

23 February 2024

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Hon Meaghan Scanlon MP
Minister for Housing, Local Government and Planning
Minister for Public Works
By email: housing@ministerial.qld.gov.au

Dear Minister

SECURITY OF PAYMENT - PROPOSED LEGISLATIVE AMENDMENTS

Master Builders is a member of the Department of Public Works' Trust Account Framework Implementation Steering Committee. That Committee has come together to assist the Department in its consideration of the implementation issues with the project trust account framework.

We note the introduction of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2024* on 14 February 2024. We will provide a submission to the Parliamentary Committee in response to the Bill and provide the below to you as a precursor.

Failure of project trust accounts

The Queensland legislated project trust account framework does not, and we submit cannot, achieve its intended purpose. We also submit this is true even if compliant software solutions can be developed.

We call out project trust accounts separately from retention trust accounts. The latter are considered workable provided there can be a simplification of administrative obligations on the trustee.

There have been at least three head contractor insolvencies involving project trust accounts, and no subcontractors have been paid from a trust account following the insolvency as at the date of this letter.

The Queensland framework does not address consequences of late payment by principals (e.g. government/developers). A 2023 survey of Master Builders members carrying out government and government-funded building contracts identified late payments were a common occurrence. Over 65 per cent of responses stated they were not always paid on time. The survey results, **attached**, were provided to the Department in June 2023.

The Report of the Building Industry Fairness Reforms Implementation and Evaluation Panel pursuant to section 200A of the *Building Industry Fairness (Security of Payment) Act 2017* [BIF Report] noted there were repeated calls for increased protection for head contractors when principals paid late.

We also understand the majority of project trust accounts opened have been subjected to a QBCC audit. The findings have been that subcontractors and suppliers are being paid and the only

shortcomings found are in the administrative requirements which in some cases are not being met (noting industry is still waiting on compliant software solutions).

The BIF Report identified:

“The few subcontractors being paid via PBAs the Panel heard from confirmed that nothing had changed in terms of payment times, but also that they had never had issues with late payment from the head contractor that was now paying them via a PBA.”

The BIF Report references the historic background of security of payment reforms, based on an Australian Senate report and Queensland industry consultation. We submit any current arguments for greater protections ignore the enhanced protections already offered in Queensland and arguably insufficiently utilised. These include:

- Building contractors in Queensland are subject to licensing requirements to the effect they must pay all debts to subcontractors and suppliers to remain licensed
- Disciplinary and offence provisions in the QBCC Act addressing avoidance of contractual obligations causing significant financial loss
- Rapid adjudication framework
- Subcontractors’ charges framework
- Requirement for supporting statements
- Maximum contractual payment timeframes
- Legislative requirement to pay an amount scheduled (or claimed if no schedule) with accompanying offences.

In summary, project trust accounts impose an enormous financial and administrative burden on head contractors for no identified benefit.

If Government believes more must be done to protect subcontractor payments in circumstances of head contractor insolvency, we submit it must be done at a federal level to avoid conflicts with corporate insolvency laws. For example, subcontractors could be given priority creditor status, or a national fund could be established, along the lines of that which exists for employees (FEG) with appropriate limitations.

Requirement to include GST with retention amount deposits

One matter raised by the Department last year was the application of GST to retention money paid into a retention trust account. Master Builders is of the view amounts paid into the retention trust account, as amounts withheld from contractor/subcontractor payments as retention money, ought be GST exclusive.

This aligns with rulings of the Australian Tax Office (ATO), overriding the basic attribution rules and deferring attribution of GST payable and input tax credits to the extent related to the retention amount. That is, GST is only payable on receipt (or invoicing) of retention money to the contractor/subcontractor at practical or final completion. The reason for making the various rulings is set out in the **attached** letter from the ATO to Master Builders:

“Having regard to the delay in receiving or paying retention amounts, the Commissioner is satisfied that this application of the basic attribution rules produce an inappropriate result.”

An impact of the ATO tax rulings is that a GST input tax credit is not available until the retention money is paid (with the GST) at the end of the project.

Contractors/subcontractors typically invoice such that the amount payable has already deducted a retention amount, and the GST on the invoice applies to the retention-exclusive amount (i.e. GST on retention is not invoiced in progress payments).

It is not current practice to pay or withhold GST in relation to withheld retention amounts, and contractors' administrative systems are not set up to do this.

Requiring the payment of GST into the retention trust account with each transfer into that account can result in substantial sums being held in an account for potential lengthy periods, when ordinarily these sums (GST amounts) are not required to be withheld. Not only that, but an input tax credit cannot be claimed until the end of the project when GST is paid to the contractor/subcontractor.

This not only has a cost impact on the retention holder, but also requires comprehensive changes to administrative procedures, which also attracts a cost to business.

As this burden for retention holders (largely head contractors at present) is created by the Queensland legislative framework for retention trust accounts, we request if the amendments proposed are to proceed, they do not commence unless and until the Queensland Government has obtained a further ATO Tax Ruling to the effect the trustee of the retention trust account can claim an input tax credit for the GST paid into the retention trust account at the time of payment into the trust account.

Planned communications activities

Master Builders has raised concerns with the Committee as to the time and resources proposed to be spent on ascertaining levels of awareness and communications about project trust accounts.

We have also raised concerns with any proposed social media messaging indicating project trust accounts result in subcontractors being paid. We refute this assertion based on the information provided above – i.e. in insolvency subcontractors are not paid, and through solvency they are paid but would have been paid regardless.

Missed opportunity to make minor amendments to separate the Home Warranty Insurance premium from deposit

Master Builders is also a participant of the Queensland Home Warranty Scheme (QHWS) Review MCC Subcommittee.

One aspect considered by the Subcommittee is the legislative restrictions on the deposit received by residential builders, in particular the requirement that the QHWS deposit amount is included in the maximum deposit amount that can be received.

For residential building contracts over \$20,000 the deposit is capped at 5 per cent of the contract sum. The insurance premium typically represents around 1 per cent of the contract sum, leaving the contractor with approximately 4 per cent, to cover numerous expenses including geotechnical and other site investigations, design, ordering of materials, site set up, and much more.

A Master Builders survey of members indicated the costs expended up front by residential builders are closer to 10 per cent of the contract sum and we have previously advocated for an increase to the maximum deposit, at least to 7.5 per cent. The impact of the lack of upfront payment on construction businesses is significant, challenging cashflow and adding to the financial costs of the business.

As part of the QHWS Review, there is an opportunity to provide some relief to Queensland's residential builders whereby the QHWS premium is separated out from the 5 per cent maximum

deposit collectible and the timing of the payment adjusted to be more reasonable (i.e. not required to be paid until the earlier of either the receipt by the head contractor of the deposit and premium, or work commenced on site). This could be achieved through a few simple amendments to the QBCC Act.

The Subcommittee agreed to these changes and but they have still not gone to the full Ministerial Construction Council as a recommendation. We followed up in November 2023 with the Department requesting they be included in any upcoming changes regarding project trust accounts with no response to date.

We are disappointed these changes were not progressed in the current Bill, given the relief it could provide to the thousands of residential building small businesses in Queensland. We are concerned industry will be waiting a substantial period for another legislative vehicle to achieve this fairly minor change, but a change that would provide substantial benefit to the thousands of small business residential builders in Queensland.

We would welcome the opportunity to discuss these matters further.

Yours sincerely,

Paul Bidwell
CEO