

SPECIAL JOINT TASKFORCE

Investigating subcontractor non-payment
in the Queensland building industry



Queensland
Government

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Executive summary

On 28 February 2019, the Queensland Premier Anastacia Palaszczuk announced the establishment of the Special Joint Taskforce (Taskforce), comprising officers from the Queensland Police Service (QPS), Queensland Building and Construction Commission (QBCC) and the Office of the Director of Public Prosecutions (ODPP). Led by the Honourable John Byrne AO RFD, the Taskforce was 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 Terms of Reference also require the Taskforce to refer possible legislative contraventions to the relevant prosecuting authority.

With a focus on fraud, the scope of the Taskforce is distinct from the work undertaken in recent years to address security of payment in the building and construction industry (industry). The Taskforce did not seek to duplicate the work of the Government in setting its payment reform agenda or that of the panel reviewing those reforms. However, this work, as well as other reviews across Australia, provided the Taskforce with valuable context about systemic issues and behaviours that contribute to non-payment.

The previous reviews highlighted the financial and social impacts of non-payment and the repercussions subcontractors face when trying to resolve payment disputes (such as intimidation and retribution). People needed to feel comfortable in sharing their experiences with the Taskforce. Accordingly, submissions were made confidentially. This also preserves the integrity of ongoing investigations by prosecuting authorities. The work of the Taskforce depended, in large measure, on submissions from those affected by fraudulent behaviour relating to non-payment.

The Taskforce invited submissions—via email, post, through an online portal and in person—from 27 March to 17 May 2019. Appointments with Taskforce investigators were available in Brisbane, Sunshine Coast, Gold Coast, Rockhampton, Mackay, Toowoomba, Townsville and Cairns. Forty-two individuals attended. The work of the Taskforce was promoted through radio advertising and a social media campaign as well as through coverage in the press, broadcast and online media. The Taskforce consulted key stakeholders from industry, government and the financial restructuring and insolvency sector.

This resulted in 146 submissions relating to complaints of non-payment. The submissions ranged from small dollar fraud to major building company collapses. Small to medium-sized businesses—commonly builders, trade contractors and electricians—were most affected.

Submitters described a variety of behaviours associated with non-payment, including insolvent trading, phoenix activity and supplying false documents such as statutory declarations and financial reports. Also drawn to the Taskforce's attention were contracting and payment practices that, while not necessarily fraudulent, sought to disadvantage subcontractors.

Taskforce investigations resulted in the referral of 69 submissions to at least one of nine prosecuting authorities¹:

- QPS—38
- QBCC—40
- Australian Competition and Consumer Commission (ACCC)—2
- Australian Taxation Office (ATO)—4
- Australian Securities and Investments Commission (ASIC)—15
- Fair Work Ombudsman—3
- Workplace Health and Safety—2
- Electrical Safety Office (ESO)—3
- QLeave—1.

¹ Some submissions suggested multiple possible breaches involving Acts administered by different authorities.

Offences involved contraventions of state and federal legislation. Those relating to fraudulent behaviour—around 45 per cent of referrals—were largely under the *Criminal Code Act 1899* (Qld) (Criminal Code). They included false declarations, fraudulent falsification of records, and forgery and uttering.

To the QBCC, the Taskforce referred matters arising under the *Queensland Building and Construction Commission Act 1991* (QBCC Act) and the *Building Industry Fairness (Security of Payment) 2017* (BIF Act). Fraud-related offences included pretending to be a licensee and giving the QBCC a misleading document.

The most common referral to ASIC concerned insolvent trading under the *Corporations Act 2001* (Cth) (Corporations Act).

Of the 77 submissions that disclosed no legislative contravention, many involved a breach of contract.

The Taskforce considered whether the existing investigative and supervisory powers are sufficient to manage the kind of conduct revealed in submissions. Largely, the powers are suitable. What remains essential is that these powers are used to their full effect. Proactive, risk-based enforcement was considered vital to improving outcomes.

The Taskforce identified key themes on which its recommendations are 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.
- Statutory declarations—False statutory declarations about subcontractor payment are not unusual and greater deterrence is needed.

Recommendations

The Taskforce recommends that:

1. The Government consider amending section 42E of the QBCC Act to place the burden on the defendant to show a reasonable excuse for a deliberate failure to comply with a building contract.
2. 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.
3. 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.
4. The licence application process require applicants (including a director or nominee for a company) to provide:
 - any previous name by which the applicant has been known
 - proof of identity, including certified photo identification.
5. The QBCC liaise with the Department of Housing and Public Works (HPW) in relation to the inclusion of mandatory and prohibited contract conditions in a regulation.
6. The Government note the work of the QBCC to identify appropriate education and training opportunities for subcontractors.
7. The Government consider making a regulation to enable the disclosure of information by the QBCC to relevant agencies.
8. The licensee register include:
 - clear, detailed information about the circumstances involved in a concluded disciplinary matter
 - where applicable—the licensee's ABN or ACN.
9. The Government consider whether amendments are needed to enable the QBCC to publish details about excluded and permanently excluded individuals.
10. The Government consider:
 - creating a legal obligation for head contractors to declare that subcontractors have been paid what is due and payable to them
 - creating an offence for making a false or misleading declaration about subcontractor payment
 - using the New South Wales legislation as a model.

Introduction

1.1 Special Joint Taskforce

The Taskforce commenced on 27 March 2019. The Taskforce was established within HPW. By its Terms of Reference, it was to provide recommendations to the Government by 30 June 2019.

Led by the Honourable John Byrne AO RFD, the Taskforce brought together officers from the QPS, QBCC and ODPP². HPW provided secretariat support.

The Taskforce and secretariat members used their collective investigative, legal, policy, governance and administrative skills to progress the work of the Taskforce.

1.1.1 Terms of Reference

The Terms of Reference established the scope of the Taskforce, which included:

- (a) invite and investigate matters and complaints provided through confidential submissions (in person and/or in writing) in relation to allegations of fraudulent behaviour relating to building subcontractor non-payment
- (b) where the material discloses evidence of possible breaches of legislation, refer that material to the relevant prosecuting authority
- (c) consider if there are sufficient and appropriate investigative and supervisory powers to deal with the conduct disclosed in the matters reviewed.

The full Terms of Reference are at Appendix A.

1.1.2 Industry engagement

The Taskforce sought to ensure that anyone aware of or affected by subcontractor non-payment related to fraudulent behaviour had the opportunity to make a submission.

The Taskforce invited individuals and organisations to provide submissions from 27 March to 17 May 2019. Submissions were accepted in writing, via email, post, through an online portal and in person. Taskforce members also visited nine locations across Queensland, where individuals and organisations could meet with a Taskforce investigator and make an in-person submission. Those places, and the days when appointments were available were:

Location	Dates
Brisbane (CBD)	9 April, 16 April, 17 April, 23 April, 30 April, 1 May, 7 May, 14 May and 15 May
Brisbane (Capalaba)	10 April, 24 April and 8 May
Sunshine Coast	29 April and 30 April
Gold Coast	1 May and 2 May
Toowoomba	3 May
Rockhampton	7 May and 8 May
Mackay	9 May and 10 May
Cairns	13 May and 14 May
Townsville	15 May and 16 May

Teleconferencing and videoconferencing facilities were available for people who wanted to speak with a Taskforce investigator but were unable to attend in person.

² In addition, an officer from Crown Law supported the Taskforce.

The Taskforce established a dedicated website and provided email and telephone contact details to manage enquiries about its work, including how to make a submission or an appointment.

Submissions were promoted through radio advertising, local and statewide press and social media as outlined in Appendix B. Members of Parliament encouraged the public to make submissions. The Taskforce Head was interviewed for radio and television to bring attention to the regional visits.

The Taskforce also consulted with key stakeholders to promote the work of the Taskforce and call for submissions. These included:

- industry bodies—Engaging with peak building and construction bodies, particularly those representing subcontractors, was critical to foster industry support and ensure that members were aware of the Taskforce and avenues for making a submission. Additionally, many of these stakeholders have been engaged with the Government's building reform agenda or are aware of the systemic issues within the industry. The Taskforce sought to use this knowledge and experience by inviting industry bodies to share their views about the sufficiency of existing supervisory and investigatory powers to deal with fraudulent conduct in relation to subcontractor non-payment.
- insolvency practitioners—Non-payment of a subcontractor can be a precursor to insolvency higher in the contractual chain. For this reason, the Taskforce considered that organisations with experience in administering insolvencies in the industry may be able to provide insights into matters within the Terms of Reference.
- government and regulators—Agencies administering or applying the regulatory framework as part of their core business were consulted in relation to item (c) of the Terms of Reference.

A detailed consultation overview is provided at Appendix C.

The engagement and promotion activities resulted in substantial media and industry coverage (see Appendix B).

1.1.3 Sensitivities

The sensitivity of the matters the Taskforce had to investigate was recognised from the outset.

Intimidation and retribution

As noted by John Murray AM in his 2017 report on the national Review of Security of Payment Laws³ (Murray Review), coercive or threatening behaviour by higher contractors or fear of retribution (i.e. not receiving further work) can create an environment where subcontractors are reluctant to exercise their statutory or contractual rights. The Taskforce apprehended that subcontractors may hold similar concerns about making submissions, in particular if the person or company alleged to be dishonest remains active in the industry. Subsequent discussions with industry bodies confirmed that, in regional areas especially, a subcontractor who has experienced non-payment may continue to rely on the defaulting contractor for business.

To make subcontractors comfortable in sharing their experiences, the Taskforce held one-on-one appointments rather than public hearings or the like. Additionally, it was decided written submissions would not be published to protect the identity of submitters.

The Taskforce also provided a collection notice as part of the submission template, detailing how submissions would be kept confidential and how personal information would be used. Those making a submission were asked to acknowledge their understanding of, and agreement to, the collection notice. Through this approach, the Taskforce sought to alleviate subcontractor concerns about retribution.

³ Murray AM, J 2017, Review of Security of Payment Laws: Building Harmony and Trust, Department of Jobs and Small Business, Canberra.

Confidentiality

Confidentiality was also considered in the context of item (b) of the Terms of Reference, which provides for possible breaches of legislation to be referred to the relevant prosecuting authority. Disclosing details of a submission beyond the prosecuting authorities could prejudice the investigation process or expose submitters to claims of defamation.

This was another factor in the Taskforce's decision not to hold public hearings.

Impact of non-payment

Non-payment adversely impacts business owners, employees, suppliers, families and the wider community. The financial pressure placed on a business through non-payment can result in debt, bankruptcy and unemployment, while harmful social impacts include relationship breakdown, loss of reputation, mental illness and even suicide.

Recognising that, for some people, contact with the Taskforce might cause distress or anxiety, the Taskforce developed procedures for identifying, and responding to, submitters who may be at risk. The Taskforce engaged with MATES in Construction, a charity established to reduce the high level of suicide among construction workers, and that links workers to free or low-cost support services. MATES in Construction provided the Taskforce with materials for distribution during one-on-one meetings. Investigators speaking to submitters also informed them about the services of MATES in Construction.

Expectations and outcomes

As outlined in part 1.2.1, issues surrounding company collapse and subcontractor non-payment in the industry have come to public attention in recent years. Because of this, the Taskforce identified the potential for its scope to be misunderstood or confused with work being undertaken in the security of payment space. Some people may view the Taskforce as an avenue to recover monies owed or to examine the circumstances surrounding insolvencies to determine culpability. That would have involved the Taskforce assuming the role of liquidator, which was not within its scope. Liquidators have obligations under the Corporations Act in a corporate insolvency to inquire into the failure of the company, report to creditors and ASIC (including reporting possible misconduct to ASIC), collect, protect and realise the company's assets and distribute the proceeds to creditors.

Similarly, the Taskforce's Terms of Reference provide for the identification of gaps in supervisory and investigative powers under legislation, which some may have seen as an opportunity to revisit the suite of security of payment laws introduced through the BIF Act (discussed in further detail at part 1.2.3).

Failing to clearly articulate the purpose of the Taskforce might have resulted in unfair criticism from some quarters about perceived inaction by the Taskforce in resolving issues. Accordingly, the Taskforce developed procedures to ensure that it was responsive to enquiries from submitters and the general public. All submitters were contacted early in an investigation by a Taskforce investigator. Submitters eventually received written advice—and where possible, also by phone—about the outcome of the Taskforce's assessment. Advertising and communication activities emphasised the Terms of Reference. And the Taskforce collaborated with key stakeholders to ensure accurate messaging.

1.2 Policy context

1.2.1 A culture of non-payment

The industry is the third largest employer in Queensland, employing more than 230,000 Queenslanders and contributing approximately \$46 billion to the state economy in 2017–18.

The industry has been impacted by several high-profile company collapses in recent years. These highlighted widespread issues of late and non-payment, with subcontractors being disproportionately affected.

The system of cascading payments in the industry means that subcontractors are usually reliant on the contractors above them for payment. According to Deloitte⁴

“...there is... an incentive for contractors higher up the chain to delay payments to those lower down to supplement their own cash flow and working capital.”

The Queensland experience is not unique. The culture of non-payment in the industry has been well documented, with multiple reviews by individual states and territories and at a national level. The Senate Economics References Committee’s 2015 inquiry into insolvency in the industry (Senate Inquiry) found that security of payment in the industry is a problem in all jurisdictions. The Senate Inquiry⁵ noted that nationally

“...the industry is burdened every year by nearly \$3 billion in unpaid debts, including subcontractor payments, employee entitlements and tax debts averaging around \$630 million a year for the past three years.”

ASIC data⁶ shows that, in 2017–18, the industry had 1,642 external administrations— the second highest of any industry in the country. Queensland accounted for approximately 19 percent of the total insolvencies during this period. The leading nominated cause of failure for these companies nationally was inadequate cash flow or high cash use. The construction industry had the third highest number of reports where companies owed more than \$10 million to unsecured creditors.

1.2.2 Prevalence of fraud and dishonesty

While only a small proportion of failures in 2017–18 was attributed to fraud, the Senate Inquiry noted that all contributing factors may not be evident to an external administrator at the time of lodging an initial report (on which the above data is based) with ASIC. The Senate Inquiry further noted that fraud can occur elsewhere in the contractual chain.

“Importantly, while the failure of one business may have been a result of inadequate cash flow, the business may have lacked cash flow as a result of the fraud of a contractor further up the chain.”

Fraud is not the only form of unscrupulous behaviour associated with insolvency. ASIC data shows that the industry is overrepresented in the number of reports alleging criminal and civil breaches of the Corporations Act. Of the 1642 external administrations in 2017–18⁷, almost 90 per cent of administrators had documentary evidence of possible misconduct and recommended inquiry by ASIC. In only 196 cases were there no reports of misconduct.

Common reports of pre-appointment criminal misconduct include:

- failure to keep financial records
- insolvent trading
- reckless or dishonest behaviour or a failure to act in good faith
- officers using their position, or information obtained through their position, dishonestly to gain an advantage or cause detriment.

⁴ Deloitte 2016, Analysis of security of payment reform for the building and construction industry, Department of Housing and Public Works, Brisbane, Queensland, viewed March 2019:

www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDeloitteReportOriginal.pdf

⁵ Commonwealth Senate Economics References Committee 2015, ‘I just want to be paid’: Insolvency in the Australian construction industry, Parliament of Australia, Canberra.

⁶ Australian Securities and Investments Commission, Insolvency statistics – Series 3 External administrators reports: <https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-3-external-administrator-reports/>

⁷ There have been 1,114 external administrations between July 2018 and March 2019.

Post-appointment, common allegations of criminal misconduct include failing to help a liquidator, failing to provide reports about the affairs of the corporation, and unlawfully retaining possession of company books.

A corporation attempting to conceal its affairs from an administrator, a liquidator or the regulator may be a sign that the insolvency involves illegal phoenix activity. Academics at Melbourne Law School and Monash Business School⁸ described phoenix activity as

“...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 not inherently fraudulent and can be used to preserve the value of a failing business. Illegal phoenix activity, however, 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.

Illegal phoenixing is not confined to the industry. In 2018, the ATO, Fair Work Ombudsman, ASIC and PricewaterhouseCoopers estimated the cost of phoenixing to the Australian economy to be between \$2.85–5.13 billion annually⁹.

However, the 2012 Collins Inquiry¹⁰ observed a common view among stakeholders is that

“...this activity was widespread in the building industry and that it was having a significant and lasting detrimental effect on their businesses.”

Another fraudulent behaviour highlighted in the Collins Inquiry was the use of false statutory declarations about subcontractor payment.

A common condition of contract requires a payment claim to a principal to be supported by a statutory declaration stating that all subcontractors have been paid what is due and payable to them.

However, the Collins Inquiry found that the requirement is not operating as intended.

“The universally held view in the industry is that the use of statutory declarations to demonstrate that subcontractors have been paid, does no such thing.”

The Senate Inquiry described the prevalence of false statutory declarations as “troubling”.

In 2014, New South Wales amended its *Building and Construction Industry Security of Payment Act 1999* to transfer the standard contractual requirement into legislation. As a result, knowingly providing a statement about subcontractor payment that is false or misleading attracts a maximum penalty of 200 penalty units for an individual (\$22,000), three months imprisonment, or both. The Murray Review supported the New South Wales model, noting that the use of false statutory declarations continues to be a “live issue”. The Murray Review recommended further enhancing its operation by requiring head contractors to provide a copy of the statement to the subcontractors.

⁸ Anderson, H, Ramsay, I, Welsh, M and Hedges, J 2017, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement*, Melbourne Law School and Monash Business School, Melbourne.

⁹ Australian Tax Office, Fair Work Ombudsman, Australian Securities and Investments Commission and PricewaterhouseCoopers 2018, *The Economic Impacts of Potential Illegal Phoenix Activity*, Australian Tax Office, viewed April 2019:
<www.ato.gov.au/uploadedFiles/Content/ITX/downloads/The_economic_impacts_of_potential_illegal_Phoenix_activity.pdf>

¹⁰ Collins QC, B 2012, *Final Report: Inquiry into Construction Industry Insolvency in NSW*, New South Wales Department of Finance, Services and Innovation, Sydney.

1.2.3 Recent policy developments

In 2015, the incoming Government committed to review security of payment for subcontractors and to consult widely. The Government released two discussion papers (the Security of Payment discussion paper in 2015 and *Queensland Building Plan discussion paper* in 2016). This process culminated in the new BIF Act which aims¹¹ to:

- improve security of payment for subcontractors by providing for effective, efficient, and fair processes for securing payment, including the establishment of a framework to establish Project Bank Accounts (PBAs)
- modernise and simplify the provisions for making a subcontractor's charge
- increase ease of access to security of payment legislation
- increase the ability of the QBCC to provide regulatory oversight.

The BIF Act is being implemented in stages.

- 10 November 2017** Amendments to the QBCC Act and consequential amendments to other Acts commenced on assent. The QBCC Act amendments:
- increased penalties for unlicensed building work
 - introduced a new offence for causing significant financial loss caused by avoidance of contractual obligations
 - made the 'excluded individual' provisions more stringent so that a person involved in a construction company failure in another jurisdiction or who was the director of a company up to two years prior to a failure is excluded from holding a QBCC licence
 - expanded the definition of 'influential person' to capture a broader range of people involved in a company failure, not just the director or secretary
 - introduced a statutory defects liability period and a requirement to pay retention monies
 - introduced a new head of power allowing prohibited and mandatory contract conditions to be prescribed by regulation
 - consolidated QBCC investigator powers.
- 1 March 2018** Commencement of chapter 2 of the BIF Act relating to PBAs for government projects valued between \$1–10 million and supporting provisions.
- 17 December 2018** Commencement of chapters 3–5 of the BIF Act, relating to progress payments, adjudication of payment disputes, subcontractors' charges and the Adjudication Registry. The *Building and Construction Industry Payments Act 2014* (BCIP Act) and the *Subcontractors Charges' Act 1974*, which previously provided for these matters, were repealed.
- 1 January 2019** Changes to the QBCC Act providing for the Minimum Financial Requirements (MFR) for licensing to be prescribed by regulation. Phase 1 of the new MFR framework was implemented through the new Queensland Building and Construction Commission (Minimum Financial Requirements) Regulation 2018 (MFR Regulation).
- 2 April 2019** Phase 2 of the new MFR framework was implemented (through amendments to the MFR Regulation) and the MFR Policy repealed.

¹¹ Explanatory Memorandum, Building Industry Fairness (Security of Payment) Bill 2017.

Uncommenced

Amendments to expand the application of PBAs to the private sector and lower-tier subcontractors and suppliers. The first phase of PBAs is the subject of an evaluation which is expected to inform the implementation of the later phases.

Minor amendments to part 6 of the QBCC Act relating to rectification of building work.

The Taskforce was not established to review the BIF Act amendments. The staged implementation of the BIF Act means that it will be some time until the effectiveness of the changes can be measured. However, the Taskforce complements recent policy developments—which largely relate to the payments legislation—by providing opportunities to examine fraudulent behaviour and to improve the ability of government and regulators to respond to such behaviour.

Allegations of fraudulent behaviour relating to building subcontractor non-payment— Term of Reference (a)

Invite and investigate matters and complaints provided through confidential submissions (in person and/or in writing) in relation to allegations of fraudulent behaviour relating to building subcontractor non-payment.

1.3 Scope

1.3.1 What is fraudulent behaviour?

Fraud can cover a range of different activities and situations. In Queensland, one definition of ‘fraud’ is found in the Criminal Code which provides, in part, that

408C Fraud

(1) *A person who dishonestly—*

...

(b) obtains property from any person; or

(c) induces any person to deliver property to any person; or

(d) gains a benefit or advantage, pecuniary or otherwise, for any person; or

(e) causes a detriment, pecuniary or otherwise, to any person; or

(f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or

(g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or

...

commits the crime of fraud.

Maximum penalty—5 years imprisonment.

In proving fraud, dishonesty must be established. ‘Dishonestly’ in section 408C requires the prosecution to prove that what the defendant did was dishonest by the standards of ordinary, decent people. To secure a conviction, the prosecution does not need to prove that the defendant must have realised that what was done was dishonest by those standards.¹²

A number of offences in the Criminal Code and other state and federal legislation depend on proof of dishonesty or a similar state of mind.

Under the Criminal Code, for example, it is an offence to knowingly make a false declaration. A head contractor who falsely declares that subcontractors have been paid money that is due and payable—a prevalent practice, as outlined at part 1.2.2—may be criminally liable, if the person knew of that non-payment. The Criminal Code also creates offences for the fraudulent falsification of records and forgery of documents.

Under the Corporations Act, acting dishonestly or with an intent to defraud can result in more severe consequences. For example, civil penalties apply to insolvent trading; but a director may be subject to criminal charges, including imprisonment, if dishonesty is found to be a factor.

¹² *Carter’s Criminal Law of Qld* at paragraph [s 408C.30]; *R v Orchard* [2018] QCA 58 at paragraphs [29] – [43].

The QBCC Act contains fraud-related offences, while the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) regulates misleading, deceptive and unconscionable conduct in business transactions.

The Taskforce considered a range of potential offences in evaluating the information gathered. Appendix D lists these.

1.3.2 What are the rules for subcontractor payment?

Payments in the industry are governed by contracts and legislative requirements. While contracting parties have a right to agree to payment and other terms, the regulatory framework provides certain safeguards.

The BIF Act creates a right to progress payments and prescribes requirements for making and responding to payment claims. The BIF Act also establishes a process for adjudication of a payment dispute.

The QBCC Act provides minimum requirements for commercial building contracts and subcontracts.

Appendix E details the operation of the payments legislation, including key changes made by the BIF Act. The historic nature of allegations made in submissions received by the Taskforce required investigators to work across current and previous legislative frameworks.

1.4 Overview of submissions

The Taskforce received 146 submissions relating to complaints of non-payment.

1.4.1 How were submissions made?

Most submissions were by email or via the online portal; both channels were adopted almost equally.

Forty-two individuals attended in-person appointments. Submitters used this as an opportunity to expand on the material provided in their submissions and to tell their story. Some booked more than one 30-minute appointment, feeling they needed additional time to discuss the submission. While attendees were encouraged to make a submission before meeting with a Taskforce investigator, not all elected to do so. Some wanted to understand the scope of the Taskforce and the likely outcome of their complaint before making a formal submission.

1.4.2 Who made submissions?

The majority of submissions (approximately 72 per cent) were made by individuals based in South Queensland, with the greatest number coming from the Gold Coast Local Government area (Figure 1 provides an overview of submissions by region). Although South Queensland accounts for the majority of the state's construction activity, the Taskforce anticipated greater uptake in regional Queensland given the number of high-profile building company collapses that have occurred in these areas in recent years. One submitter from Central Queensland suggested that a fear of reprisal may have discouraged regional subcontractors from coming forward—one of the risks identified by the Taskforce at its inception (as discussed at part 1.1.3).

More than 60 per cent of submitters were current or former QBCC licensees. Some of the most common trades affected by non-payment were builders (particularly low-rise and open), brick and block layers, carpenters, plumbers and drainers, gasfitters and joiners. Among non-QBCC licensees were electricians and subcontractors from the civil construction (such as road and earth work), asbestos removal, and labour hire sectors.

The Taskforce found that small to medium-sized businesses were the ones overwhelmingly affected by non-payment. Building and trade contractors who are licensed by the QBCC must comply with the MFR and are assigned a category based on the contractor's annual 'maximum revenue' (i.e. turnover). Of the known contractors who made submissions, 90 per cent have, or had, maximum revenue of less than \$12 million a year. Self-certification category 2 licensees, who have a maximum revenue of \$800,000, were the most common, but a significant number of category 1 (up to \$3 million) and category 2 (up to \$12 million) licensees were also affected.

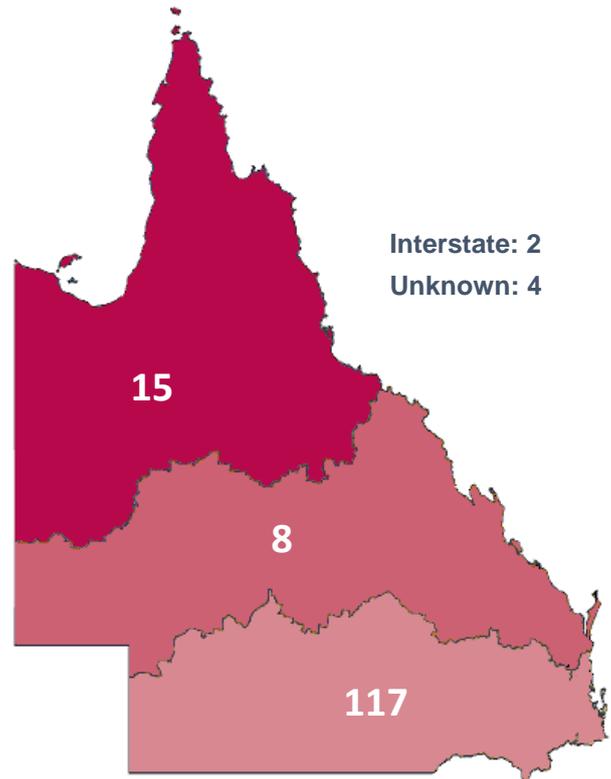


Figure 1: Submissions by region

1.4.3 Nature of submissions

While submissions were received from subcontractors of different trades and backgrounds, the work associated with non-payment was commonly carried out on commercial developments. These included multi-unit dwellings, retail premises and civil infrastructure; in only a few cases was the principal a homeowner rather than a developer. Most affected subcontractors carried out the work within the past two to three years. The earliest complaint of non-payment concerned work carried out in 2002.

The scale of non-payment varied widely, ranging from \$1,500 to \$112 million (the latter relating to a submission about non-payment of a large number of creditors). The largest individual loss reported was \$6 million. Excluding submissions relating to multiple creditors, the average loss per subcontractor amounted to \$288,000.

Submitters described a range of behaviours associated with non-payment. The most common types of dishonest behaviour alleged in submissions were:

- insolvent trading—many submitters reported that the head contractor responsible for non-payment later entered into liquidation and suggested this was evidence that the head contractor was not solvent at the time the subcontractor carried out the work
- phoenix activity
- contractual disputes—particularly involving payment being withheld based on fabricated or frivolous defective work claims, or the head contractor failing to honour agreements about the scope and cost of variations
- false statutory declarations about subcontractor payment
- false financial reporting.

Further allegations involved other types of falsified records such as bank remittances and building inspection certificates, perjury, wrongdoing on the part of an accountant, pre-insolvency advisor or liquidator, and the fitness and propriety of individuals involved in running a company.

In a number of submissions, after investigation of the circumstances surrounding the non-payment, the matters of complaint were characterised as involving a breach of contract rather than fraud or another legislative contravention. In these circumstances, the submitter did not provide evidence of dishonesty on the part of the head contractor; for example, that the contractor made representations about ability to make payment or other inducements that were fraudulent. However, it was evident that many subcontractors believe that non-payment in and of itself should have strong consequences.

The personal stories shared in submissions demonstrated the major social and financial impact of non-payment for those affected. For many submitters, the impacts continue to be felt years afterwards.

One submitter “struggling to trade out” of a loss of approximately \$16,000 noted that, for small businesses, it can be difficult to recover from even a single instance of non-payment. Around one in four submitters reported they had lost their businesses or were close to doing so. One submitter told the Taskforce about moving his family into his parents’ home after “losing everything”. Another wound up the company after more than 17 years. This meant laying off more than 40 staff as well as being unable to pay creditors and to meet personal expenses such as school fees and groceries.

Those who remain in business face issues including the debts they accrued after relying on credit facilities for short-term cashflow, having to delay their retirement, or being unable to expand and invest in their business (which has consequences at a broader economic level).

At a social level, the Taskforce heard accounts of divorce, stress-related illness (both mental and physical), loss of identity and suicidal feelings.

The ‘flow-on’ effect

The system of cascading payments used in the industry means that the impact of non-payment can flow through the contractual chain. An example of this is a subcontractor (X), who was both a complainant and the subject of a complaint to the Taskforce.

X was engaged by Company A under a subcontract to perform building work. X further sub-subcontracted out parts of the work to Y.

As the result of non-payment by Company A, X was unable to pay debts, including its liability to Y.

1.4.4 Trends and observations

While not all submissions met the Terms of Reference, they highlighted broader systemic problems. In particular, the submissions reinforced previous analysis about how the structural power imbalance leaves subcontractors vulnerable to unscrupulous contracting and payment practices¹³.

Specific practices drawn to the Taskforce’s attention included subcontractors not being paid after they made their final payment claim. Submitters advised that the final payment can be significant, as upfront costs such as materials mean that, typically, profits are not realised until the end of a project. In some cases, the subcontract was terminated and another subcontractor engaged to complete the project (the original subcontractor already having carried out the majority of the work). Other submitters reported that they completed the work but received no response to their final claim. Sometimes, the amount was reduced on grounds of defective building work or for liquidated damages—grounds that the submitters thought were fabricated by contractors to avoid their obligations.

Another recurring issue related to variations. Variations are often necessary to account for design changes, material and supply availability or changes in conditions that may arise. However, determining whether particular work constitutes a variation is a common source of contention.

¹³ Commonwealth Senate Economics References Committee 2015, ‘I just want to be paid’: Insolvency in the Australian construction industry, Parliament of Australia, Canberra.

Many subcontractors described carrying out what they understood to be a variation only for the contractor to dispute the amount to be paid or to deny liability entirely on the basis that the work is within the scope of the original contract. Compounding this was a tendency for parties not to document the terms of the variation, including the cost, before the work was completed. Subcontractors reported acting on verbal instructions from a site manager or other representative of the contractor on the promise of a purchase order being made that did not eventuate.

Several submitters believe this to be a deliberate strategy to avoid payment obligations, noting that contractors often rely on variations to increase their profit margins after initially underquoting to win the job. Central to this practice, they said, is not passing on payments for variations to the subcontractor carrying out the work.

The Taskforce identified a number of contract conditions that did not favour the subcontractor, including payment terms of up to 45 days—in breach of the QBCC Act, which requires payment no later than 25 business days after a payment claim is made. And at least one form of subcontract allowed the contractor unilaterally to decide the scope and cost of variations.

Despite such practices, many subcontractors lacked the ability or will to litigate disputes: for example, through civil proceedings or the security of payment legislation. Subcontractors cited the cost and time involved in doing so, especially given that payment is not a guaranteed outcome. In more than one case, the submitter won a favourable decision in adjudication but the respondent refused to pay the adjudicated amount and the submitter could not afford to pursue the matter.

Subcontractors may be reluctant to address concerns for fear of reputational damage and to preserve their commercial relationships. In a competitive market, a ‘troublemaking’ subcontractor is unlikely to win tenders—a fear that some contractors are willing to exploit. And differences in financial and legal capabilities often exist between the parties. Smaller businesses may not have the internal resources to review and effectively negotiate contracts, while external legal advice is costly and beyond the reach of those already competing on small margins.

1.5 Assessment of submissions

The Taskforce established two teams to investigate allegations of fraudulent behaviour relating to subcontractor non-payment. Each team comprised at least one officer from the QBCC, QPS and either ODPP or Crown Law. This multi-agency approach allowed for the cross-fertilisation of ideas, with each investigator contributing a special expertise.

Each submission was allocated to one of the teams having regard to the regional visits that team would be undertaking and other submissions relating to the same business or location that had already been allocated. Another factor was potential conflicts of interest. Some investigators had previously been exposed to matters raised in submissions through complaints made to their agencies; in these cases, the submission was assigned to the other team. This was done to avoid any apprehension of bias and to provide confidence to submitters that complaints would be investigated thoroughly and fairly.

Appendix F outlines the assessment and investigation process. One of the first steps involved determining whether a submission aligned with the Terms of Reference, i.e. did it relate to subcontractor non-payment? In each case, an investigator made personal contact with the submitter to confirm that the team accurately understood the details of the complaint and to establish any relevant facts beyond those disclosed on the face of the submission. This approach helped to ensure that the submitter’s experience was fully appreciated.

The method and level of investigation varied depending on the complexity of the matter. Cases ranged from small dollar fraud to major building company collapses. In some, the Taskforce needed only to confirm the details in a submission through interviews. Others required more comprehensive investigation, drawing upon a range of resources: these included financial records, liquidator reports,

contracts, adjudicator decisions, and QPS, QBCC and court records. Taskforce investigators also met with insolvency practitioners and officers from ASIC.

Where possible, submitters were contacted by an investigator about the outcome of the Taskforce's assessment and received written advice from the Taskforce Head.

The results of the assessment and investigation process, including the number of referrals, are detailed in part 3.

Referrals to prosecuting authorities—Term of Reference (b)

Where the material discloses evidence of possible breaches of legislation, refer that material to the relevant prosecuting authority.

1.6 Number of matters referred

The Taskforce referred possible breaches of legislation revealed in 69 of the 146 submissions to at least one prosecuting authority.

Some submissions suggested multiple possible breaches involving Acts administered by different authorities. One individual was referred to seven prosecuting authorities.

The remaining 77 submissions disclosed no legislative contravention.

The table below provides a breakdown of referrals by prosecuting authority.

Prosecuting authority	Legislation	Relevant provisions	Number of referrals
QBCC	QBCC Act	Sections 36, 42, 42E, 43, 50D, 67G 67NB, 101, 108C Part 6A	38
	BIF Act	Section 90	2
QPS	Criminal Code	Sections 194, 408C, 430, 488	38
ACCC	Competition and Consumer Act	Section 45(1)(c)	2
ASIC	Corporations Act	Sections 201A, 206A, 206B, 286, 475, 530A, 588G, 592, 1308	14
	<i>Business Names Registration Act 2011</i> (Cth)	Section 18	1
ESO	<i>Electrical Safety Act 2002</i>	Sections 56, 57AA	2
	Electrical Safety Regulation 2013	Section 7	1
Fair Work Ombudsman	<i>Fair Work Act 2009</i> (Cth)	Section 323	2
	<i>Independent Contractors Act 2006</i> (Cth)	Section 357	1
QLeave	<i>Building and Construction Industry (Portable Long Service Leave) Act 1991</i>	Section 67	1
ATO	<i>Taxation Administration Act 1953</i> (Cth)	Schedule 1, sections 12 to 35 and 16 to 75	2
	Superannuation Guarantee	Section 16	2

Prosecuting authority	Legislation	Relevant provisions	Number of referrals
	<i>(Administration) Act 1992</i> (Cth)		
Workplace Health and Safety Queensland	<i>Work Health and Safety Act 2011</i>	Section 19	1
	Work Health and Safety Regulation 2011	Chapter 6	1
Total number of referrals			108

1.7 Nature of matters referred

Referrals to the QPS largely related to possible breaches of section 408C of the Criminal Code (Fraud). The fraudulent behaviour often involved a contractor in dishonestly obtaining the benefit of work performed by a subcontractor. Others concerned false statutory declarations about subcontractor payment, in contravention of section 194 (False declarations), and possible offending against section 430 (Fraudulent falsification of records) and section 488 (Forgery and uttering).

Offences against the QBCC Act were more varied. They included:

- contravening a licence condition imposed under section 36
- unlawfully carrying out building work i.e. without a licence (section 42)
- avoidance of contractual obligations causing significant financial loss (section 42E)
- pretending to be a licensee (section 50D)
- not putting a building contract in writing (section 67G)
- failure to pay a retention amount (section 67NB)
- giving the QBCC a false or misleading document (section 108C).

There were also suspected breaches of section 101, which requires licensees to notify changes to the particulars recorded on the licensee register. The matters referred typically involved the appointment of a new company director without notifying the QBCC—usually to conceal the unlawful involvement of an excluded individual.

Case study—Multiple referrals

B subcontracted with Z to carry out building work. The subcontract included 30-day payment terms (which the QBCC Act renders void). B made two payment claims totalling \$30,000. B was promised payment on several occasions but remains unpaid.

Z provided false statutory declarations to the Principal about subcontractor payment and the Principal paid Z. The Principal then became aware of the non-payment to B.

In tendering for the head contract, Z lied about involvement in previous projects. The Principal said these were key considerations in awarding the contract to Z.

Z has since entered liquidation, raising questions about the company's solvency while engaged with the Principal and B. The Taskforce also found that the former director of Z may be involved in a new company.

This case was referred to the QPS, QBCC and ASIC.

There were only two referrals in relation to the BIF Act: both for failing to pay an adjudicated amount (section 90). This was no surprise as much of the BIF Act, including section 90, did not commence until December 2018.

Referrals to ASIC covered a range of matters; insolvent trading was the most common. Other noncompliance included failing to help a liquidator (sections 475 and 530A), disqualified persons managing a company (sections 206A and 206B), failing to keep financial records (section 286) and false and misleading statements (section 1308).

One referral to the ATO and Fair Work Ombudsman involved non-payment of wages to an employee by a contractor, in breach of section 323 of the *Fair Work Act 2009* (Cth). There was also evidence that the contractor failed to deduct tax from a wage or to pay compulsory superannuation as required under the *Taxation Administration Act 1953* (Cth) and *Superannuation Guarantee (Administration) Act 1992* (Cth). The ESO was notified of possible instances of unlicensed electrical work.

Investigative and supervisory powers—Term of Reference (c)

Consider if there are sufficient and appropriate investigative and supervisory powers to deal with the conduct disclosed in the matters reviewed.

1.8 Overview of existing powers

In Queensland, the QBCC is the primary agency responsible for regulating the industry. Its powers are conferred under the QBCC Act, BIF Act, *Building Act 1975* (Building Act) and *Plumbing and Drainage Act 2002*¹⁴ (Plumbing and Drainage Act). Most relevant to the Taskforce's Terms of the Reference are the QBCC Act and BIF Act; the QBCC's powers under the Building Act and Plumbing and Drainage Act largely relate to licensing of building certifiers and pool safety inspectors, and occupational plumbers and drainers, respectively. The key compliance and enforcement provisions under the QBCC Act and BIF Act are set out in Appendix G.

1.9 Key considerations

The Taskforce received 20 submissions specifically relating to item (c) of the Terms of Reference, from industry bodies, insolvency practitioners and government agencies. Some complaints of non-payment included comments on how to improve the exercise of existing powers. In accordance with the collection notice, individual submitters have not been identified. However, their contributions are appreciated.

In considering the sufficiency of existing investigative and supervisory powers and in making recommendations to the Government, the Taskforce had regard to the key themes arising from, and observations made in, the submissions, ranging from systemic issues to case-specific matters that highlighted opportunities for improvement. These are detailed at part 4.4.2.

Some matters, while worthy of consideration, were outside the remit of the Taskforce or required more consultation than was feasible¹⁵. However, further analysis would enable the Government to address these matters in ways that are effective and minimise the burden on affected stakeholders. Accordingly, the relevant submissions have been given to the Director-General of HPW.

The Taskforce also reviewed the investigative and supervisory powers available elsewhere to assist in recognising any deficiencies in Queensland.

1.10 How does Queensland compare to other jurisdictions?

Appendix H summarises the investigative and supervisory powers available to regulators in other states and territories. No two jurisdictions employ the same licensing and regulatory model. For example, New South Wales regulates only residential construction work—there are no contracting requirements for commercial construction. Accordingly, while Appendix H shows that the investigative and supervisory powers are generally comparable, the contexts in which they may be used differ.

With more than 60 classes of builder and trade licence, Queensland has one of the more comprehensive regulatory frameworks. Queensland is also the only state to legislate PBAs, and one of only a few to address non-conforming building products.

1.11 Overview of submissions

¹⁴ The *Plumbing and Drainage Act 2002* will be replaced by the *Plumbing and Drainage Act 2018* on 1 July 2019.

¹⁵ For example, some submitters, including the Subcontractors Alliance, recommended that the QBCC license civil construction work. They considered that this would better protect subcontractors and ensure the maintenance of proper standards. However, any recommendation for change of that kind requires evaluation of the benefits and costs associated with maintaining a licence, following consultation with those likely to be affected.

1.11.1 Are current investigative and supervisory powers sufficient?

The submissions from industry bodies, insolvency practitioners and government agencies highlighted practices and fraudulent behaviour that lead to subcontractor non-payment. While some suggestions were made about how to address these issues, few submissions identified deficiencies in the QBCC's powers or argued that they be significantly augmented.

Rather, organisations saw it as more important that the QBCC use its existing powers effectively, particularly in relation to the MFR for licensing. One insolvency practitioner noted that early intervention was essential when risk of insolvency is identified and that, when insolvency does occur, meaningful returns to subcontractors are highly unlikely.

Several organisations welcomed the new MFR framework introduced on 1 January 2019, suggesting it would encourage accountability and improve QBCC visibility. However, to fully realise the benefits, the QBCC must be adequately resourced, with the capability to detect, and quickly act on, signs of financial distress as well as to undertake complex financial investigations.

Many individual submitters called for more proactive enforcement by the QBCC, leading to tough penalties such as fines, licence cancellation and imprisonment for non-payment. The Subcontractors Alliance suggested that QPS staff work with the Australian Federal Police and ASIC to finalise the investigations of matters and to deal with insolvent trading schemes and wrongdoing by insolvency practitioners.

Improving payment outcomes was a key theme among submitters. Suggestions included:

- expanding the scope of PBAs to cover all parties in the contractual chain and to building and construction work of any value
- requiring head contractors to place funds in trust at the start of a project
- implementing an insurance scheme or similar that allows subcontractors to claim for non-payment.

Suggestions relating only to security of payment were beyond the Terms of Reference. As outlined at part 1.2.3, the Government has a clear agenda in relation to security of payment issues. That plan includes an evaluation of the BIF Act reforms, including the PBA model, by the Building Industry Fairness Reforms Implementation and Evaluation Panel. The Taskforce did not repeat this exercise. Instead, in conformity with its Terms of Reference, the Taskforce focussed on fraudulent behaviour and other illegality in relation to non-payment and the ability of government and regulators to address such behaviour.

The modesty of the Taskforce's recommendations responds to its Terms of Reference.

1.11.2 Key themes

More effective enforcement

As noted at part 2.2.3, many subcontractors believe that non-payment should attract criminal sanctions. Section 42E of the QBCC Act already permits some QBCC intervention to prosecute where a party to a building contract suffers significant financial loss.

42E Avoidance of contractual obligations causing significant financial loss

(1) This section applies to a person who is a party to a building contract.

(2) The person must not, without reasonable excuse, cause another party to the building contract to suffer a significant financial loss because the person deliberately avoids complying with, or fails to comply with, the contract.

Maximum penalty—350 penalty units.

Since section 42E became law on 10 November 2017, no prosecution has been started and its interpretation is untested in the courts.

A few features of section 42E merit attention.

First, the provision is not confined to unpaid debts. It extends to any deliberate contractual default resulting in significant financial loss to a party. As the Bar Association of Queensland said, section 42E is an “extraordinary provision of remarkably broad scope”.

Secondly, the causal element—“because the person deliberately avoids complying with, or fails to comply with, the contract”—has a curiosity: it is difficult to conceive of a situation where someone avoids complying with the contract where that outcome did not also involve a failure to comply. In other words, “avoids complying with, or...” looks to be otiose.

Thirdly, a successful prosecution depends on proof, beyond reasonable doubt, of absence of a “reasonable excuse” for failure to perform a contractual obligation. That burden is onerous because the circumstances that could give rise to a “reasonable excuse” will usually not be known to the prosecution.

The third factor means that using the legislation to its full intended effect may prove difficult in practice. There is, however, a workable, principled solution to the problem.

Section 42E will become a more effective deterrent to deliberate noncompliance with a contractual obligation if the “without reasonable excuse” issue is left to be discharged by the defendant rather than proved by the prosecution.

In considering whether to amend section 42E to reverse the burden of proof on the “without reasonable excuse” question, the fundamental legislative principles under the *Legislative Standards Act 1992* must be taken into account. These principles underlie a parliamentary democracy based on the rule of law. They include requiring that legislation have regard to individual rights and liberties.

According to the Office of the Queensland Parliamentary Counsel (OQPC)¹⁶, the former Scrutiny of Legislation Committee did not generally endorse provisions that place the onus of proving a defence on the defendant. However, the OQPC suggests that

“... provisions of this kind can be justified if the matter to be proved by the defendant is peculiarly within the defendant’s knowledge. The justification is even stronger if it would be difficult or expensive for the prosecution to disprove the matter.”

Both those factors apply here.

The Queensland statute book includes several examples of offences where an onus of proof is reversed, including in the:

- Criminal Code—sections 204, 205, 207, 230, 236, 425 and 515
- *Crime and Corruption Act 2001*—section 216

¹⁶ Office of the Queensland Parliamentary Counsel 2013, *Principles of good legislation: OQPC guide to FLPs – Reversal of onus of proof*, Office of the Queensland Parliamentary Counsel, viewed May 2019: < www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf >

- *Liquor Act 1992*—section 230
- *Keno Act 1996*—section 166
- *Work Health and Safety Act 2014*—sections 118, 144, 177, 185, 200 and 242.

Reversing the burden of proof of “reasonable excuse” would alleviate practical difficulties with the operation of section 42E as well as enhance the QBCC’s chances of a successful prosecution, thereby improving its ability to hold accountable those who cause significant financial loss by deliberate breach of a building contract.

Recommendation 1: That the Government consider amending section 42E of the QBCC Act to place the burden on the defendant to show a reasonable excuse for a deliberate failure to comply with a building contract.

The QBCC sought the ability to target all parties involved in providing false or misleading financial information to the QBCC.

It is an offence under section 53B of the QBCC Act for a person to provide false or misleading information to the QBCC about a contractor’s satisfaction of the MFR if the person knew the information to be false or misleading or failed to take reasonable steps to ensure its accuracy.

It is not uncommon for a person other than the licensee, such as an accountant, to furnish the QBCC with financial information on the licensee’s behalf. In cases where the accountant unwittingly passes on misleading information originating from, for example, the director of a licensed company, the QBCC has limited ability to hold the licensee to account.

Accessorial liability under section 7 of the Criminal Code depends upon the person who supplies the information knowing the facts that make the principal offender criminally responsible. Unless, therefore, the accountant providing the information to the QBCC knows it to be false or misleading, the person who supplied that information to the accountant has not contravened section 53B.

Section 53B presents as an insufficient deterrent to licensee misrepresentation to an accountant. And it can place accountants in a tenuous position. Ensuring the reliability of financial information provided to the QBCC will at times require the accountant to detect inaccuracies in the information supplied by the licensee and correct it in the accounts given to the QBCC. However, addressing these inaccuracies with the licensee will present accountants with challenges that would better be avoided.

Licensees may be motivated to ensure that financial information they give to an accountant is correct if a new offence were created: in substance, for knowingly supplying false or misleading information to another person if that information is subsequently given to the QBCC¹⁷.

Recommendation 2: 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.

The QBCC submitted it would be desirable to amend its statute of limitations to align with those elsewhere.

Section 111 of the QBCC Act requires a prosecution to be started within the later of two years of the commission of the offence or one year after the offence comes to the knowledge of the QBCC. Tasmania excepted, all other Australian jurisdictions have a longer time within which to start a prosecution.

¹⁷ Section 307B(a) to (c)(i) of the New South Wales *Crimes Act 1900* provides a possible model for the new offence.

The QPS also highlighted the potential challenges associated with the existing time frame, stating

It is not uncommon for offences to be identified and reported as a consequence of end of year audits and beyond the ability of the QBCC to deal with under their framework.

Increasing the limitation period could enhance the QBCC's ability to investigate complex matters relating to poor or fraudulent payment practices.

Recommendation 3: 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.

Licensing

Some submitters contended that individuals with a history of non-payment, criminal convictions or previous involvement in a failed company should be 'blacklisted' from the industry.

Appendix G outlines the eligibility of an excluded, permanently excluded or disqualified individual or a convicted company officer for a licence. An applicant for a licence, or a director, secretary or influential person for a company must also demonstrate fitness and propriety.

Those comprehensive powers have set the standard for other jurisdictions. The 2018 Fiocco Report¹⁸ recommended a similar model for Western Australia, noting industry consensus that

"...reform is required to empower the [Building Services Board] to better manage individuals who have demonstrated their incapacity to manage building companies."

The effectiveness of the QBCC's powers in this respect depends on its ability to identify individuals who may not be entitled to a licence. The Taskforce encountered a range of tactics to avoid QBCC oversight, including:

- providing false information in an application
- failing to disclose previous names by which the individual has been known (a name with criminal history attached to it)
- applying for a company licence using a director with a clean record, then bringing onboard a less scrupulous individual as a director without informing the QBCC (in breach of section 101).

The Queensland Building and Construction Commission Regulation 2018 requires a licence applicant to provide documentary evidence of identity, qualifications and experience. In practice, the licence application form for a company requires "one or more directors" to provide either existing licence details or certified photo identification. For the company nominee, only the existing licence details are requested.

While providing existing licence details is expedient as the QBCC, in granting the existing licence, would have already determined that the person is entitled to a licence, submissions reveal that the process is open to abuse.

Licence details can be discovered by perusing the QBCC's publicly accessible licensee register and thus the identified director or nominee could be fraudulently included. A person or company seeking a licence to falsify application forms can do so and then operate with a licence using another's details (without the identified person knowing of it).

Requiring formal identification routinely would enhance the QBCC's ability to determine the fitness and propriety of individuals proposed to be involved in running a company.

¹⁸ Fiocco, J 2018, Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry, Western Australia Department of Mines, Industry Regulation and Safety, Perth.

Recommendation 4: That the licence application process require applicants (including a director or nominee for a company) to provide:

- any previous name by which the applicant has been known
- proof of identity, including certified photo identification.

Unfair contract terms

As outlined at part 2.2.4, the Taskforce noted the prevalence of contract terms and conditions in subcontracts that appeared to favour the head contractor. The Master Plumbers' Association of Queensland (MPAQ) confirmed that unfair contract terms are a key concern and that power imbalances often result in subcontractors failing to protect their interests, noting that

“Subcontractors do not believe that they will ever be able to have any terms changed and they are worried that the builder will just go to the next subcontractor who is more compliant.”

MPAQ and QBCC provided examples of commonly used provisions in subcontracts that disadvantage subcontractors, including oppressive time bars for making claims relating to variations or extensions of time, termination for convenience without compensation or notification, unfair provisions concerning defects (such as denying subcontractors an opportunity to carry out rectification works), and indemnities for the head contractor against loss.

MPAQ suggested that subcontracts should not be more onerous (in certain respects) than the contract between head contractor and principal. Others advocated for standard government contracts that balance the interests of all parties.

In other contexts, unfair contractual terms are proscribed. An example can be found in the Australian Consumer Law (ACL). Recognising that small businesses often face the same vulnerabilities and difficulties as consumers in a contractual relationship, the Federal Government amended the ACL in 2016 to provide that a term of a consumer contract or small business contract is void if the term is unfair and the contract is a standard form contract¹⁹.

The ACL also sets out examples of contractual terms that may be unfair, including those that enable one party to avoid or limit obligations, terminate, or to vary the terms, and terms that penalise one party for breaching or terminating the contract.

The Explanatory Memorandum for the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*, which gave effect to the amendments, noted

“The objective of this reform is to promote fairness in contractual dealings with small businesses with regard to standard form contracts. This will reduce small business detriment and have positive impacts on the broader economy by increasing small business certainty and confidence, and providing for a more efficient allocation of risk. Small businesses, in dealing with other businesses through standard form contracts, should have confidence that the contract they are offered is fair and reasonable and that the risks are allocated efficiently.”

The Federal Government released a discussion paper in 2018 seeking comment on the reforms and whether changes are required to improve the framework. Most published responses were supportive of the policy intent but recommended clarifying and expanding the operation of the ACL provisions to protect more businesses.

¹⁹ The ACCC describes a standard form contract as “one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms—that is, it is offered on a ‘take it or leave it’ basis.”

In March 2019, the Federal Government announced that it would amend the laws (subject to the outcomes of a Regulatory Impact Statement (RIS)) to, among other things, make unfair contract terms illegal, create civil penalties, and broaden the definitions of 'small business' and 'small business contract'.

In Queensland, the legislative framework enables a similar approach to that taken federally.

Sections 67GA and 67GB of the QBCC Act provide for certain conditions in building contracts to be either mandated or prohibited by regulation. These sections establish penalties for entering into a contract which offends against the regulated requirements. Subcontractors (as the 'contracted party') would not be subject to a penalty.

No regulations have been made pursuant to sections 67GA and 67GB.

In its submission, the QBCC proposed deploying the existing powers to address the prevalence of unfair contract terms and recommended that it liaise with HPW in relation to the inclusion of such terms in a regulation. No doubt the industry would be consulted in such a process.

The Taskforce supports this idea.

The use of mandatory and prohibited contract terms would preserve flexibility for parties to agree on reasonable contractual arrangements to suit the needs of individual projects while improving the structural power imbalances between head contractors and subcontractors. This approach would also enable the QBCC to act against unsavoury conduct in relation to contracts. Noncompliance could be proved easily, by reference to the terms of the particular subcontract.

Recommendation 5: That the QBCC liaise with HPW in relation to the inclusion of mandatory and prohibited contract conditions in a regulation.

Education

The Taskforce considers that greater understanding of relevant laws, contractual obligations, and business, financial and contract management would improve subcontractors' bargaining power and payment outcomes.

While acknowledging the power imbalances with which subcontractors must contend, the Taskforce encountered cases where subcontractors did not take steps to protect their own interests, for example, by omitting to:

- ensure that the subcontract was properly documented and executed
- properly identify the parties
- enforce their legal rights in accordance with the statutory requirements.

The New South Wales Small Business Commission, in a recent review of the collapse of a civil construction company, found poor financial literacy among some contractors and subcontractors and poor commercial acumen and management of non-payment along the contracting chain. As a result, that Commission is developing a new induction approach for small business subcontractors that is focussed on improving financial literacy and awareness of security of payment mechanisms.

The Taskforce considered how Queensland's supervisory powers address education and training.

One of the objects of the QBCC Act is to provide support, education and advice for those who undertake building work and consumers.

Section 20J of the QBCC Act establishes the role of the Commissioner, which includes providing courses of instruction for:

- persons seeking to obtain licences
- licensees
- persons proposing to carry out building work as owner-builders

- other persons seeking to acquire knowledge or expertise in subjects related to the building industry.

To be entitled to a licence under the QBCC Act, a person must have the qualifications and experience required by regulation. The qualifications currently prescribed differ depending upon the class of licence, ranging from select units of competency to an advanced diploma.

A regulation may also be made pursuant to section 116 of the QBCC Act that provides for continuing professional development (CPD) to be undertaken by a contractor. While no CPD requirements have yet been prescribed, MPAQ suggests that mandatory, ongoing education for licensees would benefit “the whole industry”.

The Queensland Building Plan includes an action item to conduct an RIS on the introduction of CPD²⁰. Should this proposal be pursued, it would be beneficial to ensure that financial and business management form part of the training options available to licensees.

To translate into improved practices, education and training must be relevant and accessible. The QBCC advised that it is undertaking a mapping exercise of the education and training pathways for the industry. This exercise will inform the QBCC about how it may best support licensees to develop and retain essential skills. As part of this exercise, the QBCC is considering the key perceived and actual industry issues (such as insolvency) and the risk and causal factors involved.

The Taskforce supports this approach.

Recommendation 6: That the Government note the work of the QBCC to identify appropriate education and training opportunities for subcontractors.

Greater transparency and information-sharing

The QBCC sought the ability to collaborate and share information with agencies to address fraud and other offending behaviours.

Section 110 of the QBCC Act limits the information that the QBCC may disclose by requiring information obtained while exercising a power or performing a function under the Act to be kept confidential. Exceptions apply, including where disclosure is necessary for the administration or enforcement of the QBCC Act, Building Act or another Act prescribed by regulation.

No regulations have been made pursuant to section 110.

Section 28B of the QBCC Act allows the QBCC to enter into an arrangement with a relevant agency for the purposes of sharing or exchanging information to perform their respective functions. A ‘relevant agency’ means:

- the chief executive of a department
- a health and safety regulator within the meaning of section 28A [of the QBCC Act]
- a local government
- an agency of the Commonwealth, or another state, prescribed by regulation.

This means that the QBCC may now make arrangements with Queensland agencies, but interstate and federal regulators would need to be prescribed by regulation.

The legislation attempts to balance privacy protection with ensuring that the QBCC can effectively perform its functions.

The QBCC handles sensitive information, such as reports of licensee misconduct and commercial-in-confidence information. To maintain community trust, this information must be used appropriately.

²⁰ Department of Housing and Public Works 2017, Queensland Building Plan 2017, viewed June 2019: <www.hpw.qld.gov.au/SiteCollectionDocuments/QLDBuildingPlan.pdf>

However, fraudulent behaviour relating to subcontractor non-payment often involves conduct the significance of which could better be appreciated through acquiring information held by other agencies.

In the view of the Taskforce, the QBCC's supervision of the industry would be enhanced by greater opportunities to collaborate with relevant investigating and prosecuting authorities throughout Australia.

Recommendation 7: That the Government consider making a regulation to enable the disclosure of information by the QBCC to relevant agencies.

The QBCC suggested it would be beneficial for it to share technical insights with industry, for example to support improved risk management during design and construction.

Section 110 contemplates information-sharing with industry to the extent necessary for the administration of the QBCC Act. For example, the Commissioner's functions include providing consumer and industry education and issuing public warnings. The Commissioner may also make policies under section 115B to give guidance about compliance, decision-making, consumer and licensee rights and enforcement under the QBCC Act.

For subcontractors, the focus was on greater visibility of a contractor's financial position and disciplinary history. One submitter said that if he had known of the number of monies owed complaints against the head contractor, he would not have agreed to do the work.

Certain information is publicly available through the online licensee register. The register is maintained by the QBCC pursuant to section 99 of the QBCC Act. This section sets out the information that must be contained on the register, including the licensee's name, business address, licence number and class of licence, and the directors and nominees for the licensee (if it is a company). Some disciplinary-related matters are also prescribed:

- conviction of an offence against the QBCC Act or the BIF Act
- demerit points allocated to the licensee
- any cancellation or suspension of the licensee's licence, including the circumstances that led to the cancellation or suspension
- if the licensee, or a director, secretary, nominee or influential person for a licensed company, has been an excluded, permanently excluded, banned or disqualified individual— the circumstances that led to the exclusion, ban or disqualification
- disciplinary action that has taken effect under section 74G of the QBCC Act.

This information remains on the register for up to 10 years, depending on the nature of the disciplinary matter.

The QBCC is not required to publish details of complaints. Nor would it be appropriate to do so before wrongdoing is substantiated. However, once a disciplinary matter is finalised, additional information could be provided about the circumstances involved. For example, failure to meet the MFR (which is grounds for licence cancellation or suspension) may involve a number of issues: insufficient net tangible assets, omitting to lodge financial information and failure to pay debts. Specifying the nature of noncompliance—particularly in relation to non-payment—would inform consumer and industry decision-making. The information should be clear and user-friendly; merely referencing a section number, for example, may not assist an individual who is unfamiliar with reading legislation.

The Taskforce also recommends that the register include a licensee's ABN or ACN. Companies can change names and participate in complex corporate structures. More identifying information may assist subcontractors in enforcing their legal rights (especially where no written contract exists) or to detect previously cancelled licences.

Improving the accessibility of information about excluded and permanently excluded individuals may also help to expose phoenix activity. An excluded individual who improperly acts as an influential person or 'shadow director' will not necessarily be recorded on the register, either as an officer of the company or

as an individual licensee. Publishing a consolidated, searchable list of excluded and permanently excluded individuals would assist consumers and subcontractors to more readily ascertain a person's previous commercial dealings.

Recommendation 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.**

Recommendation 9: That the Government consider whether amendments are needed to enable the QBCC to publish details about excluded and permanently excluded individuals.

Statutory declarations

Submissions reinforced a finding of the Collins Inquiry: that statutory declarations about subcontractor payment often fail to achieve their intended purpose.

The Taskforce was told by several subcontractors that head contractors commonly give a principal a false statutory declaration stating that subcontractors have received what is due and payable to them. Evidence gathered by the Taskforce confirms the reality of that perception.

Subcontractors said that a lack of checks and enforcement allowed the practice to flourish. Principals, including government departments, were criticised for failing to verify that subcontractors had indeed been paid. Yet there is little incentive for them to do so. Payment disputes lead to disruptions and delays in project delivery which add to overall cost. Principals are also, and understandably, reluctant to become involved in a dispute about payment to a subcontractor with whom, inevitably, there is no contractual relationship.

Successful prosecution for a contravention of section 194 of the Criminal Code requires proof that the defendant knew that the declaration was false in a material particular. Defendants may plead ignorance, contending that, in making the declaration, they acted on the advice of another (such as an accountant) who was responsible for arranging subcontractor payment.

The QBCC recommended that a new offence be created in the QBCC Act for providing a false declaration that workers or subcontractors have been paid. The QBCC would be responsible for investigating and prosecuting noncompliance.

There is attraction in that proposal, although stricter scrutiny of the reliability of statutory declarations could disadvantage some subcontractors—in the near term at any rate.

Head contractors experiencing financial stress may depend on payment by the principal to derive the funds needed to pay subcontractors. In such circumstances, the contractor might yield to temptation and give the principal a false declaration to obtain the money to pass to subcontractors. And without that criminality, subcontractors might not get paid.

Experienced liquidators who met with the Taskforce recognised the dilemma for an insufficiently capitalised or temporarily cash flow poor head contractor. They expect that in the longer term, only contractors with a stronger balance sheet would survive more rigorous enforcement—an outcome likely to advantage the industry and the public.

The Collins Inquiry supported a separate offence administered by the building regulator as this was "more likely to result in action being taken against those that make false declarations".

As outlined at part 1.2.2, New South Wales implemented the recommendation through its security of payment legislation²¹. Regardless of the legislative instrument, greater enforcement is likely to deter contractors from falsifying statutory declarations and improve payment practices.

²¹ The Murray Review supported the New South Wales model (see part 1.2.2 of this report).

One feature of the New South Wales model worthy of consideration is that government regulates the form of the declaration. So it can be designed such that the burden of proof (from an enforcement perspective) is less onerous. For example, the prescribed template could include a declaration that the person making the declaration knows the facts declared.

The New South Wales Small Business Commission reported instances where breaches of the *Building and Construction Industry Security of Payment Act 1999* were not pursued on technical grounds. However, the Taskforce is not aware of significant issues with its operation.

A couple of submitters, including the Subcontractors Alliance, cautioned against extending such a provision down the contractual chain i.e. requiring a subcontractor to provide the contractor a statutory declaration that employees, sub-subcontractors and suppliers have been paid.

The Taskforce shares that concern.

Subcontractors are no less liable than contractors to pay their debts. But to require of them the kind of declaration that a principal expects of a head contractor is problematic. A subcontractor's business will often, and reasonably, lack the capital base that a head contractor needs.

Such a requirement has been used as a "weapon" against subcontractors unable to meet their obligations to others. Especially is that undesirable where that inability is attributable to non-payment by the head contractor. The subcontractor who cannot make the declaration is prevented from making further payment claims.

Recommendation 10: That the Government consider:

- **creating a legal obligation for head contractors to declare that subcontractors have been paid what is due and payable to them**
- **creating an offence for making a false or misleading declaration about subcontractor payment**
- **using the New South Wales legislation as a model.**

Appendix A—Terms of Reference

Special Joint Taskforce to investigate subcontractor non-payment in the Queensland building industry

To commence Wednesday 27 March 2019 for a period of 3 months.

The Taskforce composition

The Taskforce will be:

- led by an independent Special Investigator
- staffed by officers from the Queensland Police Service, the Queensland Building and Construction Commission and the Office of the Director of Public Prosecutions
- able to draw upon necessary skills and expertise particularly in the areas of prosecution, building contract law and civil law.

The Taskforce will report to the Minister for Housing and Public Works and will be established within the Department of Housing and Public Works.

Scope

The Taskforce will:

- a. invite and investigate matters and complaints provided through confidential submissions (in person and/or in writing) in relation to allegations of fraudulent behaviour relating to building subcontractor non-payment;
- b. where the material discloses evidence of possible breaches of legislation, refer that material to the relevant prosecuting authority;
- c. consider if there are sufficient and appropriate investigative and supervisory powers to deal with the conduct disclosed in the matters reviewed; and
- d. provide recommendations to the Government by 30 June 2019.

Appendix B—Media and engagement

There are over 230,000 workers in Queensland's \$46 billion-a-year construction industry. Many live in regional areas, separated from the commercial media's primetime news slots.

Appropriate engagement was key for the success of this Taskforce, to give each member of the industry the same opportunity to tell their story as someone living in Brisbane. To ensure as many people across the breadth of Queensland were adequately informed about the presence, function, scope and time frames of the Taskforce, several media and communication channels were utilised.

Print media

Many Queenslanders already were engaged with issues surrounding non-payment and allegations of fraudulent behaviour in the industry before the announcement of the Taskforce, in part due to the Back Our Subbies campaign run by NewsCorp through its Queensland mastheads. Primarily spearheaded by senior journalist Bill Hoffman of the Sunshine Coast Daily and driven by the Courier Mail, public awareness was heightened during the first few months of 2019. Stories were featured across most regional and metropolitan papers and their respective online news sites.

This coverage extended to the announcement and subsequent milestones of the Special Joint Taskforce. Joint media statements released by the Premier, Minister for Housing and Public Works Mick de Brenni and Minister for Police and Minister for Corrective Services Mark Ryan reached newspapers and online news sites across the state. Statements relating to the Taskforce's visits were released in Rockhampton, Townsville, Cairns, Toowoomba, Sunshine Coast, Gold Coast and Mackay and attracted print and online coverage. Since it was first announced, there have been 174 articles related to the Taskforce captured by iSentia's media monitoring tool MediaPortal. Many of these articles were directly in response to proactive media opportunities generated by the Taskforce. These items reached a collective audience of more than 1.5 million people.

Television

The Taskforce Head and Minister de Brenni were interviewed on 10 April, with syndicated stories running on Channel 7 in Rockhampton, Mackay, Cairns, Toowoomba, Sunshine Coast and Townsville. A separate news story, calling for the Taskforce to host one-on-one meetings in the Wide Bay Burnett region, ran on the same day. A further interview with Channel 7 in Rockhampton on 7 May went to air that night.

Radio

Opportunities for talk back radio on commercial stations were explored in regional communities. 4WK morning presenter Paul (Batch) Batchelor hosted an interview with the Taskforce Head on 26 April. This interview promoted the regional visit to Toowoomba on 3 May and the call for submissions from local subcontractors. The Taskforce Head was also interviewed for ABC Southern Queensland (Toowoomba) on 2 May and ABC Tropical North (Mackay) on 8 May, promoting regional visits and encouraging local subcontractors to make appointments. Grabs from the 8 May interview were used on ABC North Queensland (Townsville) on 15 May, highlighting the Taskforce's presence in Townsville.

Social media

A social media campaign was prepared, utilising wall, boosted (paid wall posts) and dark (paid content not visible on the timeline) posts on the Building for Queensland Facebook page. Content was created to encourage subcontractors to make a submission and to book appointments. The dark posts were used in conjunction with audience targeting to deliver specific regional content to people in these areas. This campaign included 11 posts, which had a combined reach of 148,075 people. With the assistance of paid content, the campaign generated a total of 486,135 impressions and 1,770 click throughs to the Taskforce website. The posts had a total of 171 engagements (reactions, shares and comments). The

similarity between the number of click throughs—a private interaction—and engagements—where the name of the individual engaging with the page is able to be seen by others—may be, in part, due to the fear of retribution outlined in 1.1.3. A post pinned to the top of page from 18 April until 2 May had the highest individual engagement. Aside from this post, an appointments dark post for Redlands received the largest number of link clicks, with 241 people clicking to visit the Taskforce website. Arrangements were made with Smart Service Queensland for after-hours monitoring and moderating of the Building for Queensland site to ensure appropriate risk management for comments and responsiveness for enquiries.

Advertising

Broadcast radio remains one of the top reach advertising mediums. For those working in the trades, radios are commonplace on the worksite.

A radio advertising campaign was run across the two most popular commercial stations in Brisbane, Sunshine Coast, Gold Coast, Toowoomba, Rockhampton, Mackay, Cairns and Townsville to increase awareness of the Taskforce and its face-to-face sessions. These comprised of two 15 second spots during popular drive times between Monday to Friday. The campaign was run from 14 April to 11 May, with advertisements scheduled in each area prior to appointment availability.

Website

New content was produced for a Special Joint Taskforce website (www.qld.gov.au/specialjointtaskforce) through which people were able to source information about the Taskforce, lodge a submission and book an appointment with a Taskforce investigator. The site had a total of 6,231 pageviews, with the Home page the most commonly visited, followed by How to make a submission.

Appendix C—Consultation

Correspondence

The Taskforce Head wrote to the following stakeholders to inform them of the Terms of Reference, as well as to invite submissions on the sufficiency of the current supervisory and investigative powers to deal satisfactorily with fraudulent conduct in relation to non-payment of subcontractors.

Information was provided on the current powers of the QBCC contained in the QBCC Act and the BIF Act.

Ministerial Construction Council (MCC)

- Air Conditioning and Mechanical Contractors' Association
- Association of Wall and Ceiling Industries Queensland
- Australian Institute of Architects
- Australian Institute of Building Surveyors
- Australian Manufacturers and Workers Union
- Board of Architects of Queensland
- Board of Professional Engineers of Queensland
- Construction, Forestry, Mining and Energy Union
- Electrical Trades Union
- Engineers Australia
- Housing Industry Association
- Landscape Queensland
- Master Builders Queensland
- Master Concreters Australia
- Master Electricians Australia
- Master Painters Queensland
- MPAQ
- National Association of Women in Construction
- Plumbers' Union Queensland
- Queensland Council of Unions
- Queensland Major Contractors Association
- Subcontractors Alliance.

Other stakeholders

- ATO
- Australian Banking Association
- Australian Financial Services Authority
- Australian Restructuring Insolvency and Turnaround Association
- ASIC
- Australian Small Business and Family Enterprise Ombudsman
- Chartered Accountants Australia New Zealand
- Commercial and Economic Planning Association
- Consult Australia
- CPA Australia
- HPW
- Local Government Association of Queensland
- Property Council of Australia
- QBCC
- QPS

- Queensland Building and Construction Board
- Queensland Law Society
- Urban Development Institute of Australia.

Insolvency practitioners

- PricewaterhouseCoopers Australia
- Ernst & Young
- KPMG Australia
- Deloitte Australia
- SV Partners
- Menzies Advisory
- BRI Ferrier Brisbane
- Bentleys Queensland
- PKF Brisbane.

Meetings

The Taskforce Head met with representatives from the following industry stakeholders. These meetings assisted to inform the views and recommendations of the Taskforce.

- ASIC
- ATO Phoenix Taskforce
- ACCC
- Bar Association of Queensland—Building and Construction Law Committee
- Building Industry Fairness Implementation and Evaluation Panel
- Deloitte Financial Advisory Pty Ltd
- HPW
- Grant Thornton
- MATES in Construction Queensland
- MCC
- Michael Hart MP, Member for Burleigh, Shadow Minister for Housing and Public Works, Shadow Minister for Energy and Shadow Minister for Innovation and Digital Technology
- MPAQ
- QBCC
- QPS
- Queensland Building and Construction Board
- Subcontractors Alliance.

The Taskforce provided materials to 30 organisations on 10 April 2019, seeking their assistance to inform Queenslanders of the presence, function and time frames of the Taskforce through sharing of the information via their regular newsletters, e-broadcasts and other communication channels.

The Taskforce Head met with Minister de Brenni. Regular meetings were held between Taskforce members and representatives from HPW to report on progress.

Appendix D—Main offences considered by Taskforce

Act	Section number	Section name
Criminal Code	194	False declarations
	398	Punishment of stealing
	408C	Fraud
	415	Extortion
	430	Fraudulent falsification of records
	488	Forgery and uttering
	Chapter 16	Offences relating to the administration of justice
Corporations Act	181	Good faith—civil obligations
	182	Use of position—civil obligations
	183	Use of information—civil obligations
	184	Good faith, use of position and use of information—criminal offences
	206A	Disqualified person not to manage corporations
	588G(2) and (3)	Director's duty to prevent insolvent trading by company
	592	Incurring of certain debts; fraudulent conduct
	596	Frauds by officers
QBCC Act	42	Unlawful carrying out of building work
	42B	Carrying out building work without a nominee
	42E	Avoidance of contractual obligations causing significant financial loss
	48	Cancellation or suspension of licence
	50D	Person must not pretend to be a licensee
	51	Improper use of licence card, certificate, number or PIN
	53B	False or misleading documents about minimum financial requirements
	55	Notification of company's nominee
	56AC	Excluded individuals and excluded companies
	67G	Building contracts to be in writing
	67AZ	Judgment debtor must notify unsatisfied judgment debt
	67NB	Failure to pay retention amount
	101	Licensees must advise change of circumstances
	105R	Offence to contravene document production requirement
	105U	Offence to contravene information or attendance requirement
	108B	False or misleading statement
108C	False or misleading document	

Act	Section number	Section name
	111	Prosecutions for offences
	Part 3	Licensing
Competition and Consumer Act	18	Misleading or deceptive conduct
	20	Unconscionable conduct within the meaning of the unwritten law
	21	Unconscionable conduct in connection with goods or services
	23	Unfair terms of consumer contracts and small business contracts
BIF Act	90	Respondent required to pay adjudicated amount
Building Act	99	Obligation to give owner inspection documentation on final inspection
	122	Building certifier's obligation to give owner inspection documentation if building development approval lapses
	148	Obligation to give inspection documentation to owner of building
	149	Obligation to give inspection documentation and any reminder notice to local government
	150	Obligation to keep inspection documentation
Building Regulation 2006	19	Building certifier's obligation to keep record of decision about competency
	23	Competent person must not give false or misleading documents
	27	Builder's obligation to give notice for inspection at completion of each stage
	28	Prohibition on further building work until stage complies
	30	Arranging inspection
	35B	Inspection procedure and process after inspection [of pool work]
	35C	Delaying inspection [of pool work] in particular circumstances
	45	Competent person must not give false or misleading documents
<i>Business Names Registration Act 2011 (Cth)</i>	18	Carrying on a business under an unregistered business name

Appendix E—Payment laws

BIF Act

The BIF Act creates a statutory right to receive progress payments for work performed under a contract and includes certain requirements for making and responding to payment claims.

Under the BIF Act, a contractor, consultant or supplier (the 'claimant') may make one payment claim per reference date, on or after the reference date. A payment claim must:

- be made in writing
- identify the construction work performed, or related goods and services supplied
- state the amount claimed
- request that the claimed amount be paid.

The individual or company from whom payment is requested is known as the 'respondent'. When the respondent receives a payment claim, they must respond by either paying the claimed amount in full by the due date or giving the claimant a written payment schedule stating the amount the respondent intends to pay. If the amount to be paid is less than the claimed amount, the respondent must include the reason, or reasons, for withholding payment.

Failing to respond to a payment claim within the prescribed time frames is an offence attracting a maximum of 100 penalty units.

The BIF Act also sets out the due date for payment, being:

- a day provided for under the contract
- if the contract does not provide for the matter—10 business days after the payment claim is made.

If a contract provision relating to payment is deemed void (for example, because it is a 'paid when paid' provision or it provides for a longer payment term than that allowed under the QBCC Act), the due date will be 10 business days as above.

A claimant may proceed to adjudication if the respondent:

- fails to pay the claimed amount in full by the due date
- gives a payment schedule where the amount to be paid is less than the amount stated in the payment claim.

The provisions relating to progress payments and adjudication were previously contained in the BCIP Act which was repealed and replaced by the BIF Act on 17 December 2018. Key elements of the BCIP Act, including the right to payment and its application to construction contracts, were retained. However, the BIF Act made changes to the progress payments process to:

- remove the requirement for a payment claim to state that it is made under the Act; the protections of the legislation, including access to adjudication, now extend to all payment claims
- create a statutory reference date for terminated contracts, allowing a claimant to submit a payment claim after the contract is terminated
- require a response to all payment claims
- require a payment schedule to be issued within 15 business days or an earlier day provided for under the contract.

The adjudication process was also amended to:

- remove the ability for respondents to issue a 'second chance' payment schedule before a claimant could proceed to adjudication
- increase the time frames for applying for adjudication
- prevent parties from raising new issues (for example, reasons for withholding payment) during adjudication
- prohibit a respondent who failed to provide a payment schedule from making a submission during adjudication
- introduce an offence for failing to pay an adjudicated amount.

QBCC Act

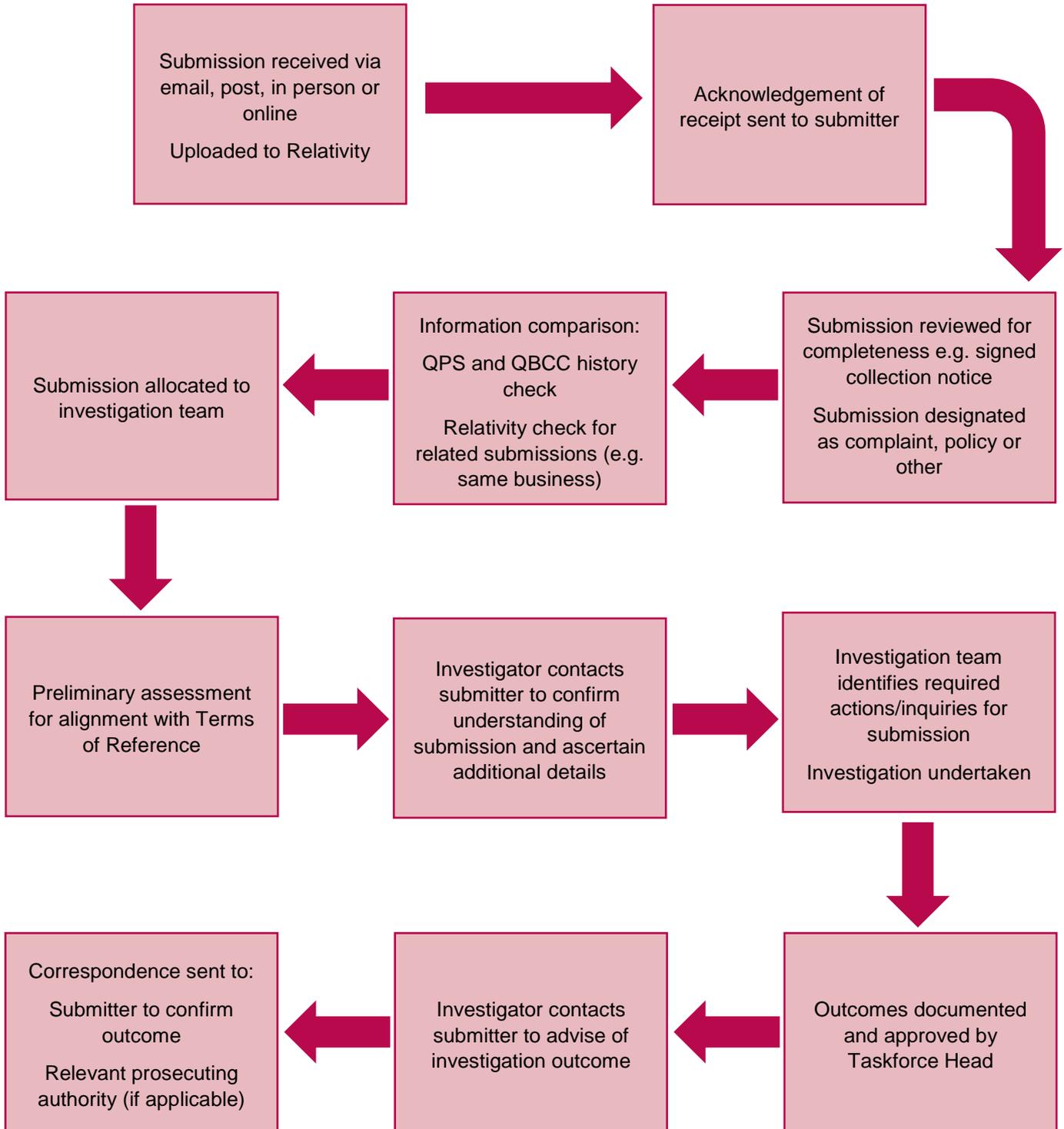
The QBCC Act regulates commercial building contracts and subcontracts. These include when a contract must be in writing, limits on retention amounts and securities held under a contract and the deductions for retentions from each progress payment, a right to be paid interest on late progress payments, and maximum payment terms for building contracts (with any contract condition attempting to circumvent these being considered void).

The BIF Act amended the QBCC Act to insert additional requirements that provide for:

- a statutory defects liability period after which retentions must be released
- penalties for failing to release retentions
- notification about the end of the defects liability period
- the ability for mandatory and prohibited contract conditions to be prescribed under regulation (no conditions have been prescribed to date).

Appendix F—Assessment and investigation process

Submissions received relevant to Terms of Reference item (a) were assessed in accordance with the following process.



Appendix G—Compliance and enforcement provisions

The QBCC has various powers under the QBCC Act and BIF Act that enable it to regulate the building and construction industry.

QBCC Act

Minimum Financial Requirements for licensing

When applying for a contractor's licence, a person or company must provide the QBCC with certain financial information. Once licensed, contractors must meet the MFR at all times, as a condition of their licences. The MFR is aimed at helping the QBCC to identify applicants or licensees who may not be operating a financially sustainable business, or who are at-risk of insolvency, and to take appropriate action.

The MFR includes a requirement to pay all debts owing to a contracted party or supplier of related goods and services on or before the day the debt becomes due and payable.

Under the QBCC Act, the Commissioner may approve an audit program for monitoring satisfaction of the MFR. Under such an approved audit, the QBCC may require a licensee to provide financial records and other documents. The QBCC may also ask for this documentation if it has reasonable grounds for concern that the licensee does not satisfy the MFR.

It is an offence to provide the QBCC false or misleading information about the MFR. A maximum penalty of 100 penalty units or two years imprisonment applies.

Entitlement to a licence

Excluded and disqualified individuals and convicted company officers

Under the QBCC Act, a person who becomes bankrupt or is involved in a construction company that is wound up becomes an 'excluded individual' and 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.

A person who accumulates 30 demerit points (which apply to various offences under the QBCC Act) within a three-year period becomes a 'disqualified person' and is similarly restricted from holding a QBCC contractor or nominee supervisor licence for three years.

A person who is convicted of an offence under section 596(1)(b) or (c) of the Corporations Act (which involves fraudulently transferring or concealing property) is deemed a 'convicted company officer' and not entitled to a contractor or nominee supervisor licence at any time.

In addition to the licence restrictions, excluded and disqualified individuals and convicted company officers cannot be a director, secretary, nominee or influential person for a licensed company. If an excluded individual is involved in a company, the company itself may be excluded.

The QBCC Act establishes procedures for the cancellation of a licence in the above circumstances.

Fitness and propriety

Section 31 of the QBCC Act requires the QBCC to be satisfied that an applicant for a contractor's licence is a fit and proper person to hold the licence. A company is entitled to a contractor's licence if the directors, secretary and influential persons are fit and proper persons to control or influence the company.

The factors that the QBCC may consider in deciding fitness and propriety include the standard of honesty and integrity demonstrated by the person in previous commercial and other dealings and any commercial and statutory obligations the person has not met and the reasons for that failure.

Investigator powers

Part 9 of the QBCC Act allows the QBCC to appoint investigators and sets out their powers for investigating, monitoring and enforcing compliance with the QBCC Act, BIF Act, Building Act and Plumbing and Drainage Act.

These include powers to:

- enter a place, including by consent or under a warrant
- after entering a place, powers to:
 - inspect, examine or make a recording of any part of the place
 - take samples for examination
 - place identifying marks on any part of the place
 - extract or copy a document
 - use any equipment or materials necessary to exercise a power
 - require an occupier of the place to give the investigator reasonable help in exercising a power
- seize material the investigator reasonably believes is evidence of an offence
- require the name and address of a person who is suspected of committing an offence
- require documents to be produced and certified
- require a person to attend an interview to answer questions.

The QBCC Act allows many of the above powers to be exercised for a 'compliance purpose', which include ascertaining whether a relevant Act is being complied with; no specific grounds (for example, reasonable suspicion of noncompliance) need to be satisfied.

Part 9 also includes several offences where a person does not comply with a requirement placed on them by an investigator, and an offence for obstructing an investigator.

Enforcement powers

The QBCC Act includes a suite of enforcement powers used to ensure that licensees and industry comply with legislative requirements and address noncompliance when it occurs.

The QBCC may impose conditions on a licence if it believes the licensee may have insufficient financial resources to satisfy their debts, or if there are other grounds for imposing a condition. It is also a condition for contractors to meet the MFR at all times.

The QBCC Act also outlines the circumstances in which the QBCC may suspend or cancel a person's licence, including where the licence was obtained by fraud, the licensee is convicted of an indictable offence or the licensee contravenes a licence condition.

Penalties are prescribed for almost 100 offences under the QBCC Act and the QBCC may issue infringement notices for some of these. Penalty infringement notice offences are prescribed under the *State Penalties Enforcement Regulation 2014* and are generally used to target low-level offending or less complex offences.

The QBCC may also take disciplinary action against licensees, former licensees and non-licensees under Part 6A. Types of disciplinary action include directing a licensee to pay compensation to another person, imposing monetary penalties and issuing a reprimand. Among the grounds for disciplinary action is where a licensee has committed an offence involving fraud or dishonesty relating to the business carried on under the licence.

Other relevant provisions

Other powers that allow the QBCC to regulate the building and construction industry include:

- offences for making false or misleading statements or providing false and misleading documents to the QBCC
- an offence where a person fails to comply with contractual obligations and as a result, causes another party to the building contract to suffer significant financial loss
- executive officer liability for certain offences relating to unlicensed building work
- director liability to pay penalties imposed under the Act.

The QBCC Act establishes a process for the prosecution of offences. A prosecution may be started within the later of two years of the commission of the offence or one year after the offence comes to the knowledge of the QBCC. The QBCC or the Attorney-General may authorise a person to bring a prosecution, however, the QBCC may not bring a prosecution for an offence under the Act that is a crime (being certain cases of unlicensed building work).

BIF Act

An investigator appointed under the QBCC Act may exercise powers under Part 9 of that Act to investigate compliance with the BIF Act. The QBCC may also approve an audit program under section 50A of the QBCC Act in relation to chapter 2 of the BIF Act (PBAs).

The BIF Act includes certain notification requirements that may alert the QBCC to potential noncompliance. For example, under section 52 of the BIF Act, a principal must inform the QBCC of any discrepancies in a payment instruction made by a head contractor. The QBCC also receives copies of adjudicator decisions which would alert it to payments owed by a respondent to a claimant. Failing to pay an adjudicated amount is an offence.

Appendix H—Interstate comparison of investigative and supervisory powers

Power	New South Wales	Victoria	Australian Capital Territory (ACT)	Tasmania	South Australia	Western Australia	Northern Territory
Legislation	<ul style="list-style-type: none"> • <i>Home Building Act 1989</i> • <i>Building and Construction Industry Security of Payment Act 1999</i> 	<i>Building Act 1993 (Vic)</i>	<ul style="list-style-type: none"> • <i>Construction Occupations (Licensing) Act 2004</i> 	<ul style="list-style-type: none"> • <i>Occupational Licensing Act 2005</i> • Occupational Licensing (Fit and Proper) Code of Practice 2010 (Code of Practice) 	<i>Building Work Contractors Act 1995</i>	<ul style="list-style-type: none"> • <i>Building Services (Registration) Act 2011</i> • <i>Building Services (Complaint Resolution and Administration) Act 2011</i> • <i>Construction Contracts Act 2004</i> 	<ul style="list-style-type: none"> • <i>Building Act 1993 (NT)</i> • <i>Construction Contracts (Security of Payment) Act 2004</i>
Regulator/administrator	Commissioner for Fair Trading, Department of Finance, Services and Innovation (the secretary)	Victorian Building Authority (VBA)	<ul style="list-style-type: none"> • ACT Construction Occupations Registrar (the registrar) • ACT Civil and Administrative Tribunal (ACAT) 	Administrator of Occupational Licensing (the administrator)	<ul style="list-style-type: none"> • Commissioner of Consumer Affairs (the commissioner) • District Court 	<ul style="list-style-type: none"> • Building Services Board (the Board) • State Administrative Tribunal (the Tribunal) 	<ul style="list-style-type: none"> • Director of Building Control (the director) • Building Practitioners Board (Practitioners Board) • Inquiry Board
Financial requirements (excluding insurance requirements)	Nil	Nil	When applying for a licence, the applicant must advise whether they have access to financial resources adequate to complete works performed under the licence.	Nil	<p>When applying for a contractor licence, an applicant needs to have sufficient financial resources for the purpose of properly carrying on the business authorised by the licence.</p> <p>To obtain a contractor licence to carry out 'specific building work', an applicant must have at least \$10,000 in net assets.</p> <p>A builder carrying out 'major residential construction' must, on application, provide evidence that the builder can obtain building indemnity insurance, or is solvent and has at least \$100,000 in net assets.</p> <p>Industrial commercial and civil builders must declare on application that they have the financial resources needed to carry on this type of business.</p>	<p>When applying for registration, or renewal of registration, as a building contractor an applicant must satisfy the Board that they have capacity to meet debts as and when they fall due.</p> <p>When assessing this, the Board may have regard to:</p> <ul style="list-style-type: none"> • the net assets of the applicant • liquid funds available to the applicant • loan or overdraft facilities available to the applicant • the applicant's equity in property or non-current assets that a loan facility may be raised against • the proposed scale of operation of the applicant • any other consideration relevant to the applicant's financial capacity. 	<p>When applying for registration, or renewal of registration, as a building contractor, an applicant must provide a net assets certificate that:</p> <ul style="list-style-type: none"> • is prepared and certified by a registered accountant • specifies the builder has at least \$50,000 in net tangible assets • is based on financial information no more than 12 months old. <p>A builder must continue to hold the required assets. The Practitioners Board may, at any time, require a builder to produce evidence of the builder's compliance with the assets requirement. Failure to comply may result in suspension of the contractor's registration.</p>
Audit powers	Nil—The secretary may only conduct audits in relation to licensed insurers and providers of Home Building Compensation cover.	Nil	Nil	Nil	Nil	Nil	The director may audit a building practitioner's work or conduct following a complaint, or at another time the director considers appropriate.

Power	New South Wales	Victoria	Australian Capital Territory (ACT)	Tasmania	South Australia	Western Australia	Northern Territory
<p>Entitlement to a licence/authority/registration:</p> <ul style="list-style-type: none"> Insolvency, bankruptcy and company collapse 	<p>A contractor's licence will be cancelled where the licensee becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with or makes an assignment of remuneration for the benefit of creditors, or is a company that is wound up or deregistered.</p> <p>The secretary may also suspend a company's licence if a controller or administrator is appointed to the company and the secretary believes there is a risk to the public that the licensee will be unable to complete building contracts.</p> <p>A person who is, or has been within the previous three years, an undischarged bankrupt or involved in a company that was wound up is only entitled to a tradesperson certificate (authorising an individual to work under supervision), unless the secretary is satisfied the person took all reasonable steps to avoid the bankruptcy or winding up.</p>	<p>The VBA must decide whether an applicant is a fit and proper person to be registered having consideration for the "financial probity requirements", including whether a person has previously been insolvent, externally administered or disqualified from managing a corporation. For a company, the director must be a fit and proper person.</p>	<p>A person who becomes bankrupt or personally insolvent may only provide construction services as a nominee or employee of a licensed entity.</p> <p>The <i>Construction Occupations (Licensing) Act 2004</i> also provides for a licence to be automatically suspended if:</p> <ul style="list-style-type: none"> an individual (other than a nominee or employee) becomes bankrupt or personally insolvent a company is wound up, or has a controller or administrator appointed. 	<p>Nil</p>	<p>The <i>Building Work Contractors Act 1995</i> allows a person who has been an insolvent under administration, subject to a composition or deed or scheme of arrangement with or, for the benefit of, creditors, or the director of a company that was wound up to apply for a licence. However, depending on when the event occurred, the person may be restricted to performing certain work or working as a subcontractor. If the person is the director of a company applying for a licence, the restrictions may be placed on the company's licence.</p>	<p>Nil, however, the Fiocco Report recommended adopting a similar model to that in Queensland.</p>	<p>Nil</p>
<ul style="list-style-type: none"> Fraudulent behaviour 	<p>A person may be disqualified from holding an authority if the person has been convicted (in New South Wales or elsewhere) of an offence involving dishonesty within the last 10 years.</p>	<p>The VBA must decide whether an applicant is a fit and proper person to be registered having consideration for the "personal probity requirements", including whether a person has been convicted of an offence (in Victoria or elsewhere) involving fraud or dishonesty that was punishable by more than 6 months imprisonment. For a company, the director must be a fit and proper person.</p>	<p>A company or partnership licence is taken to be automatically suspended if the company or an unlicensed partner is found guilty of an offence involving fraud or dishonesty that was punishable by at least one year imprisonment.</p>	<p>The Code of Practice sets out the matters the administrator may consider when determining whether a person is fit and proper to hold a licence. This includes whether a person has engaged in conduct that indicates fraud or deception in connection with contracts related to the performance of prescribed work.</p>	<p>Nil</p>	<p>Nil</p>	<p>Nil</p>

Power	New South Wales	Victoria	Australian Capital Territory (ACT)	Tasmania	South Australia	Western Australia	Northern Territory
<ul style="list-style-type: none"> Disciplinary history 	<p>A person is disqualified from holding an authority under the <i>Home Building Act 1989</i> if the person is disqualified or suspended from holding a licence, registration or other authority under a corresponding law of another jurisdiction.</p> <p>Before issuing an authority, the secretary must be satisfied that a person has not been subject to an unreasonable number of complaints, formal cautions or penalty notices.</p> <p>Also, the secretary may refuse an application for a contractor licence if it is in the public interest to do so because:</p> <ul style="list-style-type: none"> an employee of the applicant is: <ul style="list-style-type: none"> disqualified from holding a contractor licence has had an authority cancelled or suspended on disciplinary grounds, or refused on the basis of the person's character, honesty or integrity the applicant has intentionally avoided disclosing past misconduct (by the applicant or an associate of the applicant). 	<p>A person may also be excluded from registration if, within the previous two years, the person has had a relevant application for registration (in Victoria or elsewhere) refused because the application included false and misleading information.</p> <p>A person may be excluded from registration if the person, or an associate or related entity of the person, has been disqualified by a relevant disciplinary body (in Victoria or elsewhere) from applying for a licence, registration or other authority.</p>	<p>The <i>Construction Occupations (Licensing) Act 2004</i> establishes a system of demerit points. If a licensee accumulates more than 15 demerit points in three years, the registrar may disqualify the licensee for a stated period, suspend their licence or refuse a subsequent licence application.</p> <p>The registrar also may refuse to issue a licence if an individual applicant, a director or nominee for a company, or a partner in a partnership has been subject to disciplinary action or disqualified from holding a relevant licence, registration or other authority (in the ACT or elsewhere) as the result of disciplinary action.</p>	<p>A person is not entitled to a licence if the person is suspended or disqualified from practising or carrying on an occupation, trade or business under a relevant law of South Australia or another jurisdiction.</p>	<p>The administrator may refuse to grant a licence if the applicant has previously had a licence, registration or other authority as a contractor (in Tasmania or elsewhere) refused, suspended or cancelled.</p>	<p>A disqualified person (i.e. a person whose registration is cancelled by the Tribunal) cannot reapply for registration for a period of three months after the cancellation. The Board must also apply to the Tribunal for approval to register a disqualified person.</p> <p>If the Tribunal cancels or suspends the registration of a building service contractor which is a company, the Tribunal may declare an officer of the company to be an ineligible person for a period not exceeding three years.</p> <p>An ineligible person is prohibited from registration and cannot be an officer for a company that is a registered contractor.</p>	<p>Nil</p>
	Investigator powers	<p><i>Home Building Act 1989</i> The secretary may investigate the work or</p>	<p>The <i>Building Act 1993</i> (Vic) contains broad powers of entry and</p>	<p>A person may be appointed under the <i>Construction Occupations (Licensing) Act</i></p>	<p>The <i>Occupational Licensing Act 2005</i> allows an authorised</p>	<p>The <i>Building Work Contractors Act 1995</i> does not provide for the</p>	<p>The <i>Building Services (Complaint Resolution and Administration) Act 2011</i></p>

Power	New South Wales	Victoria	Australian Capital Territory (ACT)	Tasmania	South Australia	Western Australia	Northern Territory
	<p>conduct of an authority holder, regardless of whether a complaint has been received.</p> <p>An authorised person may enter premises to carry out an examination or inspection in connection with a structure or work. Authorised persons are also empowered to obtain information for various purposes.</p> <p><i>Building and Construction Industry Security of Payment Act 1999</i> The secretary may appoint an authorised officer to investigate compliance with section 13(7) or (8). An authorised person may require a head contractor or employee of a head contractor to provide documents relating to compliance with section 13(7) or (8).</p>	<p>investigation similar to those under the QBCC Act.</p> <p>These powers may be exercised for the purposes of determining compliance with the <i>Building Act 1993</i> (Vic) or the regulations.</p>	<p>2004 as a 'compliance auditor' (responsible for auditing forms and other paperwork provided by licensees) or an 'inspector' (responsible for inspecting work undertaken by licensees for compliance with relevant legislation).</p> <p>Both compliance auditors and inspectors have broad powers of entry and investigation similar to those under the QBCC Act. However, only inspectors have seizure powers.</p>	<p>officer to enter premises for the purposes of taking any action that is reasonably necessary or desirable for the purposes of that Act.</p> <p>Upon entry, an authorised person may require another person to produce records and answer questions.</p>	<p>appointment of investigators or similarly authorised persons.</p> <p>Rather, the Commissioner of Police must, at the request of the commissioner, investigate and report on matters relevant to the determination of a licence application or that might constitute grounds for disciplinary action.</p>	<p>contains broad powers of entry and investigation similar to those under the QBCC Act.</p> <p>Powers may be exercised for compliance purposes or for an investigation about a building service, home building work contract matter or a disciplinary matter.</p>	<p>enter premises to perform a function or exercise a power of the police officer, authorised officer or another person under the <i>Building Act 1993</i> (NT).</p> <p>Upon entry, an authorised officer may obtain records and information, and take samples of materials.</p>
Power to impose conditions on licence, registration or other authority (standalone power not as a consequence of disciplinary action)	<p>For contractors, it is condition that the contractor comply with a rectification order in relation to incomplete, damaged or defective building work.</p> <p>Contractors must also notify the secretary of particular changes, including to their name, address, a partnership, or to the director or nominee for a company, within seven days of the change.</p> <p>Contravening a condition of an authority is an offence.</p>	<p>On registration, the VBA must impose any prescribed conditions and may impose any other condition the VBA considers appropriate.</p> <p>It is a prescribed condition that a building practitioner does not allow another person to use the building practitioner's certificate of registration.</p> <p>Contravening a condition of registration is an offence.</p>	<p>The regulations prescribe several licence conditions including that licensees must notify the secretary of changes to a partnership, or changes to the director or nominee for a company, within one business day after the change.</p> <p>The registrar may place a condition on a licence if satisfied it is necessary or desirable to protect the public.</p> <p>The registrar may also issue a licence subject to conditions if the applicant has previously had a licence of the same type cancelled for more than one year.</p> <p>Contravening a licence condition is an offence.</p>	<p>The administrator may issue a licence subject to any conditions it considers appropriate. The administrator may also apply, vary or remove a condition of a licence at any time.</p> <p>Contravening a licence condition is an offence.</p>	<p>The commissioner may grant a licence subject to conditions limiting the work that may be performed under the authority of the licence.</p> <p>The commissioner may also impose conditions at another time if a licensee is engaging in conduct that may cause significant harm or damage unless urgent action is taken, or events have occurred such that the licensee would no longer be entitled to a licence.</p> <p>Contravening a condition of registration is an offence.</p>	<p>The Board may impose conditions at registration, renewal or during the term of the registration.</p> <p>Contravening a condition of registration is an offence.</p>	<p>The Practitioners Board may impose conditions on registration or renewal. The condition cannot be inconsistent with the Act, regulations or a determination made by the Minister.</p> <p>It is a condition that a builder, on renewal of registration, must give the Practitioners Board a net asset certificate.</p> <p>Contravening a condition of registration is an offence.</p>
Power to suspend or cancel licence, registration or other authority (standalone power not as a	Yes—The <i>Home Building Act 1989</i> provides broad grounds for cancellation of a licence similar to those under the QBCC Act.	Yes—The <i>Building Act 1993</i> (Vic) provides broad grounds for suspension or cancellation of a licence similar to those under the QBCC Act.	<p>Yes, including grounds for automatic suspension.</p> <p>A licence may only be cancelled through an occupational discipline order made by the ACAT.</p>	The administrator may cancel a licence if any of the statements or information contained in the licensee's application is found to be false or misleading.	The commissioner may suspend or cancel a licence if satisfied that the licensee no longer complies with the licensing requirements.	Registration may only be suspended (for no more than two years) or cancelled by the Tribunal in relation to a disciplinary matter.	The Practitioners Board must suspend the registration of a building practitioner if it is satisfied the practitioner no longer complies with the requirements for registration.

Power	New South Wales	Victoria	Australian Capital Territory (ACT)	Tasmania	South Australia	Western Australia	Northern Territory
consequence of disciplinary action)	The powers are less discretionary than those under the QBCC Act, with the <i>Home Building Act 1989</i> stating that the secretary "must" cancel a contractor licence in prescribed circumstances.	However, the authority is empowered to immediately suspend or cancel a licence in more cases. Mandatory cancellation applies if a practitioner is found not to be a fit and proper person.					The suspension has immediate effect. A builder's registration may only be cancelled through disciplinary action taken by the Inquiry Board.
Disciplinary action	Former authority holders only, who ceased to hold the authority within five years after the alleged conduct.	Suspended practitioners only, with disciplinary action to be taken within three years of the suspension.	Former licensees only	Former licensees only	Former licensees only	Former building service providers only	Former practitioners only, who ceased to be registered within three years after the alleged conduct.
• Application to former licensees and non-licensees							
• Grounds for disciplinary action	Includes similar grounds to those under the QBCC Act, as well as some additional circumstances where disciplinary may be taken. These include where: <ul style="list-style-type: none"> the secretary believes there is a risk to the public that the holder will be unable to carry out the work the holder has contracted to do the holder commits fraud or makes any misrepresentation in connection with a contract the holder knowingly employs, or engages under a contract for services, a person who is disqualified from holding a contractor licence, has had an application for an authority refused based on the person's character, honesty or integrity, or has had an authority cancelled or suspended on a disciplinary ground. 	The <i>Building Act 1993</i> (Vic) provides broad grounds for disciplinary action similar to those under the QBCC Act.	Includes similar grounds to those under the QBCC Act. Disciplinary action may also be taken where the licensee knowingly or recklessly gives someone information relating to a construction service that is false or misleading.	Includes similar grounds to those under the QBCC Act. Disciplinary action may also be taken where a licensee: <ul style="list-style-type: none"> gives someone information relating to prescribed work that is false or misleading is no longer a fit and proper person (as set out under the Code of Practice). 	The <i>Building Work Contractors Act 1995</i> provides broad grounds for disciplinary action similar to those under the QBCC Act.	Includes similar grounds to those under the QBCC Act. Disciplinary action may also be taken where the registered building service provider has engaged in conduct that is harsh, unconscionable, oppressive, misleading or deceptive in connection with a contract for the carrying out or completion of a building service or a variation of that contract.	The <i>Building Act 1993</i> (NT) provides broad grounds for disciplinary action similar to those under the QBCC Act.
• Type of disciplinary action that may be taken	The secretary may take similar types of disciplinary action to those under the QBCC Act. It also has the ability to: <ul style="list-style-type: none"> require an authority holder to undertake training relating to a particular type of work or business practice 	The VBA may take similar types of disciplinary action to those under the QBCC Act. It also has the ability to: <ul style="list-style-type: none"> require a practitioner to successfully complete specified training 	The registrar may take similar types of disciplinary action to those under the QBCC Act and also has the ability to require a licensee to successfully complete specified training.	The administrator may take similar types of disciplinary action to those under the QBCC Act. It also has the ability to: <ul style="list-style-type: none"> require a licensee to successfully complete specified training 	The District Court may take similar types of disciplinary action to those under the QBCC Act. It also has the ability to: <ul style="list-style-type: none"> disqualify a person from being licensed or registered under the Act 	The Tribunal may take similar types of disciplinary action to those under the QBCC Act. It also has the ability to: <ul style="list-style-type: none"> require a practitioner, or nominee supervisor for a contractor, undertake training 	The Inquiry Board may take similar types of disciplinary action to those under the QBCC Act. It also has the ability to: <ul style="list-style-type: none"> order a licensee to pay the director the reasonable cost of an investigation

Power	New South Wales	Victoria	Australian Capital Territory (ACT)	Tasmania	South Australia	Western Australia	Northern Territory
	<ul style="list-style-type: none"> disqualify a person from holding an authority, or being a member of a partnership or officer of a company. 	<ul style="list-style-type: none"> disqualify a person from being a nominee director for a company or involved in the management of a company disqualify a practitioner from being registered for up to three years. 		<ul style="list-style-type: none"> order a licensee to pay the reasonable cost of an investigation disqualify a licensee from holding a licence for a specified period. 	<ul style="list-style-type: none"> prohibit the person from being employed or engaged in the business of a contractor or consultant, or being the director of a building company. 	<ul style="list-style-type: none"> declare an officer of a contractor to be an ineligible person. 	<ul style="list-style-type: none"> require a practitioner to give an undertaking to do, or not do, a specified thing. <p>The Inquiry Board may also direct the director to audit the practitioner's work or conduct, or both.</p>
Offence/s for providing false and misleading information	Yes	<p>Yes—A person must not knowingly make a false or misleading statement, or provide false or misleading information, to a person or body carrying out any function under the <i>Building Act 1993 (Vic)</i> or the regulations.</p> <p>The application of this offence is broader than that of the equivalent offence under the QBCC Act, which is limited to statements or information provided to the QBCC.</p>	<p>Nil—However, the <i>Construction Occupations (Licensing) Act 2004</i> references the requirements of the ACT Criminal Code.</p>	Yes	<p>Yes—A person must not make a statement that is false or misleading in any information provided, or record kept, under the <i>Building Work Contractors Act 1995</i>.</p> <p>The application of this offence is broader than that of the equivalent offence under the QBCC Act, which is limited to statements or information provided to the QBCC.</p>	Yes	<p>Yes—It is an offence to provide a false or misleading statement in answer to an inquiry by an authorised officer.</p> <p>The director may also refer to the Practitioners Board matters where a building practitioner provides false or misleading information during an investigation or audit.</p>
<p>Mandatory or prohibited conditions for commercial building contracts and subcontracts</p> <p>NB: The security of payment Acts for each jurisdiction provide that 'pay when paid' provisions are void</p>	Nil	Nil	Nil	Nil	Nil	<p>Under the <i>Construction Contracts Act 2004</i>, provisions which require payment to be made more than 42 days after it is claimed are prohibited.</p> <p>The <i>Construction Contracts Act 2004</i> also implies certain contract conditions in the absence of a written condition. These include that—</p> <ul style="list-style-type: none"> the contractor is not bound to carry out a variation unless the contractor and the principal have agreed on the nature and extent of the variation and the amount, or means of calculating the amount, that the principal is to pay in relation to the variation if a principal becomes insolvent before goods supplied by a contractor become fixtures, the contractor must be given a 	<p>Under the <i>Construction Contracts (Security of Payment) Act 2004</i>, provisions which require payment to be made more than 50 days after it is claimed are prohibited. Any such provision must be read as requiring payment to be made within 28 days.</p> <p>The <i>Construction Contracts (Security of Payment) Act 2004</i> also implies certain contract conditions in the absence of a written condition, similar to those under the Western Australian <i>Construction Contracts Act 2004</i>.</p>

Power	New South Wales	Victoria	Australian Capital Territory (ACT)		Tasmania	South Australia	Western Australia	Northern Territory
							chance to recover the goods.	
Failure to comply with contractual conditions	A contractor is guilty of improper conduct if the contractor, without reasonable cause, breaches a contract to do any work the contractor is authorised to do under their licence. Improper conduct is grounds for disciplinary action.	Nil	Nil		Nil	Nil	Nil	Nil
Executive officer liability	A director is taken to be liable for offences by the company. It is also an executive officer liability offence for failing to notify the secretary that a company has been wound up or deregistered.	Any person involved in the management of a company is taken to be liable for an offence by the company.	Nil		The <i>Occupational Licensing Act 2005</i> applies vicarious liability of a person who: <ul style="list-style-type: none"> manages another person who commits an offence is the director or manager of an entity that commits an offence. 	A person carrying on a business is taken to be liable for an act or default of an officer, employee or agent of the business, unless it is proved the officer, employee or agent was acting outside their usual authority.	If a company is charged with an offence, each officer of the company may also be charged with the offence.	Any person involved in the management of a company is taken to be liable for offence by the company, unless the person can demonstrate they had no knowledge of the offence or could not have prevented the offence being committed despite exercising due diligence.
Prosecution of offences	Proceedings must be started within three years after the commission of the alleged offence.	Proceedings must be started within the later of three years after the commission of the alleged offence, or two years after the allegation comes to the knowledge of the VBA. Proceedings must not be started more than 10 years after the commission of an alleged offence.	Nil		Proceedings must be started within 12 months of an authorised officer becoming aware of the alleged offence.	Proceedings must be started within two years after the commission of the alleged offence or, if authorised by the Minister, a later time within five years after commission of the alleged offence.	Proceedings must be started within three years after the commission of the alleged offence.	Proceedings must be started within two years of police, the director or an authorised officer becoming aware of the alleged offence.

Appendix I—Taskforce operational arrangements

Taskforce staff

The Taskforce Head would like to acknowledge the support of HPW, QPS, QBCC and the Department of Justice and Attorney-General in providing staff to the Taskforce.

Support for Taskforce members

Psychological and physical wellbeing support was made available to Taskforce staff through Strive Occupational Rehabilitation (Strive) and the Employee Assistance Program provided by Benestar.

A representative from Strive provided a briefing to Taskforce members on 3 April 2019 on resilience, dealing with difficult situations, and ergonomics.

Taskforce members were invited to contact Strive and Benestar if they required support.

Location

The Taskforce was accommodated at 53 Albert Street, Brisbane.

Submission management

The Taskforce accepted submissions relating to items (a) and (c) of the Terms of Reference.

HPW contracted with Law in Order to provide a portal which allowed for the online provision of submissions and supporting documentation. Submissions were also accepted by email, post, and in person. Each submission was allocated a unique reference number, which was provided to the submitter for later reference.

All submissions, supporting documentation and internally generated records were transferred and managed in an electronic information management solution, Relativity, which was supported by Law in Order.

Recordkeeping

HPW has responsibility for ensuring the safe keeping and preservation of the records created or received in connection with the Taskforce. This includes compliance with the *Public Records Act 2002* and the *Government Records Governance Policy*.

Taskforce records will be maintained using the *Commissions of Inquiry Retention and Disposal Schedule*. This schedule has been approved by the State Archivist for use by independent reviews established by a Minister.

All submissions, including supporting evidence relevant to the Terms of Reference, will be kept permanently. Submissions and supporting documentation outside the scope of the Terms of Reference will be kept for 10 years.

Records relating to general or common administrative functions of the Taskforce, such as financial management, accommodation or workforce management, will be maintained using the *General Retention and Disposal Schedule*.

Permanent hard copy records of the Taskforce may be transferred to Queensland State Archives. HPW will manage the digital records of the Taskforce. HPW will set the restricted access periods and make decisions on access to records in Queensland State Archive's custody.

Appendix J—Glossary

Term	Description
ACCC	Australian Competition and Consumer Commission Australia's competition regulator and national consumer law champion
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission Australia's corporate, markets and financial services regulator
ATO	Australian Taxation Office
BCIP Act	<i>Building and Construction Industry Payments Act 2004</i>
BIF Act	<i>Building Industry Fairness (Security of Payment) Act 2017</i>
Building Act	<i>Building Act 1975</i>
Collins Inquiry	Inquiry into Construction Industry Insolvency in New South Wales (Bruce Collins QC, 2012)
Competition and Consumer Act	<i>Competition and Consumer Act 2010 (Cth)</i>
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
CPD	Continuing professional development
Criminal Code	<i>Criminal Code Act 1899 (Qld)</i>
Crown Law	Unit of the Department of Justice and Attorney-General that provides legal services to the Government
HPW	Department of Housing and Public Works
ESO	Electrical Safety Office Queensland's electrical safety regulator
Fiocco Report	Security of Payment Reform in the WA Building and Construction Industry (John Fiocco, 2018)
MCC	Ministerial Construction Council Convened by Minister de Brenni for consultation on industry reforms
MFR	Minimum Financial Requirements for licensing
Minister de Brenni	Honourable Mick de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport
MPAQ	Master Plumbers' Association of Queensland
Murray Review	Review of Security of Payment Laws: Building Harmony and Trust (John Murray AM, 2017)
ODPP	Office of the Director of Public Prosecutions Represents the State in criminal cases
OQPC	Office of the Queensland Parliamentary Counsel Statutory authority established under the <i>Legislative Standards Act 1992</i> responsible for drafting legislation for the Government
PBA	Project Bank Account
Plumbing and Drainage Act	<i>Plumbing and Drainage Act 2002</i>

Term	Description
Portal	The tool used to facilitate online lodgement of submissions
Premier	The Honourable Anastacia Palaszczuk MP, Premier and Minister for Trade
QBCC	Queensland Building and Construction Commission Queensland's building industry regulator
QBCC Act	<i>Queensland Building and Construction Commission Act 1991</i>
QLeave	Provides long service leave to workers in Queensland's building and construction and contract cleaning industries
QPS	Queensland Police Service
Relativity	The tool used to manage all submissions received by the Taskforce
Senate Inquiry	Senate Economics References Committee 2015 inquiry into insolvency in the Australian construction industry