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Executive Director CBOS
Department of Primary Industries, Parks, Water and Environment
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Date: 15.07.2020

By email to: Peter.J.Graham@justice.tas.gov.au

Dear Mr Graham,

RE: Residential Building Work Contract and Dispute Resolution Act 2016 – Director’s Determination – Mandatory Contract Provisions

Thank you for meeting with Jennifer Nichols in December 2019. As discussed, members of the Tasmanian Chapter of the Australian Institute of Architects are experiencing issues when administering architect-administered residential building contracts, on behalf of their clients and which is also adversely affecting builders. This is stemming from the *Residential Building Work Contracts and Dispute Resolution Act 2016: Director’s Determination – Mandatory Contract Provisions (the 2016 Determination)*. The 2016 Determination introduced mandatory progress payments according to stages with corresponding percentages of the contract price, and lists examples of progress payments at specific project stages.

When architects administer a building contract, they act on behalf of the project owner as consumer under the professional engagement between architect and client. Importantly, the 2016 Determination and the underlying legislation is intended to protect the interests of the project owner as consumer of building services. To that extent, the intended outcomes of the concerns we are raising are aligned with the intent of the legislation and the 2016 Determination.

An architect also is required by the building contract to act impartially in specific circumstances, between the owner and the builder, to ensure a fair and reasonable outcome for both parties. Especially so, when the architect assesses a builder’s claim for payment and then certifies the work done and the value of the work, so that the owner can have confidence about the contract price they are to pay the builder.

An important economic consideration here, particularly for small residential builders, is that the preferred method of progress payments should support the builder’s cashflow relative to project works costs (labour and materials). In turn, this can serve to ensure that

the builder remains solvent through the construction phase so the project is completed and delivered for the client. An important financial risk consideration for the owner as consumer, is to have checks and balances in the building contract that ensure that the consumer does not pay for works that are not yet completed, nor overpays for works that are complete.

The Institute's long-advocated position on progress payments under an architect-administered contract, is to prefer certified monthly progress payments. There are three critical elements to this:

- A. The builder's claim for the work done on site and the value of that work, is professionally assessed and certified by the architect.
- B. The architect has a contractual obligation, when assessing a payment claim, to act impartially between the builder and the client owner.
- C. The architect must promptly assess and certify the amount to be paid, and the owner has a contractual obligation to promptly pay the certified claim.

A building contract which adopts monthly progress payments and each of these key elements, best protects the economic and financial risk considerations identified above.

The owner as consumer is better protected when they have a professional, trained architect administering the contract, and the method of monthly progress claims, assessments and payments enables the builder to have regular monthly payments and maintain cash-flow, proportionate to the amount of work completed.

The staged payment method, as indicated in the Director's Determination, restricts these payments to relatively large and arbitrary percentages or payments which are made at infrequent intervals. Anecdotally, we are aware that stage payment methods based on fixed percentages, result in cash flow issues for small builders. These stage payments are often arbitrary in the sense that they do not reflect the work that has been done (which is a risk for the owner), nor do they reflect the construction costs that the builder has incurred and carries at their expense, until the time for payment for that building stage (which is a financial risk for the builder). The staged payment method also presents the risk of disputes between the owner and builder over whether a stage has or has not been met, according to the stage description, often with the architect being put in a difficult position as the intermediary.

The stage payment method also puts a significant risk on the architect if the stage documentation is not documented comprehensively enough to avoid all ambiguity as to whether a stage is actually built; or it puts a greater onus on the architect to over-document the full detail and specification of each stage, which may still change as the project progresses.

'Pre-identified' stages are therefore, in our opinion, not in the best interests of the builder nor the best interests of the client as consumer.

The Institute does not support stage payment methods where the client as consumer has engaged an architect to administer their project. The Institute would like to advocate for the Director to consider making a further determination that allow for architect-

administered residential building contracts to be exempt from the mandatory staged payment method.

To this end, the Institute is firmly of the opinion that the long-held progress payments method that is widely adopted in the Australian Building Industry Contracts (ABIC) architect-administered contracts (for example, ABIC Major Works and Simple Works 2018 revision) is the optimal payment method that balances the interests of both builders and clients.

We **enclose** for your reference, a copy of the ABIC 2018 Simple Works contract as an example of the monthly progress payment method. In particular, we note the following clauses as the 'model' provisions for monthly progress payments in architect-administered residential building contracts:

A6.3—The architect administers the contract on behalf of the owner, but not when assessing or certifying a payment claim.

A6.4—When assessing and certifying a payment claim, the architect acts independently, fairly and impartially.

N3—Procedure for contractor to submit a (monthly) progress claim.

N5—Procedure for Architect to assess a progress claim and to certify progress payment amount.

N7—Obligation on Owner to promptly pay a certified progress payment amount.

The Master Builders Tasmania are supportive of this change, and we would be happy to discuss this further with you if you require more information.

Yours sincerely,



Jennifer Nichols
Tasmanian Executive Director,
Australian Institute of Architects



Shamus Mulcahy
Tasmanian President,
Australian Institute of Architects

The Australian Institute of Architects is the peak body for the architectural profession, representing 11,500 members across Australia and overseas. The Institute actively works to improve the quality of our built environment by promoting quality, responsible and sustainable design. Learn more about the Institute, log on to www.architecture.com.au.