



26 Feb 2020

Committee Secretary
Transport and Public Works Committee
Parliament House
George Street
Brisbane Qld 4000

Via 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 a response on behalf of the property industry to the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020.

The Property Council has already outlined industry concerns with the PBA framework through comprehensive submissions to the Security of Payment Discussion Paper (March 2016), the Draft Queensland Building Plan (February 2017), the Public Works and Utilities Committee's investigation of the Bill (September 2017), the Building Industry Fairness Reforms Implementation and Evaluation Panel (October 2018) and the Special Joint Taskforce (June 2019).

The Property Council maintains the position that the current PBA model will not achieve the Government's stated objectives and that the reforms will have a perverse impact on the industry.

While recognising that the Property Council holds diametrically opposed views to the Government on the effectiveness of these reforms, we have been pleased with the Government's willingness to review the framework of the PBA model prior to private sector implementation.

The amendments contained in the Bill echo the recommendations of the Evaluation Panel and Special Joint Taskforce. These recommendations have reflected many of the points made by the Property Council to achieve a simplified and streamlined PBA model.

In relation to the proposed amendments to the *Building Industry Fairness Act* contained in the Bill, the Property Council supports the proposals put forward by Master Builders Queensland in their submission to the Committee. The Property Council contends that these proposals provide a pragmatic way forward for the PBA model, which will lead to stronger outcomes as the reforms are rolled out through the private sector.

Beyond these technical matters, the Property Council offers the following comments on a number key changes within the Bill that are of concern to our members.

Principal oversight changes

The Property Council welcomes the amendments in the Act which will remove the obligations placed on the principal to provide oversight of all payments made through any PBA on their relevant projects. Appropriately, the Bill now charges QBCC with the task of providing consistent oversight over all PBAs rather than the project principals.

The removal of the ability of a principal to replace the head contractor as trustee of any PBA on insolvency of the head contractor or termination of the contract is also a positive step forward for the simplicity of the framework.

While removing these obligations on project principals, the Bill does create another obligation on project principals to receive the new 'supporting statements' from head contractors when they submit a payment claim. The Property Council has been advised that there are no obligations extending beyond the obligation to receive these documents. As such, the Property Council does not object to this new requirement.

Charge over property

Under provisions in the Bill, if an adjudication decision is made and lodged as a judgement debt in the court, the claimant will be able to register the charge by lodging a request to register a charge over the land in question. This will have the effect of a caveat so the debtor could not deal with the land without paying it.

The Property Council does not accept that these amendments are necessary as a successful claimant in an adjudication can already register a judgment and then take the usual enforcement steps available to a claimant. These steps include registering a writ over all property owned by the principal, not just the property on which the work was carried out.

The proposed new provision is not only unnecessary from a legal perspective, it is also unlikely to have any impact in a real-world sense when considering the factors likely to face an entity that is failing to meet its financial liabilities.

It is the experience of the industry that on the rare occasions where a principal is failing to make payments to a head contractor, it is likely to have outstanding liabilities to its financiers. In these instances any lending bank will have a superior security interest compared with the claimant on a particular project.

The Property Council also notes that section 100B(2)(b) extends the charge to buildings and other structures on the lot, not just to the land, which seems to overlook the fact that a building generally is a fixture and not something which can be the subject of a separate charge.

The Property Council recommends the removal of Part 6A from the final Bill in recognition that this avenue is already a legal options for participants in the contractual chain.

Requiring higher party to withhold payment

The Property Council notes that new provisions within the Bill will empower a claimant who lodges an adjudication application to give a payment withholding request to a higher party in the contractual chain. This includes a project principal or even a project financier. As drafted, this right seems to be in addition to the right of a claimant to put on a subcontractor's charge.

Under the current Act, a claimant has a choice as to whether to go to adjudication or to use the subcontractor's charge approach. The interrelationship between these two rights is not clear in the proposed amendments.

The Property Council is concerned that this ambiguity may open these provisions up to inappropriate use. There is the opportunity for a claimant to put on an ambit claim, and to hold up the head contractor's cash flow, for the whole period of the adjudication but without the right which the head contractor normally has to apply to the court to set aside a charge improperly lodged.

The Property Council contends that where there is a difference between the claimed amount and the scheduled amount, the optimal method of dealing with that situation is through adjudication. It would be contrary to a fair outcome for the claimant to have an added right to be secured for the claimed amount.

Provision for changes to building assessment provisions

The Property Council notes the proposed changes to building assessment provisions (Clause 37) will enable future regulations to amend building assessment provisions to apply immediately to an advanced building design or undecided building application. This provision is restricted to circumstances where the Minister is satisfied that there is risk of serious injury or illness to a person and where an impact assessment has been undertaken.

Whilst the Property Council understands the merit of such an approach to respond to matters of acute public safety, we hold concerns about the potential impact of this provision on larger scale projects.

For a large office building or shopping centre, which may have involved years in planning and development, a shift in building assessment provisions could have a significant impact on the viability of a project.

As such, the Property Council is keen to ensure that any 'impact assessment' undertaken in relation to this provision is done in a manner that accurately accounts for the likely effects of any proposed regulatory changes. The Property Council recommends that the Bill should include a requirement to undertake consultation as part of any impact assessment.

It has been the experience of the Property Council that consultation, even on a small scale with industry representative bodies, often leads to far stronger outcomes in the final regulation.

Once again, thank you for the opportunity to provide feedback on the Bill. If you have any questions or would like to discuss this further, please do not hesitate to contact me on [REDACTED] or 07 [REDACTED]

Yours sincerely,



Chris Mountford
Queensland Executive Director