

INQUIRY INTO THE OPERATION AND PERFORMANCE OF THE QUEENSLAND BUILDING SERVICES AUTHORITY

The Transport, Housing and Local Government Committee

SUBMISSIONS

SUBMITTED BY
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Terms of Reference

1. The terms of reference are best summarised under two general themes:
 - *Administrative performance* of the Queensland Building Services Authority (QBSA), that is, whether the QBSA is achieving a balance between the competing interests of building contractors and consumers (Part 4B of the QBSA Act 1991 which takes legislative effect as the Domestic Building Contract Act 2000) and of building contractors and other building contractors (Part 4A of the QBSA Act 1991); and
 - The *governance arrangement* of and between the board and the general manager.
2. The **primary purpose** of the Inquiry therefore becomes focused on **Part 4B** of the QBSA Act 1991 to determine whether enactment of the *Domestic Building Contracts Act 2000* (DBC Act 2000) and the administrative performance of the QBSA in the years of major legislative change taking place before and after the DBC Act 2000 have adequately precluded abuses taking place within the *adhesive relationships* between building contractors and the special circumstance consumer which often resulted in irreparable harm to the special circumstance consumer.
3. If the primary purpose in enacting Part 4B of the QBSA Act 1991 has been achieved, the **secondary purpose** of the Inquiry becomes focused on whether the two other levels of regulation within the QBSA legislative portfolio consisting of Part 4A of the QBSA Act 1991 have market flaws and whether the market flaws require the same type and level of governmental response taken by the Parliament in enacting Part 4B of the QBSA Act 1991 as independent legislation in the form of the DBC Act 2000.
4. Under the general theme of administrative performance, five considerations flow from the terms of reference:
 - The “*cost of building a home*” and the level of regulation needed to maintain both public safety and public confidence in the Queensland building and construction industry.
 - The effectiveness of the QBSA to provide remedies for defective work and to provide education and advice;
 - The effectiveness of the “Home Warranty Scheme”;
 - Whether current licensing requirements are adequate and the level of auditing reasonably necessary to effectuate the purpose of the Licensing Regulation.
 - The number of trades licensed by the QBSA and whether industry groups should become a determinative factor in the shaping of the licensing regime.

Preliminary Considerations

5. These submissions are based on the author's practical experience as a legal practitioner and registered adjudicator whose practice is based on building and construction matters.
6. The observations and assumptions and the conclusions and recommendations that follow in the paragraphs below emanate from the overall assumption that where the marketplace functions to allocate resources fairly and where the prerequisites for the marketplace are present for the marketplace to so function, the marketplace should be initially relied on to that end.
7. The construction industry marketplace, for the reasons outlined herein, is not such a marketplace and further regulation is substantially justified because of the breakdowns of one or more of the traditional elements leading to the efficient and fair allocation of resources within the construction industry.

Regulatory Lessons Provided by Court Cases after 1999

8. Statutory adjudication has become an important regulatory regime for resolving interim performance disputes involving payment with the enactment of the Building and Construction Industry Payments Act 2004.
9. Statutory adjudication has broader application and is a statutory process that can be used in resolving performance disputes on an interim basis involving defective or incomplete performance which are matters that currently permit perfected statutory rights under the BCIP Act 2004 ***to be defeated with questionable contract terms*** imposed by the stronger party as the direct result of unequal bargaining power.
10. Thus the concept of statutory adjudication has direct application in providing swift regulatory effect to the following areas of the QBSA Act 1991: Parts 4A, 5, 6, 7, 8, and 9.
11. An important consideration not to be overlooked by the Commission is that unequal bargaining power that exists between the contractor and the consumer and the contractor and the subcontractor does not permit freedom of contract to exist within the industry so that resources within the industry are allocated efficiently and fairly.
12. The legislative reforms commenced in 1999 primarily focused on domestic building contract matters and inadvertently neglected to focus legislative reform on the contractor and subcontractor in a meaningful way. Therefore without regulation being enacted to fill the statutory voids that currently exist within the QBSA Act 1991 the marketplace is not properly balanced and consumer sovereignty is undermined when the allocation of resources between certain parts of the contractual chain favours unbargained for windfalls being achieved by the stronger party at the weaker party's expense with one of the negative outcomes being the complete demise of the weaker party.
13. The devices being used by the stronger party are derived from the regulatory gaps as they relate to regulation of the terms being imposed by the stronger party.

14. The concern is that the stronger party's cash flow is being unfairly and unjustifiably strengthened with the unregulated collection of security by the stronger party in the form of cash or bank guarantee pledged by the weaker party and this strengthened cash flow now places the stronger party in the position of being able to use the weaker party's resources against the weaker in two unconscionable ways:
 - 1) There is nothing in the form of regulation to provide adequate assurance to the weaker party that the security pledged being pledged by the weaker party is not being used by the stronger party in some function of the stronger party's operations other than to be placed in a separate trust account with liquidity and availability unconditionally guaranteed once the requirement for release have been satisfied; and
 - 2) The conduct of the stronger party in withholding of payment (for whatever reason), when such conduct is considered with the fact that the weaker party's profit (because of the profit margins within which the subcontractors operate within the industry) is being pledged as security to the stronger party with no reciprocal pledge of security for performance being given by the stronger party, becomes the expression of unregulated private power being assisted by an unregulated contractual device by which the stronger party is able to bludgeon the weaker party into silence when the stronger party moves the payment dispute from the out-of-court process into the court process.
15. Very simply put the weaker party does not have the financial resources to maintain litigation within the court system at any time of the contractual or statutory without first being paid on interim basis.

Recommendations

16. The creation of a separate Agency to regulate and administer the pledging of cash or other security, for example, bank guarantee under the construction contract.
17. The QBSA Act 1991 should be amended to provide regulatory consistency among and between the pieces of legislation within the QBSA portfolio with particular emphasis being placed on how the courts of interpreted and given effect to the BCIP Act 2004.
18. Therefore, to achieve regulatory consistency, Parts 3, 4A, 5, 6, 7, and 8 should be amended with a high level of focused regulation to offset the concentration of private power that occurs when regulation is incomplete or ineffective.
19. Part 3 should be deregulated to permit the doctrine of substantial compliance to have operative effect over interim payment. The court cases since *Marshall & Anor v Marshall* [1997] QCA 382 clearly show that the matter of unlicensed activity does not consist of the consumer using the law as a shield to protect the consumer from incompetent contractors but rather is being used effectively by the contractor as the statutory sword in conjunction with the other contractual devices being employed by the contractor to sever and defeat completely any right to monetary compensation on the part of the subcontractor. Therefore, Part 3 of the QBSA Act 1991 and the BCIP Act 2004 should be amended concurrently to permit recovery of a *quantum meruit claim* under the QBSA Act 1991 through statutory adjudication.

20. Part 4A should be amended in the same manner as Part 4B, that is, with separate legislation as a means to regulate contracts other than domestic building contracts with the overall effect being that administrative procedure relating to the entitlement to withhold payment being established to overcome the following administrative concerns that arise with respect to performance disputes under a construction contract:

- 1) Lack of warning¹;
- 2) Disparate treatment of the subcontractor whose products, services, or property may be tendered by the subcontractor and operative in some capacity under the contract at a lower cost on the expectation that the contract will be fully performed thereby giving full value to all work and services;
- 3) Direct nexus between the regulatory requirement under section 18 of the Building and Construction Industry Payments Act 2004 and the devaluation of the subcontractor's payment claim being asserted by the contractor when seeking to retain benefits expected by the subcontractor under the construction;
- 4) The extent of the devaluation being asserted by the contractor and whether the contractor has perfected statutory rights under the amended parts 4A and 5 of the QBSA Act 1991;
- 5) Lack of opportunity for the subcontractor to rectify or complete the concerns raised by the contractor;
- 6) Lack of sharing of costs reinforced by the imposition of unilateral conduct, asserted arbitrarily and capriciously, on the part of the stronger powered party under the construction;
- 7) Proportion of public benefit to private benefit; and
- 8) Extent of public benefit.

21. The Home Warranty Insurance scheme under Part 5 is a highly successful program. There are no suggestions with respect to the Home Warranty Insurance scheme but the concept of insurance should be expanded to include performance insurance or "bonds" as a means to perfect and protect the rights of the party tendering performance to provide adequate assurance of payment. Thus the Subcontractors' Charges Act 1974 should be repealed with the concept of a lien or charge being incorporated under Part 5 of the QBSA Act 1991 so that the scope of Part 5 includes performance insurance and lien or charge rights operating concurrently with the Home Warranty Insurance Scheme.

22. Part 7 should be amended to give the Tribunal greater monetary jurisdiction as a means to overcome the unfair advantage that the stronger party has over the weaker, especially in relation to the costs of the litigation with the ability of the weaker party to be self-represented in either small or large matters in the less formal setting of the tribunal rather than the court (at any jurisdictional level).

23. Parts 8 and 9 should be amended to give effect of the bright line distinction that needs to be drawn between the out-of-court process and the court process. The concept of statutory adjudication should be expanded to include all parts of the QBSA Act 1991 that give rise to dispute. The BCIP Agency should be expanded to

¹ Section 67I of the QBSA Act 1991 outlines the requirements for giving directions under a construction contract. Section 67J outlines the . However, these two provisions are inadequate and must be augmented with rules and procedure for permitting a complainant to assert a defective or incomplete performance claim against the contracted party with the overall thrust being that a complainant is obligated to state concerns precisely and to show good cause or justification for the defective or incomplete performance being raised as a means to withhold benefits under the contract.

include statutory adjudications relating to domestic building contracts and defective or incomplete work disputes arising under Part 6 (rectification of building work).

24. Lastly, Part 6 should be amended a statutory scheme giving rise to statutory adjudication relating to performance disputes other than payment. The important consideration not to be overlooked in this regard is that by providing quick, interim relief with respect to performance disputes other than payment in the form of an adjudicator's decision, a bright line can be drawn between the interim nature of the out-of-court process and the court process which frees up the court and tribunal to focus on matters of final relief as envisioned under section 100 of the BCIP Act 2004.

Discussion

25. The legislative reform commenced in 1999 is currently serving the purpose of the QBSA Act 1991 but only from one important perspective, that is, to protect the public from incompetent contractor with regulatory change being focused predominantly on the domestic building contract.
26. Thus the regulatory reform commencing in 1999 has focused predominantly on two matters: the **special circumstance consumer** and **payment**. However, the full legislative force required to regulate fully all aspects of the transaction that lead to payment were inadvertently overlooked by the Parliament.
27. A reasonable conclusion is that the legislative reform commencing in 1999 was focused on achieving balance between building contractors and consumer as the term is defined to mean a special circumstance consumer. This is the primary objective of the QBSA Act 1991—protection of the consumer from incompetent contractors and the irreparable harm that can be caused without regulation in the form of trade licensing. This aspect of the legislative reform has been highly successful and is a model that other jurisdictions are carefully considering with a view to adopting the domestic building contract regime which includes the home warranty insurance program.
28. Although payment was an important topic within the reform package, critical aspects of the transaction leading to payment were overlooked when enacting the BCIP Act 2004 as a means to provide statutory adjudication as a legislative self-help remedy intimately linked with the QBSA Act 1991 without corresponding changes being made to the QBSA Act 1991 as a means to complement, amplify, and give consistent regulatory effect to the process of statutory adjudication. The parts of the QBSA Act 1991 that were not a significant part of the 1999 reform are the unregulated parts of the construction industry transaction that lead to irreparable harm to the weaker party within the transaction.
29. Thus a secondary objective, that is, contractual relations not only between the building contractor and the consumer in the general sense but also between the building contractor and the building contractor, have been inadvertently overlooked by the Parliament and are therefore contractual relationships that take on the appearance of being unregulated because of the lack of effective regulation as it relates to the unfair contractual devices created by the stronger party and employed the stronger party to reap benefits from the weaker party that were never envisioned by the parties and rise to the level of unjust or unconscionable.

30. Therefore, it is not in the Public Interest for the remaining parts of the QBSA Act 1991 to remain as they are. They are parts of the legislation that predate the reform changes commencing in 1999 and are inconsistent or incomplete with inconsistency and incompleteness have material negative consequences, that is, irreparable harm to the weaker party in the contractual relation. The parts of the QBSA Act 1991 that require amendment to create legislative consistency within the legislative portfolio of the QBSA are: Parts 4A, 3, 5, 6, and 7 of the QBSA Act 1991.
31. The regulatory environment within the Queensland building and construction industry consists of the following three levels of regulatory effect:
- 1) The first level of regulation—the *special circumstance consumer in the specific sense as that term is defined by the QBSA Act 1991 and the DBC Act 2000*;
 - 2) The second level of regulation—*building contractor and consumer in the general sense as that term is defined by the QBSA Act 1991*; and
 - 3) The third level of regulation—*building contractor and building contractor*.
32. The construction contract, as defined by the BCIP Act 2004, is the manner in which the industry controls every phase of construction life and is the cornerstone of the construction industry. It is the instrument in which the participants use to set priorities and to order performance on a construction project. But it is also the instrument from which a great source of conflict arising directly and indirectly from hierarchy dominion and the concentration of private power within the contractual chain.
33. The contractual chain hierarchy within the construction industry is accentuated with adhesive relationships which illegitimately and indiscriminately concentrates power in the hands of the building contractor *vis a vis* the other contracting parties—that is, *the consumer* as the term is generally and specifically defined by the QBSA Act 1991 and with other *building contractors* who hold a subcontracting position.
34. Two significant market flaws that currently exist within the construction industry marketplace as it relates to the function of the marketplace to allocate resources efficiently and fairly consist of the following considerations:
- 1) ***The position of the building contractor*** as that term relates to contractor and the resulting power and influence of the contractual chain position which, when unregulated, is able to manifest as bullying and other type of dominating conduct, for example, the resulting adhesion contracts² where the weaker party has terms imposed by the stronger party on a take-it-or-leave-it basis with no reasonable ability for the weaker party to negotiate protection against such terms; and
 - 2) ***The general movement of resources between the participants in the contractual chain***. The specific concern here relates to the mechanics

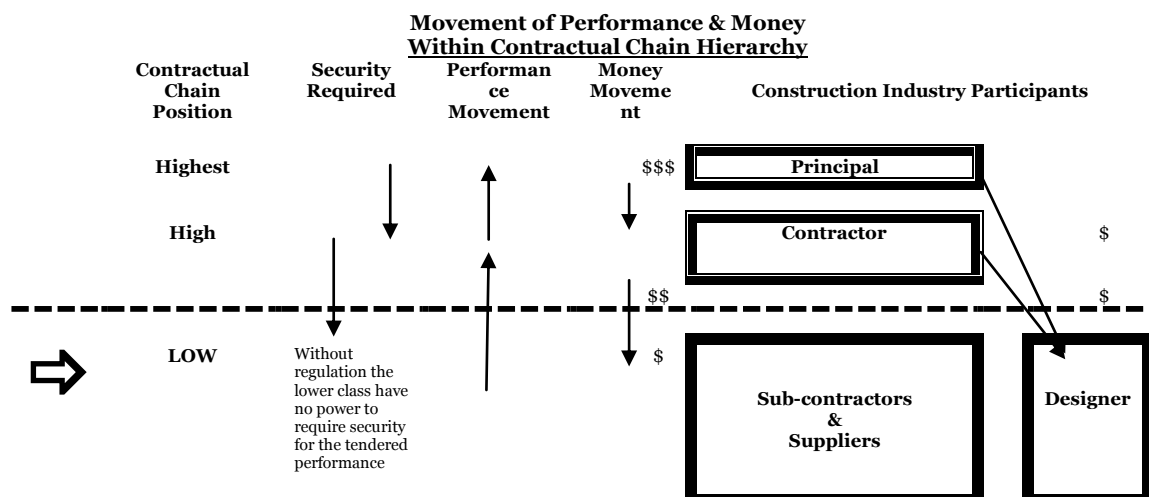
² Construction contracts involving the contractor and the subcontractor are not the product of joint efforts. An adhesion contract is a contract drafted by one party (the contractor) and usually reduced to a form which is presented to the other party (the subcontractor) under circumstances in which there is no realistic opportunity to negotiate. The adhesion contracts within the construction industry are objectionable and should be subjected to a greater deal of scrutiny and regulation with such scrutiny and regulation beginning with amendments to Part 4A of the QBSA Act 1991.

of the bargained-for exchange under the construction contract, that is, performance under a construction contract and the receipt of the benefit in relation to such performance, that is, the subsequent movement of money in exchange for the completed performance.

35. These two market flaws are contractual circumstances unique to the construction industry which materially distort the proper functioning of the marketplace with negative consequences in the form of irreparable harm to the weaker party and unbargained for windfalls being conferred on the strong party. Government intervention is therefore justified on the same regulatory level that took place with changes that were made to Part 4B of the QBSA Act 1991.
36. The table below assists in showing diagrammatically how the power becomes concentrated with the building contractor as that term is defined to mean contractor.

<i>Not QBSA Licensed</i>	Building Contractor e.g. Builder—Open Licence	<i>QBSA Licensed</i>
<p><i>Available remedies:</i></p> <p>DBC Act 2000 (Part4B QBSA Act 1991)</p> <p>BCIP Act 2004</p>	<p>This is the position within the chain that links licensed activity with the public, it is the point within the contractual chain that has the ability to exercise extreme power when unregulated in the form of bullying and unconscionable conduct with respect to other parts of the chain influenced by the position</p>	<p><i>Available remedies:</i></p> <p>Part 4A of the QBSA Act 1991</p> <p>BCIP Act 2004</p>
<p>The Consumer— <i>Special circumstance</i>— resident owner OR e.g. <i>supplier of service but not regulated by QBSA</i></p>		<p>Other Building Contractors, for example, trade contractors or subcontractors whose conduct is regulated by the QBSA</p>

9. The medium of exchange for performance of construction work or supply of related goods and service is *money*. Performance of construction work and supply of related goods are movements and re-allocation of resources from lower class participants to higher class participants in the contractual chain. The exchange of money in return for the completed performance is movement from higher class participants to lower class participants. The exchanges of performance and money are best illustrated with the following diagram:



11. The unintended consequence of unbargained for windfalls being conferred on the stronger party arise because *security for performance and the corresponding right to payment for such performance* is neither uniform nor uniformly and fairly exchanged between the parties and is not currently being regulated in any meaningful way to assist the weaker party in the transaction. To wit:
- 1) Work and the supply of related goods and services provided by a lower class within the chain become tendered performances not adequately secured under the construction contract. The unsecured performance is the direct result of unequal bargaining power and results in irreparable harm to the weaker party.
 - 2) The overarching impact of regulatory inconsistency and neglect is that the adhesive contractual relationship inherent within the hierarchy is not properly regulated by law and is a contractual relationship permitting offensive and unconscionable terms to interrupt the flow of money through the contractual chain even though entitlement to payment, for example, under the BCIP Act 2004 may have been perfected by the lower class.
 - 3) Performance other than payment has not been properly secured with an effective and adequate level of statutory procedure.
 - 4) The resulting irreparable harm is the stronger party's unjustified contractual taking of contractual benefits, the taking of which is being procured by unfair or unconscionable contract terms which are being permitted to defeat statutory entitlement to payment. This contractual "taking" is occurring with alarming consistency and is manifesting in several ways as a direct result of a regulatory void which permits, for example, a dominant party to assert contractual terms as a means to defeat an inferior party's perfected statutory right to be paid.
 - 5) The BCIP Act 2004 provides a statutory right to be paid promptly and on time. The perfected right under the BCIP Act 2004 has been secured under the statutory procedure. Although perfected under the legislation, the statutory right to be paid has not been secured by property.
 - 6) The current regime of standardised contracts requires the subcontractor to provide the contractor with security for performance in the form of cash retention or bank guarantee. There is no reciprocal provision that provides the subcontractor with such security for performance at the time the performance is given. To this end the BCIP Act 2004 and the SC Act 1974 do not provide the subcontractor with any protection at or before the tender of performance.
 - 7) A perfected statutory right should not be permitted to be defeated by a contractual right, especially when perfecting such right is not clear under the contract in question. For a building contractor to have entitlement to withhold payment or to exercise a remedy against the subcontractor, the QBSA Act 1991 must be amended to include legislation that perfects the contracting party's right to take away or withhold benefits under the construction contract involved.

12. The stern judicial criticism seen in relation to the drafting of the Subcontractors' Charges Act 1974 applies directly to the regulatory gaps currently existing within the QBSA Act 1991. In *Ex parte Pavex Constructions & Ors* [1979] QdR 318, Justice Dunn criticised the penalties being imposed on innocent or weaker parties when there is regulatory uncertainty:

I am of the opinion that there is an urgent need that the Act be amended in such a way that its meaning is more clear. The short title of the Act is "An Act to make better provision for securing the payment of money payable to sub-contractors and for other purposes;" yet there is universal, and comprehensive uncertainty as to how it makes such provision. **Any subcontractor who seeks to take advantage of its risks a liability for costs which may be heavy, especially if (as it is quite likely, because of the poor quality of the legislation) his claim must ultimately be dealt with on appeal. This is thoroughly unsatisfactory situation.** [Emphasis added.]

13. In *Northbuild Construction Pty Ltd v Lockton* [1999] QCA 91, Thomas J sets out quite clearly the problems faced by subcontractors and the resulting unfairness that often occurs when market forces are left to their own devices without proper regulatory intervention. Although Lockton involved unlicensed activity, the conduct and unfairness observed by His Honour has direct application to these issues raised within these submissions:

The respondent subcontractor performed substantial work for the appellant builder. No issue has at this stage been raised as to the general entitlement of the respondent to be paid, other than the circumstance that because the respondent does not have a contractor's licence he cannot sue for any entitlement. This is a result of a provision in the Queensland Building Services Authority Act 1991 (Qld) (s42) which can only be described as draconian. That section prohibits the carrying out of "building work" without a "contractor's licence of the appropriate class" and then provides that "[a] person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so (sections 42(1) and 42(3)). The number of cases coming before this court where such a defence has been raised long after the performance of very substantial and costly work is a matter for serious concern. Such legislation appears to encourage the cynical lying by owners and head contractors and is a potential source of serious injustice. One can understand the need for strong disincentives against the performance of unlicensed work, but the provision of a discretion which would enable a court to relieve against total forfeiture in such situations, if necessary upon terms, is a matter which deserves serious consideration by the legislature. [Emphasis added.]

14. The matter of payment is two dimensional: the obligation to make payment after acceptance of a tendered performance by the contracting party and the receipt of payment by the contracted party after a tendered performance has been accepted. The market is not functioning properly and effectively in this regard, and regulatory intervention is required to bring contractual expectations and benefits within an efficient and fair balance.
15. Because the construction industry operates in a caste-like system of hierarchy with private power easily becoming concentrated at certain points within the contractual chain, there is unequal bargaining power between the parties with the overarching effect being that "freedom of contract" does not exist in any meaningful way for the

weaker party in the transaction. Terms are not selected by the parties. Rather, they become imposed by the stronger party within an adhesive relationship and become the terms by which the stronger party has been able to reap unbargained for windfalls under the construction contract.

16. The QBSA Act 1991 is divided into *10 parts* and is the primary piece of legislation within the construction industry portfolio that seeks to address the market flaws and irreparable harm occurring within the industry with different levels of regulation occurring within the various parts of the Act.
17. The regulatory structure and operational effect as outlined in the QBSA Act 1991 is illustrated in the following diagram:

Extra-Judicial Administrative Process Including Empowerment of QBSA & Statutory Adjudication					Judicial Process
<i>Registers Part 8</i>	<i>Inspectors Part 9</i>	<i>Misc. (regulations) Part 10</i>	Licensing Part 3		<i>Tribunal Part 7</i>
BCIP Agency <i>BCIP Act 2004</i>			Building Contracts Part 4		
			Part 4A	Part 4B	
			?	DBCA	
			Rectification Part 6		
			?		

18. The construction industry, however, when left to its own devices as is what is occurring with no regulatory change in Part 4A and Part 6 of the QBSA Act 1991 to complement the regulatory changes resulting from the regulatory focus being placed on Part 4B in the 1990s, does not function in a manner that allocates resources efficiently and fairly with the ineffectiveness being directly related to the division of power and labour in the form of a contractual hierarchy (which also can be described as the “caste system” operating within the construction industry). On a very basic level, the construction industry is a system of performance stratification—which classifies participants into groupings. These differences lead to greater status and power as the direct result of placement within the contractual chain with chain “placement position” becoming the determinative factor for ranking within the hierarchy (or caste). Without proper regulation, performance stratification is a distinguishing trait of the construction industry; will carry over from one period to the next; is universal but will vary from time to time; and involves not just inequality but beliefs in domination and the exercise of such beliefs.
19. When, as in this Inquiry, consideration is being given to the release of all or some of the controlling power of government over the marketplace (that is, deregulation), the focus should be on what effects such a release of power and the return of natural market forces will have on the marketplace. The construction industry marketplace has not one but two weak links to be assessed when there is an effort to de-regulate and permit private power to be reinstated in some fashion. The overall concern with the re-entry of private power in some form must be centred on assessing the performance of the weak links with the re-introduction of private power.
20. The legislative efforts before and after the DBC Act 2000 have been predominantly focused on Part 4B of the QBSA Act 1991, and the terms of reference appear to be

focused on whether it is time to consider de-regulation now that it appears regulation has been effective as it relates to the special circumstance consumer as that term is defined in the QBSA Act 1991 and the DBC Act 2000.

21. Part 4B of the QBSA Act 1991, however, only relates to one of the two weak links in the contractual chain. Thus there are still flaws within the marketplace which justify further regulation and the fashioning of a specific means to compensate for or correct them.
22. These submissions are therefore focused on the other side of the same coin where the issue of lack of regulation exists and where more regulation is warranted: **Parts 4A, 3, 5, 6, and 7 of the QBSA Act 1991.**
23. The regulatory changes taking place in the mid 1990s have resulted in the enactment of legislation of a revolutionary character to counter the menacing culture of hierarchy dominion that plagues the construction industry. The *Home Warranty Scheme* and *Security of Payment* are two significant components within the legislative revolution, but the revolution is not yet finished, and the Inquiry is the perfect time to assess the operational effects of the remaining portion of the QBSA regulatory portfolio.

Concluding Remarks

24. A construction project and the middle of a battlefield have much in common—nowhere, except in the middle of a battlefield, must men coordinate the movement of other men and materials in the midst of enormous chaos and with such limited certainty of present facts and future occurrences as in a construction project. Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be rough, quick, and *ad hoc* sort—a situation that bears striking similarity to ever-changing commands on the battlefield.
25. Cash flow is the lifeblood of the construction industry. Two of the more difficult challenges encountered by construction industry participants, when performing within the ever-changing nature of a construction project, especially in relation to the subcontractor, appear and reappear under two important themes:
 - 1) *Getting paid the full amount of a progress claim on time*; and
 - 2) *Having access to “ready money”*.
26. Without cash flow the performance of men and machine in a construction project is disrupted. Interruption of cash flow in one link of the contractual chain has negative consequences all throughout the contractual chain.
27. Thus the failure to get paid promptly, when combined with the failure of not having a pre-planned supply line to “ready money” to augment cash flow, is not only disruptive but can also be fatal, especially for a subcontractor. This is a project consideration that takes priority over any project work performance by the subcontractor because no matter how brilliantly a work crew may perform for the subcontractor on any project, there may never be the chance for the employees of the subcontractor to do so if the subcontractor does not focus on mitigating these two negative impacts on cash flow. The disruption or even worse the demise of the subcontractor disrupts the marketplace and allocation of resources within the

marketplace. Disruption or demise of one element of the contractual chain impacts other elements of the contractual chain with the overarching negative impact on the marketplace being the demise or disruption of *consumer sovereignty*—one of the perquisites to a marketplace functioning efficiently and fairly.

28. A significant change in government policy as it relates to strengthening construction industry performance including cash flow commenced in 1999.
29. Since enactment of the BCIP Act 2004, most industry participants are aware that public policy supporting the legislation is based on the timely movement of money down the contractual chain with prompt payment. This is one way in which the industry participant is able to strengthen cash flow. However, with the changes envisioned within these submissions, that is, the strengthening the contracting process with administrative procedure within the QBSA Act 1991, the strengthening of cash flow will manifest strongly through the statutory right to be paid under the BCIP Act 2004, the process by which the right to a progress claim is so merged into the paper evidencing the claim that the paper itself not only becomes the claim but also the statutory instrument of the claim.
30. Simply put, the legislative changes envisioned within these submissions, like Aladdin's lamp, will provide the necessary regulatory assistance to industry participants in order for them to "rub the entitlement lamp" with great confidence as a means to invoke the legislative genie who transforms a commercial invoice, a document against which lenders have no interest in lending, magically into indispensable collateral paper, an instrument which lenders will now have strong interest in financing because of the strength of the collateral paper by operation law.

Respectfully submitted,

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