National Fire Industry Association
Australia
Contractors at the Frontline of Fire Protection

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26 February 2020

Transport and Public Works Committee
tpwc@parliament.qld.gov.au

Re – NFIA submission to Building Industry Fairness (Security of Payment) Other Legislation Amendment Bill 2020 enquiry

Dear Committee,

The National Fire Industry Association of Australia (NFIA) supports the Building Industry Fairness (Security of Payment) Other Legislation Amendment Bill 2020. The Bill is a major step forward for not just subcontractors, but also for the building and construction industry generally.

NFIA requests that the Committee make two recommendations regarding matters not included in the Bill. These relate to:

1. appropriately defining passive fire protection work to make our community safer; and
2. abolishing an exemption clause in the current Queensland Building and Construction Commission Act (QBCCA) that critically undermines our licensing framework.

Details on these matters are included in this submission.

The National Fire Industry Association (NFIA) is an Australia-wide community of fire protection contractors, their people, suppliers, friends and stakeholders representing a wide and varied membership from the smallest sub-contractor through to large Australia-wide construction and service businesses.

We stand together with our members who work at the frontline of fire protection in Australia.

Our mission is to build a better industry through training, quality and professionalism, thereby creating better outcomes for customers and rewarding career opportunities for the Industry's people, as well as making Australia safer.

NFIA believes that by continuing to grow the character, spirit and performance of our industry, we create a better future for those who will follow us and for their customers. NFIA is a full-on, hands-on cohort of contractors, their suppliers and supporters who are passionately committed to improving the industry.

Please find our detailed submission attached. Given our extensive involvement in the consultation and development process over the past few years, we will only address particular issues rather than submitting a clause by clause response.

Should you require any further information or have any further questions please contact myself using the details included in this submission.

Kind regards,

Wayne Smith

Chief Executive Officer

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Submission to Transport and Public Works Committee
Building Industry Fairness

26 February 2020

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PASSIVE FIRE PROTECTION WORK - LICENSING

Passive fire protection is a critical element of the built environment's response to a fire event. Unfortunately, due to the current regulatory framework, passive fire protection is the leading cause of defects within the sector and this is critically undermining the safety of buildings in which the Queensland community lives and works.

Passive fire protection includes fire doors, shutters, walls, and ceilings; along with certain measures such as the installation of fire collars, undertaking penetrations in fire rated walls, joint sealing and similar work.

Strangely, 'passive fire protection' is not legislatively defined in the QBCCA as 'fire protection'. It simply falls under the category of 'building work'. This quirk of the legislative framework means that passive work is often not licensed and very difficult to enforce. This in turn leads to major defects and safety risks.

NFIA and its Members believe that passive fire protection is critical to community safety in the building environment and must be recognised in line equally to other fire protection work in law.

In addition, this 'low bar' framework has led to substandard qualifications often being required to undertake passive work and is also contributing to the high defect rate.

Gone are the days of 'teach-yourself' and 'do-it-yourself' handymen and women undertaking this vital life-safety work.

While defects themselves can often be dismissed as a small matter to be rectified upon discovery via insurance or a similar measure, this is not the case with passive fire. Defects in passive fire protection undermine the entire building's fire protection response. Sprinkler, electrical, alarm and/or special hazards systems are designed, installed and tested on the basis that the passive fire element will work correctly. If a fire door or wall does not halt the spread of a fire, then this severely hinders the ability of other fire protection measures to work correctly. Industry advice is that 80% of fire walls fail on their first inspection.

This has been addressed by a Government fire licensing review in late 2019 which saw all major stakeholders agree to include 'passive work' within the definition of 'fire protection' in the QBCCA.

Stakeholders who support including passive fire into the definition of fire protection systems and work include:

- NFIA
- Master Plumbers' Association of Queensland
- Master Builders
- Housing Industry Association of Australia

- Master Electricians
- Air-conditioning and Mechanical Contractors Association

Unfortunately, this measure has not been included within the Bill. Other relevant measures have been included, such as the continuation and renewal of particular licence classes and the relevant legislation is being amended as part of the Bill.

Including a measure to expand the definition of fire protection work to include passive fire and excluding engineering work is of critical importance to a modern, functioning and safe built environment. This will provide our sector with the regulatory framework we need to best keep Queenslanders safe from fire in the buildings that they work and live.

It is important to note that any amendment would need to enable other non-passive trades such as sprinkler fitting, plumbing and electrical to continue to undertake the incidental work that they currently perform.

We urge the Committee to recommend this minor amendment to the definition of fire protection work in order to address this critical safety issue.

EXEMPTION FROM LICENSING FRAMEWORK

The foundation of safe buildings and a functional industry where people get paid is our licensing framework. Without this framework anyone can undertake any work at any time. Whilst Queensland is the Australian leader in relation to many aspects of licensing there is an exemption that undermines this entire framework.

The provision in question is: *Schedule 1A, 8, Head Contracts to Carry Out Building Work.*

We consider this existing provision potentially undermines the Security of Payment Reforms. In addition, it does completely undermine the licensing structure. While it may have been appropriate for the time when it was introduced, it is no longer appropriate in a modern licensing framework.

The provision is an exemption clause from having to hold a licence for any person who is engaged directly by an owner or developer. This is contrary to the intent of the whole legislative framework. It is important to note that this provision does not only apply to construction work, it applies to all work, including post-construction maintenance.

Further, the Security of Payment legislative framework works in concert with the building and construction licensing system. This provision enables a person or entity to remove themselves from this system. We consider that the impact of this ability is far reaching with several unintended consequences.

We ask that the Committee recommend that this provision be removed.

8 Head contracts to carry out building work

(1) An unlicensed person who enters into a contract to carry out building work does not contravene section 42(1) merely because the person entered into the contract if the building work —

(a) is not residential construction work or domestic building work; and

*(b) is to be carried out by a person (an **appropriately licensed contractor**) who is licensed to carry out building work of the relevant class.*

(2) Also, the unlicensed person does not contravene section 42(1) merely because the person —

(a) directly or indirectly causes the building work to be carried out by an appropriately licensed contractor; or

(b) enters into another contract, with an appropriately licensed contractor, to carry out the work.

(3) However, subsection (1) ceases to apply to the unlicensed person if the person causes or allows any of the building work to be carried out by a person who is not licensed to carry out building work of the relevant class.

BIF SUBMISSION

NFIA strongly supports the Government's subcontractor payment proposals as outlined in the Bill. Subcontractor professionals have strongly pursued comprehensive reform on this matter for some time, and this Bill marks the greatest step forward for payment security anywhere in Australia.

The historic legislative framework simply does not provide tradies with certainty of payment for the work they have performed in good faith and in accordance with legal contracts that they have entered into.

NFIA could not have been more active on this matter. We have attended every consultation session held since the passage of the original Bill and provided comprehensive information and feedback on all aspects of these reforms. Our work has found that payment security is particularly an issue on the Gold and Sunshine Coast's.

NFIA is confident that the adoption of Project Bank Accounts, as outlined in the Bill, will cause minimum disruption to the industry while simultaneously going a significant way to addressing the payment issues that continue to plague subcontractors on a day to day basis.

The main issues currently experienced include:

- Payment delays
- Underpayment
- Lack of full payment for variations
- Significantly delayed release of bank guarantees

Specific issues contained in the Bill

- The renaming of 'Building Work' to 'Project Trust Work'
    - This is supported, as it is an easier to understand framework for professionals to operate within.
- The creation of a minimum contract value
    - Subcontractors support this provision and think that around $20,000 is the appropriate amount to ensure that the regulatory compliance burden is balanced out against the protentional impact of a subcontractor losing the balance of funds in the event of a builder bankruptcy.
- Calculation of time
    - Subcontractors support the alignment of business days to respect the Christmas and New Year period. This is a common sense amendment.
- Simplification operation of PBA's and requiring only one project trust account be established by the head contractor for every eligible contract and allow one retention trust account per contractor
    - While it is our preference to maintain the previous structure, we do not oppose this amendment.
- Remove the requirement to establish a disputed funds trust account
    - Disputed funds are a complex issue and practice is constantly evolving. Due to this we recommend that the related provisions are reviewed with each implementation stage.
- Increase the oversight functions of the QBCC, including the ability to audit trust accounts as part of an audit program
    - The increase in functions are supported. A pro-active QBCC audit program is critical. Until a head contractor is unaware whether they are being audited because of 1. a compliant or 2. a QBCC random pro-active enforcement, we will not achieve the cultural change required to fix the payment practices within the building and construction industry.
- Enable QBCC to freeze trust accounts and give direction
    - We support this ability and further support the flexibility not to go to the Supreme Court for each decision. It is the job of the Regulator to regulate and being forced to go to Court for directions is a potentially timely practice.

- Compulsory training before opening a retention account to help account holders understand their obligations
    - Supported. The reality of the building and construction contractor licensing framework in Queensland is that the bar to become a contractor is too low. Often it is a single business unit on top of the occupational technical requirement. This unit is around 60 hours of work and costs less than $500. This is not enough and the practices, as well as culture within the industry, display this. On top of compulsory training we recommend reviewing the low initial bar of gaining a contractor's licence.
- Legislative implementation timeframes
    - This provides industry with certainty and is supported.
- Prescribed subcontractors
    - 14E (d) legislates the ability to prescribe, via regulation, a non-first tier subcontract to be eligible for a trust account. This is supported as an anti-avoidance measure. Implementation, in the first instance, of a 'super-subbie' clause is not supported as it runs contrary to the foundation principles of the reforms and will lead to industry confusion. Regulating against avoidance practices is appropriate and encouraged.

Project Bank Accounts

Payment delays from head contractor to subcontractor are a regular occurrence in the building and construction industry. Although contracts often hold specific payment dates, these are regularly not adhered to despite head contractors receiving payment from the principal on time. Delay timeframes vary from project to project, however any delay is an impact on the subcontractor's cash flow while fixed expenses such as resources and labour are required to be met. These circumstances often result in subcontractors taking on further debt which attracts additional expenses and can be remedied through the implementation of Project Bank Accounts.

We support a mechanism where disputed funds, for both the head contractor and subcontractor, remain within the Account. We also support retention being kept in a similar type of account.

Variations

Variations are very common in the design and construct reality of the construction industry (which is basically 100% of non-domestic contractors). Variations instructed by head contractors to subcontractors form a large portion of work on a project.

Where the change is considered a variation, a site instruction is issued. Upon site instruction, the subcontractor values and undertakes the work so as to not hold up the entire project's schedule of works. Although subcontractors most often receive payment for their variation claim within a reasonable timeframe, the "not agreed" or "paid on account" variations are used by the head contractor as bargaining tools to challenge these figures at the time of final payment settlement. This process can often lead to a reduced amount being settled between the builder and the subcontractor which effectively short-changes the subcontractor.

It is commonplace for payments for variation work to be then challenged by the head contractor and the subcontractor's final payment is regularly reduced by this challenged amount. This practice is a clear example of payment insecurity and its flow on impact to the subcontractor's bottom line, business planning and ability to operate is significant.

Further, recent consultation has found that head contractors are now in the majority of situations not considering variations as variations, but instead as simply instructions.

Head contractors have now changed their standard contracts to ensure that these instructions must be undertaken. The result of this is that once a subcontractor receives the instruction, they must complete the work, and if the head contractor refuses payment, which is common, because instructions are considered by builders to be within the subcontractors expected scope of work, then a subcontractor has the option to initiate mediation, as a first step. It is rare for a subcontractor to receive full payment for instructions.

Notification of a variation also has similar deadlines to claiming an Extension of Time (EOT). Once a subcontractor receives a set of revised drawings, a builder's contracts often only allows a set time frame (can be between 1 day and 5 days) for a subcontractor to advise that the changes will constitute a variation. Once this is done you will then have a further period in which to submit the variation. Most subcontractors do not have the staff, (nor can afford the cost), to check every set of drawings issued on a project within this timeframe. Some subcontractors attempt to overcome this disadvantage by issuing a letter to the builder every time a set of drawings is issued, advising that the drawings may constitute a variation.

It is critical that this issue continues to be addressed via the Regulation making process for the Building Industry Fairness package.

Retentions

A major issue in this space relates to bank guarantees. The use of bank guarantees as a form of retention is regular practice. These guarantees are due to be released by the head contractor back to the subcontractor in two stages. The first stage is upon practical completion and the second stage is upon the end of the defect period.

Although these stages are agreed to at the time of engagement of the subcontractor, they are rarely met. Further, it is increasingly uncommon for the head contractor/builder to communicate the formal project completion date.

Bank guarantees are viewed by financial institutions as a form of cash due to the fact that the head contractor is able to realise the guarantee as cash at any time. Therefore, a large portion of a subcontractor's cash resources are tied up through guarantees which they also make interest payments on. If these guarantees are not released on the agreed date it means the subcontractor is forced to continue to make interest repayments and has a limited operational capacity on their next scheduled project. This is viewed by contractors as the largest impost on their ability to operate a successful business.

Other issues that relate to retention are well known and have been discussed at length in the Queensland Building Plan roadshow.

It is vital that bank guarantees continue to be treated the same as cash under this reform package and that this is included in all communication and marketing material.

Thank you for considering our submission.