, the PBA will not assist the position of a Subcontractor at all. Given that the vast majority of late payments within our industry are due to disputes between the parties, this is a critical element of the payment mechanism that ought to be addressed in any regulatory intervention. The government's proposal did not expand upon the position of disputed payment claims, and we have raised this issue as part of the outstanding information required by industry (refer to page 93 "Further information required on PBAs").

### **10. Significant costs and administrative burden**

The proposed PBA model requires the Head Contractor to set up and manage both the Progress Payment PBA and the Retention Money PBA. This will include, as a minimum:

- legal costs to draw up the PBA agreement between the Principal and the Head Contractor;
- legal costs to draw up the PBA trust deed between the Head Contractor and the Subcontractors;
- costs to set up and administer both project bank accounts;
- costs to audit both project bank accounts as they are trust accounts;
- costs associated with a reduction in cashflow.

To date, Master Builders has only been able to verify the completion of six projects in Australia where PBAs were used, all of which were government projects over \$20 million in Western Australia. Our members who worked under PBAs in Western Australia have all reported a significant burden and cost in adjusting their payment systems to a PBA system.

We have been provided information that the additional costs due to the PBA model amounted to an average of 1.5% of the project value for a large builder. For smaller builders who cannot rely on economies of scale and have fewer resources, the likely cost impost could be as high as 3%. When this is contrasted against the average profit margin of less than 3% within the commercial construction sector in Queensland, it is a significant cost impost able to deter builders from the industry in Queensland.

This is in stark contrast to the government's claim that PBAs will result in a nett benefit to the community. The government released a report in November 2016 prepared for the Queensland Department of Housing and Public Works by Deloitte titled *Analysis of security of payment reform for the building and construction industry* (the Deloitte report). Master Builders intend to provide a comprehensive evaluation of the Deloitte's report, but for purposes of this submission, it is important to note that we strongly challenge the assumptions used in the Deloitte's report, as well as its findings. It is also important to appreciate that the Deloitte's report focussed solely on the commercial building and construction sector<sup>7</sup>, whereas the government is proposing to introduce PBAs on the residential sector as well.

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<sup>7</sup> See p. 36 of the Report.

The Deloitte's report's findings are based on two critically flawed assumptions, summarised in TABLE 1.

## TABLE 1

### Key Flawed Assumption 1: A PBA scheme will reduce project costs by 2.5%

The Report assumes a reduction in project costs of 2.5% (p. 15) and references a report by Highways England published in June 2015 as the basis for this assumption. Given the pivotal role that the 2.5% plays in the Report's Benefit-Cost Ratio, some closer analysis of the Highways England report is justified.

It should be noted that the Highways England report:

- was not prepared by an independent third party;
- reviewed a PBA scheme differing in important aspects from the PBA scheme proposed by the Report, for example the Highways England PBA scheme:
  - was used in large, public civil construction (road building) projects;
  - relatively few SME's were engaged as Head Contractors;
  - it covered payments to both subcontractors and sub-subcontractors (i.e. three layers of the contractual chain).

Further, the Highways England report does not actually make a claim of a 2.5% reduction in cost brought about by their PBA scheme. On page 5 of the Highways England report it states that nett savings at present is estimated to be 1%, and furthermore that this 1% is based on "anecdotal evidence". Further, on page 7 of the Highways England Report, it is acknowledged that the financial benefits of PBAs are difficult to demonstrate.

The only reference to a 2.5% reduction in costs due to a PBA scheme is found on page 5 where the report refers to research undertaken by the Office of Government Commerce which "suggested that savings in the region of 1% - 2.5% could be achieved through introduction of a PBA (Office of Government Commerce, 2007)" – emphasis added. As the first PBAs were only introduced by the UK government in 2009, at best this "suggested saving" is a forecast and not reflective of actual outcomes of a PBA scheme.

At best, the Highways England report only provides "anecdotal" evidence that a cost saving in public infrastructure is likely to be in the vicinity of 1%. The Deloitte's Report's assumption of a 2.5% reduction in project costs due to the introduction of a PBA scheme is therefore not founded on any actual, independently verified evidence. Yet, the report still used the 2.5% as its 'main case' for projections of benefits derived from a PBA scheme, including a significant positive impact on Gross State Product and even employment.

The Deloitte's report sensitised the assumption of 2.5% cost reduction in its modelling, and found a cost saving of 1% to be the cut-off point where the regulatory intervention no longer delivers a nett benefit. The Deloitte's report also listed the realisation of the reduction in project costs as a risk because it may not eventuate or take an unreasonably long time to realise.

It appears that most of the savings Deloitte's envisioned will come from subcontractors reducing the margins they allegedly build into pricing to compensate for delays in payment, and that the introduction of PBAs will cause subcontractors to reduce their prices because they will remove

this margin. This assumption is not based in fact (a survey by Master Builders of a randomly selected group of subcontractors indicated that less than 5% of subcontractors actually “price” for delayed payment), and assumes subcontractors will reduce their prices in response to the legislation. In our opinion, the cost savings will be 1% or less, and are unlikely to materialise at all.

### **Key Flawed Assumption 2: Head contractors will not pass on the increased costs of implementing a PBA scheme to the government or private clients**

The Deloitte’s report estimated the nett cost of a PBA scheme to head contractors in its Scenario 2 at \$1.5 billion due to reduced working capital as a result of losing access to progress payments and retention funds, as well as bank fees, the administrative burden imposed etc. The Report assumes that the additional costs that Head Contractors will incur because of a PBA scheme will not be passed on to the client/principal. The Report bases this assumption on the belief that competitive pressure will restrain head contractors’ abilities to raise prices.

Should a Head Contractor face a reduction in economic benefit, it will lead to a change in margins and/or rate of return. It goes against accepted economic theory that a firm would just accept a reduction in their return on equity/capital and not increase prices. Ultimately, the equilibrium price for Head Contractors would be at a higher profit level than at present to compensate for the lack of working capital. In short, the costs associated with PBAs will be passed on to government (i.e. the taxpayer) or to private clients.

If an increase in prices was not achievable then rational head contractors will use their balance sheet capacity in other States or for construction projects not covered by the PBA scheme (Residential/Infrastructure). This in turn would reduce capacity and competition in the residential and commercial building market in Queensland, resulting in the inflation of project costs for all projects subject to a PBA scheme.

We strongly urge the government to ensure a proper analysis of the cost impost of the PBA proposal is undertaken, including the expected avenue of obtaining advice from the Productivity Commission and a thorough Regulatory Impact Statement.

Based on the reported experience of our members and the lack of robust information to the contrary, Master Builders remains unconvinced that PBAs will result in any costs savings on projects. The additional costs associated with PBAs will only add to the overall project cost which, in turn, will result in an increase to the market and the end consumer.

### **Further information required on PBAs**

As noted above, there is limited information in the Discussion Paper and Fact Sheet 1 regarding how the proposed PBA model would operate in practice. However, a number of significant issues need to be clarified before Master Builders can provide its final response to the government’s proposal. These issues include:

1. How will the PBA model prevent Head Contractors from excluding in the PBA Payment Instruction amounts due and payable to Subcontractors at the time of the head contract payment?
2. How will the PBA model address the situation that arises when the Superintendent (or the Principal if there is no Superintendent) assesses a head contract payment claim at a value less than that claimed by the Head Contractor? That is, the amount paid into the PBA is less than that claimed by the Head Contractor. Will Subcontractors then only be entitled to a reduced amount from the PBA for that particular payment? The Head Contractor will have payment obligations under the subcontract, which it has to meet regardless of whether the Principal has paid its payment claim in full or not. Does this mean the Head Contractor will have to make up the shortfall by depositing additional funds into the PBA (presumably from its own bank account), and then issue a separate PBA Progress Payment Instruction to pay out the remainder of the amounts owing to the Subcontractors? What if the Head Contractor cannot make up the shortfall?
3. How will the Subcontractors be paid from the PBA in the event that the Head Contractor becomes insolvent? Do Subcontractors become secured creditors for the last payment deposited into the PBA by the Principal? Will Subcontractors be secured creditors for the amounts held in the Retention Money PBA?
4. How will disputed Subcontractor payment claims be addressed in the PBA model?
5. How will disputed Head Contractor payment claims be addressed in the PBA model?
6. How will the PBA model assist other levels of the contractual chain who experience the same payment problems as the first layer of Subcontractors e.g. head contractors, sub-subcontractors, sub-sub-subcontractors, suppliers etc.
7. How will the PBA model address payments due to the Subcontractor prior to or after the payment is made into the PBA by the Principal?
8. Who receives the interest that accrues on the Retention Money PBA?
9. How will the PBA model address the situation that arises when the Principal becomes insolvent?

## Summary

For the reasons above, Master Builders does not support the implementation of a mandatory payment mechanism such as a PBA. PBAs will add cost and complexity to the building and construction industry whilst not achieving the government's objective of improving payments within the industry. As a regulatory intervention, it is poorly targeted and the costs far outweigh any benefits that may be realised.

## Questions

For the sake of completeness, our responses to the government's specific questions in Fact Sheet 1 are below:

Question	Master Builders Response
1. Do you have any suggestions about how the PBA model discussed in Fact Sheet 1 could be improved?	Master Builders does not support a PBA model. The matters identified in our submission should be addressed, and further, the information about PBAs, as identified in our submission, should be made available to the industry for comment.
2. What would be the most effective way of implementing the model for head contractors?	Master Builders does not support a PBA model.
3. Do you have any other suggestions about how the proposed PBAs should be implemented in practice?	Master Builders does not support a PBA model. The matters identified in our submission should be addressed, and further, the information about PBAs, as identified in our submission, should be made available to the industry for comment.
4. What support should government provide to assist the building and construction sector transition to PBAs for all projects (excluding engineering projects) valued over \$1 million?	Master Builders does not support a PBA model.
5. How could the PBA model be adapted to private single residential construction over \$1 million?	Master Builders does not support a PBA model.
6. Should the PBA model also be applied to private residential construction?	No, Master Builders does not support a PBA model.
7. Should PBAs be expanded to large residential projects and developments, such as retirement villages?	No, Master Builders does not support a PBA model.
8. Do you have any other feedback to assist the department to ensure effective implementation of PBAs in the building and construction industry?	See Part B of our submission.



## 2. Amendments to the Building and Construction Industry Payments Act 2004 (the BCIPA)

The Discussion Paper and Fact Sheet 2 contain a number of proposals regarding amendments to the BCIPA. We understand the changes proposed fall into two main categories:

### 1. improvements to the adjudication process

- impartiality and independence of the Registry is to be strengthened;
- Adjudication Registrar and officers of the Registry are to solely perform functions related to the operation of the BCIPA;
- advice regarding the BCIPA must only be provided by the officers of the Adjudication Registry;
- adjudicators must maintain and develop their skills and knowledge through Continuing Professional Development (CPD) both to retain and renew their registrations as adjudicators; and
- limits to be imposed on adjudicator's fees.

### 2. enhancements to the BCIPA claims process

- all payment claims made under a construction contract to be payment claims made under the BCIPA without the need to include a notice on the payment claim itself;
- claimants are to have 30 business days to submit an application for adjudication of a Standard Payment Claim;
- claimants are to have 40 business days to submit an application for adjudication of a Complex Payment Claim;
- if a contract does not deal with payment claims made after termination of a contract for convenience, then the BCIPA will set that a reference date arises on the date of termination of the contract;
- adjudicator has the discretion to order the reimbursement of the adjudication application fee as part of the adjudicator's decision;
- adjudicator has the discretion to order that the respondent pay interest on the adjudicated amount from the date of the payment claim as part of the adjudicator's decision.

## Master Builders' response

Our response to the specific questions raised in Fact Sheet 2 are as follows:

What are your views on the proposed amendments to the BCIPA?

Proposed changes to the BCIPA adjudication process	Does Master Builders support it?	Comments
Strengthen impartiality and independence of the Registry	Yes	It is critical to the objective of the BCIPA that the Adjudication Registry is impartial and independent from both parties to a payment dispute. Whilst we support the government's intent, no detail has been provided in

Proposed changes to the BCIPA adjudication process	Does Master Builders support it?	Comments
		the Discussion Paper as to what measures are proposed to achieve this strengthening of the Registry.
Adjudication Registrar and officers of the Registry are to solely perform functions related to the operation of the BCIPA	Yes	It is extremely important that the QBCC Registry staff are focussed on administering the BCIPA and that their roles are dedicated to this purpose. Resources should be allocated by the QBCC to solely perform functions related to the operation of the BCIPA.
Advice regarding the BCIPA must only be provided by the officers of the Adjudication Registry	Yes	It is critical to the objective of the BCIPA that the parties understand their rights and obligations. However, given the complexities associated with the BCIPA process, the QBCC Registry must have resources available that understand all aspects of the process and the requirements of the Act, and are able to provide advice and support to all parties i.e. claimants, respondents and adjudicators. This requires the QBCC resources to be well educated in all aspects of the process and limiting the resources that provide that support to the parties only to those who have a sufficiently high level of understanding, is fundamental to the success of it.
Adjudicators must maintain and develop their skills and knowledge through Continuing Professional Development (CPD) both to retain and renew their registrations as adjudicators	Yes	It is critical to the objective of the BCIPA for all adjudicators to be of a high standard. They must be sufficiently trained in, and have experience with, all types of construction contracts and the relevant areas of construction law. This will ensure that their decisions are of a high standard and their duties are exercised in accordance with the BCIPA. If a high standard is not achieved and maintained, parties will lose trust in the adjudication system, resulting in increased disputes and ultimately more insolvencies within the industry.
Limits to be imposed on adjudicator's fees	No	As for the item above, we must ensure that BCIPA adjudicators continue to operate at a high standard. If the adjudicator's fees are reduced by too much, it will force good adjudicators out of the industry and poorer quality adjudicators will remain. This will lead to poor quality decisions, increased disputes and more insolvencies.

Proposed changes to the BCIPA claims process	Does Master Builders support it?	Comments
All payment claims made under a construction contract to be payment claims made under the BCIPA without the need to include a notice on the payment claim itself	No	<p>Master Builders does not support this proposed change for the following reasons:</p> <ul style="list-style-type: none"> <li>• It will be to the detriment of claimants. Claimants will 'use up' reference dates without conscious thought and when they may not want to do so. This will remove the opportunity to use the BCIPA to obtain payments due.</li> <li>• It will remove the flexibility that currently exists for the parties to resolve the dispute amicably.</li> <li>• It will increase the discord in the industry between the claimants and respondents as the respondents will be required to incur additional administrative time, effort and cost to respond to every payment claim as if it is one that will go to adjudication even though the claimant may not intend to do so.</li> <li>• It does not remove the step that places the most pressure on claimants, the need to make an application for adjudication.</li> <li>• Claimants may inadvertently make a payment claim without intending to do so as an email may be a valid payment claim under the BCIPA – thus taking a reference date away.</li> <li>• Claimants may suspend works under the BCIPA if a payment schedule has not been provided in response to a payment claim. A respondent may simply have responded as if the payment claim was a contractual payment claim and yet work suspended simply because it was not aware that the claimant intended the claim to be a BCIPA payment claim. This will impact on the project and affect entitlement to payments under the head contract.</li> </ul>
Claimants are to have 30/40 business days to submit an application for adjudication of a Standard Payment Claim/Complex Payment Claim	No	<p>Master Builders does not support this proposed change. The BCIPA process should afford both parties an equal opportunity to take steps under the BCIPA and should not offend the principles of natural justice any more than it currently does. Further, the main objective of the BCIPA is for rapid adjudication of a payment dispute. Extending the time to submit an application for adjudication does not support this objective.</p>
If a contract does not deal with payment claims made after termination of a	Yes	<p>Master Builders supports a change that permits a reference date to arise at the date of termination of a contract in circumstances where the contract is silent on this matter.</p>

Proposed changes to the BCIPA claims process	Does Master Builders support it?	Comments
contract for convenience, then the BCIPA will set that a reference date arises on the date of termination of the contract		
Adjudicator has the discretion to order the reimbursement of the adjudication application fee as part of the adjudicator's decision	Yes	Master Builders supports a change that extends the adjudicator's discretion to include an amount in the adjudication decision for reimbursement of the adjudication application fee provided that such discretion is to be exercised by taking into consideration the matters listed at s35A of the BCIPA.
Adjudicator has the discretion to order that the respondent pay interest on the adjudicated amount from the date of the payment claim as part of the adjudicator's decision	No	Master Builders does not support this proposed change. Fact Sheet 2 notes that this proposal is directed at compensating the claimant for pursuing payment through the adjudication process. However, an award of an adjudicated amount is not necessarily an entitlement to payment under the contract. The claimant has the option of what process it elects to use to pursue a payment due under a contract but no option should permit it to recover costs where it may not be entitled to the payment in the first instance. Further, there is no entitlement under the contract for interest to be calculated from the date of the payment claim and the BCIPA should not give that entitlement.

What amendments to the BCIPA could further enhance the claims process? Please provide any other feedback you consider will assist the government in implementing these reforms.

#### A. Review the BCIPA

Master Builders recognises that the object of the BCIPA is to “ensure that a person is entitled to receive, and is able to recover, progress payments if the person undertakes to carry out construction work under a construction contract or undertakes to supply related goods and services under a construction contract”. However, primacy of contract should always remain the basis for consideration of any entitlement to payment under a contract. The contract reflects the terms of the agreement reached between the parties regarding a particular project. The terms of that agreement should not be

dismissed too quickly otherwise disputes will arise between the parties and the financial stability of both parties will be undermined.

To that end, Master Builders submits that consideration should be given as to how the rapid adjudication process could best serve the interests of both parties to the contract, and the industry as a whole. In particular, consideration should be given to changing the BCIPA to reflect the evaluative model adopted in Western Australia, the Northern Territory and many other parts of the world. Key elements of the 'west coast model' include:

- timeframes to make an application for adjudication under the Act do not start to run until a dispute arises regarding payment i.e. it is not linked to the date the payment claim was made or the payment schedule was provided;
- either party may make an application for adjudication;
- the parties are not restricted as to what matters they raise in their adjudication application or response;
- the adjudicator must consider all parts of the contract and not just those raised by the parties;
- the adjudicator may dismiss an application if the dispute involves complex matters of law which cannot properly be dealt with within the short timeframes provided by the Act; and
- the adjudicator may inform himself/herself in any way he/she thinks fit.

The 'west coast' model upholds the laws of natural justice and, in turn, is a fairer system for both parties to the dispute. As a result, there is less angst within the industry when adjudication is initiated because the process is fair to both parties. Parties to a dispute are also more inclined to accept the adjudicator's decision as final for that particular dispute if they believe the process to be fair.

Further, it is imperative that adjudicators do not award payment of moneys to a claimant to which it is not entitled under the contract. This does not assist either the claimant or the respondent. The claimant will use the money received assuming that it is entitled to it, however, if the respondent recovers the overpayment at some point in the future, the claimant's financial position will be adversely affected. Similarly if a respondent is required to pay moneys to the claimant that it is not contractually required to pay, it will adversely affect its financial position. Neither outcome benefits the parties or the industry.

Entitlement to payment must always take into consideration the whole of the contract between the parties. Amending the BCIPA to reflect primacy of contract will ultimately assist both parties to get paid moneys they are entitled to be paid, thus meeting the objective of the BCIPA.

## B. Adjudicators' decisions to be subject to review

An adjudicator's decision has a significant effect on the solvency of a contractor whether they are the claimant or the respondent and, as such, it is critical that the decisions are correct and based on the sound application of the relevant laws.

Whilst the Supreme Court of Queensland can review an adjudicator's decision, it is limited to only those matters which affect the adjudicator's jurisdiction or natural justice. This leaves a significant number of adjudicators' decisions unable to be reviewed because of errors that are made by the Adjudicator that

fall within its jurisdiction. This lack of oversight negatively impacts the trust and confidence of parties involved in the adjudication process.

Master Builders recommends that changes be made to the BCIPA to grant the Adjudication Registrar the power to review, or appoint a person or panel to review, the decisions of the adjudicators. Such a review would involve consideration of whether the adjudicator has, among other things:

- a good understanding of the laws relating to construction contracts;
- the ability to apply those laws to the facts that are the subject of the adjudication application;
- discharged its obligations under the BCIPA appropriately; and
- afforded both parties natural justice.

Such reviews should be undertaken regularly to ensure that each adjudicator remains a “suitable person” to be an adjudicator. The results of such reviews should also be used by the Adjudication Registrar to determine what, if any, additional training should be undertaken by the adjudicator to maintain his/her registration as well as whether an application should be referred to a particular adjudicator given their understanding and application of the law.

Greater transparency and oversight of the adjudication decisions being handed down through the BCIPA process will benefit the industry and reduce the reluctance of parties to accept the decisions of adjudicators.

### C. Adjudication to include right to order return of non-cash security

The BCIPA currently permits a Claimant to include an amount in its payment claim for the return of cash retentions held pursuant to the construction contract. Master Builders encourages the government to consider granting the adjudicator the right to order the return of non-cash security if the payment claim includes such an item and the contract provides for the release of the non-cash security as at the reference date applicable to the payment claim. The matters the adjudicator must consider before ordering a release of a non-cash security must also be determined. Master Builders will welcome an opportunity to provide further input, should the Government decide to adopt this proposal.

### D. “Second Chance” Payment Schedule (Media Release, 11 February 2017)

Master Builders does not support the removal of the ‘second chance’ notice requirement in the absence of a payment schedule, and particularly if the government elects to remove the requirement to provide a notice on the payment claim itself that it is a claim made under the Act. The combination of these two proposed changes to the BCIPA process would be grossly unfair to the respondent, and increase the number of disputes that arise within the industry.

The government issued a media release on 11 February 2017 proposing to remove the “second chance” rule from respondents. This is a reference to s19(5) and s20A of the BCIPA. No details have been provided by the government as to the reason behind this proposal, nor has it been included in the Discussion Paper.

The ‘second chance’ rule has been in place since the commencement of the BCIPA in 2004 in relation to adjudication applications. Previously, before a claimant could file an application for adjudication in the

absence of a valid payment schedule, the claimant was required to serve a notice on the respondent advising it that the claimant intended to file an application for adjudication. This provided the respondent with a 'second chance' to serve a valid payment schedule. No such 'second chance' was required if the claimant elected to start court proceedings to recover the debt rather than through adjudication.

A change was made to the BCIPA in December 2014 which provided that a 'second chance' notice was required for both situations, that is whether the claimant intended to commence court proceedings or adjudication in relation to its payment claim. The change was made to provide a level of fairness in circumstances where there were dire consequences for the respondent when a payment schedule was not issued. Often a respondent may simply not be aware that the claimant intends to pursue the payment claim through the court or adjudication. The 'second chance' rule provides the respondent with the opportunity to properly respond with the knowledge that the claimant intends to formally pursue the claim under the BCIPA.

### 3. Redrafting the Subcontractors' Charges Act 1974 (SCA)

The government proposes to "update its (SCA's) language to the current drafting style." No further details have been provided.

In the Discussion Paper, the government poses the following question:

**Other than the language of the Subcontractor's Charges Act 1974 (SCA) are there other improvements to the SCA that you think should be made?**

In our 2016 submission to the government, Master Builders proposed the following regarding the SCA:

The SCA could be made more accessible if the provisions of legislation were simplified and made easier to understand; and there was greater industry awareness of the protection afforded by the SCA and the practical steps involved in using the SCA.

The SCA only provides security for a Subcontractor if there is a payment still owing (from a Principal) to the Head Contractor; and/or the Principal under a head contract still holds retention monies or security (which it will not require access to itself to satisfy its own losses).

Often subcontractors only resort to the SCA once a Head Contractor has become insolvent, typically after a subcontractor has already not been paid for an extended period. By this time, the opportunity for a notice of charge to attach against monies owing to a Head Contractor in many cases will be lost.

Subcontractors need to be made aware that the SCA will provide meaningful protection if a notice of charge is issued:

- immediately upon the Subcontractor becoming aware that there is a potential solvency issue with its Head Contractor (regardless of whether, and how long, invoices have not been paid); and/or

- whenever an invoice is not paid by the due date.

From the point of view of a Principal who receives notice of charge from a Subcontractor under the SCA, the process could be improved by clarifying the Principal's role in subsequent court proceedings under the SCA. That is they are only joined to ensure they discharge their obligations under the SCA and confirming that they are not required to appear at hearings unless ordered to do so by the court. This would avoid the need for a Principal to expend unnecessary time and money in seeking advice and making appearances where they receive a notice of charge and are joined in subsequent proceedings. We believe that this would encourage Principals to proactively engage with Subcontractors who are seeking to secure their entitlements using the SCA.

In addition to the above, while the SCA is often considered too costly to be a viable avenue for subcontractors to pursue, it does bring a final determination of the claims raised in the charge.

The SCA process could be made more attractive to subcontractors through both of the following:

- Requiring the Principal to provide the Subcontractor with confirmation that moneys are owed to the Head Contractor under the head contract agreement at the time of receipt of the notice of Subcontractor's charge. This could be required to be provided within five business days of receipt of the notice of charge and a failure to respond creating an obligation on the Principal to secure the amount of the charge. At present, there is no such obligation on the part of the Principal and a Subcontractor runs the risk of there being no money to which a charge can attach even though a successful decision may have been awarded by the tribunal or court.
- Requiring the Head Contractor to respond to the notice of charge and, if no response is given within the timeframes already provided in the SCA, then the claim is deemed to be accepted and the Principal must pay the amount of the charge to the Subcontractor. There is currently no penalty for the Head Contractor not acknowledging the Subcontractor's notice of charge. As a result, the Subcontractor could incur additional legal fees to pursue a claim that the Head Contractor may simply later decide to pay. There should be some motivator for the Head Contractor to nominate if the claim is accepted or disputed prior to the Subcontractor being required to commence proceedings and incur legal costs.

## 4. Combining Acts that relate to security of payment into the one Act

The Discussion Paper proposes that a new piece of legislation be developed which contains all of the existing and proposed legislation relating to security of payments in the building and construction industry. This will include relevant parts of the QBCC Act, the BCIPA, the SCA and any new legislation pertaining to PBAs. No further details have been provided regarding how this new legislation would interact with other existing legislation which deal with building and construction industry contracts or contractual arrangements between parties which do not fall within the definition of "building contracts" under the QBCC Act.



In the Discussion Paper, the government poses the following question:

**Do you have any concerns with a single new Act, combining legislation required to implement PBAs, the QBCC Act, the BCIPA and the SCA?**

Master Builders supports the proposal to combine all legislation that deals with payments under building contracts in the one piece of legislation. Since the BCIPA was introduced, the due date for payment provision has been in conflict with the equivalent provisions in the QBCC Act. This conflict has caused a significant degree of confusion across the industry. It has led to delays to payments caused by confusion as to which provision applies. The definition of business day has similarly caused confusion as it has a different meaning in different pieces of legislation.

An amalgamation of all these Acts will require careful consideration because they do not all relate to the same contracts.

## 5. Proposal re unfair contract terms

The Discussion Paper includes a “possible additional proposal” regarding “unfair contracts”, however, no information has been provided with the exception of a reference to termination for convenience clauses. The Discussion Paper notes that such clauses are used to “avoid the BCIPA” but no information regarding how this is done has been provided.

In the Discussion Paper, the government poses the following question:

**What contract provisions can operate to delay, avoid or adversely affect payment to subcontractors, i.e. ‘unfair’ provisions? How can this problem be best addressed?**

The QBCC Act already deals with some contract provisions that affect payment to Subcontractors, including setoffs or deductions from security / retention moneys, maximum security / retention moneys to be held, late progress payments and payment timeframes. Master Builders does not support any further changes to the legislation that has the effect of overriding the right of the parties to agree to terms that it considers appropriate and acceptable for a particular project. Further, the recently implemented federal legislation relating to unfair contract terms is likely to apply to the majority of subcontract agreements in the construction industry. No further legislative oversight is necessary.

## 6. Education programs for QBCC licensees

The Discussion Paper proposes that programs be provided for QBCC licensees aimed at improving financial management practices and business skills. Education programs are also to include information relating to the Personal Properties Securities Register and the BCIPA. No further details have been provided.

We believe that an education program for QBCC licensees is vital and we have been appealing to government to address this critical aspect of its regulatory response for some time now. On average, Master Builders fields about 3,000 calls annually from our members seeking assistance with contract administration, payment claims and navigating the regulatory requirements. A recurring theme is the lack of understanding of measures that already exist to assist parties to resolve disputes, such as the BCIPA, the SCA and the QBCC moneys owed process. Many contractual disputes and business failures can be avoided through a better understanding of contractual management and financial matters.

An education process should be administered by the QBCC, be delivered by accredited providers and work on two fronts:

1. Education programs should form an integral part of the licensing requirements.
2. There should be an ongoing requirement for mandatory professional development of licensees to ensure a higher level of financial and contractual competence within the industry.

## PART C: OTHER PROPOSALS

### 1. Financial Reporting Requirements

We encourage the government to reintroduce contractor reporting on meeting Minimum Financial Requirements, as well as reviewing the QBCC's role in obtaining financial information from licensees.

We believe these measures are critical in ensuring that building industry participants do not financially over extend themselves when bidding for work, and thereby create risks for other parties in the contractual chain.

We are aware that many contractors are hesitant to report incidences of under payment or late payment to the QBCC for fear of "sending a contractor over the edge" because they believe QBCC may cancel the contractor's license. A balance must be found between early intervention by the QBCC and ensuring contractors who are able to trade solvently are afforded the opportunity to do so.

Master Builders would be generally supportive of an increase in the QBCC's powers to investigate the financial affairs of licensees, if appropriate checks and balances are in place to afford a licensee a fair opportunity to respond to QBCC's powers.

### 2. Alternatives to Project Bank Accounts

PBAs are poorly suited to address the issue of late payments within our industry. PBAs will introduce costs on every participant, yet will not provide relief to Subcontractors where a Head Contractor deliberately decides to do the wrong thing.

There are other mechanisms that have been floated to address late payments<sup>8</sup>, including the use of Trade Creditor's insurance. Such a mechanism has the potential to provide real and full recovery to a

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<sup>8</sup> Royal Commission into the Building and Construction Industry (Cole Royal Commission), 2003

Subcontractor in the event of non-payment because a Head Contractor is in breach of its contractual obligations. We are aware that this type of insurance product is already used in some sectors of the construction industry. The insurance market may be an efficient way for unscrupulous participants to be effectively pushed out of the market due to becoming uninsurable.

We therefore recommend the government investigate the costs and benefits of an insurance based solution in lieu of PBAs, including considering:

- the structure and costs associated with such a scheme;
- whether it should be mandatory or voluntary;
- whether it should be provided through the private insurance market or through a government controlled scheme; and
- the efficacy of such schemes in other jurisdictions.

### 3. Amendments to the QBCC Act

Master Builders encourages the government to also consider amendments to the QBCC Act in the following areas:

- Clarify the intent of Section 67L QBCC Act which provides a maximum retention and/or security amount to be withheld from a subcontract. The provision refers to 'practical completion of building work'. It appears that this is a reference to practical completion of the *subcontract works* and not the *head contract works*, but the section is often misinterpreted within the industry and leads to disputes about retention moneys and/or security that is to be released at practical completion of the subcontract works.
- Clarify the intent of Section 67N for the same reasons as Section 67L above.
- Add a new provision mandating when final retention money and/or security is to be released under a building contract and a subcontract. This is currently not covered by the QBCC Act and often leads to disputes. It is typically due for release under the terms of the head contract/subcontract at Final Completion, that is the end of the Defects Liability Period. However, clarity regarding when the head contract and the subcontract reach Final Completion will be required for the same reasons discussed above regarding s67L and s67N in relation to practical completion.

### 4. Removal of retentions

There has been some discussion during the Building Plan Consultation Sessions with the government regarding the removal of retentions from subcontracts, even though the Government's discussion paper does not deal with the matter. The discussion appears to stem from a misunderstanding that retentions are held on contracts after completion of the contract and that retentions are only for the purposes of ensuring rectification of defective works.

Master Builders does not support the removal of retentions from subcontracts for the following reasons:

- Subcontracts (like head contracts) do not come to an end until Final Completion of the subcontract. This does not occur until the end of the Defect Liability Period. As such, retentions are NOT being withheld after completion of the subcontract as completion of the subcontract obligations are not achieved at Practical Completion but, rather at Final Completion;

- Retentions are withheld to ensure performance of the whole of the subcontract works – not just rectification of defects. Performance of the obligations under a subcontract (similar to those under the head contract) include:
  - rectification of damage caused by the subcontractor,
  - payment of moneys owed under the subcontract to the head contractor,
  - payment of liquidated damages for delays in the completion of the subcontract works,
  - rectification of defective works and/or defects.

Retention moneys recognise that the subcontractor bears the risk of not performing the works to which the subcontract relates. As the subcontractor is the only party who is in a position to ensure that it performs all of its obligations under the subcontract, it is the only party who can provide the related security.

## 5. Extend BCIPA to the housing sector

There is a need for a fairer and more timely process for resolving payment disputes between owners and builders in the housing sector. The adoption of a BCIPA style rapid adjudication process in the housing sector would help address the impact of non-payment that weighs so heavily on businesses.

Builders are frequently required to pay substantial amounts for the products and services used in the construction or renovation of a home well before they receive payment from the customer. While they have sufficient capital or financing arrangements to deal with the contractual lag in payment, non-payment can create substantial cash flow difficulties. Some consumers are aware of this situation and withhold funds to improve their leverage in a dispute. Our experience is that many consumers are withholding amounts from the final payment under the contract that far exceed the cost of rectifying any defects. While this is a breach of the contract, it not against the law.

We recognise that the QBCC's current process of early dispute resolution attempts to deal with payment disputes between the owner and the builder. However, the mediated outcomes are not enforceable. Builders in the housing sector are then forced to take action through QCAT and this can be a drawn out and costly process.

To ensure that fair outcomes are achieved, the process would require some tailoring to suit the circumstances and requirements of both consumers and builders. Master Builders believes this is achievable and strongly encourages the Queensland Government to introduce a form of rapid adjudication in the housing sector.