

SUBMISSION TO SPECIAL JOINT TASKFORCE TO INVESTIGATE SUBCONTRACTOR NON-PAYMENT IN THE QUEENSLAND BUILDING INDUSTRY

This is a very important issue for Master Builders' members, who are both builders and subcontractors, and the building and construction industry more generally.

Our comments relate specifically to the QBCC's supervisory and investigative powers to deal satisfactorily with this issue. We believe that there is a significant gap in the QBCC's powers in relation to payment issues.

A survey of our members undertaken in March 2016, illustrated the serious impact that non-payment is having on contractors in the housing and commercial sectors:

- 6 out of 10 contractors had one or more clients withhold payments that they were contractually obliged to make;
- Amounts withheld were substantial, with almost half indicating that they had a payment withheld in excess of \$5,000;
- 38% indicated that the amount withheld had a significant impact on their business; and
- 40% indicated that, consequently, they had delayed or withheld payment.

If we are to address fraudulent non-payment in our industry, we must consider the root causes of non-payment.

In our experience we have found that in the majority of cases, subcontractors are not being paid as a result of non-payment further up the supply chain: the principal or owner not paying the builder; the builder not paying the subcontractor; or the subcontractor not paying the sub-subcontractor.

There are two causes of that non-payment:

1. defective or substandard building work (not in accordance with the project documentation) carried out by subcontractors and sub-subcontractors; and
2. poor, unacceptable, or unethical business practices.

Respondents to our March 2016 Survey indicated that the most common reason for delaying or withholding payment was defective or incomplete work (44% of respondents). In two out of five cases it was because they did not have the cash available to make the payment, or because the client withheld payment. Slow payment by banks and insurance companies was also a problem.

1. Defective building work

In many cases of defective work, the owner/principal will refuse to make a payment to the builder, or deduct money from the builder, until the work is rectified. This puts financial pressure on the builder, who in turn, where possible, will withhold payments to the subcontractor until the work is rectified.

Withholding payment by the owner/principal can also have wider ramifications for the builder's cashflow with the payment withheld often being larger than the cost to rectify. This may then have wider ramifications for a builder's business and cause a chain reaction leading to further non-payment across other projects, and in the worst-case scenario the builder going broke.

If the QBCC were to ensure that subcontractors were held accountable for their defective building work, there would be fewer disputes about payments and fewer opportunities for non-payment; fraudulent and otherwise. Therefore, in order to avoid or minimise the use of defective work as a reason for non-payment, there needs to be other mechanisms for holding subcontractors accountable for rectifying their defective work.

Currently, disputes can be resolved to some extent during the construction period through the QBCC's residential Early Dispute Resolution System. The QBCC's Rectification of Building Work Policy and Regulatory Guide allow for the QBCC to issue a direction against a subcontractor. Following practical completion there is no such mechanism.

Recommendation 1: The QBCC's Rectification of Building Work Policy and Regulatory Guide should be expanded to allow contractors to submit a complaint against a subcontractor after practical completion.

Further, there is some ambiguity stemming from Section 71J *Queensland Building and Construction Commission Act 1991* which provides that "a consumer may ask the Commission to give a direction to rectify building work the consumer considers is defective or incomplete". Schedule 2 of the Act goes on to define a consumer as being "generally, a person for whom building work is carried out, but does not include a building contractor for whom building work is carried out by a subcontractor".

Accordingly, the QBCC does not accept complaints from builders for defective work carried out by a subcontractor following practical completion. In those circumstances, the builder has no option that does not involve withholding payment from the subcontractor and/or deducting the cost to rectify the defective work from money owed to the subcontractor.

Recommendation 2: The definition of 'consumer' should be changed in the legislation to include a complaint made by a builder against a subcontractor removing any ambiguity.

2. Poor, unacceptable or unethical business practices

Delayed or non-payment from owners, principals, banks and insurers puts financial pressure on builders: often through no fault of the builder. In some cases, this results in non-payment further down the supply chain.

In the commercial sector, contractors have an effective mechanism to enforce payment from the principal/developer through Chapter 3 of the *Building Industry Fairness Act (Security of Payment) 2017*. The State Government has also introduced Project Bank Accounts (PBAs) into the commercial sector with the aim of securing subcontractor payments. However, currently PBAs only cover builders to subcontractors, providing no coverage to the majority of contractors in the chain.

Recommendation 3: Extend PBAs to cover the entire supply chain (developer/principal through to sub-subcontractors and suppliers) allowing for payment issues to be addressed at each point of non-payment in the supply chain. This would secure the builders' payments to the extent that PBAs actually protect contractor payments.

We have made this recommendation to the BIF Reforms Implementation and Evaluation Panel and we understand that it will be addressed in their report to Minister de Brenni.

In the housing sector, builders have limited options to enforce payment. Chapter 3 of the *Building Industry Fairness Act (Security of Payment) 2017* is not available to builders where a resident owner does not pay. This means that a very large part of the industry does not have access to a system that addresses non-payment, leaving the door open for non-payment down the chain.

If owners are entering into legally binding contracts that involve significant amounts of money, then they should be required to comply with those contracts and if they do not, then builders should be able to use the government's statutory dispute resolution process to enforce payments they are entitled to receive under the building contracts. There are strict protections in place in Schedule 1B of the *Queensland Building and Construction Commission Act 1991* for owners. Further protection should not be given to owners who do not make payments when legally required to do so.

Recommendation 4: Amend Chapter 3 of the *Building Industry Fairness Act (Security of Payment) 2017* to remove the restriction for resident owners.

We have made this recommendation to the BIF Reforms Implementation and Evaluation Panel and we are hopeful that it has been considered in their report to Minister de Brenni.

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