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Office of the President

9 March 2020

Our ref: HS – C&I

Mr Shane King MP
Chair, Transport and Public Works Committee
Parliament House
George Street
Brisbane QLS 4000

By email: [redacted]

Dear Mr King

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

Thank you for the opportunity to appear at the public hearing on 4 March 2020. We write to provide you with responses to the questions contained in your letter of that date.

1. ***Could you please elaborate on your concerns, including possible consequences, in relation to the introduction of regulatory prescription to what are essentially civil disputes, identified on page 6 of your submission?***

The main purpose of the *Building Industry Fairness (Security of Payment) Act 2017* (**the Act**) is to help people working in the building and construction industry in being paid for the work they do (section 3(1)). In other words, the recovery of money from the other contracting party in a commercial setting. The Act contains procedures intended to support the main purpose of the Act. The Act does not create an entitlement to payment but creates a procedure, alternative to the contract, for the making of a progress payment.

QLS does not have concerns about procedures being prescribed in the Act and, as stated at the public hearing, supports the purpose and intent of the Act. QLS's concerns relate to whether the purposes of the Act are achieved by:

a) all payment claims automatically being subject to the procedures in the Act; and
b) imposition of penalties for non-compliance with the procedures of the Act, which could be seen as overreach by the regulator into what are essentially private commercial dealings between parties in a contractual relationship and may not provide a strong deterrent to non-compliance.

2. ***Your submission also proposes an endorsement of payment claims so that claimants 'opt-in' to the Act and the regulation it brings or remain under the contract. Could you please advise:***

    a) the advantages and disadvantages of this proposal to both parties; and

    QLS does not see any disadvantages to requiring a claimant to expressly endorse its payment claims such that they opt-in to the Act's regime. QLS understands that one motivation for removing the endorsement was that there is a perception amongst subcontractors that there is a stigma attached to including the express wording and that requiring an endorsement therefore makes subcontractors less likely to utilise the Act. However, in our respectful view, if a subcontractor is reluctant to endorse its payment claims for fear of a perceived stigma, it would seem highly unlikely that that same subcontractor would seek to enforce its rights under the Act (for example, by seeking a summary judgement against the contractor to recover payment in the absence of a payment schedule being provided) where no endorsement is required, for fear of even greater stigma that would come with taking such action. As such, removing the requirement to endorse is likely to have little or no effect on the willingness of a subcontractor to utilise the procedures available to it under the Act.

    On the other hand, QLS sees many disadvantages with the current system in which no endorsement is required and many advantages in reintroducing the requirement for endorsement. These include:

    - **Lack of an endorsement provides uncertainty to both claimant and respondent:** The definition of *payment claim* in section 68 is very broad. This means that it is possible, especially given the extent of formal and informal correspondence relating to payment which is regularly exchanged on construction projects, that any demand, request or reminder for payment or for a variation, or any other commercial discussion requesting payment could inadvertently constitute a payment claim. It is also common for invoices to be issued separately to the initial progress claim. Under the current Act, both the claim and the invoice would be a payment claim under section 68.The legal rights and obligations of the parties under the Act are subject to strict timeframes under the Act. These timeframes commence when the payment claim is served. If one or both of the parties is unaware that the Act applies to that document as a payment claim, then the likelihood of that party inadvertently failing to comply with the requirements of the Act is increased. This can result in significant consequences for both claimants and respondents as noted below.

    - **Inadvertent non-compliance by a respondent:** A respondent that has not identified a particular item of correspondence as constituting a payment claim could fail to submit a payment schedule in relation to that correspondence, resulting in liability to pay the amount stated in the correspondence in full and, potentially, a fine.

- **Inadvertent loss of rights by a claimant:** A claimant that has not identified a particular item of correspondence as constituting a payment claim could find that a later document which it believes and intends to constitute a payment claim is invalid under the Act. For example, pursuant to section 75(4), claimants "can not make more than 1 payment claim for each reference date". If a claimant serves correspondence which (unintentionally) constitutes a payment claim under section 68 after a reference date, then any subsequent claim relying on that reference date will be invalid. For example, if, on the day after a particular reference date, the claimant were to issue a payment reminder to a respondent seeking payment of a previous invoice, then this would likely constitute a payment claim under the Act. If the subcontractor later that day issued its new invoice for work done that month, then this second invoice would likely be invalid by operation of section 75(4), as the payment reminder had 'used up' the reference date.

  That claimant could potentially proceed all the way to adjudication, only to have the adjudicator determine that the earlier payment reminder was a valid payment claim and that the adjudicated claim was invalid.

  Alternatively, a savvy respondent could claim in its payment schedule that a particular claim is invalid because of the operation of section 75(4) and the uncertainty as to the correctness of the respondent's argument could make the claimant reluctant to proceed to adjudication.

- **Unnecessary increase in administration costs for respondents:** Given the potential that a particular document/item of correspondence will constitute a payment claim, prudent respondents are left with little option but to respond with a detailed payment schedule to all such communications, where the amount stated is more than the amount which the respondent considers is payable. This results in unnecessary additional work in responding to claims, even where the claimant does not intend the correspondence to be a payment claim or there is ultimately no actual dispute between the parties.

- **Option to choose:** An opt-in process via an endorsement means that claimants will be consciously choosing whether or not they wish to proceed down the statutory security of payment process. This would provide both parties with greater certainty of their statutory rights and obligations.

b) suggestions on how this would be achieved legislatively and how it would operate in practice?

The change could be achieved legislatively in the same manner as the requirement to endorse was previously legislated in section 17 of the *Building and Construction Industry Payments Act 2004* (Qld). That is, section 68 could be amended as follows:

68 Meaning of payment claim

(1) A payment claim, for a progress payment, is a written document that—

(a) identifies the construction work or related goods and services to which the progress payment relates;

(b) states the amount (the claimed amount) of the progress payment that the claimant claims is payable by the respondent;

(c) states that it is made under this Act; and

(d) requests payment of the claimed amount; and

(e) includes the other information prescribed by regulation.

3. Could you please provide some examples of clauses that may be challenged in the courts as the bill currently stands?

As set out in our submission, QLS is concerned about:

- lack of clarity in clause 44 of the bill
- lack of clarity in clause 63 of the bill
- the limitation on being able to use funds for their purpose, i.e. rectification of defects, pursuant to proposed new section 36 of the Act
- lack of clarity regarding the cost of training in proposed new section 41 of the Act.

QLS also notes the comments of the witnesses from Cornwalls Lawyers at the public hearing regarding the terms 'contracted party' and 'practical completion'.

QLS has not had the opportunity to review all of the bill's drafting in detail due to time constraints. There may be other clauses with the potential to lead to litigated disputes.

Part 4A

In addition to the above, we welcome this opportunity to further emphasise the comments on page 5 of our submission regarding the potential for finance to be withdrawn as a result of the ability to require higher parties to withhold payment:

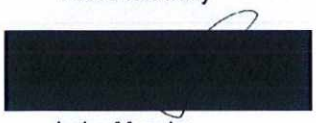
> *By way of illustrating the potential unintended consequences: clause 97B requires a "higher party" which is defined to include a financier, to retain out of the related amount payable to an unsuccessful adjudication respondent either the adjudicated amount or the related amount payable to the respondent, whichever is less. Depending on the terms of the financial accommodation and any builder's tie-in deed, there is unlikely to be any amount "payable" to the respondent in any case.*
>
> *Such a notice may, despite its own limited utility, be an event of default under any financial accommodation and could therefore result in finance being withdrawn for the whole project. The result is that any other funds payable do not flow through to other subcontractors which are not secured. While the adjudication may be for $100,000.00, a default under the financial accommodation may result in no further claims being paid*

by the financier for amounts which are to become due under the contract to unsecured subcontractors.

QLS submits that this issue requires careful consideration by the committee.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President