

## Guidance Statement – Confidential – For Internal Use Only



### Outstanding Monies

#### Background

When determining whether it is fair and reasonable under all of the circumstances to issue a Direction to Rectify (DTR) for defective or incomplete work (Section 72 of the *Queensland Building and Construction Commission Act 1991*), contractors often raise the issue with QBCC that monies are owing under the building contract.

When balancing the interests of consumers and contractors it may be viewed as unfair that QBCC would direct rectification of defective or incomplete work if the contractor had not been paid for the works performed. This in effect would provide a benefit to a consumer that is akin to unjust enrichment at the expense of the contractor.

To exercise the above discretion QBCC has to make a determination that the costs of potential rectification works to a consumer are **of a lesser value** than the sum of **monies owing** to the contractor. The decision must be supported by appropriate evidence, such as a Cordell's estimate of the cost to rectify or invoices and bank statements (or similar) proving the amount of monies owing.

Resolution Services Guidance Statement	RES-017
Created - December 2009	
Amended - November 2013; July 2015	
Reviewed - October 2016; October 2019	

## Comment

The issue of outstanding monies is only one factor that QBCC should consider whether under all of the relevant circumstances it is fair to issue a DTR.

The issue of whether outstanding monies are due under the contract should be clearly established early in the dispute process.

QBCC will normally be given some indication whether there is an issue regarding outstanding monies via the Complaint Form compiled by the home owner or at the initial site inspection where the Contractor's Statement asks the contractor if any monies are owing under the contract.

If there is **no agreement** between the consumer and the contractor that monies are owing then QBCC should attempt to decide, on the balance of probabilities, whether monies are owing.

QBCC has no powers to make determinations with respect to contractual or monetary disputes; the parties to the contract have recourse through the Queensland Civil and Administrative Tribunal or Courts to resolve those matters.

If there **is agreement** that monies are owing but the quantum is disputed QBCC should only consider the lowest agreed value of outstanding monies between the parties and **use that agreed value** in exercising any discretion.

## Conclusion

QBCC's primary role in any dispute is to adjudicate on whether building work is defective or incomplete.

It is not QBCC's role to secure outstanding monies for contractors.

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## Other Considerations

- (1) Consumers often ask QBCC whether they should pay outstanding monies due under a building contract.

QBCC officers should make it clear that the payment of any monies under a contract is a matter for the consumer and ultimately their decision alone. QBCC officers should **never** advise consumers to pay outstanding monies to a contractor before QBCC will accept a complaint form, issue a DTR or the like.

**Note:** on occasions payment of outstanding monies may form part of a settlement agreement between a consumer and contractor, and it may be appropriate under those circumstances for a consumer to make payment to comply with a settlement agreement.

- (2) Occasions may also arise where despite there being money clearly owed under a contract, the standard of workmanship is so bad that outstanding monies is not a consideration for discretion by QBCC.

Outstanding monies are only one discretionary factor to be considered. QBCC as a regulator has a responsibility to maintain and improve building standards.

If QBCC observes workmanship by a contractor that is of such a poor quality that a DTR should be issued to inform and protect the wider community from such a contractor then no discretion should be afforded to that contractor.

- (3) In the instance where an **unlicensed contractor** is the subject of a complaint regarding defective or incomplete work then **no** discretion regarding outstanding monies should be afforded to that unlicensed contractor.

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