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Committee Secretary
Housing, Big Build and Manufacturing Committee
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Submission to the Housing, Big Build and Manufacturing Committee: *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2024 ('Bill')*

Introduction

Thank you for the opportunity to make a submission to this review. Master Builders is Queensland's peak industry body for building and construction in Queensland and represents the interests of over 9,500 building and construction related members. Most members are licensed builders or trade contractors regulated under the *Queensland Building and Construction Commission Act 1991* (QBCC Act).

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

Executive Summary

This submission focuses on amendments to the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act), raising the following key issues:

- We have concerns that the change purporting to clarify who is a 'subcontractor beneficiary' creates a new set of interpretation complexities while trying to solve an existing problem.
- We believe an unintended consequence is created by using the undefined term 'entitled to be paid' in section 20A and alternative wording with an accepted meaning should be used.
- We do not agree with the proposed amendment requiring payment of GST into the retention trust account with each transfer of retention money.
 - This proposed amendment would require business practice changes contrary to existing ATO Tax Rulings on retention and GST.
 - The proposed amendment would also require the trustee (typically head contractors) to set aside GST amounts for lengthy periods, without the ability to

claim an input tax credit for those amounts until the end of the project due to the operation of Tax Rulings.

- We request that if the amendment is to proceed it not commence unless and until the Government can obtain an ATO Tax Ruling permitting the trustee to claim an input tax credit for the GST amount transferred into the retention trust account at the time of such transfer.
- We generally agree with the remaining proposed amendments provided they result in a reduced administrative burden for trustees.
- We submit the Queensland project trust account framework is fundamentally flawed and the proposed amendments in this Bill will not produce a workable framework, although may simplify some aspects and enable availability of software tools (at an expense to industry). We also submit there are other, better mechanisms to protect payments due and owing.

Clarify who is a ‘subcontractor beneficiary’ of the project trust account

The Bill proposes a simplified framework whereby parties subcontracted to carry out work and/or supply goods / services for which a relevant licence or registration is required will be ‘beneficiaries’ of the project trust account.

Master Builders agrees with the intent to simplify the assessment of which subcontractors/suppliers are ‘beneficiaries’. However, the amendments will create additional complexities and as a result we believe further consideration is required.

This is because the BIF Act creates an offence for paying someone from the project trust account if they are not a subcontractor beneficiary, in addition to an offence for not paying someone from the project trust account if they are a subcontractor beneficiary.

For example, the amendment proposed in the Bill will require a head contractor to set up separate payment arrangements for subcontractors on site who are not required to be licensed or registered, such as soft floor layers, pump operators, and others engaged as subcontractors on a project but not requiring a licence or registration to undertake the work.

Other subcontractors may be in a situation where the subcontractor company is not required to be licensed but the individual operator or worker is, such as scaffolding, cranes, demolition, earthworks, certification etc and we expect this will create confusion for head contractors as to whether the subcontractor entity is required to be paid from the project trust account.

Queensland has arguably the most rigorous licensing framework in Australia, which we support. However, there are many circumstances where industry participants are unsure whether, or which type, of licence is required to carry out particular work. In recent years, we have become aware of an inability of the QBCC to provide advice to industry participants as to whether and which licence is required. This also creates complexities for head contractors in determining which subcontractors must be paid from the project trust account and which must not.

We acknowledge the proposed head of power to prescribe additional types of work and subcontractors may assist in clarifying particular trades over time. However, we believe additional consideration is required before the changes proposed by the Bill are implemented in order to avoid unnecessary administrative costs to head contractors.

Amendment to section 20A of the Act

An amendment is proposed in the Bill to when a trustee may withdraw an amount from a project trust account. The amendment is to s.20A of the Act and replaces reference to the defined phrase 'liable to pay' with the undefined phrase 'entitled to be paid'. This creates uncertainty for industry as to when the head contractor can withdraw funds from the trust account in order to pay its employees, suppliers, business overheads and other costs.

Arguably, 'entitled to be paid' means an amount 'due and payable' to a subcontractor, but it could be argued it means the time when a payment schedule is issued, or when the time period for a schedule has passed, or perhaps even when a claim is made or a legal entitlement to make a claim arises.

We submit the phrase 'due and payable' under the subcontract is the far better term to be used as it has an accepted meaning in Queensland case law. Alternatively, 'entitled to be paid' could be defined in the Act to mean 'due and payable' under the contract, and where the phrase is used incongruously with this definition it be changed. Using an undefined and uncertain term will likely lead to disputes and legal fees.

Clarify trust account ledger and other record keeping requirements

Master Builders supports the introduction of a head of power for a guideline to assist trustees in meeting compliance requirements.

Master Builders is concerned at the burden imposed on head contractors by the QBCC in its audit program, and the large volume of records required to be produced. Master Builders understands that QBCC endeavours to audit at least 50% of all project trusts per year. Master Builders supports any amendment that will simplify that process and reduce the administrative burden and cost on head contractors.

Clarify the treatment of GST for retention amounts

The Bill purports to 'clarify' that cash retention amounts are inclusive of GST. Master Builders disagrees that this proposed amendment is a clarification, and submits it is a substantive change of policy approach.

Regard must be had to relevant rulings of the Australian Tax Office (ATO) in considering the impacts of this proposed change. These rulings override attribution rules for retention amounts and make provision for deferring attribution of GST payable and input tax credits for retention amounts. Under the ATO rulings, GST is only payable on receipt (or invoicing) of retention money to the contractor/subcontractor at practical or final completion. The rulings also have the effect that a GST input tax credit is not available until the retention money is paid (with the GST) at the end of the project.

The reason for the ATO making the above rulings is set out in the attached letter from the ATO to Master Builders. The letter includes the following statement:

“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.”

The Bill has been drafted without regard to the effect of these ATO rulings as the Bill requires the retention trust account trustee (ie the party holding the retention – presently mostly head contractors) to pay the GST amount into the retention trust account with each transfer of retention money. However, under the ATO rulings the trustee (e.g. head contractor) cannot claim an input tax credit at that time (the input tax credit is to be claimed on payment of retention at the end of the project).

In our view, the Bill imposes unnecessary costs on business without commensurate benefit. These additional costs include:

- the need for trustees to implement changes to standard business procedures for managing GST,
- imposing a consequential requirement for trustees (e.g. head contractors) to tie up additional cash in a retention trust beyond the retention amount itself, and for a lengthy period, and
- creating an obligation for a trustee to make a GST payment into a retention trust where the trustee is unable to claim an input tax credit for the GST amount until the end of the project.

While we also agree that subcontractors should not be out of pocket in the event of insolvency, we understand that subcontractors operating on an accruals accounting basis are unlikely to be required to remit GST to the ATO (or could obtain an adjustment) on a retention amount received post-insolvency and exclusive of GST. As the vast majority of head contractors operating retention trust accounts will not become insolvent, and will remit GST at the time of transaction paying a subcontractor, the proposed changes burden the majority for an unknown benefit and we submit a net benefit has not been demonstrated.

As the burden for retention account trustees (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.

Simplify the independent trust account review requirements

We support the expansion of who can audit a trust account. We have received feedback from our members having difficulty finding a suitably qualified auditor willing to undertake the audit required.

Clarify transitional application for Project Trust Account and Retention Trust Account eligibility criteria

We agree that the framework should not apply retrospectively.

General comments on Queensland's project trust account framework

The Queensland legislated project trust account framework does not, and we submit cannot, achieve its intended purpose. 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 four 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 and 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 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.

The BIF Report also 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.”

This is supported in the findings of the QBCC audits of project trust accounts. We understand that the majority have now been audited and that the findings have been that subcontractors and suppliers are being paid. The only shortcomings identified were in the administrative requirements (noting industry is still waiting, now 2 years, for compliant software solutions to become generally available). We submit any current arguments for greater protections ignore the enhanced protections already offered in Queensland.

Further we argue that there are a number of existing protections that are being insufficiently utilised to ensure appropriate payment outcomes. 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, and
- legislative requirement to pay an amount scheduled (or claimed if no schedule) with accompanying offences.

We assert that if further, additional protections are considered necessary for subcontractor payments in circumstances of head contractor insolvency, that these must be enacted at a federal

level to avoid inconsistency with Australian insolvency laws. For example, subcontractors could be placed higher in the order of creditor priority, or a federal fund could be established (similar to the Fair Entitlements Guarantee) for up to 2 progress payments per subcontractor providing the amounts are verified as due and payable by an adjudicator.

Conclusion

In summary, project trust accounts impose an enormous financial and administrative burden on head contractors for no demonstrated benefit. The amendments proposed by the Bill do not change this position.

Even if software providers are able to produce a compliant product, there will continue to be a large cost to head contractors to purchase software, implement required changes and carry out audits. Notwithstanding any software tools that may become available, head contractors will continue to bear legal responsibilities as trustee of project trust accounts which cannot be met by implementation of software tools alone. The complex administrative burden on head contractors will continue despite the provisions in this Bill.

Master Builders is strongly of the view Queensland should not continue to roll out the application of project trust accounts as planned in 2025.

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Attachment: ATO letter to Master Builders dated 17 June 2009