

**Submission to the Inquiry into the Operation and  
Performance of the Queensland Building Services  
Authority**

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Major Sub-contractors Group

20 September 2012

**Major Sub-contractors Group**  
**Submission to the Inquiry into the Operation and Performance of the QBSA**

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## **Major Sub-contractors Group**

### **Submission to the Inquiry into the Operation and Performance of the QBSA**

## **Major Sub-contractors Group**

The Major Sub-contractors Group (MSG) represents major sub-contractors who work with the larger national and international building contractors on commercial projects for the government and private developers.

MSG members provide building related services in the major disciplines including planning and design, concreting, mechanical, hydraulic, formwork, electrical, air-conditioning, plumbing, internal linings and painting.

MSG members range in size from small to large companies. Collectively the group employs nearly 1,500 employees and 170 apprentices in Queensland.

MSG members are committed to ensuring a safe workplace for their employees and a viable and fair industry for their members.

## **Key Points**

MSG provides the following submission to the Inquiry into the Operation and Performance of the Queensland Building Services Authority.

MSG members have outlined a number of key concerns about the current operation of the building industry that falls within the scope of the Inquiry, in particular:

- MSG members operate in the commercial building sector, with coverage under the *Building Services Authority Act 1991 (Qld)*<sup>1</sup> (the Act), in addition to additional considerable contractual, financial and legal controls; and in which building contractors, sub-contractors, suppliers and financiers assess and assume risk.
- The QBSA business and occupational licensing regime provides a reasonable level of coverage, however MSG is concerned about the continued expansion of licenses required by the QBSA, introduced or expanded without due impact and merit assessment.
- Electrical sub-contractors in the MSG are strongly supportive of the existing arrangements for electrical licensing to be contained within the separate *Electrical Safety Act 2002*.
- MSG members are concerned about the increasing incidents of unfair terms in commercial contracts that are disadvantaging sub-contractors. MSG is seeking to standardise Government contracts and rectify the balance.
- The process of managing retention monies and bank guarantees is being exploited to disadvantage sub-contractors and requires immediate review.

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<sup>1</sup> Superseded by the *Building Services Authority Act 1999*

## **Recommendations**

In addition, MSG has outlined five key recommendations for consideration by the Inquiry and the Queensland Government for the better operation of the commercial building industry in the State, namely:

1. The MSG advocates that the *Financial Requirements for Licensing* requirements for licensees working to commercial contracts be waived, or at the very least that the weighting given to the financial assessment be significantly reduced in assessing licensees, and that the turnover threshold limits be removed.
2. The Queensland Government should undertake an independent review of all existing licenses to test for fitness for purpose, costs and benefits.
3. Replicate section 56(3)(b) of the Electrical Safety Act 2002 in the QBSA Act to permit an electrical contractor to be the principal contractor for project works with the proviso that:
  - Activities requiring a specific QBSA license would be performed by the appropriate license holder.
  - Application is only in circumstances where the project is principally an electrical project, or in specific circumstances such as the installation of solar hot water systems.
4. Introduce a standard form contract for all Queensland Government and Local Council commercial building contracts; and include the specific requirement that the building contractor must pass through the contract terms to the sub-contractor without amendment. Such a contract will re-introduce reasonableness tests for performance in good faith.
5. MSG recommends the Queensland Government pursue discussions for an alternate approach to holding retention funds, through the establishment of an industry or government trust style fund where retention monies and bank guarantees would be held. Appropriate guidelines for remittance of retention funds would be established through industry consultation.

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## QBSA

Established under the *Building Services Authority Act 1991* (Qld)<sup>2</sup>, the QBSA is a statutory authority that regulates the building industry with objectives to:

- Ensure the maintenance of proper standards in the industry.
- Achieve a reasonable balance between the interests of building contractors and consumers.
- Provide remedies for defective building work.
- Provide support, education and advice for those who undertake building work and consumers.

The QBSA operates under a charter to regulate the building industry. Its main services for Queensland homeowners and contractors are:

- Contractor licensing; both business and occupational licenses across many disciplines.
- Dispute prevention and resolution services.
- Home warranty protection through a statutory insurance scheme.
- Information and education.
- Implement and enforce legislative reforms and where necessary prosecute persons not complying with the law.

The Act and the operation of the QBSA are significantly focused on providing protection and support to consumers and contractors of **residential building services**. These are typically people building homes or small building projects.

**Commercial building services** are also covered, particularly through the licensing provisions and under Part 4A of the Act, which deals with building contracts other than domestic building contracts. The commercial construction industry is also covered by the operation of the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA).

The administration of the Act and responsibility for the QBSA ultimately resides with the Minister for Housing and Public Works.

## Licensing

QBSA administers the licensing system for business (eg: trade contractors' license) and occupational licenses across most building related disciplines. A small number of occupational trade disciplines are not licensed including for example scaffolding.

Electrical licensing is covered in the *Electrical Safety Act 2002* (Qld) with the Attorney General and Minister for Justice holding responsibility for this legislation.

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<sup>2</sup> Superseded by the *Building Services Authority Act 1999* (the Act)

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QBSA licenses are required to undertake building works, a concept that is widely defined under the Act. This definition includes domestic or residential projects and commercial projects.

The QBSA business licenses require the licensee to meet BSA's technical, managerial and financial requirements. Licenses must be renewed annually.

### **Financial Requirements**

The QBSA's *Financial Requirements for Licensing* policy outlines the requirements for all contractors seeking to secure and retain a QBSA license. The policy aims to foster professional business practices and promote continued financial viability.

The financial requirements act to limit the annual turnover of the licensee based upon a formula that considers capital levels, liquidity levels and net tangible assets. Licensees are required to provide a declaration, independent review report or audit report, depending on their financial category.

The cost to MSG members of having these reports professionally prepared for the license renewal process can be as much as \$20,000 annually.

### **Coverage for MSG**

All MSG members are licensed by the QBSA or the Electrical Safety Office and undertake commercial sub-contracting trade services.

## Response to Scope of Review

### Whether the performance of the QBSA achieves a balance between the interests of building contractors and consumers

The primary consumer protection focus of the QBSA is in the homebuilder/residential sector. The home warranty system operates for this end of the market.

MSG members operate in the commercial sector, which is covered by a broader range of contractual, financial and legislative controls, which are in addition and external to those provided for under the Act.

The major concern of the MSG in relation to the performance and policies of the QBSA for the commercial sector, relates to the *Financial Requirements for Licensing*.

There is inadequate separation between the focus on residential and commercial activities. In the residential sector, the *Financial Requirements for Licensing* are an important part of the QBSA's efforts to protect consumers of residential building services.

The commercial sector operates entirely differently to the residential sector, with major builders, sub-contractors, financiers, insurance agencies, etc., reasonably and appropriately able to assess and assume the risk of commercial projects.

The *Financial Requirements for Licensing* for MSG members is restrictive and constrains business growth, client servicing options and commercial flexibility. The artificial restrictions of permissible turnover levels for the commercial sector are anti-competitive and discourage business growth from smaller commercial contractors.

MSG members can cite numerous cases where their business opportunities for servicing clients have been restricted through the limit on turnover levels. Builders and financiers are prepared to enter contracts only to find that the sub-contractor is restricted.

In contrast, the electrical sector does have such restrictions and the market operates on a more purely commercial basis.

The cost of MSG members in securing audited reports required to satisfy the *Financial Requirements for Licensing* policy is approximately \$20,000 per annum.

***Recommendation: The MSG advocates that the 'Financial Requirements for Licensing' requirements for licensees working to commercial contracts be waived, or at the very least that the weighting given to the financial assessment be significantly reduced in assessing licensees, and that the turnover threshold limits be removed.***

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#### **Terms of Reference (2,3,4,5)**

While recognising the value and virtue of assessing these issues by the Committee, as MSG members work on commercial projects the following questions from the terms of reference have not been addressed in this submission:

- Whether the QBSA could make further changes in order to reduce regulations to lower the cost of building a home.
- The effectiveness of the QBSA to provide remedies for defective building work and to provide support, education and advice for both those who undertake building work and consumers.
- The governance arrangements of and between the board and the general manager.
- The effectiveness of the Queensland Home Warranty Scheme and its protections.

#### **Whether the current licensing requirements of the QBSA are adequate and that there is sufficient auditing processes to maintain proper standards**

The MSG considers the QBSA business and occupational licensing regime generally provides a reasonable level of coverage and protection, although considers there is significant merit in undertaking an independent review of all existing licenses to test for fitness for purpose, costs and benefits.

This suggestion is based on MSG member concerns about the ‘license creep’ where the QBSA has continually sought to capture new parts of the industry that previously did not require licensing, and to introduce new licenses. Such decisions appear to have been largely based on the goals of the QBSA management rather than on a transparent assessment of the costs and benefits (including consumer protection benefits) of expanding the range and coverage.

In relation to the auditing process, the cost for MSG members to secure externally audited reports required to satisfy the *Financial Requirements for Licensing* policy is an expensive, direct cost to the business.

The MSG notes that in relation to the residential sector, it appears that notwithstanding QBSA’s process for auditing licensees, there remains high numbers of business defaults.

***Recommendation: The Queensland Government should undertake an independent review of all existing licenses to test for fitness for purpose, costs and benefits.***

#### **The number of trades licensed by the QBSA and whether industry groups could take a greater role within QBSA in terms of licensing standards and procedures for their members**

As referred to above, MSG members are concerned about continued gradual expansion of the range of licenses and the coverage of industries that were excluded from coverage.



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The MSG is supportive of industry groups (peak and smaller industry groups) playing a greater role in licensing standards.

In terms of licensing procedures, these should be assessed in the context of the suggested review of existing licences. Whilst industry groups should play a role in licensing procedures, caution is required to ensure that the licensing system overall is as efficient and cost effective as possible. Dilution of centrally administered procedures and/or widespread procedural modifications based on individual sectors could risk introducing greater inefficiency.

#### Electrical Contractors

Electrical sub-contractors in the MSG remain strongly supportive of the existing arrangements for electrical licensing to be contained within the separate *Electrical Safety Act 2002* (Qld). The responsibility for this Act resides with the Attorney General and Minister for Justice holding responsibility for this legislation.

Electrical contractors are not required to be licensed by the QBSA, unless they engage in building works.

Unfortunately as part of the QBSA's approach for 'license creep', there have been growing instances where the QBSA has issued penalty infringements and/or deemed licensed electrical contractors unfit to submit for work as a principal contractor where that work might require minor works to be sub-contracted to other licensed tradespeople, for example, minor plumbing works required in a substation refit.

At present Section 56(1) of the *Electrical Safety Act 2002* requires that a person conducting a business that includes the performance of electrical work must hold an electrical contractors' license. However, under section 56(3)(b) a person conducting a business that includes the performance of electrical work, who does not hold an electrical contractors' license, would not be in breach of the unlicensed contracting provisions if the electrical work is to be sub-contracted to a person holding the appropriate electrical license.

***Recommendation: Replicate section 56(3)(b) of the Electrical Safety Act 2002 in the QBSA Act to permit an electrical contractor to be the principal contractor for project works with the proviso that:***

- ***Activities requiring a specific QBSA license would be performed by the appropriate license holder.***
- ***Application is only in circumstances where the project is principally an electrical project, or in specific circumstances such as the installation of solar hot water systems.***

This legislative amendment would maintain the integrity of the current licensing regime, whilst also overcoming a legislative technicality that is currently excluding electrical contractors from many business opportunities.

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#### **Examining opportunities for reform of the Authority with a view to enhanced assistance for both industry and consumers.**

MSG members are increasingly concerned about the recent and growing incidents of what can only be considered harsh, unconscionable and unfair terms in commercial contracts.

MSG is urgently seeking intervention by the Queensland Government to introduce a standard major commercial contract form for all commercial works contracted by the Government; and a requirement that the standard contract conditions be passed through to sub-contractors without amendment. It is hoped the Queensland Government standard commercial contract form would then be more broadly used across industry for private sector contracts. MSG suggests this contract would reference the 'Australian Standard General Conditions of Contract AS 2124-1992'.

Government contracts being issued to building contractors are being extensively modified prior to issuing to sub-contractors. The concentration of market power rests with the building contractors who are using their market and contract strength to force unfair conditions onto sub-contractors, which results in increased costs as the sub-contractor endeavours to quantify the level of risk.

Examples of current practice by building contractors and the implications on sub-contractors, illustrated by practical case studies, include:

- Variations.
- Termination clauses.
- Pass through of unfair liabilities.

***Recommendation: Introduce a standard form contract for all Queensland Government and Local Council commercial building contracts; and include the specific requirement that the building contractor must pass through the contract terms to the sub-contractor without amendment. Such a contract will re-introduce reasonableness tests for performance in good faith.***

#### **Variations**

Typically a sub-contractor will undertake a scope of work as requested at the outset of a project and during the course of the project there will be variations.

There is a developing practice by some major building contractors where variations are not paid as part of the progress claim, rather left to the end of the work at which time they may or may not be paid. Sub-contractors remain unpaid for additional work undertaken at their expense. If the sub-contractor's attempts to negotiate a fair and reasonable outcome for payment such as variations is continually frustrated by the building contractor, the sub-contractor is left with little option but to commence an adjudication as a means of resolution.

## Major Sub-contractors Group

### Submission to the Inquiry into the Operation and Performance of the QBSA

#### Case Study

An MSG member was engaged on a Brisbane project where a number of variations were paid on account but not approved. At handover of the building, the builder effectively argued that the variation costs were not acceptable and offered a lesser amount. If the MSG member rejected the offer, there was a possibility they would not be paid at all. The sub-contractor accepted the lesser value even though the variation costs could be justified, as some payment was better than none.

#### Case Study

An MSG member was engaged by a building contractor to undertake work on three related Queensland Government housing developments.

During the course of executing work on the second project, considerable variations were requested by the building contractor. On completion of the second project, the sub-contractor submitted a claim for release of 50% of the cash retention being held and the cost of the variations. This claim was refuted, which forced the sub-contractor to seek adjudication under the BCIPA. The sub-contractor was successful in winning the adjudicated case and, as a result, received the cash retention and the variations. However, as a form of retribution, the building contractor then unlawfully cashed in the bank guarantee for project two and project three. Again the sub-contractor went to the BCIPA to retrieve the cash from the bank guarantee for project two and, while they were successful, it was at their own legal and administrative expense, and their money was tied up for an extended time.

This situation worsened when the sub-contractor faced a further challenge in seeking to retrieve the cash from the cashed in bank guarantee after the defect liability period expired for project three and had to instigate legal proceedings to retrieve their monies.

A further challenge to extracting payment for variations is the introduction of time bar restrictions to contracts. Often contractual terms will require that a variation be priced within anything from 2 days to 7 days, which is an unreasonable demand. If this timeframe is not met, variations will not be accepted.

The MSG feels that contract terms are being imposed onto the sub-contractors on a take-it-or-leave-it basis with no reasonable ability for the sub-contractor to negotiate or assert rights.

#### **Termination clauses**

In recent years, there has been a sharp increase in termination clauses that are outside the traditional “fairness” conditions – clauses such as, ‘termination for convenience’ and ‘termination for frustration’. Such clauses provide the building contractor with the ability to terminate the contract without providing the sub-contractor with a reason.

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#### Case Study

An MSG member received notice of “Termination for Convenience” at which time they were issued notices to immediately cease work. The MSG member understands this termination was a result of pursuing costs resulting from delays and disruption during the construction phase. The building contractor was unable to terminate the subcontractor for poor performance, poor safety or poor quality work and the sub-contractor was given three days to de-mobilise from the site, leaving all materials purchased (fixed or unfixed) on the project. The sub-contractor was then required to submit a final claim outlining work to date, demobilisation costs and the cost of materials including evidence of purchase price.

Due to the timing of the termination notice it was two months before this claim could be submitted, a period during which the sub-contractor was not being paid, access to all project records was denied, leaving the sub-contractor unable to claim costs incurred. In this case the sub-contractor was simply terminated with no explanation to avoid the dispute resolution process.

MSG members accept that there are situations where the application of termination clauses is warranted. However it is the view of MSG members that in addition to the standard contract the Queensland Government consider a mandated negotiation process, administered through the QBSA, to ensure these clauses are fairly applied and not solely used by building contractors to avoid the dispute resolution process.

#### Pass through of unfair liabilities

Consistent with the removal of “in good faith” clauses, there are many examples throughout the sector of building contractors passing through to the sub-contractors indemnification clauses, even where the building contractor may have been negligent. In practice, building contractors are asking MSG members to indemnify them and therefore to accept risk for actions outside their control.

#### Case Study

An MSG member’s employee was injured on a job site due to poor housekeeping by the building contractor. The employee was unable to keep working and filed a workers’ compensation claim. Due to the indemnification clauses in the contract, the sub-contracting company is unable to seek any recourse from the building contractor. Similarly an MSG member’s employee was injured on a shopping center project when the building contractor failed to provide adequate lighting in the work area. The employee injured his thumb and proceeded with a workers’ compensation claim. Again the building contractor was not liable due to the “indemnity” clauses. When challenged on this the building contractor threatened to exclude the sub-contractor from future work.

MSG members feel these clauses are increasingly being used in legal proceedings which leaves sub-contractors bearing unacceptable risk and should be addressed in the application of the standard contract. Equally, there is a general trend that the unfair terms procured by building contractors are being permitted by the courts to defeat statutory entitlements.

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#### Retention Payments

There is urgent need to reform the management of retention monies and bank guarantees.

Current practice is for building contractors to hold bank guarantees or cash until the completion of a job on a project to ensure they have recourse for any outstanding defects or issues.

However there are many cases where these cash or bank guarantee have been held for an unacceptable amount of time and/or on the basis of matters not related to the individual sub-contractor.

For instance, despite a sub-contractor having nil defects outstanding after the 12 months liability period, the building contractor has the capacity to retain the sub-contractor's retention for outstanding defects unrelated to that particular sub-contractor. As a result, the sub-contractor suffers the penalty of being unable to recover the outstanding retention amount, while simultaneously the builder or main contract has the financial benefit of the retention. If the unrelated defect continues to remain outstanding, then the unrelated sub-contractor continues to have the retention amount held.

#### Case Study

For one MSG member undertaking work on a Queensland Government project for a major building contractor, retrieving the retention fee took an additional twelve months post their work completion. This was caused because **one of the 15 plus sub-contractors** had not completed their work to the required building standard in order for the builder to obtain "practical completion."

In this example, 15-20 sub-contractors were awaiting payment, although on a larger job it could be as many as 40-50 sub-contractors.

The MSG member spent approximately twelve months following the defect liability period and countless administrative hours attempting to get their money back. In fact, the sub-contractor estimates it cost twice the amount of the retention to retrieve it.

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#### Case Study

An MSG member was engaged by the main building contractor on a large Queensland Government project with a total cost of \$1.5 billion and a 3 to 4 year expected timeframe. The member's job was valued at approximately \$4 million.

The sub-contractor substantially completed the work within nine months and within the year had worked to remedy any defects and finalise the contract. The sub-contractor had provided an unconditional bank guarantee to the value of approximately \$200,000. While half of the bank guarantee has been retrieved by the sub-contractor, two years later the building contractor continues to hold approximately \$100,000.

The MSG member has been unable to settle the account or force it to dispute and has spent countless administrative hours and approximately \$2,500 per year in bank fees associated with continuing to have the guarantee in place.

***Recommendation: MSG recommends the Queensland Government pursue discussions for an alternate approach to holding retention funds, through the establishment of an industry or government trust style fund where retention monies and bank guarantees would be held. Appropriate guidelines for remittance of retention funds would be established through industry consultation.***

The MSG advocates the merit of considering a system much like that which exists for the Residential Tenancies Authority (RTA), which requires a tenant to pay a security deposit at the start of a tenancy. This deposit is held by the RTA and is paid back to the tenancy provided no money is owed to the lessor or agent for rent, damages or other costs.

While recognising there would be some initial establishment costs for such an entity, MSG considers that the scheme should be self funding with the administration of the fund to be met by industry; that is by allocating the interest from deposits held to fund administration.

#### **Contractors not following the intent of the BCIPA**

The *Building and Construction Industry Payments Act 2004* (BCIPA) outlines terms in construction contracts, to provide for adjudication of payment disputes under construction contracts, and for other purposes.

MSG members site numerous examples where building contractors are deliberately avoiding the intent of the Act and misusing the provisions that enable the creation of a dispute. Sub-contractors consistently report that some building contractor automatically reject initial claims, often on the basis of ill-defined or unsubstantiated 'defects', to create a dispute under the BCIPA - thus permitting the building contractor to avoid the payment requirements in the intended manner. This is creating a situation where security for performance and the corresponding right to payment for such performance is neither uniform nor fair.

MSG members believe that an administrative procedure should be developed and introduced to ensure fair and efficient settlement of such disputes.



## **Recommendations**

1. The MSG advocates that the 'Financial Requirements for Licensing' requirements for licensees working to commercial contracts be waived, or at the very least that the weighting given to the financial assessment be significantly reduced in assessing licensees, and that the turnover threshold limits be removed.
2. The Queensland Government should undertake an independent review of all existing licenses to test for fitness for purpose, costs and benefits.
3. Replicate section 56(3)(b) of the Electrical Safety Act 2002 in the QBSA Act to permit an electrical contractor to be the principal contractor for project works with the proviso that:
  - Activities requiring a specific QBSA license would be performed by the appropriate license holder.
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4. Introduce a standard form contract for all Queensland Government and Local Council commercial building contracts; and include the specific requirement that the building contractor must pass through the contract terms to the sub-contractor without amendment. Such a contract will re-introduce reasonableness tests for performance in good faith.
5. MSG recommends the Queensland Government pursue discussions for an alternate approach to holding retention funds, through the establishment of an industry or government trust style fund where retention monies and bank guarantees would be held. Appropriate guidelines for remittance of retention funds would be established through industry consultation.

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**Parties to the Submission**

The sub-contractors who make up MSG include:

- Fairfield Services Pty Ltd
- FDS Plumbing and Gas Pty Ltd
- Hosmed Services Pty Limited
- Johnston Contracting Pty Ltd
- Leadbetter Contracting Pty Ltd
- Nardia Plumbing
- NWCI Pty Ltd
- PHP Contractors Pty Ltd
- Precision Interior Walls and Ceilings
- QR Concrete Pty Ltd
- Scooter Commercial Pty Ltd
- Vealstruct Pty Ltd
- Wideform Pty Ltd

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