Building Industry Fairness
(Security of Payment)
Bill 2017

Report No. 50, 55th Parliament
Public Works and Utilities
Committee
October 2017
Public Works and Utilities Committee

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Building Industry Fairness (Security of Payment) Bill 2017

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<td>AMCA</td>
<td>Air Conditioning and Mechanical Contractors’ Association</td>
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<td>Building Industry Fairness (Security of Payment) Bill 2017</td>
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<td>BCIPA</td>
<td>Building and Construction Industry Payments Act 2004</td>
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<tr>
<td>DHPW/department</td>
<td>Department of Housing and Public Works</td>
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<td>FLP</td>
<td>Fundamental Legislative Principle</td>
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<td>HIA</td>
<td>Housing Industry Association</td>
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<td>LSA</td>
<td>Legislative Standards Act 1992</td>
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<td>Master Builders</td>
<td>Master Builders Queensland</td>
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<td>MEA</td>
<td>Master Electricians Australia</td>
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<td>MPAQ</td>
<td>Master Plumbers Association of Queensland</td>
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<tr>
<td>Minister</td>
<td>Minister for Housing and Public Works and Minister for Sport</td>
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<td>OQPC</td>
<td>Office of Queensland Parliamentary Counsel</td>
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<td>NFIA</td>
<td>National Fire Industry Association Australia</td>
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<td>PBA</td>
<td>Project Bank Account</td>
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<td>Property Council</td>
<td>Property Council of Australia</td>
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<td>QBCC</td>
<td>Queensland Building and Construction Commission</td>
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<td>QLS</td>
<td>Queensland Law Society</td>
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<td>SCA</td>
<td>Subcontractors’ Charges Act 1974</td>
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<td>UDIA</td>
<td>Urban Development Institute of Australia, Queensland</td>
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Chair’s foreword

This report presents a summary of the Public Works and Utilities Committee’s examination of the Building Industry Fairness (Security of Payment) Bill 2017.

The committee’s task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who lodged written submissions on the bill. I also thank the committee’s secretariat, and the Department of Housing and Public Works and the Queensland Building and Construction Commission.

I commend this report to the House.

Shane King MP
Chair
Recommendations

Recommendation 1
The committee recommends the Building Industry Fairness (Security of Payment) Bill 2017 be passed.

Recommendation 2
The committee recommends that the Minister consider ensuring the review of phase 1 of the Project Bank Account provisions:

- commence at least three months prior to the commencement of phase 2;
- be undertaken in consultation with representatives of the building and construction industry; and
- the Minister report the review findings to the Legislative Assembly prior to the sections of the bill that commence phase 2 being proclaimed.

Recommendation 3
The committee recommends that the Minister review the appropriateness of the proposed imprisonment penalties for a number of new offences contained in the bill.

Recommendation 4
The committee recommends that the Minister consider amending the bill to require the QBCC to provide licensees with the opportunity to rectify building work, within a specified timeframe, before a direction to rectify is issued and a demerit point penalty is applied.

Recommendation 5
The committee recommends the Minister consult with the building and construction industry when developing the regulation that will mandate and prohibit certain conditions for building contracts and with regard to any subsequent amendments to the regulation.

Recommendation 6
The committee recommends that the Minister report to the House during the second reading speech on those issues raised by stakeholders about the bill where the department indicated it would undertake further consideration.

Recommendation 7
The committee recommends that the Minister in his second reading speech provide examples of any proposed regulations that he intends to make should the bill be passed.
1 Introduction

1.1 Role of the committee

The Public Works and Utilities Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the Parliament of Queensland Act 2001 and the Standing Rules and Orders of the Legislative Assembly.\(^1\)

The committee’s primary areas of responsibility are:

- Main Roads, Road Safety, Ports, Energy and Water Supply, and
- Housing, Public Works and Sport.

Section 93(1) of the Parliament of Queensland Act 2001 provided that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

1.2 Inquiry referral and committee process

The Building Industry Fairness (Security of Payment) Bill 2017 (bill) was introduced into the House by the Hon. Mick de Brenni MP, the Minister for Housing and Public Works and Minister for Sport (the Minister) and referred to the committee on 22 August 2017. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the committee to report to the Legislative Assembly by 13 October 2017.

During its examination of the bill, the committee:

- invited stakeholders and subscribers to lodge written submissions
- received a public briefing from the Department of Housing and Public Works (DHPW/the department) and the Queensland Building and Construction Commission (QBCC) on 6 September 2017 (see Appendix A for a list of witnesses)
- received written advice from DHPW on issues raised in submissions on 18 September 2017, and
- held a public hearing in Brisbane on 20 September 2017 (see Appendix B for a list of witnesses).

A list of the 33 submissions accepted by the committee is at Appendix C. Further information on the committee’s inquiry can be found on the committee’s website.

1.3 Policy objectives of the Building Industry Fairness (Security of Payment) Bill 2017

The explanatory notes advised the objectives of the bill are to:

- improve security of payment for subcontractors in the building and construction industry by providing for effective, efficient, and fair processes for securing payment, including the establishment of a framework to establish Project Bank Accounts (PBA)
- modernise and simplify the provisions for making a subcontractors charge
- increase ease of access to security of payment legislation, and

\(^1\) Parliament of Queensland Act 2001, section 88 and Standing Order 194.
• improve legislation to provide increased ability of the QBCC to provide regulatory oversight to the building and construction industry.2

1.4 Government consultation on the bill

DHPW advised that the department undertook two rounds of consultation across the state between December 2015 and March 2017.3 As set out in the explanatory notes, the Minister released the Security of Payment discussion paper on 17 December 2015, which was followed by extensive consultation between December 2015 and March 2016:

Following consideration of this feedback, the Premier and the Ministers for the Arts, and the Minister for Housing and Public Works and Minister for Sport released the Queensland Building Plan discussion paper in November 2016. Comprehensive consultation was undertaken across Queensland until 31 March 2017. The government held 15 public consultation sessions throughout Queensland which were attended by over 1100 key industry associations, industry representatives, local government representatives and consumers.

The feedback from these extensive consultation processes refined the policy objectives in the bill.4

Further consultation occurred as part of the Queensland Building Plan process from November 2016 to March 2017.5

1.5 Should the bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend the bill be passed.

After examination of the bill, including the policy objectives which it will achieve and consideration of the information provided by the department, the QBCC and from submitters, the committee recommends that the bill be passed.

Recommendation 1

The committee recommends the Building Industry Fairness (Security of Payment) Bill 2017 be passed.

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2 Explanatory notes, p 1.
3 Public briefing transcript, 6 September 2017, p 1.
4 Explanatory notes, p 8.
5 Public briefing transcript, 6 September 2017, p 1.
2 Examination of the Building Industry Fairness (Security of Payment) Bill 2017

This report only discusses those clauses of the bill where issues were raised by stakeholders or by the committee.

2.1 Background

The building and construction industry is the third largest employer in Queensland, employing around 220,000 Queenslanders and contributing approximately $44 billion to the State economy in 2015-16.6

The explanatory notes provided the following background information:

- following a series of high profile collapses in the industry, the Government made an election commitment to review the issue of security of payment for subcontractors and to consult widely
- consultation outcomes reinforced previous analysis of systemic problems within the building and construction industry, including non-compliance with existing State regulations and non-compliance with existing contractual requirements.
- what was once considered poor business practice has become a standard operating model for some licensees in the industry – higher contractors often do not make, or delay payments to subcontractors in order to supplement cash flow, offset the costs of other projects or to receive interest, and avoid additional financing costs for accessing further funding
- the results of consultation were supported by the Senate Economics References Committee’s 2015 inquiry into insolvency in the Australian construction industry, which found that security of payment in the building and construction industry is a problem across all jurisdictions
- the Australian Securities and Investments Commission’s submission to the Senate Committee noted that from 2009 to 2014, the construction industry experienced the highest number of external administrator appointments of all industry sectors, except for the business and personal services sectors and the Senate Committee’s report also found that the Australian building and construction industry’s rate of insolvencies is out of proportion to its share of national output
- delaying payments to subcontractors, or non-payment, can have a significant impact on the cash flow of the subcontractor and can contribute to subcontractor insolvency and subcontractors also typically have more lending risk than their higher contractor counterparts due to reliance on payments, and they subsequently incur higher costs associated with accessing short term finance to meet cash flow commitments, and
- evidence from subcontractors suggests it is common practice to embed additional costs in all contracts to offset the loss of funds from bad debts and to counteract the effects of delayed cash flow from other projects.7

The Minister, in the explanatory speech, stated:

...if you do the work you should get paid. For far too long subcontractors have suffered an unreasonably high level of risk and burden of financial loss associated with the building and construction industry. The majority of the risk in a $44 billion industry has been placed on the shoulders of those who have the least power, and the result has been a disaster for small and

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6 Explanatory notes, p 1.
7 Explanatory notes, pp 1-2.
medium sized subcontracting businesses. Non-payment has busted apart families. It has made people homeless. It has been a mental health disaster.\textsuperscript{8}

The bill proposes a new Act - \textit{Building Industry Fairness (Security of Payment) Act 2017} which combines security of payment legislation into one act by containing the requirements for PBAs as well as including modernised and simplified provisions from the \textit{Building and Construction Industry Payments Act 2004} (BCIPA) and the \textit{Subcontractors’ Charges Act 1974} (SCA), which are to be repealed.

The bill also proposes amendments to the \textit{Queensland Building and Construction Commission Act 1991} (QBCC Act) to improve regulatory compliance and enhance the QBCC’s enforcement capability.

\textbf{2.2 Project Bank Accounts – chapters 1 and 2}

\textbf{2.2.1 Establishment of the PBA framework}

The department advised the committee that the bill proposes PBAs be established to improve security of payment in insolvency situations and to assist in addressing late and non-payment of subcontractors.\textsuperscript{9}

The explanatory notes advised that PBAs are trust accounts where progress payments, retention monies and disputed funds will be held in trust for the subcontractor, independent of the head contractor and principal:

\begin{quote}
PBAs are intended to provide greater security in events such as insolvency, where money within the account is effectively quarantined for subcontractors who are beneficiaries to the trust.
\end{quote}

\begin{quote}
It is also expected to lead to faster progress payments, as the head contractor and subcontractors are paid out of the PBA simultaneously. Phases 1 and 2 will apply to first tier subcontractors, that is, subcontractors who contract directly with the head contractor. The Bill also enables application of PBA to lower tier contractors and suppliers at a later date.\textsuperscript{10}
\end{quote}

A PBA is required to be made up of three trust accounts:

- a general trust account for the management of progress payments
- a retention account for amounts held as retention, and
- a disputed funds account for amounts that are the subject of a payment dispute.\textsuperscript{11}

The bill proposes to establish a framework for PBAs for both government and private sector building and construction projects. It is proposed that PBAs be implemented in two phases:

- phase 1 - PBAs will apply to government building and construction projects between $1 million and $10 million, excluding engineering projects (infrastructure such as bridges, roads and ports)
- followed by phase 2 - a roll out to the private sector for all building and construction projects over $1 million, excluding engineering projects.\textsuperscript{12}

At the public briefing on the bill the DHPW advised that the PBA requirements in the government sector would start from 1 January 2018, with the private sector starting a year later, on 1 January 2019,

\textsuperscript{8} Queensland Parliament, Record of Proceedings, 22 August 2017, p 2285.
\textsuperscript{9} Public hearing transcript, 20 September 2017, p 40.
\textsuperscript{10} Explanatory notes, p 3.
\textsuperscript{11} Queensland Parliament, Record of Proceedings, 22 August 2017, p 2285; see also subsection 23(1) of the bill.
\textsuperscript{12} Explanatory notes, p 3.
dependent on an evaluation the department is doing as part of the initial rollout. DHPW also clarified that the start date for phase 2 would be ‘no sooner than 1 year from commencement of phase 1.’

The Minister, in the explanatory speech, advised:

One of the most important things about a PBA is that in the event of head contractor insolvency, money in the PBA will be protected from other creditors. This means that progress payments in the PBA are protected, retention monies in the PBA are protected and payments in dispute in the PBA are protected. ... We have listened to industry and under our new laws we will also have the ability to expand PBAs down beyond the first tier of subcontractors to protect those subcontractors and suppliers further down the contractual chain.

At the public briefing on the bill, the committee requested further information about building company collapses in Queensland over the last three years. DHPW advised that according to Australian Securities and Investments Commission data, 912 construction companies in Queensland have entered into external administration between 1 July 2014 and 30 June 2017 and that this data also provides that financial management generally, which includes financial control, cash flow and under capitalisation, was cited as the top reason for these failures.

The department also advised that Australian Securities and Investment data for 2016-17 provides:

- Queensland’s construction industry had 303 external administrations of the 1,500 nationally, which represented over 20% of the total external administrations nationally, and
- the construction industry had the most external administrations in the country – 1,509 out of the total 8,000.

Following a further committee question at the public hearing the QBCC provided data for the 2016-17 financial year in respect of monies owed complaints and the amount of financial investigations that it currently takes under the current minimum financial requirements policy:

In the 2016-17 year I can advise the committee that we undertook 484 financial audits. There were 347 non-payment of debt investigations. We do not have the data in respect of number of insolvencies because, as I alluded to before, insolvencies are regulated by the Australian Securities and Investments Commission as opposed to the QBCC. They are the statistics that I have at this point in respect of the type of investigations that we undertake about our current minimum financial requirements policy.

The QBCC also provided data for the 2016-17 year in respect to the monies recovered through its free monies owed service and data for the same period in respect to adjudication statistics:

For the financial year 2016-17 we recovered $7,711,278.41 from people who raised a monies owed complaint with us. Predominantly, that is subcontractors, et cetera. In respect of adjudications registry decisions, the total value of claims for that period where a decision was released was $1,084,167,871. The total value of adjudicated amounts where a decision was released was $648,109,051.
2.2.1.1 Stakeholder views and department response

There was strong support from a number of stakeholders, including Master Electricians Australia (MEA), Master Plumbers Association of Queensland (MPAQ), Subcontractors Alliance and the National Fire Industry Association Australia (NFIA), for the introduction of PBA’s on the basis it would go a significant way toward addressing the payment issues that subcontractors and their employees face.\(^{21}\) The NFIA advised the main issues currently experienced include payment delays, underpayment for work performed and the non-release of retention bank guarantees or retention monies on or near to their agreed expiry date and PBAs ‘will lead to a significant improvement to the status quo’.\(^{22}\)

At the public hearing the NFIA elaborated:

..in 2017 we still have poor payment to subcontractors; an unfair power equation that forces subcontractors to accept unfair payment and contract conditions; onerous contract provisions; subcontractors simply not getting paid for the work they perform; subcontractors being put out of business by the builder going bust; and the Dutch auction that occurs at the end of the job when payments, final payments and retentions are withheld, disputed and simply not paid by builders. Those issues continue on and on and on.

While many builders are first class professional operations who enjoy great relationships with trade contractors, the reality is that too many abuse the current system. The industry simply cannot maintain these abusive behaviours. We cannot continue to tolerate a biased system which favours one party over another.\(^{23}\)

The MPAQ provided the following advice on the importance of the legislation to subcontractors:

Across Queensland subcontractors are eagerly watching the parliament’s action on this bill. This is the single biggest issue faced by every plumber, gasfitter, painter, electrician, bricklayer, carpenter, plasterer, fire protection worker, air-conditioning installer, shopfitter, tiler and roofer as well as every other trade across this state. This is because there is not a single plumber in Queensland who has not been impacted by non-payment or extremely late payment.

...The matter of payment security impacts every single business, worker and family within the building and construction industry. It seems that every time you turn around you hear more tails of heartbreak. It is not an exaggeration to say that the effects of a subcontractor not being paid flow from the business straight into the family home. Subcontracting businesses are overwhelmingly small family based operations and often use the home as security. The business puts food on the table, it puts uniforms on the kids and it is the cause of stress, anxiety and sleepless nights when money is owed.\(^{24}\)

The MEA summed up its position:

In summary, the proposed bill achieves a cultural change in the industry to correct the biggest issue plaguing contractors for 80 years. It denies the ability of a builder to be rewarded financially for withholding payment from a subcontractor. It limits the ability of a builder to reference subcontractors’ funds as their own for financial assessment. The bill is aimed at a key area of improvement in the industry. It corrects the process for retentions to be held in escrow, it clarifies the process for claiming variations and enables the easier lodging of disputes for unpaid contractor charges.


\(^{22}\) Submission 26, p 2.


\(^{24}\) Public hearing transcript, 20 September 2017, p 28.
MEA supports the intent of the legislation and the impact it may have on the industry. While we will leave the legal detail to the lawyers to argue about, we fully support the bill and commend the minister for introducing it.25

The Subcontractors Alliance supported the legislation and recommended that PBA’s should be extended to engineering infrastructure projects:

The exclusion of this sector exhibits preference for one industry sector over another thereby disadvantaging subcontractors and suppliers engaged by main or managing contractors in this sector.

This sector is notorious for forcing extended payment times (90 – 120 days) and other unfair contract conditions upon the secondary subcontracted parties.

The recent liquidation of QLD civil contractors Ostwald Brothers engaged on the publically funded major infrastructure projects (Toowoomba Range Crossing and Ballina Pacific Hwy bypass) in both QLD and NSW will leave significant debt to subcontractors. It is not the first and it will not be the last.26

The submission from Brisbane Screening also expressed extreme disappointment that the legislation will not apply to infrastructure projects:

Contractors in the infrastructure industry are unfortunately just as prone to mismanaging funds, underquoting for jobs and acting in their own best interests rather than those of their subcontractors as other parts of the construction industry. In some cases I believe practices are even more unprofessional because there is no regulator for this section of the industry.27

On the other hand, stakeholders such as Master Builders Queensland (Master Builders), the Housing Industry Association (HIA) and the Property Council of Australia (Property Council) argued that PBAs should not be introduced for private sector commercial construction projects on the basis they will result in increased construction and administration costs, delays in payment processes, delays in construction projects, increased construction finance costs to the principal and increased litigation.28

For example, Hutchinson Builders submitted that the proposed legislation is ‘cumbersome’ and:

We believe it makes Queensland uncompetitive and less appealing for investment. Rather than protecting industry participants it will see construction become more costly and difficult, and projects and the economy will be impeded by the resultant effects.29

The HIA advised the committee that it considered the legislation to be ill-conceived and poorly drafted and that ‘persecuting the overall majority of Queensland head contractors who pay their contractors in a business-like manner is an inept and will ultimately prove to be an ineffective way to try to catch the tiny minority who do the wrong thing’.30

At the public hearing Master Builders advised that half of it membership are subcontractors and the other half builders and provided the following summary of its concerns:

On the face of it we agree that project bank accounts look sensible to deal with the problem of slow and/or non-payments; however, given the complexity of contractual arrangements from principal through to supplier, and despite what the minister says, PBAs physically cannot secure

26 Submission 25, p 9.
27 Submission 7, p 1.
28 See submissions 19, 21, and 24.
29 Submission 18, p 2.
payment for subcontractors. That is just a fact. Our major concern is with the government’s proposal for PBAs and their introduction into the private sector on 1 January 2019 for projects over $1 million.

...Under the new system the builder still retains control over the payment process in many different ways; therefore, even with the best of intentions the subbies will not be any more secure tomorrow than they are today. That is one of the key points.31

The Civil Contractors Federation agreed that the establishment of PBAs will not guarantee that subcontractors receive accurate payments.32

Consult Australia raised the following concerns about the introduction of PBAs:

At face value, project bank accounts may offer a tool to ensure security of payment however the implications are further project cost and administrative burdens which many projects will struggle to afford. Project Banks Accounts will mean a change in business model across the industry and money used for cash flow would, with the introduction of the Project Bank Accounts, be held in trust by a Third Party increasing the cost of financing for projects and will restrict access to retention monies specified in construction contracts.

The administrative burden and cost implications of setting up and managing three separate trust accounts and imposing a further cost onto contractors will be felt across the supply chain, as greater pressure is placed on consultants and sub-consultants to reduce their fees in response to the increasing compliance costs. We suggest that Project Bank Accounts may be required on projects where building cost is well in excess of the $1 Million to $10 Million suggested in the Bill or alternatively on all government funded projects over $10 Million but for projects $1 Million plus it is not clear that the cost benefit analysis of the Project Bank Accounts proposal has demonstrated sufficient benefit when measured against the cost of implementation.33

Some stakeholders, including the Property Council, argued that PBAs would slow payments to subcontractors.34 Hutchinson Builders provided the following advice at the public hearing:

Our interpretation or advice is that the strict payment regime in the bill could restrict our subcontractors from receiving those payments that they currently receive on seven and 14-day terms if for no other reason than the additional administrative burden that comes with the entire system. We genuinely go out and help our subbies across the line—about a third of our monthly turnover gets paid on the better than 30-day terms. If that is what plays out as a result of this process, our subbies will be actually worse off.35

While the submission from Peter Woods, Founder From Concept to Completion supported the proposition that builders must not control other parties’ funds, it raised concerns about the proposed PBA model submitting that, amongst other things, the processes are unnecessarily convoluted and only larger building companies will have the resources to administer the processes, forcing the small to medium builders out of the Industry; there is a serious risk that the above $1M project value will become the domain of the larger builders; and it is naive to expect that this proposal will not increase building costs.36

32 Submission 23, p 3.
33 Submission 17, p 1.
34 See for example, submission 24, p 2 and submission 2, p 1.
36 Submission 13, p 2.
DHPW advised that independent economic analysis commissioned by the department demonstrates that PBAs will benefit the building construction industry. The department also advised that the analysis undertaken by Deloitte Economic Access concludes that even when costs are incurred by head contractors there is a net benefit to Queensland of $4.2 billion over a 20 year period and it will also create up to 2,373 additional jobs by 2036-37.

At the public hearing the department indicated that it would review the issues raised about the increase in administrative burden:

There was a lot of discussion around the administrative impost of the payment, claim and payment schedule. As Mr Rivers pointed out, that is something we will look at in greater detail because the intent behind the changes to the payment claim and the payment schedule is to reverse the business culture of some subcontractors having to follow up for the money. The intent was noble in terms of trying to make sure there was a reversal of that culture. Certainly the intent was not to impose such an administrative burden that it could not be complied with. The intent is very clear and we need to make sure we work through those issues raised by the submitters.

2.2.2 Subcontracts, subcontractors and subcontracted work – clause 6

2.2.2.1 Proposed provisions

Clause 6 of the bill identifies the subcontracts to which the new Act will apply.

2.2.2.2 Stakeholder views and department response

The Queensland Law Society (QLS) drew the committee’s attention to the fact that the definition of ‘first tier subcontract’ in clause 6(5) only captures contracts where the same person is contractor and subcontractor and suggested that it should refer to related entities.

Subsection (5) provides that a subcontract will be a first tier subcontract if the performance of the subcontract contributes directly to the performance of a head contract.

In response, DHPW advised:

Head contractors may seek to circumvent the requirement to establish a PBA by having a related company, with which the head contractor has no specific contract, engage subcontractors for the job. Under such an arrangement, however, there would arguably be an implied subcontract between the related companies and the anti-avoidance provisions in clauses 19 – 21 would apply. Nevertheless, the submission will be considered by the department.

2.2.3 Definitions for chapter 2 – clause 8

2.2.3.1 Proposed provisions

Clause 8 of the bill details the definitions for chapter 2.

2.2.3.2 Stakeholder views and department response

There were a number of concerns raised by stakeholders about various definitions and also about terms that appear not to be adequately defined. For example, Master Builders advised that there are

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37 Correspondence dated 18 September 2017, p 7.
38 Correspondence dated 26 September 2017, answer to question taken on notice no. 3.
39 Public hearing transcript, 20 September 2017, p 43.
40 Submission 30, p 4.
41 Correspondence dated 18 September 2017, Appendix 1, p 13.
nine different provisions which refer to what is ‘due and owing’ and that wording such as this needs to be clearly defined or it will need to go to the courts to determine the meaning.\(^{42}\)

In relation to the definition of ‘building work’ in clause 8 the following concerns were raised:

- the definition may not include work for ‘power supply’ or ‘power lines’, particularly given the exclusion of ‘suppliers’ (clauses 9 and 11)\(^{43}\)
- the MEA raised a concern that as the QBCC does not regulate Electrical Work the definition may exclude electrical and other subcontractors\(^{44}\)
- Master Builders raised a concern that paragraph (c) ‘does not include work prescribed by regulation’ is confusing when read with paragraph (b) ‘includes work prescribed by regulation’ and should be amended to ensure clarity\(^{45}\), and
- the QLS noted the definition differs from the definition of ‘building’ in the QBCC Act and that as it is not clear why, the subtle differences are apt to create confusion\(^{46}\).

The department advised the definition of ‘building work’ is intended to align broadly with the definition of that expression in the QBCC Act and it was not intended to exclude subcontracted work by an electrician related to the erection or construction of a building from the protection afforded by PBAs. The department indicated that it would consider the issue raised.\(^{47}\)

The Urban Development Institute of Australia, Queensland (UDIA) recommended that further consideration be given to the different definitions throughout the bill for ‘work’, ‘building work’ and ‘construction work’.\(^{48}\) The department advised that the use of different definitions is necessary because of the different types of work that project bank accounts, progress payment adjudications and subcontractor’s charges are designed to protect and that DHPW will work with the QBCC to develop education and communication materials to ensure industry is aware of the scope of the three security of payment measures.\(^{49}\)

Other issues raised regarding definitions included:

- ‘defects liability period’ - that as paragraph (b) is currently worded, it could be argued that if the contract does not provide for a definition that aligns with paragraph (a), the statutory defects liability period applies
- ‘practical completion’ - that the definition is expressed to be ‘for building work’ whereas a PBA can be required for a ‘building contract’ under which only a portion of the work is ‘building work’, and
- ‘retention amount’ - that the expression as defined only relates to a head contract and not, as it should, an amount retained under a subcontract.\(^{50}\)

\(^{42}\) Public hearing transcript, 20 September 2017, p 5.
\(^{43}\) Submission 14, pp 5-6 and see also submission 31, pp 6-7.
\(^{44}\) Submission 29, p 12.
\(^{45}\) Submission 19, p 5.
\(^{46}\) Submission 30, p 5.
\(^{47}\) Correspondence dated 18 September 2017, Appendix 1, p 14.
\(^{48}\) Submission 16, p 3.
\(^{49}\) Correspondence dated 18 September 2017, Appendix 1, p 41.
\(^{50}\) Submission 19, pp 5-6.
DHPW advised that these three definitions are intended to align with industry practice and indicated that the department would consider the issues raised.\(^{51}\)

2.2.4 What is a project bank account – clause 9

2.2.4.1 Proposed provisions

Clause 9 subsection (1) of the bill provides that a PBA is a trust over the following amounts:

(a) an amount paid by the principal to the head contractor under a building contract;
(b) an amount a subcontractor is entitled to be paid by the head contractor under a first tier subcontract;
(c) a retention amount withheld from a subcontractor under a first tier subcontract;
(d) an amount that is the subject of a payment dispute.

The department provided the following advice at the public briefing:

What the project bank account does is create a trust account around how the moneys flow from the principal to the head contractor and are disbursed to the subcontractors. The focus of that is actually how the payments flow and how they are made. Rather than the money all going to the head contractor and then the head contractor passing it on, the project bank account creates a mechanism by which the money goes into the project bank account and, based on instructions from the head contractor, it is automatically disbursed by the bank to the subcontractors as well as the head contractor.

...The project bank account will be a trust account administered and established by the head contractor. There is an oversight mechanism in the view of the government. The principal has oversight and visibility in terms of what is paid out of that account. If and when it is applied to the broader sector, as a result of that evaluation, the QBCC will have an active oversight role to ensure that the payments are in accordance with what is expected. There are heavy penalties for people who do not comply. It is definitely incumbent upon the head contractor to establish it and administer it. There are interactions with subbies, with the principal and with the QBCC as the regulator.\(^{52}\)

2.2.4.2 Stakeholder views and department response

The department advised it would consider the following issues raised about clause 9\(^{53}\):

- clause 9(3)(a) that the beneficial interest for a subcontractor is ‘an amount the subcontractor is entitled to be paid under its subcontract...’ however, the beneficial interest for the subcontractor should be an amount identified against the subcontractor’s name in the relevant payment instruction\(^{54}\)
- that in the case of oral subcontracts, it may be difficult to determine commencement date and it was suggested that ‘site mobilisation’ or ‘site induction’ be used as an alternative in such cases\(^{55}\), and

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\(^{51}\) Correspondence dated 18 September 2017, Appendix 1, p 14.

\(^{52}\) Public briefing transcript, 6 September 2017, pp 3-4.

\(^{53}\) Correspondence dated 18 September 2017, Appendix 1, p 15.

\(^{54}\) Submission 19, p 6.

\(^{55}\) Submission 3, p 3.
• definition of ‘remainder’ in clause 9(5) – that the phrase ‘entitled to be paid under a first tier subcontract’ is unclear as it potentially includes work yet to be done under the subcontract and should more narrowly relate to work done in accordance with the subcontract.56

2.2.5 Building contracts for residential construction work – clause 16

2.2.5.1 Proposed provisions

Clause 16 provides that a PBA is not required for a building contract if the only building work for the contract is residential construction work unless the principal is the department (section 16(2)(a)) or the residential construction work relates to three or more living units (section 16(2)(b)).

The department advised at the public hearing that a PBA would only be required for residential projects if the work relates to three or more living units (for example, at least three detached houses or two duplexes) and if the contract price is over $1 million.57

2.2.5.2 Stakeholder views and department response

The UDIA was strongly opposed to the application of PBAs to private residential projects.58

McKays (Solicitors) and the MPAQ raised concerns about a minor drafting error in the definition of ‘residential construction work’ and suggested the error could be rectified by changing the introductory part of the definition to, ‘residential construction work means and includes’ and then deleting the word ‘includes’ in subparagraph (b).59

Master Builders raised a concern that the definition of ‘residential construction work’ includes the word ‘residence’ yet that word is not itself defined.60

The department advised that paragraph (b) of the definition of ‘residential construction work’ is intended to supplement paragraph (a) by clarifying the inclusion of certain work for ‘residential purposes’ and that the word ‘residence’ is intended to have the same meaning as it does in the QBCC Act. DHPW advised that it would consider the issues raised.61

2.2.6 Application of the chapter if parties to a subcontract are related entities – clause 20

2.2.6.1 Proposed provisions

Clause 20 sets out what is required if a PBA is required for a building contract and a subcontractor, for the first tier contract, is a related entity for the head contractor.

2.2.6.2 Stakeholder views and department response

McKays suggested that clause 20 be redrafted as the proposed provision could potentially be circumvented if the main contractor inserted a controlled entity not just as the first tier subcontractor but inserted another controlled entity ‘beneath’ the controlled first tier subcontractor.62

The department advised it would consider the issue and clarified that the intention for the ‘government only’ phase is to protect genuine ‘arms-length’ first tier subcontractors:

It is recognised that head contractors may seek to side-step the requirements by artificially interposing related subcontractor companies. Clause 20 is intended to address this possibility. Also,

56 Submission 21, p 13.
57 Public hearing transcript, 20 September 2017, p 40.
58 Submission 16, p 3.
59 Submission 14, p 6 and submission 31, p 7.
60 Submission 19, p 6.
61 Correspondence dated 18 September 2017, Appendix 1, pp 16-17.
62 Submission 14, p 6.
2.2.7 Notices about related entities – clause 21

2.2.7.1 Proposed provisions

Clause 21 sets out the procedure for notification if a PBA is established for a building contract and the parties to a subcontract are related entities.

2.2.7.2 Stakeholder views and department response

Quantum Estimating suggested the bill should require that every contracted party be provided a mandatory disclosure statement prior to a subcontract being entered into of all related entities of a contracting party and that all related entities are jointly and severally bound to the contracting party’s PBA responsibilities. The department responded that it considered that the requirements for disclosure statements are satisfactory.

The Property Council expressed concern this provision exposes the principal to a penalty of up to 50 penalty units for failing to report any activity that is genuinely unknown to them. The department responded that it would consider the issue raised, however:

The concern about exposing principals to a penalty for an activity that is genuinely unknown to them, appears to be contrary to the requirement of clause 21(2) that the principal ‘knows that the subcontractor beneficiary is a related entity’.

2.2.8 Head contractor must establish PBA – clause 23

2.2.8.1 Proposed provisions

Clause 23 subsection (1) would require a head contractor to establish a PBA (including the three required trust accounts) with a financial institution within the state, within 20 business days of entering into the first subcontract for the building contract. The explanatory notes advised that there would be nothing to prevent a head contractor from establishing a PBA earlier than this timeframe, if they are aware they will be engaging subcontractors for the work.

Clause 23 subsection (4) provides that a head contractor is not required to establish a PBA if they can prove that there is less than 90 days between the day a PBA is required for the contract and the day of practical completion for the contract.

The Minister, in the explanatory speech, advised:

There will also be penalties for failure to comply with the project bank account requirements. For example, it will be an offence if a head contractor fails to open a PBA when required or if a principal fails to place money into a PBA.

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63 Correspondence dated 18 September 2017, Appendix 1, p 17.
64 Submission 3, p 4.
65 Correspondence dated 18 September 2017, Appendix 1, p 17.
66 Submission 24, p 2.
67 Correspondence dated 18 September 2017, Appendix 1, p 18.
68 Explanatory notes, p 15.
2.2.8.2 Stakeholder views and department response

A number of stakeholders raised a concern about the practicability of the requirements provided in clause 23. For example, Hutchinson Builders argued this will create accounting and financial structuring implications to the industry and place preferential payments over other creditors.\(^{70}\) They also advised that Bank of Queensland Ltd has told them it does not have the ability to pay into one control account and then channel funds into three sub-accounts.\(^{71}\)

Master Builders advised that they have had some discussions with the National Bank of Australia who are in the process of trying to work out whether it is a service they are able to offer or whether they want to offer because of the complexities and the additional work required to process the accounts:

*The model in Queensland is different to WA. Under this proposed legislation it is more complex for the banks. While CBA, for example, can do it in WA—and some other banks are considering whether they can—that is an easier model than this one. That is the advice that we have been given by the banks.*\(^{72}\)

The HIA calculated that if the bill had been in force in 2016-17 there would have been an estimated 3,135 projects requiring the establishment of PBAs and with three separate accounts required for each project, nearly 10,000 separate trust accounts would need to be opened and maintained every year. The HIA estimated that one years’ worth of PBAs would generate a requirement for nearly 1 million additional individual processes into the operation of building processes across Queensland each year and these processes would all involve some manual handling, adding substantially to the cost of running a building business.\(^{73}\) The HIA submitted that retention trust accounts should only be required on those projects where they are intended to be used in the normal administration of the project.\(^{74}\)

Master Builders estimated that construction costs would increase in the order of 3 per cent as a result of the proposed policy.\(^{75}\) Master Builders also submitted:

- that to impose a requirement for a retention account to be opened on projects that do not provide for retentions, is of no benefit yet will add additional costs and administration for the head contractor, and
- suggested an amendment should be made to remove the requirement for a retention account where the head contractor shows that no retentions are permitted to be withheld in any of the subcontracts that relate to the project.\(^{76}\)

The Brisbane City Council advised that it was particularly concerned about the requirement for the contracted party to establish a PBA for building contracts over $1 million as ‘Council anticipates that this may cause an increase in a contractor’s overheads resulting in more expensive contact prices for Council and the ratepayers of Brisbane’.\(^{77}\)

The MEA noted that some advocates within the industry ‘decry that Project Bank Accounts’ will bring the industry to its knees, will stop development and lengthen payment periods’ and advised that the evidence does not support these arguments:

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\(^{70}\) Submission 18, p 2.
\(^{71}\) Public hearing transcript, 20 September 2017, p 5.
\(^{72}\) Public hearing transcript, 20 September 2017, p 6.
\(^{73}\) Submission 21, p 11.
\(^{74}\) Submission 21, p 13.
\(^{75}\) Submission 19, p 1.
\(^{76}\) Submission 19, pp 6-7.
\(^{77}\) Submission 1, p 1.
The benefit to industry is clear, savings of up to $285,000,000 dollars per year, ensuring subcontractors and their employees are paid. Less liquidations results in less taxes required to support the General Employee Entitlements and Redundancy Scheme (GEERS) more employment opportunities and higher business confidence to invest. The Project Principal also receives a benefit whereby a builder enters into liquidation may then be quarantined and works may continue faster with another builder which can then rely on subcontractors who are not affected and can continue to work. Builder also receive the benefit whereby a Project Principal may also go into liquidation.78

The department advised that the process of establishing a PBA is not expected to be unduly burdensome for industry. It also advised that it is not expected that there would be any significant cost saving for industry by opening two rather than three bank accounts and in the interests of simplicity, it is preferred to keep the requirements consistent for all PBAs.79

DHPW advised that it consulted with the Commonwealth Bank of Australia, Westpac and ANZ regarding the introduction of PBAs and it is confident that these and other institutions in the financial services market are able to provide support to the industry.80

The department also corrected its earlier advice about the estimated number of additional hours for administration of PBAs advising that the Deloitte report has identified that 7 additional hours would be incurred each month per project for head contractors who manage a project bank account contract.81

2.2.9 Particular requirements for trust accounts – clause 24

2.2.9.1 Proposed provisions

Clause 24 requires the head contractor:

- to make any deposits to, or withdrawals from the PBA to be by electronic transfers (maximum penalty 500 penalty units), and
- to ensure that the principal can view matters such as deposits to the accounts, withdrawals from the accounts and payment instructions given to the financial institutions (maximum penalty 200 penalty units).

The explanatory notes advised:

Requiring only electronic funds transfers into and out of PBAs will assist the QBCC in any audits and investigations and provide accountability by the principal and the head contractor. For the Government and the QBCC to effectively regulate the use of PBAs, it is critical that an audit trail is established supported by appropriate record-keeping. The penalty of 200 penalty units for this offence will help encourage proper business practices and bring about cultural change.82

2.2.9.2 Stakeholder views and department response

The QLS raised a concern that the penalties in relation to this and other provisions, that some might see as administrative errors, appear to be disproportionate to the offence:

For example, clause 24 of the bill attracts 500 penalty units for failing to use electronic funds transfers to deposit or withdraw funds from accounts and also anticipates a regulation directed

78 Submission 29, p 9.
79 Correspondence dated 18 September 2017, Appendix 1, p 18.
80 Correspondence dated 26 September 2017, p 4.
81 Correspondence dated 26 September 2017, p 5.
82 Explanatory notes, p 15.
to payment instructions governing how amounts will be transferred between accounts. That penalty of 500 penalty units is comparable to other legislation. For example, the dangerous operation of a vehicle while adversely affected by an intoxicating substance attracts a similar penalty. A person participating in a criminal organisation recruiting or attempting to recruit another person attracts a similar penalty. Employers failing to notify of events that cause or threaten serious or material environmental harm attracts a similar penalty.83

The UDIA raised a concern that electronic payment may be too slow where ‘urgent payment’ is required, suggesting that this may cause delays of ‘up to two to three days’ for the funds to transfer firstly from the head contractor to the trust account and then from the trust account to the subcontractor.84 Master Builders recommended that if funds are required on an urgent basis, payment be able to be made directly, if agreed, between the head contractor and the subcontractor.85

The department responded by advising that it is not expected that the requirement for electronic payments will impede the timeliness of payment and subcontractors who require frequent payments should negotiate frequent reference dates. DHPW also advised that it is not proposed to allow direct payments outside the PBA as this would tend to subvert the integrity of the scheme.86

Master Builders noted that the while the clause requires the head contractor to ensure the principal can view ‘account payment reports’, this is not defined. The submission recommended that a definition of what is required in this regard should be inserted in the bill to provide clarity for the head contractor and principal.87 DHPW responded that the intent is that the principal be able to view historical reports of payments into and out of the PBA as well as transfers between the three accounts.88

2.2.10 All payments from a principal to be deposited into PBA – clause 27

2.2.10.1 Proposed provisions

The explanatory notes advised

• clause 27 (1) applies if the principal pays an amount to the head contractor under the building contract and that otherwise reduces the unpaid amount of the contract price for the building contract and the principal must pay the amount into the general trust account for the PBA unless the amount was due to be paid before the PBA was established or the principal has reasonable excuse

• once deposited into the general trust account, the amount is taken to be a payment made by the principal to the head contractor and discharges the principal’s liability to the pay that amount to the head contractor under the building contract

• subsection (4) provides that if an amount is paid to the head contractor or its agent in contravention of subsection (2) the head contractor must deposit the amount into the general trust account as soon as practicable after receiving the amount, and

• a penalty of 200 penalty units or 2 years’ imprisonment applies and this penalty reflects the seriousness of the requirements for principals to comply with the PBA requirements.89

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84 Submission 16, p 5.
85 Submission 19, p 17.
86 Correspondence dated 18 September 2017, Appendix 1, p 20.
87 Submission 19, p 7.
88 Correspondence dated 18 September 2017, Appendix 1, p 20.
89 Explanatory notes, p 16.
2.2.10.2 Stakeholder views and department response

The HIA expressed concern that clause 27 requires that all payments made under the building contract from the principal are to be deposited into the PBA, submitting that this requirement should be subject to the terms of the building contract, as some building contracts may require that payments made by the principal are to be held or retained in security or escrow accounts for the benefit of the principal. Further the HIA stated that if there is a dispute between the principal and head contractor, the principal may wish to have their disputed funds held in trust or paid into court.90

The department responded by advising that the intent of clause 27 is that it only applies to an amount paid by the principal ‘to the head contractor’ or ‘that otherwise reduces the unpaid amount of the contract price’ – clause 27(1) and:

*It is not intended that amounts held or retained in security or escrow accounts for the benefit of the principal would be required to be deposited into a PBA.*91

At the public hearing the department provided the following further advice:

*There appears to be some confusion about how the bill is intended to operate. The first issue is the suggestion that the builder is required to put the entire value of the contract into the PBA and is then not allowed to withdraw any money for themselves until the end of the project. I would like to clarify that that is not the policy intent. The payments into a project bank account other than retentions will be based on regular progress payments that are due and payable under the contract. The money in the PBA will then be disbursed to subcontractors and the head contractor in accordance with a payment instruction prepared by the head contractor. So it is a regular payment.*92

2.2.11 All payments to subcontract beneficiaries to be paid from PBA – clause 29

2.2.11.1 Proposed provisions

Clause 29 applies if a subcontractor beneficiary is entitled to be paid an amount under its subcontract. The head contractor may only pay the amount to the subcontractor beneficiary from a trust account. This provision carries a penalty of 200 penalty units or 1 year’s imprisonment. The explanatory notes advised this penalty reflects that need for compliance with the PBA requirements to provide payment to subcontractors through the PBA.93

A number of proposed new penalties relating to PBAs include maximum penalties of 1 or 2 year’s imprisonment. For example, section 29 proposes a maximum penalty of 1 year’s imprisonment if a head contractor pays an amount from an account other than the trust account and section 27 requires all payments made from a principal to be deposited in the trust account – 2 years imprisonment maximum penalty.

The department advised that the initial driver for the requirement to pay through an electronic payment system was concerns around cash payments and that it also allows payments to be audited more effectively.94

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90 Submission 21, pp 13-14.
91 Correspondence dated 18 September 2017, Appendix 1, pp 20-21.
92 Public hearing transcript, 20 September 2017, p 40
93 Explanatory notes, pp 16-17.
94 Public briefing transcript, 6 September 2017, p 7.
2.2.11.2  Stakeholder views and department response

A number of stakeholders expressed concern that the threat of jail time for builders who pay contractors directly and not from the PBA is too harsh.95 The HIA indicated its strong concern about the penalty at the public hearing:

Imprisoning builders for paying their subcontractors out of the wrong bank account is not the answer to improving security of payment in this important industry. Unless Queensland wishes to become known as the red-tape state, unless Queensland wishes to dramatically increase the costs of construction, unless Queensland wishes to reduce competition and make the building industry unviable, the bill should not proceed. HIA supports the objective of the bill in terms of securing payment for people in the contractual chain, but beyond that it needs to be scrapped.96

While the QLS did not refer specifically to penalty of imprisonment it did submit that the penalties imposed by the legislation are ‘objectively harsh, when compared to other offences’ and QLS was concerned that adequate justification for the increase in penalty severity has not been provided.97

Other stakeholders argued this provision is required to ensure payments are actually made, and on time. For example, the Subcontractors Alliance provided the following example at the public hearing:

You have to supply statutory declarations to your client to say that you have paid the contractual chain below you. He has obviously issued statutory declarations to say that he has paid in order to get money. That is straightaway getting money by false pretences. It is a mechanism to commit fraud. He does not pay by EFT; he pays by cheque. The cheque comes 140 days later, if you are lucky enough to get it, but it is backdated to the day it should be paid. That is how he gets away with it, so EFT is crucial because you can track when the payments are made.98

The department advised that the requirement in clause 29 is one of the central provisions relating to PBAs and needs to have a strong deterrent penalty attached to it, so as to maintain the integrity of the scheme.99

2.2.12  Head contractor to cover shortfalls – clause 30

2.2.12.1  Proposed provisions

Clause 30 applies if there is an insufficient amount available in the trust account to pay an amount to a subcontractor beneficiary and requires the head contractor to immediately deposit into the trust account an amount equal to the shortfall.

2.2.12.2  Stakeholder views and department response

A number of submissions, including Hutchinson Builders expressed concern about the requirement for head contractors to meet shortfalls through payment into the PBA, suggesting that it represented a significant change in the risk profile to a portfolio, will place increasing pressure on funding approval from financiers and will seriously impact the cash flow of businesses.100 The HIA submitted that it is not clear when a head contractor may ‘know’ that there are insufficient funds as in many cases it may not be until after the monies are due and owing if payment to subcontractors and from the principal occur on or about the same day.101

95 See for example submission 2, p 1, submission 21, p 14 and submission 5, p 2.
97 Submission 30, p 3.
99 Correspondence dated 18 September 2017, Appendix 1, p 21.
100 See submissions 18, p 2, submission 5, p 2, submission 2, p 2, submission 16, p 2 and submission 19, p 7.
101 Submission 21, p 14.
The department advised that in order to enhance protection for progress payments and for simplicity and to facilitate auditing, all payments are to be made via the PBA and it does not expect any significant change in risk profile or cash flow for head contractors who currently make appropriate provision for prompt payment of money due to subcontractors.102

DHPW indicated that it would consider the issues raised and clarified that the intent is that the head contractor pay the shortfall amount to the PBA in time to facilitate money which has been paid into the PBA by the principal, flowing through to subcontractors as indicated in the payment instruction and that the head contractor pay the shortfall amount to the PBA in time to facilitate money which has been paid into the PBA by the principal, flowing through to subcontractors as indicated in the payment instruction.103

The department advised that concern was also expressed about how the head contractor can comply with the requirement to ‘top up’ the PBA in an insolvency event and DHPW indicated that this matter will be considered further.104

At the public hearing DHPW advised that if there is a barrier to enabling the top-up process they will have to make sure the drafting reflects the intent.105

2.2.13 Limited purpose for which money may be withdrawn from PBA – clause 31

2.2.13.1 Proposed provisions

Clause 31 provides for the circumstances in which money may be withdrawn from the PBA which includes paying a subcontractor beneficiary an amount that the head contractor is liable to pay the subcontractor under a subcontract for the building contract. It also requires the head contractor to repay to the trust account all amounts that the head contractor withdraws in contravention of subsection (1) as soon as practicable after withdrawing the amount.

The penalties for this section are 300 penalty units or 2 years’ imprisonment. The explanatory notes advised that the building and construction industry has a culture of late or non-payment and it is important that head contractors meet their obligations to pay and that this ‘provision ensures that the PBA and the funds held in the account are not misused, and will help encourage proper business practices and bring about cultural change’.106

2.2.13.2 Stakeholder views and department response

Master Builders submitted the current wording referring to ‘an amount that the head contractor is liable to pay the subcontractor’ is likely to create confusion as the head contractor is liable to pay the subcontractor the full amount of the subcontract price although the subcontractor is only entitled to be paid what is due and owing at the time the payment instruction is issued.107

The department advised that it would consider the issue raised and clarified:

*It is not intended that the head contractor be liable to pay the ‘full amount of the subcontract price’ into the PBA. Only amounts due and owing to the subcontractor are required to be paid.*108

Master Builders also noted that as the bill is currently written, there is no mechanism for the head contractor to transfer an amount from the general account to the retention account or the disputed...
funds account. It recommended a new subparagraph should be inserted under clause 31(1) to permit these transfers to be noted on a payment instruction and if no such amendment is made to the bill, the head contractor will not be permitted to withdraw such amounts from the general account but is required, pursuant to clause 34(1) and 36(2), to deposit such amounts in the retention account and the disputed funds account respectively.\textsuperscript{109} DHPW advised that it would consider the issue raised and clarified that it is intended that head contractors be able to transfer moneys between the accounts by means of a payment instruction – clause 24(1)(c).\textsuperscript{110}

2.2.14 Order of priority – clause 32

2.2.14.1 Proposed provisions

Clause 32 applies if there is an insufficient amount available in a trust account to pay the amounts listed in the clause in full. It provides that the head contractor must not withdraw an amount from the trust account or make a prescribed payment until the subcontractor’s amount is paid in full to the subcontractor beneficiary, however, the head contractor may withdraw an amount before the subcontractor’s amount is paid in full if the withdrawal is to make a payment ordered by the court or for an adjudication under the proposed Act.

The penalty for subsection (2) is 300 penalty units or 2 years’ imprisonment. The explanatory notes provided the following justification for the proposed penalty:

\textit{The building and construction industry has a culture of late or non-payment and it is important that head contractors meet their obligations to pay. This provision ensures that subcontractors are getting their entitlements to the greatest degree possible.}\textsuperscript{111}

2.2.14.2 Stakeholder views and department response

Master Builders suggested that, for consistency, and to ensure clarity regarding the payments to be made to the subcontractors, clause 32(1)(a) should be amended to reflect that the amount referred to is the amount due and owing to the subcontractor.\textsuperscript{112} The HIA also submitted that this clause needed to be redrafted to make it clear that the requirement to pay the subcontractor beneficially arises when under the subcontractor, those monies are due and owing.\textsuperscript{113}

The department advised that it will consider the issue raised and clarified that the reference in clause 32(1)(a) to ‘an amount a subcontractor beneficiary is entitled to be paid under its subcontract’ is intended to catch amounts due and owing.\textsuperscript{114}

2.2.15 Dealing with retention amounts – clause 34

2.2.15.1 Proposed provisions

Clause 34 provides that a head contractor must ensure that if an amount held in trust under a PBA is a retention amount, the amount is held in the retention account for the PBA. The penalty for this offence is 200 penalty units or 2 years’ imprisonment. The explanatory notes advised that

\textit{The penalties in this clause reflect the fact that the building and construction industry has a culture of late or non-payment and it is important that head contractors meet their obligations}

\begin{footnotesize}
\textsuperscript{109} Submission 19, p 8.
\textsuperscript{110} Correspondence dated 18 September 2017, Appendix 1, p 23.
\textsuperscript{111} Explanatory notes, p 17.
\textsuperscript{112} Submission 19, p 8.
\textsuperscript{113} Submission 21, pp 14-15.
\textsuperscript{114} Correspondence dated 18 September 2017, Appendix 1, p 23.
\end{footnotesize}
to pay. This provision ensures that the PBA and the funds held in the account are not misused, and will help encourage proper business practices and bring about cultural change.115

2.2.15.2 Stakeholder views and department response

A number of submissions expressed support for retention moneys being held in a PBA.116 The Air Conditioning and Mechanical Contractors’ Association (AMCA) advised the committee at the public hearing that it strongly supported the proposed penalties for refusal to release retention monies without reasonable excuse.117

Master Builders recommended an amendment to proposed section 32(2)(b) raising a concern that as the bill is currently written, the head contractor is permitted to withdraw an amount ‘to secure, wholly or partly, the performance of a subcontract by a subcontractor beneficiary’:

As set out in section 8 (on page 23 of the legislation), such an amount is the definition of a “retention amount”. Therefore, by permitting the Head Contractor to withdraw this amount, the Head Contractor will be entitled to withdraw the full amount of retention held from the Subcontractor leaving nothing in the retention account.

The Head Contractor should only be permitted to exercise a right of recourse to a retention amount where such a right is granted by the relevant subcontract. Accordingly, s34(2)(b) should be amended as follows:

Proposed amendment – s34(2)(b)

payment to the head contractor of an amount to correct defects in the building work, or otherwise to exercise a right of recourse to a retention amount as provided for in the subcontract.118

The department advised that it would consider the issue raised and clarified:

It is not intended that head contractors be permitted to withdraw the full amount of retention held from the subcontractor leaving nothing in the retention account, as suggested. It is intended that the head contractor only have access to amounts to correct defects in the building work, or otherwise to exercise a right of recourse to a retention amount as provided for in the subcontract.119

2.2.16 When payment dispute occurs – clause 35

2.2.16.1 Proposed provisions

The explanatory notes advised that this clause will apply when a head contractor provides a payment schedule under the Act to a subcontractor and the amount in the progress payment instruction that is provided to the principal is less than that provided for in the payment schedule.120

2.2.16.2 Stakeholder views and department response

Various submissions expressed confusion over the present drafting and the intent of this clause.121

115 Explanatory notes, p 18.
116 See for example, submission 26, p 2 and submission 32, p 1.
118 Submission 19, p 8.
119 Correspondence dated 18 September 2017, Appendix 1, p 24.
120 Explanatory notes, p 18.
121 See for example, submission 21, p 15.
For example, McKays noted that there appeared to be a drafting error in relation to the use of the term ‘instructed amount’ and requested that the definition be amended.¹²²

The department advised that it will consider the issue raised and clarified:

_The intent of this clause (and Division 6 of the Bill more broadly) is to establish a process when a payment dispute occurs. A payment dispute will occur when there is a difference between the amount in a payment schedule and the amount later specified in the payment instruction. In this case it is intended to transfer this difference into the disputed funds account until the matter is resolved._¹²³

DHPW also advised that a matter can be resolved in a number of ways which might include negotiation, a progress payment claim or court action.¹²⁴

2.2.17 Dealing with amounts if payment dispute occurs – clause 36

2.2.17.1 Proposed provisions

Where clause 36 applies, the head contractor must, to the extent that there is a discrepancy in the payment schedule and the instructed amount, place the difference in the disputed funds account.

The penalty for not complying with this requirement is 200 penalty units or 1 year’s imprisonment. The explanatory notes provided the following justification for the proposed penalty:

_This penalty is designed to ensure that the head contractor does not mislead the principal in the progress payment instruction as to the amount owing to the subcontractor._¹²⁵

DHPW advised the committee the bill provides:

- that money only moves into a disputed funds account if the head contractor certifies the amount to be paid to a subcontractor via a payment schedule, and then that same head contractor puts a lower amount in the payment instruction, and
- the amount of the difference between the amount in the payment schedule and the amount in the payment instruction is the ‘disputed amount’ and it will need to be placed in the disputed funds account.¹²⁶

2.2.17.2 Stakeholder views and department response

A number of submissions sought clarity on the intent of this clause and questioned what this division will achieve.¹²⁷ For example, Master Builders noted that as the legislation is currently written, an amount that is in the disputed funds account remains in that account until such time as it is ‘no longer needed for the purpose it is held, however, no mechanism is provided for this to occur:

_An amount that is required to be transferred into the disputed funds account is determined at the time a payment dispute occurs. As such, its classification as a disputed amount cannot be changed by a future event unless the legislation provides a mechanism for such an event._

¹²² Submission 14, pp 6-7.
¹²³ Correspondence dated 18 September 2017, Appendix 1, p 25.
¹²⁴ Correspondence dated 18 September 2017, p 8.
¹²⁵ Explanatory notes, p 18.
¹²⁶ Correspondence dated 11 September 2017, p 8.
¹²⁷ See for example submission 30, p 2.
Accordingly, a new subparagraph should be added to section 36 to provide a mechanism (with an appropriate time limit) that would permit the event referred to in section 36(4) to occur and the amount to be transferred to the general account.\(^{128}\)

The department advised that it will consider the issue raised and clarified:

\textit{The intent of this clause is to specify what happens to an amount if a payment dispute occurs. Generally, the head contractor must deposit the difference between the amount in a payment schedule and the amount later specified in the payment instruction. This is to place the difference amount in the protected trust account until the matter can be resolved.} \(^{129}\)

2.2.18 Power to employ agents and power to delegate - clauses 41 and 42

\subsection*{2.2.18.1 Proposed provisions}

Clause 41 would permit the trustee to employ agents to perform their functions, however, the trustee remains liable for the agent's acts and defaults.

Clause 42 provides that the head contractor may, using the approved form, delegate to a person resident in the State any powers of the head contractor in relation to the PBA, other than the power to delegate.

\subsection*{2.2.18.2 Stakeholder views and department response}

The UDIA submitted that the bill be amended so that it does not limit delegates for the PBA to those residing in Queensland.\(^{130}\)

The QLS suggested that the reference to 'contract' and 'contractor's' in clauses 41(1) and (2) should be a reference to 'contracting party' and 'contracting party's' respectively.\(^{131}\)

The department advised that it would consider the issues raised and clarified that:

\textit{The intent of clauses 41 and 42 is to provide flexibility for the head contractor to employ agents and delegate various powers. Given the head contractor need not reside in the State of Queensland, there does not appear to be a risk if the delegate is also not a person residing in the State.} \(^{132}\)

2.2.19 No assignment of entitlement by head contractor – clause 47

\subsection*{2.2.19.1 Proposed provision}

Clause 47 provides that an assignment by the head contractor of an entitlement of the head contractor to an amount held in trust under the PBA is of no effect.

\subsection*{2.2.19.2 Stakeholder views and department response}

The HIA noted the explanatory notes advice that clause 39 aims to ensure that the subcontractor beneficiary's money in the trust account cannot be used otherwise than for the benefit of the subcontractor beneficiary and that in this way subcontractors should receive their entitlements. The HIA noted that section 47 goes further to specifically provide that a head contractor cannot assign their entitlement to an amount held in trust and submitted:

\begin{quote}
\textit{The intent of clauses 41 and 42 is to provide flexibility for the head contractor to employ agents and delegate various powers. Given the head contractor need not reside in the State of Queensland, there does not appear to be a risk if the delegate is also not a person residing in the State.}
\end{quote}

\(^{128}\) Submission 19, pp 8-9.
\(^{129}\) Correspondence dated 18 September 2017, Appendix 1, p 25.
\(^{130}\) Submission 16, p 3.
\(^{131}\) Submission 30, p 5.
\(^{132}\) Correspondence dated 18 September 2017, Appendix 1, p 26.
This further restriction is unnecessary and unfair. Both the subcontractors and head contractor have beneficial interests in the trust property.

To the extent there are concerns that a head contractor will misuse (such as charge or encumber) the trust property, the legislation sets out an exhaustive list of trustee responsibilities, including obligations to account.

Rather than protection of subcontractor interests, the restriction on head contractor’s assigning their own interests in the trust (for instance as part of an arrangement with their financier) appears based on the (unstated) assumption that head contractors are not legitimately deserving of the payments that they are contractually entitled to, at a point earlier than the completion of the project. This is impractical and likely to create financial uncertainty for a head contractor who is limited from claiming due payments and then meet their own obligations for employees and suppliers.133

The department clarified that the intent of this clause is to restrict head contractors from assigning their entitlement of an amount held in the project bank account and this is intended to simplify the arrangements to more easily track money to beneficiaries. DHPW also advised that ‘if an entitlement is assigned to a non-beneficiary this complicates the reporting arrangements when reviewing payment instructions etc.’134

2.2.20 Principal to be given information about subcontracts – clause 50

2.2.20.1 Proposed provisions

Clause 50 applies if a PBA is required to be established for a building contract under section 13. The head contractor must, after establishing the PBA, give the principal the information prescribed by regulation. The head contractor must also advise the principal of a change in this information.135

2.2.20.2 Stakeholder views and department response

The HIA sought clarity on what information the head contractor will be required to provide the principal after establishing the project bank account.136 The department advised that it would consider the issue raised and clarified:

The intent of this clause is to provide the principal with sufficient information about the beneficiaries to be able to perform its oversight role. For example, the regulation may prescribe the name and nominated bank account details of all subcontractor beneficiaries. This will assist the principal in its role under clause 52 to inform the QBCC Commissioner of any discrepancies in a payment instruction, for example, if a non-beneficiary is listed.137

2.2.21 Principal and subcontractor to be given a copy of payment instruction – clause 51

2.2.21.1 Proposed provisions

Clause 51 applies if a head contractor gives a financial institution an instruction about a payment from a trust account for a PBA. The head contractor must as soon as practicable after giving the instruction give a copy of the instruction to the principal and if the payment is to a subcontractor beneficiary, the subcontractor beneficiary.138

133 Submission 21, p 16.
134 Correspondence dated 18 September 2017, Appendix 1, p 26.
135 Explanatory notes, p 21.
136 Submission 21, p 16.
137 Correspondence dated 18 September 2017, Appendix 1, p 27.
2.2.21.2 Stakeholder views and department response

The UDIA recommended that proposed section 51 be deleted as it would significantly increase the administrative burden on the head contractor. Some submissions, including Master Builders and the HIA, also expressed concern that the payment instruction information the head contractor must provide to the principal and subcontractors may be ‘commercial in confidence’.

DHPW advised that it would consider the issues raised and clarified:

*The intent of these provisions is that the head contractor must provide a copy of the payment instruction to the principal and relevant subcontractors and this copy is to be used by the principal and subcontractor as a level of oversight to ensure the payment instructions are correct and identify the correct beneficiaries and entitlement of each subcontractor.*

*It is not intended that the information in the payment instruction would breach ‘commercial in confidence’. It is intended that a regulation will prescribe the payment instruction information necessary for each party. For example, this may include the beneficiary name, bank account details and the payment amount. It will not be a requirement to include specific contractual information such as the payment arrangements and agreed rates between the head contractor and subcontractors for specific work. It is further intended that the regulation will specify that each subcontractor will only receive an extract of the payment instruction i.e. they will only receive the information relevant to them and no information relating to other subcontractors.*

2.2.22 Principal to inform commissioner of discrepancies – clause 52

2.2.22.1 Proposed provisions

Clause 52 applies if a head contractor gives a principal a copy of a payment instruction under clause 51. The principal must inform the commissioner of any discrepancies in the payment instruction as soon as practicable after becoming aware of discrepancies. The explanatory notes advised that this provision is to provide the principal and the commissioner of oversight over the payment instruction process.

2.2.22.2 Stakeholder views and department response

The UDIA recommended that proposed section 52 be deleted as it would significantly increase the administrative burden on the head contractor. The Property Council submitted that the requirement is unreasonable:

*The discrepancies outlined, such as errors in account numbers, or account name not matching, may be easily resolved and should not require mandatory reporting unless it is clear that the head contractor is seeking to contravene the Act.*

The department responded by advising that the intent of this clause is for the principal to oversee payments and inform the QBCC Commissioner if there is a discrepancy in a payment instruction:

*It is acknowledged that the obligation to report discrepancies could be considered onerous on the principal. For this reason, only particular discrepancies which have the potential to undermine the project bank account system have been specified. For example, an incorrect account number, non-subcontractor beneficiary and non-matching account name have the
potential to result in a payment from the trust to a non-beneficiary. Such action places the trust at risk. While the head contractor may quickly resolve the matter, and deem it an honest mistake, it is important that the discrepancy is flagged with the QBCC to investigate ongoing discrepancies.145

2.2.23 Right of principal to step in as trustee – clause 54

2.2.23.1 Proposed provisions

Clause 54 applies if a PBA is established for a building contract and the contract is terminated by the principal for a default by the head contractor; or if the head contractor is an individual, he or she is insolvent under administration within the meaning of section 9 of the Corporations Act 2001 (Cwlth), or if the head contractor is a company a provisional liquidator, liquidator, administrator or controller is appointed or the company is wound up or ordered to be wound up under the Corporations Act 2001 (Cwlth) or another circumstance prescribed by regulation.

The explanatory notes advised:

The principal may serve a notice on the head contractor advising that the principal will replace the head contractor as trustee of the PBA. From the day the notice is served on the head contractor the head contractor is discharged as trustee for the PBA and the principal is appointed as trustee for the PBA. Amounts in the PBA are divested from the head contractor to the principal. However, the head contractor continues to be entitled to any interest by virtue of section 44.146

2.2.23.2 Stakeholder views and department response

The Subcontractors Alliance considered the right of the principal to step in as being extremely ill-considered and noted that the proposal works on the premise that building and construction industry principals are all above reproach:

That is far from reality as the industry harbours some are the worst offenders and corporate criminals operating as developers/principals. The unconscionable and “sharp” business behaviour of our largest supermarket chains, a number of mining companies, QRail and one of the “big 4 banks” following the liquidation of Walton Constructions (QLD) and of principals in the residential development sector since Walton should provide a sobering reminder of that fact.147

The submission recommended these provisions be amended so that an independent trust agent be appointed to administer the PBA, and this should be mandatory for projects above a certain value.148

The department responded by advising that it would consider the issues raised and clarified:

The intent of this clause (and Part 5 more broadly) is to establish a process for the replacement of the trustee in circumstances where the head contractor is no longer deemed suitable.149

2.2.24 Principal as trustee – clause 56

2.2.24.1 Proposed provisions

Clause 56 applies if the principal for a PBA is also appointed as trustee for the PBA under clause 54. As trustee of the PBA the principal may only make the payments to the subcontractor beneficiaries or the head contractor (as a beneficiary) that are required to be made under this chapter.150

145 Correspondence dated 18 September 2017, Appendix 1, p 28.
146 Explanatory notes, p 22.
147 Submission 25, p 6.
149 Correspondence dated 18 September 2017, Appendix 1, p 28.
150 Explanatory notes, p 22.
2.2.24.2 Stakeholder views and department response

The Property Council welcomed the inclusion of clauses 56 to 58 of bill and noted that in the event of a default by the head contractor, it is imperative that the legislation does not shift outstanding subcontractor payment liabilities on to the principals of the project, whether the principal be the Government or a private developer.\textsuperscript{151}

Several submissions raised concerns about the principal’s ability to undertake the role as trustee on the insolvency of the head contractor or when the contract is terminated by the principal. For example, Master Builders suggested that the principal will not be privy to sufficient contractual and commercial details to properly exercise its duties as trustee without negligence and the consequence of this would be that subcontractors will need to prove their entitlement in court, significantly increasing costs and timeframes.\textsuperscript{152}

The HIA specifically queried how an insolvent head contractor will be able to fulfil their top up obligations and suggests the bill may be inconsistent with the Corporations Act which provides for a stay of enforcement and proceedings whilst a company is under external administration, provisional liquidation or liquidation.\textsuperscript{153}

The department advised that it will consider the issues raised in submissions and clarified:

\textit{The intent of this clause is to establish the powers of the principal acting as a step-in trustee. The clause also clarifies the entitlements of the trustee and head contractor in the event of step in.}

\textit{It is intended that should the principal undertake the role of Trustee, the principal will have access to all relevant information.}\textsuperscript{154}

2.2.25 Application of Personal Property Securities Act 2009 (Cwlth) – clause 59

2.2.25.1 Proposed provisions

Clause 59 provides that a PBA has priority over security interests under the \textit{Personal Property Securities Act 2009 (Cwlth)}. The explanatory notes advised that this is to avoid conflict with the PBA provisions.\textsuperscript{155}

2.2.25.2 Stakeholder views and department response

The QLS raised a concern that it is not clear that clause 59(1)(b) is valid in so far as it prioritises PBAs over other security interests.\textsuperscript{156}

The department advised that it would consider the issue raised and clarified:

\textit{The intent of this clause is to clarify that beneficiary interests to money in a project bank account have priority over all other security interests in relation to money held in trust under the project bank account.}\textsuperscript{157}

\textsuperscript{151} Submission 24, p 3.

\textsuperscript{152} Submission 19, p 9.

\textsuperscript{153} Submission 21, pp 16-17.

\textsuperscript{154} Correspondence dated 18 September 2017, Appendix 1, p 29.

\textsuperscript{155} Explanatory notes, p 22.

\textsuperscript{156} Submission 30, p 3.

\textsuperscript{157} Correspondence dated 18 September 2017, Appendix 1, p 30.
2.2.26 Stakeholder concerns on other clauses in chapters 1 and 2

There were a number of other clauses in chapters 1 and 2 about which stakeholders raised concerns and where the department provided clarification and indicated that no change to the bill was proposed. The comments provided by the department can be accessed in the DHPW brief provided to the committee.\(^{158}\) The relevant clauses include:

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2.2.27 Review of phase 1 – Government contracts

As noted earlier in this report, the government intends to review phase 1 of the PBA (Government contracts) before commencing Phase 2 (proposed for 1 Jan 2019). The bill provides for commencement of chapter 9, part 1, division 2 (Extended application of PBAs to private and local government building contracts) by proclamation.

DHPW advised that the initial phase 1 will enable any issues arising from implementation to be addressed before PBAs are applied more generally. This view was supported by a number of stakeholders, including the NFIA which submitted ‘that the provision of over a year to prepare for the commencement of these reforms is sufficient’\(^{159}\) and the MPAQ which submitted that the introduction of PBAs in a phased manner ‘allows for any difficulties to be ironed out before PBAs are rolled out to the industry in general’\(^{160}\).

Other stakeholders raised a concern that a start date of 1 January 2019 for phase 2 would not allow enough time for a considered and independent review of phase 1. For example, the HIA recommended that, if the bill does proceed, the provisions relating to PBAs be removed until after the pilot of their use on government projects has been properly and independently evaluated,\(^{161}\) arguing:

> The government should not take any steps to mandate PBAs for all private commercial building projects over $1 million from 1 January 2019 without proper and conclusive evidence of their benefit (and costs) and ability to address the problems at hand.\(^{162}\)

\(^{158}\) Correspondence dated 18 September 2017, Appendix 1, pp 13-30.

\(^{159}\) Submission 26, p 1.

\(^{160}\) Submission 31, p 4.

\(^{161}\) Submission 21, p 4 and public hearing transcript, 20 September 2017, p 7.

\(^{162}\) Submission 21, p 6.
Building Industry Fairness (Security of Payment) Bill 2017

Hutchinson Builders strongly recommended:

... a review of the legislation within no more than 9 months of enactment prior to the to the next phase of the legislation on 1 January 2019 which will have greater ramification for the entire construction industry. This review should consider the effect on the industry and whether the legislation is appropriate. We would be pleased to participate in such a review. ¹⁶³

The department responded by advising that the application of PBA’s to government will be closely monitored and evaluated to ensure the application to industry occurs smoothly. ¹⁶⁴

2.2.28 Committee consideration

At the public briefing on the bill, the committee asked whether there was any timeline for the proposed review of phase 1 of the PBA requirements. DHPW advised that the private roll-out is proposed from January 2019 and the government has committed to reviewing phase 1:

The reason for the two phases is very clear. This is a significant change. In terms of having the project bank accounts occur on government projects first, the government is actually quite close to ascertaining if there are simpler ways: are there things that are occurring in how the project bank accounts are being set up, the administration of them, what the principal asks for et cetera? It is that oversight that we have talked about, which allows all of those things to be sorted out through government projects before it is applied more broadly. The idea of the sequencing is simply to make sure we do it in a systematic way, that there is not a big interruption to the industry. We want to make sure that it occurs smoothly and that adjustments can occur as we go. ¹⁶⁵

2.2.28.1 Committee comment and recommendations

The committee noted both the strong support for the establishment of the PBA framework from some stakeholders and also the strong concerns raised by others about the proposed provisions.

The committee considered the specific issues raised by stakeholders about chapter 2 of the bill (for example, administration costs and head contractors being required to cover shortfalls) and is of the view that implementation of phase 1 will provide the opportunity to determine the legitimacy of these concerns. The committee is therefore of the view that these issues should be considered through the proposed review process of phase 1 and that phase 2 should not commence until the outcome of the review has been reported to Parliament.

Recommendation 2

The committee recommends that the Minister consider ensuring the review of phase 1 of the Project Bank Account provisions:

• commence at least three months prior to the commencement of phase 2;
• be undertaken in consultation with representatives of the building and construction industry; and
• the Minister report the review findings to the Legislative Assembly prior to the sections of the bill that commence phase 2 being proclaimed.

¹⁶³ Submission 18, p 2.
¹⁶⁴ Correspondence dated 18 September 2017, Appendix 1, p 45.
¹⁶⁵ Public briefing transcript, 6 September 2017, p 8.
The committee also noted the concerns raised by a number of stakeholders that a number of the new penalties associated with PBA offence provisions attract a maximum sentence of either 1 or 2 years imprisonment and that these penalties do not appear to be commensurate with the offence. While the committee noted the department’s advice that the requirements in clauses 27 and 29 are central provisions relating to PBAs, and need to have a strong deterrent penalty to maintain the integrity of the scheme, it shares the concerns raised about the appropriateness of imprisonment as the maximum penalty.

**Recommendation 3**

The committee recommends that the Minister review the appropriateness of the proposed imprisonment penalties for a number of new offences contained in the bill.

The committee noted the significant number of technical issues raised by stakeholders throughout the committee’s inquiry and the department’s advice that it will consider a number of these issues further. The committee has made a recommendation that the Minister report to Parliament on these issues during the second reading speech on the bill.

### 2.3 Progress payments – chapter 3

#### 2.3.1 Introduction

Chapter 3 of the bill (clauses 61 to 102) proposes to replace BCIPA which is to be repealed by clause 202(1).

The committee was advised that the provisions of chapter 3 will enhance the provisions of BCIPA and are intended to make the progress claims process easier as:

- claimants will have a longer time to make an adjudication application
- the second chance notice will be abolished where a payment schedule has not been served and adjudication application can be made without further notice
- a warning notice must be provided to the respondent before court proceedings are commenced regarding the claimed amount and that this is to protect against a judgement potentially being set aside due to lack of notice, and
- it will no longer be possible for a respondent to a complex claim ($750,000 or more) to provide new reasons in an adjudication response.\(^{166}\)

The department also advised that the proposed provision will simplify the adjudication process by:

- enabling a regulation to specify what documents can be presented in an adjudication and the length of the submissions, and
- providing that an adjudicator must—instead of ‘may’—consider the conduct of the parties when making a decision about fees and expenses which aims to improve the behaviour of parties to the adjudication process.\(^{167}\)

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\(^{166}\) Public briefing transcript, 6 September 2017, p 2 and Queensland Parliament, Record of Proceedings, 22 August 2017, p 2285.

\(^{167}\) Public briefing transcript, 6 September 2017, p 2.
In the explanatory speech, the Minister advised:

*The bill will also establish tough new penalties for people who fail to comply with an adjudication decision. To improve the behaviour of parties to the adjudication process, the bill also provides that the adjudicator must consider the conduct of the parties when making a decision about fees and expenses.*

In response to a question from the committee at the public briefing, the department advised that all the current provisions from BCIPA had been included in the provisions in the bill. DHPW later clarified that some provisions have not been replicated in the bill:

*This was largely due to adopting modern drafting practices and expression, consolidating provisions or removing redundant provisions, improving and streamlining processes, and policy reforms.*

*For example, section 101 of the BCIPA, which allows the Queensland Building and Construction Board to make policies under the Act, was omitted from the Bill as this power has now been conferred on the Adjudication Registrar.*

### 2.3.2 Application of chapter 3 – clause 61

#### 2.3.2.1 Proposed provisions

The explanatory notes advised clause 61 replicates section 3 of BCIPA, which provides for the application of this chapter to all construction contracts, whether written or oral, or partly written and partly oral. Certain classes of contract are excluded from the bill, as are certain classes of contractual provision.

#### 2.3.2.2 Stakeholder views and department response

Two submissions raised a specific concern about an apparent gap in the transitional provisions of the bill whereby clause 61 of the bill provides that chapter will apply to construction contracts entered into after the commencement of this chapter, while clause 205 provides that BCIPA will continue to apply to ‘unfinished matters’, as defined in clause 205(3). The concern raised is that this does not cover payment claims made after chapter 3 commences, but under contracts which are entered into before this time.

The department responded that it will consider the issue raised and clarified that it is the policy intent that the provisions of chapter 3 commence, and from that time, only the new provisions apply:

*The reasoning for this is to avoid the situation that arose following previous amendments where two sets of rules were in operation at the same time. This was confusing for adjudications, as it was not immediately clear which rules applied to each dispute.*

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169 Public briefing transcript, 6 September 2017, p 2.
170 Correspondence dated 11 September 2017, p 8.
171 Explanatory notes, p 23.
172 QLS, submission 30, p 4; and Contract Administrations Group Pty Ltd, submission 4, p 2.
173 Correspondence dated 18 September 2017, Appendix 1, pp 30-31.
2.3.3  Meaning of reference date – clause 67

2.3.3.1  Proposed provisions

Clause 67 proposes a new provision defining the term ‘reference date’ for the purposes of this chapter. Proposed section 67(2) also provides for when a construction contract is terminated and does not provide for a reference date surviving beyond termination. In such cases, the final reference date for when a payment claim may be made is the day the contract is terminated.174

2.3.3.2  Stakeholder views and department response

A number of submissions supported the contract termination date becoming the reference date.175 However, some stakeholders recommended that there be provision for a termination payment claim after termination of the contract. For example, Quantum Estimating recommended an additional section 67(3) to allow a termination payment claim to be made up to 10 days after termination of the contact.176

The department advised that the policy is to have an additional reference date if a contract is terminated:

This allows the parties to recover funds even where a contract is terminated before the next reference date. Currently, industry practice includes terminating just prior to a reference date, so that no work can be claimed for a certain period.177

2.3.4  Meaning of payment claim – clause 68

2.3.4.1  Proposed provisions

Clause 68 proposes a new provision defining the term ‘payment claim’ for the purposes of the chapter. The current provision under BCIPA, provides that a payment claim must state that it is made under that Act is removed from the proposed definition. DHPW advised that the removal of the need for endorsement of a claim under chapter 3 makes it open for this jurisdiction to apply at an earlier time and the policy decision:

... followed feedback from consultation that revealed it would be useful to have the provisions of the BCIPA apply from the start of the payment process. Currently, a party may submit an invoice, then await payment. When this does not eventuate, in part or in full, the party may then consider submitting a payment claim under the provisions of the BCIPA. Further, the claimant must wait for the time limits under that legislation in order to seek adjudication.

In addition, feedback on consultation revealed that claimants are reluctant to include the words regarding the BCIPA claim on their invoices, to make them into payment claims, due to a stigma about using the BCIPA. Some subcontractors expressed a belief that they would be ‘blacklisted’ by head contractors for stating that their claim is a BCIPA claim, in that they would not be given work in the future.178

The department also advised that the proposed policy means the jurisdiction and mechanisms of chapter 3 apply from the start of the payment process, which means that claimants can move more quickly to address non-payment and without stigma:

175 See for example, submission 19, p 9; submission 32, p 3; submission 8, p 6; and submission 12, p 2.
176 Submission 3, p 5.
177 Correspondence dated 18 September 2017, Appendix 1, p 31.
178 Correspondence dated 18 September 2017, p 8.
It is expected that this reform will result in more prompt payment of claims for payment. The change is expected to deliver a cultural change to one of payment, rather than non- or delayed payment. It is expected that industry will adapt to the change, however the department will consider the various issues raised as they impact on implementation.

It should be noted that there will be no change to the present provisions that allow only one payment claim per reference date.179

2.3.4.2 Stakeholder views and department response

A number of stakeholders supported the removal of this endorsement.180 Others raised concerns about the removal of the requirement, for example, the National Electrical and Communications Association submitted that the removal of endorsement will create significant problems for all parties, both the respondent and the claimants:

NECA is in the unique position that it has seen and experienced first-hand the effect that the removal of the endorsement had in NSW. The NSW experience showed that the removal of the endorsement is counter-productive. The NSW government propose to reinstate the endorsement as a result of complaints from subcontractors and submissions from industry associations in support of the reinstatement in NSW.

... The experience in NSW has shown that the removal of the endorsement does not improve the use of the security of payment legislation, but rather causes confusion and unduly complicates the process. Under the proposed amendment it is not only invoices that will be payment claims, but even an email with a description of the work and an amount may be a payment claim.

The removal of the second chance notice is sufficient to level the playing field for subcontractors and will speed up the process. However, it is imperative that the endorsement remain.181

Resolution Institute advised that the majority of its member adjudicators agreed all payment claims should include the endorsement and it understood that NSW is currently considering whether to reinstate the endorsement requirement ‘as there is a perception that since the 2014 amendments there is now too much confusion regarding what is or is not a payment claim’.182 At the public hearing Scott Pettersson provided the following example:

What it means is that a subcontractor, an electrician or a plumber, if they are instructed to do some variation work and they send in a note to the contractor, their superior contracting party, saying that it cost $400 to change some piping, potentially they have just now issued a payment claim, because they have described the work, they have said how much the money was. That falls within those broad parameters. ‘Not requiring an endorsement’ now means two possible things. Firstly, the person who receives it will now have to provide a payment schedule or they face the consequences of potentially 100 penalty units, which would seem grossly unfair. Secondly, for the claimant, they will have used an available reference date so they will not be able to claim again until the next entire payment cycle goes through, which is probably going to be another month even though they were only claiming for a few hundred dollars’ worth of work, but intended to claim for $30,000 at the end of the month.183

The department advised that while it understands that the proposed amendment is a departure from the status quo, it is the intent of this change to create a culture of on time payment in the industry and

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179 Correspondence dated 18 September 2017, p 9.
180 See for example, submission 31, p 4.
181 Submission 22, pp 2-3.
182 Submission 8, p 6.
183 Public hearing transcript, 20 September 2017, p 16.
that it is important to remember that there can be only one payment claim per reference date and that this is intended to avoid a large number of payment claims per month.\textsuperscript{184}

### 2.3.5 Right to progress payment – clause 70

#### 2.3.5.1 Proposed provisions

Clause 70 essentially replicates section 12 of BCIPA. The explanatory notes advised that it provides that for each reference date under a construction contract, a person who has carried out construction work or supplied related goods and services, becomes entitled to a progress payment.\textsuperscript{185}

#### 2.3.5.2 Stakeholder views and department response

A number of stakeholders referred to a drafting change which refers to ‘for a reference date’ rather than the previously used ‘from a reference date’ and the implications for previous court determinations.\textsuperscript{186}

At the public hearing Scott Pettersson noted that what appear to be minor changes to language, such as replacing ‘from’ with ‘for’ a reference date, can have significant consequences:

\textit{These sound like really small matters, but in the state of Queensland there have been in excess of 400 cases which have gone to the Supreme Court since the original legislation. In those 400-plus cases the court has decided what those words mean. They have decided whether it has a particular meaning or does not have a particular meaning. I am sure you do not want to invite to have all of those things relitigated.}\textsuperscript{187}

DHPW advised that it was not intended to alter the wording regarding reference dates in this context and the department would consider the issue raised.\textsuperscript{188}

### 2.3.6 Amount of a progress payment – clause 71

#### 2.3.6.1 Proposed provision

The explanatory notes advised that clause 71 replicates section 13 of BCIPA and it provides for the amount of a progress payment that a person is entitled to under a construction contract to be ascertained in accordance with the terms of the contract. If the construction contract does not provide for the amount of a progress payment, the amount should be calculated on the basis of the value of the construction work carried out, or related goods and services supplied.\textsuperscript{189}

#### 2.3.6.2 Stakeholder views and department response

Adjudicate Today raised a concern that the removal of the word ‘undertaken’ is slightly unusual as it has been considered by the Courts and section 75 contains ‘or who claims to be, entitled’ which in part aligns with the concept of not having completed work but having undertaken to do work.\textsuperscript{190}

The submission from Darcy Ringland also raised the removal of the term ‘or undertaken to be carried out’ stating that this disadvantages the subcontractor/supplier if they have pre-purchased or pre-booked supplies and services, of which the works have not been carried out:

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\textsuperscript{184} Correspondence dated 18 September 2017, Appendix 1, pp 31-32.

\textsuperscript{185} Explanatory notes, p 24.

\textsuperscript{186} See for example submission 30, p 3.

\textsuperscript{187} Public hearing transcript, 20 September 2017, p 16.

\textsuperscript{188} Correspondence dated 18 September 2017, Appendix 1, pp 32-33.

\textsuperscript{189} Explanatory notes, p 24.

\textsuperscript{190} Submission 6, p 8.
In practical sense this nullifies the ability to recoup costs for any specialist or off site works such as a $500,000 lift that is on its way from Sweden and or any overheads and or costs that have been or may be borne by the termination of a contract.\(^{191}\)

The department advised that it was not intended to alter the meaning of this phrase and it would consider the issues raised.\(^{192}\)

2.3.7 Valuation of construction work and related goods and services – clause 72

2.3.7.1 Proposed provisions

The explanatory notes advised that clause 72 incorporates and amends section 14 of BCIPA, which provides for the manner in which the value of construction work carried out, or related goods and services supplied, under a construction contract is to be valued.\(^{193}\)

2.3.7.2 Stakeholder views and department response

Adjudicate Today noted that it is not clear what is intended by a ‘reasonable estimate’ or who is to make such an estimate and that the current interpretation of BCIPA requires the adjudicator to apply the values proposed by the parties or to contact the parties advising of the view of the adjudicator (if different from the parties) and to allow the parties the opportunity to make such submissions as are relevant - to do otherwise is to deny the parties natural justice.\(^{194}\)

The submission from Helen Durham also raised a concern that there are significant problems with the re-definition of the first matter to be taken into account in valuing construction work or related goods and services, in sections 72(1)(b)(i) and 72(2)(b)(i) respectively, as a significant proportion of construction contracts are lump sum contracts without breakdowns and as such have no price for the part of the work that is being valued and that to the ‘best of her knowledge, there has never been any problem with the previous wording and this change will accordingly cause untold problems for no apparent benefit’.\(^{195}\)

The department agreed that the wording should be clarified and indicated that it would consider the issues raised.\(^{196}\)

2.3.8 Due date for payment – clause 73

A number of submissions, including Quantum Estimating, pointed out that there appears to be a typographical error in section 73:

\textit{Clause 73 Due date for payment subclause 73(3) appears to have a typographical error being “...clause Q67P applies ...”, which should be “... clause 67P applies ...”}\(^{197}\)

The department agreed that the wording should be clarified and indicated that it would consider the issue raised.\(^{198}\)

\(^{191}\) Submission 20, p 3.
\(^{192}\) Correspondence dated 18 September 2017, Appendix 1, p 33.
\(^{193}\) Explanatory notes, pp 24-25.
\(^{194}\) Submission 6, pp 8-9.
\(^{195}\) Submission 33, p 8.
\(^{196}\) Correspondence dated 18 September 2017, Appendix 1, p 33.
\(^{197}\) See for example, submission 3, p 9.
\(^{198}\) Correspondence dated 18 September 2017, Appendix 1, p 33.
2.3.9 Making a payment claim – clause 75

2.3.9.1 Proposed provisions

The explanatory notes advised that clause 75 incorporates and amends section 17 of BCIPA, which enables a person who is entitled to a progress payment (the claimant) to serve a payment claim on the person who is liable to make the payment (the respondent). The clause also sets out the timeframes for making a payment claim.\(^{199}\)

2.3.9.2 Stakeholder views and department response

Subcontractors Alliance raised a number of concerns with the proposed drafting of this section, including that section 75(3) effectively makes it almost impossible for a trade contractor to make a final claim as the head contractors have made a ‘practiced art of obfuscating when a project has reached practical completion’ and section 75(5) ‘takes the act back to the injustices that existed with respect to the inclusion of prior material’.\(^{200}\)

A number of submissions requested that the term ‘re-agitation’ be defined in relation to clause 75.\(^{201}\) DHPW advised that this is not a new term and exists in the current version of legislation. DHPW stated that it would consider the issue raised and ‘it is consistent with the policy position to provide the definition of re-agitation’.\(^{202}\)

2.3.10 Responding to payment claim with a payment schedule – clause 76

2.3.10.1 Proposed provisions

While clause 69 provides the meaning of a payment schedule, clause 76 incorporates and varies section 18 of BCIPA to provide that a respondent given a payment claim must provide a payment schedule to the claimant, whether or not the respondent intends to pay the amount stated in the claim, unless the respondent has a reasonable excuse.\(^{203}\)

The department advised that it is intended that a payment schedule should be provided for every payment claim:

*The aim is to provide early communication between the parties. It will also allow the claimant to know earlier whether the respondent intends to pay, thus allowing them to proceed to recover the claimed amount more quickly. This policy change is intended to bring about a positive change in the industry with respect to payment, as claimants will be able to take earlier action to recover payment.*\(^{204}\)

DHPW also advised that it is important to remember that there can be only one payment claim per reference date and this is intended to minimise large numbers of payment claims per month and amongst other things, the intent of this policy is to bring about cultural change in the industry.\(^{205}\)

\(^{199}\) Explanatory notes, p 25.

\(^{200}\) Submission 25, p 7.

\(^{201}\) See for example, submission 14, p 7.

\(^{202}\) Correspondence dated 18 September 2017, Appendix 1, p 33.

\(^{203}\) Explanatory notes, p 25.

\(^{204}\) Correspondence dated 18 September 2017, p 9.

\(^{205}\) Correspondence dated 18 September 2017, p 9.
2.3.10.2 Stakeholder views and department response

A number of stakeholders supported the proposed amendment, for example Master Concreters submitted that this provision, along with a number of other provisions including the requirement for payment schedules, is considered essential to ensure the subcontractor is paid on time for the work performed.\textsuperscript{206} Holding Redlich advised the committee that there is currently no consequence for contractors who simply do not issue a payment schedule:

\textit{.. if you get a payment claim and no payment schedule—primarily principals in my experience, not necessarily the head contractors in our industry, have introduced a practice of simply issuing no payment schedule to the first payment claim. How can they do that? There is simply no consequence for doing so.}\textsuperscript{207}

Quantum Estimating recommended the inclusion of a new subsection 76(1A) to remove doubt for acceptance of a payment by a respondent by expressly barring any respondent unreasonable excuse for not issuing a payment schedule.\textsuperscript{208}

Some stakeholders raised concerns about the extent of what constitutes a ‘reasonable excuse’, for example, Resolution Institute submitted that confusion and arguments over the meaning of the term may provide grounds for delay and proliferation of litigation.\textsuperscript{209} The department advised that ‘it is envisaged that examples of a reasonable excuse might include that the respondent was not aware of a payment claim being made because it was sent to a wrong address or the respondent was seriously ill in hospital when the payment claim was made’.\textsuperscript{210}

Another concern raised by some stakeholders was about increased administration as a result of mandatory payment schedules. For example, Master Builders submitted that it had grave concerns about this section given the requirement to provide a payment schedule even if the respondent intends to pay the amount stated in the payment claim:

\textit{This provision will be seriously detrimental to the industry as a whole (including Subcontractors) and is unnecessary when payment is made in full and by the due date for payment.}

\textit{If payment is made in full by the due date for payment, the claimant has not suffered any loss or harm. Accordingly, it is grossly unfair and unreasonable to impose an obligation on the respondent to issue a document that confirms that the respondent agrees with the claimant’s payment claim and intends to pay on time. The Respondent should be permitted to raise such matters in an Adjudication response.}\textsuperscript{211}

The department advised that there was also concern that as payment claims will no longer be endorsed as a claim made under the Act it may be difficult for a respondent to know what a payment claim actually is, and therefore whether a payment schedule is needed and DHPW advised that the amendment:

\textit{... is designed to achieve faster adjudication, to resolve the dispute, rather than waiting for the due date for payment. It is not the intent that the payment schedule be an onerous process.}\textsuperscript{212}

\textsuperscript{206} Submission 15, p 1; see also submission 31, p 4.
\textsuperscript{207} Public hearing transcript, 20 September 2017, p 15.
\textsuperscript{208} Submission 3, p 9.
\textsuperscript{209} Submission 8, p 8 and see also submission 30, pp 2-3.
\textsuperscript{210} Correspondence dated 18 September 2017, p 9.
\textsuperscript{211} Submission 19, p 11.
\textsuperscript{212} Correspondence dated 18 September 2017, Appendix 1, p 34.
At the public hearing the department responded to concerns raised advising:

... these changes were aimed at the need to instigate a cultural shift in the industry towards one where subcontractors do not have to chase the money that they are rightfully owed. There have been concerns raised about the mandatory requirement for a payment schedule to be provided for all payment claims. The department is aware of the points that have been raised by the submitters and is considering the advice received.²¹³

DHPW also advised that it will provide industry with further guidance on how to identify a payment claim and payment schedule.²¹⁴

2.3.11 Application for adjudication – clause 79

2.3.11.1 Proposed provisions

Clause 79 incorporates and varies section 21 of BCIPA. The explanatory notes advised that the section enables a claimant to apply for adjudication in the event that the respondent fails to pay an amount to the claimant by the due date for the payment, or the amount set out in the respondent’s payment schedule is less than the amount set out in the claimant’s payment claim.²¹⁵

2.3.11.2 Stakeholder views and department response

Submissions were generally in favour of provisions that extend the timeframes for claimants to make an adjudication application.²¹⁶ Subcontractors Alliance recommended that section 79(3) be amended as the timeline for issue of adjudication applications needs to be as long as required and this is impossible to predict.²¹⁷

Master Builders did not support the extended time periods on the basis ‘the adjudication process was always intended to be a rapid process and the new timeframes are excessive and will result in the dragging out of payment disputes between parties’.²¹⁸

There was also some opposition to the introduction of limits of the amount of material for an adjudication.²¹⁹

The HIA argued that there a number of new provisions in chapter 3 that are grossly unfair including:

... where the respondent will have a page limit on how long their response can be and the adjudicator in looking at that response has to stop at the end of that page limit irrespective of what information is after that, but they do not have the same obligation on the applicant.²²⁰

The department advised that the extension of timeframes for claimants is necessary allow them sufficient time to prepare applications:

Progress payment applications can involve legal issues and it may be necessary to engage a lawyer to assist and prepare the application. This can be time consuming. Consultation revealed that it is common for some claimants to run out of time to make a BCIPA claim despite being entitled to payment. Also, when it becomes apparent that payment will not be made, as a claimant might rightfully expect under their contract, the claimant has little time to actually

²¹³ Public hearing transcript, 20 September 2017, p 40.
²¹⁴ Correspondence dated 18 September 2017, p 9.
²¹⁶ See for example, submission 4, p 6 and submission 31, p 5.
²¹⁷ Submission 25, p 7.
²¹⁸ Submission 19, p 11.
²¹⁹ See for example, submission 12, p 2 and submission 33, p 6.
prepare their adjudication application. This amendment is intended to assist claimants in this situation.  

2.3.12 Adjudication response – clause 82

2.3.12.1 Proposed provisions

The explanatory notes advised that clause 82 essentially replicates section 24 of BCIPA. It only allows the respondent to give the adjudicator a response to the claimant’s adjudication application if the respondent provided a payment schedule to the claimant within the required timeframe.

2.3.12.2 Stakeholder views and department response

The department advised that submissions were largely in favour of these provisions. However, Master Builders and the HIA submitted the removal of the ability to raise new reasons to be unreasonable in the case of a complex payment claim.

DHPW responded that the removal of the ability to provide new reasons for complex claims is to encourage early communication between the parties:

As payment schedules will be mandatory, these should specify the reasons for any lack of acceptance of the whole amount of a payment claim. If a respondent provides this information with the payment schedule early on, this may mean the claimant decides the information and reasons provided by the respondent are valid. As a result, the claimant may not decide to go to adjudication.

Providing further reasons at a later date may mean that the adjudication becomes more complex and the claimant must spend more money to respond to the respondent’s reasons. Also, the claimant may agree the reasons are valid, but at that point, they have already expended funds in the adjudication process.

The intent of this reform is improve communication within the industry, simplify the adjudication process and reduce expense to claimants.

2.3.13 Valuation of work etc. in later adjudication application – clause 87

2.3.13.1 Proposed provisions

The explanatory notes advised that clause 87 incorporates and varies section 27 of BCIPA:

- it applies in the situation where an adjudicator has previously decided the value of any construction work under a construction contract or the value of any related goods and services supplied under a construction contract
- it provides that the adjudicator, or another adjudicator, must in any later adjudication application that involves the same work or the same goods and services, give the work or the goods and services the same value as that previously decided - the exception is where the parties satisfy the adjudicator concerned that the value of the work or of the goods and services has changed since the previous decision, and

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221 Correspondence dated 11 September 2017, p 9.
222 Explanatory notes, p 27.
223 Correspondence dated 18 September 2017, Appendix 1, p 35.
224 Submission 19, p 12 and submission 21, p 20.
225 Correspondence dated 18 September 2017, Appendix 1, pp 35-36.
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- it provides that if a decision or order of a court changes the value of the construction work or of the related goods and services, the adjudicator must apply the value as changed by the court.226

2.3.13.2 Stakeholder views and department response

A number of submissions advised that it was not reasonable for an adjudicator to be bound by a determination as to value made by another adjudicator in relation to the same job in a dispute between the same parties.227

The department advised that it would consider the issues raised and clarified:

*The policy intent is that if one adjudication on a certain matter has decided a certain value, this is upheld in later matters. However, if for example, a person seeks review in a court, the court would, of course, be free to decide this matter.*228

2.3.14 Service of notices – clause 102

2.3.14.1 Proposed provisions

The explanatory notes advised that this clause essentially replicates section 103 of BCIPA and provides the procedure for the service of notices under chapter 3 and allows notices to be served by an agent.229

2.3.14.2 Stakeholder views and department response

Aitchison Reid Building and Construction Lawyers submitted that this clause does not allow notices to be served by email:

*It refers to section 39 of the Acts Interpretation Act 1954, which allows for facsimile but not email.*

*Emailing invoices is a standard industry practice. With an overwhelming proportion of payment claims being emailed, it would be nonsensical that the Act did not allow for payment claims to be emailed.*

*We submit that this change is crucial to supporting subcontractors and trade contractors serve valid payment claims.*230

The department advised that it will consider the issue raised and clarified that it is the intent that email would be contemplated when notices are served.231

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227 See submissions 4, 14, 31 and 33.
228 Correspondence dated 18 September 2017, Appendix 1, p 37.
229 Explanatory notes, p 32.
230 Submission 9, p 3.
231 Correspondence dated 18 September 2017, Appendix 1, p 40.
2.3.15 Stakeholder views on other clauses in chapter 3

There were a number of other clauses in chapter 3 about which stakeholders raised issues and where the department provided clarification and indicated that no change to the bill was proposed. The comments provided by the department can be accessed in the departmental brief provided to the committee. The relevant clauses include:

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2.3.16 Committee consideration

The committee noted that a number of technical issues concerning chapter 3 were raised by stakeholders throughout the committee’s inquiry and also noted the department’s advice that it will consider a number of these issues further. The committee has made a recommendation that the Minister report to Parliament on these issues during the second reading speech on the bill.

232 Correspondence dated 18 September 2017, Appendix 1, pp 32-40.
2.4 Subcontractors’ charges – chapter 4

The bill proposes that the SCA be repealed (clause 202(2)) and replaced with chapter 4 of the new Act. DHPW advised that chapter 4 modernises the provisions that are in the current act. The Minister, in the explanatory speech, noted:

To provide more information to the subcontractor about the likelihood of payment, the bill also provides that the higher contractor must notify the subcontractor about whether they accept liability to pay, in whole, in part, or not at all. Failure to do so will also be an offence.

2.4.1 Notice of claim – clauses 122 to 127

2.4.1.1 Proposed provisions

The explanatory notes provided:

- clause 122 proposes to insert a new provision which is derived from section 10 of the SCA which introduces obligations on the subcontractor and establishes a process for claiming a charge
- clause 123 proposes to insert a new provision which is derived from section 10 of the SCA which requires the subcontractor to provide a copy of the notice of claim to the contractor
- clause 124 proposes to insert a new provision which is derived from section 10 of the SCA which requires the subcontractor to provide a copy of the notice of claim to the holder of a security, and
- clauses 125 to 127 propose to insert new provisions derived from section 11 of the SCA.

2.4.1.2 Stakeholder views and department response

The Subcontractors Alliance submitted that the requirement proposed in section 122 for a certificate of a qualified person (required to confirm the amount of a claim when lodging a notice of claim) is irrelevant and should be deleted as they view it as ‘an extra expense to the claimant, a delay in the claims process, and in most instances the qualified person is not aware of the contract, the variations and work completed’.

DHPW advised that the changes in clause 122 are designed to assist the user in understanding the requirements for a notice of claim; they do not make substantive changes to the policy currently in section 10 of the SCA; and the certificate has a long-standing history and is understood by industry.

Master Builders noted that a significant issue for subcontractors when serving a notice of claim on the principal, is not knowing if there is any money owing to the head contractor for the subcontractor’s charge to attach to and recommended that a new subsection (6) be inserted into section 126 to require the recipient of the notice of claim to provide a notice to the subcontractor and contractor advising whether there is any money still payable under subsection (2).

The department advised that the charge can only attach to money once the notice of claim has been given and the money has become payable and it is therefore not possible for the principle to definitively provide notice of any future money that may become payable.

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235 Explanatory notes, p 35.
236 Submission 25, p 8.
237 Correspondence dated 18 September 2017, p 10.
238 Submission 19, p 12.
239 Correspondence dated 18 September 2017, p 10.
2.4.2 Contractor given copy of notice of claim must respond – clause 128

2.4.2.1 Proposed provisions

The explanatory notes advised that clause 128 is a new provision that requires a contractor to provide a response where a subcontractor has given them a notice of a claim of a charge:

- subsection (2) provides that the contractor must respond in writing to the notice of the claim to both the subcontractor and the person who gave the notice of the claim; the response must be made within 5 business days of the contractor receiving the copy of the notice of the claim (previously the requirement was within 14 days under the repealed SCA); penalties apply for contravening this requirement, and

- subsection (3) outlines that the response must be made in the approved form; and specifies that the contractor must advise about whether they accept liability to pay the full amount claimed, accept liability to pay part of the amount claimed but dispute the remainder, or dispute the entire claim - this is essentially a reproduction of parts of section 11(3) of the repealed SCA.

2.4.2.2 Stakeholder views and department response

A number of submissions raised concerns about the reduced timeframe for providing the contractor’s response and about the addition of the penalty for failure to respond.

The Subcontractors Alliance submitted that the penalty attached to section 128(2) is somewhat irrelevant and the UDIA noted:

Presently there is no consequence for failing to respond to a notice of claim of charge, likely because in many circumstances the party liable for responding to a notice of claim of charge is insolvent or under external administration. Under the Bill, failure to respond will constitute an offence for which the company may be charged or fined.

The UDIA recommended that the period in which to respond be extended and that the penalty not be applied for failure to respond if the liable party is insolvent or under external administration.

Master Builder’s submitted that the timeframe is too short to review the notice of claim, consider the relevant facts and determine what the appropriate response to the claim should be in the circumstances:

In order to avoid the Contractor simply denying the claim in full due to insufficient time to assess the claim, the legislation should revert to the previous timeframe of 14 days.

The department responded that the penalty is designed to encourage compliance and the reduced timeframe is necessary to assist the subcontractor should they be required to start an action to enforce their claim of charge.

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240 Explanatory notes, pp 35-36.
241 Submission 25, p 8.
242 Submission 16, p 7.
243 Submission 16, pp 7-8.
244 Submission 19, p 13.
245 Correspondence dated 18 September 2017, Appendix 1, p 42.
2.4.3 Proceedings for subcontractor’s charges – clause 136

2.4.3.1 Proposed provision

The explanatory notes advised that clause 136 is a reproduction of section 15 of the SCA.246

2.4.3.2 Stakeholder views and department response

The Subcontractors Alliance recommended that the timeframe of 1 month proposed in section 136(1)(a)(ii) is too short as subcontractors often have to commence actions when they have no idea of the viability of the charge and the previous period of 3 months should be reintroduced:

The head contractor does not suffer in any way as they always have the right to commence an action in court in their own right to have a charge set aside or otherwise reduced under section 138.247

The submission from Darcy Ringland recommended that the timeframe should be increased to 2 months.248

The department responded by advising that once a person has been given a notice of claim they have an obligation to retain money that is payable or is to become payable to the higher contractor up to the amount claimed by the subcontractor:

This right to a subcontractors’ charge must be balanced with the broader need for cash flow through the industry. A subcontractors’ charge effectively restricts cash flow and so it necessary that a subcontractor should start their action so that the matter may be resolved efficiently.249

2.4.4 Stakeholder views on other clauses in chapter 4

There were a number of other clauses in chapter 4 about which stakeholders raised technical issues and where the department provided clarification and indicated that that no change to the bill was proposed. The comments provided by the department can be accessed in the departmental brief provided to the committee.250 The relevant clauses include:

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<tr>
<th>Clause</th>
<th>Submissions</th>
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<td>104</td>
<td>19</td>
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<td>110</td>
<td>20 and 25</td>
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<td>147</td>
<td>4</td>
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2.4.5 Committee consideration

In response to a question from the committee at the public briefing, the department advised that all the current provisions in the SCA had been included in the provisions in the bill.251 DHPW later clarified that some provisions have not been replicated in the bill:

246 Explanatory notes, p 36.
247 Submission 25, p 8.
248 Submission 20, p 5.
249 Correspondence dated 18 September 2017, Appendix 1, p 42.
250 Correspondence dated 18 September 2017, Appendix 1, pp 32-40.
251 Public briefing transcript, 6 September 2017, p 2.
This was largely due to adopting modern drafting practices and expression, consolidating provisions or removing redundant provisions, improving and streamlining processes, and policy reforms.\footnote{Correspondence dated 11 September 2017, p 8.}

The committee sought clarification about the impact of the bill on subcontractors on smaller projects that would not be captured by the PBA requirements. The department reiterated that the existing regime under the SCA would be maintained and that under this regime a sub-subcontractor can lodge a claim, use the adjudication process and use the monies owed complaint through the QBCC.\footnote{Public briefing transcript, 6 September 2017, p 9.}

The committee noted the commitments made by the department that it will consider a number of the issues raised by stakeholders in relation to the provisions in chapter 4 of the bill. The committee has made a recommendation that the Minister report to Parliament on these issues during the second reading speech on the bill.

2.5 Administration and legal proceedings– chapters 5 and 6

2.5.1 Consideration of application – clause 160

2.5.1.1 Proposed provisions

Clause 60 replicates section 58 of BCIPA and provides that the register must consider and either grant or refuse an application.

2.5.1.2 Stakeholder views and department response

Quantum Estimating suggested reinstating the requirement for the registrar to decide an adjudicator application within 28 days.\footnote{Submission 3, p 11.} In response, the department advised that clause 163 requires that the registrar must inform the applicant of their decision on the application for registration and the removed BCIPA, section 63 provided additional administration requirements to this requirement. The department advised that it would consider the issue raised further.\footnote{Correspondence dated 18 September 2017, Appendix 1, p 44.}

2.5.2 Suitability criteria and conditions of registration for adjudicators– clauses 161 to 165

2.5.2.1 Proposed provisions

The explanatory notes advised:

- clause 161 of the bill replicates section 60 of BCIPA and provides the eligibility requirements for a person to be registered as an adjudicator and that it also sets out the matters that the registrar may have regard to when deciding if a person is suitable to be registered as an adjudicator, including whether the applicant has been convicted of a relevant offence, or has had their registration with a professional association (such as a legal profession) cancelled because of disciplinary action
- clause 162 incorporates and varies section 61 of BCIPA and provides that the registrar may seek further information from the applicant to assist the registrar in deciding the application, and
- clause 165 replicates section 65 of BCIPA and sets out the conditions of registration that apply to all adjudicators, including complying with the requirements for continuing professional development prescribed by regulation; and also allows additional conditions to be imposed by the registrar at the time of registration, renewal or another time deemed necessary to ensure that an adjudicator can effectively perform their functions.\footnote{Explanatory notes, p 41.}
2.5.2.2 Stakeholders views and department response

Two submissions were supportive of the continuing professional development being in the Act, including Master Builders which supported ‘the inclusion of continuing professional development for adjudicators as the skillset and experience of adjudicators is critical to ensuring that the adjudication process is carried out competently and in accordance with the legislation’.\(^{257}\)

Some submissions, for example Resolution Institute, suggested additional criteria that could be considered in relation to suitability of adjudicators.\(^{258}\) The submission from Helen Durham raised concerns about section 165(1)(b) which provides that an adjudicator must complete continuing professional development as prescribed by regulation, stating:

> *It is wholly inappropriate because it has the potential to significantly compromise the independence of adjudicators, for example, by requiring that adjudicators undertake particular courses, or courses with particular people. It is also contrary to the requirement that decision makers be free to form their own associations to promote their own professional development.*\(^{259}\)

The department advised that clause 165(1)(c) of the bill provides for the possibility of additional conditions of registration should the registrar consider it appropriate. DHPW also advised:

> *The intention for the introduction of a requirement of continuing professional development as prescribed by regulation is to ensure that adjudicators maintain the requisite level of skill and knowledge needed to undertake their role.*\(^{260}\)

2.5.3 Stakeholder views on other clauses in chapters 5 and 6

There were a number of other clauses in chapters 5 and 6 about which stakeholders raised concerns and where the department provided clarification and indicated that no change to the bill was proposed. The comments provided by the department can be accessed in the departmental brief provided to the committee.\(^{261}\) The relevant clauses include:

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<tr>
<th>Clause</th>
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<td>149</td>
<td>4, 6 and 25</td>
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<td>154</td>
<td>33</td>
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<td>189</td>
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\(^{257}\) Submission 19, p 13.

\(^{258}\) See for example, submission 8, pp 12-13.

\(^{259}\) Submission 33, p 8.

\(^{260}\) Correspondence dated 18 September 2017, Appendix 1, p 44.

\(^{261}\) Correspondence dated 18 September 2017, Appendix 1, p 43.
2.6 Proposed amendments to the QBCC Act – chapter 9, part 4

The QBCC administers the building and construction licensing system and amendments are proposed to the QBCC Act to improve regulatory compliance and enhance the QBCC’s enforcement capability. A number of the proposed amendments are discussed below.

2.6.1 Influential persons and excluded individuals – clause 252 and clause 271

2.6.1.1 Amendments proposed in the bill

Clause 252 proposes to insert a new section 4AA in the QBCC Act which defines an ‘influential person’ for a company as an individual, other than a director or secretary of the company, who controls or substantially influences the company’s conduct. The definition also describes a number of activities, relationships, functions and roles that may result in a person being considered an ‘influential person’ and the circumstances under which a person will not be considered an ‘influential person’. 262

The explanatory notes advised that this amendment broadens the definition of an ‘influential person’ to help address the issue of ‘phoenixing’ and it ensures that a person who is influential in a company failure will be excluded from holding a QBCC licence and be prevented from being in a position of influence in the business of another QBCC licensee. 263

In the explanatory speech, the Minister stated:

*Anyone who receives a ban under these new laws will face major penalties if they try to run another building company, either in their own name or by, once again, giving secret directions from behind the scenes. The new regime will allow someone to be declared an ‘influential person’ even if they have no obvious paid role in a company or even if they are given a job title which is a disguise designed to provide false reassurance that the person is not actually in charge.* 264

Clause 271 of the bill also proposes to amend section 56AC of the QBCC Acts to extend the ‘excluded individual’ provisions, so that a person who was involved in a company failure in other jurisdictions, or who was the director of a company up to 2 years prior to a failure, will be excluded from obtaining a QBCC licence. 265 The explanatory notes advised that the bill ‘will allow the QBCC to more effectively target defaulting contractors who restructure their corporate affairs in order to keep operating after their licence has been cancelled’. 266

2.6.1.2 Stakeholders views and department response

A number of stakeholders, including the NFIA and the AMCA, supported the amendments proposed in clauses 252 and 271. 267

The HIA agreed that ‘excluded individuals’ should include those involved with failed ‘construction companies’ outside of Queensland and supported sensible changes to reduce phoenixing in the industry. However, the HIA submitted that the proposed new definition of ‘influential person’ is unnecessary as the current definition was drafted broadly enough and the inclusion of persons who ‘make, or participate in making’ decisions ‘may potentially indirectly capture in-house lawyers or lower and middle level employees, like book keepers, who simply provide input into the company’s decisions’. 268

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262 Explanatory notes, p 54.
263 Explanatory notes, p 55.
265 Explanatory notes, p 3 and p 60.
266 Explanatory notes, p 3.
267 See for example, submission 11, p 2submission 26, p 3, submission 32, p 3 and submission 15, p 1.
268 Submission 21, p 21.
The department responded:

The list of roles and activities in section 4AA(3) is designed to help clarify what is intended to be captured by the definition of ‘influential person’, and to help guide the courts when making their determination.

Ultimately, section 4AA(3) will need to be read in conjunction with section 4AA(1). If a person is making or participating in making decisions that affect the whole or a substantial part of the company’s business or financial standing, and this constitutes controlling or substantially influencing the company’s conduct, then they should rightfully be considered an ‘influential person’.269

A number of submissions also raised a concern that the excluded individual amendment could exclude a person who sold or left a company while it was in good financial health and the company later went into liquidation.270 Some submissions suggested that a defence should be introduced to protect persons in this situation, for example by establishing that at the time they ceased to be a director of the company, it was in good financial health and not otherwise in breach of its obligations under the QBCC Act or the Corporations Act.271

The department responded that the amendment has the effect of excluding an individual if they were a director, secretary, or influential person for a company within 2 years of a relevant company event (for example, the winding up of a company) and that DHPW will consider the issues raised.272

2.6.2 Queensland Building and Construction Board appointment provisions – clause 254

2.6.2.1 Amendments proposed in the bill

Clause 254 of the bill proposes to amend section 12 of the QBCC Act (Appointment) to change the appointment provisions for the QBC Board to:

- expand the number of members on the Board from 7 to not more than 10, and
- to ensure that the Governor in Council, in appointing a person to the Board, must have regard to the person’s experience and competence in the areas including building and construction, finance, corporate governance and risk, insurance, consumer advocacy and awareness, and public sector governance.

2.6.2.2 Committee consideration

The committee asked the department for further information on the diversity and range of people that would be considered suitable to be members of the QBC Board. The department advised:

The idea of increasing the possible number of people on the board is exactly that—to make sure that there is a good cross-section and representation of different sectors. People are on the board for the skills that they bring to the board. Often what happens is that you might want people who have building industry skills, legal skills and financial/banking skills, but with a limited number on the board often you do not have as broad a representation. This allows that in any mix on the board you do not have to fill all the positions but it allows additional positions if for whatever reason at different times the people on the board do not cover a couple of different sectors.273

269 Correspondence dated 18 September 2017, Appendix 1, p 47.
270 See for example, submission 14, p 8.
271 See for example, submission 14, pp 8-9.
272 Correspondence dated 18 September 2017, Appendix 1, p 49.
2.6.3 Minimum financial requirements – clauses 257 and 258

2.6.3.1 Proposed amendments

Clause 257 proposes to insert a requirement into section 31 of the QBCC Act to require an applicant for a contractor’s licence to satisfy the minimum financial requirements for the licence.

Clause 258 proposes to insert requirements into section 35 of the Act to require the licensee’s financial circumstances to at all times satisfy the minimum financial requirements for the licence and for any variations of the contractor’s turnover and assets to be notified, or notified and approved, in accordance with the minimum financial requirements for the licence.

The Minister, in the explanatory speech, advised:

*The bill will restore tougher minimum financial requirements. This provides the Queensland Building and Construction Commission with an insight into a company’s financial position and allows it to act on any potential problems. The bill provides that a regulation may prescribe increased financial reporting by QBCC contractor licensees.*

DHPW advised that the bill proposes that important policies such as minimum financial requirements policies must now be prescribed by a regulation:

*Under the MFR [minimum financial requirements] policy, licensees have particular reporting requirements based on their annual turnover. The bill provides that a regulation may prescribe increased financial reporting by QBCC contractor licensees to enable more effective monitoring by the QBCC.*

2.6.3.2 Stakeholder views

A number of stakeholders supported the reintroduction of mandatory financial reporting, including the Master Concreters who strongly supported it on the basis that ‘subcontractors are repeatedly subject to corporate phoenixing which has forced many of them to fold’.

2.6.3.3 Committee consideration

In response to a question from the committee about what payment protection would be provided to subcontractors working on projects under $1 million the department advised:

*We have not forgotten those subbies working on projects under a million dollars. That is the point about the suite of reforms. It also goes to the minimum financial requirements. Like what happened with the product disclosure statement for the Home Warranty Scheme that was pulled into a regulation to give it more weight, more consistency and more clarity, it is the same thing with the minimum financial requirements. If we get that right and we are much more active in ensuring the bigger head contractors are solvent, we therefore look after the subbies as well. The whole suite of reforms in that bill do not forget the sub-subcontractors and the projects under a million dollars.*

At the public briefing the committee also asked the department for further information about how minimum financial requirements will be administered and reported and whether the QBCC, which set the minimum financial requirements in 2014 would ‘effectively lose that control’. The department responded that currently these requirements are made through the QBCC rather than through

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275 Public briefing transcript, 6 September 2017, p 2.
276 Submission 15, p 1.
278 Public briefing transcript, 6 September 2017, p 2.
regulation and the bill provides for a regulation to be made which will stipulate what the minimum financial requirements are required to be. The QBCC added:

If I break your question down into the relevant parts, the first part of the question was around the board setting the current minimum financial requirements policy from October 2014. That is correct. With the proposed changes, that policy in effect becomes a part of the QBCC Act via a regulation. At an operational level that means that according to the policy at the moment there is some discretion as to if and when the QBCC actually administers that policy versus bringing it into a regulation and prescribing, in effect, the requirement for the QBCC to administer it thereby removing a lack of discretion that currently exists within the QBCC.

... Under the current policy, we administer the policy as it was set by the board at the time. The board policy of October 2014 is still in existence, so we still administer the policy as it sits from when the board made that decision of October 2014.279

2.6.4 Unlawfully carrying out building and fire protection work – clauses 260 to 263

2.6.4.1 Proposed amendments

Clauses 260 to 263 of the bill propose to amend section 42 of the QBCC Act to increase penalties for unlicensed work under the QBCC Act. The current offence provisions attract a maximum penalty of 250 penalty units280 with the proposed amendments providing for a graduated penalty regime, which includes:

- first offence—maximum 250 penalty units
- second offence—maximum 300 penalty units, and
- third and subsequent offences—maximum 350 penalty units or 1 year imprisonment.

2.6.4.2 Stakeholders views and department response

The MBQ submitted that the imposition of a penalty of imprisonment for a third or later offence for undertaking building work without a contractor’s licence is excessive:

Whilst we do not support unlicenced contractors undertaking building work, we are concerned that there are times when a contractor may inadvertently step over the line into ‘building work’ over the $3,300 limit. The penalty unit penalty seems sufficient – imprisonment is not necessary.281

The department responded that the amendment is intended to provide a strong deterrent to those unlawfully carrying out building work and advised:

- higher penalties are considered appropriate due to the significant safety and financial implications of performing defective building work
- the penalties align Queensland more closely with other states and territories, which generally have higher maximum penalties for unlicensed building work
- the possibility of imprisonment is aimed at repeat and high-level offenders; only for a third or later offence, or if the building work carried out is tier 1 defective work (for example may cause grievous bodily harm or death to a person), will the offence will be considered a crime, and
- ultimately, the courts will have the discretion to impose penalties as they see fit.282

279 Public briefing transcript, 6 September 2017, pp 2-3.
280 Public briefing transcript, 6 September 2017, p 2.
281 Submission 19, p 13.
282 Correspondence dated 18 September 2017, Appendix 1, pp 47-48.
2.6.4.3 **Committee consideration**

The committee noted the department’s advice that the maximum penalty of 1 year’s imprisonment is only intended to be applied to repeat and high-level offenders.

2.6.5 **Avoidance of contractual obligations causing significant financial loss – clause 264**

Clause 264 of the bill proposes to insert a new section 42E into the QBCC Act which prescribes a maximum penalty of 350 penalty units where a person deliberately avoids complying with a building contract and, as a result, causes another person significant financial loss. The explanatory notes advised that this provision was ‘necessary to address a problematic trend in the building and construction industry of poor payment practices and contractual deficiencies which can have a detrimental impact for both licensees and consumers’.283

2.6.5.1 **Stakeholders views and department response**

A number of stakeholders supported the new provision, for example the AMCA advised the committee that it strongly supported the proposed penalties for persons who without reasonable excuse cause another party to a building contract to suffer financial loss.284 Quantum Estimating welcomed the provision but raised a concern that it may be relied upon by ‘unscrupulous head contractors against subcontractors who cannot adhere to draconian contract provisions’.285

The HIA submitted that the proposed new provision is ‘completely flawed as is the Government’s justification for it’ and seeks clarification on a number of the terms used in the provision. Additionally, the HIA claimed ‘to the extent that the QBCC is empowered to determine ‘contractual rights’, the provision offends the doctrine of separation of powers’:

> The division of power between different bodies (that it is up to the elected legislature via Parliament to make law, it is up to executive government and its public service to implement the law, and it is the role of an independent judiciary to interpret the law and resolve disputes between citizens), is a cornerstone principle of our system of government.

> As to the argument that the provision is necessary because some subcontractors do not pursue contract claims for fear of being “blacklisted” this does not make sense – whether or not the matter is pursued by the QBCC or courts there will still be an underlying dispute which gave rise to the breach of contract in the first place. Both builders and subcontractors need to co-operate in the course of a building project or risk their future business relationship.286

The department responded that it will consider the issues raised by submitters further and determine whether amendments are appropriate to clarify the intention of the provision, however, it considers this offence provision is necessary due to the prevalence of poor contractual practices in the building and construction industry as ‘unlike large companies, most subcontractors often do not have the financial means to pursue a matter through the courts – they are “mum and dad” operators who rely on timely payment to survive financially’.287

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283 Explanatory notes, p 6.
285 Submission 3, p 12.
286 Submission 21, p 22.
287 Correspondence dated 18 September 2017, Appendix 1, p 48.
2.6.6 Demerit points for receiving a direction to rectify or remedy – clauses 272 to 274

2.6.6.1 Proposed amendments

Clause 272 of the bill proposes to amend section 67AQ by inserting a new definition of ‘demerit matter’ in part 3E of the QBCC Act which includes ‘being given a direction to rectify or remedy’.

Clause 273 proposes an amendment to section 67AW to allow the commission to allocate 4 demerit points to a person when they are issued with a direction to rectify or remedy.

Clause 274 proposes to insert a new provision (section 67AZAA) which provides that the commission must allocate demerit points to a person issued with a direction to rectify or remedy as soon as possible after giving the direction.

The explanatory notes provided:

It is considered that this will provide a suitable deterrent for carrying out defective building work and will subsequently improve the standard of work being performed in the building and construction industry.288

2.6.6.2 Stakeholders views and department response

Some stakeholders suggested that the imposition of 4 demerit points for simply receiving a direction to rectify is unreasonable. For example:

- Master Builders noted that this penalty is unreasonable in the light of the QBCC’s recent policy decision to issue a direction to rectify on the head contractor even where the QBCC accepts that a subcontractor is responsible for the defective work and also in circumstances where the contractor complies with the direction,289 and

- the HIA noted that these amendments mean that 4 demerit points are automatically allocated to a person when they are issued with a Direction, irrespective of circumstances and submits that this is ‘harsh and unfair’ and that as the QBCC will no longer issue a Request to Rectify prior to issuing a Direction to Rectify, this means in many cases the builder will have little opportunity to voluntarily rectify.290

The HIA also noted that there may be legitimate reasons why a builder has not yet rectified the work, including the fact that they were awaiting the QBCC’s consideration of the matter:

The automatic imposition of penalty coupled with abolition of the Request to Rectify practice, will force many small builders to simply acquiesce to the consumer’s claim, even when there is no foundation, to avoid penalty.291

Master Builders concluded at the public hearing:

In terms of directions to rectify, the proposed new penalty of four demerit points when a direction is issued is completely unreasonable and will create an enormous amount of angst across the industry.292

288 Explanatory notes, p 60.
289 Submission 19, p 4.
290 Submission 21, p 22.
291 Submission 21, p 23.
The department responded that no change is proposed to the bill as a strong penalty for receiving a direction to rectify or remedy will reinforce the expectation that building work should be free of defects and carried out to completion.\footnote{293 Correspondence dated 18 September 2017, Appendix 1, p 49.}

\subsection*{Committee consideration}

The committee considered the concerns raised about clauses 272 to 274 of the bill and also noted that currently:

- 10 demerit points can be applied for failure to comply with a direction to rectify and that a licensee who gets 30 demerit points in a 3-year period is disqualified from holding a licence for 3 years, and
- the QBCC policy does not include issuing a Request to Rectify but indicates it will only issue a Direction to Rectify following investigation of the defective work and a discussion with the licensee regarding their intention to fix any problems.\footnote{294 QBCC website, http://www.qbcc.qld.gov.au/defective-work-disputes/responding-direction-rectify <accessed 5 October 2017>}

The committee agreed with the stated objective of the proposed clauses, that is to reinforce the expectation that building work should be free of defects and carried out to completion. However, it is concerned about the proposal to apply for 4 demerit points when a licensee is given a direction to rectify or remedy especially given the QBCC policy is to no longer issue a Request to Rectify prior to a direction to rectify being issued. The committee is of the view that the QBCC should be required to provide licensees with the opportunity to rectify within a specified timeframe before a demerit point penalty is applied.

\begin{boxed}{Recommendation 4}

The committee recommends that the Minister consider amending the bill to require the QBCC to provide licensees with the opportunity to rectify building work, within a specified timeframe, before a direction to rectify is issued and a demerit point penalty is applied.

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\subsection{Definition of defects liability period – clauses 275}

\subsubsection{Proposed amendment}

Clause 275 proposes to omit the definition of ‘contract price’ and insert definitions for ‘defects liability period’ and ‘practical completion’ in Part 4A (section 67A).

\subsubsection{Stakeholder views and department response}

Master Builders raised a concern that the way paragraph (b) of the proposed definition for ‘defects liability period’ is currently worded, it could be argued that if the contract does not provide for a definition that aligns with paragraph (a), the statutory defects liability period will apply.\footnote{295 Submission 19, pp 13-14.}

The department responded that it is not intended to create confusion with the definition of ‘defects liability period’ and that it will consider the issue raised.\footnote{296 Correspondence dated 18 September 2017, Appendix 1, p 50.}
2.6.8 Building contracts to include mandatory conditions – clause 276

2.6.8.1 Proposed amendments

Clause 276 proposes to insert new sections 67GA and 67GB into the Act. The proposed amendments create new powers to prescribe by regulation mandatory and prohibited conditions for building contracts.

Section 67GA provides that a building contractor must not enter into a building contract that does not include conditions prescribed by regulation for inclusion in that type of building contract. This section does not apply to a building contractor who enters into a building contract in their capacity as principal. The explanatory notes stated that this provision ‘aims to achieve greater consistency across the building and construction industry by prescribing certain mandatory conditions that must be included in building contacts’.297

Section 67GB provides that a building contractor must not enter into a building contract that includes a prohibited condition prescribed by regulation; and that a provision of a building contract is void if it incorporates a prohibited provision that may be reasonable construed as an attempt to enforce a prohibited condition. The explanatory notes advised that this provision ‘aims to eliminate the prevalence of unconscionable or unfair contract provisions in building contracts and seeks to improve fairness in the building and construction industry’.298

Following a question from the committee at the public briefing the department advised:

The proposed new powers to prescribe by regulation mandatory conditions and prohibited conditions will create a fairer and more accountable industry.

The types of mandatory conditions intended to be prescribed by regulation include ‘best practice’ conditions contained in relevant Australian standards for contracts and conditions which will facilitate the implementation of PBAs.

The types of prohibited conditions intended to be prescribed include certain unfair and unconscionable conditions in building contracts.

Including a power to address conditions such as these via regulation provides the government with the flexibility to prescribe the technical detail in the regulation and to respond to rapid changes in Australian contract standards for the building and construction industry.299

2.6.8.2 Stakeholder views and department response

A number of stakeholders supported the proposed provisions, including Quantum Estimating which recommended that, in addition, the ‘usual host of unconscionable contract terms must be made statutorily specific void provisions to every subcontractor tier for equity’.300

Some stakeholders expressed concern that imposing mandatory and prohibited conditions in building contracts will restrict the fundamental right of parties to make and agree to their own contractual arrangements.301 The HIA also raised a concern that creating a power to prescribe these conditions by regulation will mean they will not be subject to debate in Parliament, submitting that the proposed power ‘is objectionable and opposed’.302

297 Explanatory notes, p 61.
298 Explanatory notes, p 61.
299 Correspondence dated 11 September 2017, answer to Question taken on Notice 2.
300 Submission 3, p 13.
301 See for example, submission 19, p 14.
302 Submission 21, p 23.
DHPW advised that ‘feedback received on consultation revealed that subcontractors are often in a poorer bargaining position and are offered to enter unfair contractual on a ‘take it or leave it’ basis’:

The department considers the amendments are necessary to create a fairer and more accountable industry and placing the contract conditions in a regulation will provide flexibility for the government to respond to the dynamic nature of the building and construction industry.303

Some submissions also suggested that the drafting of these proposed new sections will mean that contracts between subcontractors will not be captured by these provisions.304 DHPW responded that in these circumstances it is intended the contracting party be caught by these provisions and the department will consider the issue raised.305

2.6.8.3 Committee consideration

The committee noted the concerns raised regarding clause 276 of the bill and is of the view that the building and construction industry should be consulted when developing the regulation.

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<th>Recommendation 5</th>
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<td>The committee recommends the Minister consult with the building and construction industry when developing the regulation that will mandate and prohibit certain conditions for building contracts and with regard to any subsequent amendments to the regulation.</td>
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2.6.9 Requirements for defect liability period and retention amounts – clause 278

2.6.9.1 Proposed amendments

Clause 278 proposes to insert new sections 67NA, 67NB and 67NC into the QBCC Act.

Proposed new section 67NA imposes a statutory defects liability period on a building contract if, under the contract, a retention amount or security is held to correct defects and the contract does not provide for a defects liability period. The explanatory notes advised:

The building contract is made subject to a condition that the retention amount or security must be released at the end of 12 months starting on the day of practical completion for the contract. This provision aims to create certainty for when a retention amount or security will be released where a contract fails to stipulate a proper timeframe, thus ensuring that contracted parties are paid what they are owed.306

Proposed new section 67NB provides that if a retention amount is withheld under a building contract, the contracting party must, unless they have a reasonable excuse release the retention amount to the contracted party in accordance with the contract. This provision has a maximum penalty of 200 penalty units or 1 year’s imprisonment. The explanatory notes clarified:

This section does not apply to a retention amount that is paid into court to satisfy a notice of claim under the Building Industry Fairness (Security of Payment) Act 2017, or is the subject of a dispute between the parties to the building contract unless, as an outcome of the dispute, the amount is to be paid to the contracted party.

It is current industry practice for some head contractors to fail to pay subcontractors the retention money they are owed at the end of the defects liability period. Consultation revealed

303 Correspondence dated 18 September 2017, p 12.
304 See for example, submission 19, p 14.
305 Correspondence dated 18 September 2017, Appendix 1, p 50.
306 Explanatory notes, p 61.
that subcontractors may be reluctant to pursue the head contractor due to the costs involved or for fear of being ‘blacklisted’ in the industry.

Section 67NB is intended to change the culture within the building and construction industry to one where it is the norm for subcontractors to be paid what they are owed. Therefore, it is critical that the penalty provide strong encouragement for contractors to comply with their payment obligations.  

Proposed section 67NC provides that where a retention amount or security is held under a building contract, a contracting party must give the contracted party a notice within 10 days prior to the end of the defects liability period stating the following:

- the date the defects liability period ends
- for a retention amount—the amount to be paid to the contracting party at the end of the defects liability period, if no amount is required to correct defects in the building work under the contract, and
- for a retention amount—the date the retention amount is to be paid to the contracting party.  

In the explanatory speech the Minister provided the following advice:

*Retentions have been a consistent frustration for subcontractors. Too often they are blind to the time frames for accessing retentions, especially for early stage trades. In order that subcontractors are aware of the end of the defects liability period, and the right to receive retention money, the bill provides that a head contractor must notify all subcontractors in the contractual chain about the start and the end of the defects liability period, the amount of retention money due to be paid and the proposed date of payment.*

2.6.9.2 **Stakeholder views and department response**

Submissions generally supported the proposed penalty for those in the industry who persistently fail to release retention monies. For example the NFIA submitted:

*We strongly support 200 penalty units and possible imprisonment for persons who fail to release retention money. This is a major factor in the culture of non-payment. It is regular practice for retention not to be released until a subcontractor has agreed to forfeit some form of money owed or bid on the next contract at a reduced rate. This provision will assist in addressing the overwhelming power imbalance between builders and subcontractors.*

While Master Builders supported the release of retentions held on all parties to a building contract, it did not support the maximum penalty of 1 year imprisonment for ‘what is actually a contractual obligation’.  

DHPW responded by stating that no change is proposed and reiterated the advice provided in the explanatory notes that it is a prevalent industry practice to not pay subcontractors the retention money they are owed at the end of the defects liability period and a high maximum penalty will provide a significant deterrent to those who do not fulfil this important obligation.
2.6.10 Extending time to rectify or remedy – clause 283

2.6.10.1 Amendments proposed in the bill

Clause 283 proposes to insert a new section 72B in the QBCC Act which would allow a person who has been given a direction to rectify or remedy the ability to apply to the commission for an extension of time to comply with the direction. The explanatory notes advised:

The provision aims to achieve a reasonable balance between the interests of building contractors and consumers. The extension of time is intended to be used where a licensee who has been issued a direction to rectify work is legitimately unable to comply with the timeframe stated in the direction.

The decision to issue an extension of time is a non-reviewable decision. This is due to the fact any additional review process has the potential to delay the QBCC’s ability to assist consumers under the Queensland Home Warranty Scheme and there is a risk of inappropriate use to achieve such an outcome.314

2.6.10.2 Stakeholder views and department response

While the HIA supported the new section it submitted that there would be no practical check on the QBCC’s exercise of their discretion as a decision to refuse to grant an extension of time is not a reviewable decision.315

The department responded by advising that the new provision aims to achieve a reasonable balance between the interest of contractors and consumers and that no change is proposed as:

Making this a reviewable decision could result in significant delays for consumers seeking to have rectification work performed. An additional review process has the potential to delay the QBCC’s ability to assist a consumer under the Queensland Home Warranty Scheme.316

2.6.11 Dictionary – schedule 2

A number of stakeholders raised issues with specific terms in schedule 2, including:

• requesting consistency with respect to the meaning of ‘business day’ for legislation governing the building and industry317, and

• querying whether references to ‘financial institution’ throughout the bill should be references to ‘recognised financial institution’ as defined Schedule 2318.

In response the department advised that terms have been defined differently in certain chapters to ensure the mechanics of the legislation function as intended, however it is not intended to create confusion with references to ‘business day’ and ‘financial institution’ throughout the bill and that the department will consider the issues raised further.319

314 Explanatory notes, p 63.
315 Submission 21, p 22.
316 Correspondence dated 18 September 2017, Appendix 1, p 51.
317 Submission 31, p 10.
318 Submission 31, p 5.
319 Correspondence dated 18 September 2017, Appendix 1, p 52.
2.6.12 Stakeholder views on other clauses in chapter 9

There were a number of other clauses in chapter 9 about which stakeholders raised technical issues and where the department provided clarification and indicated that that either no change was proposed in the bill or it would consider the issues raised. The comments provided by the department can be accessed in the departmental brief provided to the committee. The relevant clauses include:

<table>
<thead>
<tr>
<th>Clause</th>
<th>Submissions</th>
</tr>
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<tbody>
<tr>
<td>217</td>
<td>30</td>
</tr>
<tr>
<td>219</td>
<td>30</td>
</tr>
</tbody>
</table>

2.7 Technical and drafting issues

2.7.1 Committee consideration

The committee noted the advice provided by the department that it would consider a number of the issues raised by stakeholders in relation to specific clauses in the bill, including those clauses listed below:

- Clause 6 - Subcontractor, subcontractors and subcontracted work
- Clause 8 - Definitions for chapter 2
- Clause 9 - What is a PBA
- Clause 16 - Building contracts for residential construction work
- Clause 20 - Application of chapter if parties to a subcontract are related entities
- Clause 21 - Notices of related entities
- Clause 23 - Head contractor must establish PBA
- Clause 27 - All payments from principal to be deposited in PBA
- Clause 30 - Head contractor to cover shortfalls
- Clause 31 - Limited purpose for which money may be withdrawn from PBA
- Clause 32 - Order of priority
- Clause 34 - Dealing with retention amounts
- Clause 35 - When payment dispute occurs
- Clause 36 - Dealing with amounts if payment dispute occurs
- Clause 41 - Power to employ agents
- Clause 50 - Principal to be given information about subcontracts
- Clause 51 - Principal and subcontractor to be given copy of payment instruction
- Clause 54 - Right of principal to step in as trustee
- Clause 55 - Information to be given to principal as trustee

320 Correspondence dated 18 September 2017, Appendix 1, pp 32-40.
• Clause 56 - Principal as trustee
• Clause 59 - Application of Personal Properties Securities Act 2009 (Cwlth)
• Clause 61 - Application of chapter 3
• Clause 70 - Right to progress payment
• Clause 71 - Amount of progress payment
• Clause 72 - Valuation of construction work and related goods and services
• Clause 73 - Due date for payment
• Clause 75 - Making a payment claim
• Clause 76 - Responding to a payment claim
• Clause 86 - Extending time for deciding adjudication
• Clause 87 - Valuation of work etc. in later adjudication application
• Clause 102 - Services of notices
• Clause 160 - Consideration of application
• Clause 205 - Unfinished matters for existing payment claims
• Clause 217 - Insertion of new ch 2, pt 2, div 4 (Multiple contracts at same or adjacent sites)
• Clause 271 - Amendment of section 56AC – Excluded individuals and excluded companies
• Clause 275 - Amendment of section 67A (Definitions for pt 4A)
• Clause 276 - Insertion of new ss 67GA and 67BA (Building contracts conditions), and
• Schedule 2 – Dictionary.

Committee consideration
The government members of the committee were satisfied with the advice from the department that it would consider the issues raised.

The non-government members of the committee were concerned about the number of issues where the department indicated it would consider the issues raised.

Recommendation 6
The committee recommends that the Minister report to the House during the second reading speech on those issues raised by stakeholders about the bill where the department indicated it would undertake further consideration.
3 Compliance with the Legislative Standards Act 1992

3.1 Fundamental legislative principles

Section 4 of the Legislative Standards Act 1992 (LSA) states that FLPs are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

• the rights and liberties of individuals, and
• the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the bill. The committee brings the following to the attention of the House.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

3.1.1.1 Clause 276 - Building contracts to include mandatory conditions

Proposed section 67GA(1) of the QBCC Act provides that a building contractor must not enter into a building contract that does not include the conditions (mandatory conditions) prescribed by regulation for inclusion in that type of building contract. Pursuant to section 67GA(3), a building contract is subject to the mandatory conditions regardless of whether the conditions are stated in the contract or not. Section 67GA(4) provides that the mandatory conditions have effect despite any provision to the contrary in a building contract.

Potential FLP issue

Section 67GA provides for mandatory conditions in a contract to be prescribed by regulation which will restrict parties from entering into commercial contracts on terms they themselves agree on. It may be argued that in not allowing parties to freely negotiate and agree on their own contractual terms, section 67GA potentially breaches section 4(2)(a) of the LSA which provides that legislation should have sufficient regard to the rights and liberties of individuals and their ordinary activities should not be unduly restricted.

Master Builders submitted that the clause would provide an impediment to parties making their own commercial contractual arrangements:

As no detail has been provided regarding the mandatory conditions and prohibited conditions which are going to be prescribed by regulation for inclusion in building contracts, Master Builders is unable to provide a meaningful response. However, we are concerned that such conditions will restrict the fundamental right of the parties to contract as they wish to do.\(^{321}\)

The HIA also expressed concern in their submission to the committee:

More fundamentally the foreshadowed regulation of contractual terms intrudes on the freedom of parties to commercial contracts to make and agree to their own contractual arrangements.

There are, of course, already many statutory checks on the freedom of contract doctrines.

The unfair contract provisions of the Competition and Consumer Act already apply to most subcontracts.

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\(^{321}\) Submission 19, p 14.
The QBCC Act also already directly voids certain terms and conditions. HIA is unaware of any issues with the current legislation in this regard.\textsuperscript{322}

The explanatory notes have acknowledged the potential FLP and provide the following justification:

\begin{quote}
Certain clauses of the Bill could also be considered as overriding the provisions of contracts between parties, such as clause 276 which provides that particular conditions in building contracts are void. These provisions are justified to correct an imbalance that can occur in subcontracts that provide unfair conditions on subcontractors.\textsuperscript{323}

This provision aims to eliminate the prevalence of unconscionable or unfair contract provisions in building contracts and seeks to improve fairness in the building and construction industry.\textsuperscript{324}
\end{quote}

Committee consideration

The committee noted that the mandatory contractual terms a building contractor must enter into are to be prescribed by regulation and has made a recommendation in relation to consultation on the proposed regulation.

3.1.1.2 Clause 283 – Extending time to rectify or remedy

Proposed section 72B(1) of the QBCC Act provides that a person given a direction to rectify or remedy may apply to the commission for an extension of the period for compliance. Pursuant to section 72B(2) an application must be made before the end of the period stated in the direction and also state the reasons the extension is needed.

Proposed section 72B(3) provides that the QBCC must decide whether or not to grant the extension, and inform the applicant of the decision, within 10 business days after receiving the application. Pursuant to section 72B(7), the QBCC must give the applicant written notice of the refusal, if the QBCC refuses to grant the extension. Section 72B(8) provides that should the QBCC fail to comply with subsection (3), the QBCC is taken to have decided to refuse the application.

The explanatory notes advised the following in relation to the new section:

\begin{quote}
The provision aims to achieve a reasonable balance between the interests of building contractors and consumers. The extension of time is intended to be used where a licensee who has been issued a direction to rectify work is legitimately unable to comply with the timeframe stated in the direction.

The decision to issue an extension of time is a non-reviewable decision. This is due to the fact any additional review process has the potential to delay the QBCC’s ability to assist consumers under the Queensland Home Warranty Scheme and there is a risk of inappropriate use to achieve such an outcome.\textsuperscript{325}
\end{quote}

Potential FLP issue

There is no provision within section 72B to review a decision by the QBCC should it not grant an extension. Further, section 72B(8) provides that the failure by the commission to make a decision will be taken as a decision to refuse an application. This potentially means that a decision with respect to an application may be made as a result of inaction by the QBCC.

\textsuperscript{322} Submission 21, p 23.
\textsuperscript{323} Explanatory notes, p 6.
\textsuperscript{324} Explanatory notes, p 61.
\textsuperscript{325} Explanatory notes, p 63.
It may be argued that pursuant to the principles of natural justice a party should have their application properly considered and their matter progressed and determined within the appropriate timeframe. Allowing for a decision to be confirmed because of the QBCC’s failure to determine an application may be considered unjust and a breach of section 4(3)(b) LSA which provides that a bill should be consistent with the principles of natural justice, particularly in circumstances where the decision is non-reviewable.

The explanatory notes acknowledged the potential FLP and provide the following justification:

The provision under clause 283 regarding an extension of time for a direction to rectify is a non-reviewable decision. This is considered to be justified on the basis of the need for consumers to have defective work remedied in the shortest amount of time. This is because there could potentially be safety concerns or a severe impost on the consumer (for example, not being able to occupy a building through no fault of their own).  

Committee consideration

The committee noted that the QBCC’s decision in relation to section 72B is non-reviewable and it may be argued that the failure of the QBCC to make a decision and thereby refuse a person’s application potentially does not provide an applicant with sufficient procedural fairness. However, the committee noted the justification provided in the explanatory notes in that the section seeks to benefit consumers by having work remedied as soon as possible.

3.1.1.3 Clause 23 – Head contractor must establish PBA

Clause 23(1) provides that the head contractor must establish a PBA within 20 business days after entering into the first subcontract for the building contract by opening trust accounts at the office or a branch of a financial institution within the state. These include a general trust account, a retention account and a disputed funds account. A failure to establish a trust account will result in a maximum penalty of 500 penalty units.

Clause 23(4) provides that the section does not apply to a head contractor if the contractor can prove that there is less than 90 days between the day a PBA is required for the contract; and the day of practical completion for the contract.

Potential FLP issues

Clause 23 places the onus on the head contractor to establish a PBA unless they can prove there is less than 90 days between when the PBA is required and the day of completion. This may be considered a reversal of the onus of proof and a potential breach of section 4(3)(d) of the LSA which provides that legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence. For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and where the defendant would be particularly well positioned to disprove guilt.

The explanatory notes commented on the clause as follows:

The clause provides for significant penalties of 500 penalty units for noncompliance. The building and construction industry has a culture of late or non-payment and it is important that head contractors meet their obligations establish PBAs and so meet their obligations to pay. The requirements in this clause underpin the whole PBA regime and it is critical the levels of the offences reflect the seriousness of the requirement.

326 Explanatory notes, p 6.
327 OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 36.
328 Explanatory notes, p 15.
3.1.1.4 Use of the defence of ‘reasonable excuse’

The bill contains several clauses that allow for a defence of ‘reasonable excuse’. These include:

- clause 27(2)(b) in clause 27 – All payments from principal to be deposited in PBA
- clause 76(1) in clause 76 – Responding to payment claim
- clause 81(1) in clause 81 – Appointment of adjudicator
- clause 120(4) in clause 120 – Damages payable for failure to give information
- clause 264, section 42E(2) – Avoidance of contractual obligations causing significant financial loss
- clause 278, section 67NB(2) – Failure to pay retention amount, and
- clause 293, section 104H – Return of identity card.

The explanatory notes acknowledged the potential FLP and provide the following justification:

*In these cases, the provisions are considered justified because they provide clear grounds for liability but also provide for specific exceptions. It is therefore reasonable that the person seeking an exception from the requirement should bear the onus of proof. For example, section 76 of the Justices Act 1886 outlines that it is considered appropriate in such cases that the onus of proving the exception on the balance of probabilities lies with the person seeking to rely on the exception.*¹²²⁹

Committee consideration

The committee noted that while some submitters have expressed concern in relation to the use of reasonable excuse as a defence in the bill, in particular in relation to clause 76(1), the use of reasonable excuse as a defence is commonly found in Queensland legislation in circumstances where the matter is within the knowledge of the defendant only, and they are therefore best placed to rebut the allegation.³³⁰

3.1.2 Institution of Parliament

Section 4(2)(b) of the LSA requires legislation to have sufficient regard to the institution of Parliament.

3.1.2.1 Delegation of legislative power

The bill contains several clauses that allow for certain matters to be prescribed by regulation, including:

- clause 8 - the definition of ‘building work’ can include work prescribed by regulation. A ‘state authority’ also does not include an entity prescribed by regulation
- clause 14 - a building contract may, by regulation, be declared a PBA contract if the principal for the contract is the State or a State authority
- clause 16 - that the definition of ‘residential construction work’ can include other building work prescribed by regulation
- clause 28 - a head contractor may only deposit money into a PBA for particular purposes or as prescribed by regulation
- clause 31 - a head contractor may only withdraw money from the PBA for particular purposes or as prescribed by regulation
- clause 32 - where there are insufficient funds in the PBA, the head contractor is prohibited from paying itself or making another payment as prescribed by regulation
- clause 36 - in dealing with amounts payable if a dispute occurs a head contractor must ensure that the amount transferred under subsection (2) is not paid to any person other than the subcontractor beneficiary or to another person in the circumstances prescribed by regulation
- clause 50 - the head contractor must, within 5 business days after establishing the project bank account, give the principal the information prescribed by regulation. The maximum penalty for breaching this provision is 200 penalty units
- clause 51 - applies if a head contractor gives a financial institution an instruction about a payment from a trust account for a project bank account. Clause 50(3) provides that the copy of the instruction need only include the information prescribed by regulation
- clause 54 - provides the circumstances in which the section applies if a PBA is established for a building contract. Pursuant to clause 54(d) the section also applies to another circumstance prescribed by regulation
- clause 65 - the definition of ‘Construction work’ can include any other work of a kind prescribed by regulation
- clause 66 - provides that the meaning of related goods and services can include ‘of a kind prescribed by regulation’
- clause 68 - apart from the matters listed, a payment claim for a progress payment, is a written document that includes other information prescribed by regulation
- clauses 79 and 82 - a regulation may limit the number and length of submissions that may accompany an adjudication application or an adjudication response
- clause 122 - a notice of claim must be in the approved form and include other information as prescribed by regulation
- clause 161 - an adjudicator must achieve an adjudication competency standard as prescribed by regulation from a body also prescribed by regulation
- clause 165 - requires adjudicators to comply with the continuing professional development requirements prescribed by regulation as a condition of registration
- clause 258 amends the QBCC Act to require licensees to comply with minimum financial requirements prescribed by regulation, and
- clause 276 inserts new sections 67GA and 67GB into the QBCC Act - section 67GA provides that a building contractor must not enter into a building contract that does not include the conditions (mandatory conditions) prescribed by regulation for inclusion in that type of building contract and pursuant to section 67GB a building contractor must not enter into a building contract that includes a prohibited condition prescribed by regulation.
Potential FLP issues

The aforementioned clauses defer a wide variety of powers to a regulation in order to prescribe potentially significant matters. It may be argued that given the importance of these matters they should be set out in the primary act and not a regulation. As such these clauses potentially breach section 4(4)(a) of the LSA which requires that a bill allow the delegation of legislative power only in appropriate cases and to appropriate persons and also section 4(5)(c) of the LSA which provides that subordinate legislation should contain only matters appropriate to that level of legislation.

It may also be argued that these clauses breach section 4(4)(c) of the LSA which provides that legislation should allow or authorise the amendment of an Act only by another Act. A clause in an Act, which enables the Act to be expressly or impliedly amended by subordinate legislation or executive action is defined as a Henry VIII clause.

In relation to clause 276, the explanatory notes provided the following justification of the clause:

The type of mandatory conditions that are intended to be imposed include ‘best practice’ conditions contained in relevant Australian Standards for contracts. However, these standards are subject to regular review. Placing the conditions in a regulation will provide greater flexibility for the government to amend conditions following such reviews. Further, it is expected that the suite of security of payment reforms, including PBAs, will necessitate changes to standard industry contracts and the way that industry does business generally. The department will be monitoring these changes and again, the regulation-making power will allow the government to respond to these changes in industry practice.\textsuperscript{331}

The HIA submitted that the justification provided was insufficient:

This power is objectionable and opposed.

Firstly, there is no detail in the legislation on what these regulations might practically include. The Explanatory Notes only makes passing reference to “best practice’ from Australian Standard contracts, which are subject to “regular review”.

Secondly, the justification for the inclusion of this power is to enable the “government to respond to the dynamic nature of the building and construction industry”.

HIA submits that this is not a sufficient explanation or reason to include a Henry the VIII clause of this nature which would mean that any mandatory terms or prohibited terms would not be subject to debate within Parliament.\textsuperscript{332}

In relation to the use of regulations throughout the bill, the explanatory notes acknowledged the potential FLP and addressed the issue as follows:

While a regulation made under these provisions could potentially affect some aspects of the operation of the Act, they are limited to strict circumstances and many are administrative in nature. Some flexibility for the government to be able to consider these matters in an expedient manner is considered appropriate due to the need to respond to changing practices.

It is also considered that, due to the limited aspects that could be covered by a regulation made under these provisions, there is little scope for a regulation to be made that would be considered to be outside the scope of the power in the authorising law. It would need to be consistent with the policy objectives and purpose of the authorising law.\textsuperscript{333}

\textsuperscript{331} Explanatory notes, p 7.
\textsuperscript{332} Submission 21, p 23.
\textsuperscript{333} Explanatory notes, p 7-8.
Committee consideration

The committee noted the use of regulations throughout the bill for certain matters and also noted the concerns raised by stakeholders in relation to clause 276 and the justification provided in that the use of regulation is designed to provide flexibility in relation to ever changing standards for contracts.

The committee is aware that all such regulations will come before it for consideration and be subject to disallowance.

**Recommendation 7**

The committee recommends that the Minister in his second reading speech provide examples of any proposed regulations that he intends to make should the bill be passed.

### 3.2 Proposed new and amended offence provisions

<table>
<thead>
<tr>
<th>Clause</th>
<th>Offence</th>
<th>Proposed maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>21</strong></td>
<td>Notices about related entities</td>
<td></td>
</tr>
<tr>
<td>(1)</td>
<td>This section applies if a project bank account is established for a building contract.</td>
<td></td>
</tr>
<tr>
<td>(2)</td>
<td>If the principal knows that a subcontractor beneficiary is a related entity for the head contractor, the principal must advise the commissioner of the matter in the approved form within 5 business days after the person first knows the subcontractor beneficiary is a related entity for the head contractor.</td>
<td>50 penalty units</td>
</tr>
<tr>
<td>(3)</td>
<td>For subsection (2), the principal is taken to know a subcontractor beneficiary is a related entity for the head contractor if the principal ought reasonably to know.</td>
<td></td>
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<tr>
<td><strong>21</strong></td>
<td></td>
<td>200 penalty units</td>
</tr>
<tr>
<td>(4)</td>
<td>If the head contractor enters into a subcontract with a related entity, the head contractor must advise the commissioner and the principal, in the approved form, within 5 business days after entering into the subcontract.</td>
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</tr>
<tr>
<td><strong>23</strong></td>
<td>Head contractor must establish project bank account</td>
<td>500 penalty units</td>
</tr>
<tr>
<td>(1)</td>
<td>The head contractor must, within 20 business days after entering into the first subcontract for the building contract, establish a project bank account by opening all of the following trust accounts at the office or a branch of a financial institution within the State—</td>
<td></td>
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<tr>
<td></td>
<td>(a) an account <em>(general trust account)</em> for deposit of amounts relating to the project bank account and withdrawal of amounts payable to a beneficiary;</td>
<td></td>
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<tr>
<td></td>
<td>(b) an account <em>(retention account)</em> for amounts held as a retention amount;</td>
<td></td>
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<tr>
<td></td>
<td>(c) an account <em>(disputed funds account)</em> for amounts the subject of a payment dispute.</td>
<td></td>
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<tr>
<td>(2)</td>
<td>However, subsection (3) applies if the head contractor has already entered into a subcontract for the building contract before the day <em>(the start date)</em> a project bank account is required for the contract. Note— Under section 15 a project bank account may be required for a building contract after an amendment of the contract.</td>
<td></td>
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<tr>
<td><strong>23</strong></td>
<td>The head contractor must establish the project bank account within 10 business days after the start date.</td>
<td>500 penalty units</td>
</tr>
</tbody>
</table>
(4) This section does not apply to a head contractor if the contractor can prove that there is less than 90 days between—
(a) the day a project bank account is required for the contract; and
(b) the day of practical completion for the contract.

25 **Name of trust account**
If opening an account at a financial institution in relation to a project bank account, the head contractor must ensure the account’s name includes the words ‘trust account’.

200 penalty units

26 **Notice of trust account’s opening, closing or name change**
(1) This section applies if the head contractor takes any of the following actions in relation to the project bank account—
(a) opens a trust account;
(b) changes the name of a trust account;
(c) closes a trust account.
(2) The head contractor must give the principal written notice of taking the action within 10 business days after taking it.
(3) The written notice must state the following—
(a) the name of the project bank account;
(b) the name of the trust account;
(c) the name of the financial institution where the trust account is or was kept;
(d) the identifying number of the financial institution;
Note—The identifying number is commonly referred to as the bank state branch number (BSB).
(e) the trust account number.

200 penalty units

27 **All payments from principal to be deposited in project bank account**
(1) Subsection (2) applies if the principal pays an amount—
(a) to the head contractor under the building contract; or
(b) that otherwise reduces the unpaid amount of the contract price for the building contract.
(2) The principal must deposit the amount into the general trust account for the project bank account unless—
(a) the amount was due to be paid before the project bank account was established; or
(b) the principal has a reasonable excuse.
(3) An amount deposited under subsection (2) is taken to be a payment made by the principal to the head contractor and discharges the principal’s liability to pay that amount to the head contractor under the building contract.

200 penalty units

27 (4) If an amount is paid to the head contractor or its agent in contravention of subsection (2), the head contractor must deposit the amount into the general trust account as soon as practicable after receiving the amount.

200 penalty units or 2 years imprisonment.

28 **Limited purposes for which money may be deposited into project bank account**
The head contractor must not cause an amount to be deposited into a trust account for any purpose other than—
(a) paying the head contractor an amount the head contractor is entitled to be paid under the building contract; or

200 penalty units or 1 year’s imprisonment.
(b) paying a subcontractor beneficiary an amount that the beneficiary is entitled to be paid under a subcontract for the building contract; or
(c) paying an amount the subject of a payment dispute; or
(d) making another payment prescribed by regulation.

<table>
<thead>
<tr>
<th>29</th>
<th>All payments to subcontractor beneficiaries to be paid from project bank account</th>
</tr>
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<tbody>
<tr>
<td>(1) This section applies if a subcontractor beneficiary is entitled to be paid an amount under its subcontract.</td>
<td></td>
</tr>
<tr>
<td>(2) The head contractor may only pay the amount to the subcontractor beneficiary from a trust account.</td>
<td></td>
</tr>
</tbody>
</table>
| (3) To remove any doubt, it is declared that the obligation under subsection (2) applies whether or not the amount to be paid is held in a trust account when the amount is due.  
Note—See section 30 about head contractors covering shortfalls. |

<table>
<thead>
<tr>
<th>30</th>
<th>Head contractor to cover shortfalls</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) This section applies if the head contractor knows there will be an insufficient amount available in a trust account to pay an amount to a subcontractor beneficiary.</td>
<td></td>
</tr>
<tr>
<td>(2) The head contractor must immediately deposit into the trust account an amount equal to the shortfall.</td>
<td></td>
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<tr>
<td>(3) In this section— <strong>shortfall</strong> means an amount equal to the difference between the amount available in a trust account and the amount to be paid from the trust account.</td>
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</tbody>
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<table>
<thead>
<tr>
<th>31</th>
<th>Limited purposes for which money may be withdrawn from project bank account</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) The head contractor must not withdraw an amount from a trust account for any purpose other than—</td>
<td></td>
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<tr>
<td>(a) paying a subcontractor beneficiary an amount that the head contractor is liable to pay the subcontractor under a subcontract for the building contract; or</td>
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<tr>
<td>(b) paying to the head contractor an amount that the principal is liable to pay the head contractor for contracted building work but only to the extent the head contractor is not also liable to pay a subcontractor beneficiary for the same work; or</td>
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<tr>
<td>(c) returning an amount paid in error by the principal; or</td>
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<tr>
<td>(d) making another payment prescribed by regulation.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>31</th>
<th>Order of priority</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) The head contractor must repay to the trust account all amounts that the head contractor withdraws in contravention of subsection (1) as soon as practicable after withdrawing the amount.</td>
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</tr>
<tr>
<td>(3) The head contractor is taken to have made a withdrawal if the head contractor authorises any person to make the withdrawal or knowingly contributes to the withdrawal being made.</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>32</th>
<th>Order of priority</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) This section applies if there is an insufficient amount available in a trust account to pay any of the following amounts in full—</td>
<td></td>
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<tr>
<td>(a) an amount (the <strong>subcontractor's amount</strong>) a subcontractor beneficiary is entitled to be paid under its subcontract;</td>
<td></td>
</tr>
<tr>
<td>(b) an amount the head contractor is entitled to be paid under the building contract;</td>
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</tr>
<tr>
<td>(c) making another payment (a <strong>prescribed payment</strong>) prescribed by regulation.</td>
<td></td>
</tr>
</tbody>
</table>
(2) The head contractor must not withdraw an amount from the trust account to pay itself or make a prescribed payment until the subcontractor’s amount is paid in full to the subcontractor beneficiary.

(3) However, the head contractor may withdraw an amount before the subcontractor’s amount is paid in full if the withdrawal is to make a payment ordered by a court or for an adjudication under this Act.

### Insufficient amounts available for payments

(1) This section applies if—
   (a) there are 2 or more subcontractor beneficiaries (each a claimant) due to be paid an amount from a trust account at the same time; and
   (b) the amount held in the trust account is insufficient to satisfy in full all of the amounts due to be paid to the subcontractor beneficiaries.

(2) The amount to be paid to each subcontractor beneficiary is to be reduced in proportion to the amounts due to be paid to each. 
   
   Example—
   If one subcontractor beneficiary is due to be paid $50,000 and another subcontractor beneficiary is due to be paid $30,000 but only $40,000 is available, the beneficiaries are to be paid $25,000 and $15,000 respectively.

(3) While there continues to be insufficient amounts held in the trust account, the head contractor must not pay a claimant unless the amount paid complies with subsection (2).

(4) Nothing in subsection (2) relieves the head contractor of its liability to pay in full each claimant the amounts they are due to be paid.

### Dealing with retention amounts

(1) The head contractor must ensure that if an amount held in trust under a project bank account is a retention amount, the amount is held in the retention account for the project bank account.

(2) The head contractor must not withdraw an amount held in the retention account unless the withdrawal is to make any of the following payments in accordance with the building contract—
   (a) payment to a subcontractor beneficiary of an amount withheld under the beneficiary’s subcontract;
   (b) payment to the head contractor of an amount to correct defects in the building work, or otherwise to secure, wholly or partly, the performance of a subcontract by a subcontractor beneficiary;
   (c) a payment ordered by a court.

(3) The head contractor must ensure an amount held in the retention account is identifiable as being held for the subcontractor beneficiary that is entitled to be paid the amount.

### Dealing with amounts if payment dispute occurs

(1) This section applies if the head contractor is to pay an amount (the instructed amount) from a trust account to a subcontractor beneficiary in relation to a progress payment and a payment dispute occurs.

(2) The head contractor must, as soon as it becomes aware of the payment dispute, transfer an amount to the disputed funds account that is equal to the difference between—
(a) the amount the head contractor proposed to pay under the payment schedule; and
(b) the instructed amount.

36  (3) The head contractor must ensure that the amount transferred under subsection (2) is not paid to any person other than the subcontractor beneficiary or to another person in the circumstances prescribed by regulation.  

36  (4) However, if an amount held in the disputed funds account is no longer needed for the purpose it is held, the head contractor must return the amount to the general trust account within 5 business days after the contractor becomes aware it is no longer needed for that purpose.

38 **Unauthorised ending of project bank account**

(1) While a project bank account is required for a building contract, the head contractor must not dissolve the project bank account.

(2) The head contractor is taken to dissolve a project bank account if it—
   (a) withdraws all amounts held in trust under the project bank account; or
   (b) closes any of the trust accounts.

40 **No power of head contractor to invest**

(1) The head contractor must not invest funds held in a trust account for the project bank account in any form of investment.

(2) Subsection (1) does not apply to interest on an amount held in the trust account paid by the financial institution at which the account is held.

45 **Account to be kept by head contractor**

(1) A head contractor must keep written records of all transactions involving amounts held in a trust for a project bank account that will—
   (a) sufficiently explain the transactions; and
   (b) provide a true position in relation to the outcome of the transactions; and
   (c) enable accurate accounts to be prepared from time to time; and
   (d) enable convenient and proper audit of the transactions.

(2) Any words used in the records to explain a transaction must be in the English language.

45  (3) The head contractor must retain a copy of the records for a period of not less than 7 years.

49 **Notice of project bank account before entering subcontracts**

(1) This section applies if a project bank account is required for a building contract under section 13.

(2) Before entering into a subcontract for the building contract, the head contractor must give the subcontractor the following information using the approved form—
   (a) that a project bank account will be used for making payments to the subcontractor;
   (b) details of the financial institution at which the trust accounts for the project bank account are to be held.
(3) However, if the head contractor entered into a subcontract for the building contract before the day (the *start date*) a project bank account is required for the contract, the head contractor must give the subcontractor the information within 10 business days after the start date.

*Note*—Under section 15 a project bank account may be required for a building contract only after an amendment of the contract.

### 50 Principal to be given information about subcontracts

1. This section applies if a project bank account is required to be established for a building contract under section 13.

2. The head contractor must, within 5 business days after establishing the project bank account, give the principal the information prescribed by regulation.

3. The head contractor must, within 5 business days after a change in information given to the principal under subsection (2), advise the principal of the change using the approved form.

*Note*—A change would include the addition of a subcontractor beneficiary.

4. A notice given under this section must be given in the approved form.

### 51 Principal and subcontractor to be given copy of payment instruction

1. This section applies if a head contractor gives a financial institution an instruction about a payment from a trust account for a project bank account.

2. The head contractor must, as soon as practicable after giving the instruction, give a copy of the instruction to—
   a. the principal; and
   b. if the payment is to a subcontractor beneficiary—the subcontractor beneficiary.

3. However, the copy of the instruction need only include the information prescribed by regulation.

4. In giving a copy of the instruction under subsection (2), the head contractor must not give the principal or subcontractor beneficiary information the contractor knows is false or misleading in a material particular.

### 52 Principal to inform commissioner of discrepancies

1. This section applies if a head contractor gives a principal a copy of a payment instruction under section 51.

2. The principal must inform the commissioner of any discrepancies in the payment instruction as soon as practicable after becoming aware of the discrepancies.

3. In this section—
   *discrepancies*, for a payment instruction, means—
   a. an error in the account number for a subcontractor beneficiary; or
   b. payment to an entity, other than the head contractor, that is not an subcontractor beneficiary; or
   c. payment to a subcontractor beneficiary if the name of the beneficiary and the account name do not match.

### 55 Information to be given to principal as trustee

1. This section applies if the principal for a project bank account is appointed as trustee for the project bank account under section 54.
(2) The head contractor must, as soon as practicable, give the principal the information the principal will require to act as trustee of the project bank account, including, for example, the following information—
   (a) details of the relevant financial institution;
   (b) sufficient information to enable the principal to contact each subcontractor beneficiary;
   (c) the details of a bank account into which each subcontractor beneficiary is to be paid amounts from the project bank account.

55 (3) The head contractor must, as soon as practicable, inform the relevant financial institution that the principal will act as the trustee of the project bank account.

(4) In this section—
   *relevant financial institution*, for a project bank account, means the financial institution at which the trust accounts for the project bank account are held.
   *head contractor* includes an insolvency official for the head contractor.

50 penalty units

76 Responding to payment claim
(1) If given a payment claim, a respondent must respond to the payment claim by giving the claimant a payment schedule (whether or not the respondent intends to pay the amount stated in the claim), unless the respondent has a reasonable excuse.

100 penalty units

88 Adjudicator’s decision
(4) The adjudicator’s decision must—
   (a) be in writing; and
   (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.

(5) The adjudicator must give a copy of the decision to the registrar at the same time the adjudicator gives a copy of the decision to the claimant and respondent.

40 penalty units

90 Respondent required to pay adjudicated amount
If an adjudicator decides that a respondent is required to pay an adjudicated amount, the respondent must pay the amount to the claimant on or before—
   (a) the day that is 5 business days after the day on which a copy of the adjudicator’s decision is given to the respondent by the adjudicator; or
   (b) if the adjudicator decides a later date for payment under section 88(1)(b)—the later date.

*Note*—A failure to pay an adjudicated amount on or before the due date is also a ground for taking disciplinary action under the *Queensland Building and Construction Commission Act 1991*.

200 penalty units

119 Request for information about building contract or security
(1) If requested in writing by a subcontractor, the contractor must give the subcontractor the following information within 10 business days after the request is made—
   (a) the name of the person who engaged the contractor under the contract;
   (b) the address of—
       (i) the person’s place of business; or

20 penalty units
119  (ii) if the person does not have a place of business—the person’s place of residence;  
(c) the information about the contract that would enable the subcontractor to give a notice of claim to a person under section 122;  
(d) advice as to whether there are any securities in existence for the contract;  
(e) if known to the contractor, the name and address of the holder of each security mentioned in paragraph (d).  
(2) Subsection (3) applies if, in response to a request under subsection (1), the contractor tells the subcontractor of the existence of a security but does not give the name and address of the holder of the security.

<table>
<thead>
<tr>
<th>119</th>
<th>If requested in writing by the subcontractor, the person who engaged the contractor under the contract must give the subcontractor the name and address of the holder of the security within 10 business days after the request is made.</th>
</tr>
</thead>
</table>
| 128 | Contractor given copy of notice of claim must respond [s11]  
(1) This section applies if a subcontractor gives a contractor a copy of a notice of claim.  
(2) The contractor must give both of the following persons a written response to the claim within 5 business days after the contractor is given the copy of the notice of claim—  
(a) the person given the notice of claim;  
(b) the subcontractor. |
| 182 | Adjudicator must comply with registration conditions  
(1) An adjudicator must not contravene a condition of the registration.  
(2) The penalty under subsection (1) may be imposed whether or not the registration is suspended or cancelled because of the contravention. |
| 185 | Adjudicator must give information to registrar  
(1) An adjudicator must inform the registrar, in writing, of any of the following matters within 10 business days after it happens—  
(a) the adjudicator changes address of his or her place of business or residence;  
(b) the adjudicator is convicted of a relevant offence;  
(c) the adjudicator’s registration with a professional association is cancelled because of disciplinary action. |
| 187 | False or misleading statements  
A person must not, for an application made under this part, state anything to the registrar the person knows is false or misleading in a material particular. |
| 188 | False or misleading documents  
(1) A person must not, for an application made under this part, give a document to the registrar that includes information the person knows is false or misleading in a material particular. |
(2) Subsection (1) does not apply to a person if the person, when giving the document—
   (a) tells the registrar, to the best of the person’s ability, how it is false or misleading; and
   (b) if the person has, or can reasonably obtain, the correct information—gives the correct information to the registrar.

260 Amendment of **Queensland Building and Construction Commission Act 1991**

**Amendment of s42 Unlawful carrying out of building work**
(1) Unless exempt under schedule 1A, a person must not carry out, or undertake to carry out, building work unless the person holds a contractor’s licence of the appropriate class under this Act.
(2) An individual who contravenes subsection (1) and is liable to a maximum penalty of 350 penalty units or 1 year’s imprisonment, commits a crime.

261 Amendment of **s42B Carrying out building work without a nominee**
(1) Section 42B(1), penalty—
   *omit, insert—*
(2) Section 42B—
   *insert—*
   (3) An individual who contravenes subsection (1) and is liable to a maximum penalty of 350 penalty units, commits a crime.

262 Amendment of **s42C Unlawful carrying out of fire protection work**
(1) Section 42C(1), penalty—
   *omit, insert—*
(2) Section 42C—
   *insert—*
   (4) An individual who contravenes subsection (1) and is liable to a maximum penalty of 350 penalty units or 1 year’s imprisonment, commits a crime.

263 Amendment of **s42D Licensed contractor must not engage or direct unauthorised person for fire protection work**
(1) Section 42D, penalty—
   *omit, insert—*
(2) Section 42D—
   *insert—*
   (2) An individual who contravenes subsection (1) and is liable to a maximum penalty of 350 penalty units or 1 year’s imprisonment, commits a crime.

264 Insertion of new **s42E Avoidance of contractual obligations causing significant financial loss**
(1) This section applies to a person who is a party to a building contract.
(2) The person must not, without reasonable excuse, cause another party to the building contract to suffer a significant financial loss

350 penalty units
because the person deliberately avoids complying with, or fails to comply with, the contract.

### 276 Insertion of new s67GA Building contracts to include mandatory conditions

| (1) A building contractor must not enter into a building contract that does not include the conditions *(mandatory conditions)* prescribed by regulation for inclusion in that type of building contract. |
| (2) Subsection (1) does not apply to a building contractor who enters into a building contract as a principal or a subcontractor. |

#### 276 Insertion of new s67GB Particular conditions void in building contracts

| (1) A building contractor must not enter into a building contract that includes a prohibited condition *(prohibited conditions)* prescribed by regulation. |
| (2) Subsection (1) does not apply to a building contractor who enters into a building contract as a principal or a subcontractor. |

### 278 Insertion of new s67NB Failure to pay retention amount

| (1) This section applies if a retention amount is withheld under a building contract. |
| (2) The contracting party must, unless the party has a reasonable excuse, release the retention amount to the contracted party in accordance with the building contract, including, for example, releasing the retention amount on or before the day the amount is due to be paid under the contract. |
| (3) Subsection (2) does not apply to that part of a retention amount that is— |
| (a) paid into court to satisfy a notice of claim under the *Building Industry Fairness (Security of Payment) Act 2017*; or |
| (b) the subject of a dispute between the parties to the building contract unless, as an outcome of the dispute, the amount is to be paid to the contracted party. |

#### 278 Insertion of new s67NC Notice about end of defects liability period

| (1) This section applies if either of the following apply for a building contract— |
| (a) a retention amount is withheld; |
| (b) a security is held after practical completion in relation to the need to correct defects in the building work under the contract. |
| (2) Within 10 business days before the end of the defects liability period, the contracting party must give the contracted party a notice *(the relevant notice)*, in the approved form, stating the following— |
| (a) the date that the defects liability period ends; |
| (b) for a retention amount— |
| (i) the amount to be paid to the contracting party at the end of the defects liability period, if no amount is required to correct defects in the building work under the contract; and |
| (ii) the date the retention amount is proposed to be paid to the contracting party. |

#### 278 (3) However, subsection (4) applies if— |
| (a) the defects liability period relates to a subcontract; and |

#### 278

| (4) The notice must state the following— |
| (a) the date that the defects liability period ends; |
| (b) the amount to be paid to the contracting party at the end of the defects liability period, if no amount is required to correct defects in the building work under the contract; and |
| (c) the date the retention amount is proposed to be paid to the contracting party. |
(b) the defects liability period is linked to the defects liability period (the other period) for another building contract; and
(c) the contracting party for the subcontract is only given a relevant notice for the other period after a day that would enable the party to comply with subsection (2).

(4) Within 5 business days after being given a relevant notice for the other period, the contracting party must give the contracted party for the subcontract a relevant notice for the defects liability period for the subcontract.

(5) This section does not apply to a contracting party who enters into a building contract as a principal.

293 Replacement of s104H Return of identity card
If the office of a person as an investigator ends, the person must return the person’s identity card to the commission with 21 days after the office ends unless the person has a reasonable excuse. 10 penalty units

297 Insertion of s107B Impersonating investigator
A person must not impersonate an investigator. 40 penalty units

3.3 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Committee consideration

The committee noted that explanatory notes were tabled with the introduction of the bill and the notes are fairly detailed and contain the information required by part 4 and a reasonable level of background information and commentary to facilitate understanding of the bill’s aims and origins.
Appendix A – List of witnesses at public departmental briefing

Department of Housing and Public Works
- Liza Carroll, Director-General
- Don Rivers, Assistant Director-General, Building Industry and Policy
- Logan Timms, Executive Director, Building Industry and Policy
- Danielle Cooper, Acting Director, Strategic Policy (Building), Building Industry and Policy

Queensland Building and Construction Commission
- Brett Bassett, Commissioner
Appendix B – List of witnesses at public hearing

Master Builders Queensland
• Grant Galvin, CEO
• Paul Bidwell, Deputy CEO
• Tracey Wood, Manager of Contracts

Hutchinson Builders
• Greg Quinn, Managing Director
• Owen Valmadre, Finance Director

Housing Industry Association
• Michael Robert, Acting Executive Director – Queensland
• Warwick Temby, Acting Chief Economist
• David Humphrey, Senior Executive Director – Business, Compliance and Contracting

G & G Quality Homes
• Joanne Gottardo - Owner

Adjudicate Today
• Robert Sundercome, President – The Adjudication Forum
• Scott Pettersson

Holding Redlich
• Troy Lewis, Partner, Brisbane, Construction and Infrastructure

Queensland Law Society
• Christopher Coyne, Vice President
• Ross Williams, Chair of the QLS Construction and Infrastructure Law Committee
• Karyn Reardon, Member of the QLS Alternative Dispute Resolution Committee

Subcontractors Alliance
• Les Williams
• Juanita Gibson

Aitchison Reid Building and Construction Lawyers
• Fiona Reid, Director

Master Plumbers’ Association of Queensland
• Penny Cornah, Executive Director

National Fire Industry Association Australia
• Wayne Smith, CEO

Air Conditioning and Mechanical Contractors Association
• Graham MacKrill, Executive Director
Master Electricians Australia
- Malcolm Richards, CEO
- Gary Veenstra, State Manager

Queensland Council of Unions
- John Martin

Electrical Trades Union
- Keith McKenzie, Assistant Secretary

Department of Housing and Public Works
- Don Rivers, Assistant Director-General, Building Industry and Policy
- Logan Timms, Executive Director, Building Industry and Policy
- Catherine McCahon, Acting Director, Strategic Policy (Building), Building Industry and Policy

Queensland Building and Construction Commission
- Brett Bassett, Commissioner
### Appendix C – List of submissions

<table>
<thead>
<tr>
<th>Sub #</th>
<th>Submitter</th>
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<tbody>
<tr>
<td>001</td>
<td>Brisbane City Council</td>
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<td>002</td>
<td>Nicad Developments</td>
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<td>003</td>
<td>Quantum Estimating</td>
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<td>004</td>
<td>Contract Administration Group</td>
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<td>Landscape Queensland Industries Association Inc.</td>
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<td>012</td>
<td>Susan Leech</td>
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<td>013</td>
<td>Concept to Completion [C2C]</td>
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<td>McKays (Solicitors)</td>
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<td>015</td>
<td>Master Concreteers Australia</td>
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<td>016</td>
<td>Urban Development Institute of Australia, Queensland</td>
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<td>033</td>
<td>Helen Durham</td>
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Statement of Reservation
Building Industry Fairness (Security of Payment) Bill 2017

Statement of Reservation

LNP Members of the Public Works and Utilities Committee have listened to and reviewed the substantial volume of submissions from peak industry bodies in the Queensland building and construction industry, as well as from smaller, individual companies.

We are very concerned that the Bill, as stands, is rushed, will fail to deliver intended outcomes, and moreover will add substantial red tape and compliance costs right across industry without making any real improvements. Indeed, as it stands the Bill could well hold up payments, add to overall building costs across industry and unfairly impose added costs, particularly to smaller builders and contractors.

Further, it is clear that the Minister and the Government have rushed the draft legislation without listening and acting on the many concerns of stakeholder groups in the building and construction industry.

While it is clear that vast majority of head contractors in the industry do the right thing, the Minister seems hell-bent on imposing costly and ineffective compliance costs right across the sector, instead of more effectively dealing with those companies and individuals who habitually do the wrong thing.
The Minister seems addicted to Project Bank Accounts (PBAs) and their compulsory introduction, when there is limited evidence of their success in ensuring payments to subcontractors. PBAs around the world do not deal with disputed payments or builder insolvencies and the Minister’s model will not either. It will not secure payments for subcontractors.

**Master Builders Queensland (MBQ)** stated it represented all segments of the construction industry, and was committed to everyone being paid on time and in full.

MBQ submitted the Bill, as drafted, would not achieve security of payments, but add an uncosted regulatory burden and time and complexity to both disputes and payment claims.

MBQ said despite the Government’s claims, the reforms set out in the Bill would not reduce disputes and payment delays and would not reduce the cost of construction. Rather, construction costs would increase, in the order of at least 3%, and there’d need to be additional time to deal with disputes with no additional security for payment given to anyone in the contractual chain.

“In relying on the threat of punishment, the Bill fails to get at the heart of many payment issues. Subcontractors will continue to need to prove that an offence has been committed and alert the QBCC to the offence before punishment can be imposed – two actions subcontractors have proven unwilling to do for fear of ‘sending a contractor over the edge’. The legislation also fails to strike the necessary balance between early intervention by the regulator and ensuring contractors who are able to trade solvently are afforded the opportunity to do so.”

MBQ do not support PBAs, warning they’ll add cost and complexity to the building and construction industry while failing to achieve the government’s objective of improving payments in the industry.

MBQ says the policy is poorly targeted and costs will far outweigh any benefits.
MBQ states that under the proposed policy, the head contractor will continue to control the money coming out of the PBAs providing no security of payment for subcontractors. The subcontractors will still need to take action to enforce their contractual rights to recover amounts that they claim they are entitled to under the subcontract. MBQ states the Government seeks to protect disputed monies held by the head contractor, but under the Bill as drafted, this will not occur. Whilst the Bill requires that amounts in dispute are withheld in a separate bank account, this only applies to differences between what is written on the payment schedule from the builder and what is written on the payment instruction to the bank for the PBA. Given that the builder writes both documents, it is unlikely that there will ever be an amount that would be considered “disputed money”. Accordingly, this does not, and cannot, secure payment for the subcontractor of the amount it claims it is owed. If the contractor issues a payment schedule or a payment instruction for an amount that is less than the amount claimed by the subcontractor, the subcontractor must decide whether to accept it, make an application for adjudication, or commence legal proceedings. This is no different to what the subcontractor must do now. The onus is still on the subcontractor to enforce its rights under its subcontract and the legislation.

The Housing Industry Association (HIA) urged the Committee “in the strongest possible terms” not to support the Bill.

The HIA opposes mandatory PBAs for private sector building projects.

The HIA said “much of the legislation is unreasonable, unworkable and one-sided”.

Rather than providing the stated objective of effective, efficient, and fair processes for securing subcontractor payments, if passed, the Bill would generate an unprecedented and absurd amount of paperwork and red tape for the industry.

“The Bill will fundamentally change the administrative practices in every building company in Queensland. For example, the Bill requires principals (clients), builders (head contractor) and subcontractors respond to every invoice/payment claim they receive with a piece of
paper, in the form of a payment schedule. HIA estimates this imposition alone will cause in excess of 15 million payment schedules being prepared and supplied each year.

If enacted, the Bill will require the issuing of a payment schedule on every invoice issued by every subcontractor on every building job in Queensland - 15,700,000 payment schedules are estimated to be required each year, even though little more than 700 matters currently proceed to adjudication.

HIA estimates the progress payment mechanisms contained in the Bill could speed the resolution of a payment dispute by 5 days. This time saving will cost the industry millions (of dollars) in additional unproductive administrative processes. HIA says red tape burden from the PBA and progress payment sections of the Bill will add nearly 16.7 million additional administrative processes into the running of Queensland's building businesses each year. The consequences for cost, non-compliance, deterioration in housing affordability and business failure could be catastrophic.

Brisbane City Council (BCC) noted many concerns with the Bill, including amendments that:

• seek to apply a penalty for failing to provide a contractor with a payment schedule, especially where the full amount claim will be paid;

• seek to remove the requirement for a contractor to provide a warning notice to a respondent of any proposed adjudication application which is currently provided for in the Building and Construction Industry Payments Act 2004;

• seek to apply a penalty for failure to pay an adjudicated amount when there are other appeal and remedy options available to the claimant both by law and under the proposed amendments;

• seek to limit the ability of a respondent to bring a counterclaim or raise any defence to court proceedings when they have not provided a payment schedule, as this is not consistent with principles of natural justice or procedural fairness;

• may result in a reduction to the standard of documentation which should be provided by a subcontractor when seeking to apply a subcontractor's charge.

BCC is particularly concerned with the proposed requirement for the contracted party to establish a Project Bank Account (PBA) for building contracts which are more than $1
million. BCC anticipates this may cause an increase in a contractor’s overheads resulting in more expensive contract prices for Council and the ratepayers of Brisbane.

**Nicad Developments Pty Ltd** of Coorparoo, one-man operation, wants the Bill scrapped, stating it would hamper business without providing any real benefit for those it intends to help - noting the requirement to set up three PBAs and then issue payment instructions would add to costs and slow payments. Nicad often ‘self-funds’ part of its projects which allows payments to subcontractors the day they hand-in invoices. The legislation will mean having to hire a part-time administrator to meet compliance and push payments out a week.

Nicad said penalties for non-compliance were ‘way over the top’ – the jail penalty for builders who pay subcontractors directly and not out of the PBA “is ludicrous” and having to respond to every single invoice with a payment schedule “even when I intend to pay ...is excessive, as is the penalty for failing to do this” ... the Bill will make same day payments to subcontractors illegal.

“I urge the committee to scrap this Bill and re-examine the implications for Builders ...who have an unblemished record in regards to payment of subcontractors ...”

Similarly concerned, **G&G Quality Homes** (husband & wife and six fulltime staff) of Aspley submitted the Bill would not benefit the housing industry. G&G said the Bill assumed all builders treated their subcontractors poorly, which was untrue and extremely unfair. G&G was concerned over the amount of paperwork and tracking and reconciliation of numerous accounts. When a contractor works on different job sites they will need to be paid from different accounts, potentially adding to time taken to receive payments. G&G stated, like most small businesses, it operated on slim profit margins and did not have the ability to absorb the extra costs the Bill would impose, nor the staff to administer.

**The Queensland Law Society** (QLS) has serious concerns, including that the new obligations which are to be imposed in relation to PBAs don’t reflect the intention of the policy and penalties are “objectively harsh compared with other offences and that justification for the severity has not been provided.
The QLS submits the obligation on contracted parties to pay disputed amounts into a PBA disrupts both the timing and volume of cash flow throughout the industry, with a consequential increased risk of insolvency. This risk may be addressed by head contractors ‘front loading’ their progress payments. This risk will have a significant impact on growth and new project opportunities. There is no evidence that we (QLS) can see which demonstrates that these new measures will achieve the policy intention of reducing insolvency.

QLS holds several other concerns over disputed payments, including that the Bill sets out a ‘payment dispute’ will occur if the amount to be paid from a trust account to a subcontractor is less than the scheduled amount (being the amount the contracted party accepts is payable). The QLS says this new definition of the dispute will trigger activation when the contracted party does not have sufficient funds to pay the scheduled amount – not because there is a dispute (as that term is usually understood).

Further, the QLS says it is unclear exactly what behaviour or actions the disputed payment clauses (35 & 36) of the Bill seek to address. Clause 30 of the Bill determines that a contracted party will be required to ‘top up’ a trust account, as required. If the contracted party is unable to do this, they will be equally unable to pay amounts to the disputed funds account as required (by clause 36). The QLS says the result of this shortfall is that the disputed funds account will not work as intended in these circumstances.

It is clear that various organisations support the objects of the Bill, however, it is also clear that the Bill does not achieve those objects and does not deliver what the Minister has promised it will deliver.

Notwithstanding that the Bill does not secure payment for the subcontractor, the Minister has relied entirely on the Deloitte reports to show that there is a significant economic benefit to the industry and society in introducing PBAs. However, according to the Deloitte reports, the economic benefit that may be realised from the introduction of PBAs will only be achieved if there is an overall reduction in project costs across the industry of 2.5%. The
Deloitte modelling shows that if there is no cost saving across the industry, there is no economic benefit in bringing in PBAs because the cost exceeds any anticipated benefit.

With the complexity of the PBA model that the Minister has proposed in the Bill, there will be no overall cost saving – instead, there will be additional costs that will be necessarily incurred. Such additional costs will impact negatively on the likelihood of developers choosing Queensland for their developments. Similarly, the additional responsibilities and penalties imposed on the private sector principals will make Queensland an unattractive place in which to develop. The economic modelling, in light of these issues, shows that the Bill will not provide savings to the industry or additional jobs and is likely to restrict development in Queensland.

The Minister also has not provided any economic modelling showing the impact of the other chapters in the Bill including the changes to BCIPA, Subcontractors’ Charges Act and the QBCC Act. These other changes apply to both contractors and subcontractors for all projects and are not limited to projects over $1 million. The changes to BCIPA, in particular, take away the rights of subcontractors to use the adjudication process to get paid. The removal of the reference to the BCIPA on a payment claim is a change that the NSW government made in 2014 which they have recently identified was a mistake and are making moves to revert to the original requirement to refer to the Act for a payment claim. Despite NSW acknowledging their error, the government wants to make the same mistake. This will not protect subcontractors and the government should not make the same mistake that NSW has now recognised that it made.

A number of the submissions make it clear that this change, along with the mandatory Payment Schedule requirement in the Bill, will be harmful for subcontractors and will reduce their ability to be paid. It is another example of the government trying to rush through legislation without listening to those in the industry who are best placed to understand the significant implications of this Bill.

Other changes to the QBCC Act such as the imposition of demerit points just for receiving a Direction to Rectify Defective Works will apply to both contractors and subcontractors and
is unnecessary if the contractor or subcontractor actually rectifies the defective work. The existing legislation already has a significant penalty of 10 demerit points if the work is not rectified. To impose an additional penalty just for receiving a direction achieves nothing positive.

The Department of Housing and Public Works has identified in its report to the Parliamentary Committee dated 18 September 2017 that an extensive number of provisions in the draft Bill will be considered further just to reflect what the government intended. This shows that the Bill is poorly drafted as was pointed out in a number of submissions including from MBQ, HIA and QLS. The government has rushed this legislation through and has not properly considered the significant issues raised in the submissions.

Technical Scrutiny
The committee considered during technical scrutiny of the bill that significant sections of the bill failed to meet “Fundamental Legislative Standards” in that Clauses; 8, 14, 16, 28, 31, 36, 50, 51, 54, 65, 68, 79, 82, 122, 161, 165, 258, 276, defer a wide variety of powers to regulation in order to prescribe potentially significant matters. It may be argued that given the importance of these matters that they should be set out in the primary act and not in regulation. As such these clause potentially breach section 4(4)(a) of the LSA which requires the Bill to allow the delegation of legislative power only in appropriate case and to appropriate persons and also section 4(5)(c) of the LSA which provides that subordinate legislation should contain only matters appropriate to that level of legislation.

In fact one departmental staff member described the Bill as “a skeleton Bill”. I can only assume they could see what was so apparent to LNP Opposition Members of the Committee that the bill is a hollow and empty shell of promises without substance.

And that is why the committee has asked the Minister to be transparent and thorough in respect of the details.

Recommendation 7
"The Minister in his second reading speech provide examples of any proposed regulations that he intends to make should the bill be passed".

It simply isn’t acceptable that the Queensland Parliament be asked to pass legislation so incomplete, clearly it has been rushed and now before it comes back to the House for final consideration the Minister and the Department must complete the gaps and address the broad range of concerns raised by the department, from technical scrutiny, stakeholders and the committee.

**Proposed New Offence Provisions**

Furthermore significant concerns have been raised in respect of; Proposed New Offence Provisions. More than thirty new offences have been proposed along with significant amendments to existing provisions providing for more than 70 offences and aside from increasing cash penalties, more than twenty penalties propose jail time where the defence is unable to provide a “reasonable excuse”, a legislative term broadly applied but as ambiguous as this Minister’s proposed legislation.

While the Bill is well intentioned it fundamentally fail to deliver the reforms that Queensland’s thousands of sun-contractors so desperately want. The trial proposed for government contracts in excess of $1,000,000 and the proposed stage two which promises to provide certainty of payment for commercial contracts in excess of $1,000,000 fails to provide any certainty for almost 70% of those subcontractors who each day undertaken work on small projects, renovations and service contracts for projects completed with a value of less than $1,000,000.

Frankly the Minister has promised much, he executed a brilliant public relations campaign but it is like so many Labor policies a cruel hoax, a shiny bauble, nice to look at but hollow and empty on the inside.

The Bill does not achieve security of payment for subcontractors, will increase costs in the industry, will reduce development and growth in Queensland, and will increase the risk of more insolvencies for contractors and subcontractors. Subcontractors are not protected
under this Bill and it should not be passed in its current form. The reforms promised by the Minister in this Bill are best described as disingenuous, he needs to dig deeper and must come back in his second reading with meaningful amendments and absolute clarity in response to all those concerns raised by the committee and industry stakeholders.

The proposed trial in respect of government contracts is a smoke screen, neither the department or QBCC were able to present any evidence of known building collapses in respect of government contracts. The proposed PBA’s which promise improved and more timely payment processes do not provide any real insurance against commercial collapses and deliver nothing for sub-contractors on projects or work on projects valued under a $1,000,000.

Yours sincerely

Rob Molhoek
Member for Southport
Deputy Chair Public Works & Utilities Committee