Transport and Public Works Committee

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Deputy Chair  Mr Ted Sorensen MP, Member for Hervey Bay
Members  Mr Colin Boyce MP, Member for Callide
         Mr Robbie Katter MP, Member for Traeger
         Mr Joe Kelly MP, Member for Greenslopes (from 20 February 2020)
         Mr Bart Mellish MP, Member for Aspley
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Acknowledgements

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<td><em>Architects Act 2002</em></td>
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<td>ASIC</td>
<td>Australian Securities and Investments Commission</td>
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<tr>
<td>BCIPA</td>
<td><em>Building and Construction Industry Payments Act 2004</em></td>
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<td>BCR</td>
<td>Building Confidence Report</td>
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<td>BECE</td>
<td>Brisbane Electrical Contractors and Engineering</td>
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<td>2017 Bill</td>
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<td>the Bill/BIFOLA Bill</td>
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<td>BMF</td>
<td>Building Ministers’ Forum</td>
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<tr>
<td>BOAQ</td>
<td>Board of Architects Queensland</td>
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<tr>
<td>BPEQ</td>
<td>Board of Professional Engineers Queensland</td>
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<td>Building Act</td>
<td><em>Building Act 1975</em></td>
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<td>CFMEU</td>
<td>Construction, Forestry, Maritime, Mining and Energy Union</td>
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<tr>
<td>the committee</td>
<td>Transport and Public Works Committee</td>
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<td>Cornwalls</td>
<td>Cornwalls Law + More</td>
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<td>CPD</td>
<td>continuing professional development</td>
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<td>the department/DHPW</td>
<td>Department of Housing and Public Works</td>
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<td>FLP</td>
<td>fundamental legislative principles</td>
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<td>GST</td>
<td>goods and services tax</td>
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<td>HHS</td>
<td>Health and Hospital Service</td>
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<td>HIA</td>
<td>Housing Industry Association Limited</td>
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<td>LGAQ</td>
<td>Local Government Association of Queensland</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<td>LSA</td>
<td>Legislative Standards Act 1992</td>
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<td>MBQ</td>
<td>Master Builders Queensland</td>
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<td>MCC</td>
<td>Ministerial Construction Council</td>
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<td>MEA</td>
<td>Master Electricians Australia</td>
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<td>MFR</td>
<td>minimum financial requirements</td>
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<td>MPAQ</td>
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<td>NFIA</td>
<td>National Fire Industry Association of Australia</td>
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<td>OQPC</td>
<td>Office of the Queensland Parliamentary Counsel</td>
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<td>OQPC guide</td>
<td>Principles of good legislation: Reversal of onus of proof</td>
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<td>Panel</td>
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<td>PBAs</td>
<td>project bank accounts</td>
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<td>PE Act</td>
<td>Professional Engineers Act 2002</td>
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<td>PIN</td>
<td>Penalty infringement notice</td>
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<td>PPP</td>
<td>public private partnership</td>
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<td>Property Council</td>
<td>Property Council of Australia</td>
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<td>PTA</td>
<td>project trust account</td>
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<tr>
<td>PWUC</td>
<td>former Public Works and Utilities Committee (55th Parliament)</td>
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<td>QBCC</td>
<td>Queensland Building and Construction Commission</td>
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<td>QBP</td>
<td>Queensland Building Plan</td>
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<td>QCAT</td>
<td>Queensland Civil and Administrative Tribunal</td>
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<td>Queensland Civil and Administrative Tribunal Act 2009</td>
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<td>QHWS</td>
<td>Queensland Home Warranty Scheme</td>
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<td>QPC</td>
<td>Queensland Productivity Commission</td>
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<td>Queensland Plumbers Union</td>
<td>Plumbing and Pipe Trades Employees Union</td>
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<td>RV Transitional Regulation</td>
<td>Retirement Villages (Transitional) Regulation 2019</td>
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<td>SLC</td>
<td>former Scrutiny of Legislation Committee</td>
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<td>SPV</td>
<td>special purpose vehicle</td>
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<td>Taskforce</td>
<td>Special Joint Taskforce investigating subcontractor non-payment in the Queensland building industry</td>
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<td>UCT</td>
<td>unfair contract terms</td>
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<tr>
<td>UDIAQ</td>
<td>Urban Development Institute of Australia, Queensland</td>
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Chair’s foreword

This report presents a summary of the Transport and Public Works Committee’s examination of the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020.

The committee’s task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles— that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament – and compatibility with the Human Rights Act.

The committee has made 12 recommendations including that the Bill be passed.

On behalf of the committee, I thank those individuals and organisations who made written submissions, participated in public hearings and provided additional written information to the committee on the Bill. I also thank our Parliamentary Service staff and the Department of Housing and Public Works.

I commend this report to the House.

Shane King MP
Chair
Recommendations

Recommendation 1
The committee recommends the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 be passed.

Recommendation 2
The committee recommends that the Minister for Housing and Public Works review all definitions identified by stakeholders as having ambiguities and amend the legislation as appropriate.

Recommendation 3
The committee recommends that the Bill be amended to include measures to prevent the use of multiple contracts on the same or adjacent land in relation to contracts for small scale residential construction work.

Recommendation 4
The committee recommends that the Bill be amended to make it clear which parties are intended to be excluded by the exemption allowed in proposed new section 15E.

Recommendation 5
The committee recommends that the terms used in proposed new section 15F be reviewed to ensure the intent is clearly articulated and amended as considered appropriate.

Recommendation 6
The committee recommends that clause 63 of the Bill (proposed new section 20) be amended to ensure that the account nominated by the subcontractor must be under the control of the subcontractor.

Recommendation 7
The committee recommends that the Bill be amended to ensure that all relevant contractors are protected by the trust regime.

Recommendation 8
The committee recommends that both the need for and location of proposed new section 55B(6) of the Bill be reconsidered and that the Bill be amended accordingly.

Recommendation 9
The committee recommends that section 42 and Schedule 1A(8) of the Queensland Building and Construction Commission Act 1991 be amended to omit the exemption allowing an unlicensed person who enters into a contract to carry out building work, does not contravene section 42(1) merely because the person entered into the contract, if the building work is to be carried out by a person (an appropriately licensed contractor) who is licensed to carry out building work of the relevant class.

Recommendation 10
The committee recommends that the Queensland Building and Construction Commission Act 1991 be amended to include ‘passive fire work’ in the definition of ‘fire protection’ during consideration of the Bill.

Recommendation 11
The committee recommends that the Minister for Housing and Public Works considers undertaking a review of the role of property developers in the building and construction industry including consideration of the impact of their financial and operational capacity, ethical behaviour, and work practices.
Recommendation 12

The committee recommends that should the review detailed in Recommendation 11 be conducted that it be conducted in consultation with industry stakeholders, and the Minister for Housing and Public Works should report the findings of the review by 1 July 2021.
1 Introduction

1.1 Role of the committee

The Transport and Public Works Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 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:

- Transport and Main Roads
- Housing, Public Works, Digital Technology and Sport.

Section 93(1) of the Parliament of Queensland Act 2001 provides 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
- compatibility with the Human Rights Act 2019
- for subordinate legislation – its lawfulness.

The Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 (Bill) was introduced into the Legislative Assembly and referred to the committee on 5 February 2020. The committee was required to report to the Legislative Assembly by 20 March 2020.

1.2 Inquiry process

On 10 February 2020, the committee invited stakeholders and subscribers to make written submissions on the Bill. Twenty-three submissions were received. A list of submissions received is contained in Appendix A.

The committee received a public briefing about the Bill from the Department of Housing and Public Works (department/DHPW) and the Queensland Building and Construction Commission (QBCC) on 17 February 2020. A transcript is published on the committee’s webpage. A list of officials is contained in Appendix B.

The committee received written advice from the department in response to matters raised in submissions. The committee also received additional written information from the department and stakeholders in relation to questions taken on notice. The committee also sought and received responses from the department in relation to additional questions.

The committee held public hearings in Brisbane on 3 and 4 March 2020. A list of witnesses is contained in Appendix C.

The submissions, correspondence and transcripts of the briefing and hearings are available on the committee’s webpage.

1.3 Policy objectives of the Bill

The Bill will amend the following legislation:

- Architects Act 2002 (Architects Act)
- Building Act 1975 (Building Act)
- Building Industry Fairness (Security of Payment) Act 2017 (BIF Act)

• Professional Engineers Act 2002 (PE Act)
• Queensland Building and Construction Commission Act 1991 (QBCC Act)
• Retirement Villages Act 1999 (RV Act)

The explanatory notes detail that the objectives of the Bill are to:

• implement the recommendations of the Building Industry Fairness Reforms Implementation and Evaluation Panel (Panel)
• implement the recommendations of the Special Joint Taskforce that investigated subcontractor non-payment in the Queensland building industry (Taskforce)
• enhance Queensland’s security of payment legislation and further extend the protections for industry
• improve the QBCC’s ability to address fraudulent behaviour in the industry
• strengthen Queensland’s building laws to enhance regulatory oversight capabilities, clarify licensing requirements, improve building safety and support industry professionals
• implement reforms arising from the Queensland Building Plan (QBP) to strengthen the certification and inspection process and improve professional standards and compliance in the certification sector
• implement reforms arising from the Building Confidence Report (BCR) such as enhancements to the regulation of architects and registered professional engineers
• ensure the continuation of external review rights for decisions about transition plans for retirement village schemes.

1.4 Consultation on the Bill

1.4.1 Security of payment reforms

The explanatory notes identify that the Panel’s evaluation included significant consultation with a wide range of stakeholders. The explanatory notes state:

Consultation activities were diverse and included releasing a discussion paper and online questionnaire and holding seven industry forums across Queensland which were attended by head contractors, subcontractors, sub-subcontractors, suppliers, consultants, private sector principals and accounting staff. The Panel also conducted one-on-one interviews with head contractors who were a party to a phase 1 PBA under the current BIF Act, eight banks offering PBAs and representatives of two principals (state government agencies) involved in phase 1 PBA projects. The Panel was also supported by an industry reference group.2

The government engaged in a consultation process with affected stakeholders and industry representatives including the Ministerial Construction Council (MCC) which formed a subcommittee to review detailed aspects of the drafts of the Bill.3

The explanatory notes detail some of the key issues raised by stakeholders including: definitions; minimum contract value; payment withholding request; charge over land; calculation of time under sections 67U and section 67W of the QBCC Act; and QBCC oversight functions.4 The stakeholder feedback in respect to these issues is included in the relevant sections of this report.

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2 Explanatory notes, p 18.
3 Explanatory notes, p 18.
In relation to consultation on the Bill, the Urban Development Institute of Australia, Queensland, (UDIAQ) stated:

*The Institute recommends the legislation be further consulted with the property industry to ensure practical and reasonable measures are put in place. The Institute is concerned that the provisions impacting upon the developer of the property have not been thoroughly consulted with the industry. The provisions have been introduced without this critical input and should not be put in place without full consultation with the Institute and its members.*

However, other stakeholders confirmed they had been consulted as part of the Bill development process. For example, Master Builders Queensland (MBQ) advised that, whilst they hold concerns in relation to some aspects of the Bill, they had worked constructively with the government, along with other industry stakeholders, to refine the legislation, particularly as it relates to project bank accounts and progress payments.

1.4.2 Implementation of Special Joint Taskforce recommendations

The work undertaken by the Taskforce informed the amendments proposed in the Bill:

*The Taskforce sought confidential submissions in relation to allegations of fraudulent behaviour relating to building subcontractor non-payment. During the submission period, 166 submissions were received, with 146 involving complaints of non-payment and another 20, largely from industry organisations, providing suggestions for reform. The Taskforce also held face to face meetings with 42 people across the state. The full list of stakeholders who were consulted with is available in the Taskforce report. The submissions and meetings informed the recommendations made by the Taskforce and are represented in the amendments proposed in this Bill.*

1.4.3 Strengthening Queensland’s building laws

Consultation in relation to strengthening Queensland’s building laws related to licensing requirements, building certification, and architects and registered professional engineers. The consultation in relation to these areas is discussed in the following subsections of this report. The explanatory notes state that the MCC was consulted in January 2020 on the key amendments included in the Bill.

1.4.3.1 Licensing requirements

The revised minimum financial requirements (MFR) were subject to four weeks public consultation in 2018 and involved key construction industry stakeholders including the MCC and accountancy bodies. The explanatory notes further detail that the Queensland Law Society (QLS), CPA Australia, and Chartered Accountants of Australia and New Zealand were consulted on the proposed reforms and advice about technical drafting matters were incorporated as far as possible in the Bill.

In relation to the proposed retrospective amendment for the landscaping licence, relevant stakeholders, including Landscape Queensland, Tennis Queensland, the Sports and Play Industry Association, MBQ and the Housing Industry Association (HIA), were consulted and all parties were supportive of the amendment.

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5 Submission 11, p 2.
6 Submission 4, p 1.
7 Explanatory notes, p 20. [Note: Any in-text footnote references have been removed. Please refer to the source document for further details.]
8 Explanatory notes, p 21.
9 Explanatory notes, p 21.
10 Explanatory notes, p 21.
1.4.3.2 Building certification

The department consulted widely with industry regarding the building certification reforms, including state-wide Queensland Building Plan (QBP) consultation sessions, dedicated workshops and MCC subcommittee workshops.

Stakeholders provided the following feedback:

Generally, industry supported the reforms relating to certification, however, sought further clarification about how and when a regulation would apply to a new building assessment provision as provided in clause 37. Industry acknowledged the need to respond swiftly to significant risks likely to harm people, the economy or environment. Industry supported the requirement for an impact assessment to be performed prior to recommending the regulation be made.11

The explanatory notes also state that the Queensland Productivity Commission (QPC) was consulted regarding the reforms and advised that no further regulatory assessment is required.12

1.4.3.3 Architects and registered professional engineers

The explanatory notes identify that the Board of Architects of Queensland (BOAQ) and the Board of Professional Engineers Queensland (BPEQ) were consulted during the development of the amendments.13

However, in their submission, the Australian Institute of Architects (AIA) stated:

... the changes to the Architects Act are very significant, and we are of the view that, as a matter of courtesy, a consultation document should have been prepared by the government to enable architects in Queensland via the peak body—that is, the institute—to be given the opportunity to submit comments. We understand that the most recent changes to the act were not foreshadowed in the first draft bill.14

1.4.4 General stakeholder comments

With regard to consultation on the Bill, QLS advised:

Three weeks of consultation is not adequate for a bill of this size and nature, particularly where QLS was not involved in any consultation at the draft bill stage (QLS had been consulted regarding the revised minimum financial requirements regime in 2018 as mentioned in the explanatory notes).15

1.5 Commencement

Various clauses of the Bill have different commencement dates. Clause 2 of the Bill sets out the proposed commencement of the provisions to be as follows:

- Commencing on 1 July 2020
  - Part 4 – Clauses 60 – 84
  - Part 6, division 3 – Clauses 127 – 133

11 Explanatory notes, p 21.
12 Explanatory notes, p 21.
13 Explanatory notes, p 21.
14 Public hearing transcript, Brisbane, 4 March 2020, p 6.
15 Submission 23, p 1.
• Commencing on a day to be fixed by proclamation
  ➢ Part 3 – Clauses – Clauses 32 – 59
  ➢ Part 6, division 4 – Clauses 134 – 149
  ➢ Schedule 1, part 2

• Commencement on assent
  ➢ Part 1 – Clauses 1 – 2
  ➢ Part 2 – Clause 1 – 31
  ➢ Part 5 – Clauses 85 – 107
  ➢ Part 6, divisions 1 and 2 – Clauses 108 – 126
  ➢ Part 7 – Clauses 150 – 151
  ➢ Part 8 – Clause 152
  ➢ Part 9 – Clause 153
  ➢ Schedule, Part 1

1.6 Should the Bill be passed?

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

After examination of the Bill, including consideration of the policy objectives to be implemented, stakeholders’ views and information provided by the department, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 be passed.
2 Examination of the Bill

This section discusses issues raised during the committee’s examination of the Bill.

2.1 Security of payment reforms

2.1.1 Background

The security of payment reforms have been the subject of previous legislation and a review of the implementation of that legislation has been undertaken.

2.1.1.1 Previous reforms

Following a series of high profile building and construction industry collapses in 2015-16, the government made an election commitment to review the issue of security of payment for subcontractors.

Following a review, the government introduced the Building Industry Fairness (Security of Payment) Bill 2017 (2017 Bill) on 22 August 2017. The 2017 Bill was referred to the former Public Works and Utilities Committee (PWUC), 55th Parliament. The 2017 Bill combined security of payment legislation into one act by containing the requirements for project bank accounts (PBAs) as well as including modernised and simplified provisions from the Building Construction Industry Payments Act 2004 and the Subcontractors’ Charges Act 1974 which were subsequently repealed.

The PWUC’s report\textsuperscript{16} was tabled on 13 October 2017 with the committee recommending that the 2017 Bill be passed but also making six additional recommendations as follows:

- 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.

- 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 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.

- 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.

- 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.

\textsuperscript{16} Public Works and Utilities Committee, Report No 50, 55\textsuperscript{th} Parliament – Building Industry Fairness (Security of Payment Bill 2017, October 2017
• 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.  

In response, the government accepted the PWUC’s recommendations. Amendments that implemented the recommendations were made prior to the passage of the legislation. The 2017 Bill was passed, with amendment (discussed below), on 26 October 2017.

The 2017 Bill established PBAs as trust accounts where progress payments, retention monies and disputed funds are held in trust for the subcontractor, independent of the head contractor and principal. The existing legislation requires that a PBA is made of three trust accounts:

• A general trust account for the management of progress
• A retention account for amounts held as retention
• A disputed funds account for amounts that are the subject of a payment dispute.

The 2017 Bill originally proposed a framework for PBAs for both government and the private sector to be implemented in two phases:

• phase 1 – PBAs to 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.

Amendments were moved during consideration in detail of the 2017 Bill which established a statutory requirement for an independent review of phase 1. Phase 1 has been in operation since March 2018. The result of the independent review was the Panel report discussed in section 2.1.1.2 below.

The explanatory notes state that PBAs have been in place for government building contracts valued between $1 million and $10 million since 2018, and the reforms have offered protections to over 200 contracts, amounting to over $800 million in project value.

2.1.1.2 Building Industry Fairness Reforms Implementation and Evaluation Panel report

The government appointed the Panel, chaired by Ms Bronwyn Weir, pursuant to section 200A of the BIF Act. The Panel reported in March 2019, and the report was tabled by the Minister on 28 November 2019. The Panel conducted a review of the Act to determine the effectiveness of the legislative framework in meeting the policy intent and identifying opportunities for improvement of security of payment outcomes.

The report notes:

*The overarching policy intent of the BIF Act is to make systemic changes designed to effect cultural change in the building and construction industry. The Act is intended to provide for effective, efficient and fair processes for securing payment. This includes the establishment of a framework for project bank accounts (PBA) where money is held on trust for subcontractors. The reforms are intended to lead to better financial practices, reduced family breakdown, greater business confidence and more fairness in the industry.*


The Panel concluded that the BIF Act reflects the government’s policy intent, and phase 1 has allowed the government to test the model. The Panel suggested improvements including a measured phasing in of the PBA reforms to the private sector, reduced administrative complexity and additional protections for monies held in trust.


The Panel’s report states:

*Whilst the Act reflects Government’s policy intent, if the Panel’s recommendations are adopted, the outcome will be an enhanced legislative framework resulting in improved security of payment outcomes for Queensland’s building and construction industry. The improvements resulting from our recommendations will be a measured phasing in of the PBA reforms to the private sector, reduced administrative complexity and additional protections for monies held on trust.*


The Panel’s report contains 20 recommendations under the following themes:

- Managing the financial transition – to provide the best chance of minimising financial stress as the sector transitions to improved financial viability
- Simplifying the framework – and in doing so improve the balance between the administrative costs to comply and the need for transparency over the movement of project funds
- Improving protections – by expanding the obligation to hold retentions on trust to all parts of the contracting chain and creating new mechanisms to secure funds in dispute to all claimants.


The government accepted or accepted in principle all 20 recommendations. Appendix D contains a copy of the government’s response to the Panel report recommendations.

### 2.2 Amendment of Building Industry Fairness (Security of Payment) Act 2017

#### 2.2.1 Introduction

The policy objectives of the Bill in relation to security of payment are to be achieved by amending the BIF Act to implement the Panel’s recommendations.
To ‘simplify the framework’, the Bill will:

- simplify the operation of the PBAs
- require that only one project trust account be established by the head contractor for every eligible contract
- allow for one retention trust account per contractor or eligible principal to be established to protect retention monies
- remove the requirement to establish a disputed funds trust account and instead introduce other protective measures.\(^{27}\)

The department advised that the purpose of the Bill is to improve the existing security of payment legislation and further enhance the protections for the industry. The department noted that the Panel concluded that, compared to other trust models, Queensland’s PBA model provides a greater level of transparency and traceability over the movement of funds and ensures money owed to subcontractors is not used as working capital by those who owe the money.\(^{28}\)

The Panel recommended simplifying the PBA framework by reducing the number of bank accounts from three to one. The Panel report states:

> The Panel heard that managing project funds across three bank accounts per project came with high administrative costs. The reporting requirements coupled with the need to individualise and identify all transactions in the bank accounts was burdensome. Not all banks were readily able to offer products which could meet the requirements in the Act. Whilst they were willing and able to work through these issues, the duplication of record keeping, and complexity involved in compliance remained a concern. Reporting to principals and the requirement to allow principal viewing access to PBA bank accounts were challenges that many believed would be made more difficult on private sector building projects.\(^{29}\)

The Panel report notes that all project funds would continue to be deposited into a project trust account (PTA) by the principal and from that account monies liable to be paid to subcontractors would remain protected and have priority over payments to head contractors. However, the disputed funds trust account and the retention trust account would be replaced by other improved protections.\(^{30}\)

The department advised:

> Other payment enforcement mechanisms will replace the disputed trust account currently required under the PBA framework; these will be more widely available for industry and not just where a project trust account is in place. These changes will reduce the financial and administrative burden for industry and improve the functionality of the accounts.\(^{31}\)

To ‘improve protections and oversight’, the Bill will:

- remove the principal’s viewing rights and step-in ability as these will not be effective when implemented in the private sector
- increase the oversight functions of the QBCC including the ability to audit trust accounts as part of an audit program

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27 Explanatory notes, p 5.
enable the QBCC to ‘freeze’ trust accounts and to give a direction that the trustee gives the QBCC’s Commissioner an account review report for one or more of the trust accounts for the trustee

introduce the ability to serve a ‘payment withholding request’ on a party above the respondent (including for a head contractor, a financier) to protect money that may be payable as a result of an adjudication decision, where the adjudicated amount is not paid in the timeframes required by the BIF Act

allow a head contractor to lodge a statutory charge on property owned by a developer or a related entity of the developer, where the construction work took place, for an amount determined through adjudication that is unpaid.32

To ‘manage the financial transactions’, the Bill will provide for the application of trust account requirements to be extended to eligible contracts as follows:

- from 1 July 2020, project and retention trusts will apply to government and Hospital and Health Services’ (HHS) building contracts valued at $1 million or more (excluding GST)
- from 1 July 2021, project and retention trusts will also apply to private sector and local government building contracts valued at $10 million or more (excluding GST)
- from 1 January 2022, project and retention trusts will also apply to private sector and local government building and construction contracts valued at $3 million or more (excluding GST)
- from 1 July 2022, project and retention trusts will apply to all building and construction contracts valued at $1 million or more (excluding GST)
- retention trust accounts for cash retentions will apply for all phases where a project trust is also required, and in the final phase will apply to all parties holding cash retentions down the contractual chain where the head contract requires a project trust.33

The Minister tabled a copy of the draft Building Industry Fairness (Security of Payment) Amendment Regulation 2020 (draft regulation) when he introduced the Bill. The draft regulation provides for the commencement dates by inserting a new section 39A in the Building Industry Fairness (Security of Payment) Regulation 2018 (BIF Regulation).

The Panel noted that its proposed reforms to the BIF Act will require many head contractors to change their business practices and the financial transition will cause disruption. The Panel considered that the effective management of the transition is essential to the success of the proposed reforms. Accordingly, the panel recommended there be three further phases to the introduction of the PBA reforms based on analysis of data which estimates that around 63 per cent of contracts will be subject to a PBA valued between $1 million and $3 million.34

32 Explanatory notes, p 5.
33 Explanatory notes, p 6.
The Panel considered that the gradual reduction in the contract value that is subject to a PBA will manage the financial impact to give all head contractors the best opportunity to transition their businesses towards improved viability. The Panel also considered that the phased introduction of the PBA reforms will provide time for banks and accounting software providers to develop market readiness by adjusting their products and services as the demand for new bank accounts increases.

2.2.2 General stakeholder comments

The committee received a number of submissions from stakeholders impacted by the collapse of building companies. For example Brisbane Electrical Contractors and Engineering (BECE) detailed for the committee their history of losses to builder collapses over a number of years. BECE Manager, Clair Wilkinson, advised:

“It is not just about builders who go broke. We appreciate businesses all over Australia do go into liquidation every day for a variety of reasons—but we need to drive change in our industry as the number of companies that do collapse in the construction industry is not slowing down and neither is the financial and the emotional support that is put on not only our businesses but also the people we have to employ and also our local communities.”

The department also acknowledged that the impacts of non-payment can be significant for these stakeholders. The department advised the committee that subcontractors that had made submissions to the Taskforce reported an average loss of $288,000 and the largest individual loss reported was $6 million. The department also reported harmful social impacts including relationship breakdown, loss of reputation, mental illness and suicide.

The department advised:

Under the Bill, PBAs will be renamed project and retention trust accounts. A disputed funds account will no longer be required. Under the simplified framework only 1 project trust account will be required per eligible building contract. A retention trust account will no longer be required for each project. Rather, only one retention trust account per contractor or relevant principal will be required where cash retentions are withheld.

Stakeholders were generally supportive of reducing the existing requirement from three PBAs to requiring one PTA. For example, Mr Richard Field from Richard Field Constructions Pty Ltd advised that streamlining the three accounts to a single account per project and a common retention trust account in perpetuity is an improvement compared to the current arrangements.

However, some stakeholders were philosophically opposed to the use of PBAs, particularly in the private sector.

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37 Refer submission nos 1, 2, 3 and 14.
38 Public hearing transcript, Brisbane, 3 March 2020, p 13.
41 Public hearing transcript, Brisbane, 4 March 2020, p 1.
For example, MBQ advised:

Although we have worked constructively with the Government, along with other industry stakeholders, to refine the legislation particularly as it relates to project bank accounts and progress payments, we continue to hold grave concerns about the effectiveness of the Project Bank Accounts (PBAs) regime and the true costs to the building industry.

The Government’s proposed changes to BIF will reduce the level of red tape for builders and subcontractors. However, there is still no evidence that PBAs have played any part in ensuring that the more than 1,000 subbies involved in the 100 PBA projects (to date) were paid ‘in full, on time, every time’, as they are intended to do. We do know from the Implementation and Evaluation Panel’s report that PBAs and the changes to progress payments have come at a cost to the principals, builders and the subcontractors involved.42

The Property Council of Australia (Property Council) supported MBQ’s submission and advised:

The Property Council maintains the position that the current PBA model will not achieve the Government’s stated objectives and that the reforms will have a perverse impact on the industry.

While recognising that the Property Council holds diametrically opposed views to the Government on the effectiveness of these reforms, we have been pleased with the Government’s willingness to review the framework of the PBA model prior to private sector implementation.

The amendments contained in the Bill echo the recommendations of the Evaluation Panel and Special Joint Taskforce. These recommendations have reflected many of the points made by the Property Council to achieve a simplified and streamlined PBA model.43

Other stakeholders were fully supportive of the legislation. For example, the Queensland Plumbing and Pipe Trades Employees Union (Queensland Plumbers Union) advised:

For workers across Queensland to be paid their wages and entitlements, it’s vital that their employers receive payment for work undertaken. In our industry, this means that subcontractors must receive payments in full and on-time. The simple matter of paying someone correctly for their work is the basis of a fair and functioning society, and as a Union we believe that workers must be paid their full entitlements. In turn, we do not support circumstances where subcontracting businesses are left unpaid for works undertaken.

Prior to 2017, Queensland’s building and construction payment laws provided certain sections of the industry with the ability to draft contracts in ways that significantly disadvantaged and manipulated subcontractors, created power imbalances and made it next to impossible for subcontractors to lawfully claim payment. The laws and systems facilitated and, in practice, often legalised the avoidance of meeting payment obligations. Following-on from this, subcontractors were often left without access to legal remedies.

The Building Industry Fairness (Security of Payment) Act 2017 substantially changed the legislative landscape of building and construction payment, going a significant way to achieving greater fairness for subcontractors.44

The National Fire Industry Association of Australia (NFIA) advised:

NFIA strongly supports the Government’s subcontractor payment proposals as outlined in the Bill. Subcontractor professionals have strongly pursued comprehensive reform on this matter for some time, and this Bill marks the greatest step forward for payment security anywhere in Australia.

42 Submission 4, p 1.
43 Submission 8, p 1.
44 Submission 13, p 1.
The historic legislative framework simply does not provide tradies with certainty of payment for the work they have performed in good faith and in accordance with legal contracts that they have entered into.45

Stakeholders were generally supportive of the proposed changes to the PBA scheme, in particular the reduction in the requirement for three PBAs. For example, Cornwalls Law + More (Cornwalls) advised:

The Bill would result in substantial improvements to the BIF Act and in particular the project bank account scheme compared with that in the Act. The overall scheme for what are to be “project trusts” in lieu of project bank accounts, should prove less burdensome and more practicable.46

The Master Plumbers’ Association of Queensland (MPAQ) advised:

A number of our members, specifically in the Gold Coast and Sunshine Coast areas have experienced issues with non-payment. Trade contractors are too concerned about what impact it will have on their business if they speak out about non-payment.

One of the most important reforms the State Government could undertake is Security of Payments. We need to ensure that all sub-contractors are paid in full and on time for the work they do. There is not a single plumber in this state that has not experienced non-payment or delayed payments.

It is not only head contractor insolvency that leaves subcontractors unpaid for work they have performed but it is also payment practices that are encouraged under the current legislation. These practices have led to the bankruptcy of countless small businesses while many others experience setbacks costing their business significant funds for a number of years.47

MPAQ advised:

I do not think there is one plumber in Queensland who has not been impacted by non-payment. We need to ensure all trade contractors are paid in full and on time for the work they do. I speak to members on a regular basis, and it is heartbreaking to hear their stories of non-payment and the impact it has on those businesses, their families and, of course, the community at large. MPAQ is strongly supportive of security of payment reforms to ensure cultural changes within the building and construction industry.48

Master Electricians Australia (MEA) supported the introduction of trust account requirements to be extended to eligible contracts over the proposed timeframes.49

The Local Government Association of Queensland (LGAQ) advised:

Overall, local government supports the objectives of the Bill including to strengthen Queensland’s building laws in relation to building certification and inspection processes and enhance Queensland’s security of payment legislation to extend protections for the building and construction industry.50

45 Submission 21, p 4.
46 Submission 5, p 1.
47 Submission 22, p 1.
48 Public hearing transcript, Brisbane, 3 March 2020, p 22.
49 Submission 19, p 2.
50 Submission 16, p 4.
2.2.2.1 General stakeholder comments — minimum PBA application limits

Some stakeholders argued that PBAs should not apply to builders in the $1 million to $3 million price category, whilst other stakeholders argued that there should be no lower limit.

HIA advised that feedback from their members is that they will stop undertaking work in this price category, including small apartment buildings and townhouse projects, if the legislation is introduced. They advised:

> It is HIA’s contention today that, until the legislation has been tested to its full extent in the private sector, it is premature to include projects in the $1 million to $3 million price category given the significant ramifications to the businesses that undertake this work. This category should be removed from the bill.51

HIA advised that builders in this category are often small family owned businesses that do not have the administrative resources to take on the burden that the legislation proposes.52

MBQ advised:

> It is one thing for those bigger companies that are doing the government work to establish project bank accounts and deal with the progress payment requirements. It is a completely other thing when you start to roll that into the private sector for those smaller companies that are doing $1 million to $3 million projects, which is where it is intended to be. They just have not got the resources to cope with it.53

HIA advised:

> The ramifications for small, less sophisticated building businesses with less capacity to absorb the additional administrative and accounting burden will be significant.54

As a medium sized construction business owner who has used PBAs on government projects since their introduction in 2018, the committee sought Mr Field’s input on the proposed $1 million contract threshold. Mr Field advised:

> I think smaller builders that approach the PBA market with the $1 million threshold will almost certainly see it as a barrier to entry and stay out of the market. That barrier to entry will reduce competition and will drive prices up. That is basic economic supply and demand. I do not think a builder rising through the market or a mum-and-dad operator will ever be able to comply with this properly. It will be very, very difficult for them.55

However, Mr Field also agreed with the proposition that avoiding the inclusion of ‘unsophisticated’ operators who cannot manage cash flow and complicated projects, potentially collapsing and doing the damage that the legislation is trying to avoid in the industry, is also valid.56

Mr Field acknowledged that the PBA process creates barriers to entry and suggested that inevitably the future would see more larger building companies and fewer smaller ones.57

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51 Public hearing transcript, Brisbane, 3 March 2020, p 3.
52 Public hearing transcript, Brisbane, 3 March 2020, p 4.
53 Public hearing transcript, Brisbane, 3 March 2020, p 4.
54 Public hearing transcript, Brisbane, 3 March 2020, p 3.
55 Public hearing transcript, Brisbane, 4 March 2020, p 3.
56 Public hearing transcript, Brisbane, 4 March 2020, p 3.
57 Public hearing transcript, Brisbane, 4 March 2020, p 4.
With regard to the suggestion that the minimum threshold should be raised, Mr Field advised:

*If I were an equitable person and trying to balance the objective of the government protecting subcontractors trying to get paid and not making it too difficult for the smaller operators that do jump into the $1 million space presently fairly easily, there must be a tipping point there. Certainly I do not think the figure would need to be $5 million, but would $2 million or $3 million be better or $1.5 million or $2.5 million? I think round figures works. If you were going to increase it, it would be to $2 million or $3 million.*

Mr Field also suggested that there would be a need in the future to adjust whatever minimum threshold was agreed upon but recommended that any future increases should be to round numbers.

A number of stakeholders suggested that PTAs should apply to contracts below $1 million. For example, Subcontractors Alliance advised:

*The root cause of the payment problem for subcontractors lies with building companies, yet this amended bill seeks to exempt large sectors from PBA coverage, impose a bottom limit of $1 million for an eligible contract and phase the introduction of PBAs with full coverage not available until July 2022. We find the whole three objectionable. It is saying to a subcontractor that if you work in this sector you are worthy of payment protection but if you work in the other sector you are not. It is simply favouring builders in those exempted sectors. Under these circumstances the most vulnerable mum-and-dad operators are being denied protection. The protective blanket of a PBA should be available to all subcontractors with no bottom limit applying and starting on 1 July this year.*

With regard to the suitability of the $1 million threshold, MPAQ advised that their members would like it to extend below that threshold; however, they consider that if it works properly at that level then it may be able to reduced.

MEA commented:

*The other thing that you have to take into account is that the $1 million project level, from our industry point of view, means that the electrical value then is about $100,000. When you start going into those sorts of figures and you are breaking down each of the trades into $1 million, I think it is covering more people than what people think.*

The committee sought information from the department regarding the reasons for the $1 million contract limit. The department advised:

*The department engaged Deloitte Access Economics in 2017—and it is a publicly available document—to complete some cost-benefit analysis. The $1 million threshold was based heavily on its analysis. There is a point in time where the administrative overhead and burden and also the number of subcontractors potentially working on those projects is far fewer. What the provisions and our security of payment reforms really target are those larger contracts where in the event of an insolvency or a company collapse many subcontractors are left exposed.*

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58 Public hearing transcript, Brisbane, 4 March 2020, pp 3-4.
59 Public hearing transcript, Brisbane, 4 March 2020, p 3.
60 Public hearing transcript, Brisbane, 3 March 2020, p 12.
63 Public briefing transcript, Brisbane, 27 February 2020, p 6.
MBQ questioned the Deloitte analysis commissioned by the government which indicated that the PBA reforms would over time have a significant economic benefit. MBQ advised:

90 per cent of head contractors reported increased business administration costs, with more than half reporting a cost increase of more than 3 per cent of the project cost. Half of both subcontractors and principals reported an increase in their business administration costs. For builders, the additional cost totalled $12 million (based on 3 per cent of the $405 million value of current PBA projects) which is a cost that ultimately Queensland’s taxpayers will wear.64

The department acknowledged that the Panel was unable to assess the potential impact of PBAs on private sector projects with reported costs varying significantly and most head contractors saying it was too early to determine what, if any, costs would be passed on. However, the indicative impacts of PBAs on government projects suggested the administrative and financial transition costs of the current framework for PBA reforms were high.65

With regard to the suggestion that the minimum threshold should be lower than $1 million, Mr Field advised:

I think anyone who wants to lower it has never done it. I invite anyone who really cares about this legislation to come and sit with me on my carpet for a couple of hours and see what is involved in these processes. Anyone who is doing it would never, ever, ever, ever want to lower it and trigger more of it.66

2.2.2.2 General stakeholder comments — economic benefit of PBAs

MBQ advised:

There is still no evidence that PBAs have played any role in ensuring that the 1,000 subbies involved in the 100 PBA projects were paid in full, on time, every time as they are intended to do—but we do know from the independent implementation and evaluation panel’s report that they cost. They cost but we would say there is little benefit. It is a far cry from the Deloitte report commissioned by the government in 2016 which indicated that these reforms would have significant economic benefit.67

HIA also noted:

The report of the government’s own expert panel following the trial period found that there was 40 per cent to 60 per cent more administration involved on a PBA project; there was a 50 per cent increase in accounts administrator work; there was an increase in contract price of between two per cent and three per cent—and that was before the introduction of the account reporting requirements that have been included in this bill; and there was a probable $15,000 to $33,000 upgrade to software required. It should be remembered that these were costs incurred by larger building companies with admin and accounting systems and processes already in place. The ramifications for small, less sophisticated building businesses with less capacity to absorb the additional administrative and accounting burden will be significant. The expert panel also reported that there was no evidence of improved payment times to subcontractors and, not surprisingly, contractor prices had not reduced as was reported in the Deloitte’s report.68

64 Submission 4, pp 1-2.
65 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 7.
66 Public hearing transcript, Brisbane, 4 March 2020, p 3.
67 Public hearing transcript, Brisbane, 3 March 2020, p 3.
68 Public hearing transcript, Brisbane, 3 March 2020, p 3.
The department confirmed:

*In November 2016 and July 2017, respectively, Deloitte Access Economics prepared two reports for the Department of Housing and Public Works (DHPW) in relation to the security of payment reforms. In its 2016 report, Deloitte advised that the estimated ‘break-even’ point for the PBA model was $837,000, meaning that requiring a PBA for contracts below this value would result in a negative benefit to cost ratio.*

The department also noted:

*According to Deloitte, effective regulation of security of payment would provide an overall net benefit to society of $4.2 billion over 20 years, translating into a positive Gross State Product impact of $12.6 billion by 2036-37 and a positive impact of 2,373 FTEs.*

### 2.2.3 Clause 63

Clause 63 provides for the replacement of chapter 2 (Project bank accounts) and inserts a new chapter that deals with project trust accounts. Proposed new section 7 states that the main purpose of the chapter is to ensure that funds paid to the contracted party for particular contracts are held in a trust to protect the interests of subcontractors.

#### 2.2.3.1 Omission of existing sections 49, 50, 51, 52, 53, 54, 54A, 55, 55A, 56, 57 and 58

Existing Part 4 (sections 49, 50, 51 and 52) and existing Part 5 (sections 53, 54, 54A, 55, 55A, 56, 57 and 58) relate to the principal oversight responsibilities. These provisions will be omitted and replaced. The proposed new provisions relate to oversight powers to be exercised by the QBCC Commissioner.

The department advised that the Bill will remove both the requirement for principal oversight and the ability to step in on termination of a contract, bankruptcy or insolvency. The department advised that these measures would not be appropriate or effective in the private sector context, and instead the QBCC will have stronger oversight functions.

The explanatory notes also detailed that consultation on the Bill showed support for removing the principal oversight role in favour of extended QBCC functions and powers over trust accounts.

Stakeholders were supportive of the proposal to remove the principal oversight provisions. The Property Council advised:

*The Property Council welcomes the amendments in the Act which will remove the obligations placed on the principal to provide oversight of all payments made through any PBA on their relevant projects. Appropriately, the Bill now charges QBCC with the task of providing consistent oversight over all PBAs rather than the project principals.*

*The removal of the ability of a principal to replace the head contractor as trustee of any PBA on insolvency of the head contractor or termination of the contract is also a positive step forward for the simplicity of the framework.*

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70 Department of Housing and Public Works, correspondence dated 4 March 2020, p 6.
72 Explanatory notes, p 20.
73 Submission 8, p 1.
2.2.3.2 Proposed new section 8 (Definitions for chapter)

Cornwalls advised the committee that some terms have been defined to mean different things in different parts of the BIF Act and some other terms have been defined in a manner which may prove problematic.74

Cornwalls advised that the definition of ‘contracted party’ in proposed sections 8, 10C(c) and 30A allows the term to be used in a potentially inconsistent manner. They have suggested that this definition be reviewed.75 HIA also identified the issue of ambiguity in the definition of ‘contracted party’.76

In response, the department advised:

*It is proposed to consider options to further remove potential ambiguity in the ‘contracted party’ term.*77

MPAQ also raised the issue of the definitions contained in proposed new section 8. MPAQ suggested that the Bill be amended:

*... to remove any such ambiguities arising from these definitions before the Bill is passed into law. If not, there are reasonable prospects of these definitional problems ending up before the courts for interpretation which is not ideal.*78

Queensland Major Contractors Association (QMCA) also identified that the proposed definition of ‘building’ to be open to interpretation and proposed the original definition be retained. QMCA proposed the following:79

With regard to the other definitions in the chapter, QMCA proposed:

*... all such definition include, or the 8A Meaning of project trust work is prefaced by words such as “carried out in preparation for the erection or construction of a building on the site;” such that project trust work is clearly defined as only applying to works associated with the erection or construction of a building.*80

In response to various issues from stakeholders relating to definitions, the department proposed to consider options to remove ambiguities.81

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74 Submission 5, p 1.
75 Submission 5, pp 1-2.
76 Submission 18, p 3.
78 Submission 22, p 2.
79 Submission 20, p 2.
80 Submission 20, p 3.
2.2.3.3 Committee comments – Definitions
The committee notes that stakeholders have identified a number of definitions that they consider to contain potential ambiguities. The committee considers that there is a need to review these definitions to ensure that the legislation is clear and able to be interpreted appropriately by stakeholders.

<table>
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<th>Recommendation 2</th>
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<tr>
<td>The committee recommends that the Minister for Housing and Public Works review all definitions identified by stakeholders as having ambiguities and amend the legislation as appropriate.</td>
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2.2.3.4 Proposed new section 11A – Who are the trustee and beneficiaries of a project trust

Proposed new section 11A defines who is the trustee and beneficiary of a project trust. The contracted party, as the party who controls the project trust account, is the trustee and will usually be the head contractor.  

Proposed new subsection (4)(c) provides the opportunity for a minimum subcontract value to be set which will determine which subcontractors must be paid through the project trust account. The explanatory notes provide the example that if a minimum contract price of $50,000 is set by regulation only subcontracts over that value would need to be paid through the project trust.  

MBQ has recommended that a minimum subcontract price should be set at $20,000 excluding GST in the BIF Regulation from commencement of the new project trust account model. The justification for the proposed limit is:  

... the number of subcontractors who are beneficiaries has increased because the current model only applies to subcontractors who are carrying out ‘building work’ compared with the new model that applies to subcontractors who are carrying out ‘protected work’. ‘Protected work’ is far broader than ‘building work’.  

As a result, unless a minimum subcontract price is set from commencement of the new model to remove low level subcontracts from the onerous obligations associated with statutory trust accounts, then substantially greater administrative time and costs will be incurred by head contractors than what the Review Panel considered.  

This issue was also raised by Mr Field who also suggested a PBA minimum ‘Subcontract Agreement Value’ of $20,000 excluding GST and a minimum required payment to be made from a PBA to be $3,300 including GST. Mr Field advised the committee that he is proposing this threshold to try to avoid very small subcontractors getting caught up in the burden of the project bank account process. Mr Field also considered that the errors that occur between paying a supplier and a subcontractor would start to disappear if these minimum thresholds were put in place.  

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82 Explanatory notes, p 37.
83 Explanatory notes, p 38.
84 Submission 4, p 6.
85 Submission 7, p 1.
86 Public hearing transcript, Brisbane, 4 March 2020, pp 1-2.
The committee sought additional information from Mr Field regarding how he selected these particular figures. In relation to the minimum subcontract agreement value, Mr Field advised:

The minimum subcontract agreement value could be, in my opinion, anywhere between $10,000 and $20,000. I have asked for $20,000. If the government is not comfortable with that but is considering putting a figure on it and wanted a lower figure, I would suggest $10,000 at the lowest end but, from my experience, certainly nothing more than $20,000.87

In relation to the minimum required payment amount, Mr Field advised:

The $3,300, the minimum required payment to be paid from a PBA, is associated with another clause that has been in place for about 20 years which is that, if the works are less than $3,300—I am no lawyer, but I think it is unregulated building works—it is not subject to QBCC licensing and other parameters. It is the same figure reused that is already in legislation for other aspects of licensing. What it means is that we do not have extra additional figures, that people have to remember this rule or that rule. I have just used it for consistency. I have worked in the industry for 20 years. If you do not refresh parts of the legislation for five years, you forget it. Having different figures for different parts of the legislation becomes troublesome when you are trying to remember, but if it is the same figure repeated across different aspects of the legislation it is easier to remember, so that is why I am pushing for $3,300.88

Mr Field agreed that the sensible option would be if the minimum required payment could be tied to a consistent bottom threshold rather than a dollar figure.89

MBQ also raised the issue of minimum subcontract payments advising:

... it is important that the significant additional administration associated with making payments from the project trust account do not apply where the payments are for low amounts. The number of subcontractors that are considered subcontractor beneficiaries under the new project trust account model is significantly higher than under the current model and a number of these are likely to make payment claims for a relatively small amount e.g. surveyor, consultants. As such, it is disproportionate to the payment to make these from the project trust account and to carry out the not insignificant additional paperwork associated with that payment. Payments for less than $3,000 excluding GST should not be required to be made from the project trust account.90

MBQ’s solution was to amend proposed new section 20(1), discussed in section 2.2.3.5 below, and the definition of ‘minimum subcontract payment’ to mean ‘an amount prescribed by regulation’ in proposed new section 10.91

In response to the issue of a suggested minimum contract value of $20,000, the department advised:

The Panel recommended that government have the flexibility to prescribe a minimum contract price for a subcontractor to qualify as a beneficiary for a project trust account. Any limitation to the application of the project trust account framework would need to balance the need to protect subcontractor payments with potential administrative burden for head contractors particularly when the lower value subcontracts are likely to be for those smaller subcontractors who are more vulnerable to the impacts of non-payment.

87  Public hearing transcript, Brisbane, 4 March 2020, p 2.
88  Public hearing transcript, Brisbane, 4 March 2020, p 2.
89  Public hearing transcript, Brisbane, 4 March 2020, p 2.
90  Submission 4, p 7.
91  Submission 4, p 8.
The Bill includes a head of power to prescribe a minimum value in regulation. While it is not proposed to prescribe any minimum subcontract value immediately, the ability to prescribe an amount in a regulation offers the flexibility to respond to changes in the industry that may arise following implementation of reforms.92

In response to the issue of minimum subcontract payment amounts, the department advised:

Setting a minimum subcontract payment amount for payments from a trust account was raised in consultation and it was identified there would be unintended consequences. For example, for avoidance purposes multiple payment claims may be made and most critically that monies owed less than the minimum payment amount may not have the protections of the trust.

On this basis it was determined not to proceed with establishing a head of power for this.93

2.2.3.5 Committee comments – Proposed new section 11A

The committee notes both stakeholders and the department’s views relating to the minimum subcontract value and the minimum subcontract payment amount.

The committee is conscious of the need to balance the needs of all stakeholders, including those both making and receiving payments. Whilst some of the arguments advanced by stakeholders in relation to the administration of PBAs are compelling, the committee considers that there is also a need to protect smaller stakeholders.

The committee is satisfied that the proposed amendments allow for flexibility to implement a minimum contract value should the need arise following implementation of the proposed amendments.

2.2.3.6 Proposed new section 14 – Eligible contracts

Proposed new section 14 defines the particular contracts that are eligible for a project trust. The eligible contracts for the next phase are where the contracting party is the State or a HHS and more than 50 per cent of the contract price is for project trust work and the contract price is $1 million or more. This is consistent with section 14 of the BIF Act but includes HHSs and the upper cap of $10 million has been removed.94

Subcontractors Alliance advised the committee that they consider the exclusions to be objectionable:

In effect, they deprive some of the most vulnerable from the very protections that the legislation is intended to provide.

The exclusions are artificial and arbitrary.95

2.2.3.7 Proposed new section 14A – Amendments of contracts requiring project trusts

Proposed new section 14A specifies that the contract will become eligible once the amendment takes effect. It only applies where the amendments increase the original contract price by 30 per cent or more. The explanatory notes state that this provision is consistent with current requirements under section 15 of the BIF Act.96

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92 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, pp 24-25.
93 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 25.
94 Explanatory notes, p 38.
95 Submission 6, p 1.
96 Explanatory notes, p 38.
Subcontractors Alliance sought the removal of the 30 per cent price trigger advising:

The 30% factor will simply result in a builder awarding a contract for a value that is marginally below the threshold and then promptly adding a variation.\(^97\)

The committee sought additional information from the department regarding the reasons for setting the price trigger at 30 per cent. The department advised:

This figure aligns with provisions of the Queensland Home Warranty Scheme (QHWS) relating to the assistance available to a consumer where a contract is underquoted by 30% or more. Though not directly related to the trust account framework, the QHWS provisions also recognise the significance of a 30% variation in contract price.

Industry is generally familiar with the QHWS requirements, so adopting the same figure for the project trust framework was intended to maintain consistency and assist with compliance.\(^98\)

With regard to the $1 million minimum contract value, the committee sought information about what occurs when a variation takes the contract value over the minimum contract value. The department advised:

If the contract is varied, the requirement for the increased contractual value or the value of delivering that project would be required to be paid into the project trust account. The requirements under the proposed amendments will further protect money by meaning that those retentions being held by the head contractor are ring fenced, put into a separate account and cannot be drawn on to pay for those additional increases in contractual value.

The framework will operate under the agreed contract value. If the contract for delivering a new school, for example, increases by $10 million, that $10 million increase will be required to flow through the project trust account or the project retention account. The great feature of the proposed reforms is the fact that these retentions are ring fenced or put to the side. There is also a charge or a trust is applied over them so that, in the event that a head contractor becomes insolvent, they are a registered or a secured debt to which the subcontractor is entitled.\(^99\)

The department also advised that proposed section 14A allows for a project trust account to be set up later, after a variation. They provided the following example:

... where a project was originally below that threshold but through either a variation or a change in scope of the works increases over that threshold, that provision allows for the project trust account structures to be established.\(^100\)

2.2.3.8 Proposed new section 14E – Prescribed subcontracts require project trusts

Proposed new section 14E provides for the ability to prescribe in regulation subcontracts that will be required to establish a project trust. This will allow for the project trust to cascade in a limited number of circumstances. It is not intended to prescribe any circumstances at this stage but allow for future flexibility.\(^101\)
MBQ recommended that subcontracts between the same head contractor and the same subcontractor under one or more subcontracts, with a combined contract price of $1 million excluding GST or more, should be prescribed in the BIF Regulation from commencement of the new project trust account model. MBQ explained:

*The proposed new Section 14E allows some subcontracts to be prescribed by regulation to require project trusts in addition to the head contract. The Review Panel report identified that head contractors may elect to contract to only a few subcontractors for large packages to minimise the number of subcontractors to be dealt with under the statutory trust accounts as this has a direct effect on the administration required to operate statutory trust accounts. Under that arrangement, only those few subcontractors will be beneficiaries of the statutory trust account. To enable more subcontractors on a project to be beneficiaries under the project and/or retention trust, the regulation should prescribe that all subcontracts between a head contractor and the same subcontractor, for one or more subcontracts, with a combined contract price of more than $1 million excluding GST, should require a project trust.*

In response, the department advised:

*Future consideration may be given as to whether a regulation will be prescribed for this section and the value that this might be. This consideration would occur in consultation with industry.*

2.2.3.9 *Proposed new section 15C – Contracts for small scale residential construction work*

Proposed new section 15C provides that a project trust is not required for a contract if the only project trust work to be carried out is residential construction for fewer than three living units. The explanatory notes detail:

*It is not intended that a project trust account be required for the construction of domestic buildings. However, construction of large-scale residential projects, such as housing developments and blocks of units will be required to have a project trust account. The threshold for small scale residential construction work is where there are less than 3 living units. For example a duplex will not trigger the project trust requirements as it only has two living units, but a complex of 5 units will trigger the requirements, provided it meets the other criteria for project trust accounts.*

Subcontractors Alliance considered that there was no sound reason to exclude the small scale residential sector from the provisions. Subcontractors Alliance advised:

*The financial harm that can be inflicted on a trade contractor by builders that engage trade contractors on so called “small scale residential work” is just the same as any commercial builder.

A notable example of situations where this exclusion would result in the same degree of carnage that this legislation is intended to protect trade contractors is the Bloomer insolvency. Over 40% of insolvencies occur in this sector.*

In response, the department advised that the Panel did not identify any concern with this limitation.

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102 Submission 4, pp 6-7.
103 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 5.
104 Explanatory notes, p 39.
105 Submission 6, p 3.
106 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 22.
Cornwalls identified:

In proposed section 14B, which deals with multiple contracts at the same site or adjacent sites, separate contracts for works on a site or separate contracts for carrying out what would otherwise be project trust work at the same site or adjacent sites, are taken to be a single contract for the purposes of proposed section 14 which is the proposed section that determines whether a contract is eligible for a project trust. (For convenience we shall refer to this type of proposed section as a conglomeration clause.)

As we understand it, proposed section 14B was inserted to prevent principals and/or contractors endeavouring to ensure that the project trust scheme does not apply to a construction contract by dividing up the works into multiple contracts thereby ensuring that each particular contract does not meet the financial qualification to eligible to be project trust work under proposed section 14.

Proposed section 15C, which deals with small scale residential construction work, does not have a similar provision. In the absence of such a provision in or applying to proposed section 15C, it is reasonably likely that principals and/or contractors who wish to ensure that a particular project does not fall within the project trust scheme, will exploit this “loophole” for that purpose by the use of multiple contracts all of which have a contract price below the financial qualification to be eligible to be project trust work under proposed section 14.107

Cornwalls advocated that proposed new section 15C should also have a conglomeration section similar to that contained in proposed section 14B to prevent such avoidance.108 MPAQ also made the same suggestion.109

In response, the department advised:

The department will further consider and confirm whether the existing drafting achieves the intent.110

2.2.3.10 Committee comments – Proposed new section 15C

The committee agrees that the intention of proposed new section 15C is to enable small scale residential construction to be undertaken without triggering the project trust provisions. The committee is of the view that the intent of the provision could be thwarted by unscrupulous operators who put in place multiple contracts on the same or adjacent sites. The committee therefore agrees that the Bill needs to be amended to include measures to prevent this occurring.

Recommendation 3

The committee recommends that the Bill be amended to include measures to prevent the use of multiple contracts on the same or adjacent land in relation to contracts for small scale residential construction work.

107 Submission 5, p 2.
108 Submission 5, p 3.
109 Submission 22, p 3.
110 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 5.
2.2.3.11 **Proposed new section 15D – Contracts for maintenance work**

Proposed new section 15E provides that where a contract is for building work that is for maintenance work only, the contract will not be eligible for a project trust account. The clause defines ‘maintenance work’ as follows:

- (a) means—
  - (i) testing; and
  - (ii) taking samples and restoring the sample site; and
  - (iii) work required on an ongoing basis to—
    - (A) prevent deterioration or failure of a thing; or
    - (B) restore a thing to its correct operating specifications; or
    - (C) replace a component at the end of its working life; but
- (b) does not include—
  - (i) improving a building to increase its capabilities or functions; or
  - (ii) improving a building to meet new statutory requirements applying to the building; or
  - (iii) a refurbishment or replacement of a building that extends the life of the building.

Subcontractors Alliance advised that they consider there is a flaw in the definition of ‘maintenance work’.

While there has been an attempt to exclude significant work from the exclusion in subsection 15D(2)(b), the reality is that a financial limit needs to be placed on items (A), (B) and (C) as those items can become significant and of long duration such that the potential losses to trade contractors can be crippling.

A significant flaw in the provisions of 15D(2)(b) is that there can be significant refurbishments that have nothing to do with extending the life of a building.

The words “that extends the life of the building” should be deleted.

In response, the department advised:

The terminology referenced by the Subcontractors Alliance is consistent with the existing BIF Act and the Panel did not identify any concern with this limitation.

2.2.3.12 **Proposed new section 15E – Contracts for building work services**

Proposed new section 15E provides that a project trust is not required if the contract is only for building work services. This will exclude a project trust from being required where the contract only includes certain services such as architectural, design and surveying and other advisory services.

Cornwalls considered the interaction of the terms ‘building work services’, ‘administration services’, ‘advisory services’, ‘management services’ and ‘supervisory services’ in relation to proposed new section 15E and how the legislation would operate in a practical sense. Cornwalls noted that it is appropriate to consider the prospects of principals and/or contractors seeking to avoid the need to establish a project trust account.

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111 Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020, clause 63, p. 97.
112 Submission 6, pp 3-4.
113 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p. 22.
114 Explanatory notes, p. 39.
115 Submission 5, p. 3.
Cornwalls advised:

It is already the practice that the very large “builders” such as Abigroup, Hutchinsons, Balderstone Hornibrook to name some examples (Major Contractors), sometimes establish the contractual relationship between themselves and the principal on the one hand and what one would ordinarily consider to be the first-tier subcontractors on the other, through an arrangement by which the Major Contractor in question is the “managing contractor”. Under this type of arrangement, the Major Contractor is responsible, among other things, for the management of the direct contracts between the principal and the parties we would ordinarily consider to be first-tier subcontractors. The obligations of the Major Contractor under such an arrangement are very much like the work described in the definition of “building work services”.

It is known in the industry that in many jobs the Major Contractors do not do any building in the traditional sense at all in they do not have what one would ordinarily consider to be building labour on the site but merely coordinate all the various “subcontractors” and manage the contracts and report to the principal.

If all the services being provided by a Major Contractor pursuant to such an arrangement fall within the definition of “building work services”, as we believe is easily conceivable, the Major Contractor will not be required to establish a project trust account for that project and that obligation will fall to the businesses which one would ordinarily consider to be first-tier subcontractors, such as the plumbing contractor, the air and mechanical contractor, the fire services contractor, the electrical contractor, the formwork contractor, the landscape contractor, and on it goes. ¹¹⁷

Conwalls suggested that the reason this exemption is included in proposed section 15E may be to avoid unintended consequences so that those providing advisory and/or professional services are not unintentionally obligated to establish PTAs when there is no utilitarian purpose in them having to do so. ¹¹⁸ MPAQ also made the same suggestion. ¹¹⁹

Conwalls has suggested that the Bill be amended to either specifically refer to those classes of persons whom it is intended be excluded or to include some mechanism which would prevent major contractors from using the type of arrangement to avoid their obligations. ¹²⁰

In response, the department advised:

The department will consider amendments to further clarify this exclusion. ¹²¹

2.2.3.13 Committee comments – Proposed new section 15E

The committee agrees that the parties which are to be captured by or excluded from the proposed new section 15E need to be clear in the Bill.

**Recommendation 4**

The committee recommends that the Bill be amended to make it clear which parties are intended to be excluded by the exemption allowed in proposed new section 15E.
2.2.3.14 Proposed new section 15F – Contracts with less than 90 days until practical completion

Proposed new section 15E provides an exemption where the contracted work would be completed in less than 90 days between when a project trust account would be established and practical completion.122

Cornwalls suggested that the intent of section 15F is not clear and identified problems in both how to determine whether the contract is for less than 90 days, including whether the date is the anticipated date or the actual date, and the confusing definitions of ‘practical completion’ and the ‘date for practical completion’. Cornwalls suggested that the provision be amended to provide clarity on its intent.123 MPAQ also made the same suggestion.124

In response, the department advised:

The intent of section 15F is to exclude contracts with less than 90 days until practical completion from the requirement to establish a project trust account. Use of the phrase ‘the day practical completion for the contracted work would occur’ was intended to make clear that it is the anticipated date for practical completion at the time the contracted party is assessing whether a project trust is required.

For example, if a person enters a contract on 2 July 2020, and the contract states that practical completion is to occur on 2 September 2020, no project trust will be required. Equally, if a variation triggers a project trust requirement but there are less than 90 days before practical completion is expected to occur, based on the time of assessing the project trust applicability, no project trust is intended to be required.

The intent was not to have the project trust framework apply to short contracts or contracts with only an expected short duration remaining as it would be an unreasonable burden on the contractor.125

Subcontractors Alliance did not support the exclusion of short-term contracts, advising:

The financial harm that can be inflicted on a trade contractor in three months is just the same as any greater period.

On projects with considerable or expensive materials the bills can be just as high.

There are current examples of short term projects that would be exempt from the PBA regime under this section and the trade contractors have lost significant sums of money because PBA are not in place.126

In response, the department advised:

The exclusion is consistent with the existing BIF Act and the Panel did not identify any concern with this limitation.

Excluding short term contracts balances the cost to industry against the benefits to subcontractors on the basis it is expected only a small number of projects valued at $1 million or more would be able to be completed in less than 90 days.127

122  Explanatory notes, p 39.
123  Submission 5, pp 4-5.
124  Submission 22, p 5.
125  Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 14.
126  Submission 6, p 4.
127  Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 22.
2.2.3.15 Committee comments – Proposed new section 15F

The committee agrees that the terms used in proposed new section 15F need to be clear in their intent.

**Recommendation 5**

The committee recommends that the terms used in proposed new section 15F be reviewed to ensure the intent is clearly articulated and amended as considered appropriate.

2.2.3.16 Proposed new section 20 – All payments to subcontractor beneficiaries to be paid from project trust account

Proposed new section 20 requires all payments to beneficiaries be paid from the project trust account and is consistent with section 29 of the BIF Act.128 Proposed new section 20 provides:

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20 All payments to subcontractor beneficiaries to be paid from project trust account
   (1) This section applies if a project trust is required for a contract and the contracted party is liable to pay an amount to a subcontractor beneficiary in connection with its subcontract.
   (2) The contracted party may only pay the amount to the subcontractor beneficiary—
       (a) from the project trust account; and
       (b) by depositing the amount into the account of a financial institution nominated by the beneficiary.
       Maximum penalty—200 penalty units or 1 year’s imprisonment.
   (3) To remove any doubt, it is declared that the obligation to pay an amount from the project trust account applies whether or not the amount is held in the account when it is to be paid.
       Note—
       See section 51 about covering shortfalls.
   (4) If a subcontractor beneficiary is also required to establish a project trust for its subcontract, the account nominated by the beneficiary under subsection (2)(b) must be the account for the project trust for the subcontract.
   (5) This section does not apply to—
       (a) a retention amount withheld from payment to a subcontractor beneficiary if the amount is deposited into a retention trust account of which the subcontractor is, or will be, a beneficiary; and
       (b) a retention amount to be released to a subcontractor beneficiary from a retention trust account.

MBQ has recommended that proposed section 20(2)(b) be amended by adding the words ‘by depositing the amount into the contracted party’s account at a financial institution’.129

MBQ advised the reason for this suggested amendment as follows:

The proposed new Section 20(2) provides that payments to a subcontractor beneficiary are to be deposited “into the account of a financial institution nominated by the beneficiary”. Extensive discussion was held with the Government and agreement reached that all payments from a project trust account to a subcontractor beneficiary must be deposited into a bank account that is held by the subcontractor beneficiary. It was agreed that allowing the beneficiary the option of nominating a different account would undermine the purpose of Chapter 2 of the BIF Act being to ensure payments to subcontractor beneficiaries are made. It would also make it significantly more difficult for the QBCC to audit the project trust account as it would need to obtain additional information to determine whether the payment out of the project trust account was deposited into an account on instruction from a subcontractor beneficiary or whether the head contractor was in breach of the BIF Act by depositing the payment into the account of a person who was not a subcontractor beneficiary.
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128 Explanatory notes, p 49.
129 Submission 4, p 7.
The proposed new Section 36A(2)(b) in relation to the retention trust account requires that all payments from the retention trust account must be made into “the contracted party’s account”. A similar restriction must be included in Section 20(2) to ensure that only subcontractor beneficiaries receive payments from the project trust account.\(^\text{130}\)

In response, the department acknowledged that the matter of allowing subcontractor beneficiaries to nominate another account for payment to be made into was the subject of discussion during consultation, and it was identified that this was raised as an issue due to the increasing use of debt factoring arrangements in the industry.\(^\text{131}\) The department advised:

\begin{quote}
It was agreed the use of a third-party account to receive payment, such as a debt factoring company, may reduce the trust protections over the amounts owed and undermines the intent of the reforms to ensure monies owed to subcontractor beneficiaries are protected.
\end{quote}

The Bill does not specifically provide for a third-party account to be nominated, it is intended the word ‘nominated’ be used as meaning ‘specified’ and that the subcontractor nominate an account in their name or business name.\(^\text{132}\)

The department advised that it would consider putting beyond doubt that the account nominated must be under the control of the subcontractor.\(^\text{133}\)

MBQ also recommended that proposed new section 20(1) be amended to include the words ‘that exceeds the minimum subcontract payment’. The reasons for this suggested amendment are discussed in section 2.2.3.1 above.

2.2.3.17 Committee comments – Proposed new section 20

The committee considers the issue regarding payments to subcontractors accounts raised by MBQ to be of concern. The committee agrees that the matter needs to be put beyond doubt in order to ensure that trust protections are not undermined.

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<td>The committee recommends that clause 63 of the Bill (proposed new section 20) be amended to ensure that the account nominated by the subcontractor must be under the control of the subcontractor.</td>
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2.2.3.18 Proposed new section 20C – Insufficient amounts available for payments

Proposed new section 20C directs that amounts liable to be paid are paid on a proportional basis to all subcontractors where there is an insufficient amount available to cover all payments. This is to avoid payments being made to a favoured subcontractor where there are insufficient funds in the project trust. Where there are insufficient funds to pay all subcontractors and a proportional payment is made, a new requirement means the contractor must notify the commissioner of this payment in the approved way (subsection 3). This is to support QBCC compliance and enforcement activities. The explanatory notes state that this provision is consistent with existing section 33 of the BIF Act with the exception that it does not include imprisonment as a penalty as the offence relates to a failure to notify only.\(^\text{134}\)

\(^{130}\) Submission 4, p 7.
\(^{131}\) Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 5.
\(^{132}\) Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 5.
\(^{133}\) Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 6.
\(^{134}\) Explanatory notes, p 42.
MBQ considered:

It is inappropriate and entirely unreasonable to create a new offence for non-compliance with an obligation that is only included to assist the QBCC in identifying when a shortfall exists in the trust account. The head contractor is already subject to a penalty of up to 100 penalty units or 1 year’s imprisonment under Section 51(2) when a shortfall exists. Further, if a subcontractor receives a shortfall in the payment due to it, it has many options available to it to pursue payment including lodging a Monies Owed Complaint with the QBCC.135

In response, the department advised that it considered the provision and the associated penalty to be appropriate because:

The Panel recommended (recommendation 16) that a requirement be introduced to notify the QBCC if a ‘pro-rata’ payment is made under section 33 of the BIF Act. Section 20C addresses this recommendation and has a penalty for failing to comply.

Having insufficient funds in the account to pay amounts due may be an early indicator of contracting party financial distress. Failing to notify of the pro-rata payment may be a way of concealing financial distress and the consequences of this could be the subcontractor continuing to perform work the contracting party knows they will not be able to pay for. The intent of the security of payment reforms is to minimise these occurrences.136

2.2.3.19 Proposed new section 24A – Contracting party to report failure to establish project trust

Proposed new section 24A places a positive obligation on the contracting party (i.e. the principal) to inform the commissioner if they are aware that a project trust is required but has not been established. The intent of the requirement is to assist the QBCC in fulfilling its regulatory functions which is consistent with the intent of section 52 of the BIF Act. For this reason, the same maximum penalty of 100 penalty units has been applied.137

QLS advised:

The section as drafted does not impose a time limitation for informing the commissioner and accordingly, QLS considers that, despite the operation of subsection 38(4) of the Acts Interpretation Act 1954, it is difficult to envisage the fine actually being imposed. QLS recommends that a specific time frame be included in the provision, such as x number of days from when the contracting party becomes aware or has reasonable grounds for suspicion that the project trust has not been established.138

2.2.3.20 Proposed new section 25B – No assignment of entitlement by contracted party

Proposed new section 25B provides that an assignment by the contracted party of an entitlement of the party to an amount held in trust for a project trust is of no effect.139 The explanatory notes state that the proposed new section is consistent with existing section 47 but has been amended to reflect the updated terminology and project trust framework.140

135 Submission 4, p 8.
136 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 6.
137 Explanatory notes, p 43.
138 Submission 23, p 3.
139 Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020, clause 63, p 115.
140 Explanatory notes, p 44.
Cornwalls observed that whilst factoring and invoice discounting have traditionally been minimal in the building and construction industry it has become more common in recent years. Cornwalls considered that the proposed new section may have consequences for those who use these types of facilities to finance their businesses. MPAQ also made the same suggestion.

In response, the department advised:

_During consultation, the department sought feedback on the suitability of the Bill permitting factoring arrangements. Concerns were raised that allowing payment to a third party via debt factoring arrangements was contrary to the intent of the BIF Act and may compromise the integrity of the trust arrangements, such as increasing fraud risk. Following this, it was determined that factoring arrangements would not be supported in the Bill._

2.2.3.21 **Proposed new section 31 – What is a retention trust**

Proposed new section 31 defines that a retention trust is a trust over amounts being withheld as retention for security of performance under a building contract. The trust over amounts extends only to cash retentions being withheld and not other forms of security such as bank guarantees. This provision is primarily for the benefit of the party that is entitled to be paid retention amounts.

Cornwalls and MPAQ considered the definition of ‘retention trust’ in the provision to be inappropriate. Cornwalls explained:

_We think this one is also a potential significant problem in that in the previous iteration of this bill the term ‘building work’ was defined using the definition in the QBCC Act. As a consequence, people who did not do work under the QBCC Act like electrical contractors were excluded from that regime had it come in. That was brought to the attention of the relevant people and that was taken out. That is not how it is defined when you look at setting up project trusts, the work that attracts project trusts. When you come down to the retention trust issue, it is still the same. You still rely on the definition of ‘building work’ as defined in the QBCC Act. The consequence of that is that electrical contractors are out of the retention scheme, and there is a whole series of them listed there that are exceptions. I am a builder and I am administering the retention trust account and then I do not have to put the money for the electrical contractor in there but I do have to put the money for the plumber in there._

The MEA also raised the issue of electrical and other sub trade work not covered by the QBCC Regulation. MEA advised:

_MEA wishes to ensure that electrical and other sub trade work not covered by the QBCC regulation is considered and defined as “building work” to enact the protection of the Bill. The complex interrelationship of current legislation, this bill and the transition to Trust accounts must ensure that there is no loop hole that may allow unscrupulous parties to avoid liability._

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141 Submission 5, p 7.
142 Submission 22, p 6.
143 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, pp 15-16.
144 Explanatory notes, p 45.
145 Submission 22, p 7.
146 Public hearing transcript, Brisbane, 4 March 2020, p 15.
147 Submission, 19, p 2.
In response, the department advised:

*It is acknowledged that some contracts for building and construction work that permit the withholding of cash retention will not fall within the scope of ‘building contracts’ under the QBCC Act. However, these parties were intended to be protected under the retention trust provisions. The retention trust framework was intended to offer broad protection for all contracted parties in the building and construction industry who have cash retentions withheld. This includes, electricians, architects, engineers and other professions currently excluded from the definition of ‘building work’ under the QBCC Act.*

The department will investigate how best to ensure all relevant contracts are protected by the retention trust regime. It may be appropriate for contracts relating to ‘protected work’ to be the applicable contract type.\(^\text{148}\)

### 2.2.3.22 Committee comments – Proposed new section 31

The committee notes that the matter of the definition of ‘building work’ excluding electricians and some other subcontractors not regulated by the QBCC was raised during consultation on the 2017 Bill.\(^\text{149}\) The committee also notes the department’s agreement to investigate how best to ensure all relevant contracts are protected by the retention trust regime.

The committee agrees that the provisions need to be clear in their intent.

<table>
<thead>
<tr>
<th>Recommendation 7</th>
</tr>
</thead>
<tbody>
<tr>
<td>The committee recommends that the Bill be amended to ensure that all relevant contractors are protected by the trust regime.</td>
</tr>
</tbody>
</table>

### 2.2.3.23 Proposed new section 32 – When retention trust required

Proposed new section 32 outlines when a retention trust is required. A retention trust account is required when certain criteria of a contract are met, including that the contract or subcontract is one associated with a project trust account. The requirement to have a retention trust account starts when a retention amount is withheld under a contract which meets the criteria. A retention trust is not required when the contracting party is the State, the Commonwealth, a state authority, local government or another entity prescribed by regulation.\(^\text{150}\)

In addition, the proposed new section creates a head of power which will allow a minimum contract price to be set to exclude a contract from requiring a retention trust account. If a minimum value is not prescribed in regulation, no minimum value will apply. The explanatory notes state that this new provision has been included to provide flexibility.\(^\text{151}\)

Similar to the issues MBQ has raised in relation to proposed new section 11A, discussed in section 2.2.3.1, they have recommended that the minimum subcontract price should be set at $20,000 excluding GST from the commencement of the new retention trust account model.\(^\text{152}\)

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\(^{148}\) Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 17.


\(^{150}\) Explanatory notes, p 45.

\(^{151}\) Explanatory notes, p 45.

\(^{152}\) Submission 4, p 8.
The committee notes comments made by Gympie Blinds regarding what some would consider to be small losses of retention amounts:

*Whilst these amounts may not seem much, it is still our money that is owed. We really feel for other contractors in Gympie who have lost larger amounts of money. These amounts of money can be enough to sink a business. We hope that something can be done to stop these large companies taking advantage of small business.*

2.2.3.24 Committee comments – Proposed new section 32

The committee is conscious of the need to balance the needs of all stakeholders, including both those making and receiving payments. The committee considers that there is a need to protect smaller operators who could be considered particularly vulnerable to these types of financial losses.

The committee is satisfied that the proposed amendments allow for flexibility to implement a minimum contract value should the need arise following implementation of the proposed amendments.

2.2.3.25 Proposed new section 36 – Limited purposes for which money may be withdrawn from retention trust accounts

Proposed new section 36 specifies that funds can only be released from the retention trust account to pay the contracted party money they are entitled to under the contract. Subsection (2) requires that an amount must not be withdrawn from a retention trust account until after the defect liability period, as it applies to the amount in question, ends.

MBQ considers that proposed new section 36(2) should be deleted on the basis that it is unreasonable and defeats the purpose for which retention is held under a subcontract to only permit withdrawal from the retention account at the end of the defects liability period.

MBQ advised:

*The head contractor is only permitted to have recourse to a subcontractor’s retention if the subcontractor is in breach of the subcontract. Sections 67L and 67N of the QBCC Act restrict how much retention can be withheld under a subcontract and Section 67J restricts when the head contractor has the right to have recourse to the retention. It is unnecessary, therefore, to impose yet more restrictions in Section 36 of the BIF Act when the QBCC Act and the subcontract itself gives the head contractor the right to the retention monies.*

If the head contractor is permitted to have recourse to a subcontractor’s retention, the head contractor becomes the beneficiary of that amount at that time. Therefore, the head contractor ought to be permitted to withdraw the amount that it is the beneficiary of when the right arises under the subcontract.

Cornwalls also raised this issue, advising:

*The effect of this would be that the trustee/contracting party which holds the retention amount, would be required to rectify the defects or problem or engage others to do so at the trustee/contracting party’s cost, and bear those costs until such time as the defects liability period is over. This does not seem equitable or reasonable for the trustee/contracting party given the purpose for which retentions are held during the defects liability period.*

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153 Submission 3, p 1.
154 Explanatory notes, p 47.
155 Submission 4, p 9.
156 Submission 5, p 7.
MPAQ also agreed, suggesting:

... that this subsection should be either deleted or modified so as to enable a trustee/contracting party operating a retention trust account to use the moneys in the retention account for the intended purpose set out in the contract. That is, rectifying defective work provided that the contracted party has failed to carry out that rectification work, in accordance with its contractual obligations.157

QLS advised that the limitation on the use of the retention to correct defects or omission in the contracted work would:

... prevent the trustee addressing defects and issues during the defects liability period, even where the contracted party refuses to perform rectification works or ought to comply with the terms of the contract. It also ignores a situation where the contract itself is terminated and the entitlement to have the benefit of those moneys crystallises, perhaps prior to the end of the defects liability period.158

In response, the department advised:

In this respect, the Bill mirrors the present BIF Act. Limiting the purposes for which a trustee may withdraw from the retention trust account will ensure that cash retentions remain protected until such time as they are to be released to the beneficiary.

This will ensure, for example, if a subcontractor does not agree that they are responsible for defects or omissions in the contracted work, the retentions will still be available at the end of the defects liability period, at which time the matter can be resolved.159

2.2.3.26 Proposed new section 41 – Training before withholding retention amount

Proposed new section 41 requires that a person administering a retention trust account must receive training prior to opening a retention trust account. The training will be prescribed by regulation. This provision is the result of Panel recommendation 7.160

In relation to the proposed retention trust training, HIA commented that:

... training in relation to retention amounts and trust accounts is quite pointless if undertaken in isolation. If someone does not have detailed knowledge of the entire security of payment regime nor have an adequate understanding of the complex contract requirements that apply generally to commercial contracts as well as trust account requirements, then retentions training may be more likely to confuse than clarify.161

Cornwalls noted that failure to comply with the provision could result in significant penalties. They considered that the QBCC should ensure that industry participants are well aware of their obligations. Cornwalls also noted that the quantum of money involved in retention accounts will be comparatively small in proportion to the contract sum and the PTA, and yet there is no equivalent training requirement with respect to operating project trust accounts.162

MPAQ also made the same suggestion.163

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157  Submission 22, p 8.
158  Submission 23, p 3.
160  Explanatory notes, p 41.
161  Submission 18, p 4.
162  Submission 5, p 7.
163  Submission 22, p 8.
In response, the department advised:

Recommendation 8 of the Panel report was that contractors intending to withhold cash retentions be required to complete compulsory training about the management of a retention trust account. The Panel did not recommend specific training for project trust accounts.

The Bill provides that the detail about the retention trust training largely to be prescribed in regulation. The Bill does not explicitly prevent the opening of a retention trust account prior to the retention training having been completed. The Bill also clearly states that the trustee may nominate an officer of the company who will be charged with administering the account, where the trustee will themselves not be undertaking this function.164

QLS noted that, unlike the Work Health and Safety Act 2011 on which the provision is modelled, the proposed new section does not address the cost of training.165

In response, the department advised:

The Bill provides for the detail about the retention trust training largely to be prescribed in regulation.

During consultation on the Bill, stakeholders emphasised the need for the prescribed training to be cost-effective, accessible to regional businesses and flexible enough to cover relevant officers in a building company. The department will continue to work closely with stakeholders as this detail is developed.166

Subcontractors Alliance suggested that the requirement for training should be deleted on the basis that:

The trust account system is not that difficult.

It does not include the intricacies of solicitors or real estate agents trust accounts.

The costs and time delay are unnecessary.167

In response, the department advised:

The provision implements recommendation 8 of the Panel report—that contractors intending to withhold cash retentions be required to complete compulsory training about the management of a retention trust account. This will ensure contractors understand their obligations and can comply.168

2.2.3.27 Proposed new section 51 – Trustee to cover shortfalls

Proposed new section 51 will apply if there is an insufficient amount available in the trust account to pay an amount due to a beneficiary of the trust. The provision requires the trust to immediately deposit an amount equal to the shortfall in the trust account and failure to do so will incur a maximum penalty of 100 penalty units or one year’s imprisonment.169

164  Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 18.
165  Submission 23, p 3.
166  Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 69.
167  Submission 6, p 4.
168  Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 23.
169  Explanatory notes, p 50.
New subsection (3) requires the trustee to notify the commissioner within five business days of depositing an amount equal to the shortfall and failure to notify the commissioner incurs a maximum penalty of 50 penalty units. The explanatory notes state that this requirement is to indicate possible financial distress to the commissioner.170

MBQ has recommended that proposed new section 51(3) be removed on the basis that it considers it is unnecessary and it unreasonably adds further administration. MBQ considered:

If the head contractor has made the deposit on or before the payments are due to be paid to the subcontractor beneficiaries in compliance with the legislation, it is not necessary for the head contractor to notify the QBCC that it has complied.171

HIA also objected to the notification requirement, advising:

HIA finds the requirement that the head contractor will be required to inform the QBCC Commissioner of the shortfall particularly problematic. As a matter of course, in the residential construction industry a builder may be required to top up the trust account to pay a subcontractor simply because most of the sector operates under a negative cash flow model. Under these arrangements a builder effectively funds the construction projects. In circumstances in which the aim is to ensure a subcontractor is paid on time and in the right amount, the notification process would seem unnecessary. The prospect that such a notification could trigger a QBCC audit or involvement from the regulator should send a shiver down the spine of QBCC management given the impact this will have on resources as this provision will generate hundreds of notifications annually.172

In response, the department advised:

The drafting of this provision was informed by the Panel’s observation that having insufficient funds in the account to pay amounts due may be an early indicator of contracting party financial distress.

However, it is arguable that the requirement under section 20C for a trustee to notify the QBCC if a ‘pro-rata’ payment is made sufficiently delivers on the Panel’s intent.

The department will consider removing the notification requirement under section 51.

Proposed new section 53D – Power to appoint special investigator

Proposed new section 53D provides the commissioner with the ability to appoint a special investigator to investigate a person’s compliance with the requirements under the BIF Act for trust accounts.173

MBQ advised:

Under the proposed new section 53D, if the special investigator appointed by the QBCC establishes that a person has contravened a provision of the BIF Act, the QBCC may recover the cost of the investigation, as a debt, from the person. However, the BIF Act contains a significant number of obligations that are administrative in nature and that do not affect payments to subcontractors. As such, it is entirely unreasonable to require a person to cover the cost of an investigation simply because it did not strictly comply with every little administrative task.174
MBQ advised that the provision should be amended to apply only to those provisions that affect payments to subcontractors.\textsuperscript{175}

In response, the department advised:

\begin{quote}
A special investigator may be appointed to investigate alleged non-compliance with the BIF Act relating to trust accounts. Administrative non-compliance may result in non-payment to subcontractors or have the effect of reducing protections over monies owed.

The recovery of costs for a special investigator are considered appropriate and is consistent with regulatory frameworks for other Queensland statutory trusts. Additionally, determining whether costs are to be recovered may take into consideration other factors including the severity of the offence and impact on individuals and the community.\textsuperscript{176}
\end{quote}

The committee sought additional information from the department in relation to the anticipated circumstances where a special investigator may be appointed. The department advised:

\begin{quote}
The special investigator provisions are based on other statutory trust account models, such as the Agents Financial Administration Act 2014 for real estate agents.

It is anticipated that a special investigator may be appointed to investigate particularly complex matters relating to trust account compliance, such as those requiring forensic financial analysis. For example, if a trustee fails to keep appropriate trust records the special investigator may be required to verify the amounts being withheld on behalf of each beneficiary in a retention trust to ensure payments have been made correctly or the QBCC may decide that a special investigator is best placed to respond to reports from a financial institution of potential noncompliance, if specialised knowledge of particular banking platforms is required.

The functions of the special investigator are intended to complement the QBCC’s ongoing monitoring and enforcement activities.\textsuperscript{177}
\end{quote}

2.2.3.29 \textit{Proposed new section 55B – Reports, records and information}

Proposed new section 55B(6) provides a requirement for the trustee for a project or retention to provide information to an investigator. The rest of the provision relates to financial institutions.\textsuperscript{178}

MBQ noted that proposed new section 55B(6) does not apply to financial institutions and recommended that the subsection be deleted.

In response, the department agreed with the observation and advised that it will consider omitting proposed new section 55B(6).\textsuperscript{179}

\textsuperscript{175} Submission 4, p 10.
\textsuperscript{176} Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 8.
\textsuperscript{177} Department of Housing and Public Works, correspondence dated 11 March 2020, Attachment, p 4.
\textsuperscript{178} Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020, clause 63, p 150.
\textsuperscript{179} Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 9.
2.2.3.30 Committee comments – Proposed new section 55B

The committee notes the department’s advice about considering whether it will omit proposed new section 55B(6). The committee considers that, should the department consider it is necessary that the provisions be included in the Bill, proposed new section 55B(6) should more appropriately be included in Subdivision 2 Special Investigators.

Recommendation 8

The committee recommends that both the need for and location of proposed new section 55B(6) of the Bill be reconsidered and that the Bill be amended accordingly.

2.2.3.31 Proposed new section 58A – Liability of executive officer for offence committed by corporation against executive liability provision

Proposed new section 58A applies liability to executive officers for offence committed by a corporation where the officer did not take reasonable steps to ensure the corporation did not engage in the conduct constituting the offence. New subsection (2) prescribes what the court must have regard to when considering what ‘reasonable steps’ the officer has taken. New subsection (5) identifies that sections 18(1), 19(2), 20A(1), 20A(2), 20B, 34(2), 36(1) and 36(3) relate to ensuring that money is held and deposited into trust accounts appropriately as well as only withdrawn in certain circumstances. This provides the protections for subcontractor money.180

MBQ considers that executive liability provisions should only apply to office holders of the company and those who are considered ‘executive officers’. MBQ advised:

The definition of ‘executive officer’ is so broad that it captures many employees of a company that may not have the information needed to ensure that the company complies with the statutory trust account obligations.181

Cornwalls identified two difficulties with the definitions contained in the clause, advising:

... “executive officer of a corporation” is not defined very clearly. The current definition is, “a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer.”

To some extent, all administrative staff, for example, project managers, contract administrators down to clerks assisting a project manager or a contract administrator, could fall within this rather broad definition.

It is our submission that this term needs to be more clearly defined to, among other things, make it clear that at the very least, it is restricted to a person who has financial control or some degree of financial control over the determinations and operations of the party to the contract.182

And,

... the term “all reasonable steps” has been defined by the courts in a number of cases in relation to the now repealed provisions of the QBCC Act relating to permitted individual matters in a very expansive sense with the consequence that if those cases are applied in cases about what an “executive officer” has to do in order not to be guilty of this offence, it might be difficult to demonstrate that a person took “all reasonable steps” even when any reasonable application of the “pub test” would suggest they had done everything they could.

180 Explanatory notes, pp 57-58.
181 Submission 4, p 10.
182 Submission 5, p 7.
It is our submission that this level of uncertainty as to whom this obligation rests on and the extent to which they are required to take “all reasonable steps” needs to be addressed more specifically in the Bill before it is passed into law.\(^{183}\)

In response to these issues, the department advised:

The Bill specifies a small number of offences as being subject to executive officer liability. These offences were chosen based on the seriousness of non-compliance with the trust account framework. For example, the prescribed executive liability offences relate to establishment of a trust account and deposits and withdrawals. The section specifying an offence for paying less than the scheduled amount has not been prescribed as an executive liability provision.\(^{184}\)

Section 58A of the Bill has been drafted along similar lines to section 111B of the QBCC Act. Section 58A specifies what conduct may constitute reasonable steps by an executive officer.

The definition of ‘executive officer’ in this section aligns with that under Schedule 2 of the QBCC Act, which similarly applies to a person responsible for a company’s management even if not called the director, secretary or executive officer.

This is an important anti-avoidance provision, as a person could otherwise assign another title to their position and avoid liability for decisions for which they were directly responsible.\(^{185}\)

### 2.2.4 Clause 65

Clause 65 implements Taskforce recommendation 10 and Panel recommendation 11 by amending section 75 (Making payment claim) to provide that head contractors must provide a supporting statement with every payment claim.\(^{186}\)

HIA advised of their opposition to the obligation to include a supporting statement on the basis that they considered it to be:

... unreasonable, uncommercial and impractical. HIA is not aware of any other industry subject to such requirements.

HIA contends there is a risk that this proposed requirement could have unintended consequences. For example, a claim from a subcontractor against the head contractor may have a due date for payment of 20 business days. If the head contractor puts in a claim against the client/principal before that due date is reached, despite intending to make payment in full to the subcontractor, they would be required to specify in the supporting statement (given to the principal) that not all subcontractors have been paid what is owed. This, at a minimum, may raise conflict between the head contractor and their client when it is not necessary. The explanatory notes do not make clear that this will not be the situation.

HIA believes that if this requirement is going to be imposed it should be imposed for all parties able to make a payment claim instead of focusing on only one particular link in the contractual chain.\(^{187}\)

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\(^{183}\) Submission 5, p 8.

\(^{184}\) Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, pp 18-19.

\(^{185}\) Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 9.

\(^{186}\) Explanatory notes, p 58.

\(^{187}\) Submission 18, pp 6-7.
2.2.4.1  **Clause 65 – definitions**

Cornwalls stated that providing a supporting statement is required if the matter relates to a subcontract under a construction contract but not if the construction contract is also a subcontract for another construction contract. Cornwalls advised:

*Given the definitions and certain difficulties which relate to those definitions, it is not entirely clear to which contracts or subcontracts it does or does not apply to.*

*Further, we fail to understand why the obligation to provide such a supporting statement is limited as it is under this provision. We assume that an attempt has been made to adopt the New South Wales approach which applies to head contractors, however this is only our assumption and has not historically been made clear.*

*It is our submission that this obligation should be imposed right through the contractual chain and that the Bill should be amended to effect this.*\(^{188}\)

In response, the department advised:

*Regarding the application of supporting statements to others in the contractual chain, the Taskforce recommended that the requirement be limited to head contractors. This was because of concerns that head contractors could use the requirement as a “weapon” against subcontractors unable to meet their obligations to others especially where that inability is attributable to non-payment by the head contractor.*

*The Bill provides for the declaration to be provided in the form of a supporting statement, consistent with the terminology used in the existing New South Wales model. While not a statutory declaration, the QBCC will have the ability to investigate and enforce false or misleading information provided in a supporting statement. The Taskforce observed the benefits of creating a separate offence administered by the QBCC.*\(^{189}\)

Cornwalls also questioned why the obligation to provide a supporting statement does not invalidate the claim.\(^{190}\) QLS also raised this issue, advising:

*... there is a requirement under section 75 that creates an offence of a failure to provide a supporting statement with a payment claim. That is an offence, but it does not invalidate the payment claim. You could still bring a payment claim without a supporting statement. You might be prosecuted for it, but you could still proceed under the BIF act. I do not know if that is really what was intended. A better incentive for people to give a supporting statement and actually do a payment claim properly would be to say that the payment claim is invalid unless it is accompanied by a supporting statement. You could still make it an offence, but it is the invalidation of the payment claim that is the key thing in the contractual relationship between people.*\(^{191}\)

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\(^{188}\) Submission 5, p 8.  
\(^{189}\) Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 20.  
\(^{190}\) Submission 5, p 8.  
\(^{191}\) Public hearing transcript, Brisbane, 4 March 2020, p 13.
QLS expressed concern that:

... the amendments to section 75 of the BIF Act will not achieve the intended purpose because failure to provide a supporting statement with a payment claim, while an offence punishable by a fine, does not invalidate the payment claim itself, which remains enforceable under the BIF Act. It is conceivable that a party that has not paid its subcontractors would intentionally not provide a supporting statement, knowing that the potential payment to be obtained from the respondent could outweigh the penalty which may be imposed for not providing the statement.\(^{192}\)

QLS also noted:

The consequences of failure to declare that subcontractors have been paid or of making a false declaration in the supporting statement required by the proposed amendment to section 75, will only be able to be actioned by the QBCC and will have no apparent impact on the legal rights of the parties to the payment dispute. This will mean that a claimant that has not paid its subcontractors will still be able to utilise the procedures under the Act to itself recover payment.\(^{193}\)

In response to this issue, the department advised:

Both the Panel (recommendation 11) and the Taskforce (recommendation 10) supported requiring a head contractor to declare that its subcontractors have been paid. Offences were recommended for a failure to comply (Panel) and for making a false or misleading declaration (Taskforce). The provision is aimed at increasing transparency over unpaid amounts and providing stricter scrutiny of the reliability of declarations (which can be provided now as a contractual requirement).\(^{194}\)

Subcontractors Alliance questioned the need for the claimant to provide a supporting statement, advising:

The information to be supplied in the supporting statement:

- has nothing to do with the claimant’s right to make a progress claim;
- does not in any way assist in the progression of the progress claim; and
- has nothing to do with the relationship between the claimant and the respondent concerning the respondent’s obligations to pay.

The information required weaponises the act in favour of the Respondent. The Respondent is provided with information about the financial status of the claimant. This enables the Respondent to determine whether or not to starve the claimant out.\(^{195}\)

In response, the department advised:

The information that must be included in a supporting statement is consistent with that required under the New South Wales model. It will encourage transparency and will assist principals and the QBCC in identifying subcontractors that have not been paid unlawfully.\(^{196}\)

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192  Submission 23, p 4.
193  Submission 23, p 4.
195  Submission 6, p 5.
196  Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 23.
### 2.2.4.2 Proposed new section 75(6)

Proposed section 75(6) inserts a definition of a supporting statement. The proposed provision is as follows:  

<table>
<thead>
<tr>
<th><strong>supporting statement</strong> for a payment claim means a written document—</th>
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</thead>
<tbody>
<tr>
<td><em>(a)</em> declaring that all subcontractors have been paid all amounts owed to them by the claimant at the date of the payment claim; or</td>
</tr>
<tr>
<td><em>(b)</em> stating —</td>
</tr>
<tr>
<td>i. the following for each subcontractor who has not been paid the full amount owed to them by the claimant at the date of the payment claim —</td>
</tr>
<tr>
<td>A. the subcontractor’s name;</td>
</tr>
<tr>
<td>B. the amount still unpaid;</td>
</tr>
<tr>
<td>C. the details of the unpaid payment claim for the subcontractor;</td>
</tr>
<tr>
<td>D. the date the subcontractor carried out the construction work or supplied the related goods and services;</td>
</tr>
<tr>
<td>E. the reasons the amount was not paid in full; and</td>
</tr>
<tr>
<td>ii. that all other subcontractors have been paid the full amount owed to them by the claimant.</td>
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</tbody>
</table>

MBQ advised that the requirement under proposed section 75(6)(b)(i)(D) could cause difficulties for head contractors and should be deleted. MBQ explained:

> The head contractor is not going to know the precise date that a subcontractor carried out a particular activity. Including this in the Supporting Statement is not going to assist the subcontractor to get paid yet the head contractor may be penalised up to 100 Penalty units if the Supporting Statement does not include that information.  

In response, the department advised:

> The information that must be included in a supporting statement is also consistent with the New South Wales model. Specifying the date work is performed will provide important context when the same subcontractor is listed as being unpaid on consecutive supporting statement. For example, if it is evident that a subcontractor remains unpaid for some time, this may prompt further investigation by the principal or referral to QBCC.

### 2.2.5 Clause 70

Clause 70 provides the replacement of section 90 (Respondent required to pay adjudicated amount). The clause provides a new requirement that the respondent provide evidence to the registrar when they have paid the claimant. The notification must be made within five business days of making the payment. A maximum penalty of 20 penalty units applies for failing to notify the registrar, which is consistent with section 128 of the BIF Act. The explanatory notes state that this will assist the commission when determining whether payment has been made.

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197 Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020, clause 65, p 161.  
198 Submission 4, p 12.  
199 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 11.  
200 Explanatory notes, p 58.
MBQ noted that the amended clause includes an additional notification requirement which it considered should be removed. MBQ advised:

> It does not benefit the claimant at all and is simply an additional administrative obligation on the respondent that is only required to assist the QBCC in identifying respondents who have not paid an adjudicated amount within the timeframe. The claimant has many options available to it if the respondent does not pay the adjudicated amount – one of which is to notify the QBCC itself. It is inappropriate and entirely unreasonable to create a new offence for not assisting the QBCC when the claimant has the option to do so itself if it wished to do so.\(^\text{201}\)

### 2.2.6 Clause 72

Clause 72 amends section 97 (Withdrawing from adjudication). The clause provides that where an adjudication application has been withdrawn under section 95, the claimant will now be required to also notify the Registrar. An adjudication application is considered withdrawn if the claimant chooses to withdraw it or if the respondent pays the full amount claimed in the payment claim that is being adjudicated. The explanatory notes state that this will assist the registrar in fulfilling their functions to collect statistical data.\(^\text{202}\)

MBQ stated:

> This is another of the provisions that have been only been included to assist the QBCC to do their job. These penalties do not benefit the claimants or the respondents and do not have anything to do with assisting payments being made to claimants. These are, therefore, unnecessary and should be removed from the BIFOLA Bill.\(^\text{203}\)

In response, the department advised:

> Prompt advice about the withdrawal of an adjudication application will allow the registrar to effectively monitor the use of the adjudication process. This information will also assist the registrar be more effective in its role and thereby better support industry.\(^\text{204}\)

### 2.2.7 Clause 73

Clause 73 inserts new chapter 3, part 4A. The provisions implement the Panel’s recommendations 5(a), (b) and (c)(i). The new part gives the claimant in an adjudication, who may be a subcontractor or head contractor, the ability to serve a payment withholding request on the higher party in the contractual chain.\(^\text{205}\)

#### 2.2.7.1 Part 4A – Requiring higher party to withhold payment

The Property Council expressed concern that the proposed provision will empower a claimant who lodges an adjudication application to give a payment withholding request to a higher party in the contractual chain which includes a project principal or a project financier. The Property Council explained:

> Under the current Act, a claimant has a choice as to whether to go to adjudication or to use the subcontractor’s charge approach. The interrelationship between these two rights is not clear in the proposed amendments.

\(^{201}\) Submission 4, p 13.  
\(^{202}\) Explanatory notes, p 58.  
\(^{203}\) Submission 4, p 13.  
\(^{204}\) Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 12.  
\(^{205}\) Explanatory notes, p 58.
The Property Council is concerned that this ambiguity may open these provisions up to inappropriate use. There is the opportunity for a claimant to put on an ambit claim, and to hold up the head contractor’s cash flow, for the whole period of the adjudication but without the right which the head contractor normally has to apply to the court to set aside a charge improperly lodged.

The Property Council contends that where there is a difference between the claimed amount and the scheduled amount, the optimal method of dealing with that situation is through adjudication. It would be contrary to a fair outcome for the claimant to have an added right to be secured for the claimed amount.206

In response, the department advised:

The Panel noted that a shortcoming of the payment withholding request models in other jurisdictions is that a head contractor would not be able to make the request if they make an adjudication claim against the principal given there is no one in the contractual chain above the principal. This is also the case with subcontractors’ charges under chapter 4 of the BIF Act—the mechanism is not available to head contractors.

Consequently, the Panel recommended (recommendation 5) that head contractors have the ability to issue a payment withholding request on a financier of the project.

During consultation on the Bill, stakeholders raised the issue of ambit claims, or that money may be withheld arbitrarily if an adjudication application ultimately is found to be invalid or a decision is made in favour of the respondent. As a result, the Bill provides that a payment withholding request can only be made where an adjudicated amount has not been paid, rather than when an application has been made.207

2.2.7.2 Proposed new section 97B – Higher party may be required to retain amount owed to respondent

Proposed new section 97B provides the circumstances under which a claimant may require a higher party to withhold sufficient money from money that is or becomes payable by the higher party to the respondent to satisfy the adjudicated amount. A claimant can make a withholding request where an adjudication decision has been made requiring the respondent to pay an amount to the claimant and the amount has not been paid in compliance with section 90.208

QLS advised:

QLS notes that these provisions appear to be drawn from the subcontractor’s charges procedures, with the aim of having a claimant paid by a higher party from monies still to flow down the line to the respondent for the particular work in question. New subsection 97B(2) makes this procedure optional, which QLS notes will be useful if the respondent is in insolvency administration because the amendments allow a claimant to create a charge over the “related amount payable to the respondent”, which can often be a claimant’s only hope of being paid if the respondent is insolvent. However, if a claimant goes down this path against a solvent respondent, the dispute could widen and deepen by pulling in a higher party, which in turn could defeat the original cash flow objective of the BIF Act.

206  Submission 8, pp 2-3.
207  Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 45.
208  Explanatory notes, p 60.
By way of illustrating the potential unintended consequences: clause 97B requires a "higher party" which is defined to include a financier, to retain out of the related amount payable to an unsuccessful adjudication respondent either the adjudicated amount or the related amount payable to the respondent, whichever is less. Depending on the terms of the financial accommodation and any builder's tie-in deed, there is unlikely to be any amount "payable" to the respondent in any case.

Such a notice may, despite its own limited utility, be an event of default under any financial accommodation and could therefore result in finance being withdrawn for the whole project. The result is that any other funds payable do not flow through to other subcontractors which are not secured. While the adjudication may be for $100,000.00, a default under the financial accommodation may result in no further claims being paid by the financier for amounts which are to become due under the contract to unsecured subcontractors.209

2.2.7.3 Proposed new section 97F – Respondent to provide information about higher party

Proposed new section 97F places an obligation on the respondent to give the claimant information about the higher party to assist them in issuing a payment withholding request. The claimant can request that the claimant provide:

- the name of the higher party for the relevant adjudicated amount
- the address of the higher party’s place of business or if the higher party does not have a place of business, the higher party’s place of residence
- whether any money is, or will become, payable by the higher party to the respondent.210

The respondent must comply within five business days, and there are penalties for non-compliance and providing false or misleading information.211

MBQ advised that they considered that some of the information required may not be within the respondent’s knowledge. MBQ considered that the respondent should be able to defend the imposition of a penalty if it has a reasonable excuse.212

In response, the department advised:

The information which can be requested by the claimant is limited to the name and address of the higher party. Given the relationship between the parties is one where a contract is likely to exist and the respondent has made a payment claim to the higher party, it is considered that the respondent would possess this information.213

2.2.8 Clause 75

Clause 75 inserts new chapter 3, part 6A (Charge over property). The proposed new part implements Panel recommendation 5. The proposed new part gives a claimant for an adjudication application who is a head contractor the ability to have a charge registered over property where an adjudicated amount has not been paid.214

209 Submission 23, p 5.
210 Explanatory notes, pp 57-58.
211 Explanatory notes, p 62.
212 Submission 4, p 14.
213 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 12.
214 Explanatory notes, p 63.
At the committee’s public hearings, the UDIA Q and Cornwalls both expressed concern about the impact of the clause on developers’ ability to access financing should this clause be enacted on the basis that it will undermine the confidence of investors and financiers in the development industry and place all projects in doubt. UDIAQ advised:

*We believe that the clause creates significant uncertainty that will ultimately delay the delivery of homes to Queenslanders. It essentially applies a charge at the time of peak debt in a project and essentially holds a property developer to ransom. Our understanding also is that the charge can last for two years and extend for a further period creating further uncertainty. The presence of this clause is likely to significantly increase costs to projects and in most cases will create a very large imbalance between the adjudicated amount and the amount of project value.*

UDIAQ also indicated that they have issues associated with the suitability of the proposal to reach a timely solution. They advised:

*The adjudicator’s decision arrangements are intended to be a timely service by a single building industry expert for subcontractors in day-to-day disputes. We believe that the same jurisdiction is not appropriate nor an equitable avenue for potentially major impacts on property projects and landholdings. We believe that a higher court should consider if a charge on land is relevant. Under the bill, the payment of the adjudicated amount to the court should be permitted, which would avoid the need to charge on the land and allow a review of the details of the adjudicated decision.*

The Property Council also raised this issue in its submission. The Property Council is of the view that this provision will have the effect of a caveat so the debtor could not deal with the land without paying the debt. The Property Council advised:

*The Property Council does not accept that these amendments are necessary as a successful claimant in an adjudication can already register a judgment and then take the usual enforcement steps available to a claimant. These steps include registering a writ over all property owned by the principal, not just the property on which the work was carried out.

The proposed new provision is not only unnecessary from a legal perspective, it is also unlikely to have any impact in a real-world sense when considering the factors likely to face an entity that is failing to meet its financial liabilities.*

The Property Council also noted that it is their experience that on occasions where a principal fails to make payments to a head contractor, it is likely to also have outstanding liabilities to their financiers which would have a superior security interest compared with the claimant on a particular project.

It should be noted that MBQ advised the committee that they support clause 75 and consider the government’s proposed changes will reduce the level of red tape for builders and subcontractors.

The committee sought a response from the department on this issue. The department advised:

*The Panel recommended (Recommendation 5) that a claimant that is a head contractor have the ability to register a charge over property where the respondent has failed to pay. This recommendation is in response to consultation with stakeholders who advocated for greater protections for head contractors that are not paid by principals.*
The Department of Housing and Public Works (DHPW) does not consider that the charge over property greatly increases the lending risk to a developer over the current common law mechanisms for debt recovery of an unpaid amount. DHPW is not aware of these existing mechanisms impacting a developer’s access to financing.

Failing to pay an adjudicated amount means that the respondent is at risk of having their property sold to satisfy the debt to the claimant. This is an outcome the respondent would want to avoid. The charge over property is intended to act as a deterrent to improve the likelihood of a claimant receiving disputed amounts in a timely manner. So ideally, it would only be used in limited circumstances.

The charge over property provides additional benefits to the current common law mechanisms for debt recovery of an unpaid amount. Registering a charge over property, by way of a security interest, provides security to the claimant in the event of insolvency of the respondent. A charge created pursuant to the BIF Act would also not be a voidable transaction or unfair preference that is subject to clawback by liquidators in the event of insolvency. However, it does not give priority over earlier secured creditors. For example, the claimant’s interest would not get priority over a mortgage if the mortgage was registered earlier than the claimant’s charge.220

2.2.9 Clause 83

Clause 83 provides for the replacement of chapter 9, part 1, divisions 2 and 3.221 This chapter includes some of the provisions that are yet to commence.

2.2.9.1 Proposed new section 215 – Amendment of section 14 (Particular contracts for project trust work)

Proposed new section 215 amends section 14 of the BIF Act to omit and replace subsection (1). The amendment expands the new framework to also apply to local government, the private sector and all state authorities. A contract continues to be eligible for a project trust if the contracting party is the State or a HHS and the contract price is $1 million or more. A contract will also be eligible for a project trust if the contracting party is a State authority (that is not a HHS), local government or an individual or private entity and the contract price is $10 million or more. This amendment is intended to commence on 1 July 2021 and represents Phase 2B of the new framework regime. Phase 2A is the commencement of the new PBA regime on 1 July 2020.222

The AIA indicated its concern in relation to the proposed commencement of project trust accounts. They consider that the commencement of existing section 215 should be no earlier than 1 January 2022. The AIA advised:

Included in the Bill is an amendment 215 that extends at a later date, project trust accounts to the private sector where the contract price is $10 million or more. Based on advice to-date it is anticipated that the proclamation for this amendment is [sic] will be made on 1 July 2021. This means the private sector has only 16 months to prepare this situation. It is considered a longer period is needed to ensure that the necessary education and training is undertaken by those who will be affected.223

221 Explanatory notes, p 68.
222 Explanatory notes, p 68.
223 Submission 9, p 3.
2.2.10 Clauses 131 and 132

Clause 131 inserts a definition of ‘business day’ to mean a day that is not –

(a) a Saturday or Sunday; or

(b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or made be done; or

(c) a day in the period from 22 December in a particular year to 10 January in the following year, both days inclusive.

Proposed section 67W provides that a provision in a commercial building contract is void to the extent it provides for payment of a progress payment by a contraction party to a contracted party later than 15 business days after submission of a payment claim.

Clause 132 inserts the same definition as clause 131 above.

Proposed section 67U provides that a provision in a construction management trade contract or subcontract is void to the extent it provides for payment of a progress payment by a contracting party to a contracted party later than 25 business days after submission of a payment claim.

The explanatory notes detail that the consultation on the Bill highlighted the desirability of aligning the definition of ‘business days’ in sections 67U and 67W of the QBCC Act with chapter 3 of the BIF Act. The current misalignment can cause compliance difficulties over the Christmas/New Year period.\(^\text{224}\)

A number of stakeholders raised the issue of payment delays occurring due to the proposed exclusion of the Christmas/New Year period not being ‘business days’.\(^\text{225}\) For example, Subcontractors Alliance advised:

\begin{quote}
The proposed inclusion of the period from 22 December to 10 January provides a payment holiday for the builder over the Christmas period.

Those providing goods and services to the builder are still required to pay their suppliers and staff in the meantime.

The proposed amendment weaponises the legislation in favour of the builder and the developer against the subcontractors.\(^\text{226}\)
\end{quote}

In response, the department advised:

\begin{quote}
Sections 67U and 67W of the QBCC Act provide for the maximum payment terms under different types of building contract. A payment provision in a contract that exceeds the timeframes under sections 67U and 67W is made void by the BIF Act and the default payment timeframe of 10 business days applies. However, the definitions of ‘business days’ used in the QBCC Act and the BIF Act differ.

During consultation on the Bill, industry stakeholders suggested that the change would substantially improve compliance with the BIF Act and avoid the confusion that arises due to this conflict with respect to payments.\(^\text{227}\)
\end{quote}

\(^{224}\) Explanatory notes, p 20.

\(^{225}\) Refer submissions 6 and 12.

\(^{226}\) Submission 6, p 5.

The committee sought a response from the department in relation to the implications for the payment of subcontractors as a result of excluding the period from 22 December in a particular year to 10 January in the following year from being considered as business days. The department advised:

Section 73 of the BIF Act provides that if a contract contains a void payment provision under s 67U, the due date for payment is 10 business days. To improve consistency in this section, the Bill aligns the definition of ‘business days’ under 67U of the QBCC Act with the BIF Act definition. Industry stakeholders said it would substantially improve compliance with the BIF Act and avoid the confusion that arises due to this conflict with respect to payments.

However, it does have the effect of providing the head contractor an extended period/additional time to make payment on a payment claim over the shut down period.

For example, if a payment claim was given on 20 December 2019 a contract that provided for payment later than 30 January 2020 would be void using the existing definition of business days under the QBCC Act. The proposed amendments mean that a contract could provide for payment by 17 February 2020 without being void. Payment claims given any other time during the year will not be affected.228

2.3 Implementation of Special Joint Taskforce recommendations

The policy objectives of the Bill in relation to the Taskforce’s recommendations are to be achieved by implementing five of the Taskforce’s 10 recommendations, with the remaining recommendations to be implemented through administrative and regulation changes.229

The committee sought additional information from the department regarding the reasons for the implementation methods to be used. The department provided the following additional information in relation to those recommendations to be implemented through administrative and regulation changes:

- Recommendation 4 – implemented through a combination of regulation and administrative amendments.
- Recommendation 5 – implemented through making a regulation, and a subcommittee of the Ministerial Construction Council is examining what mandatory and prohibited contract conditions should be prescribed.
- Recommendation 6 – recommendation was for noting only: no legislative or administrative changes are required.
- Recommendation 7 – implementing this recommendation will involve making a regulation to prescribe Commonwealth and/or interstate agencies with which the QBCC may enter into an information-sharing agreement.
- Recommendation 8 – recommendation to be implemented through a combination of regulation and administrative amendments.230

229 Explanatory notes, p 6.
The explanatory notes identify that to improve the QBCC’s ability to address fraudulent and dishonest practices in the building industry, the Bill will:

- strengthen and clarify an existing offence provision relating to causing significant financial loss, to improve the QBCC’s ability to enforce non-compliance with contractual obligations. This includes making it clear that section 76 of the Justices Act 1886 applies which places the onus of proof on a defendant to prove the existence of reasonable excuse for non-compliance
- create a new offence for giving false or misleading information about a licensee’s financial position where that information is communicated by another person to the QBCC
- increase the timeframes for QBCC to start a prosecution
- enable the QBCC to publish details about excluded and permanently excluded individuals who are not licensees.

The BIF Act will also be amended to create a legal obligation for a head contractor, when making a payment claim, to declare that subcontractors have been paid in full or otherwise provide details about those subcontractors that have not been paid.

2.3.1 Background

2.3.1.1 Special Joint Taskforce investigating subcontractor non-payment in the Queensland building industry

In February 2019, the Premier announced the establishment of a Special Joint Taskforce (Taskforce) comprising officers from the Queensland Police Service (QPS), QBCC and the Office of the Director of Public Prosecutions (ODPP) to investigate complaints of fraudulent behaviour relating to subcontractor non-payment and consider the ability of government and regulators to respond to such behaviour. The Taskforce, chaired by Hon John Byrne AO RFD, reported in June 2019. The report was tabled by the Minister on 28 November 2019.

The Taskforce identified the following key themes on which its recommendations were based:

- More effective enforcement — some legislative provisions may not operate as intended, constraining the QBCC’s ability to target offending behaviour and to mount successful prosecutions.
- Licensing — gaps in the current licensing process may allow inappropriate individuals to enter the industry.
- Unfair contract terms — a concern among subcontractors and the organisations that represent them is that subcontractors are not operating on a level playing field with head contractors and have limited ability to negotiate contract terms that balance the rights and obligations of the parties.
- Education — a lack of understanding of relevant laws, contractual obligations, and business, financial and contract management means that subcontractors can fall victim to poor payment and contracting practices.
- Greater transparency and information-sharing — there is scope for more collaborative enforcement between the QBCC and other agencies, as well as information-sharing to assist subcontractors in making informed decisions.

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231 Explanatory notes, p 6.
233 Special Joint Taskforce, Investigating subcontractor non-payment in the Queensland building industry, June 2019.
• Statutory declarations — false statutory declarations about subcontractor payment are not unusual and greater deterrence is needed.\textsuperscript{234}

The Taskforce made 10 recommendations. The government accepted all 10 recommendations. The government response to the Taskforce recommendations is contained in Appendix E.

2.4 Strengthening Queensland’s building laws

The Bill proposes to strengthen Queensland’s building laws in the areas of licensing requirements, building certification, and regulation of architects and registered professional engineers.

2.4.1 Background

2.4.1.1 Building Confidence Report

In mid-2017 the Building Ministers’ Forum (BMF) appointed Professor Peter Shergold AC and Ms Bronwyn Weir to undertake an assessment of the effectiveness of compliance and enforcement systems in the building and construction industry across Australia. Professor Shergold and Ms Weir provided the BCR report, \textit{Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia}, in February 2018.

The report made 24 recommendations covering the following matters:

- Recommendations 1 to 4 – registration and training of practitioners
- Recommendations 5 to 7 – roles and responsibilities of regulators
- Recommendation 8 – role of fire authorities
- Recommendations 9 to 11 – integrity of private building surveyors
- Recommendation 12 – collecting and sharing building information and intelligence
- Recommendations 13 to 17 – adequacy of documentation and record keeping
- Recommendations 18 to 19 – inspection regimes
- Recommendation 20 – post-construction information management
- Recommendation 21 – building product safety
- Recommendations 22 to 24 – implementation of the recommendations.\textsuperscript{235}

2.4.1.2 Minimum financial requirements

A new framework for the MFR for licensing was released in 2018 with the aim of restoring financial reporting requirements. These changes have been implemented in phases through the Queensland Building and Construction Commission (Minimum Financial Requirements) Regulation 2018 (MFR Regulation). Phase 1 of the MFR Regulation commenced on 1 January 2019 and re-introduced mandatory annual reporting for all licenses, changed how decreases in net tangible assets are reported and clarified how assets are to be treated. Phase 2 began on 2 April 2019 and introduced higher reporting standards for category 4-7 licensees, along with measures to improve data quality and availability for the QBCC.\textsuperscript{236}

\textsuperscript{234} Special Joint Taskforce, Investigating subcontractor non-payment in the Queensland building industry, June 2019, p. 5.

\textsuperscript{235} Shergold, P, and Weir, B, \textit{Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia}, February 2018, p 5.

\textsuperscript{236} Explanatory notes, p 3.
2.5 Amendment of Architects Act 2002

2.5.1 Introduction

Architects are regulated by the BOAQ under the Architects Act 2002 (Architects Act). Both the Architects Act and the PE Act, which is considered in section 2.3.3 of this report, are similar in operation and seek to promote public safety by ensuring that architectural and professional engineering services are provided by qualified, registered practitioners and that their services are of a high standard.237

In relation to both the BOAQ and the BPEQ, the explanatory notes state:

Presently, however, the Boards have limited compliance, enforcement and disciplinary powers—particularly when compared to other industry regulators, such as the QBCC. For example, the Boards’ investigatory powers are restricted to requiring information or documents from persons under investigation, which creates a risk of crucial evidence being withheld or destroyed and hinders investigations.

It is necessary to empower the Boards to discharge their public safety functions and promote high professional standards. It is also important to ensure the Boards are adequately supported by their enabling legislation and able to effectively regulate the professions.238

... Legislative change is needed to expand the Boards’ powers beyond those already provided, and to improve the operation of each Act.239

In relation to the Architects Act, the explanatory notes detail that:

The amendments proposed in the Bill predominately relate to the management of, or tasks undertaken by, the Boards. In particular, the expanded compliance and enforcement powers are only expected to materially impact those persons who breach current requirements.240

The explanatory notes also state:

Each Australian state and territory regulates the profession of architecture, with the aim of ensuring public safety by ensuring that architectural services are only provided by registered practitioners and to a high standard. Architecture boards in other jurisdictions have varying powers in undertaking investigations. Improving the BOAQ’s investigatory powers to ensure more effective regulation of the profession will support the BCR recommendations and be specific to Queensland.241

Stakeholders raised a number of issues in relation to the proposed amendments which are detailed in the following subsections. For example, the AIA advised the committee that whilst it supported the proposed amendments to the Architects Act in principle, it had identified some areas of concern.242 The AIA also advised that some of the proposed amendments do not meet the fairness test.243

238 Explanatory notes, p 4.
239 Explanatory notes, p 10.
240 Explanatory notes, p 21.
241 Explanatory notes, p 23.
242 Public hearing transcript, Brisbane, 4 March 2020, p 6.
243 Public hearing transcript, Brisbane, 4 March 2020, p 9.
2.5.2 Clause 7

Clause 7 amends section 29A (Immediate suspension of registration). The explanatory notes detail that the purpose of the proposed amendment is to align the requirements in the Act for immediately suspending registration with grounds considered by the BOAQ in cancelling registration of an architect and if it is in the public interest.

Existing section 29A applies if the board requires an architect to undergo a health assessment under section 35D and the architect does not undergo the health assessment as required or does not cooperate with the doctor appointed to conduct the assessment.

The AIA noted the expansion of the power and advised that it considered that the clause, as currently worded, could be open to misuse and should only be used in special cases where it is clearly obvious that immediate action is required.

AIA suggested the following amendment:

Amendment of s 29A (Immediate suspension of registration)

Section 29A(1)—

1. This section applies if the board reasonably believes after carefully reviewing the relevant information—

a. it is in the public interest to immediately suspend the architect’s registration.

In response, the department advised:

The grounds listed in section 28 are serious, and it is important that the Board has the ability to act immediately if a person is in breach of that section.

In order to act under the section, the Board must have a reasonable belief that a ground exists under section 28 and that it is in the public interest to suspend the architect’s registration.

In order to form the reasonable belief, the Board will be required to consider relevant information and to satisfy itself that the action that it is taking is in the public interest. The requirement to act in the public interest will ensure that the Board will need to make its decision carefully.

The AIA also expressed its concern that the proposed amendment, if an immediate suspension later proves to be based on incorrect information or evidence and as a result the architect’s reputation is seriously damaged, should lead to the architect being entitled to compensation, but doesn’t in its current wording.

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244 Explanatory notes, p 24.
245 Architects Act 2002, s 29A.
246 Submission 9, p 1.
247 Submission 9, p 1.
249 Submission 9, p 2.
Existing section 64 provides:250

<table>
<thead>
<tr>
<th>64 Compensation</th>
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<tbody>
<tr>
<td>(1) This section applies if a person incurs loss or damage because of the exercise or purported exercise of a power under division 6 or 7.</td>
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<tr>
<td>(2) The person is entitled to be paid the reasonable compensation because of the loss or damage agreed between the board and the person, or failing agreement, decided by a court.</td>
</tr>
<tr>
<td>(3) Compensation may be claimed and ordered to be paid in a proceeding—</td>
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<tr>
<td>(a) brought in a court with jurisdiction for the recovery of the amount of compensation claimed; or</td>
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<td>(b) for an offence against this Act brought against the person claiming compensation.</td>
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<td>(4) A court may order compensation to be paid only if it is satisfied it is fair to make the order in the circumstances of the particular case.</td>
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The AIA suggested that existing section 64(1) be amended to include application where there has been serious damage to a person’s reputation.251

In response, the department noted the submitters’ comments but advised that this issue falls outside the scope of the Bill.252 However, the department did note that any alleged defamation in Queensland is addressed under the Defamation Act 2005.253

2.5.2.1 Committee comments – clause 7

The committee is satisfied that the intent of the provision is that any decision to immediately suspend an architect’s registration will require the Board to satisfy itself that the decision is being made in the public interest. The committee supports the proposed amendment.

2.5.3 Clause 11

Clause 11 inserts a new Part 2B (Audit of architects). Proposed new section 35I provides that the BOAQ may approve a program of audits of one or more architects.254 The audit power is not currently provided for in the Act, as an investigation is only triggered by a reasonable suspicion of wrongdoing or the receipt of a complaint.255 The AIA suggested:

... these audits be undertaken on a random selection basis similar to that used to confirm compliance with the CPD [continuing professional development] requirement. This suggestion will avoid any criticism that certain architects are being targeted.256

In response, the department advised that the introduction of performance audit powers was recommended in the BCR. The department advised:

The Bill requires that the Board establish an audit program to audit 1 or more architects. Similar provisions are contained in comparable statutes and this represents sound regulatory practice. The department believes that the clause provides appropriate governance arrangements which provide transparency and accountability about the manner in which an approved audit program can be conducted, including for example the purpose of the program and the criteria used to select an architect for auditing.

250 Architects Act 2002, s 64.
251 Submission 9, p 2.
252 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 32.
253 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 33.
254 Explanatory notes, p 25.
256 Submission 9, p 1.
It also allows the Board to target particular areas for auditing that may be of concern to the public or industry, for example randomly selecting architects that undertake commercial or high-rise building design work to audit what cladding has been selected.257

2.5.3.1 Committee comments – clause 11
The committee is satisfied that regulatory practice regarding the proposed audit program should ensure coverage of areas of risk. The committee suggests that in order to avoid any perceived criticism the Board should clearly articulate the purpose, criteria used to select particular architects, and the particular areas to be audited.

2.5.4 Clause 17
Clause 17 inserts a new Part 3, Divisions 7A to 7C. The explanatory notes identify that the proposed amendment will empower the BOAQ to discharge its public safety functions and promote high professional standards by providing for greater investigatory powers, including the power to enter places, to search places that have been entered and seize evidence, and to require the production of a broader range of potential evidence.258

2.5.4.1 Proposed new section 62K (General powers)
The AIA considered the investigation powers and entry by investigators to be too wide and suggested that the investigator should only be allowed to investigate items, things, etc that are related to the issue to be investigated. The AIA considered that other material and/or information in the architect’s office should remain confidential.259

The AIA has suggested the following amendment:260

62K General powers
(1) The investigator may do any of the following procedures provided they are part of the issue being investigated (each a general power)—
   a. search any part of the place;
   b. inspect, examine or film any part of the place or anything at the place;
   c. take for examination a thing, or a sample of or from a thing, at the place;

2.5.4.2 Proposed new section 62P (Power to secure seized thing)
Clause 17 also inserts new Division 7C which provides the power to seize evidence. The AIA considered that if the seized item is equipment and the item is made inoperable under proposed new section 62P(2)(b), there is the possibility that the equipment may be damaged during this process.261

258 Explanatory notes, p 8.
259 Submission 9, p 1.
260 Submission 9, p 2.
261 Submission 9, p 2.
The AIA has suggested the following amendment:\textsuperscript{262} 

\textbf{62P Power to secure seized thing}

1. Having seized a thing under this division, an investigator may—
   a. leave it at the place where it was seized (the place of seizure) and take reasonable action to restrict access to it; or
   b. move the thing from the place of seizure.

2. For subsection (1)(a), the investigator may, for example—
   a. seal the thing, or the entrance to the place of seizure, and mark the thing or place to show access to the thing or place is restricted; or
   b. for equipment—make it inoperable \textit{but not damage it}; or

In response, the department advised:

\textit{The proposed powers to enter and search are standard investigatory powers held by other Queensland regulators, including the QBCC, Electrical Safety Office, Valuers Registration Board and the Queensland College of Teachers. Similar powers are also outlined in the Commonwealth’s Regulatory Powers (Standard Provisions) Act 2014.}

\textit{The department notes that if an investigator enters a place with the occupier’s consent, the occupier may give consent subject to conditions and this consent may be withdrawn at any time. If consent is not provided, an investigator must apply to a magistrate, who must be satisfied there are reasonable grounds for suspecting there may be evidence of an offence against the Act before granting the warrant.}

\textit{The department believes these provisions provide sufficient safeguards for an occupier while enabling an investigator to undertake a search to determine if there is evidence of an offence against the Act.}\textsuperscript{263}

2.5.4.3 \textit{Proposed new section 62Y (How property may be dealt with)}

The AIA also considered that the destruction of usable equipment should not be allowed and has suggested the following amendment:\textsuperscript{264}

\textbf{62Y How property may be dealt with}

3. The board may deal with the thing as the board considers appropriate, including, for example, by destroying it \textit{(provided the thing is not usable equipment)} or giving it away.

In relation to proposed section 62Y, the department advised:

\textit{... if an item becomes property of the Board, the clause provides that the Board may deal with the item as appropriate. This may also include giving the item away or selling it and making efforts to return proceeds of the sale to the former owner, minus the sale costs.}\textsuperscript{265}

2.5.4.4 \textit{Committee comments – clause 11} 

The committee is satisfied that the provisions contained in clause 11 are appropriate for their purpose.

\begin{itemize}
  \item \textsuperscript{262} Submission 9, p 2.
  \item \textsuperscript{263} Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 31.
  \item \textsuperscript{264} Submission 9, p 2.
  \item \textsuperscript{265} Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 31.
\end{itemize}
2.6 Amendment of Professional Engineers Act 2002

2.6.1 Introduction

Registered professional engineers are regulated by the BPEQ under the PE Act. The explanatory notes state:

Both Victoria and Queensland regulate professional engineering through legislation. As the Victorian laws also seek to promote best practice and ensure only registered engineers may provide professional engineering services, the amendments are complementary.266

2.6.2 Clauses 85 to 107

The proposed amendments are similar to those proposed for architects. The committee did not receive any feedback from stakeholders in relation to the proposed amendments to the PE Act.

2.6.2.1 Committee comments – clauses 85 to 107

The committee is satisfied that the provisions contained in clauses 85 to 107 are appropriate.

2.7 Amendment of Building Act 1975

2.7.1 Introduction

With regard to the proposed amendments to the Building Act, the LGAQ advised:

The LGAQ seeks a working partnership with the Department of Housing and Public Works (the Department) and the QBCC to ensure local government input and expertise can inform further phases of the building certification reforms, as these are progressed (including any amendments to the Building Regulation 2006 and Queensland Development Code).267

2.7.2 Clause 37

Clause 37 amends section 37 (Provision for changes to building assessment provisions) by inserting new subsections (5) and (6). Subsection (5) provides that a regulation may provide for an amendment to a building assessment provision to apply immediately to an advanced building design or an undecided building application. Subsection (6) restricts subsection (5) to circumstances where the Minister is satisfied that there is a risk of serious injury or illness to a person if the regulation is not made, and an impact assessment is undertaken.268

The Property Council advised:

The Property Council notes the proposed changes to building assessment provisions (Clause 37) will enable future regulations to amend building assessment provisions to apply immediately to an advanced building design or undecided building application. This provision is restricted to circumstances where the Minister is satisfied that there is risk of serious injury or illness to a person and where an impact assessment has been undertaken.

Whilst the Property Council understands the merit of such an approach to respond to matters of acute public safety, we hold concerns about the potential impact of this provision on larger scale projects.

For a large office building or shopping centre, which may have involved years in planning and development, a shift in building assessment provisions could have a significant impact on the viability of a project.

266 Explanatory notes, p 23.
267 Submission 16, p 7.
268 Explanatory notes, p 31.
As such, the Property Council is keen to ensure that any 'impact assessment' undertaken in relation to this provision is done in a manner that accurately accounts for the likely effects of any proposed regulatory changes. The Property Council recommends that the Bill should include a requirement to undertake consultation as part of any impact assessment.

It has been the experience of the Property Council that consultation, even on a small scale with industry representative bodies, often leads to far stronger outcomes in the final regulation.269

LGAQ supported the intent of the amendment to enable a more responsive regulatory system and protect against significant risks to public health and safety. However, it suggested that 'impact assessment' in proposed new section 37(6) should be defined and/or further guidance developed to provide more certainty for industry as to the process the Minister will conduct before making the regulation.270

The department confirmed that an impact assessment will be required, including consideration of the costs and benefits, before the application of a building assessment provision.271

Thomas Independent Certifiers suggested that clause 37 allows for retrospective legislation which it did not support.272 However, the department confirmed that the provision is not retrospective as the immediate application of building assessment provisions does not apply to buildings under construction.273

2.7.2.1 Committee comments – clause 37

The committee is satisfied that the requirement for an impact assessment mitigates the risk of unintended consequences to changes in the building assessment process.

2.7.3 Clause 44

LGAQ identified the timeframes for notifying a local government of engagement differs for a private certifier depending on whether or not the certifier is engaged by a client that is the building owner or not. LGAQ advised that it is unclear why there is a discrepancy and feedback from local government officers has suggested five business days should be reasonable in both instances. LGAQ recommended:

...the timeframes for a private certifier to notify a local government of engagement should seek to align if possible, regardless of whether the certifier is engaged by an owner client or a non-owner client.274

In response, the department advised:

The timeframes for a certifier notifying local government of their engagement aligns with the timeframe in which the certifier is made aware of the owner’s name and contact details. In the case where the certifier is not engaged by the owner, the client has 10 business days to provide the owner’s name and contact details to the certifier, the certifier has 15 business days from engagement to notify local government (if the client has only provided the details on the 10th business day, this results in the certifier having a remaining 5 business days to notify local government which aligns with the timeframes of when the certifier is directly engaged by the owner.275

269 Submission 8, p 3.
270 Submission 16, p 7.
271 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 27.
272 Submission 10, p 1.
273 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 33.
274 Submission 16, p 8.
275 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, pp 46-47.
2.7.3.1 Proposed new section 143B – Owner may require performance of additional certifying functions

Proposed new section 143B applies when the owner is not the client or applicant and they require the performance of additional certifying functions by a building certifier. The owner can provide the client an additional inspection notice to be forwarded to the building certifier. An agreement must be reached about when the additional certification functions are to be performed or if no agreement can be reached the certifier must decide the day and notify the parties of the date.276

Thomas Independent Certifiers did not support this provision advising:

*The building certifier cannot be used as a “clerk of works” for a project making decisions on standard of workmanship of the builder. The building certifier has the power in the conditions of approval to require special inspections to confirm compliance as determined by the building certifier not the owner (e.g. fire wall inspection). Note the definition of certifying function is so broad that all requirements of the standard of construction of the building can be included.*277

In response, the department advised:

*This amendment provides the owner with the ability to request additional inspections, noting additional certification inspections require a day to be agreed between the owner, certifier, builder and client if not the builder. Where there is no agreement, the agreed day is determined by the certifier.*

*The additional inspections must be agreed at the start of the engagement, clarifying the requirements of all parties up front, with the owner liable to pay the cost of the additional inspection, limiting the impacts on all parties and mitigating the potential for a certifier to be used as a “clerk of works”.*278

QLS advised that it considered that proposed new section 143B contains a number of deficiencies which need to be addressed to make the section workable. In their view, there is a lack of detail in the proposed new section as follows:

1. *It does not expressly require that the additional certifying function must relate to the “building” the subject of the current engagement.*
2. *It does not take account of the information currently before the building certifier, or give any guidance as to what might be a reasonable excuse for the building certifier.*
3. *The “agreed day” calculation does not put any bounds on when a nominated date might be. It seems it can be any date which is nominated within 15 business days after the relevant day.*
4. *It does not address that the owner is directing further certification functions, the cost of which contractually rests with the builder. While subsection (7) makes the owner liable for the reasonable cost of performance of the certifying function by the building certifier under an additional certification notice:*
   (a) *the building certifier has no contract with the owner if the builder defaults in making payment; and*
   (b) *the provision does not expressly give the builder a right to payment for organising the performance of the certifying function under the contract of engagement.*279

276 Explanatory notes, p 33.
277 Submission 10, p 1.
278 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 34.
279 Submission 23, p 2.
In response, the department advised:

This clause was developed with significant input from key industry stakeholders, including building industry practitioners and certifiers to ensure it was a workable solution that enables all parties to be clear on certification requirements at the start of the building process, while enabling owners to request additional inspections.

Additional inspections requested under section 143B will be available for work to which the certifier was, or is, engaged under a contract made in accordance with section 138 of the Building Act.

Given the owner needs to request an additional certifying function and state the details of the certifying function to be performed by the building certifier, the builder, client, owner and certifier need to agree to the day or way to calculate the day for performing the certifying function or, where no agreement is made, the certifier must decide the day. Given the duty for the certifier to act in the public interest prevails, no further clarification is deemed necessary to ensure the certifying function relates to the building that is the subject of the current engagement.

S143B provides due consideration of circumstances where a building certifier may have a reasonable excuse to not comply with an additional certification requirement. The term ‘reasonable excuse’ is a commonly used term.

The agreed day calculation is bound by any date nominated within 15 business days after the relevant day and the day that the certificate of occupancy or final inspection certificate is issued for the building work. Flexibility is required as the date of inspection will depend on the nature of the additional certification work requested and the timing of the building work.

S143B states the owner is liable for reasonable costs of the performance of an additional certifying function, meaning payment for services rendered by a certifier would not be affected where a builder defaults.

Further costs can be determined when agreeing contractual terms between the builder and owner, noting that this clause does not apply retrospectively.280

2.7.4 Clause 55

Clause 55 amends section 190 (Making a complaint against a building certifier) to give the QBCC a discretionary power to dismiss complaints. The explanatory notes state that this power is limited to situations where there is insufficient or unsubstantiated evidence to support a complaint or where the QBCC is satisfied the complaint is frivolous, vexatious or lacks credibility.

The provision also limits the period for making a complaint about conduct of a building certifier for breaches unlikely to cause serious financial loss or harm. No limitation of time applies for making a complaint about conduct that is likely to cause serious financial loss or harm.281

LGAQ advised that, although the restrictions on complaint timeframes are limited, it considers it important that changes do not reduce consumer protections. LGAQ identified:

Local governments also currently experience difficulties in the operational and administrative processes associated with lodging complaints to the QBCC about building certifiers. To complement the proposed legislative changes under clause 55 of the Bill, the process for local governments to lodge complaints with the QBCC against a building certifier, should be streamlined and improved.282

280 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, pp 67-68.
281 Explanatory notes, p 35.
LGAQ requested:

... the Department and the QBCC work with local government to streamline and improve the process for local governments to lodge complaints with the QBCC, against building certifiers who are not acting in accordance with the building legislation.283

2.7.5 Clause 56

Clause 56 inserts a new chapter 6, part 5 (Disqualified individuals) comprising of three divisions. The chapter introduces a point system for a building certifier’s licence and enables a licence to be disqualified where an individual accumulates 30 demerit points over a three-year period.284

Thomas Independent Certifiers objected to the use of demerit points for private certifiers, advising the committee:

The building certifier is a professional and should be considered similar to the architect and engineer. The use of demerit points, and control of the building certifier like a contractor is not appropriate.

The whole of Part 3 of Chapter 6 should be amended to include the provisions similar in the Architects Act and Professional Engineers Act.285

In response, the department advised:

Architects and Engineers are registered by their respective boards. Currently building certifiers are licenced by the QBCC. It is a different framework. This clause extends the demerit points system, which is used for building practitioners licensed by the QBCC, to building certifiers. The purpose of this amendment is to strengthen compliance and enhance confidence in the majority of building certifiers who work hard to ensure buildings are safe and compliant.286

2.7.5.1 Committee comments – clause 56

The committee has considered stakeholder feedback regarding the professional nature of certifiers, and it notes that there is no Board or regulatory body providing registration for private certifiers. Therefore, similar provisions as those applied to architects and professional engineers cannot be applied. The committee is of the view that the provision is appropriate in the circumstances.

2.8 Amendment of Queensland Building and Construction Commission Act 1991

2.8.1 General stakeholder comments

2.8.1.1 Penalties

The MBQ noted many provisions in the Bill carry significant penalties that they consider to be excessive compared to the offence committed. MBQ also noted that one event can result in multiple offences. MBQ advised:

This approach does not achieve the intended purpose of the BIF Act which is to assist subcontractors to get paid and/or to secure money that is owed to subcontractors. It does add further complexity and risk to an already complex process. A significant number of these offences apply even though all subcontractors may have been paid what they are owed.287

283 Submission 16, p 9.
284 Explanatory notes, p 35.
285 Submission 10, p 2.
286 Department of Housing and Public Works, correspondence dated 4 March 2020, p 34.
287 Submission 4, p 3.
MBQ suggested:

These provisions should be amended to reduce the penalty to one that is commensurate with the offence committed. Alternatively, a defence of ‘without reasonable excuse’ should be included so that head contractors who inadvertently do not comply with administrative provisions of the BIF Act are not subject to the significant and disproportionate penalties …

And,

... a provision should be included to limit how many penalties can be applied.

However, the Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) argued that the fines are too low, stating:

If you are going to be consistent and have strong regulation and good governance, these fines need to be increased.

With regard to MBQ’s concern regarding the application of multiple penalties, the department advised:

When developing penalties for the BIF Act, the offences were compared to similar provisions dealing with trusts in the Queensland statute book. These included the Legal Profession Act 2017 and the Agents Financial Administration Act 2014.

The impact of subcontractor non-payment can be severe. Non-payment can result in financial ruin and serious social impacts such as suicide and family breakdown.

The Taskforce received 146 submissions relating to complaints of non-payment with the value of instances of non-payment ranging from $1,500 to $112 million (the latter being for a large number of creditors). Excluding submissions relating to multiple creditors, the average loss per subcontractor was $288,000. This is only based on those submissions received by the Taskforce.

Compliance with the trust provisions is critical to the effectiveness of the BIF Act in protecting subcontractor funds. These include requirements to hold money for the beneficial interest of subcontractors and to only use trust money as permitted by the Act.

The increased penalties that apply to offences that are essential to the trust framework in order to provide an effective deterrent against non-compliance.

The QBCC, in prosecuting offences must have regard to the Director of Public Prosecution’s Guidelines issued by the Department of Justice and Attorney-General. One of the key considerations in the decision to prosecute is the public interest.

In addition, it must be noted that the penalties prescribed for each offence are maximum penalties. The courts, in imposing penalties must have regard to relevant legislative provisions, including the Penalties and Sentences Act 1992.

If a person is issued with a penalty infringement notice (PIN), the person can elect not to pay the PIN and instead have the matter dealt with by the court.

288 Submission 4, p 3.
289 Submission 4, p 3.
290 Public hearing transcript, Brisbane, 4 March 2020, p 21.
291 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 11.
QLS also commented on penalties in relation to the information-sharing provisions and queried:

... whether, given many retentions are held on a monthly basis during lengthy contracts, giving notice upon every deposit to that trust account in respect of all subcontractors is too administratively burdensome and not proportionate to the mischief the provisions aim to prevent.292

In response, the department advised:

The information-sharing and notification requirements in the Bill largely reflect the Panel recommendations.

For example, sections 18B and 34B give effect to Panel recommendation 11, that a trustee be required to notify the contracting party of the details of the opening, closing or name change of a trust account. This section also implements recommendation 14, by requiring the QBCC to be notified as well. A regulation may prescribe the information to be included in the notice.

Sections 23A and 40A, which require the trustee to inform subcontractor beneficiaries about particular trust account withdrawals and transactions, align with recommendation 19 of the Panel Report.293

With regard to penalties, Mr Field advised:

... my construction firm pays hundreds of payment certificates each month. We rarely miss one. How do we not get penalised when something is missed or overlooked until corrected? I understand the legislation is trying to be punitive on bad contractors, and I appreciate that. That works in my interests and helps garner a stronger industry of people doing the right thing which I appreciate, because the sooner we get rid of the bad operators the better for me, but I certainly do not want to get into a situation where I am penalised for something that is missed or overlooked until corrected.294

Mr Field made the observation that:

Ninety per cent of my work is for the government. I get paid by the government, and every now and again the government pays me incorrectly or late or not into the project bank account. I put that down to human error. There is a breakdown in the system from the government’s perspective.

With all of the resources of the government, I need to bring to the committee’s attention that errors do occur. The system still has human inputs and people miss things. People make mistakes. We ring up and we contact our paying department in the government and they say, ‘We’re very sorry. We’ll get that fixed in a few days.’ I am just trying to highlight that, as difficult as it is and the challenges that are faced by commercial building contractors to comply with the legislation, humans are involved, errors occur, not everything is perfectly automated in the system. Our strike rate is probably equal to or as good as the government’s in return. That is what I have noticed, but I do not want to get penalised for an error or something that has been overlooked.295

292 Submission 23, p 3.
293 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 71.
294 Public hearing transcript, Brisbane, 4 March 2020, p 1.
295 Public hearing transcript, Brisbane, 4 March 2020, p 2.
In response to this issue, the department advised:

The QBCC, in prosecuting offences must have regard to the Director of Public Prosecution’s Guidelines issued by the Department of Justice and Attorney-General. One of the key considerations in the decision to prosecute is the public interest.

In addition, it must be noted that the penalties prescribed for each offence are maximum penalties. The courts, in imposing penalties must have regard to relevant legislative provisions, including the Penalties and Sentences Act 1992.  

2.8.2 Clause 119

Clause 119 inserts new sections 53BA and 53BB that strengthen the MFR framework. Proposed new section 53BB imposes additional responsibilities on executive officers of a licensed entity and those carrying on a business in partnership with a licensee. Proposed new section 53BA provides the penalties for failing to provide information to the QBCC under the MFR framework.  

The explanatory notes state:

Similar to the executive officer responsibilities in other safety-focused Acts, these persons will be required to take reasonable steps to promote their company’s compliance with the MFR framework. This includes maintaining a knowledge and understanding of the MFR framework and ensuring that appropriate resources and processes are provided to promote compliance. This seeks to further protect consumers by ensuring that responsibility is shared by all key decision makers within a company and that each is held accountable for decisions made in their field of responsibility.  

Proposed new section 53BB(2) provides for escalating penalties for executive officers who fail in the responsibilities imposed by the Bill, culminating in a maximum penalty of imprisonment.  

An executive officer is defined under proposed section 58A as follows:

executive officer, of a corporation, means a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer.  

MBQ considered:

We are recommending two significant changes to the QBCC Act. The first deals with the provision requiring an executive officer of a licensed company and the business partner of a licensee, to be responsible for due diligence in relation to the Minimum Financial Requirements. The first offence for failing to understand the nature of the licensee’s financial management and ensuring that the licensee has the appropriate resources to meet the MFRs (amongst other things) is a $33k fine; second offence $40k; third offence $46k or 1 year in jail. This is an outrageous provision and should be deleted. 

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297 Explanatory notes, p 76.
298 Explanatory notes, p 76.
299 Explanatory notes, p 76.
300 Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020, clause 63.
301 Submission 4, p 1.
In response, the department advised:

While the MFR applies to most QBCC contractor licensees, the QBCC advises that the key focus of its compliance and enforcement approach remains on larger, high-risk licensees that have the potential to cause significant financial harm to the industry if not managed appropriately.

Higher maximum penalties are needed in the Act to provide an adequate deterrent. A lower maximum penalty would not be appropriate for executive officers of one or more large companies with significant revenue streams.

The penalties are consistent with other similar offences in the QBCC Act. They also reflect the significant financial losses to industry and consumers that are often associated with company collapses and seek to provide a clear deterrent to non-compliance.302

2.8.3 Clause 125

The explanatory notes detail that the Queensland licensing framework needs amendment in relation to landscaping licensees to strengthen some existing licensing requirements and provide greater certainty.303

Clause 125 inserts a new section 79 in the QBCC Act. The proposed new section provides that landscaping licensees performing relevant work before the commencement of the Queensland Building and Construction Commission (Structural Landscaping Licences) Amendment Regulation 2019 shall be taken to have an appropriate licence and are protected from prosecution under the QBCC Act.304

The proposed amendment will ensure that existing landscaping licensees who have worked on tennis and other sporting courts prior to the commencement of the Regulation are protected from prosecution for unlawful building work.305 The explanatory notes state:

This clarifies that these licensees, who may now legally perform work on tennis or other sporting court, were not expected to hold a builder licence to complete this work.306

The committee sought additional advice from the department regarding the impact on landscaping licensees who have undertaken this type of work prior to the proposed amendment. The department advised:

... no enforcement action has been taken in relation to licenses who may have undertaken this work prior to the amendment of the QBCC Regulation.307

2.8.4 Clause 134

Clause 134 amends section 32AA and provides that an excluded individual or permanently excluded individual is not entitled to hold a site supervisor’s licence. This recognises the influential nature of a site supervisor and ensures that those who are excluded under the QBCC Act for bankruptcy or involvement in a company collapse are prevented from holding further positions of influence.308

303 Explanatory notes, p 3.
304 Explanatory notes, p 77.
305 Explanatory notes, p 3.
306 Explanatory notes, p 77.
308 Explanatory notes, p 3.
HIA advised that currently an excluded person or permanently excluded individual is allowed to apply for a site supervisor’s licence. This allows a holder to carry out personal supervision of building work on a construction site. HIA advised that the current laws provide that an excluded person cannot be an ‘influential person’ within a QBCC licenced entity.309

HIA stated that in their experience site supervisors are not influential persons within a business but are there for technical supervision to ensure buildings are constructed to meet required standards and timeframes. HIA considered the consequences of becoming an excluded person are already the most severe in any Australian jurisdiction.310

HIA stated that it finds:

… it deplorable that a contractor who knows nothing else other than building and who becomes insolvent because they have not been paid will, if this provision takes effect, have no option but to seek employment in a completely different industry as the ability to become a site supervisor is removed. HIA would suggest this is not in the best interests of individuals or contractors or the Queensland residential building industry more broadly.311

Builder, Darcy Ringland, expressed his concern about restrictions on site supervisors:

I understand from the above discussion that the QBCC and or HPW are proposing to automatically remove supervisors licensee from industry personal in the event of an insolvency and is contained somewhere or hidden in the changes to the legislation.

My personal response is “what correlation is there between a person whom has had a business and financial failure and that of the work that they do supervising either trade works or a project” and further to that I question practically why the QBCC would want to remove the ability for that person to shall they get a supervisory job in their field of trade, wish to stop the creditors of such insolvency to be able to retrieve further funds shall the person gain suitable employment in his actual trade works – not as an actual trade contractor but that as a supervisor and or tickets that they may have picked up over their time within the industry... I also have a major issue whether it is applicable under the human rights act that legislation is being asked to consider of late and consideration for regional towns where that expertise maybe lacking in numbers and availability.

I’m sorry but this is just over the top and when figures reviewed below on insolvencies, trades and questions on notice of how many ABN persons are in the industry and it is a kick in the guts or face for regional Queenslanders.312

In response, the department advised:

The introduction of this change strengthens and brings consistency across the licensing framework with regards to excluded and permanently excluded individuals’ entitlement to hold a QBCC licence.

The department agrees that it is important for an excluded or permanently excluded individual to be able to gain employment after a financial event such as a bankruptcy. Excluded individuals will still be permitted to be employed and carry out building work for a licensee but will no longer be able to hold a site supervisor licence or a position of influence in a company.313

309 Submission 18, p 11.
310 Submission 18, p 9.
311 Submission 18, 9.
312 Submission 12, p 17.
313 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 55.
2.9 Right of review for transition plans in retirement villages

The explanatory notes identify that under part 2, division 5 of the RV Act, scheme operators who propose to transition control of a retirement village to a new scheme operator must prepare a transition plan which is provided to the chief executive for approval.\textsuperscript{314}

The department advised that the proposed amendment addresses a minor inconsistency that was noted during the implementation of recent amendments to the RV Act.\textsuperscript{315}

It is intended for decisions by the chief executive in relation to transition plans to be reviewable by the Queensland Civil and Administrative Tribunal (QCAT); however, decisions made under this division were not given an explicit right of review. This differs from comparable provisions for closure plans and redevelopment plans.\textsuperscript{316}

The Retirement Villages (Transitional) Regulation 2019 (RV Transitional Regulation) fixes this by enabling QCAT to review these decisions until 11 November 2020. An amendment to the RV Act is required to preserve this right beyond this date.\textsuperscript{317}

The explanatory notes state that the proposed amendment maintains the transparency and procedural fairness of chief executive decisions in relation to transition plans by ensuring a right of review of decisions.\textsuperscript{318} The explanatory notes also state that the policy objective to preserve this right beyond the expiry date of the RV Transitional Regulation cannot be addressed without legislative amendment.\textsuperscript{319}

2.9.1 Clause 151

Clause 151 inserts new section 41K to provide that a person who has been given QCAT information by the chief executive in relation to a transition plan may apply, as provided under the Queensland Civil and Administrative Tribunal Act 2009 (QCAT Act), to QCAT for a review of the decision.\textsuperscript{320}

The committee did not receive any feedback in relation to the proposed amendment.

2.9.2 Clause 152

Clause 152 repeals the RV Transitional Regulation. The amendment proposed in clause 151 supersedes the RV Transitional Regulation.\textsuperscript{321}

The committee did not receive any feedback in relation to the proposed amendment.

2.9.2.1 Committee comments – Clauses 85 to 107

The committee is satisfied that the provisions contained in clauses 151 and 152 are required and appropriate.

\textsuperscript{314} Explanatory notes, p 5.
\textsuperscript{315} Public briefing transcript, Brisbane, 27 February 2020, p 3.
\textsuperscript{316} Explanatory notes, p 5.
\textsuperscript{317} Explanatory notes, p 5.
\textsuperscript{318} Explanatory notes, p 9.
\textsuperscript{319} Explanatory notes, p 10.
\textsuperscript{320} Explanatory notes, p 82.
\textsuperscript{321} Explanatory notes, p 83.
2.10 Issues outside the scope of the Bill

2.10.1 Existing section 68 of Building Industry Fairness (Security of Payment) Act 2017

Existing section 68 (Meaning of payment claim) of the BIF Act states\(^{322}\):

<table>
<thead>
<tr>
<th>68 Meaning of payment claim</th>
</tr>
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<tbody>
<tr>
<td>(1) A <strong>payment claim</strong>, for a progress payment, is a written document that—</td>
</tr>
<tr>
<td>(a) identifies the construction work or related goods and services to which the progress payment relates; and</td>
</tr>
<tr>
<td>(b) states the amount (the <strong>claimed amount</strong>) of the progress payment that claims is payable by the respondent; and</td>
</tr>
<tr>
<td>(c) requests payment of the claimed amount; and</td>
</tr>
<tr>
<td>(d) includes the other information prescribed by regulation.</td>
</tr>
<tr>
<td>(2) The amount claimed in the payment claim may include an amount that—</td>
</tr>
<tr>
<td>(a) the respondent is liable to pay the claimant under section 98(3); or</td>
</tr>
<tr>
<td>(b) is held under the construction contract by the respondent and that the claimant claims is due for release.</td>
</tr>
<tr>
<td>(3) A written document bearing the word ‘invoice’ is taken to satisfy subsection (1)(c).</td>
</tr>
</tbody>
</table>

MBQ recommended that section 68(c) should be deleted and replaced with ‘*must state that it is made under this Act*’ in order to allow the claimant to decide when it makes a payment claim under the BIF Act, and it can do that after it has received advice as to what is required and how best to approach it.\(^{323}\)

MBQ advised:

*The process for progress payments under the previous legislation, Building and Construction Industry Payments Act 2004 (BCIPA), allowed a claimant to decide when it made a payment claim to which the legislation applied. If the claimant was not familiar with the process or did not want to escalate a payment dispute prematurely, the claimant could simply make a claim for payment under the contract without triggering a payment claim under the legislation. If it then wanted to pursue payment through adjudication, the claimant could seek advice as to how to make a valid payment claim to ensure that it was successful in the adjudication.*

*Under the BCIPA model, there were many more adjudication applications lodged than there have been under the BIF Act and there were many more that were validly made than there have been under the BIF Act. We have been advised by the QBCC that a significant number of adjudication applications are withdrawn following the QBCC’s vetting process and still, on average, 23 per cent of applications that are referred to adjudicators are found to be invalid. Unfortunately, claimants are often left to pay the adjudicator’s fees in that instance and are still not paid their payment claim. It is, therefore, imperative that claimants are given back the power to decide when the BIF Act payment process begins. Claimants in the industry do not have the time to monitor multiple aspects of a project to ensure that it makes a valid payment claim every time in case the claim is disputed by the respondent. Claimants should also have the power to combine multiple outstanding invoices into the one payment claim so that all outstanding money is pursued through the one adjudication application rather than multiple applications.*

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\(^{322}\) *Building Industry Fairness (Security of Payment) Act 2017*, section 86.

\(^{323}\) Submission 4, p 11.
Similarly, respondents have significantly more administration duties and exposure to excessive penalties even where a payment claim is not intended by the claimant to be a payment claim made under the BIF Act. We have heard from many subcontractors in the industry that they are receiving payment schedules for zero dollars or no payment schedule at all because their payment claims are not valid payment claims. Respondents do not have the time to spend trying to work through the complex process to determine whether the payment claims are valid or not, and as it is now mandatory to give a payment schedule if the claim is a valid payment claim, respondents are issuing payment schedules in any event but often for zero dollars to protect themselves from excessive penalties just in case the claim was a valid claim. Those penalties apply even if the claimant never intended the claim to be made under the BIF Act or the respondent honestly thought the claim was not a valid payment claim. This is one of many unintended consequences of the BIF Act and does nothing to assist the subcontractors to get paid.

The original legislation, BCIPA, was designed to provide claimants with a fast process to pursue a statutory right to a progress payment. It is important, therefore, that claimants have the power to decide when they use that process – the change to the process in the BIF Act removed that right and it is having a detrimental effect on claimants in the industry at all levels. The process is not an easy one – it is extremely complex and has been made more so with the changes made in the BIF Act.

In addition to the above, the new requirements in the BIF Act for a payment claim has resulted in many emails sent by claimants actually being considered payment claims made under the BIF Act. As an example, an email chasing up an overdue payment often meets the requirements of a payment claim made under the BIF Act which has the effect of ‘using up’ a reference date for the claimant. All valid payment claims must, among other things, have a reference date to which the payment claim can attach. We have received feedback from many claimants since Chapter 3 of the BIF Act commenced in December 2018, that they have inadvertently issued a payment claim simply chasing payment. Then when they want to make an application for adjudication, they do not have the opportunity to make a valid payment claim that they can take to adjudication. Again, the claimants must control when they make a payment claim otherwise there is little benefit in the legislation for them.324

Alternatively, MBQ recommended that section 68(3) should be deleted. MBQ advised that the effect of section 68(3) is that any written document bearing the word ‘invoice’, that also describes construction work and states an amount, is deemed to be a payment claim, and that this could include emails simply advising that work has been completed and an invoice will be forthcoming. MBQ considered:

Deeming provisions such as this in such a complex process have the effect of taking away what little power the claimant has under the BIF Act.325

2.10.2 Existing section 42 of Queensland Building and Construction Commission Act 1991

Existing section 42 (Unlawful carrying out of building work) of the QBCC Act provides that a person must not carry out building work unless the person holds an appropriate contractor’s licence, unless exempt under schedule 1A.326
The exemptions incorporated in Schedule 1A include an unlicensed person who enters into a contract to carry out building work provided the work is carried out by an appropriately licensed contractor.327

The MBQ identified what it considered to be a loophole in the current QBCC Act which:

... allows anyone without a licence to carry out commercial work provided that the building work is undertaken by licensed contractors. The Act was changed nearly 10 years ago to allow for non-licensed entities to contract with major developers (e.g. LNG projects at Gladstone) provided that the building work was ultimately undertaken by a licensed contractor.328

MBQ considered that the provision undermines the intent of the Act to ensure that only licensed contractors carry out building work in Queensland and stated that this needs to be fixed.329

MBQ highlighted the industry’s concern regarding this particular exemption, advising:

Under that exemption, head contractors who contract to carry out building work do not need to hold a licence provided that that building work is not residential construction work or domestic building work, and the head contractor engages an appropriately licensed contractor to carry out the building work. This provision undermines the intent of Section 42 of the QBCC Act to ensure that only licensed contractors carry out building work in Queensland. Under this provision, a person or company can contract with a consumer to carry out building work yet are not the entity that actually carries out that building work. This creates problems when defective building work is found as the entity that has the contractual responsibility to the consumer for that work is not an entity that the QBCC has the power to direct to rectify.330

MBQ advised that the exemption was introduced approximately 10 years ago, and it had no concern at the time as the proposal was to remove a regulatory impediment for commercial development seeking to tender for public infrastructure projects carried out under a Public Private Partnership (PPP) involving a special purpose vehicle (SPV) or similar arrangement. MBQ advised:

However, a separate exemption now exists for a PPP or SPV arrangement under Sections 10 and 11 of Schedule 1A so there is no need for Section 8 to assist those arrangements. In practice, there are entities in the industry who rely upon Section 8 of Schedule 1A to contract to consumers for building work. This should not be permitted as it creates unintended consequences that undermine Section 42.331

MBQ also considered that the provision undermines the intent of the Statutory Trust Account model as, under this arrangement, a statutory trust account would only be required for one subcontractor: that is, the licensed builder actually carrying out the building work. The subcontractors who subcontract to that builder will not be beneficiaries under a statutory trust account.332

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328 Submission 4, p 1.
329 Submission 4, p 1.
330 Submission 4, p 16.
331 Submission 4, p 16.
332 Submission 4, p 17.
The Queensland Plumbers Union agreed that the schedule 1A(8) exemption potentially undermines the framework and advised:

*As a Union which represents and fiercely advocates for licensed trades, we know how important it is to have a comprehensive and effective licensing framework. This ensures that work which is critical to the safety of buildings, and to the functionality of services within buildings, is performed by appropriately trained and qualified individuals. Importantly, this also protects the workers who’ve undertaken years of education and training so that they can perform this work safely and to a high standard.*

*Queensland often leads the way in the licensing framework space, however the existing exemption at QBCCA Schedule 1A Clause 8 (Head contracts to carry out building work) (though unintentional) potentially undermines this entire framework.*

*In short, the provision (which applies to all work) exempts persons from the requirement to hold a license where they are engaged directly by an owner or developer. This is clearly contrary to the legislative framework’s intent, and potentially undermines security of payment reforms and the licensing structure. The exemption also enables a person or entity to remove themselves from the building and construction licensing system, a system which the security of payment legislative framework works in concert with.*

The NFIA also advocated for the removal of the provision, advising:

*We consider this existing provision potentially undermines the Security of Payment Reforms. In addition, it does completely undermine the licensing structure. While it may have been appropriate for the time when it was introduced, it is no longer appropriate in a modern licensing framework.*

*Further, the Security of Payment legislative framework works in concert with the building and construction licensing system. This provision enables a person or entity to remove themselves from this system. We consider that the impact of this ability is far reaching with several unintended consequences.*

In response, the department advised:

*It is considered that the exemption under section 8 is no longer required, as other sections of schedule 1A now provide sufficient licensing exemptions for public-private partnerships and prescribed government projects.*

2.10.2.1 Committee comments – existing section 42 of Queensland Building and Construction Commission Act 1991

The committee notes the support of stakeholders, including the MBQ, Queensland Plumbers Union and NFIA, for head contractors to be appropriately licenced.

The committee agrees with the view expressed by MBQ in relation to the exemption for head contractors provided the work is undertaken by an appropriately licenced contractor. The committee considers that head contractors should be appropriately licensed contractors.

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333 Submission 13, p 3.
334 Submission 21, p 3.
335 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 35.
Whilst this issue is outside the scope of the Bill as it currently stands, the exemption potentially undermines the provisions in relation to payment of subcontractors.

**Recommendation 9**

The committee recommends that section 42 and Schedule 1A(8) of the *Queensland Building and Construction Commission Act 1991* be amended to omit the exemption allowing an unlicensed person who enters into a contract to carry out building work, does not contravene section 42(1) merely because the person entered into the contract, if the building work is to be carried out by a person (an appropriately licensed contractor) who is licensed to carry out building work of the relevant class.

### 2.10.3 Passive fire protection

Existing 42C (Unlawful carrying out of fire protection work) requires individuals carrying out or supervising fire protection work to hold a fire protection occupational licence; or hold a licence, registration or authorisation that allows the person to carry out or supervise the work.336

Fire protection work is prescribed under the Queensland Building and Construction Commission Regulation 2018 (QBCC Regulation). Passive fire protection is also prescribed under the QBCC Regulation.337

Passive fire protection includes fire doors, shutters, walls, and ceilings, along with certain measures such as the installation of fire collars, undertaking penetrations in fire rated walls, joint sealing and similar work.338

The Queensland Plumbers Union advised the committee that the government recently undertook a review of fire licensing which identified the critical issue of ‘passive fire protection’ work currently falling within the definition of ‘building work’ instead of ‘fire protection’ under the QBCC Act.339

The Queensland Plumbers Union advised:

> It’s because of this that the work is often not licensed, the required qualifications are often inappropriate, and it’s very difficult to enforce, which in turn leads to increased safety risks and high rates of defects. This review saw the Union and all other major stakeholders agree to remedying this issue by amending the QBCCA.

> Passive fire protection is a crucial element of a building’s response to fire hazards and is therefore critical to community safety. It includes building elements such as the fire doors and shutters you see in essentially every commercial and residential apartment building, fire and smoke walls and ceilings, and other measures such as the installation of fire collars, joint sealing and undertaking penetrations in fire rated walls.

> Unfortunately, owing to the regulatory deficiency highlighted through the review, passive fire protection is the leading cause of defects within this sector. When a passive fire element doesn’t function properly, the building’s entire fire protection response is at risk of failing to operate effectively and efficiently. This work should be recognised within the legislative framework as being equal to other fire protection work. The categorisation of passive work as external to fire protection work critically undermines the safety of people working and living in these buildings, despite the core purpose of this work being to protect the people inside.340

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337 *Queensland Building and Construction Commission Regulation 2018*.

338 Submission 21, p 4.

339 Submission 13, p 2.

340 Submission 13, p 2.
The Queensland Plumbers Union recommended that the QBCC Act be amended to incorporate ‘passive fire protection’ (excluding engineering work) into the definition of ‘fire protection work’ and removed from the definition of ‘building work’, while ensuring that other non-passive trades, including sprinkler fitting, plumbing and electrical, remain able to undertake the incidental work that they currently perform.341

The NFIA shared a similar view, advising:

*Passive fire protection is a critical element of the built environment’s response to a fire event. Unfortunately, due to the current regulatory framework, passive fire protection is the leading cause of defects within the sector and this is critically undermining the safety of buildings in which the Queensland community lives and works.*

... 

*Strangely, ‘passive fire protection’ is not legislatively defined in the QBCCA as ‘fire protection’. It simply falls under the category of ‘building work’. This quirk of the legislative framework means that passive work is often not licensed and very difficult to enforce. This in turn leads to major defects and safety risks.* 342

The NFIA advised that the framework has led to substandard qualifications often being required to undertake passive fire protection work, and this has contributed to a high defect rate. The NFIA further advised that defects in passive fire protection undermine the entire building’s fire protection response and can hinder the ability of other fire protection measures to work correctly.343

The NFIA reported that the issue is being addressed by the government fire licensing review in late 2019. The NFIA advised that the review saw all major stakeholders, including NFIA, MPAQ, MBQ, HIA, Master Electricians and Air-conditioning and Mechanical Contractors Association, agree to include ‘passive work’ within the definition of ‘fire protection’ in the QBCC Act.344

The NFIA advised the committee that this is a critical safety issue that needs to be addressed.345 The MPAQ also agreed that changes to the definition are required.346

The department confirmed that this issue relates to the broader work of the Ministerial Construction Council in the area of fire protection licensing reforms. The department advised that this work is aimed at developing a new fire protection licensing model, which is being jointly developed by industry and government.347

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341 Submission 13, p 2.
342 Submission 21, p 4.
343 Submission 21, p 4.
344 Submission 21, pp 4-5.
345 Submission 21, p 5.
346 Submission 22, p 10.
347 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 36.
2.10.3.1 Committee comments – passive fire protection

The committee notes the department’s advice that the Ministerial Construction Council is developing a new fire protection licensing model. However, the committee considers that it is essential that the fire safety of buildings is addressed as soon as practicable and therefore recommends that, as an interim measure, amendments to the definitions of passive fire work within the QBCC Act are included within the definition of ‘fire protection’, while ensuring that other non-passive trades, including sprinkler fitting, plumbing and electrical, remain able to undertake the incidental work that they currently perform, while considering this Bill.

Recommendation 10

The committee recommends that the Queensland Building and Construction Commission Act 1991 be amended to include ‘passive fire work’ in the definition of ‘fire protection’ during consideration of the Bill.

2.10.4 Insurance for small business

Superior Skip Bins suggested in its submission that QBCC should have insurance premiums to cover business insolvency, which is available in some industries.348

In response to this suggestion, the department advised:

The option of requiring insurance cover to protect subcontractor payment was consulted on in the 2015 Discussion Paper and consultation feedback did not support this option.349

The department also noted that significant changes have been made to the MFR for licensing to provide the QBCC increased oversight of the solvency of building contractors, and the progressive implementation of project trusts to the private sector will ensure that more subcontractors are protected from non-payment. In addition, the department advised that the increased protections over progress payments improves the QBCC’s ability to remove unscrupulous participates from the building industry.350

2.10.5 Variations

Existing section 8 of the BIF Act defines variation as follows:351

\[\text{variation},\ \text{of a building contract, means an addition to, or an omission from, the building work required to be carried out under the contract.}\]

Mr Les Mundt advised the committee that the BIF Act does not specify what constitutes a variation to a contract. Mr Mundt advised:

In my 12 years of handling paperwork, preparing claims, preparing paperwork for variation costings etc, I have never had a builder/contractor issue externally an identifying number for a variation. In other words, admit that there is a variation.

For good reason - it immediately makes them liable for payment.

Builders/contractors will do anything in their power (legal or illegal) to avoid paying for a variation.

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348 Submission 1, p 1.
350 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 1.
A growing ploy is for architects to change a drawing, reissue it but fail to CLOUD THE
CHANGES. 352

Mr Mundt considers that variations should be considered outside, but related to, the original contract
cope. He suggested:

a. It should carry its own unique identification based upon the original project number and
issued by the builder, identified as to whom requested the variation.

b. It should be priced by quote only
   i. Site Managers are not always avbl [sic] to sign off day sheets
   ii. The price is fixed within its own separate scope
   iii. Payment is made without waiting for practical completion which could be 12 months
        later
   iv. No retention applies; but it forms part of the defect period
   v. An automatic extension of time is granted without threats of delay charges.
   vi. A time frame for start and finish (by negotiation) is set in place.
   vii. Can be undertaken by others other than the original sub-contractor. (Plumbing and
electrical excluded because of regulations and signoffs) 353

The issue of what constitutes a variation was discussed at length at the committee’s public hearings.
Mr Mundt detailed examples where the tender documents on which the quote was prepared changed
significantly with new plans issued shortly after contracts had been signed. 354 Mr Mundt noted that
during the adjudication process they were advised that a change to a drawing ‘may’ constitute a
variation. He considered that this ambiguity could be fixed by the Act specifying that a change to a
drawing ‘does’ constitute a variation. 355

Ms Wilkinson also observed:

The definition of a ‘variation’ and the definition of an ‘approved variation’ in the building industry
are two entirely different things. As subcontractors, we submit variations through site
instructions that do not constitute a variation. However, the builder then will basically review
those and determine them not as a true variation. There is still an element of doubt in that. 356

The Subcontractors Alliance, Ms Wilkinson and Mr Mundt all confirmed that it is not a requirement
that companies provide correct information on which they tender and detailed engineers drawings
compliant with electrical, hydraulic and plumbing laws are a rarity, and it is left up to subcontractors
to ensure that their work is compliant with relevant laws. 357 They also confirmed that it is difficult to
get written variations agreed due to time constraints and lack of appropriate personnel on site. 358

MEA advised that variations are a significant issue in the electrical industry. MEA advised:

Site instructions not being considered to be variations and the fight later, the timing of our trade
particularly being at the end of the job, time pressures et cetera, not being able to get an
authorisation to say, yes, it is a variation before you have to get the work done because you have

352  Submission 14, p 2.
353  Submission 14, p 3.
354  Public hearing transcript, Brisbane, 3 March 2020, p 14.
355  Public hearing transcript, Brisbane, 3 March 2020, p 15.
356  Public hearing transcript, Brisbane, 3 March 2020, p 15.
357  Public hearing transcript, Brisbane, 3 March 2020, p 16.
358  Public hearing transcript, Brisbane, 3 March 2020, p 18.
other liquidator damages hanging over your head and site imperatives—they are all significant issues. It is a consistent issue for our members.

... 

I think it really comes down to trying to work out what is and is not acceptable in terms of practice in the industry. From an actual outcome point of view, a written site instruction that says, ‘Yes, there will be costs involved,’ signed off to be considered to be a variation—that would be the easiest solution.\(^{359}\)

MPAQ advised:

It is regular practice for variations to be a significant part of the project. Our consultation has said anywhere from 10 to 15 per cent of the costs in dollar terms. Sometimes the variations are not in writing; they are just a handshake, so to speak, and perhaps paid on account. Like Wayne said, when it comes to the end of the job they could be waiting months or potentially years in order to get paid for that work. It is an issue that our members are definitely experiencing.\(^{360}\)

The NFIA observed:

... the bottom line is that variations are used as a tool to manipulate subcontractor payment basically at the end of the job. It is very rare under the current system where a subcontractor is paid in full. What tends to happen is that the work continues onsite, because there are other penalties that could be contractually imposed on the subcontractor for slowing down work or not complying with the instructions or the work programs—that is probably the better way to say it. \(^{361}\)

However, NFIA also advised:

... the definition of ‘variation’ in the bill is as close as we think we could get it in this framework. There is a regulation-making power to deal with unfair clauses in contracts, because we understand that common law, as cases go forward, evolve. We would be keen to see things like mandatory site instructions being included as variations or example clauses around site instructions being included as part of that regulation-making work. In terms of the NFIA—and I cannot speak for anybody else here—our position would be that this could be addressed through unfair clauses in contracts in the regulation, for which there is a power to make under this bill or under the act that this bill is amending.\(^{362}\)

The committee sought additional information from the department regarding the actions being taken by government to address the issues raised by stakeholders. The department advised:

The Queensland Building and Construction Commission Act 1991 (QBCC Act) includes a provision that states a building contractor must not enter into a building contract that includes certain prohibited conditions, as prescribed by regulation. The Building Industry Fairness (Security of Payment) Act 2017 (BIF Act) also allows for mandatory conditions to be prescribed. The payment of variations issue raised by stakeholders could potentially be addressed, in part, through prescribing prohibited contract conditions.

The Fairness in Contracting Subcommittee of the Ministerial Construction Council (MCC) was established in 2019 to investigate potential prohibited and mandatory conditions. The subcommittee has compiled a list of potentially unfair contract conditions and has been assessing which of those could be suitable to be prescribed under regulation.

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\(^{359}\) Public hearing transcript, Brisbane, 3 March 2020, p 25.

\(^{360}\) Public hearing transcript, Brisbane, 3 March 2020, p 25.

\(^{361}\) Public hearing transcript, Brisbane, 3 March 2020, p 26.

\(^{362}\) Public hearing transcript, Brisbane, 3 March 2020, p 26.
Concurrently, there has been ongoing work on this topic at the Commonwealth level. The Commonwealth Government’s ‘Consultation Regulatory Impact Statement (RIS) on Enhancements to Unfair Contract Term (UCT) Protections’ was released on 13 December 2019 and closes on 16 March 2020. There is some overlap with the work of the subcommittee. For example, the RIS includes options for improving compliance and providing penalties in relation to unfair contract terms. To avoid duplication and potentially competing regulatory requirements, it is intended the subcommittee will continue its work once the outcomes of the Commonwealth RIS are known.363

2.10.5.1 Committee comments – variations
The committee is of the view that the issue of what constitutes a variation requires further investigation and suggests that the Minister consider this issue further.

2.10.6 Retentions
The Subcontractors Alliance expressed the view that:

... retentions on subcontractors should be scrapped altogether. It is just a source of revenue for builders and they trade on it. If a subcontractor does not fix his defects, he is liable to getting demerit points by the QBCC and having his whole business at risk, so we are double-dipping. If we just get rid of them it would save a lot of problems.364

... I know it is obviously a very sore point. With a lot of subcontractors it is. It is really open to abuse and it is where a lot of fraud is occurring. I do not know what the answers are—you would need someone smarter than me—but it definitely needs attention. If they issue a drawing, there should be an amendment number on the drawing and there should be a list of the amendments on the drawing. The contractor or the subcontractor should be allowed to price that before they do the work. It should be acknowledged, but again the whole process needs to be looked at and designed by someone smarter than me.365

Mr Mundt advised that it is often difficult to get retentions paid, and they will usually need to pursue payment.366

Mr Mundt noted that section 67 of the QBCC Act requires contractors/builders to notify subcontractors of retention amounts and the date of payment but questioned why subcontractors still do not get paid. Mr Mundt advised that:

The QBCC Act is simply ignored and it then becomes the responsibility of the subcontractor to chase their money by issuing a MONEYS OWED COMPLAINT to QBCC for investigation without the QBCC having authority to issue penalties for non-compliance.367

Mr Mundt’s suggested solution to this issue was to:

Immediately move ALL retention money to a government-controlled trust fund where the money can be invested and profits used by QBCC to ensure honesty in the construction industry.368

364 Public hearing transcript, Brisbane, 3 March 2020, p18.
365 Public hearing transcript, Brisbane, 3 March 2020, p 21.
367 Submission 14, p 4.
368 Submission 14, p 3.
In response to this issue, the department advised:

_The policy position is to protect retention amounts by requiring contractors to keep cash retention amounts in a dedicated trust account. Appropriate penalties apply to encourage compliance._\(^{369}\)

### 2.10.7 Regulation of property developers

The CFMEU advised the committee that it considered the legislation is deficient if its intention is to modify behaviours in the construction industry as it misses the point on where the true power lies. The CFMEU advised:

_The only ones who are making money at the moment in the building industry—if you ask the builders and ask the subbies—and who have reasonable financial balance sheets at the moment are the developers. They are the ones who carry the least amount of risk on the project and they are the ones who stand to gain the greatest reward._\(^{370}\)

The CFMEU reported that increasingly they are seeing developers dictate terms to builders and subsequently subcontractors.\(^{371}\)

The CFMEU advised:

_From our point of view, we are the ones who pick up the pieces. When a developer sets an unrealistic program, it has an effect on the behaviour on the project. Increasingly these days, builders are competing on program. Someone will shave three months or four months off and then it becomes an auction for who is shaving the most off the program at tender time. The behaviours that then encourages on the project are that site managers and workers end up working ridiculous hours and cutting corners on safety and pressure is put on subcontractors. It creates further security of payment issues as well. From our point of view, they cannot be left out of any regulation. At the moment they are. All of this legislation is good, but we are really fighting over the scraps. The one that is serving the meal up to the industry is the developer. You can regulate all of the other industry participants as much as you like, but it will not change anything without regulating the person or the organisations that are at the top of the tree._\(^{372}\)

The CFMEU advised that it considered the property developers need to be part of any regulatory regime, advising:

_It does not matter what you do—you could have the best regulatory regime in the world but, if it does not have all of the industry participants captured in it, it is pointless._\(^{373}\)

....

_If you want to fix the issue, there is no point dealing with the symptoms of it: you have to go to the source. That is where we have the issues at the moment. No-one is going near the source. We keep saying that all of the subbies and builders have to do this and that. We have PBAs. We are now calling them retention trusts. We are doing all of these things, but again they are symptoms of the problem. You need to go to the source._\(^{374}\)
The CFMEU advised that the employers and the unions are in agreement that the structural problem in the industry is the developers.375

The CFMEU suggested in order to improve the viability of the whole industry there is a need to regulate developers:

\[\text{When you actually regulate the people who control the money and how projects are run—that is, the developers—and then you go down the food chain and regulate everyone else, it improves the viability of the industry.}\]376

The CFMEU suggested solution is licensing of developers:

\[\text{With licensing you then make developers accountable for various things like MFRs, minimum financial requirements—that they are a reasonable going concern before they are allowed to trade in Queensland. That should be something that every Queenslander wants—not just have these shell companies where you do not know where in the world the finance is coming from and the trail of destruction they can potentially leave as a result of their unscrupulous activity. Definitely with licensing you have them on the hook for MFRs. You then have them on the hook for non-conforming building products as well. You have them on the hook for security of payments and some of their unfair contracting practices—the way that they just unilaterally and without cause make calls on the job.}\]377

... If you have a licence, you can have it taken from you. You can have conditions put on it. You have to submit audited accounts. Every other subbie and builder has to submit audited accounts to the licensing authority.378

The CFMEU advised the committee that the construction industry has the highest number of insolvencies across all industries. They advised:

\[\text{Basically, what they do is they sink a company to avoid paying any of their financial obligations. If there are contractors who hold currently a QBCC licence and they engage in that kind of activity, they can have conditions imposed. They can be refused. They can be excluded from holding licences in the future. That regime exists right now. It could be done better, I agree, but there is no equivalent for developers at the moment.}\]379

The committee sought information regarding whether any other jurisdictions regulate developers. The CFMEU advised that, as far as it is aware, only the ACT is considering it with consultation currently taking place with industry stakeholders.380

Mr Ringland also questioned the role of the developer and financier in starting the flow of funds down the contractual ladder. Mr Ringland stated:

\[\text{I understand the panel has not addressed this issue in entirety or made any recommendations to hold both the developer and the financier jointly liable nor or thus ensuring the funds flow down the contractual chain. Until this is solved or negated there is no ability for PBA’s to in the future be able to work within the private industry and are thus substantial flawed.}\]
I can confirm that this was heatedly discussed at some of the meetings and the ability to ensure project financing and payment to the contractual chain and down the contractual chain. As problems occur not only when the developer doesn’t have funds but also when the financier takes his time in approving funds as he/ she / they are NOT bound by the building contract nor its payment terms and possibly should be.  

MBQ also raised the issue of industry supply chain:

If you are going to deal with the issue, it needs to be dealt with from top to bottom. The government said as part of this trial, ‘We are only going to deal with the builder and the first tier subbie’—that is only one part of the supply chain—‘and future stages can roll down further.’ We made the point, which we are making now, to the independent review panel that, if you are going to do something you need to do it from top to bottom. You need to rope the developer in. When builders go broke it is primarily because they were not paid. Then it flows on down the line.

The challenge was: what can we do? What the panel and some very clever people around the table came up with was the charge on the land. We said we want to rope developers into the project bank account, but that is not possible. As an aside, my ‘colleagues’ at the CFMEU in Canberra are pushing a line that they should license developers as one way to capture them into the security of payment supply chain. I am not saying that we are going that far.

2.10.7.1 Committee comments – regulation of property developers

Based on evidence submitted by MBQ and CFMEU, the committee recommends that the Minister considers conducting a review of the role of property developers, including the impact of their financial and operational capacity, ethical behaviour, and work practices on the industry.

The committee considers that this review should be conducted in consultation with industry stakeholders, and the Minister should report the findings of the review by 1 July 2021.

Recommendation 11

The committee recommends that the Minister for Housing and Public Works considers undertaking a review of the role of property developers in the building and construction industry including consideration of the impact of their financial and operational capacity, ethical behaviour, and work practices.

Recommendation 12

The committee recommends that should the review detailed in Recommendation 11 be conducted that it be conducted in consultation with industry stakeholders, and the Minister for Housing and Public Works should report the findings of the review by 1 July 2021.

2.10.8 General education and training

The MPAQ raised the issue of training for QBCC licensees. MPAQ advised:

MPAQ also believes an education program for QBCC licensees is required and should be mandatory along with the adoption of a compulsory continuing professional development scheme. A commitment to maintaining and enhancing competence through ongoing personal and professional development is what sets the professions apart from everyone else. It is also partly why they are held in such high regard by government and consumers alike.

381 Submission 12, p 11.
382 Public hearing transcript, Brisbane, 3 March 2020, p 6.
Organisations that commit to ongoing and continuous development stay on top of new products and regulations, they are the ones that lead the field. They know about the labour time saving opportunities available through performance based standards and how to use technology to make their businesses more profitable.

Industries that adopt continuing professional development will likewise grow and prosper and hold the respect of the government and community at large. As a result the whole industry will benefit through highly trained and competent practitioners who are able to command special consideration, having their voice heard with legislation that specifies who can and cannot perform certain work.³⁸³

Mr Ringland also highlighted the capacity of businesses to educate and the time it takes when trades need to down tools, give up income and attend seminars is an issue. Mr Ringland considered that the QBCC confuses providing education and giving advice. Mr Ringland highlighted:

We also have unsuccessful seminars like what has been recently seen on the MFR’s where the regional cities are not either engaging or the delivery aspect of the QBCC is not working and associations like the MBA have better results in actually speaking to their members and audiences – as shown in the PBA panels summary – road shows that were conduction with MBA had a distinctive (or substantial) increase in numbers.³⁸⁴

Mr Ringland contended that education should not be singularly developed and provided by the QBCC but shared through industry associations.³⁸⁵

MEA agreed that there was a need for education. MEA advised:

There does need to be a significant amount of education across the whole industry—not just the builders but also for subcontractors. I particularly find that that needs to happen inside new entrants to make sure they know what they are getting in for. The biggest thing that I see—particularly with new entrants into this market and people who eventually come to us saying, ‘I need help’—is that they do not understand their costs. If you do not understand your costs or your regulatory requirements, you are not going to last. This bill goes some way but it is only part of the solution. The rest of the solution is implementation and education. There needs to be a significant amount of investment in that.³⁸⁶

HIA questioned the ability to provide advice, education and training in rural and regional areas.³⁸⁷

The committee sought additional information on the role of peak bodies in training. The MBQ responded:

We and Master Builders have been having ‘behind closed doors’ discussions for over 12 months now about the need for us to work together and develop a business skills training program. Fundamentally these guys do a little bit when they do their certificate IV qualifications before they get their builders licence. They do a little bit. It is not a lot. As associations, we have recognised that they need to do a lot more.

³⁸³ Submission 22, p 2.
³⁸⁴ Submission 12, p 11
³⁸⁵ Submission 12, p 12.
³⁸⁶ Public hearing transcript, Brisbane, 3 March 2020, p 23.
³⁸⁷ Public hearing transcript, Brisbane, 3 March 2020, p 4.
It is interesting to talk to the tax office about where people establishing small businesses go for information. Accountants are at the top of the list. Friends and family are No. 2. Nobody is No. 3 and associations are No. 4. The challenge we face as associations is that we are more than willing and able to put together training programs. It is how you encourage these people to take time off work and come and sit in a classroom and do some extra study.\textsuperscript{388}

LGAQ advised the committee that the LGAQ Policy Statement states:

\textit{The state government should provide a comprehensive education program to increase community awareness of how the building certification system works and where responsibility/liability resides. The state government should also create a system of consumer protection.}\textsuperscript{389}

LGAQ also recommended that:

\textit{... the Department prepare guidance material for building owners and develop a comprehensive education program, in consultation with local governments, to increase community awareness and understanding of the proposed changes to the building certification and inspection processes.}\textsuperscript{390}

The committee sought additional information from the department in relation to how adequate education and training will be provided to the building and construction industry throughout Queensland on the proposed changes in the Bill. The department advised:

\textit{The Building Industry Fairness Reforms Implementation and Evaluation Panel (the Panel) noted that clarity and certainty about how and when the reforms will apply were critical to support the roll-out of the trust account framework. This will be particularly important prior to commencement of the final phase on 1 July 2022, which will apply the trust account framework to the majority of private sector projects, including extending retention trusts down the contractual chain. The details of these implementation and communication activities will be finalised subject to the passage of the Bill, but would typically include: radio, newspaper, social and digital advertising, web content, blog posts, emails to licensees and industry organisations, fact sheets, webinars, video content, regular stakeholder meetings, industry roadshows and forums and leveraging stakeholder networks to provide information to member These activities will generally be led by the Queensland Building and Construction Commission (QBCC). The QBCC Contact Centre, Front Counter staff at all offices and Adjudication staff (to the extent relevant) will also be trained to support general enquiries that customers and stakeholders may have.}\textsuperscript{391}

\begin{flushleft}
\footnotesize
\textsuperscript{388} Public hearing transcript, Brisbane, 3 March 2020, p 6.
\textsuperscript{389} Submission 16, p 6.
\textsuperscript{390} Submission 16, p 8.
\textsuperscript{391} Department of Housing and Public Works, correspondence dated 11 March 2020, Attachment, p 1.
\end{flushleft}
2.10.9 Phoenix activity

A number of stakeholders raised the issue of phoenix behaviour. For example, the CFMEU advised:

*Most developers will set up a specific special purpose vehicle company for each project which is a shell. They bury the company at the end of the project. It carries no liability and no assets. Ask a homeowner who has bought a unit off a plan that is defective and leaking. Two of the most common issues we have with defects are waterproofing and fire certification. The homeowner is the one who has to pick up the pieces. It is the biggest investment most people make in their lives. Developers are not being held accountable for their unscrupulous behaviour. It creates so many other problems for builders, subcontractors and employees on projects, but it does not stop there. It then creates problems for the unfortunate unit owners and homeowners who are subject to it all.*

The committee sought additional information from the department regarding the steps the QBCC is taking to both identify and prosecute this type of activity. The department advised:

*Phoenix activity is the practice of one company taking over the business of another company that is wound up or abandoned where the controllers of both companies are the same people or their associates. Phoenix activity is illegal if it involves a fraud upon creditors, for example, a director may deliberately seek to avoid paying the company’s creditors by transferring the assets to another entity at undervalue as the company approaches insolvency.*

The Australian Securities and Investments Commission (ASIC) administers the Corporations Act 2001 (Cth) and is responsible for prosecuting illegal phoenix activity, as is Queensland Police Service in the context of a fraud offence. However, there are certain provisions in the QBCC Act targeted at preventing phoenix activity in Queensland’s building and construction industry.

*For example, Part 3A of the QBCC Act establishes a framework for excluding individuals from holding a QBCC contractor or nominee supervisor licence or being in a controlling role in a licensed company where the individual has been bankrupt or is involved in a construction company that is wound up. An excluded individual is restricted from holding a QBCC contractor or nominee supervisor licence for three years. A ‘construction company’ includes a company in Queensland or another Australian jurisdiction that has been involved in building work within two years prior to the collapse. A person who is involved in two or more bankruptcies or company collapses faces permanent exclusion.*

*In addition to officers for a company, the excluded and permanently excluded individual provisions apply to any ‘influential person’ who is in a position to control or substantially influence the company’s conduct. The definition of ‘influential person’ was expanded in 2017 to capture a broader range of people involved in a company failure. The QBCC can investigate complaints about excluded individuals establishing themselves as an influential person in a new company and take action to cancel licences where appropriate. The QBCC also checks all company licence applications to ensure that an excluded person is not in a controlling role and will not grant the licence if this established.*

*Section 42E of the QBCC Act (Avoidance of contractual obligations causing significant financial loss) was introduced to target unscrupulous contracting and payment practices that leave consumers and contractors out of pocket such as illegal phoenix activity. A maximum penalty of 350 penalty units applies to the offence.*

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392 Public hearing transcript, Brisbane, 4 March 2020, p 20.
Other matters within the QBCC’s purview that provide transparency over a licensee’s previous commercial dealings or assist the QBCC to detect possible financial distress include:

- BIF Act offences such as failure to provide a payment schedule or pay an adjudicated amount
- the adjudication process
- Minimum Financial Requirements for licensing including mandatory annual reporting
- monies owed complaints
- licensee register, which includes details of disciplinary action taken against a licensee.

Finally, the QBCC is a member of the Australian Taxation Office’s Phoenix Taskforce, through which it receives and investigates intelligence about licensees who may be engaging in phoenix activity.  

2.10.10 Adjudication

Mr Mundt detailed the experience of his business with the adjudication process both in his submission and at the public hearing. 

2.10.10.1 Adjudication complaint process

The committee sought additional information from the department regarding the complaint processes in place should either party have a complaint about the work done by an adjudicator. The department advised:

> If a party to an adjudication has a complaint about an adjudicator’s conduct, they may make a complaint to the registrar. The registrar may impose a condition on the adjudicator’s registration or, if the registrar determines the adjudicator is no longer suitable to be registered, suspend or cancel the registration.

The prescribed Code of Conduct for Adjudicators sets out the standards of conduct required from registered adjudicators when adjudicating payment claim disputes made under the BIF Act. Contravention of a requirement of the Code of Conduct is also grounds for suspending or cancelling an adjudicator’s registration.

If a party to an adjudication does not agree with the adjudicator’s decision, they can apply to the Supreme Court to have the decision reviewed. The court may set aside the decision on the ground of non-jurisdictional error of law on the face of the record, or for jurisdictional error or denial of procedural fairness.

2.10.10.2 Training and support for adjudicators

The issue of training and support for adjudicators was raised at the committee’s public hearings. The committee sought additional information from the department regarding what training processes are in place to ensure adequate training for adjudicators. The department advised:

> Adjudicators are registered under chapter 5 of the BIF Act. A person is not eligible to be registered as an adjudicator unless the person holds the prescribed adjudication qualification or another qualification that the adjudication registrar considers equivalent.

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393 Department of Housing and Public Works, correspondence dated 11 March 2020, pp 11-12.
394 Refer submission 14 and public hearing transcript, Brisbane, 4 March 2020, p 14.
The adjudication qualification is prescribed in the BIF Regulation. It is delivered by an approved provider and includes the following elements:

- Role and functions of an adjudicator
- Role and functions of the adjudication registry
- Analysis of the Building Industry Fairness (Security of Payment) Act 2017
- Practical aspects of adjudication
- Ethics, natural justice and good faith
- Decision making and decision writing
- Legal concepts for adjudicators
- Technical concepts for adjudicators
- Assessment—Examination
- Assessment 2—Assignment: Mock adjudication decision

In deciding whether an applicant is suitable person to be registered, the registrar may also have regard to matters including the experience and qualifications of the person, whether registration in another state or territory has been refused, cancelled or suspended and whether the person is competent to adjudicate matters.

Once registered, an adjudicator is subject to the conditions that they complete prescribed continuing professional development (CPD) and mandatory training. The BIF Regulation sets out the CPD requirements. An adjudicator must accumulate 10 CPD points in each CPD year. CPD points are accumulated by completing CPD activities, such as courses, seminars, preparation and publication of papers, or tertiary study. Mandatory training may be prescribed in relation to matters that all adjudicators should have awareness of, for example, legislative amendments to progress payment processes.396

The committee also sought information from the department regarding the processes in place to enable adjudicators to seek additional expert advice if required. The department advised:

When deciding an adjudication application, an adjudicator may ask for further written submissions from either party or may carry out an inspection of any matter to which the claim relates. However, the BIF Act does not contemplate allowing an adjudicator to seek advice from an unrelated third party.

Whether a matter would benefit from particular subject matter knowledge is something considered by the registrar when an adjudication application is first lodged. The prescribed Adjudicator Referral Policy sets out the application referral process. The registrar will assess the application to identify key matters, including the claimed amount, the complexity of the material issues in dispute and any specific skills, expertise or qualifications best suited to determine the dispute. This assessment is intended to ensure that each adjudication application is referred to an adjudicator well placed to decide the application.397

2.10.10.3 Payment of adjudicators

Existing section 95 of the BIF Act prescribes the fees payable to an adjudicator. Existing 96 provides for deciding fees payable by a claimant and a respondent. Existing section 97 provides for where an adjudication application is withdrawn.\textsuperscript{398}

Section 97 states:

\textbf{Section 97 Withdrawing from adjudication}

(1) An adjudication application—

(a) is withdrawn if the claimant has given a written notice of discontinuation to the adjudicator and respondent; or

(b) is taken to have been withdrawn if the respondent has, before an adjudicator has decided the application, paid the claimant the amount stated in the payment claim the subject of the adjudication application.

\textit{Note—}

Despite the withdrawal of an adjudication application an adjudicator is still entitled to be paid fees for considering the application, see section 95.

(2) If subsection (1)(b) applies, the claimant must as soon as practicable inform the adjudicator that the adjudication application has been withdrawn because of payment.

Adjudicator Susan Leech advised the committee that she considers that the provision would benefit from amendment, stating:

\textit{Under s.97(1) a claimant may withdraw its application for its own reasons. In this case, it is reasonable that the claimant is responsible for 100% of the adjudication fees. In this circumstance, it is not necessary for the adjudicator to decide the application and the Claimant simply becomes liable for the fees.}

\textit{The Taken to Have Been Withdrawn Provision relates to where the respondent decides to pay the full claimed amount after the claimant has applied for adjudication. The act of payment in this instance is an implicit admission of liability by the Respondent. In this instance it would seem reasonable for the respondent to be liable for 100% of the adjudication fees. However, under s.97(1)(b), if a respondent pays in full, this triggers automatic withdrawal of the adjudication.}

\textit{Note that this is enabled by the current wording of the Act: “An adjudication application is taken to be withdrawn if the respondent has [...] paid the claimant the amount stated in the payment claim [...]” (s.97(1)(b)). The word “withdrawn” places an implicit onus on the claimant, since only the claimant holds the power to submit and withdraw an adjudication application under the Act.}

\textit{Accordingly, under s.97 in its present form, the Claimant becomes liable for the adjudication fees in the circumstance that the Respondent pays the full claimed amount. In my view this is not appropriate and s.97(1)(b) and its supplementary provision s.97(2) should be deleted.}\textsuperscript{399}

In its initial response to the issues raised by Ms Leech, the department advised that the issue is outside the scope of the Bill but noted that the BIF Act provides broad powers enabling an adjudicator to decide how fees are to be apportioned.\textsuperscript{400}

The committee sought additional information from the department regarding the powers available to adjudicators to determine fees. The department advised:

\textit{... an adjudicator does not fail to make a decision only because the adjudication application is withdrawn. Therefore, the adjudicator is entitled to be paid and may decide the proportion of fees and expenses, as well as the adjudication application fee, payable by the claimant and the respondent.}\textsuperscript{401}

\textsuperscript{398} Building Industry Fairness (Security of Payment) Act 2017, s 95, s 96 and s 97.

\textsuperscript{399} Submission 15, pp 1-2.

\textsuperscript{400} Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 44.

\textsuperscript{401} Department of Housing and Public Works, correspondence dated 11 March 2020, Attachment, pp 10-11.
3 Compliance with the Legislative Standards Act 1992

3.1 Fundamental legislative principles

Section 4 of the Legislative Standards Act 1992 (LSA) states that ‘fundamental legislative principles’ 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
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles (FLP) to the Bill. The committee brings the following to the attention of the Legislative Assembly.

The committee identified that Clauses 17, 30, 37, 41, 44, 57, 62, 63, 78, 82, 99, 119, 121, 126, 135, 140, 143 and 147 of the Bill raise FLP issues.

Table 1 below provides a summary of the breaches of fundamental legislative principle in the Bill. These issues are discussed in further detail in sections 3.1.1 and 3.1.2 of this report.

Table 1: Summary of Issues of Fundamental Legislative Principle

<table>
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<th>CLAUSES</th>
<th>ISSUES OF FUNDAMENTAL LEGISLATIVE PRINCIPLE</th>
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| Clauses 140 and 143 allow the QBCC to publish details about an excluded individual.  
Excluded individuals are those who have become bankrupt or have been involved in a construction company collapse. | Rights and liberties of individuals – legislation should have regard to an individual’s right to privacy of their personal information.  
A person has a right to privacy, particularly in relation to their personal information. The provisions aim to ensure the integrity of industry participants and promote transparency. The legislation incorporates a number of safeguards to lessen the potential privacy impact, including producing a show cause notice and ensuring all review periods have ended before publication. |
| Various clauses introduce a number of new penalties or replicate existing penalties, with the most severe penalties relating to the requirements surrounding trust accounts. These attract a maximum penalty of up to 500 penalty units.  
Some provisions also provide for sentences of imprisonment up to 1 or 2 years. | Rights and liberties of individuals – penalties should be reasonable and proportionate.  
The explanatory notes explain the importance of the penalties in order to promote improved payment practices and bring about cultural change in the building and construction industry. |

402 The penalty unit value in Queensland is $133.45 (current from 1 July 2019)
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<th>CLAUSES</th>
<th>ISSUES OF FUNDAMENTAL LEGISLATIVE PRINCIPLE</th>
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<td><strong>Clause 147</strong> allows proceedings for offences under the QBCC Act to be brought within three years after the offence is committed or within two years after the offence comes to the knowledge of the QBCC.</td>
<td><strong>Rights and liberties of individuals</strong> – legislation should have sufficient regard to the rights and liberties of individuals. By extending the period for instituting proceedings, an individual’s rights and liberties may be affected.</td>
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<td><strong>Clause 135</strong> provides that it is an offence if a person, without reasonable excuse, causes another party financial loss because of the person’s deliberate non-compliance with the contract. There are also numerous other provisions which impose an offence, unless there is a reasonable excuse.</td>
<td><strong>Reversal of onus of proof</strong> – the onus of proof should only be reversed with adequate justification and the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.</td>
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<td><strong>Clauses 17 and 99</strong> give investigators powers to enter places with consent or under a warrant, under the Architects Act and the PE Act.</td>
<td><strong>Power to enter premises</strong> – the power to enter premises and search for or seize documents should only be pursuant to a warrant. The investigatory powers provided for in the Bill appear similar to powers provided for in other legislation. These powers are intrusive, though there are a number of safeguards, which provide some protection for the individual.</td>
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<td><strong>Clause 78</strong> inserts new section 189A in the BIF Act. It states that a person is not excused from supplying documents under an approved audit program for the BIF Act on the ground that the document may tend to incriminate the person. <strong>Clause 63</strong> inserts new sections 23B and 40B in the BIF Act and provides that it is not a reasonable excuse not to provide information on the grounds that the request might incriminate the trustee.</td>
<td><strong>Protection against self-incrimination</strong> – a person should not be obliged to incriminate themselves. The explanatory notes state that the information sought would be peculiarly within the knowledge of the person subject to the audit and would be difficult for the QBCC to establish through an alternative evidential means. New section 189B provides some evidential immunity in proceedings. Sections 23B and 40B do not provide this immunity.</td>
</tr>
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Clauses

Clause 63 new section 53G in the 2017 Act. It protects the commissioner, employees and agents of the QBCC from civil liability for performing a function or exercising a power, if the conduct is engaged in good faith and without negligence.

Issues of Fundamental Legislative Principle

Immunity from proceedings – a Bill should not confer immunity from proceedings or prosecution without adequate justification. The preferred format of a provision that provides immunity, should be for an action done honestly and without negligence, and if liability is removed it is usually shifted to the state.

In this instance, immunity does not attach to acts done or omissions made which are reckless, unreasonable or excessive, but attaches only to acts done or omissions made in good faith and without negligence. Liability also attaches to the State.

The Bill includes a number of regulation-making powers and transitional regulation making powers.

Delegation of legislative power – a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons.

Regulation making powers and transitional regulation making powers are regularly found in legislation. The transitional regulation expire s within two years after commencement.

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 Clauses 140 and 143 – Section 4(2)(a) of LSA – Right to privacy regarding personal information

Clauses 140 and 143 insert new provisions in the QBCC Act. These provision allow the QBCC to publish the details of an ‘excluded individual’ on the commission’s website, including the individual’s name and business address and that the individual is an excluded individual for a period for a stated relevant event. Excluded individuals include, broadly, individuals who have become bankrupt or have been involved in a construction company financial collapse.

These provisions limit the individual’s right to privacy. This raises an issue of fundamental legislative principle as the right to privacy, and the disclosure of private or confidential information, are relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.

The explanatory notes state that these amendments implement a recommendation of the Special Joint Taskforce, which found that:

... information about excluded and permanently excluded individuals is not always readily accessible if the individual has not previously held a licence (for example, the person was a company’s chief financial officer). This makes it difficult for a consumer or subcontractor to ascertain a person’s previous commercial dealings and to decide whether to conduct business with that person.\(^{403}\)

\(^{403}\) Explanatory notes, p 15.
The explanatory notes offer the following justification:

*The amendments are considered justifiable, as the ... publication of information on the website is necessary for ensuring the integrity of industry participants and promoting transparency. The Bill incorporates safeguards to lessen potential privacy impact. For example, the QBCC may only publish the details of excluded and permanently excluded individuals who are not licensees if it has issued a show cause notice and all periods for a relevant review or appeal have ended. Further, the information may not be published for longer than 10 years and must only include the suburb or locality for an individual business address if it is also the individual's residential address.*

In relation to Clause 140, the department also advised:

*The Taskforce found that information about excluded and permanently excluded individuals is not always readily accessible if the individual has not previously held a licence, for example, a company’s director or chief financial officer.

In implementing the Taskforce recommendation (recommendation 9), the amendments promote transparency about a person’s previous commercial dealings, which will in turn assist consumers and contractors to make informed decisions about whether to conduct business with certain individuals.

Limiting the application of the provision may not achieve the transparency required. For example, a person may attempt to establish themselves within the Queensland building industry following an interstate company failure. In this circumstance it would be appropriate for the QBCC to publish the person’s details, even though the company was not QBCC-licensed.

*Further, it is not mandatory for the QBCC to publish an excluded individual’s details.*

Committee comment

The committee is satisfied that the breach of fundamental legislative principle is justified, taking into account the policy objective of the provisions and the safeguards in place.

3.1.1.2 Clauses 41, 44, 63, 119 and 121 – Section 4(2)(a) of LSA – Proportionality and relevance of penalties

Clause 63 inserts a replacement chapter 2 (project bank accounts) in the BIF Act. The Bill replicates a number of existing BIF Act offences and introduces new offences associated with the trust account requirements. Some of these requirements, and maximum penalties for a failure to comply, include:

**Building Industry Fairness (Security of Payment) Act 2017**

- requirements to open a project trust account (clause 63, new section 18 – 500 penalty units)
- requirements for a project trust account, including account being held at approved financial institution, account name to include the trustee’s name and the word ‘trust’ and that transactions create an electronic record of the transfer (clause 63, new section 18A – maximum penalties 200 to 500 penalty units)
- requirement to notify opening, closure, transfer, or name change of an account (clause 63, new section 18A – maximum penalty 200 penalty units)

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404 Explanatory notes, p 15.
405 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, pp 54-55.
• requirements regarding deposits to and withdrawals from a project trust account and repayment of amounts withdrawn from a project trust account (clause 63, new sections 19, 19A, 210, 20A – maximum penalty 200 to 300 penalty units or with imprisonment of up to one year in some cases and 2 years in others)

• requirement for subcontractor beneficiaries to be paid from project trust account (clause 63, new section 20 – maximum penalty 200 penalty units or 1 year’s imprisonment)

• requirement not to withdraw an amount from the project trust account unless there is sufficient amounts available to pay all liabilities to subcontractor beneficiaries (clause 63, new section 20B – maximum penalty 300 penalty units or 2 year’s imprisonment)

• requirement not to pay a subcontractor beneficiary where there is insufficient amount held in the project trust account (clause 63, new section 20C – maximum penalty 100 penalty units or 1 year’s imprisonment)

• requirements regarding dissolution of a project trust (clause 63, new section 21A – maximum penalty 500 penalty units or 1 year’s imprisonment)

• requirement to give notice of a project trust account (clause 63, new section 23 – maximum penalty 200 penalty units or 1 year’s imprisonment)

• requirement not to deposit amounts improperly in the retention trust account (clause 63, new section 35A – maximum penalty – 200 penalty units or 1 year’s imprisonment)

• requirement not to withdraw amounts improperly from the retention trust account (clause 63, new section 36 – maximum penalty – 300 penalty units or 2 year’s imprisonment)

• requirement to release amounts from retention trust account in certain manner (clause 63, new section 36A – maximum penalty – 200 penalty units or 1 year’s imprisonment)

• requirement not to dissolve the retention trust before it is properly dissolved (clause 63, new section 37A – maximum penalty – 500 penalty units or 1 year’s imprisonment)

• requirement to give notice of the use of a retention trust (clause 63, new section 40 – maximum penalty – 200 penalty units or 1 year’s imprisonment)

• requirement to hold sufficient amount in a trust account to pay to a beneficiary of a trust (clause 63, new section 51 – maximum penalty – 100 penalty units or 1 year’s imprisonment)

• requirement for trustee for a project trust or retention trust not to invest the funds in an investment (clause 63, new section 51B – maximum penalty – 200 penalty units or 1 year’s imprisonment)

• requirement to keep records by a trustee for a project trust or retention trust (clause 63, new section 52 – maximum penalty – 300 penalty units or 1 year’s imprisonment)

• requirement to engage an auditor to review a project trust or retention trust (clause 63, new section 57 – maximum penalty – 200 penalty units or 1 year’s imprisonment)

Building Act 1975

Clause 41 imposes a maximum penalty of 20 penalty units for a failure by a building certifier to comply with an owner’s request to provide any inspection documentation within 5 business days, without reasonable excuse.

Clause 44 creates a range of obligations for building certifiers, with offences for failure to comply, with maximum penalties of 20 to 40 penalty units.
Clause 119 imposes a maximum penalty of 200 penalty units for a licensee failing to comply with a requirement to give information to the commission under the minimum financial requirements.

Clause 121 introduces a new penalty for delaying or obstructing the rectification of building work, with a maximum penalty of 250 penalty units.

Architects Act and Professional Engineers Act

The Bill introduces a number of new offences, particularly regarding investigatory and audit powers, such as:

- failing to give notice to the board of a prescribed change for the architect within 21 days, without reasonable excuse (clause 9 - maximum penalty 50 penalty units)
- failing to give notice to the board of a disciplinary event for the architect within 21 days, without reasonable excuse (clause 10 - maximum penalty 50 penalty units)
- failing to comply with a notice to produce documents during an audit (clause 11 – maximum penalty 100 penalty units)
- contravention of a help requirement, without reasonable excuse (clause 17, new s62M, – maximum penalty 50 penalty units)
- failing to comply with a seizure requirement, without reasonable excuse (clause 17, new s62Q – maximum penalty 50 penalty units)
- tampering or interfering with a restricted size thing, without reasonable excuse (clause 17, new s62R – maximum penalty 50 penalty units).

The creation of new offences and penalties affects the rights and liberties of individuals. Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, penalties and other consequences imposed by legislation are proportionate and relevant to the actions to which the consequences relate. A penalty should be proportionate to the offence:

In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy.

... Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.406

As mentioned above, some of the penalties replicate those already existing in the BIF Act. The committee report on the 2017 Bill addressed the offence of a head contractor failing to establish a project bank account. The penalty was a maximum of 500 penalty units. However, the report was more concerned with the requirement for the head contractor to prove the existence of the account (reverse onus) than with the proportionality and relevance of the penalties.407

The explanatory notes for the 2017 Bill stated:

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.  

The committee notes that MBQ has criticised various penalties in the Bill as excessive:

There are many provisions in the BIF Act and the BIFOLA Bill that carry significant penalties that are excessive compared to the offence committed. This approach does not achieve the intended purpose of the BIF Act which is to assist subcontractors to get paid and/or to secure money that is owed to subcontractors. It does add further complexity and risk to an already complex process. A significant number of these offences apply even though all subcontractors may have been paid what they are owed.

These provisions should be amended to reduce the penalty to one that is commensurate with the offence committed. Alternatively, a defence of ‘without reasonable excuse’ should be included so that head contractors who inadvertently do not comply with administrative provisions of the BIF Act are not subject to the significant and disproportionate penalties noted below. Similarly, where one event results in multiple offences, a provision should be included to limit how many penalties can be applied.

The explanatory notes for the current Bill address the issue of proportionality and relevance of the BIF Act penalties:

The quantum of the penalties supports the policy objective to promote improved payment practices and bring about cultural change in the building and construction industry. The penalties are proportionate and relevant to the seriousness of the conduct, subcontractors, business owners, employees, suppliers and the wider community. In addition to the financial effects, social impacts can include relationship breakdowns, loss of reputation and stress-related illnesses.

In relation to the penalties under the QBCC Act regarding the minimum financial requirements, the explanatory notes state:

... The new offences and penalties are consistent with the existing penalties for similar offences under the QBCC Act. This will enable the QBCC to hold to account non-licensed persons who effectively operate a QBCC-licensed entity, and to better regulate those who pose the greatest risk across the building industry.

In relation to the new penalty for delaying or obstructing the rectification of building work, the explanatory notes state:

... This will benefit consumers by providing a deterrent to those who may seek to prevent work from being rectified effectively and in an expeditious manner. The penalty amount is consistent with the existing penalty for failing to comply with a direction to rectify building work.

408  Explanatory notes to Building Industry Fairness (Security of Payment) Bill 2017, p 15.
409  Master Builders Queensland, submission 4, p 3.
410  Explanatory notes, p 12.
In relation to penalties under the Architects Act and PE Act, the explanatory notes offer this justification:

*The maximum penalty units associated with the proposed offences are proportionate and align with existing offences in the Acts, where relevant, ranging from 50 to 100 penalty units. For example, the maximum penalty for failing to notify the Board of a disciplinary event in another jurisdiction is identical to the maximum penalty for the existing offences of failing to notify the Board of a relevant change in circumstance (i.e. 50 penalty units).*

**Committee comment**

The committee is satisfied that the various offences and maximum penalties available are proportionate and relevant.

3.1.1.3  **Clause 147 – Section 4(2)(a) of LSA – Ordinary activities should not be unduly restricted**

Clause 147 amends the QBCC Act to allow proceedings for an offence to be brought within three years after the offence is committed or within two years after the offence comes to the knowledge of the QBCC.

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to the rights and liberties of individuals.

The Office of the Queensland Parliamentary Counsel (OQPC) Notebook (OQPC notebook) provides:

*The administrative power to start a prosecution or proceeding under legislation should be responsive to the general principle that there must be an end to liability to prosecution or proceedings at some reasonable point.*

Extending the period for instituting proceedings may affect an individual’s rights and liberties, as they might expect that their possible exposure to prosecution should end at a reasonable time.

The explanatory notes state:

*The amendment implements recommendation 3 of the Taskforce report. It brings Queensland in line with other states and territories. Tasmania aside, all interjurisdictional building regulators have a longer time than the QBCC within which to start a prosecution.*

The explanatory notes further state:

*The limitation period in the Bill is sufficiently long to allow the QBCC to recognise and consider an alleged breach and further the public interest by providing a consequence for legally wrong conduct that has potential safety, financial or social impacts, while still protecting individuals from the threat of endless prosecution.*

**Committee comment**

The committee is satisfied that the breach of an individual’s rights and liberties has been sufficiently justified.
3.1.1.4 Clause 135 – Section 4(3)(d) of LSA – onus of proof

Clause 135 amends section 42E of the QBCC Act. It establishes an offence for a person, without reasonable excuse, to cause another party financial loss because of the person’s deliberate non-compliance with the contract.

The clause inserts a note for this provision referencing section 76 of the Justices Act 1886. Section 76 provides that the defendant shall be called upon to prove the affirmative in the defendant’s defence, meaning that the burden is on the defendant to prove the existence of a reasonable excuse.

The Bill also introduces a number of other provisions which create an offence for actions done, in the absence of a ‘reasonable excuse’:

- notification of prescribed changes, unless there is a reasonable excuse (clause 9 – section 32AA Architects Act)
- notification of disciplinary event, unless there is a reasonable excuse (clause 10 – section 32A Architects Act)
- compliance with audit, unless there is a reasonable excuse (clause 11 – section 35J Architects Act)
- requirement to comply with help requirement, unless there is a reasonable excuse (clause 17 – section 62M Architects Act)
- requirement to comply with investigator, unless there is a reasonable excuse (clause 17 – section 62Q Architects Act)
- restricting access to a thing or place, without a reasonable excuse (clause 17 – section 62R Architects Act)
- certifier must give inspection information to an owner, unless there is a reasonable excuse (clause 41 – section 124A Building Act)
- private certifier must give notice of engagement, unless there is a reasonable excuse (clause 44 – section 143 Building Act)
- notice of engagement and contact details relating to private certifiers, unless there is a reasonable excuse (clause 44 – section 143A Building Act)
- requirements in relation to additional certification notice, unless there is a reasonable excuse (clause 44 – section 143B Building Act)
- contracting party failing to deposit amount into an account, unless there is a reasonable excuse (clause 63 – section 19 BIF Act)
- trustee to give notice of withdrawal from project trust account, unless there is a reasonable excuse (clause 63 – section 23A BIF Act)
- trustee must give information to subcontractor beneficiary, unless there is a reasonable excuse (clause 63 – section 23B BIF Act)
- trustee must give contracted party notice of deposit or withdrawal from retention trust account unless there is a reasonable excuse (clause 63 – section 40A BIF Act)
- trustee must give information to a beneficiary of a retention trust, unless there is a reasonable excuse (clause 63 – section 40B BIF Act)
- supply of financial records and other documents, unless there is a reasonable excuse (clause 78 – section 189A BIF Act)
• registered professional engineer must give notice of a prescribed change, unless there is a reasonable excuse (clause 92 – section 32AA PE Act)
• registered professional engineer must give notice of a disciplinary event, unless there is a reasonable excuse (clause 93 – section 32A PE Act)
• engineer must comply with requirements in an audit, unless there is a reasonable excuse (clause 94 – section 35K PE Act)
• person must comply with requirement of investigator, unless there is a reasonable excuse (clause 99 – section 62Q PE Act)
• person must not tamper with a seized thing or restrict access, unless there is a reasonable excuse (clause 99 – section 62R PE Act)
• licensee must give notice about interstate or New Zealand licences, unless there is a reasonable excuse (clause 123 – section 109B QBCC Act)

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.417

The OQPC notebook states 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 the defendant would be particularly well positioned to disprove guilt.418

Such ‘reasonable excuse’ provisions are discussed in some detail in the OQPC, Principles of good legislation: Reversal of onus of proof (OQPC guide). That discussion starts with the following:

If legislation prohibits a person from doing something ‘without reasonable excuse’ it would seem in many cases appropriate for the accused person to provide the necessary evidence of the reasonable excuse. While there is no Queensland case law directly on point, the Northern Territory Supreme Court has held that the onus of proving the existence of a reasonable excuse rested with the defendant on the basis that the reasonable excuse was a statutory exception that existed as a separate matter to the general prohibition… That approach is consistent with the principles used to determine whether a provision contains an exception to the offence or whether negating the existence of the reasonable excuse is a matter to be proved by the prosecution once the excuse has been properly raised …

… it is understood that in Queensland, ‘reasonable excuse provisions’ are drafted on the assumption that the Justices Act 1886, section 76 will apply and place both the evidential and legal onus on the defendant to raise and prove the existence of a reasonable excuse. On the other hand, … departments have often taken the view in their Explanatory Notes that a provision containing an exemption where a reasonable excuse exists is an excuse for which only the evidential onus lies with the accused.419

The OQPC guide provides some examples where departments have disagreed with the view (expressed by the former Scrutiny of Legislation Committee (SLC)) that reasonable excuse provisions involve a reversal of the onus of proof. 420

The discussion in the OQPC guide concludes:

It seems likely that in most cases a reasonable excuse will constitute a statutory exception to be proved by the defendant. However, in the absence of an express statement as to the allocation of the onus, the question will ultimately need to be determined by a court having regard to the established rules of statutory interpretation. 421

Elsewhere, the OQPC has noted:

Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.

For example, if legislation prohibits a person from doing something ‘without reasonable excuse’, it is generally appropriate for a defendant to provide the necessary evidence of the reasonable excuse if evidence of the reasonable excuse does not appear in the case for the prosecution. 422

The explanatory notes state:

The reversal of the onus of proof is justified because the existence of a reasonable excuse is peculiarly within the defendant’s knowledge. Because of this, without the reversal of the onus of proof, it would be difficult for the prosecution to prove the offence and the legislation could not otherwise be practically administered. 423

Committee comment

The committee is satisfied that sufficient regard has been given to an individual’s rights and liberties.

3.1.1.5 Clauses 17 and 99 – Section 4(3)(e) of LSA – power to enter premises

Clause 17 gives investigators powers under the Architects Act to enter places, with consent or under a warrant. Clause 99 provides the same power under the PE Act. Entry can also be made to public places where the entry is made when the place is open to the public.

Following entry, an investigator may also search for or seize documents and other evidence of offences. An investigator may also require reasonable help from an occupier of the place or a person at the place, for example, to produce a document or to give information. There are penalties for any failure to comply.

Section 4(3)(e) of the LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer. 424

422 See the Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: the OQPC Notebook, p 36.
423 Explanatory notes, p 16.
Legislation should confer power to enter premises, and search for or seize documents or other property, with the occupier’s consent or under a warrant issued by a judge or other judicial officer. This principle supports a long established rule of common law that protects the property of citizens.\footnote{Office of the Queensland Parliamentary Counsel, \emph{Fundamental Legislative Principles: The OQPC Notebook}, p 44.}

\textit{FLPs are particularly important when powers of inspectors and similar officials are prescribed in legislation because these powers are very likely to interfere directly with the rights and liberties of individuals.}\footnote{Office of the Queensland Parliamentary Counsel, \emph{Fundamental Legislative Principles: The OQPC Notebook}, p 45.}

Strict adherence to the principle may not be required if the premises are business premises operating under a licence or premises of a public authority.

The explanatory notes give this justification in relation to the entry powers:

\ldots an investigator may only enter for the purpose of conducting an investigation and cannot enter any residence without a warrant or consent. These entry powers will allow investigators to ensure compliance with the Acts. Without these powers, the Boards will continue to have limited investigatory powers which may prevent them from undertaking effective investigations into architects and registered professional engineers.\footnote{Explanatory notes, p 14.}

The explanatory notes say this about safeguards:

\ldots Safeguards have been included for example, providing for an owner to have reasonable access to, and for the return of, a seized thing. Reasonable efforts must also be made to return a thing to an owner, including issuing an information notice, before a thing is forfeited to the Boards.\footnote{Explanatory notes, p 14.}

In relation to a help requirement, the explanatory notes state:

\ldots While a person is required to provide this reasonable help, the Bill ensures sufficient protections are in place by providing that a reasonable excuse for non-compliance is if complying may tend to incriminate the person.\footnote{Explanatory notes, p 15.}

**Committee comment**

The investigatory powers provided for in the Bill are similar to powers provided for in other legislation. These powers are intrusive, though there are a number of safeguards, which provide some protection for the individual.

The committee is satisfied that the breaches of FLP in these provisions are justified.

3.1.1.6 \textit{Clauses 63 and 78 – Section 4(3)(f) of LSA – protection against self-incrimination}

Clause 78 inserts new section 189A in the BIF Act, providing for an offence where a person fails to supply documents when required as part of an approved audit program, without a reasonable excuse. There is a maximum penalty of 100 penalty units.

Section 189A(4) expressly states that it is not a reasonable excuse for a failure to comply on the basis that complying might tend to incriminate the person or expose them to a penalty.

\begin{footnotes}
\item[425] Office of the Queensland Parliamentary Counsel, \emph{Fundamental Legislative Principles: The OQPC Notebook}, p 44.
\item[426] Office of the Queensland Parliamentary Counsel, \emph{Fundamental Legislative Principles: The OQPC Notebook}, p 45.
\item[427] Explanatory notes, p 14.
\item[428] Explanatory notes, p 14.
\item[429] Explanatory notes, p 15.
\end{footnotes}
Clause 63 inserts new sections 23B and 40B in the BIF Act. Section 23B(4) states that it is not a reasonable excuse for the trustee to fail to comply with a request from a subcontractor beneficiary to provide information on the grounds that complying with the request might tend to incriminate the trustee or expose the trustee to a penalty.

Section 40B has a similar requirement in relation to a request for information relating to a retention trust account.

Section 4(3)(f) of the LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides appropriate protection against self-incrimination.\(^{430}\)

The principle that legislation should provide appropriate protection against self-incrimination:

\[\text{... has as its source the long established and strong principle of common law that an individual accused of a criminal offence should not be obliged to incriminate himself or herself.}\]\(^{431}\)

Provisions denying the privilege [against self-incrimination] are rarely essential to the operation of legislation, although there is a perception that they are essential.\(^{432}\)

Denial of the protection afforded by the privilege against self-incrimination is only potentially justifiable if:

\begin{itemize}
  \item the questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed and that would be difficult or impossible to establish by any alternative evidential means
  \item the legislation prohibits use of the information obtained in prosecutions against the person
  \item in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming a right).\(^{433}\)
\end{itemize}

The explanatory notes state:

The Bill seeks both to ensure there are strong powers to compel the provision of information to secure compliance with the security of payment reforms, and also to protect the rights of persons under the criminal law. The information sought through an audit program would be peculiarly within the knowledge of the person subject to the audit and would be difficult for the QBCC to establish through an alternative evidential means. The provision seeks to ensure persons cannot deliberately withhold information that would otherwise assist the QBCC in detecting, and mitigating the effects of, a breach of the BIF Act. Limiting the information that may be available to the QBCC may compromise its ability to ensure ongoing compliance and payment protections.\(^{434}\)

It can be noted that new section 189B provides some evidential immunity. It states that a document or other evidence provided by a person under section 189B is not admissible as evidence against that person in civil or criminal proceedings, other than proceedings arising if the answer is misleading or false, to the extent that it tends to incriminate the person or exposes them to a penalty.

\[^{430}\text{Legislative Standards Act 1992, s 4}(3)(f).\]
\[^{431}\text{Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: The OQPC Notebook, p 52.}\]
\[^{432}\text{Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: The OQPC Notebook, p 52.}\]
\[^{433}\text{Scrutiny of Legislation Committee, Alert Digest 1 of 2000, p 7, para 57; Alert Digest 13 of 1999, p 31; and Alert Digest 4 of 1999, p 9, para 1.60.}\]
\[^{434}\text{Explanatory notes, p 16.}\]
Neither of the proposed sections 23B or 40B contain a similar protection. It is unclear why this is so, and the explanatory notes make no reference to any issue of fundamental legislative principle in relation to these two provisions, only proposed section 189A.

The committee sought additional information from the department in relation to this issue. The department advised:

*The potential infringement of the fundamental legislative principles presented by new sections 23B and 40B of the BIF Act are considered justifiable. The provisions implement the BIF Panel’s recommendation that beneficiaries for a trust account have reasonable access to trust accounting information. Subcontractor beneficiaries require sufficient information to understand their cashflow and how money being held on their behalf is being used.*

*While it is common for evidential immunity to apply to requirements relating to an investigation (i.e. providing information to a government entity about compliance), new sections 23B and 40B are about giving information to beneficiaries of a trust.*

*If there were some incriminating information given to a beneficiary, this would have to be identified and further action taken by the beneficiary for that information to be given to the QBCC, which may never be done. That is different to when the information is given directly to the QBCC under new section 189B in that it is given to the very same government entity likely to investigate it and start a prosecution because of it.*

*Providing immunity for information given under new sections 23B and 40B could also have unintended consequences that would complicate a prosecution of the relevant trustee. For example, the QBCC may proceed with a matter unaware that evidence to be used in the prosecution was also the subject of a request under section 23B or 40B and that immunity applies.*

*Therefore, evidential immunity in the Bill has only been applied where the requirement to give information is to give it to the same entity that would investigate or prosecute the person giving the information. Evidential immunities are also generally limited to the situation where having the information is of greater public value than prosecuting the person about whom the information relates, for example, for the purpose of investigating what went wrong and how to avoid it in the future.*

**Committee comment**

After considering the additional information provided by the department, the committee is satisfied that the breaches of FLP in these provisions are justified.

3.1.1.7 **Clause 63 and 78 – Section 4(3)(h) of LSA – immunity from proceedings**

Clause 63 inserts new section 53G in the *Building Industry Fairness (Security of Payment) Act 2017*. This provision protects the commissioner, employees and agents of the QBCC from civil liability for performing a function or exercising a power if the conduct is engaged in good faith and without negligence.

Section 4(3)(h) of the LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

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The OQPC Notebook states:

A person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence ... and if liability is removed it is usually shifted to the State.\(^437\)

Former committees have stated that one of the fundamental principles of law is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding that position, former committees also recognised that conferral of immunity is appropriate in certain situations.\(^438\)

The explanatory notes provide:

There may be justification for immunity if it is necessary for the administration of an Act, which may be the case here. Officers of the QBCC may be required to exercise judgments, make decisions and exercise power with limited information and in urgent circumstances. As a result, it is important that they and others engaged in the administration of the legislation are not deterred from exercising their skill and judgment due to fear of personal legal liability. If QBCC officers could be sued for an incident occurring when they are acting in good faith, they may be reluctant to act.\(^439\)

The explanatory notes continue:

The immunity is appropriately limited in scope, as it does not attach to acts done or omissions made which are reckless, unreasonable or excessive, but attaches only to acts done or omissions made in good faith and without negligence. Additionally, liability for the consequences of actions done, or omissions made, is not extinguished by the Bill, but the liability attaches to the State instead. Therefore, where persons consider themselves to have been injured by the actions or omissions of the commissioner or an employee or agent of the QBCC, legal redress remains open to them.\(^440\)

Committee comment

The committee is satisfied that the grant of immunity breach is adequately justified, given:

- the immunity exists only for acts done in good faith and without negligence and for other acts that would attract liability, and
- where the immunity operates, liability will instead attach to the commission (effectively, to the State).

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\(^437\) Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 64.


\(^439\) Explanatory notes, p 16.

\(^440\) Explanatory notes, p 17.
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 Clauses 30, 37, 57, 62, 82 and 126 – Section 4(4)(a) of LSA – Delegation of legislative power

The Bill inserts a number of regulation-making powers, including:

- clause 62 – section 8A(1)(w) of the BIF Act provides that the scope of what constitutes ‘project trust work’, for the purposes of establishing a project trust, can be further extended in the regulation
- clause 62 – section 41 of the BIF Act requires a trustee for a retention trust account to complete training as prescribed by regulation
- clause 62 – section 57A of the BIF Act allows a regulation to prescribe the contents of an account review report for a retention trust account

Clauses 57 and 82 introduce transitional regulation-making powers for the Building Act and BIF Act respectively. These transitional regulations allow provisions of a saving or transitional nature to be made where not sufficiently provided for by the Acts. The transitional regulation making powers end two years after commencement for the Building Act and one year after commencement for the BIF Act.

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, as noted earlier, section 4(4)(a) of the LSA provides that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons.441

With regard to the regulation-making powers, the explanatory notes provide the following justification:

Complex legislative schemes, such as this one, need to be facilitated by strong regulation-making powers. Not all the powers will be deployed immediately – the intent being to provide flexibility to respond to changes in the industry that may arise following implementation of the reforms.442

With regard to the transitional regulation-making powers, the explanatory notes provide the following justification:

The inclusion of these clauses is justified because it is intended to be a temporary measure to facilitate a smooth transition to the new legislative schemes by enabling a regulation to be made to address any emerging or unforeseen transitional issues. Importantly, the potential contravention of FLPs is mitigated in that the Bill provides for the expiry of the transitional regulation-making powers one to two years after the day of commencement.443

Committee comment

Regulation-making powers are a common feature in legislation. In addition, the transitional regulations contain expiry dates to ensure that they have limited effect. The committee is therefore satisfied that sufficient regard has been given to the institution of Parliament.

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441 Legislative Standards Act 1992, s 4(4)(a).
442 Explanatory notes, p 17.
443 Explanatory notes, p 18.
3.2 Explanatory notes

Part 4 of the Legislative Standards Act 1992 requires that an explanatory note be circulated when a Bill is introduced in the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. They do not traverse some of the issues of fundamental legislative principle in the Bill, as noted above. Otherwise, the notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.
4 Compatibility with human rights

Section 39 of the Human Rights Act 2019 (HRA) requires that the portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.

The committee has examined the application of the HRA to the Bill. The committee brings the following to the attention of the Legislative Assembly.

The committee identified that Clauses 17, 51, 63, 75, 78, 99, 140 and 143 of the Bill potentially raise HRA issues.

4.1 Clauses 51, 63, 140 and 143

The committee has identified that section 25 (Privacy and reputation) of the HRA are relevant to clauses 51, 63, 140 and 143.

4.1.1 Nature of the right

Section 25 of the HRA provides:

A person has the right—

(a) not to have the person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have the person’s reputation unlawfully attacked.444

4.1.2 Nature of the purpose of the limitation

Clauses 51, 63, 140 and 143 of the Bill provide for QBCC publication of details about individuals regarding bankruptcy and other exclusionary circumstances, including having been involved in a construction company collapse.

It is not clear that section 13 of the HRA needs to be relied upon as publication of this information may not constitute an arbitrary interference with privacy. If there was any prima facie privacy violation then such publication could readily be justified under section 13.

4.1.3 The relationship between the limitation and its purpose

There is a close relationship between the publication of such information and the protection of the rights of others and the publication of such information is consistent with a free and democratic society based on human dignity, equality and freedom. It is provided by law and is proportionate.

4.1.4 Are there less restrictive and reasonably available ways to achieve the purposes?

No.

4.1.5 The balance between the importance of the purpose of the limitation and the importance of preserving the human right

The balance is in favour of limitation in these circumstances.

4.1.6 Committee comment

The committee is satisfied that the balance is in favour of limitation in these circumstances.

444 Human Rights Act 2019, s 25.
4.2 Clauses 17, 75 and 99

The committee has identified that section 24 (Property rights) section 25 (Privacy and reputation) of the HRA are relevant to clauses 17, 75 and 99.

4.2.1 Nature of the right

Section 24 of the HRA provides:

(1) All persons have the right to own property alone or in association with others.

(2) A person must not be arbitrarily deprived of the person’s property. 445

Section 25 of the HRA provides:

A person has the right—

(a) not to have the person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have the person’s reputation unlawfully attacked. 446

4.2.2 Nature of the purpose of the limitation

Clauses 17 and 99 of the Bill provide for investigators to enter premises and seize property reasonably believed to be evidence of an offence. Clause 75 of the Bill provides for the registration of charges upon land.

It is not clear that section 13 of the HRA needs to be relied upon as entry and seizure do not appear to be arbitrary. Entry is to occur with consent or upon the issuance of warrants. Seizure appears to be authorised by law and can only occur where there is the existence of a reasonable belief that offences have been committed.

The provision for the registration of charges upon land in clause 75 does not appear to be an arbitrary deprivation of property and would, in any event, be a reasonable limitation.

4.2.3 The relationship between the limitation and its purpose

There appears to be a relationship between entry into premises and the seizure of potential evidence of offences and the protection of the rights of others. Such entry and seizure appears to be consistent with a free and democratic society based on human dignity, equality and freedom. It is provided by law and is proportionate.

4.2.4 Are there less restrictive and reasonably available ways to achieve the purposes?

No.

4.2.5 The balance between the importance of the purpose of the limitation and the importance of preserving the human right

The balance is in favour of limitation in these circumstances.

4.2.6 Committee comment

The committee is satisfied that the balance is in favour of limitation in these circumstances.

446 Human Rights Act 2019, s 25.
4.3 Clauses 63 and 78

The committee has identified that section 32(2)(k) (Rights in criminal proceedings) of the HRA is relevant to clauses 63 and 78.

4.3.1 Nature of the right

Section 32(2)(k) of the HRA provides:

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees —

... (k) not to be compelled to testify against themselves or to confess guilt.

4.3.2 Nature of the purpose of the limitation

Clauses 63 and 78 of the Bill include provisions that compel persons to provide information. These provisions include:

- Section 23B – Subcontractor beneficiary may request particular information – Section 23B(5) provides that it is not a reasonable excuse for the trustee to fail to comply with the request on the grounds that complying with the request might tend to incriminate the trustee or expose the trustee to a penalty. Section 40B(4) is similar.

- Section 189A – Supply of financial records and other documents under approved audit program or for other reason – Section 189A(4) provides that it is not a reasonable excuse for the person to fail to comply with the requirement on the basis that complying with the requirement might tend to incriminate the person or expose the person to a penalty. Section 189B(2) provides that evidence of the document, and other evidence directly or indirectly derived from the document, is not admissible against the individual in any proceeding to the extent it tends to incriminate the individual, or expose the individual to a penalty, in the proceeding.

It is open to argue that sections 23B(5), 40B(4) and 189A(4) do not violate section 32(2)(k) of the HRA as they relate to documents rather than to oral testimony. If this argument is not considered compelling, then it is not clear that such limitations as set out in sections 23B(5) and 40B(4) could be justified under section 13 of the HRA. Section 189B(2) does, however, appear to limit the prospects that section 189A(4) will be inconsistent with section 32(2)(k) of the HRA.

4.3.3 The relationship between the limitation and its purpose

As noted above, it may be difficult to justify these limitations under section 13 of the HRA.

4.3.4 Are there less restrictive and reasonably available ways to achieve the purposes?

Arguably, yes. It may be open to argue that derivative use immunity similar to section 189B(2) could have been incorporated into sections 23B and 40B.

The committee sought a response from the department in relation to this issue and was advised, for the reasons included in section 3.1.1.6 of this report, that:

... the inclusion of evidential immunity was not identified as a less restrictive way to achieve the purpose of the limitation of human rights.

4.3.5  The balance between the importance of the purpose of the limitation and the importance of preserving the human right

If section 32(2)(k) of the HRA is enlivened by these provisions, then it is not clear that the balance favours limitation.

4.3.6  Committee comment

After considering the additional information provided by the department, the committee is satisfied that the balance is in favour of limitation in these circumstances.

4.4  Statement of compatibility

Section 38 of the HRA requires that a member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill’s compatibility with human rights.

A statement of compatibility was tabled with the introduction of the Bill and, subject to the reservations above regarding the privilege against self-incrimination, a sufficient level of information was provided to facilitate understanding of the Bill in relation to its compatibility with human rights.
## Appendix A – Submitters

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<thead>
<tr>
<th>Sub #</th>
<th>Submitter</th>
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<tr>
<td>001</td>
<td>Superior Skip Bins</td>
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<td>002</td>
<td>CPM Engineering Queensland</td>
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<td>003</td>
<td>Gympie Blinds</td>
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<td>004</td>
<td>Master Builders Queensland</td>
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<td>005</td>
<td>Cornwalls Law + More</td>
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<td>006</td>
<td>Subcontractors Alliance</td>
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<td>007</td>
<td>Richard Field Constructions Pty Ltd</td>
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<td>008</td>
<td>Property Council of Australia</td>
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<td>009</td>
<td>Australian Institute of Architects</td>
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<td>010</td>
<td>Thomas Independent Certification</td>
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<td>011</td>
<td>Urban Development Institute of Australia</td>
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<td>012</td>
<td>Darcy Ringland</td>
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<td>013</td>
<td>Queensland Plumbing and Pipe Trades Employees Union</td>
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<td>014</td>
<td>Les Mundt</td>
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<tr>
<td>015</td>
<td>Susan Leech</td>
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<td>016</td>
<td>Local Government Association of Queensland</td>
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<td>017</td>
<td>Brisbane Electrical Contractors and Engineering</td>
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<td>018</td>
<td>Housing Industry Association Limited</td>
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<td>019</td>
<td>Master Electricians Australia</td>
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<td>020</td>
<td>Queensland Major Contractors Association</td>
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<td>021</td>
<td>National Fire Industry Association Australia</td>
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<td>022</td>
<td>Master Plumbers Association of Queensland</td>
</tr>
<tr>
<td>023</td>
<td>Queensland Law Society</td>
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</tbody>
</table>
Appendix B – Officials at public departmental briefing

Department of Housing and Public Works
- Mr Richard Cassidy, Assistant Director General – Building Legislation Policy
- Mr Anthony Crack, Executive Director – Building Legislation Policy
- Ms Anne Neuendorf, Acting Director, Strategic Policy (Building) – Building Legislation Policy

Queensland Building and Construction Commission
- Mr Brett Bassett, Commissioner
Appendix C – Witnesses at public hearings on 3 March 2020 and 4 March 2020

Witnesses at public hearing on 3 March 2020

Master Builders Queensland
- Mr Paul Bidwell, Deputy CEO
- Mrs Tracey Wood, Principal Lawyer

Urban Development Institute of Australia, Queensland
- Mrs Kirsty Chessher-Brown, Chief Executive Officer
- Mr Martin Zaltron, Manager Policy

Housing Industry Association
- Mr Michael Roberts, Executive Director
- Mr Patrick Hill, Manager Workplace Services – Qld

Subcontractors Alliance
- Mr Les Williams, Chairman

Brisbane Electrical Contractors and Engineering
- Ms Clair Wilkinson, Manager

Individual
- Mr Les Mundt

National Fire Industry Association, Australia
- Mr Glen Chatterton, General Manager
- Mr Wayne Smith, Chief Executive Officer

Queensland Plumbers Union
- Ms Shannon Fogarty, Industrial Officer

Master Electricians Australia
- Mr Jason O’Dwyer, Manager Advocacy and Policy

Master Plumbers’ Association of Queensland
- Mrs Penny Cornah, Executive Director
Witnesses at public hearing on 4 March 2020

Richard Field Constructions Pty Ltd
- Mr Richard Field, Director

Australian Institute of Architects
- Dr Michael Lavery, President
- Mr Jack Williamson, Practice Committee Member

Thomas Independent Certification
- Mr Keith Thomas, Building Certifier

Individual
- Ms Susan Leech, Queensland Adjudicator

Cornwalls Law + More
- Mr Ian Heathwood, Partner
- Mr Brent Turnbull, Partner

Queensland Law Society
- Mr Luke Murphy, President
- Mr Ross Williams, Chair, QLS Construction and Infrastructure Committee
- Ms Hayley Stubbings, Policy Solicitor

Construction, Forestry, Mining and Energy Union
- Mr Michael Ravbar, State Secretary
- Mr Jade Ingham, State Assistant Secretary
Appendix D – Government response to the Building Industry Fairness Reforms Implementation and Evaluation Panel report
Government response to the Building Industry Fairness Reforms Implementation and Evaluation Panel report

2019
Government response to the Building Industry Fairness Reforms Implementation and Evaluation Panel report

Foreword

The building and construction industry plays an important part in Queensland’s economy with a value of $46 billion and employing approximately 240,000 people. As an election commitment in 2015 and later through the October 2017 Queensland Building Plan, the government has driven significant reform in this critical part of the economy, particularly regarding security of payment.

The imperative for project bank accounts (PBA) and payment reform to support cultural and structural change is ongoing. The Australian building and construction industry faces consistently higher rates of insolvency and delayed and non-payment than other industries in Australia. It is reported that each year the industry faces almost $3 billion in unpaid debts. The industry’s level of insolvency is also grossly disproportionate to its overall share of annual Gross Domestic Product. These high and disproportionate rates of insolvency and non-payment are not just a reflection of market forces but a combination of business and cultural practices that affect the industry.

Security of payment reforms facilitate subcontractors getting paid for the work they do. This provides the opportunity for businesses to reinvest in job creation and helps prevent mental illness and suicide brought about by financial stress from non-payment of work.

To maximise the effectiveness and operation of the security of payment reforms the government appointed the independent Building Industry Fairness Reforms Implementation and Evaluation Panel (Panel). The Panel provided their report to the Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport on 29 March 2019. The Panel’s evaluation primarily focused on PBAs, consistent with the government’s commitment to conduct an evaluation before implementing PBA reforms to all building projects over $1 million.

The Panel confirmed the Building Industry Fairness (Security of Payment) Act 2017 (BIF Act) meets the government’s intent of making systemic changes to encourage cultural change across the industry. The Panel confirmed they had sufficient information to inform their work, and the government considers the thorough analysis the Panel has undertaken provides a solid evidence base for refinement to the framework to enhance security of payment outcomes. The Panel provided 20 recommendations which give a clear indication of how to implement this structural reform in a way that continues to enhance protections over subcontractor money, while managing the significant financial, operational and cultural transition across the entire building and construction industry.

The government considers that the recommendations provide a balance between enhancing the legislative framework for better impact and commencing the reforms in the private sector to extend the protections more widely. The government has undertaken further investigation and impact assessment to inform this response.

The Queensland Government response accepts or accepts in-principle all the Panel’s recommendations.

There has always been a legal requirement to pay subcontractors on time. The holding in trust of project and retention funds owed to subcontractors intentionally forces a cultural change to the way contractors fund working capital for their business. Whilst the Panel’s
recommendations result in a different PBA framework, there will be no compromise to payment protections or loss of transparency over project funds. However, the phasing of the PBA reforms to the private sector, and its timing, is critical for its successful implementation. Sufficient time will be allowed for businesses to change their financial management practices and adapt to not having the ability to co-mingle project funds and use on other projects, and to allow for market readiness, industry education and for the Queensland Building and Construction Commission (QBCC) to prepare for their new oversight role.

The government’s response to each of the Panel’s recommendations is detailed below.

Finally, the government would like to thank the Panel, their supporting Industry Reference Group, Secretariat and members of the building and construction industry that gave thoughtful consideration on how to effectively implement this significant reform.
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<tr>
<th>Rec No.</th>
<th>Evaluation Panel Recommendation</th>
<th>Queensland Government Response</th>
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</table>
| 1       | That further phasing of the PBA reforms be as follows:  
(a) Phase 2: add all government and private projects valued at $10M (excluding GST) or more;  
(b) Phase 3: add private projects in the range of $3M to $10M (excluding GST); and  
(c) Phase 4: add private projects in the range of $1M to $3M (excluding GST).  
The timing of the commencement of each phase be as follows:  
(i) Phase 2: at least 2 months after the passing of any amendments to the BIF Act;  
(ii) Phase 3: 4-6 months after Phase 2; and  
(iii) Phase 4: 4-6 months after Phase 3. | **Accepted**  
The government accepts this recommendation.  
Holding project and retention funds in trust is in line with the existing PBA framework. It is acknowledged that business restructuring and removal of project and retention funds from operating capital is an intended consequence of the reforms and some businesses may need to change their financial management practices and find other sources of working capital from savings, by increasing debt, or liquidating assets.  
Acknowledging this as the intended consequence, the Panel highlighted that without effective management of the financial transition, destabilisation through head contractor stress or failure could affect contractors, subcontractors and the community as a whole.  
It is proposed to introduce PBA reforms to the public and private sectors progressively in three further phases. This will provide a balance between commencing the protections and providing sufficient time for market adjustment, contractors to change their financial management practices and possibly find other sources of working capital from savings, increasing debt or liquidating assets. Further phases will not commence before the legislative framework has been settled.  
A number of building and construction industry reforms have been progressed over the past two years which aim to create a safer, fairer and more sustainable industry. The timing of the implementation of the phases will recognise the ongoing efforts of the industry in this regard.  
Legislating the timing of the phased commencement of PBA reforms will provide industry certainty to transition and prepare their business operations. The government will engage with key stakeholders and establish transitional arrangements to support industry during the phased commencement. |
| 2       | The BIF Act be amended to provide that:  
(a) ‘building work’ is as defined in the *Queensland Building and Construction Commission Act 1991* (QBCC Act); | **Accepted**  
The government accepts this recommendation. |
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<td>(b)</td>
<td>revoke section 4 of the Building Industry Fairness (Security of Payment) Regulation 2018; (c) in section 9(5) of the BIF Act, amend definition of ‘subcontractor’ to provide that ‘subcontractor’ for a building contract means a party who enters into a first-tier subcontract for construction work or services within the meaning of section 65 or 66(1)(b) of the BIF Act regardless of the value of the first-tier subcontract unless a minimum value is prescribed by regulations. (d) revoke section 11 of the BIF Act; (e) amend section 14 to provide that a building contract solely for services within the meaning of section 66(1)(b) of the BIF Act is not a PBA contract; and (f) amend Chapter 2 of the BIF Act as necessary to provide that a building contract that is a subcontract for another building contract is not a PBA contract unless otherwise prescribed.</td>
<td>The definitions in the BIF Act for ‘building work’ and ‘subcontractor’ will be amended to clarify the application of PBA and other requirements for industry. The government is seeking to ensure the broadest protection across the building and construction industry. Clear and consistent interpretation will support understanding requirements and compliance. Clarifying the definition for ‘building work’ so that it aligns with the definition in the QBCC Act will provide industry with clarity about the contracts that require a PBA. It will also ensure only QBCC licensed contractors will be required to open a PBA which will aid effective compliance and enforcement action. Contracts solely for the supply of construction related services within the meaning of section 66(1)(b) of the BIF Act (including architectural, design, surveying and other advisory services) will be excluded from the requirements to establish a PBA. Consistent with the current framework, a PBA will not be required for contracts less than $1 million; for domestic building contracts involving less than three living units; or for maintenance, civil and transport infrastructure projects. Amending the definition for ‘subcontractor’ to include civil construction work and consultants will offer the protection of the PBA to a larger section of the industry. Providing a head of power in the BIF Act to prescribe in Regulation circumstances which would require a subcontractor (second-tier contractor) to establish a PBA, will allow government to monitor and respond quickly and effectively to ensure avoidance practices do not undermine the integrity of the PBA framework.</td>
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<td>3</td>
<td>That Chapter 2 of the BIF Act be amended to remove the requirement for a disputed funds trust account as part of the PBA framework.</td>
<td>Accepted</td>
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<td>4</td>
<td>That Chapter 3 of the BIF Act be amended to make it an offence for a person given a payment</td>
<td>Accepted</td>
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The government accepts this recommendation, in conjunction with the enhanced protections offered in recommendation 5 that will meet the policy intent of protecting monies in dispute.
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<td>claim to pay less than the amount stated in a payment schedule.</td>
<td>The government is committed to ensuring everyone is paid on time for their work. This new penalty will apply to all parties in the contracting chain including principals, head contractors and subcontractors, and will ensure the continued flow of money through the contracting chain.</td>
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<td>5</td>
<td>That Chapter 3 of the BIF Act be amended to provide that: (a) on or after making an adjudication application, a claimant may serve a payment withholding request on a party above the respondent in the contractual chain to require that party to retain sufficient money to cover the claim out of the money that is or becomes payable by that party to the respondent; (b) a person receiving a payment withholding request who fails to comply with such a request will become jointly and severally liable with the respondent; (c) that where the claimant is a head contractor and the adjudication application is made against the principal: (i) the claimant may issue a payment withholding request on a financier or funder of the project; and (ii) the claimant may issue a charging order on the property on which the building work the subject of the adjudication application is being carried out, but only if the adjudicated amount is</td>
<td><strong>Accepted in principle</strong> The government is committed to improving security of payment for all contractors where money is owed. To protect disputed amounts and reduce the risk of non-payment by the head contractor following adjudication, a subcontractor will be able to give a payment withholding request to the principal. Noting payment withholding requests are provided for in other jurisdictions (NSW and Victoria), it is proposed a payment withholding request attach to any amount that is or will become payable to the head contractor, including retention amounts. A payment withholding request will apply where an adjudication application is lodged under Chapter 3 of the BIF Act and therefore would not just apply to projects requiring a PBA. The ability to issue a charging order or impose a lien over property will ensure there are protections for everyone along the contractual chain, including head contractors when principals or developers fail to pay what they owe. These measures, accepted in principle, have long been a feature in security of payment laws in several countries including New Zealand, Canada and the USA. Queensland will be the first jurisdiction to introduce protections to help head contractors secure payment by a principal or developer. As there is no ‘model’ legislation on which to base these measures, the government will engage with key stakeholders during drafting to ensure these protections meet the objectives.</td>
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<td>not paid by the due date as stated in the adjudicated decision.</td>
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<td>6</td>
<td>That the BIF Act be amended to remove the requirement for a retention trust account as part of a PBA and instead require the creation of a retention trust account by all contractors in the contractual chain and any private sector principals withholding cash retentions in relation to any: (a) project which requires a PBA; or (b) prescribed work.</td>
<td>Accepted</td>
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<tr>
<td></td>
<td>The government accepts this recommendation.</td>
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<td></td>
<td>The BIF Act will be amended to require a single retention trust account be held by all building and construction contractors in the contractual chain and by private sector principals.</td>
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<td>A retention trust will be required by a contracting party who holds or intends to hold cash retentions under a building contract, construction management trade contract or subcontract. Only one retention trust per contractor will be required. As the requirement to operate a retention trust account has been decoupled from the requirement to establish a project trust, a retention trust account may be required even when the contractor does not require a project trust.</td>
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<td></td>
<td>The existing policy was to apply PBAs at all levels of the contracting chain. Whilst the project trust account will only apply at the first tier, the intent is to apply the retention trust account to all building contractors, including private sector principals, who hold cash retentions.</td>
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<td></td>
<td>Supported by recommendations 7 through 10, this recommendation achieves the policy intent of ensuring cash retention amounts held along the contractual chain are not co-mingled with the head contractor’s working capital or used for other purposes.</td>
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<td></td>
<td>Interest on retention trust accounts will initially be able to be retained by the account holder to support the transition and offset the costs associated with change to working capital. Following the phased implementation of the PBA reforms, the government will consider how interest may be returned to the government and/or regulator to fund compliance, enforcement and public benefit schemes.</td>
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<td>7</td>
<td>The BIF Act require that the retention trust account requirements proposed in recommendation 6 require:</td>
<td>Accepted</td>
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<td></td>
<td>The government accepts this recommendation.</td>
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### Evaluation Panel Recommendation

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<th>Rec No.</th>
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<tr>
<td>a)</td>
<td>all retentions to be held in a single bank account that is only for retentions;</td>
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<td>b)</td>
<td>the bank account name must include the words ‘trust’;</td>
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<td>c)</td>
<td>the trustee of the retention trust is the person entitled to hold retentions;</td>
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<td>d)</td>
<td>the beneficiaries of the retention trust are the trustee and any persons from whom the retentions have been held;</td>
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<td>e)</td>
<td>monies held on trust for a beneficiary other than the trustee are deemed to be a charge in favour of the beneficiary but only to the extent that that beneficiary is entitled to the money withheld from them;</td>
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<td>f)</td>
<td>section 59 of the BIF Act be amended to also apply to the retention trust account;</td>
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<td>g)</td>
<td>detailed trust accounting records must be kept; and</td>
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<td>h)</td>
<td>mandatory external auditing of trust accounting records.</td>
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### Queensland Government Response

To ensure that money held in a retention trust account is identifiable and secured, the BIF Act will be amended to provide for detailed trust accounting records, mandatory account reviews, and other statutory protections including a charge deemed over monies within the account to ensure the greatest possible protections in the event of insolvency or bankruptcy.

Mandatory trust account reviews will be required initially within the first six months of a retention trust being opened and continuing at least annually thereafter. Consideration will be given to how these requirements can be aligned to existing financial audit requirements for licensees for administrative and cost efficiency. The government will engage with key stakeholders to determine ways to support transition for industry.

The government accepts this recommendation, in conjunction with recommendations 6 and 13.

8 That there be a requirement for all contractors in the contractual chain and any prescribed person wishing to hold retentions to undergo compulsory training and assessment by an approved training organisation on the management of a retention trust account by a specified time, after which, any contractor who has not successfully completed the compulsory training will not be entitled to hold retentions.

### Accepted

The government accepts this recommendation.

All contractors wishing to hold cash retentions will be required to complete training and assessment by an approved training provider on the management of a retention trust prior to them opening a retention trust account. The retention trust account will hold monies across multiple projects for a number of years with the account existing in perpetuity. It is important all contractors fully understand their role as trustee and their accounting, record keeping and other compliance obligations. Similar mandatory training is required for trustees operating solicitors, real estate and auctioneer trust accounts in Queensland.
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<th>Rec No.</th>
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| 9       | That the QBCC be given adequate powers to: (a) monitor and enforce compliance with the retention trust account requirements set out in recommendation 7; (b) freeze retention trust accounts; and (c) administer a retention trust account in certain circumstances such as where an account holder becomes insolvent or unable to manage the account. | **Accepted**

The government accepts this recommendation.

The government acknowledges industry’s preference that, for commercial reasons, private sector principals should not have an oversight role.

Within that context, the government agrees that the necessary oversight responsibilities sit with the QBCC. Acknowledging the QBCC’s intent to become a risk-based regulator, the government supports the QBCC monitoring and enforcing PBA compliance not through direct viewing access, but rather through risk-based monitoring, proactive and reactive oversight and enforcement. Reporting about PBA establishment and providing account review reports to the QBCC will arm the QBCC with information to support this role.

In accepting this recommendation, the government believes that the integrity of the retention trust account will be upheld and there will be enhanced protection over money held in retention where a contractor or principal becomes insolvent or unable to manage the account.

The government will work with the QBCC to develop a risk-based monitoring, proactive and reactive oversight and enforcement framework; and in conjunction with recommendation 15 ensure the QBCC has sufficient powers to execute its role. |
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<td>10</td>
<td>That a phase in of the requirement for a retention trust account be aligned to the phases for the expansion of PBAs at set out in recommendation 1 such that: (a) in Phases 2 and 3 where a PBA is required, all head contractors and private sector principals must hold any retentions from those projects in a retention trust account; and (b) in Phase 4 (i) all contractors in the contractual chain holding retentions on a project for ‘building work’; and (ii) private sector principals on projects requiring a PBA, must hold any retentions from those projects in a retention trust account.</td>
<td><strong>Accepted</strong></td>
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<td></td>
<td>The government accepts this recommendation. The retention trust account requirements will be implemented progressively in further phases aligned to the phasing of PBAs to the public and private sector. The government will engage with key stakeholders and establish transitional arrangements to support industry during the phased commencement.</td>
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<td>11</td>
<td>That the BIF Act be amended to remove the requirement for lodgement of information with the principal other than: (a) details of the PBAs opening, closing or name change; and (b) a supporting statement with any payment claim, which includes a declaration that: (i) all subcontractors have been paid the amounts due and payable to them for construction work done; or (ii) identifies those subcontractors which have not been paid and the amounts outstanding, if any.</td>
<td><strong>Accepted</strong></td>
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<td></td>
<td>The government accepts this recommendation. Simplifying the role of the principal and reducing administration for contractors and principals will reduce compliance costs without compromising transparency over the movement of project funds and protections for subcontractors. The principal will still have an obligation to report suspected breaches to improve chain of responsibility and reinforce cultural change. The government supports the recommendation requiring supporting statements. The Special Joint Taskforce has also recommended the government consider placing obligations on a head contractor to declare its subcontractors have been paid. This will give principals confidence the money is flowing through the contracting chain and increase transparency over unpaid amounts, and provide increased assurance for subcontractors.</td>
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<td></td>
<td>(c) The failure to comply with (b) or the provision of false information in a supporting statement should be an offence. In making this recommendation, it follows that the Panel recommends that section 24(2), 24(3), 50, 51 (as it relates to principals) and 52 of the BIF Act be repealed.</td>
<td>It is understood the provision of statutory declarations in relation to subcontractor payments are required under most standard head contracts (including Queensland Government capital works contracts) with the key concern of industry that falsified declarations are rarely enforced. The BIF Act will be amended to require a head contractor’s payment claim to a principal to include a supporting statement and to apply to all construction contracts between a principal and head contractor (not only limited to PBA building contracts). The government also supports the recommended offence provisions for providing false information in the supporting statement.</td>
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<td>12</td>
<td>That section 23(1) of the BIF Act be amended to provide that for each building contract requiring a PBA, the head contractor must: (a) open a separate bank account that is a project trust account; (b) the bank account must have the name “trust”; and (c) the project trust account must correlate with the trust accounting records required by recommendation 13.</td>
<td>Accepted The government accepts the Panel’s recommendation to continue to ensure project funds are attached to the project and not co-mingled. Having the word ‘trust’ in the name of the account will also continue to protect monies in the account and ensure financial institutions recognise the money as being held on trust. The trust accounting records will further enhance integrity and transparency over the project trust account.</td>
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<td>13</td>
<td>That section 45 of the BIF Act be amended to require that for projects requiring a PBA the head contractor must keep detailed trust accounting records which include: (a) information relating to all transactions to and from the PBA; (b) details of all beneficiaries; (c) all payment claims and supporting statements, if any; (d) all payment schedules;</td>
<td>Accepted The government accepts this recommendation. There are existing Acts that govern the trust requirements for money held by persons such as real estate agents and solicitors. These are well established and well operating systems which will provide an ability to leverage on knowledge and tested frameworks to give greater confidence to industry. The BIF Act will be amended to require trustees of project trust accounts and retention trust accounts maintain and reconcile detailed trust accounting records in accordance with the prescribed</td>
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<tr>
<td>(e)</td>
<td>any documentation relating to payment claims, schedules and payments; and (f) any information prescribed by regulations.</td>
<td>information requirements. Trust records will be retained for a minimum period of seven years from the date the money was received and must be available at the request of an independent auditor or an investigator/compliance officer of the QBCC. The government accepts that it is of benefit for subcontractors and principals to have access to information as it relates to them, and the circumstances when this will be appropriate are being considered in more detail to ensure head contractors’ commercial-in-confidence information is appropriately protected. This may include having the right to inspect trust records for the trust accounts in which their money is being, or has been, held and allow them to be verified against the balances and transacting records of the associated trust accounts. Read in conjunction with recommendation 7, it is intended the mandatory external review will apply only to the retention trust. In the building and construction industry, a contractor may be required to open multiple project trust accounts as well as a single retention trust. To require an independent review for each of these accounts may represent a significant cost and would likely be much greater than the savings expected to be realised through the Panel’s recommended ‘simplifications’ to the model. The government will engage with key stakeholders to develop suitable alternative reporting requirements for the project trust account which might include, for example, submitting account summary reports to the QBCC at the same time as submitting other financial reporting. The project trust will still be subject to the QBCC’s monitoring and compliance audit program and the commissioner will have powers to direct external reviews by exception.</td>
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<td>(i)</td>
<td>made available to the QBCC on request; (ii) made available to the principal or a beneficiary in certain circumstances; and (iii) subject to mandatory external auditing at specified intervals.</td>
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<td>14</td>
<td>That the head contractor be required to lodge the following information within a specified number of days after entry into a contract that requires a PBA with the QBCC: (a) site address; (b) value of contract; (c) name of principal; (d) description of building work;</td>
<td>Accepted The government accepts this recommendation as it provides the QBCC with information necessary for it to complete compliance activities, which will help ensure the protections of monies for subcontractors working under a PBA. The reporting mechanisms for head contractors to provide the prescribed information is being considered to ensure head contractors are not unnecessarily burdened.</td>
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<td>e)</td>
<td>bank in which the PBA will be or is established;</td>
<td>The financial and resourcing impact of the increased compliance and monitoring obligations of the QBCC are being considered in further detail.</td>
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<td>f)</td>
<td>commencement date;</td>
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<td>g)</td>
<td>date for practical completion;</td>
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<td>h)</td>
<td>any other prescribed information.</td>
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<td>15</td>
<td>That the QBCC’s powers be reviewed and, if necessary, amended to ensure that it has the power to freeze PBAs, obtain any information related to PBAs from any person or class of persons including a principal, head contractor, beneficiary or bank including: (a) relevant building contracts, subcontracts or supply contracts; (b) documents relating to the establishment and operation of a PBA; and (c) all trust accounting records required to be kept by recommendation 13.</td>
<td>Accepted</td>
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<td>The government accepts this recommendation.</td>
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<td>The government considers that accepting this recommendation will strengthen regulatory oversight providing confidence for industry, support the integrity of the reforms, and enhance the protections afforded to subcontractor beneficiaries of a PBA.</td>
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<td>It is anticipated for information about trust accounts be reported to the QBCC, and that the QBCC will maintain a register and publish certain information about trust accounts. This will support transparency and accountability.</td>
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<td>The QBCC will need appropriate powers to investigate and request trust account records from trustees and the approved financial institutions. This may include power to make directions regarding the trust accounts, and to appoint special investigators to determine compliance with the requirements for holding trust accounts under the Act.</td>
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<td>The government is considering when it would be most appropriate for the QBCC to use these provisions, particularly relating to freezing the account. The government is confident that industry will be comfortable with the QBCC having such authority compared to existing principal oversight.</td>
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<td>The government will work with the QBCC to develop a risk-based monitoring, proactive and reactive oversight and enforcement framework and, in conjunction with recommendation 9, will ensure the QBCC has sufficient powers to execute its role.</td>
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<td>16</td>
<td>There be a requirement for head contractors to notify the QBCC if a pro rata payment is made pursuant to section 33 of the BIF Act.</td>
<td>Accepted in principle</td>
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<td>Rec No.</td>
<td>Evaluation Panel Recommendation</td>
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<td>17</td>
<td>That the BIF Act provide for:</td>
<td>Accepted</td>
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<td>(a) principals on a project requiring a PBA; or (b) beneficiaries to the PBA or to a retention trust account, to have reasonable access to appropriate trust accounting information.</td>
<td>The government accepts this recommendation in principle as it is expected to enhance security of payment protections by alerting the QBCC to possible head contractor financial stress. Further consideration of the recommendation and the operation of sections 30 and 33 of the BIF Act has occurred. To achieve the same intent of the Panel’s recommendation (i.e. to assist the QBCC with early detection of financial distress) it is proposed the obligation to advise the QBCC would apply where a trustee is unable to cover a short fall in the account in accordance with section 30.</td>
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<td>18</td>
<td>That the BIF Act be amended to remove the ability for a principal to replace the head contractor as trustee of the PBA on insolvency of the head contractor or termination of the contract. Instead the QBCC, at its discretion, should be able to administer the PBA in these circumstances. The QBCC’s powers should be reviewed to ensure that it can effectively administer the PBA in these circumstances.</td>
<td>Accepted</td>
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<td></td>
<td>In accepting this recommendation, the government believes that as regulator, the QBCC will be better placed to administer both the PBA and retention trust account in the case of a head contractor insolvency or termination of contract. The government will work with the QBCC and relevant stakeholders to determine an effective legislative framework.</td>
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<td>19</td>
<td>That section 51 of the BIF Act (as it relates to subcontractors) be replaced with a requirement that within five (5) business days of each payment</td>
<td>Accepted</td>
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<td>The government accepts this recommendation.</td>
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<td>Evaluation Panel Recommendation</td>
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<td>instruction being issued to the bank in relation to a subcontractor, the head contractor is to issue a statement to that subcontractor with the following information: (a) the amount to be paid to the subcontractor under the payment instruction in relation that project; and (b) where cash retentions are held from that subcontractor for that project: (i) the amount to be transferred to the retention trust account on behalf of that subcontractor in relation to that payment, if any; (ii) the total amount held in the retention trust account on behalf of subcontractor following that payment, if any; and (c) any prescribed information.</td>
<td>The government considers that this recommendation is seeking to provide a balance between achieving increased communication and information sharing between head contractors and subcontractors and the administrative obligations for head contractors. It is considered appropriate to require a payment statement be made to any beneficiary that states the amount to be paid and, where cash retentions are withheld, provides information about the retention amounts. However, the government does not intend to duplicate existing payment notices (i.e. payment schedules in accordance with s76 of the BIF Act, and industry practice of providing remittance and payment summaries).</td>
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<td>20</td>
<td>That section 99(3) of the BIF Act be amended to provide that a warning notice must be issued within 60 business days after the due date for payment or other alternative timeframe prescribed.</td>
<td>Accepted in principle The government accepts this recommendation in principle as it considers extending the time frame to issue a warning notice could provide claimants more time to apply to the Court, increasing access to security of payment protection. It is agreed there is an inconsistency in the time limits for making an adjudication application and initiating a court recovery process. The BIF Act could be amended to provide that a warning notice must be issued within 30 business days after the due date for payment to align with the maximum timeframe for making an adjudication application. However, further consideration must be given to the effects of this recommendation on the existing security of payment protections available under the adjudication provisions.</td>
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Appendix E – Government response to the Special Joint Taskforce report
Government response to the Special Joint Taskforce report
2019
**Foreword**

The building and construction industry is critical to Queensland’s economy, contributing $46 billion in 2017–18 and employing approximately 230,000 people. The Queensland Government has led significant reform to support this industry, following through on an election commitment in 2015, and as a result of the 2017 Queensland Building Plan (QBP).

To further support this industry, the Special Joint Taskforce (Taskforce) was established on 27 March 2019 to investigate complaints of fraudulent behaviour relating to subcontractor non-payment, and refer possible breaches of legislation to the relevant prosecuting authorities. The Taskforce was led by the Honourable John Byrne AO RFD, and brought together officers from the Queensland Police Service, Queensland Building and Construction Commission (QBCC), and the Office of the Director of Public Prosecutions. The Department of Housing and Public Works (DHPW) provided secretariat support.

Complementing security of payment and other industry reforms, the Taskforce provided opportunities to examine how fraudulent and dishonest behaviour contribute to subcontractor non-payment, and to improve the ability of government and regulators to respond to such behaviour.

Following a three-month investigation period, the Taskforce provided its report to the Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport on 28 June 2019. During this investigation period, the Taskforce received 166 submissions (146 of these involving complaints of non-payment), and held appointments with 42 individuals across Queensland. Taskforce investigations resulted in the referral of 108 possible breaches of legislation to relevant prosecuting authorities.

The Taskforce also considered whether the existing investigative and supervisory powers are sufficient to manage the type of conduct revealed in submissions to the Taskforce. The Taskforce made 10 recommendations focused on delivering more effective enforcement by the building industry regulator, ensuring the integrity of industry participants, and enhancing collaboration among regulators.

The recommendations are consistent with the government's building reform agenda established by the QBP.

*The Queensland Government response accepts all the Taskforce’s recommendations.*

The government’s response to each recommendation is detailed below.

Finally, the government would like to thank the Taskforce and secretariat for its well-considered investigation of subcontractor non-payment in the Queensland building and construction industry, as well as the members of the industry that contributed to this work.
<table>
<thead>
<tr>
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<th>Queensland Government Response</th>
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<tr>
<td>1</td>
<td>That the government consider amending section 42E of the <em>Queensland Building and Construction Commission Act 1991</em> (QBCC Act) to place the burden on the defendant to show a reasonable excuse for a deliberate failure to comply with a building contract.</td>
<td>Accepted &lt;br&gt;The government accepts this recommendation. &lt;br&gt;This provision is aimed at addressing conduct such as poor payment practices and deliberate avoidance of contractual obligations, which often cause significant financial loss to innocent parties. It is important that the QBCC can effectively enforce such conduct. &lt;br&gt;The Taskforce acknowledged that reversal of the onus of proof must be justified. Given that a reasonable excuse for failure to perform a contractual obligation would be within the particular knowledge of the defendant, the government agrees that placing the burden on the defendant is appropriate in this case.</td>
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<td>2</td>
<td>That the government consider creating an offence directed against the giving of false or misleading information about a licensee’s financial circumstances where that information is communicated by another person to the QBCC.</td>
<td>Accepted &lt;br&gt;The government accepts this recommendation. &lt;br&gt;In early 2019, the Queensland Government introduced new laws to strengthen the Minimum Financial Requirements (MFR) for licensing. The MFR framework will better equip the QBCC to detect and mitigate the impact of possible insolvencies and corporate collapses. &lt;br&gt;It is intended that the government will progress amendments to the QBCC Act to create a new offence as recommended by the Taskforce. This will further enable the QBCC to target all parties involved in providing false or misleading information to the QBCC.</td>
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<td>3</td>
<td>That the government consider amending section 111 of the QBCC Act so that a prosecution may be started within three years of the commission of an offence or two years after the offence comes to the knowledge of the QBCC, whichever is the later.</td>
<td>Accepted &lt;br&gt;The government accepts this recommendation. &lt;br&gt;Increasing the limitation period for starting a prosecution as recommended would bring Queensland in line with other states and territories, as well as enhance the QBCC’s ability to effectively investigate and prosecute complex matters.</td>
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<td>4</td>
<td>That the licence application process require applicants (including a director or nominee for a company) to provide:</td>
<td>Accepted &lt;br&gt;The government accepts this recommendation.</td>
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|        | • any previous name by which the applicant has been known  
|        | • proof of identity, including certified photo identification.                          | This is a simple change that will help to ensure the integrity of industry participants.                                                                       |
| 5      | That the QBCC liaise with DHPW in relation to the inclusion of mandatory and prohibited contract conditions in a regulation. | **Accepted**  
|        |                                                                                         | The government accepts this recommendation.  
|        |                                                                                         | DHPW is working with industry presently to investigate possible mandatory and prohibited contract conditions. QBCC will be consulted as part of this process. |
| 6      | That the government note the work of the QBCC to identify appropriate education and training opportunities for subcontractors. | **Accepted**  
|        |                                                                                         | The government accepts this recommendation.  
|        |                                                                                         | The Queensland Government supports the work of the QBCC to educate subcontractors.  
|        |                                                                                         | The QBP provides a framework to enhance industry capability through support and greater professional development. The government will consider further opportunities in these areas as it implements the QBP. |
| 7      | That the government consider making a regulation to enable the disclosure of information by the QBCC to relevant agencies. | **Accepted**  
|        |                                                                                         | The government accepts this recommendation.  
|        |                                                                                         | DHPW will work with QBCC to identify relevant agencies with which to share information. |
| 8      | That the licensee register include:  
|        | • clear, detailed information about the circumstances involved in a concluded disciplinary matter  
|        | • where applicable — the licensee’s ABN or ACN.                                         | **Accepted**  
|        |                                                                                         | The government accepts this recommendation.  
|        |                                                                                         | DHPW will work with QBCC to implement the recommendation. It will increase transparency about a licensee’s disciplinary history and commercial dealings. This will assist subcontractors and consumers to make informed decisions. |
| 9      | That the government consider whether amendments are needed to enable the QBCC to publish details about excluded and permanently excluded individuals. | **Accepted**  
<p>|        |                                                                                         | The government accepts this recommendation. |</p>
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<td>10</td>
<td>That the government consider:</td>
<td><strong>Accepted</strong></td>
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<td>- creating a legal obligation for head contractors to declare that subcontractors have been paid what is due and payable to them</td>
<td>The government accepts this recommendation.</td>
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<td>- creating an offence for making a false or misleading declaration about subcontractor payment</td>
<td>The Building Industry Fairness Reforms Implementation and Evaluation Panel also recommended placing obligations on a head contractor to declare its subcontractors have been paid.</td>
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<td>- using the New South Wales legislation as a model.</td>
<td>It is intended that the government will progress amendments to the QBCC Act to give effect to the recommendation.</td>
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<td>It is intended that the government will progress amendments to the Building Industry Fairness (Security of Payment) Act 2017 to implement the recommendation.</td>
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STATEMENT OF RESERVATIONS

LNP Members of the Transport and Public Works Committee with respect to the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020

Sub-contractor late payment and non-payment remains a challenging issue across the building industry. Non-payment hampers the growth of Queensland businesses and we remain concerned that it is still happening all too often.

The LNP position is firm on the principle that everyone deserves to be paid for the work they do. It is vital we make sure that everyone, including developers, are being held to account. In view of the above, clearly there is a need to enhance Queensland’s security of payment legislation around Project Bank Accounts (PBA’s) and to further extend the protections for industry.

When the Building Industry Fairness (Security of Payment) Act was introduced in 2017, the LNP called for an Implementation Panel to assess the merits of the application of Project Bank Accounts (PBA’s). At the time, the Labor Government said this was not required, however, it was eventually put in place.

This Building Industry Fairness Reforms Implementation and Evaluation Panel (Panel) has examined the application of the PBA’s and has provided constructive recommendations for improving the security of payment laws. It is noted that while the Panel’s findings were submitted to the Government in March 2019, it took the Government many months before tabling it on 28 November 2019.

With the on-going issues around non-payment and allegations of systemic fraud, in 2018 the LNP called for a Commission of Inquiry into all aspects of the building industry. The Government eventually responded by establishing a Special Joint Taskforce to investigate complaints and allegations of fraudulent behaviour that related to sub-contractor non-payment in the building industry. It is noted that recommendations were provided by the Joint Taskforce to improve the Queensland Building and Construction Commission’s (QBCC) ability to address fraudulent behaviour in the industry and these have been included in the Bill.
It is disappointing that given the changes made to the reporting associated with Minimum Financial Requirements (MFR) the Government still hasn’t got it right – with significant numbers of contractors not complying. Of further concern is that the Bill is complicated and burdensome for contractors. So, while most builders are endeavouring to do the right thing, by not keeping up with the latest reporting requirements, they are in contravention of the law. The Committee heard that even legally qualified practitioners and bankers find the laws heavy going, so it is understandable that Mum and Dad operations will find it daunting.

In our view, this reinforces the need to simplify the operation of PBA’s and streamline the administrative procedures. In addition, the industry body needs time to bring together training packages to assist their members with implementing the new arrangements. In view of the added uncertainty around the COVID – 19 virus, the nominated date of 1 July 2020 may be too tight for industry to fully prepare. Furthermore, in terms of on-going professional training and development, we note there is no recommendation from the Committee on this important matter.

Finally, given the findings of the Evaluation Panel, it may be prudent to retain this group until the cascading schedule for activating the PBA’s to all building and construction contracts valued at $1 million or more has concluded. It is also stressed that we propose to outline further reservations in the Second Reading debate.

DATED: 18 March 2020

Ted Sorenson
Member for Hervey Bay

Col Boyce
Member for Callide