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QUEENSLAND BUILDING PLAN

Submission from Master Electricians Australia



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About Master Electricians Australia

Master Electricians Australia (MEA) is a national employer association representing the interests of electrical contractors and the broader electrotechnology industry. As one of the longest running organisations of its kind, MEA has established itself as the leading voice of the electrotechnology sector. MEA is recognised by industry, government and the community as the electrical industry's foremost business partner, knowledge source and advocate. The organisation's website is: www.masterelectricians.com.au.

MEA congratulates the Queensland Government on committing to the development of a Building Plan as well as taking steps to actively consult with the community to ensure the Plan achieves the desired outcomes.

Security of payment

MEA has long advocated for reforms to security of payment arrangements in Queensland and made a comprehensive submission to the Queensland Government's 2015 discussion paper on the issue. Our responses to the questions posed in the Building Plan Discussion Paper regarding Project Bank Accounts and the BCIPA fact sheet are below.

Questions from Queensland Building Plan Discussion Paper

- 1. The proposed PBA model is a significant new initiative. Do you have any suggestions about how a PBA could be implemented in the private sector to projects over the value of \$1 million?***

Just as subcontractors working on government projects are entitled to a security of payment system that supports their right to prompt payment, so too are those operating in the private sector. The experience in Europe indicates there may be many advantages with the use of PBAs in the private sector. These include:

- Greater certainty over payment timing and amounts will appeal to clients and strength the building and construction industry.
- Minimal set-up costs will reduce administration and speed up payment. The resultant shifts in project behaviours will likely appeal to the private sector.
- A secure chain of payment will allow contractors to focus on the project at hand without worrying about their bottom line.
- An established system of payment achieved through PBAs will remove some of the tensions experienced between head contractors and subcontractors on a site. This will in turn facilitate partnering and collaborative working.
- Analysis of past projects suggests that up to 2.5 per cent efficiency savings are achievable based on research by Faithful Gould in Europe.

(From: <https://www.fgould.com/uk-europe/articles/will-private-sector-run-project-bank-accounts/>)



We propose that such a scheme for the private sector be administered by the state government. We further recommend that the added establishment and administration costs be covered by the interest earned on the funds held in the PBAs.

2. Should the PBA model also be applied to private residential construction?

Yes. We suggest a lowering of the \$1 million monetary threshold for such projects.

➤ *Lower monetary threshold*

Limiting the PBA model to projects valued at between \$1 million and \$10 million excludes many subcontractors from the benefits of the scheme. Most subcontractors in Queensland are working on new private homes where construction costs range between \$150,000 and \$400,000. The \$1 million threshold means that these small business subcontractors who most need PBAs in order to secure their cashflows will not be protected. Small businesses employ a large proportion of workers in the construction industry and without the protection of PBAs they will remain vulnerable to non-payment from head contractors. This risks not only the survival of small businesses, but also the employment of the many thousands of workers employed by these businesses.

We therefore recommend that the PBA scheme threshold be lowered to better accommodate small business subcontractors.

➤ *Calculating the value of a project*

MEA also suggests that, regardless of the monetary threshold determined, where a subcontractor has a contract with a head contractor for multiple structures for a private residential construction, the aggregate value of those builds be used to calculate the project value for the purposes of establishing a PBA. Whilst the project scope may be used to remove or limit the ability for head contractors to reduce packages to avoid their obligations, an overall test should be constructed to ensure that location, size and number of subcontractors from the same trade can be established. If the contractual relationship between the parties remains the same, there is no reason why four projects valued at \$300,000 each, for example, should not be aggregated to meet the \$1 million minimum for the establishment of a PBA.

If an electrical contractor is the head contractor on a project, the same obligations would apply. If multiple builds are governed by a single contractual relationship between the electrical contractor and a subcontractor, the value of those builds would be aggregated to calculate the project value, again subject to the same overall test. If the aggregate value is \$1 million or more, the electrical contractor would be obliged to establish a PBA. MEA members have expressed their willingness to take on this responsibility, should it be required, to ensure security of payment for all industry participants.

3. Should the PBA model be used on large residential projects, such as retirement villages?

Yes. As stated above, subcontractors on all building and construction projects are entitled to prompt payment.

4. Other than the language of the SCA, are there other improvements to the Act that you think should be made?

Ideally, we would like to see a consolidation of security of payment legislation into one Act, eliminating the need for the SCA.

However, should this not occur, we recommend that the time frames for making a claim for a progress payment be changed to 21 days to allow subcontractors, who are most often small businesses, time to prepare the necessary documents.

5. Do you have any concerns with a single new Act, combining legislation required to implement PBAs, the BCIPA and the SCA?

No. Consolidating security of payment legislation will make it easier for industry participants to navigate the system and understand their respective rights and responsibilities.

6. What contract provisions can operate to delay, avoid or adversely affect payment to subcontractors i.e. 'unfair' provisions?

Termination for convenience provisions often serve to delay or avoid payment entirely to subcontractors. Small businesses, in particular, can face serious financial consequences if a head contractor decides to utilise a termination for convenience clause.

Other examples of "unfair" clauses used include:

- Clauses that unilaterally vary the contract
- Automatic rollover / renewal clauses
- Time bar clauses
- Retention money / right to terminate clause
- Unilateral determination of breach
- Forfeiture clause
- Permits one party to avoid or limit performance of contract
- Limits on rights to sue
- Assignment of the contract to the detriment of another party

7. How can this problem be best addressed?

MEA recommends that the QBCC develop a list of both mandatory and prohibited clauses as industry standard for construction contracts. See below for a list of suggested mandatory and prohibited clauses (including those listed above under question 6):

MANDATORY	COMMENT
Schedule of works	
Dispute resolution procedure	Must reflect new <i>BCIPA</i> and <i>SCA</i> requirements.

Force majeure clause, ie. <i>Neither party will be liable for failing to perform its obligations under this agreement as long as the failure is triggered by something beyond its reasonable control. This clause does not excuse payment of monies due.</i>	This would protect subcontractors from liquidated damages claims from a head contractor should a project timeframe extend through no fault of their own.
Payment within 28 days of receiving a payment claim	This is integral to protect the steady cash flow of subcontractors.
All contract variations to be made in writing before work can commence	Subcontractors can be in the position in which unforeseen circumstances require a variation to the original schedule of works. In some instances, head contractors have required a subcontractor to commence work on the variation without the details of such being confirmed in writing. Subcontractors can be reluctant to insist on a written variation to avoid damaging their relationship with the head contractor. A mandatory clause of this type would provide protection to subcontractors in this situation.

PROHIBITED	COMMENT
Termination for convenience	Should the decision be made not to void termination for convenience clauses, the right for subcontractors to make a claim for loss of profit in these circumstances must be an available option in all construction contracts.
Clauses that require subcontractors to provide an upfront security to a head contractor at the commencement of the project.	Much like retention monies, requiring a subcontractor to provide an upfront security to a head contractor removes funds from a subcontractor's cashflow which they risk losing should the head contractor go into liquidation.

8. Are there any other issues you want to raise in relation to the proposed package of reforms?

Retention Trust Fund Scheme

As an alternative to PBAs for projects under \$1 million, MEA proposes the introduction of a Construction Retention Trust Fund Scheme.

Introducing a Construction Retention Trust Scheme in Queensland would undoubtedly involve establishment costs. However, it would also create a more equitable balance between the interests of principal contractors and the subcontractors engaged on a project who are lawfully entitled to payment for the work they have performed. This system would also continue to protect the rights of consumers by ensuring work is performed to a certain standard in order for funds to be released.

The New South Wales Government has acted on this issue by introducing a retention trust scheme. In NSW, the costs involved in administering the scheme are to be offset through lodgement fees for audit reports that will need to be prepared by head contractors. This may be an option the Queensland government to consider in order to cover the costs of administering a retention trust scheme.

Education campaign

It is imperative that any changes to security of payment laws in Queensland be accompanied by a comprehensive education campaign. It is inevitable that the changes may create initial reluctance from the building and construction industry. However, evidence from other jurisdictions demonstrates that once industry becomes familiar with the PBA, the system will run smoothly. An education campaign will be integral in this respect. Head contractors will require targeted guidance on their new responsibilities. Ideally, government would work together with industry bodies to ensure the message is received and understood by those affected.

Questions from BCIPA factsheet

1. *What are your views on the proposed amendments to the BCIPA?*

Overall MEA welcomes the amendments to the BCIPA that have been proposed to improve both the adjudication process and the BCIPA claims process. We are confident that the changes will better protect the right of subcontractors to prompt payment.

We further suggest that, subject to privacy requirements, the QBCC publish Adjudicator's decisions. This may incentivise head contractors, trying to avoid their payment obligations, to reach a settlement and prevent public exposure of their unfair payment practices. It would have the added benefit of making subcontractors aware of any head contractors with a history of non-payment.

2. *What amendments to the BCIPA could further enhance the claims process?*

Further to the enhancement removing the requirement to state a payment claim is made under the BCIPA, we propose the following amendments to preserve the right of subcontractors to make a claim.

➤ *Timeframes*

Currently, under the BCIPA, after a subcontractor issues a payment claim, the head contractor has 21 days to respond with a payment schedule or to dispute the claim. These 21 days awaiting payment can have a significant impact on a subcontractor's cashflow when the outcome may still be delayed/nil payment for the subcontractor. Particularly if the head contractor disagrees with some or all of the payment claim and elects adjudication to resolve the issue.

We propose that the 21-day response timeframe be shortened to 7 days. For the most part, a head contractor will have more resources at their disposal to prepare the response and, in many cases, may have unintentionally missed a progress payment which can be easily remedied.

➤ *Auto trigger*

This is to prevent the situation whereby subcontractors are pressured by the head contractor not to commence the adjudication process for fear of being blacklisted by a head contractor and denied future work.

➤ *Disputed Claim can be separable*

If only part of a claim is in dispute between the head contractor and the subcontractor, the part of the claim not in dispute should still be payable within the usual payment terms. If it is to be found later that the head contractor should have reasonably understood that there was a partial claim not to have been in dispute, the head contractor would be subject to costs, penalties and interest on monies owing since the date of dispute.

Non-conforming building products

1. Do you support the proposals? Have we missed anything?

MEA has long put forward a number of proposals in relation to the growing incidences of non-conforming building and electrical products being made subject to product safety recalls. These proposals include:

a) *Product tracking*

All manufacturers, importers and suppliers of all building products supplied in Australia to have processes and procedures in place to enable the tracking and tracing of product which is found to be faulty and/or non-compliant to the relevant Australian Standards.

b) *Register of electrical products*

Sellers of electrical products would be obliged to maintain a register of electrical products that require installation by an electrician. The register would be used to contact purchasers in the event of a product safety recall

c) *Mandatory recall insurance*

Mandatory recall insurance would give security to consumers that any faulty or non-compliant electrical products purchased are removed and replaced without delay.

Proactive approach

We are concerned that the Queensland Building Plan may be missing the opportunity to develop more proactive approaches to non-conforming products. Ensuring the QBCC has powers to ensure buildings are safe and products meet the relevant standards is a

valuable tool, however, more needs to be done to prevent non-conforming products being made available to the public in the first place.

A report from the Senior Officers' Group (SOG), "*Strategies to address risks related to non-conforming building products*", identified that:

"The current regulatory framework places a disproportionate burden on the end of the product supply chain for identifying NCBPs (builder, installer and building certifier/surveyor) and after a building product has already been paid for and/or installed."

There are number of bodies conducting work on developing more proactive approaches to non-conforming products being sold in the Australian marketplace. The Senate Inquiry into non-conforming products is due to release a report later this year along with the SOG and Building Minister Forum also formulating strategies, such as third party certification. While there may be a growing focus on proactive measures, we consider that the proposals in the Building Plan may only be placing more pressure on building contractors to address a problem that should rest with suppliers.

2. *Are there any concerns with increasing the powers of the building regulator as proposed? If not, are there particular powers you think should be introduced or strengthened?*

We have some concern that the powers proposed for the QBCC appear to be duplicating what is already being done by the Queensland Building and Construction Product Committee, which was established to coordinate the respective powers and areas of expertise across the government regulators. This could result in confusion and duplication in their activities.

MEA is also concerned about the proposal in the Building Code that, "where appropriate, prosecute offences relating to supplying or installing a non-conforming building product". We certainly support, where appropriate, powers to facilitate the prosecution of those supplying non-conforming products. However, we recommend that prosecution for installing non-conforming products be limited to those who "knowingly or negligently" install non-conforming products. Otherwise, contractors who install products that are only identified as non-conforming post installation will face repercussions beyond the out of pocket expenses they incur to remove and replace the faulty items.

3. *Who should pay to cover the costs of testing any suspected non-conforming building products?*

Manufacturers must incur the costs to test suspected non-conforming building products.

4. *Do you think the Minister should be able to ban a NCBP? Or do you think this power should rest with Queensland's building regulator?*

MEA recommends that the power to ban a NCBP should reside with the Queensland building regulator. The building regulator has the technical expertise and established links with industry to allow efficient notification of a NCBP on the market. Faster notification of a NCBP will allow for a ban to be implemented more rapidly. Should the power rest with the Minister, the process would likely be more extended with the ban taking longer to be enacted.

Licensing reforms

In conducting a review of licensing, it is imperative that the regulation of electrical licensing remain with the Electrical Safety Office. Given the inherent dangers associated with electricity, it is essential that electrical licenses be overseen by a dedicated specialist regulator.

We do recommend that the introduction of any new licenses be predicated on a proper impact and efficiency assessment, and integrated into existing licenses where possible. The Building Plan is also an opportunity to rationalize existing classes to prevent duplication.

A QBCC licensing issue we would like to see addressed concerns the installation of split system air-conditioning units. A licensed electrical contractor wanting to install a split system air-conditioning unit also needs a QBCC licence if the value of the “ancillary building work” exceeds \$3,300. This licensing requirement is an additional financial and administrative burden that is unnecessary in light of the level of the knowledge and skill that must be demonstrated in order to obtain an electrical licence. We propose that a licensed electrical contractor be permitted to install a split system air-conditioning unit, including ancillary building work above \$3,300, without a QBCC contractor licence.

Conclusion

As a key stakeholder in the building and construction industry, MEA is eager to be involved in the development of the Queensland Building Plan as it progresses.

Yours sincerely,



Gary Veenstra
State Manager - Queensland