

**SUBMISSION****INQUIRY INTO BUILDING SERVICES**

**Prepared by: Jill VAN DORSSSEN for and on behalf of:  
DB & J Van Dorssen and CD & KJ Houlihan (The Owners)**

**Introduction:**

On the 25 March 2011, we, The Owners, entered into a Queensland Master Builders Association (QMBA) Contract with [REDACTED], The Builder, to construct our new residential home (Principal place of residence).

The project is a joint venture between my husband and I and our daughter and son-in-law. Both parties have recently carried out building projects, a total of 4 new builds and 2 renovations. Standard QMBA contracts were entered into.

I have attached a copy of correspondence addressed to [REDACTED], [REDACTED], dated 7 November 2011 as background to some of our concerns and issues to that date. [REDACTED] referred this document to the Minister and it was forwarded to the Building Services Authority. We were very thankful for the support and assistance we received. Regrettably the matter continued to be very difficult and stressful. Final inspection and Handover was effected on the 30 November 2011. [REDACTED], Manager Resolution Services, BSA was in attendance as an independent facilitator to help achieve the handover.

Since the 7 November, 2011, we continued to have several issues. The contractor continued to deny our written request for access to our property for the purpose of inspecting the work etc. Refused to respond to written or attempted verbal communications. Denied us previously agreed site access for concurrent works e.g. swimming pool construction. (Designated pool location roped off and excluded from contractors works site at commencement of project – access would not have interfered with dwelling construction site – acreage property). Ignored our request for confirmation of Practical Completion Date. (Contract date 2/11/11). Issued late builders requested variations for matters identified at commencement of project – demanding immediate approval or suspension of works. Refused to provide details to substantiate his claim. Neglected to provide owners with any form of defects list pursuant to the final inspection. Neglected to attend to majority of defects post handover. Ignored owners written advices regarding outstanding defects. Owners resorted to sending document by Registered Post at end of defects liability period. Completed significant elements of the project contrary to the approved plan design and agreed specifications. To highlight some of the many ongoing issues.

On the 30 June 2012, we lodged a complaint against the contractor with the BSA regarding several outstanding building defect items, including items identified at final inspection. This process is current and we are awaiting the defects report following the BSA building inspection conducted on the 14 September, 2012.

There are additional contractual errors and omissions that require referral to the QCAT process for resolution. It is also our intention to proceed with formal complaints against the contractor for his disregard of responsibilities to the terms and conditions of the contract, compliance with the DBC Act, unconscionable conduct and unfair business practices.

We acknowledge the majority of the members of the construction industry, are genuine contributors to this very crucial sector of our community and economy, carrying out their duties in a professional manner, delivering quality services and products, enhancing our lifestyle and environment. These hardworking members do not deserve the consequences of a small minority who bring disrepute on the industry nor the unnecessary stress and heartache to consumers who embark on possibly one of the most major lifetime projects - the building of their family home.

**Reference Resources:**

Queensland Master Builders Association

Residential Building Contract (RBC)  
General Conditions – Residential Building Contract (GC-RBC)  
Contract Information Statement  
(As signed and dated 25 March 2011)

Building Services Authority

Major Works Contract Kit – September 2010  
General Conditions of BSA New Home Construction Contract – August 2011

Queensland Domestic Building Contracts Act – Reprint No. 2C as in force on 18 December 2009.

**Matters of Concern:**

Based on the events and circumstances of our recent experience, it is evident that while the intent of the QMBA standard contract is generally in accordance with the QDBC Act, clauses are intended to favour the contractor and from our experience, hinder the owners access to fair dealings with contractor who choose to operate outside the QMBA code of practice and acceptable best practice. Inexperience causes many owners to be very vulnerable to this type of practice as so often presented by various media programs and outlets.

Of more concern is the total lack of timely consequence to the contractor for breaches of responsibility and general non- adherence to the terms and conditions. From our experience we were bullied, denied our rights particularly with regard to access of our property, ripped off by excessive charges associated with variations, held to ransom for early payments and any pro-active actions to try and enforce our rights. As owners, on our position of needing complete the project and 'move in' the contractor with a leverage to continue hold us to ransom and proceed with his unprofessional and unconscionable to avoid unnecessary delays. Most home builders are in very similar circumstances – incurring additional expenses for rent etc.

To summarise some of the areas that could be addressed to achieve balance between the competing interests of building contractors and consumers,

**Dispute resolution**

The Queensland Master Builders Association – Residential Building Contract is a document designed by the industry for the industry and some of the clauses are very heavily weighted to favour the contractor. (During the process we engaged the services of a very experience construction lawyer who confirmed this opinion). The QMBA promotes its standard form contract's provisions as fair to both parties.

Included in the Contract Information Statement, The QMBA reinforce a position of providing equitable, timely and effective dispute resolution for disputes between contractors and consumers. As the construction and building industries employers' body, their obligation is to represent their members' interests. This services is offered free of charge to their members.

The QMBA were able to assist us with minor issues such as the contractors issuing of progress payment claims before stage works actually completed and the contractor demanding payment before the 5 business days as per contract terms. The only risk associated with early payment is that of the owners. On payment of a stage claim, the owners accept all works associated with that stage as complete and satisfactory even if not yet completed and not be covered by the BSA Home Owners Warranty Insurance.

For more serious matters, they advised us they were not able to assist and our only option was to seek separate legal advice. Continually cautioned us against initiating mediation because of the legal costs we would incur (\$6,000.00 conservative estimate), the possibility of the contractor, rightfully or wrongfully, suspending works and the associated time loss (min 6 to 12 months). Their key advice to us as owners - to put aside our emotions, treat it as a business transaction, just pay the contractor whatever and whenever he demanded, accept the project if around 90% of what we expected, get the keys, take possession, settle in for a couple of months and then if we still had energy and resources, take them up the issues as consumers. During the contract period there was very little option available. While the terms and conditions of the contract are in very plain language, if the contractor chooses to ignore them, there is very little consequence to the contractor for his failure to comply. It is now proving that once the non-compliant work is completed, it is very difficult to have it rectified.

**Comment:**

True fair and equitable dispute resolution should be provided by an independent body that has the ability to provide basic impartial advice to consumers on all matters, defective work, errors and omissions, minor legal matters relating directly to the contract, and/or contractor, without causing consumers additional legal costs. Power to apply and enforce realistic consequence on contractor for non-compliance during the term of contract in addition to 'penalty points'. Where the cause of the dispute is determined to be the contractors responsibility, the owners should be entitled to immediate financial compensation for hardship and associated costs including but not limited to rent associated with delays, legal costs etc. This could be by way of authorised back charge provisions on contractor's right to payment.

**Remedies for defective work.**

The QMBA standard contract does not allow for any right of set-off or retention for the owner. The only monies that can be withheld are liquidated damages at final payment. There is a written provision for disputed monies at practical completion to be deposited into Trust with QMBA - but not recommended. This is contradictory to the set-off provisions. Should the contractor dispute this, rightfully or wrongfully, it is very difficult for owner to take possession and associated risks are inherent to the owner. Owners become liable for costs from contractor and if they take possession, immediately accepts project practically complete at that time.

The owners' ability to enforce the contractor to attend to defect rectification work, during the construction period and/or at practical completion, is very limited. There is no means of enforcing compliance. The contract is written in very plain language –

The Contractor **must** rectify defects

Provide signed defects list, etc-

-but all monies are paid. The contractor has left site, moved on and not concerned about the owner's position. From our recent experience, the longer the minor defects are left they can become entangled as to whether they are the responsibility of the contractor or form part of the owners general maintenance responsibilities. Date first noted and reported was not considered. As the owners continue to value add by way of landscaping, general improvements etc, and once the defect is not easily visible, they no longer exist. Particularly important for early defective building work that is covered by fixings etc.

Only recourse is to proceed with lodging complaint with BSA. Time consuming, stressful, complex and daunting process. The outlays of time, energy and emotions are all by the owner. Many owners could be very disadvantaged by this process as well by way of language and cultural barriers.

**Comment:**

Owners should have the right to withhold retention monies to the extent of 5% of contract sum reducing to 2.5% at practical completion to be held for a period of 6 months. Contractor to submit claim for release of retention monies on approved, satisfactory rectification of all defects.

An additional 3 months defects liability period to be applied to allow owners true and fair time to identify all defects. 9 months total defects liability period. This is standard industry practise in the commercial sector and many domestic/residential situation e.g. Architect controlled projects.

**Note:** To minimise risk of non-payment of final retention monies by owner, where the funds are not required to be released by a financial lending institution, funds could be held in trust similar to the Residential Tenancy Bond monies.

Develop - Guide to Standards and Tolerances (Similar to the Victorian Building Commission guide) Provide basic information that can be used by builders and building owners as a convenient plain language reference guide to the minimum quality of building work expectation. A good reference guide to all parties before entering into dispute of what is defective work.

Note: Consumers have restricted access to BCA and Australian Standards.

Regarding recent BSA Building Inspection (14/11/12) – Building inspector clarified he relied on his observation of our reported defect and whether or not he would accept it in his own home. I consider this to be very subjective. (Not a slight on the individual but as owners, far more equitable for us if there is a basic reference standard). No reference to what the property approved plans and specifications required, any premium owner paid to contractor for a more detailed finish and no tangible reference point for the owner to compare with. The initial first impression of a home is not necessarily reflective of defects, but a reflection of the attention to detail in the fittings and fixture etc decided by the owner. If a display home contract, the contractor has very specific requirements to provide the finish no less than displayed or if applicable, a upgrade to a more discerning finish. This too should not be reliant on a third persons acceptance standard.

### **Progress Payment Claims:**

QMBA provision for Progress payment claims requires all claims to be paid in full as and when demanded by contractor, or interest on unpaid monies will be applied.

It would be more equitable if the interest rate was in line with the current mortgage interest rate ( as per Item 13 BSA contract conditions schedule) and not the current high rate of 15% QMBA. A Minimum and maximum rate could also be set.

Claims for stage payments, constitute the contractors confirmation that the project is complete to that stage requirement. Some of the stages require Compliance and Inspection Certification. i.e. Footings, slab, frame and final. These certificates (Form 16 /15 should be required to be supplied with the progress claim to validate the contractor's statement of attainment, similarly to the Final Form 21 at practical completion. The QMBA contract requires the contractor provide these to the owner as soon as practicable after issue but this is very rarely done. We were informed it is common industry practise for contractors not issue these to the owners till Practical Completion. To avoid this, they should form part of the requirement for contractor entitlement for payment of the stage. We were unable to get copies of the documents progressively through the project, despite repeated verbal and written requests.

I have reviewed the documents and have concerns about several aspects e.g. The footings certificate issued by the certifier dated 29.11.11 – day before handover. Inspection of site drainage, cut and fill batters, soil erosion and sediment control and sanitary drainage and set out of building works – signed by builder – dated 18.11.11. Bracing, lintels, tie down and framing – signed by engineer dated 15.7.11 but we had received and paid the progress payment 24.5.11.

Questions:

Were the inspections physically carried out as and when required?

What would have been our recourse if stages paid for were not compliant?

What would have been the consequences to the contractor for making false statements in the progress payment claim? The builders certifies the project has reached an applicable stage for his payment claim – There is no certification that the works are compliant.

The QMBA standard contract does not provide for the owner to dispute a progress claim or part thereof.

Owners failure to make payment on time is included in the 'Definitions' as a 'substantial breach' and may give rise to the Contractor suspending works or terminating the contract. Where contractors have over committed to works in progress, a temporary suspension of works of selected homes could be very advantageous to them to favour projects where this is a distinct financial benefit to complete a home to allow a claim. This is common where certain stages incur more financial outlays by the contractor than others. (credit management).

BSA General Conditions provide for – Notice of Dispute of Progress Claim (BSA Form 4 or similar appropriate written notice) providing owners legitimate rights to ensure they are getting what they pay for without opportunity for the contract to penalise the owner – rightfully or wrongfully.

**Comment:**

All owners should be entitled to reserve the right to dispute a progress claim or part thereof on the grounds of incomplete stage works, disputed variations costs etc, defective work etc and be deemed to have met their contractual obligation. Part payment is fair and reasonable to ensure cash flow to the contractor. Balance of payment due and payable on successful completion of stage. (Commercial sector withholds till following claim – usually monthly)

**Variations:**

The construction and building industry recognise variations as an opportunity to increase their profit margin. It is not uncommon in the building and construction industry, where it is possible to recognise scope for variations, to reduce the initial profit margin on quotation (to win the job) and rely on the variation works. Contracts commonly nominate a reasonable profit margin on costs for variations (say 20%). This is often to compensate for additional administrative costs etc. Accordingly owners should be entitled to a detailed breakdown of the variation:- e.g.

- Actual cost to contractor  
Substantiated by copy of source documents where required – particularly significant variations
- Actual labour hour component if applicable
- Deletion value of substituted component included in original cost.
- Net value due and payable

(This is common practise in the commercial sector)

The QMBA's position on variation costs – the owner either accepts the price from the contractor (reasonable or not) or chooses not to proceed with variation. There is no responsibility for the contractor to be accountable, and transparent.

In our recent project situation, the contractor was well aware of changes we required. Resisted all our efforts for specific items to be included in specifications – nominating the specification supplied by him was sufficient to cover our nominated specifications. Reality – at 'selections', the only options without incurring additional variations, were limited samples supplied by them at their office. At no time prior to entering into contract were we advised or shown their 'builders range'. The contractor continually denied us the opportunity to access these prior to signing the contract. In his words – not necessary – he had allowed for our nominated items. Eventually our contractor admitted had he included items specified by us – his original quote would have been \$50,000.00 more. Variations raised by contractor approx \$40,000.00. (Misleading and deceptive conduct?)

Domestic Building Contracts Act 2000 – Part 7 (s79 – s84 : Pages 54 – 58 ) provides very specific and comprehensive requirements regarding valid variations and the contractor right to payment. In our situation, the contractor blatantly disregarded many of his obligations e.g.

Nominated immediate payment in full for all variations as raised - no provision for payment on commencement. Variation for fixing elements such as cabinetry, plumbing fixtures etc raised 14.6.11 – Fixing stage claim 11.10.11

Did not include variations in adjusted contract sum (Contractors position – variations do not form part of contract – outside of contract ) *Our concern – would this have excluded variation items from the Home Owners Guarantee Insurance and other contractual terms and conditions such as defective work etc.*

Contractor did not sign variation documents (repeatedly requested from owners)  
Sect 84 – Right of building contractor to recover amount for variation calls up contractors signing of variations as a necessary component.  
*Contractor position – if not paid in full at time of issue – work will not proceed and would hold up works)*

Contractor did not adhere to issuing variations ‘within the shortest practicable time’ requirement.

Contractor refused to carry out variation work after work accepted and signed by owner.

**Comment:**

Failure to adhere to the DBCA requirements does impose penalty by way of penalty points. During construction and contract period – owners have limited ability to exercise their rights without risk of contractor not proceeding – rightfully or wrongly,

Owners should have ability to ensure the requirements of the DBCA are adhered to.

**The Site – Access and Concurrent Works.**

Feedback suggests it is common for contractors to assume an entitlement to the total site to the exclusion of all other than their workers and representatives.

The QMBA General Conditions contract information statement explains the contractor has ‘entitlement’ to access site. The BSA document general conditions – 7.1 the Owner gives the contractor a licence to enter and occupy the site.

The reference to entitlement allows a broader interpretation of control if the contractor is inclined. The BSA documents clearly retain the owner as the principal party to the condition.

At all times owners and contractors need to adhere to and respect the WPH&S requirements. However, our contractor used this provision to exclude us from site at all times including repeated request for access at times when it suited him. At other times, he would instruct us to attend site unaccompanied or to meet with sub-contractors on site to discuss matters we raised with him. I consider the provision for WPH&S should not be manipulated in this manner. The contractors should be accountable for appropriate application of these requirements and provision for recourse against contractors who choose to conduct their business in this manner.

The contract documents are clear and reasonable about the owners and/or representative right to access site. The ‘site’ is further defined – that part of the land necessary to be occupied and used by the contractor for the construction works’ - not the whole of the property.

The contractor chose to use the provisions of WPH&S and nominating our requests for as 'unreasonable' to his advantage to totally exclude us from site. The contractor further assumed the position of total control over authorised persons including those authorised by the owner and refused all access. When we challenged these approaches, the contractor continued to threaten us with breach of contract and suspension of works 'without further notice'.

Concurrent works such as swimming pool construction, driveways etc should be specifically covered under the contract conditions at a time when of signing. We had roped off an area for swimming pool constructions and the contractor agreed to exclusion from that area (not necessary for his access or scope of works). Access was easily available as to not impede nor obstruct the house construction (acreage property – pool located in front of house). This was an agreed matter to allow for pool construction concurrently with house construction. Pool construction separate from house by way of independent contract, building approval and certifier etc. Building contractor agreed to co-ordinate commencement date directly with pool contractor. As relationship deteriorated – building contractor contacted pool contractor directly and refused them access to property. The concurrent construction of the pool did not proceed and was subsequently delayed because of the wet weather. This was what we were scheduling to avoid. As owners we were totally frustrated and had no avenue of recourse to access the part of our property that was previously physically excluded from the contractor.

**Comment:**

Such matters need to be formally finalised to avoid the contractor assuming control of the total property.

**Delay and Extension of Time:**

BSA General Conditions

14.2: allows for extension of time for: events occurring on or before the date of practical completion which are beyond the reasonable control of the contractor, including, but limited to general industrial action (*excluding contractor specific action*)...../

:- Such exclusion should be included in all provisions.

14.6: if the owner does not respond to the contractors claim, the extension of time claimed by the contractor will be deemed to be disputed by the owner.

:- More equitable than the reverse as called up in the QMBA conditions.

**Comment:**

BSA Form 2 Extension of Time Claim and Owners Response to Claim or similar should be essential to all claims. Contractors are required to include as estimate of extension of time claim on variation documents and treat this as their formal request. Once again the owner has very limited recourse to qualification of necessary procedure as per QMBA General Conditions 15.

15.1 (c) - ....or the manufacture or supply of materials for the work to include that could not have reasonably been foreseen by contractor at time of signing contract.

15.1 (e) – Reference to inclement weather should clarify only days in excess of calculable days allowed and how the days are validated. Such inclement days can only be for stages that are directly affected by inclement weather. i.e. rain days would cause delays of internal works once the structure has roof installed, enclosed etc.

15.1 (d) Regarding unavailability of materials etc – should not include for contractors who have failed to place timely orders.

15.1 (g) should include – except for any unnecessary or unlawful suspensions caused by the contractor

The contractor is the professional who is responsible for the appropriate and adequate scheduling of works, sub-contractors, delivery of material etc and should be included as contractor's responsibility. The inclusion of a 'Program of Works' could be considered to help protect owners against incorrect claims for extension of time.

### **Practical Completion –Handover.**

By the time the owners reach this stage, the owners are usually committed to receiving the keys to the property.

E.g.     Having nominated a vacate date such as rental property etc that cannot be extended,  
          Arranged absence from work that cannot be readily re-arranged on short notice  
          Arranged removalist assistance and transport etc.

Some of these matters are required to be formalised several weeks in advance.

This places the owners at a distinct disadvantage when the contractor nominates such things as final inspection, handover and payment of all monies all at the same time to the limit of the owners commitments as above. This is a very stressful and demanding time for owners.

In our situation. The contractor had passed his contract date and while he had nominated estimates of extension of time on variations, had not made a formal application nor nominated any amended contract finish date. Following repeated request from us he nominated a 'handover' date that included for all his estimated time extension. We made all the necessary arrangements – gave notice on rental property, arranged all necessary vacate obligations, organised limited time off work (IC Paramedic and Physiotherapist) for removal, booked removalist etc. We requested access prior to handover for the purpose of carrying out a final inspection (recommended best practise) – denied. Would not respond to any form of communication from us to try and arrange a mutually acceptable time. We were receiving support from [REDACTED] (BSA) to try and resolve various issues with the contractor who was also having difficulties contacting the contractor. 2 days before handover day, the contractor advised us our only option to attend a final inspection would be in the afternoon of handover day. The final inspection was lengthy and difficult. The contractor was totally unprepared and did not provide a defect lists – we had to rely on our own document. The contractor did not give us instructions on any of the property. He needed to get to the bank before it closed (last day of month). Handed us a box containing all keys, warranties, certificates etc and left the site without carrying out any sort of handover procedure.

There were a number of defects, errors and omissions that we were aware of. We were very concerned and sought advice from the QMBA, BSA and independent legal advice regarding our right to withhold monies from the final payment and deposit into the QMBA Trust Account. Following this advice, we considered the risk of the contractor disputing this action and rightfully or wrongfully, denying us possession of the property.

### **Comment:**

It is very difficult to successfully complete all elements of the final inspection and handover in a limited time all on the one day. The contractor is familiar with the process and subsequently place owners at a disadvantage by their inexperience.

Handover and final inspection should never be the same day.

As in the commercial sector, the residential sector should have a 'substantial completion' process. On the completion of the final inspection and issue of signed and accepted defects, errors and omissions the contractor may issue a claim for final payment. This claim to include retention monies to the value of 5% of contract sum.

To validate contractor's right to payment – claim to include a check list



To include but not be limited to:-

A check list to be completed and signed by the contractor and owners together to cover such Matters as:

Complying inspection and compliance certificates (listed separately)

Warranties

Instruction Manuals

Items requiring detailed operation instruction

Keys etc

Confirmation of complying defects list (signed by both parties)

Statement reserving the owners right under the contract and at law (or similar).

(Quality Control elements)

Practical completion being achieved on the completion of all defects etc nominated on original final inspections lists and any other defects nominated since handover to that date.

At practical completion – Contractor to submit claim for release of retention monies to 2.5% of contract sum. Final release to be after defects liability period and on acceptable completion of all defects.

There is a recommended check list for the initiating of the contract. This also should be in line with the BSA Schedule and completed by both parties together. This offers the owner an opportunity to consider items that may otherwise be passed over. We were presented with a completed computer generated contract and therefore did not consider each item in detail. It is easy for the contractor to pass over items that are already completed e.g. liquidated damages.

### **Overview**

At all times throughout the process, as owners we were the party at immediate risk by the contractors actions – either by way of the contractor suspending works, carry out works contrary to plans and specifications, paying for expensive legal fees (we did end up having to pay \$4000.00).

QMBA reinforced their advice – our priority should be to get the keys and take possession. We had more options once the contract was concluded and we could exercise our rights as consumers. The problem now is the contractor carried out work contrary to approved plans etc and the process of rectification is lengthy, costly and could cause additional damage. Should we be successful with our claim with the BSA for rectification of defective work, there is no control over how the contractor carries out this work – it is totally at his discretion. If we don't want to run the risk of the contractor continuing to be negligent in the quality of his work, we have to proceed to the QCAT process. Should the contractor decided not to return to site, BSA process allows for the engagement of one of their endorsed contractors to quote and to carry out the repairs.

As part of the BSA building inspectors consideration as to whether he would nominate the repair of a defect was whether the cost of the repair or remedy warranted the rectification.

The defects we have listed are visible from 'normal viewing position'. There will be a cost associated with the defect. Either by way of rectification work or the unknown value associated with the reduction in the overall capital worth of the property. This may not be realised till at a time the property is offered for sale. Any astute purchaser will negotiate a reduction in the asking price for any noticeable defects etc. – The risk is that of the owner.

If a contractor has caused a defect, error or omission it was the contractor's conscious business decision and therefore should accept the consequences and financial liability to rectify - not the owner.

In summary, the majority of our issues were caused by the contractor ignoring his obligations under the contract. The QMBA contract information statement states '....The contractor has an independent

obligation to ensure their contractor complies with the DBC Act'. Owners need more protection to allow the enforcement of their rights without being so vulnerable to risk.

It is my opinion that the interpretation of the DBC Act as written in the BSA documents is more users friendly, fair and equitable and could be used as a minimum standard for all contracts.

Another area of concern:

We entered into discussions and negotiations with the owner of the construction company. He offered technical building advice and recommendations.

It was after we started construction and a few issues started to develop we did a BSA search of his licence. It was at this time we discovered he was not a licensed building in his own right. The company has a nominated technical person.

This person should have been disclosed on the contract.

A copy of the BSA license search should be attached to the contract.

The BSA Disciplinary Record shows:

BSA Directions to rectify Defective Work but does not include complaints lodged that the builder has a chance to rectify before the Directions are issued. The BSA has a record of these on the system but is not available to the public. Knowledge of these items as well could certainly influence an owner and achieve balance in the competing interests of building contractors and consumers. If this information was more readily available, it may persuade contractors to satisfy their obligations and not rely on the BSA to determine what is and what not defective work is.