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24 February 2020

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The Committee Secretary
Transport and Public Works Committee
Parliament House
George Street
Brisbane Qld 4000
Email: tpwc@parliament.qld.gov.au

Re: Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020

Thank you for the opportunity to provide feedback on this important Bill.

With respect to the new powers to be included in Building Act, Master Builders is reassured by the safeguards that have also been put in place and has no further amendments to recommend. We strongly support the amendments aimed at strengthening the role of the building certifier which will bring greater certainty to our industry, in particular:

- Public interest as the primary duty for the certifier.
- Certifiers subject to demerit points and additional information provided on their public record.
- Changes to the accreditation system that underpins certifier licensing.

However, we have a number of detailed recommendations in relation to the amendments proposed to the Building Industry Fairness Act and the QBCC Act (attached).

In summary our concerns are as follows:

Building Industry Fairness Act (BIF)

Although we have worked constructively with the Government, along with other industry stakeholders, to refine the legislation particularly as it relates to project bank accounts and progress payments, we continue to hold grave concerns about the effectiveness of the Project Bank Accounts (PBAs) regime and the true costs to the building industry.

The Government's proposed changes to BIF will reduce the level of red tape for builders and subcontractors. However, there is still no evidence that PBAs have played any part in ensuring that the more than 1,000 subbies involved in the 100 PBA projects (to date) were paid 'in full, on time, every time', as they are intended to do. We do know from the Implementation and Evaluation Panel's report that PBAs and the changes to progress payments have come at a cost to the principals, builders and the subcontractors involved.

90 per cent of head contractors reported increased business administration costs, with more than half reporting a cost increase of more than 3 per cent of the project cost. Half of both subcontractors and

principals reported an increase in their business administration costs. For builders, the additional cost totalled $12 million (based on 3 per cent of the $405 million value of current PBA projects) which is a cost that ultimately Queensland's taxpayers will wear.

This is a far cry from the Deloitte analysis (commissioned by the Government in 2016) which indicated that the PBA reforms would over time have a significant economic benefit.

We acknowledge the Government's efforts to streamline and simplify PBAs and progress payments. And we welcome the opportunity to work with the Committee to make additional changes to the Bill, aimed at further reducing unnecessary administration and other unintended consequences.

But we remain convinced that it would be an unmitigated disaster if these requirements were introduced into the private sector which the legislation provides for, commencing in July 2021.

QBCC Act

We are recommending two significant changes to the QBCC Act. The first deals with the provision requiring an executive officer of a licensed company and the business partner of a licensee, to be responsible for due diligence in relation to the Minimum Financial Requirements. The first offence for failing to understand the nature of the licensee's financial management and ensuring that the licensee has the appropriate resources to meet the MFRs (amongst other things) is a $33k fine; second offence $40k; third offence $46k or 1 year in jail. This is an outrageous provision and should be deleted.

The second relates to a loophole in the current QBCC Act which allows anyone without a licence to carry out commercial work provided that the building work is undertaken by licensed contractors. The Act was changed nearly 10 years ago to allow for non-licensed entities to contract with major developers (e.g. LNG projects at Gladstone) provided that the building work was ultimately undertaken by a licensed contractor. This undermines the intent the Act to ensure that only licensed contractors carry out building work in Queensland and needs to be fixed.

Thank you for taking the time to consider our response. We look forward to discussing our recommendations with the Committee.

Yours sincerely,

Grant Galvin
Chief Executive Officer

PART 4 AMENDMENT OF BIF ACT 2017: CHAPTER 2 – STATUTORY TRUST ACCOUNTS (clause 63 BIFOLA Bill)

• Excessive penalties

There are many provisions in the BIF Act and the BIFOLA Bill that carry significant penalties that are excessive compared to the offence committed. This approach does not achieve the intended purpose of the BIF Act which is to assist subcontractors to get paid and/or to secure money that is owed to subcontractors. It does add further complexity and risk to an already complex process. A significant number of these offences apply even though all subcontractors may have been paid what they are owed.

These provisions should be amended to reduce the penalty to one that is commensurate with the offence committed. Alternatively, a defence of 'without reasonable excuse' should be included so that head contractors who inadvertently do not comply with administrative provisions of the BIF Act are not subject to the significant and disproportionate penalties noted below. Similarly, where one event results in multiple offences, a provision should be included to limit how many penalties can be applied.

The following is a list of the provisions that should have reduced penalties in relation to Chapter 2 Statutory Trust Accounts:

- **Project Trust Accounts:**
  - **Section 18 trustee must open project trust account at a financial institution – 500 penalty units**
  - **Section 18A Restrictions for project trust account:**
    - **sub-section (1) project trust account to be held in approved financial institution – 200 penalty units**
    - **sub-section (2) project trust account to have a particular name – 200 penalty units**
    - **sub-section (3) transactions must create an electronic record of transfer – 500 penalty units**
  - **Section 18B notice of project trust account's opening, closing or name change to be given to the QBCC and the principal – 200 penalty units**
  - **Section 18C trustee can only transfer project trust account to another financial institution if it is an approved financial institution, all amounts are transferred, and trustee informs the principal, QBCC and all subcontractor beneficiaries – 200 penalty units**
  - **Section 19(4) if the principal deposits the head contractor's payment into an account that is not the project trust account, then the head contractor must transfer the deposit to the project trust account – 200 penalty units or 2 years imprisonment**

- **Section 19A(1) trustee must not deposit money into the project trust account that is not for a reason set out in this provision – 200 penalty units or 1 year's imprisonment**
- **Section 20(2) trustee can only pay subcontractor beneficiaries from the project trust account – 200 penalty units or 1 year's imprisonment**
- **Section 20A(1) trustee can only withdraw an amount from project trust account for a reason set out in this provision – 300 penalty units or 2 years imprisonment**
- **Section 20A(2) trustee must repay an amount withdrawn in breach – 300 penalty units or 2 years imprisonment**
- **Section 20B trustee must not withdraw an amount to pay itself unless there is sufficient amount left to pay subcontractor beneficiaries what the trustee is liable to pay – 300 penalty units or 2 years imprisonment**
- **Section 20C(3) trustee must advise QBCC if it makes a pro rata payment to subcontractor beneficiaries – 100 penalty units**
- **Section 20C(4) trustee must pay subcontractor beneficiaries on a pro rata basis if there is an insufficient amount in the project trust account at the time payment is due to be made – 100 penalty units or 1 year's imprisonment**
- **Section 21A trustee must not dissolve a project trust before it is permitted – 500 penalty units or 1 year's imprisonment**
- **Section 23(1) trustee to advise subcontractors of project trust before entering into subcontracts – 200 penalty units or 1 year's imprisonment**
- **Section 23A trustee must inform subcontractor beneficiaries of each payment made to them – 100 penalty units**
- **Section 23B trustee must provide information to a subcontractor beneficiary of payments to that entity when requested – 100 penalty units**
- **Section 25(2) trustee to notify QBCC when it enters into a subcontract with a related entity – 200 penalty units**

- **Retention Trust Accounts:**
  - **Section 34(2) trustee must open retention trust account at a financial institution – 500 penalty units**
  - **Section 34A Restrictions for retention trust account:**
    - **sub-section (1) retention trust account to be held in approved financial institution – 200 penalty units**
    - **sub-section (2) retention account to have a particular name – 200 penalty units**
    - **sub-section (3) transactions must create an electronic record of transfer – 500 penalty units**
    - **sub-section (4) trustee cannot close retention trust account unless there is no retention held for a subcontractor – 200 penalty units**
  - **Section 34B notice of retention trust account's opening, closing or name change to be given to the QBCC and the principal – 200 penalty units**

- **Section 34C trustee can only transfer retention trust account to another financial institution if it is an approved financial institution, all amounts are transferred, and trustee informs all subcontractor beneficiaries – 200 penalty units**
- **Section 35 trustee must ensure retention amounts are held in retention trust account – 200 penalty units or 2 years imprisonment**
- **Section 35A(1) trustee must not deposit money into the retention trust account that is not for a reason set out in this provision – 200 penalty units or 1 year's imprisonment**
- **Section 36(1) trustee can only withdraw an amount from retention trust account for a reason set out in this provision – 300 penalty units or 2 years imprisonment**
- **Section 36(2) trustee cannot withdraw an amount from the retention trust account to pay itself until after the defects liability period unless it is to correct defects – 300 penalty units or 2 years imprisonment**
- **Section 36(3) trustee must repay an amount withdrawn in breach – 300 penalty units or 2 years imprisonment**
- **Section 36A(2) trustee must not release retention to a subcontractor beneficiary except from the retention trust account – 200 penalty units or 1 year's imprisonment**
- **Section 37A(1) trustee must not dissolve a retention trust before it is permitted – 500 penalty units or 1 year's imprisonment**
- **Section 40(1) trustee to advise subcontractors of retention trust before withholding retention – 200 penalty units or 1 year's imprisonment**
- **Section 40A trustee must inform subcontractor beneficiaries of each retention deposit or withdrawal in relation to their subcontract – 100 penalty units**
- **Section 40B trustee must provide information to a subcontractor beneficiary of payments in relation to that subcontractor's retention when requested – 100 penalty units**

- **both Project Trust Accounts and Retention Trust Accounts:**
  - **Section 51(2) trustee to cover shortfalls if there is an insufficient amount in the account to pay what is due to be paid – 100 penalty units or 1 year's imprisonment**
  - **Section 51(3) trustee to notify QBCC of deposits of shortfalls into the account – 50 penalty units**
  - **Section 51B trustee cannot invest funds held in trust – 200 penalty units or 1 year's imprisonment**
  - **Section 52 trustee to keep trust account records – 300 penalty units or 1 year's imprisonment**
  - **Section 57 trustee must engage an independent auditor to audit the trust accounts – 200 penalty units or 1 year's imprisonment**
  - **Section 57B(2) trustee must provide trust account records to auditor – 200 penalty units**

Some of these provisions may result in double or triple penalties for the same event which are unnecessary and entirely unreasonable. Examples include:

- **Trustee opens a bank account not in accordance with s18A, it commits 3 separate offences under s18A;**
- **Trustee engages a subcontractor but does not realise that that subcontractor is, in fact, a subcontractor beneficiary under the statutory trust model, however, it does pay the subcontractor from its business account. It commits an offence under ss20(2), 20A(1), 20A(2), 20B, 23(1), 23A, 25(2) in relation to progress payments;**
- **Trustee uses the money it has a beneficial interest in that is in the trust account. It commits an offence under ss20A(1), 20A(2), and 51B.**

• Section 11A - Who are the trustees and beneficiaries of a project trust

Section 11A(4)(c) of this proposed new section allows a minimum subcontract price to be set by regulations to which a project trust applies. The Review Panel report identified that substantial additional administrative costs were incurred by head contractors operating project bank accounts. A number of head contractors reported to the Review Panel that the time and cost associated with complying with the project bank account requirements for subcontracts with a low subcontract price was disproportionate to the subcontract price.

Under the proposed model, the number of subcontractors who are beneficiaries has increased because the current model only applies to subcontractors who are carrying out 'building work' compared with the new model that applies to subcontractors who are carrying out 'protected work'. 'Protected work' is far broader than 'building work'.

As a result, unless a minimum subcontract price is set from commencement of the new model to remove low level subcontracts from the onerous obligations associated with statutory trust accounts, then substantially greater administrative time and costs will be incurred by head contractors than what the Review Panel considered.

Recommendation: Minimum subcontract price should be set at $20,000 excluding GST in the BIF Regulation from commencement of the new project trust account model.

• Section 14E – Super-subcontracts

The proposed new Section 14E allows some subcontracts to be prescribed by regulation to require project trusts in addition to the head contract. The Review Panel report identified that head contractors may elect to contract to only a few subcontractors for large packages to minimise the number of subcontractors to be dealt with under the statutory trust accounts as this has a direct effect on the administration required to operate statutory trust accounts. Under that arrangement, only

those few subcontractors will be beneficiaries of the statutory trust account. To enable more subcontractors on a project to be beneficiaries under the project and/or retention trust, the regulation should prescribe that all subcontracts between a head contractor and the same subcontractor, for one or more subcontracts, with a combined contract price of more than $1 million excluding GST, should require a project trust.

Recommendation: Subcontracts between the same head contractor and the same subcontractor, under one or more subcontracts, with a combined contract price of $1 million excluding GST or more, should be prescribed in the BIF Regulation from commencement of the new project trust account model.

• Section 20 All payments to subcontractor beneficiaries to be paid from project trust account

The proposed new Section 20(2) provides that payments to a subcontractor beneficiary are to be deposited "*into the account of a financial institution nominated by the beneficiary*". Extensive discussion was held with the Government and agreement reached that all payments from a project trust account to a subcontractor beneficiary must be deposited into a bank account that is held by the subcontractor beneficiary. It was agreed that allowing the beneficiary the option of nominating a different account would undermine the purpose of Chapter 2 of the BIF Act being to ensure payments to subcontractor beneficiaries are made. It would also make it significantly more difficult for the QBCC to audit the project trust account as it would need to obtain additional information to determine whether the payment out of the project trust account was deposited into an account on instruction from a subcontractor beneficiary or whether the head contractor was in breach of the BIF Act by depositing the payment into the account of a person who was not a subcontractor beneficiary.

The proposed new Section 36A(2)(b) in relation to the retention trust account requires that all payments from the retention trust account must be made into "*the contracted party's account*". A similar restriction must be included in Section 20(2) to ensure that only subcontractor beneficiaries receive payments from the project trust account.

Accordingly, an amendment should be made to Section 20(2)(b) (lines 23 to 25, page 105) as follows: "by depositing the amount into the contracted party's account at a financial institution".

Further, it is important that the significant additional administration associated with making payments from the project trust account do not apply where the payments are for low amounts. The number of subcontractors that are considered subcontractor beneficiaries under the new project trust account model is significantly higher than under the current model and a number of these are likely to make payment claims for a relatively small amount e.g. surveyor, consultants. As such, it is disproportionate to the payment to make these from the project trust account and to carry out the not insignificant additional paperwork associated with that payment. Payments for less than $3,000 excluding GST should not be required to be made from the project trust account.

Accordingly, an amendment should be made to sub-section 1 to include the following words at the end of the current proposed subsection as follows: "*that exceeds the minimum subcontract payment*".

A definition for 'minimum subcontract payment' should be included in Section 10 as follows: "*minimum subcontract payment means an amount prescribed by regulation*".

• Section 20C Insufficient amounts available for payments

The proposed new Section 20C requires the head contractor to make payments to subcontractor beneficiaries on a pro-rata basis if there is an insufficient amount in the project trust account to pay subcontractor beneficiaries what they are due to the paid on the date that payment is due to be made. When such a pro-rata payment is made, the head contractor is required by this section to report the pro-rata payment to the QBCC with a maximum penalty of 100 penalty units for non-compliance.

It is inappropriate and entirely unreasonable to create a new offence for non-compliance with an obligation that is only included to assist the QBCC in identifying when a shortfall exists in the trust account. The head contractor is already subject to a penalty of up to 100 penalty units or 1 year's imprisonment under Section 51(2) when a shortfall exists. Further, if a subcontractor receives a shortfall in the payment due to it, it has many options available to it to pursue payment including lodging a Monies Owed Complaint with the QBCC.

Accordingly, section 20C(3) should be deleted in full (lines 30 to 34, page 108, and line 1, page 109).

• Section 32 When retention trust required

Section 32(c) of this proposed new section allows a minimum subcontract price to be set by regulations to which a retention trust applies. The Review Panel report identified that substantial additional administrative costs were incurred by head contractors operating project bank accounts. A number of head contractors reported to the Review Panel that the time and cost associated with complying with the project bank account requirements for subcontracts with a low subcontract price was disproportionate to the subcontract price. Under the proposed model, the number of subcontractors who are beneficiaries has increased because the current model only applies to subcontractors who are carrying out 'building work' compared with the new model that applies to subcontractors who are carrying out 'protected work'. 'Protected work' is far broader than 'building work'. As a result, unless a minimum subcontract price is set from commencement of the new model to remove low level subcontracts from the onerous obligations associated with retention trust accounts, then substantially greater administrative time and costs will be incurred by head contractors than what the Review Panel considered.

Accordingly, the minimum subcontract price should be set at $20,000 excluding GST in the BIF Regulation from commencement of the new retention trust account model.

- ## Section 36 Limited purposes for which money may be withdrawn from retention trust account

Under Section 36, the head contractor is only permitted to withdraw an amount from the retention trust account to pay itself when permitted under the subcontract and only at the end of the defects liability period. This is unreasonable and defeats the purpose for which retention is held under a subcontract.

The head contractor is only permitted to have recourse to a subcontractor's retention if the subcontractor is in breach of the subcontract. Sections 67L and 67N of the QBCC Act restrict how much retention can be withheld under a subcontract and Section 67J restricts when the head contractor has the right to have recourse to the retention. It is unnecessary, therefore, to impose yet more restrictions in Section 36 of the BIF Act when the QBCC Act and the subcontract itself gives the head contractor the right to the retention monies.

If the head contractor is permitted to have recourse to a subcontractor's retention, the head contractor becomes the beneficiary of that amount at that time. Therefore, the head contractor ought to be permitted to withdraw the amount that it is the beneficiary of when the right arises under the subcontract.

Accordingly, section 36(2) should be deleted in full (lines 24 to 29, page 125).

- ## Section 51 Trustee to cover shortfalls

Under the proposed new Section 51, the head contractor is required to deposit an amount into the project trust account and the retention trust account if the amount that is due to be paid to the subcontractor beneficiaries is less than the balance of the account on that day. This is the same as the current position under the BIF Act, however, the head contractor is now required to notify the QBCC of the deposit it makes into the project trust account and/or the retention trust account to comply with this section. There is a penalty of up to 50 penalty units for non-compliance. This is unnecessary and unreasonably adds further administration to the Statutory Trust Account model.

If the head contractor has made the deposit on or before the payments are due to be paid to the subcontractor beneficiaries in compliance with the legislation, it is not necessary for the head contractor to notify the QBCC that it has complied.

Accordingly, section 51(3) should be deleted in full (lines 10 to 13, page 132).

- ## Section 53D Power to appoint special investigator

Under the proposed new section 53D, if the special investigator appointed by the QBCC establishes that a person has contravened a provision of the BIF Act, the QBCC may recover the cost of the investigation, as a debt, from the person. However, the BIF Act contains a significant number of obligations that are administrative in nature and that do not affect payments to subcontractors. As such, it is entirely unreasonable to require a person to cover the cost of an investigation simply because it did not strictly comply with every little administrative task.

Accordingly, section 53D(7) (lines 24 to 28, page 142) should be amended to apply only to those provisions that affect payments to subcontractors.

• Section 55B(6) Reports, records and information

The proposed new Section 55B(6) forms part of Division 6 which applies to Financial Institutions, however, subsection (6) does not apply to financial institutions.

Accordingly, section 55B(6) (lines 12 to 24, page 150) should be deleted in full.

• Section 58A Liability of executive officer for offence committed by corporation against executive liability provision

Under the proposed new Section 58A, an executive officer of a corporation commits an offence if the corporation commits an offence and the officer did not take all reasonable steps. The definition of 'executive officer' is so broad that it captures many employees of a company that may not have the information needed to ensure that the company complies with the statutory trust account obligations.

The executive liability provisions should only apply to office holders of the company.

Accordingly, the definition of 'executive officer' should be amended to limit the people who are considered 'executive officers' (lines 7 to 11, page 159).

PART 4 AMENDMENT OF BIF ACT 2017: CHAPTER 3 – PROGRESS PAYMENTS

• Proposed amendment to section 68 BIF Act

The process for progress payments under the previous legislation, *Building and Construction Industry Payments Act 2004* (BCIPA), allowed a claimant to decide when it made a payment claim to which the legislation applied. If the claimant was not familiar with the process or did not want to escalate a payment dispute prematurely, the claimant could simply make a claim for payment under the contract without triggering a payment claim under the legislation. If it then wanted to pursue payment through adjudication, the claimant could seek advice as to how to make a valid payment claim to ensure that it was successful in the adjudication.

Under the BCIPA model, there were many more adjudication applications lodged than there have been under the BIF Act and there were many more that were validly made than there have been under the BIF Act. We have been advised by the QBCC that a significant number of adjudication applications are withdrawn following the QBCC's vetting process and still, on average, 23 per cent of applications that are referred to adjudicators are found to be invalid. Unfortunately, claimants are often left to pay the adjudicator's fees in that instance and are still not paid their payment claim. It is, therefore, imperative that claimants are given back the power to decide when the BIF Act payment process begins. Claimants in the industry do not have the time to monitor multiple aspects of a project to ensure that it makes a valid payment claim every time in case the claim is disputed by the respondent. Claimants should also have the power to combine multiple outstanding invoices into the one payment claim so that all outstanding money is pursued through the one adjudication application rather than multiple applications.

Similarly, respondents have significantly more administration duties and exposure to excessive penalties even where a payment claim is not intended by the claimant to be a payment claim made under the BIF Act. We have heard from many subcontractors in the industry that they are receiving payment schedules for zero dollars or no payment schedule at all because their payment claims are not valid payment claims. Respondents do not have the time to spend trying to work through the complex process to determine whether the payment claims are valid or not, and as it is now mandatory to give a payment schedule if the claim is a valid payment claim, respondents are issuing payment schedules in any event but often for zero dollars to protect themselves from excessive penalties just in case the claim was a valid claim. Those penalties apply even if the claimant never intended the claim to be made under the BIF Act or the respondent honestly thought the claim was not a valid payment claim. This is one of many unintended consequences of the BIF Act and does nothing to assist the subcontractors to get paid.

The original legislation, BCIPA, was designed to provide claimants with a fast process to pursue a statutory right to a progress payment. It is important, therefore, that claimants have the power to decide when they use that process – the change to the process in the BIF Act removed that right and

it is having a detrimental effect on claimants in the industry at all levels. The process is not an easy one – it is extremely complex and has been made more so with the changes made in the BIF Act.

In addition to the above, the new requirements in the BIF Act for a payment claim has resulted in many emails sent by claimants actually being considered payment claims made under the BIF Act. As an example, an email chasing up an overdue payment often meets the requirements of a payment claim made under the BIF Act which has the effect of 'using up' a reference date for the claimant. All valid payment claims must, among other things, have a reference date to which the payment claim can attach. We have received feedback from many claimants since Chapter 3 of the BIF Act commenced in December 2018, that they have inadvertently issued a payment claim simply chasing payment. Then when they want to make an application for adjudication, they do not have the opportunity to make a valid payment claim that they can take to adjudication. Again, the claimants must control when they make a payment claim otherwise there is little benefit in the legislation for them.

Accordingly, section 68(c) of the BIF Act should be deleted and replaced with the following: *"must state that it is made under this Act"*.

This amendment allows the claimant to decide when it makes a payment claim under the BIF Act and it can do that after it has received advice as to what is required and how best to approach it.

If the above amendment is not made to the BIF Act, then s68(3) should, at least, be deleted. That section says that "*a written document bearing the word 'invoice' is taken to satisfy subsection (1)(c)*". The effect of that provision is that any written document bearing that word, that also describes construction work and states an amount, is deemed to be a payment claim. This could include emails simply advising that work has been completed and an invoice will be forthcoming. Deeming provisions such as this in such a complex process have the effect of taking away what little power the claimant has under the BIF Act.

• Clause 65(2) BIFOLA Bill - Amendment of s75 (Making payment claim)

Under Section 65(2) of the BIFOLA Bill, it is proposed that a new requirement be inserted for a 'Supporting Statement' with all payment claims made by a head contractor. At subparagraph D, a Supporting Statement requires the head contractor to declare *the date the subcontractor carried out the construction work or supplied the related goods or services*. The head contractor is not going to know the precise date that a subcontractor carried out a particular activity. Including this in the Supporting Statement is not going to assist the subcontractor to get paid yet the head contractor may be penalised up to 100 Penalty units if the Supporting Statement does not include that information.

Accordingly, section 65(2) of the BIFOLA Bill should be amended to delete subparagraph D in full (lines 21 to 24, page 161).

• Clause 70 BIFOLA Bill – Replacement of s90 (Respondent required to pay adjudicated amount)

There are a number of provisions that appear to only be included to assist the QBCC to do their job. These penalties do not benefit the claimants or the respondents and do not have anything to do with assisting payments being made to claimants. These are, therefore, unnecessary and should be removed.

Under Clause 70 of the BIFOLA Bill, the respondent must pay the adjudicated amount (if any) to the claimant within 5 business days of receiving the decision from the adjudicator (or an earlier time if decided by the adjudicator). This carries a significant penalty of up to 200 penalty units. This is the same as it currently is under the BIF Act. However, under Clause 70(3) of the BIFOLA Bill, the respondent is also required to notify the registrar within 5 business days of making the payment and provide the registrar with evidence the payment was made. This new requirement carries a maximum penalty of 20 penalty units. This additional requirement must be removed. It does not benefit the claimant at all and is simply an additional administrative obligation on the respondent that is only required to assist the QBCC in identifying respondents who have not paid an adjudicated amount within the timeframe. The claimant has many options available to it if the respondent does not pay the adjudicated amount – one of which is to notify the QBCC itself. It is inappropriate and entirely unreasonable to create a new offence for not assisting the QBCC when the claimant has the option to do so itself if it wished to do so.

Accordingly, subclause 90(3) as set out in clause 70 of the BIFOLA Bill should be deleted in full (lines 10 to 17, page 164).

• Clause 72 BIFOLA Bill – Amendment of s97 (Withdrawing from adjudication)

This is another of the provisions that have been only been included to assist the QBCC to do their job. These penalties do not benefit the claimants or the respondents and do not have anything to do with assisting payments being made to claimants. These are, therefore, unnecessary and should be removed from the BIFOLA Bill.

Under Clause 72 of the BIFOLA Bill, the claimant must notify the registrar that it has withdrawn an adjudication application. This new requirement carries a maximum penalty of 20 penalty units. This additional requirement must be removed. It does not benefit the claimant or the respondent and is simply an additional administrative obligation on the claimant that is only required to assist the QBCC in identifying which applications it should monitor to determine if an offence has been committed by either party. It is inappropriate and entirely unreasonable to create a new offence for not assisting the QBCC.

Accordingly, subclause 72(2) of the BIFOLA Bill should be deleted in full (lines 2 to 13, page 165).

- ## Clause 73 BIFOLA Bill - Insertion of new ch 3, pt 4A

Under the proposed Section 97F, the respondent is required to give the claimant the information listed in subparagraph (1) of that section if requested by the claimant. However, some of the items listed may not be within the respondent's knowledge. For example subparagraph (b) which requires:

> the address of the higher party's place of business or, if the higher party does not have a place of business, the higher party's place of residence.

The respondent may not know the higher party's place of residence and there is no feasible way for the respondent to find this out if the claimant requests it. The respondent may be able to utilise the search facilities available on the QBCC website or the ASIC website, however, these registers may not record the correct and/or current business address or residential address. The respondent should be able to defend the imposition of a penalty by the QBCC if it has a reasonable excuse.

Accordingly, section 97F(1) should be amended to include the words "*unless it has a reasonable excuse*" at the end of the first paragraph of subparagraph 1 after the words "*the following information*" (line 17, page 169).

PART 6 AMENDMENT OF THE QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION ACT 1991

- ## Clause 119 BIFOLA Bill – Insertion of new ss 53BA and 53BB

Section 53BB is a new provision to be inserted that applies to an individual who is:

(a) an executive officer of a company that is a licensee; or
(b) an unlicensed person who carries out, or undertakes to carry out, building work in partnership with a licensee.

Under this provision, an individual is required to exercise 'due diligence' to ensure the licensee complies with the minimum financial requirements for the licence. There are significant penalties, including 1 year's imprisonment, for non-compliance with this new provision. However, the steps that must be taken by the individual to be considered compliant are excessive and unreasonable.

An 'executive officer' is defined in the QBCC Act to be a person who is:

(c) a director or secretary of the company; or
(d) a person who is concerned with, or takes part in, the company's management, whether or not the person is a director or secretary of the company or the person's position is given the name of executive officer.

That definition is too broad for the obligations of 'due diligence'. Additionally, it is unreasonable to place the obligation of 'due diligence' on a non-licensed partner of a licensee who operates as a partnership. Many licensees who operate as a partnership are 'mum and dad' partnerships and it is not reasonable to expect the unlicensed partner to comply with this requirement. The licensed partner is already required to comply – it is unnecessary to put an even more onerous obligation on the unlicensed partner.

Similarly, the definition of 'executive officer' in the QBCC Act is so broad that it captures many employees of a company including those that may have no involvement in the financial management of the company. Individuals have an obligation already in the QBCC Act to provide evidence that they comply with the minimum financial requirements for the licence. Similarly, directors of a corporate licensee have an obligation to comply with the minimum financial requirements for the licence. Directors of a company are already liable for any breaches of the law by the company so it is unreasonable to extend such an obligation to individuals who are not directors or secretaries of a company.

Accordingly, Section 53BB should be deleted in full (lines 10 to 32, page 232 and lines 1 to 22, page 233).

• Amendment to Schedule 1A of the QBCC Act

Section 42 of the QBCC Act provides that a person must not carry out, or undertake to carry out, building work unless that person hold a contractor's licence of the appropriate class under the QBCC Act.

However, notwithstanding s42 QBCC Act, contractors who fall within one of the exemptions provided in Schedule 1A of the QBCC Act do not need to hold a contractor's licence. The exemption that is of particular concern to the industry is contained in Section 8 of Schedule 1A of the QBCC Act. Under that exemption, head contractors who contract to carry out building work do not need to hold a licence provided that that building work is not residential construction work or domestic building work, and the head contractor engages an appropriately licensed contractor to carry out the building work. This provision undermines the intent of Section 42 of the QBCC Act to ensure that only licensed contractors carry out building work in Queensland. Under this provision, a person or company can contract with a consumer to carry out building work yet are not the entity that actually carries out that building work. This creates problems when defective building work is found as the entity that has the contractual responsibility to the consumer for that work is not an entity that the QBCC has the power to direct to rectify.

When this exemption was introduced almost 10 years ago, Master Builders had no concerns with the proposal to remove a regulatory impediment for commercial development seeking to tender for public infrastructure projects carried out under a Public Private Partnership (PPP) involving special purpose vehicle (SPV) or similar arrangement. However, a separate exemption now exists for a PPP or SPV arrangement under Sections 10 and 11 of Schedule 1A so there is no need for Section 8 to assist those arrangements. In practice, there are entities in the industry who rely upon Section 8 of Schedule 1A to contract to consumers for building work. This should not be permitted as it creates unintended consequences that undermine Section 42. Listed below are examples of some of those consequences.

Example 1 - Developer, Business Manager, Builder, Subcontractor

- Developer contracts with a business manager to build a commercial building
- Business manager contracts with a builder to carry out all the works
- Builder contracts with all subcontractors

Example 2 - Owner, Trade Contractor (water proofing), Subcontractor (painter)

- Owner contracts a trade contractor to carry out water proofing to commercial building
- Owner also contracts the water proofing trade contractor to paint exterior of the building
- Water proofing trade contractor contracts a painting contractor to complete the painting work

Example 3 - Owner, Manufacturer, Trade Contractor

- Owner contracts a manufacturer to supply and install a product.

- Manufacturer contracts a trade contractor to carry out the installation of the product.

Example 4 - Owner, Unlicensed Overseas Contractor (UOC), Builder, Subcontractor

- Owner contracts an UOC to renovate a commercial building
- UOC contracts a builder to carry out work (licence lending key issue)
- Builder contracts all subcontractors

Further, this provision undermines the intent of the Statutory Trust Account model as under this arrangement, a statutory trust account would only be required for one subcontractor, that is the licensed builder actually carrying out the building work. The subcontractors who subcontract to that builder will not be beneficiaries under a statutory trust account.

Accordingly, section 8 of Schedule 1A of the QBCC Act should be deleted in full.