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Office of the President

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Security of Payment Discussion paper

Department of Housing and Public Works

By email: securityofpayment@hpw.qld.gov.au

Security of Payment Discussion Paper dated December 2015

Thank you for the opportunity to comment on the Department of Housing and Public Works' Security of Payment Discussion Paper dated December 2015 (the "Discussion Paper"); Queensland Law Society appreciates being consulted in relation to these important reforms.

This response has been drafted with the assistance of the Society's Construction & Infrastructure Committee and the Law Council of Australia Construction Committee (Queensland), hereafter referred to as the "Committee".

Members of the Committee have had the benefit of reading, the submission of the Society of Construction Law Australia ("SoCLA") in response to the Discussion Paper. A copy of the SoCLA submission is attached with this letter. The Society commends the work that went into the SoCLA submission and wishes to agree and endorse the remarks stated in the SoCLA submission in its entirety, subject to the comments stated below.

Much of the content of the Discussion Paper is devoted to the possibility of introducing project bank accounts ("PBA"), which seems to be a response to the collapse of Walton Constructions in 2013. The Society suggest that prior to imposing another layer of compliance on an already significantly regulated industry, some assessment of the current figures in relation to such collapses should be made. The circumstances leading to the Walton's collapse-and the activities of some of the parties involved-are not evident in the construction industry in general and the cost of compliance with further regulation, especially to medium and small contractors, may not be justified.

The Society is also of the view that, properly enforced, existing regulations would address the issues raised in the Discussion Paper. Specifically, those regulations are:

- S 67U of the *Queensland Building and Construction Commission Act 1991* (QBCCA)
- Minimum Financial Requirements Policy for licensing.

The Society is of the view that if the financial monitoring requirements were amended to require quarterly reporting, with those reports being no older than 14 days prior to submission and a maximum age of one moth old, the issue raised in the Discussion Paper would be appropriately addressed.

<u>Further Observations</u>

A key advantage intended through use of a PBA is that it provides security of payment in the event of insolvency of a head contractor. While it is appreciated that the proposal for the use of PBA is still to be fully documented, two issues should be addressed:

1. The protection afforded by a PBA will provide some benefit for subcontractors in some situations. However, a question must be asked whether (on a cost/benefit analysis) the PBA is the most efficient mechanism for managing the risk to subcontractors of head contractor insolvency.

   The costs of a PBA process will either lead to higher costs for projects (inhibiting growth) or (if head contractors are asked to absorb the costs) reduce margins (perhaps to a limited extent creating solvency risk). From a policy perspective, is it appropriate to penalise the many head contractors that are not at risk of insolvency to address the few which are?

   The protection of subcontractors could be addressed by using and improving the policing of early insolvency warnings through the minimum financial requirements regime for licensees. This would allow those head contractors identified to be at risk to be more closely scrutinised. Head contractors which are not at risk of insolvency would not then be penalised.

2. The protection afforded by the PBA will exist only for the period during which the money is held in the account and is dependent on the head contractor accurately assessing the subcontractors' claims.

   It is assumed that the PBA is "cleared" each month, with the amount not paid to subcontractors then paid to the head contractor. At what point is a Principal able to decline to approve payment of the balance in the PBA to the head contractor? It will be obvious that a head contractor will have solvency issues if, say, the head contractor requests that less than 10% of the amount in the PBA is paid to the subcontractors with the balance to be paid to the head contractor. However, where will the line be drawn? Can a Principal refuse to approve payment of the balance to the head contractor if less than 70% (or 80% or 90%) of money in the PBA is paid to subcontractors?

   If 70% of the money in the PBA is paid to subcontractors, it is acknowledged that a significant part of the payment due to subcontractors will be protected – certainly more than if no payment were made. However, the Principal (whether public or private sector) is being asked to shoulder a significant responsibility in making the decision and it could have significant ramifications for the head contractor. Is the Principal, in making that decision, immune from suit?

It is difficult to conceive any firm guideline on a decision regarding when payment of the balance in the PBA should not be paid to a head contractor; for example, there may be a significant dispute between the head contractor and a major subcontractor warranting non-payment to the subcontractor.

Thank you for the opportunity to provide comments and submissions to the Discussion Paper.

Please do not hesitate to contact either myself or have a member of your staff contact our Policy Solicitor, Annmaree Verderosa on (07) 3842 5872 or a.verderosa@qls.com.au if you wish to discuss these concepts further.

Yours faithfully

Bill Potts
President