

# Building Fairness

## An Evaluation of Queensland's Building Industry Fairness Reforms

Report of the Building Industry Fairness Reforms  
Implementation and Evaluation Panel pursuant  
to section 200A of the *Building Industry Fairness  
(Security of Payment) Act 2017*.



Queensland  
Government



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March 2019

# The Building Industry Fairness Reforms Implementation and Evaluation Panel

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This report is prepared by the Building Industry Fairness Reforms Implementation and Evaluation Panel which is comprised of:

## **Bronwyn Weir – Chair**

Bronwyn Weir has been a lawyer for over 20 years. She advises government on regulatory practice, enforcement and compliance matters.

Bronwyn was co-appointed with Professor Peter Shergold by the Building Ministers' Forum to make recommendations on a national best practice approach to regulation of the building sector. This work was commissioned shortly after the London Grenfell Tower fire. The appointment reflects Bronwyn's in-depth knowledge of building regulation and her detailed knowledge of the National Construction Code. She is also a legal advisor to the Victorian Cladding Taskforce.

In addition to the building sector, Bronwyn has advised regulators in the education sector including early childhood and vocational education, the health sector, primary industries, animal welfare and food safety. She has conducted reviews of regulatory systems and processes and advises regulators on administrative law, enforcement and operationalising risk-based decision-making.

## **Jennifer Robertson – Deputy Chair**

Jennifer Robertson is the Managing Director of corporate governance consulting firm, Board Matters. Established in 2002, Board Matters provides specialised and tailored governance services for boards and their directors. These services include board reviews, structural reviews and trouble-shooting advice. Board Matters clients include ASX listed companies, Government Owned Corporations, not-for-profit entities and small to medium enterprises.

After more than 10 years as a private practice lawyer, including eight years as a construction and engineering lawyer in a large national law firm, Jennifer made the strategic career move to become a corporate governance consultant at Board Matters in 2006. During her time at Board Matters, Jennifer has maintained a portfolio of roles including governance consultant, practicing lawyer, company director and facilitator for the Australian Institute of Company Directors.

Jennifer currently maintains a number of company director roles. These include as Deputy Chair of the Queensland Building and Construction Commission, Chair of the Defence Reserves Support Council Queensland, Deputy Chair of the Building Industry Fairness Implementation and Evaluation Panel and she is the first non-pilot director on the board of Brisbane Marine Pilots in its 30-year history. She is a Fellow of the Australian Institute of Company Directors and Governance Institute of Australia, and Member of the Queensland Law Society.

## Troy Lewis – Member

Troy is the National Head – Construction and Infrastructure at Holding Redlich. He is a construction litigator specialising in arbitration, expert determination and substantive litigation of construction disputes in all states and territories of Australia.

Troy also specialises in claims involving the Security of Payment Acts Australia wide. This extensive experience ensures that Troy and the entire security of payment team understand the tips, tricks and traps associated with such claims.

Troy has extensive experience advising and acting on behalf of clients in relation to construction disputes (substantive litigation in all superior courts, arbitration, expert determination and mediation) in a number of sectors including major commercial construction, civil works projects, infrastructure projects, water, energy and resources projects, Public Private Partnerships, Liquefied Natural Gas projects and mining projects.

An industry expert in construction litigation, Troy has been recognised in 2012, 2013, 2014, 2015, 2016, 2017, 2018 and 2019 *Doyle's Guides* as one of the Leading Construction and Infrastructure Lawyers in Queensland. Troy is also named in the 2014, 2015, 2016, 2017, 2018, 2019 and 2020 editions of the *Best Lawyers in Australia guide* in the area of Construction/Infrastructure Law.

### Qualifications

- Bachelor of Laws (Hons)—Queensland University of Technology
- Bachelor of Business (Accounting)—Queensland University of Technology.

## Fionna Reid – Member

Fionna is Managing Director at Aitchison Reid Building and Construction Lawyers, a firm which specialises in working for Queensland's subcontractors, trade contractors, developers and homeowners.

Since becoming a construction lawyer in 2002, Fionna has proactively educated subcontractors on security of payment both here and overseas. In Queensland, Fionna actively participated in Queensland Government security of payment consultations, made submissions on security of payment and was called as a witness to the Queensland Parliamentary subcommittee. Fionna is a vocal advocate for subcontractors and fairness in the construction industry.

Fionna has worked in multiple aspects of construction law including adjudication, court proceedings, alternative dispute resolution, contract drafting and contract review, both here and overseas.

Fionna was the first person in New Zealand to complete co-joint Law and Building Science degrees. Fionna is the co-founder of Women in Building and Construction group and a National Association of Women in Construction (QLD) award winner for 2016.

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# Executive Summary

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This report from the Building Industry Fairness Reforms Evaluation and Implementation Panel (Panel) is made pursuant to section 200A of the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act).

The Panel was appointed to undertake an evaluation of the implementation of the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act). We were tasked with determining the effectiveness of the legislative framework in meeting the policy intent and identifying opportunities for improvement of security of payment outcomes.

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

The Panel has concluded that the Building Industry Fairness Act reflects the Government's policy intent. By passing the Act and commencing a 'trial' of a PBA framework, the Government has been able to test the model and seek the Panel's advice on refinements that will ensure the PBA reforms are as effective as possible.

Since the commencement of the PBA reforms, 100 PBAs have been awarded to 41 head contractors for building works valued over \$400 million. Our evaluation included over 30 hours of meetings with around 100 representatives from many of the entities involved in projects with PBAs.

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

Our report contains 20 recommendations, which can be summarised under the following key themes:

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

## *Managing the financial transition*

The PBA reforms will require many head contractors to change their business practices. They will be prohibited from using retentions or project funds as part of their cash flow. Many will need to source additional capital by increasing debt or liquidating assets. This financial transition, whilst an intended consequence, will cause disruption. Some contractors may choose to restructure, others will be able to increase their asset base over time.

The Panel considers that the effective management of this financial transition is essential to the success of the reforms. Destabilisation of the sector through head contractor stress or failure will not be good for head contractors, subcontractors or the community as a whole.

Accordingly, we have made a recommendation there be three further phases to the introduction of the PBA reforms. This recommendation is based on analysis of data which estimates that around 63% of contracts that will be subject to a PBA are valued between \$1 million and \$3 million.

By gradually reducing the contract value that is subject to a PBA, the financial impact can be managed to give all head contractors the best opportunity to transition their businesses towards improved viability.

Consistent with the current framework, a PBA will not be required for building contracts under \$1 million or domestic building contracts involving less than 3 dwelling units. This means that renovations to homes and the construction of homes for first home buyers will not require a PBA.

The recommended phase in of the PBA reforms will provide time for banks and accounting software providers to develop market readiness by adjusting their products and services as the demand for new bank accounts increases. It will also allow for Government, the QBCC and industry bodies to conduct ongoing implementation activities to educate and support stakeholders through the cultural transition.

### *Simplifying the framework*

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

If our recommendations are adopted, all project funds will continue to be deposited into a project trust account by the principal. From that account, monies liable to be paid to subcontractors will remain protected and have priority over payments to head contractors. However, to simplify the framework, the Panel has recommended replacement of the disputed funds trust account and retention trust account with the improved protections discussed below.

If our recommendations are adopted, the QBCC will replace the role of the principal to oversight the PBA. The QBCC will need enhanced powers to enable effective monitoring and enforcement. This will provide consistent oversight and an essential level of integrity to the framework.

The recommendations also simplify the definitions of ‘building work’, ‘subcontractors’ and ‘suppliers’ resulting in increased clarity over when a PBA must be established, by whom and who the beneficiaries of the PBA will be.

### *Improving protections*

A range of submissions made to the Panel pointed out areas where the BIF Act did not offer adequate protection. They argued that the PBA framework did not provide protection for sub-subcontractors. There were repeated calls for increased protection for head contractors when principals paid late. Although the PBA framework provides for a disputed funds trust account, some stakeholders remained concerned about whether adjudicated amounts would be available and paid following a successful adjudication. The Panel has made a series of recommendations that seek to alleviate each of these concerns.

In relation to the call for increased protection along the contractual chain, in place of the retention account as part of the PBA, the Panel has recommended a single retention trust account be held by all contractors in the contractual chain and also by private sector principals. Appropriate phasing in of this requirement aligned to the phasing in of PBAs is recommended.

We recommend that both the project bank accounts and the retention trust accounts be supported by the creation of detailed trust accounting records that are regularly audited. Contractors and any prescribed person wishing to hold retentions, should have to undertake compulsory training and assessment on the management of a retention trust account by a specified date. In addition, we recommend the money held in the retention trust account be secured by a charge.

If our recommendations are adopted the Government will be ensuring that, to the greatest extent possible in state laws, monies held in a PBA or retention trust account for subcontractors are protected in the event of an insolvency.

In place of the disputed funds account, the Panel recommends improved mechanisms to increase the likelihood of receiving disputed amounts following adjudication, including the ability to issue a payment withholding request or where the adjudication is against a principal, a charging order over relevant land.

The above requirements and mechanisms will be available to all parts of the contractual chain, whether or not the head contract requires a PBA.

### *Role of industry in our work*

Our recommendations have been influenced by constructive feedback from Queensland's building and construction industry. The Panel wishes to acknowledge the input from the Industry Reference Group appointed to complement our work and the time and effort spent by many stakeholders to provide the Panel with valuable insights and suggestions for our work.

The Panel also acknowledges the participants in Phase 1 of the PBA reforms. Each person the Panel spoke to was committed to understanding and complying with the PBA reforms. There was clear evidence of genuine investment of time and money in applying these reforms to businesses over several months. Each member of this group came to us with reasoned and constructive feedback. Their efforts have been made on behalf of the broader construction industry and are to be commended.

Finally, we thank our dedicated secretariat for their invaluable support. They have been diligent, responsive and hard working in their contribution to our work.

# Synopsis of Recommendations

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Our recommendations simplify the PBA framework without compromising the policy intent. The Panel recommends that:

- each head contractor continues to be required to open one project bank account for each project into which all project funds are paid (Recommendation 12);
- a separate retentions trust account no longer be required for each project (Recommendation 6); and
- the disputed funds trust account no longer be required (Recommendation 3).

As an alternative to the disputed funds trust account and the retention trust account, the panel makes recommendations to strengthen protections.

In relation to the enforcement of disputed funds and debts due, the Panel recommends the following additional protections for all claimants:

- that it be an offence for a person given a payment claim to pay less than the amount stated in the payment schedule (Recommendation 4);
- that the claimant in an adjudication be able to issue a payment withholding request to a party above the respondent to require sufficient money to be retained to cover the claimed amount (Recommendation 5);
- if the claimant in the adjudication is a head contractor claiming against a respondent principal, then the head contractor may:
  - › issue a withholding request on any financier or funder of the project (Recommendation 5);
  - › subject to certain restrictions, issue a charge over the property on which the building works the subject of the adjudication application is being carried out (Recommendation 5); and
- extending the warning notice in section 99(3) to 60 business days after the due date for payment or such other time as prescribed (Recommendation 20).

As an alternative to a retention trust account for each project, the Panel recommends that any contractor withholding retentions be required to hold them in a single retention trust account. This will extend the obligation to hold a retention trust account to any party in the contractual chain and to private sector principals. All contractors and prescribed persons would need to undertake compulsory training in order to be able to hold retentions (Recommendations 6 and 8).

To ensure that the bank accounts established under the BIF Act are recognised as trust accounts, the Panel recommends that the head contractor:

- keeps and maintains detailed records of transactions (consistent with trust accounting principles);
- undertakes compulsory training on how to manage accounts in accordance with trust principles; and
- be subject to mandatory external auditing of the trust accounting records.

The Panel also recommends that bank accounts include the name 'trust' so that third parties, including banks, are put on notice that monies in these accounts are held on behalf of beneficiaries. Further, the Panel recommends the BIF Act be amended to charge the monies held in the retention trust account (Recommendations 7 for retention trust accounts, and recommendation 13 for PBA accounts).

To give greater clarity to the application of the BIF Act, we recommend aligning the definition of 'building work' with the definition in the QBCC Act. Minor adjustments to definitions clarify that beneficiaries to a PBA include:

- subcontractors carrying out construction work (including civil works) where the head contract is a PBA; and
- consultants who undertake building contracts for design work (but without requiring these consultants to establish a PBA) (Recommendation 2).

We also recommend that Government be given the power to make regulations so that if, after further evaluation it considers it necessary, it can introduce:

- a minimum contract value for subcontractors to be beneficiaries to a PBA; or
- provide for a PBA to be established by first-tier subcontractors in certain circumstances (Recommendation 2).

In response to representations made about principal oversight of the PBA framework, the Panel recommends that the QBCC be the body with oversight of PBAs and retention trust accounts (Recommendations 9, 14, 15, 16, 18).

Our recommendations replace the detailed reporting requirements in the current framework with:

- reporting to principals on limited key matters such as the PBA being opened, closed or the name changed. However, so that the principal can be assured that payments are being passed down the contractual chain, the Panel is also recommending that a supporting statement be made by the head contractor with every payment claim. The supporting statement will set out what work has been paid for, and if any payment for work remains outstanding. If this supporting statement is made falsely, the Panel recommends it be an offence, which can be enforced by the QBCC (Recommendation 11); and
- an obligation on head contractors to give subcontractors details of all amounts to be paid under the subcontract for progress payments as well as cash retentions (Recommendation 19).

Currently PBAs are only required for State Government contracts with a value of \$1M to \$10M (including GST). To better manage the financial transition that will result from the implementation of the PBA reforms, the Panel recommends the following phases:

- Phase 2: add all Government and private projects valued at \$10M (excluding GST) or more;
- Phase 3: add private projects in the range of \$3M to \$10M (excluding GST); and
- Phase 4: add private projects in the range of \$1M to \$3M (excluding GST).

The timing of the commencement of each phase be as follows:

- Phase 2: at least 2 months after the passing of any amendments to the BIF Act;
- Phase 3: 4-6 months after Phase 2; and
- Phase 4: 4-6 months after Phase 3 (Recommendation 1).

The Panel recommends that the requirement to hold a retention trust account be aligned to the phases referred to above. In Phases 2 and 3, all head contractors and private sector principals must hold any retentions in a retention trust account. In Phase 4, retention trust accounts will apply to all contractors holding retentions relating to 'building work' and any private sector principal on a PBA project (Recommendation 10).

## Terminology and Acronyms

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<b>Adjudication Registry</b>	The independent judicial office created by the BIF Act (formerly BCIPA) to oversee adjudication, which is a fast-track dispute resolution process designed to determine, on an interim basis, disputes between the claimants and respondents of payment claims as defined in the BIF Act
<b>AMCA</b>	Air-Conditioning and Mechanical Contractors Association
<b>BAS</b>	Building and Asset Services, part of DPHW
<b>BCIPA</b>	<i>Building and Construction Industry Payments Act 2004</i> (repealed in December 2018)
<b>BIF Act; Act</b>	<i>Building Industry Fairness (Security of Payment) Act 2017</i>
<b>Chapter 3 reforms</b>	Payment reforms which modify previous laws to improve protections and processes for payment claims and payment schedules and streamline adjudication.
<b>Claimant</b>	As per 75(1) of the BIF Act
<b>DHPW; the department</b>	The Queensland Department of Housing and Public Works
<b>Fiocco Report</b>	John Fiocco, <i>Security of Payment Reform in the WA Building and Construction Industry</i> (October 2018)
<b>Government</b>	Queensland State Government unless otherwise stated
<b>HIA</b>	Housing Industry Association Limited
<b>IRG</b>	Industry Reference Group
<b>MBAQ</b>	Master Builders Association Queensland
<b>MFR</b>	Minimum Financial Requirements
<b>Minister</b>	Hon. Mick de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology, Minister for Sport
<b>Murray Report</b>	John Murray, <i>Review of Security of Payment Laws: Building Trust and Harmony</i> (December 2017)
<b>NCBP Act</b>	<i>Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017</i>
<b>NFIA</b>	National Fire Industry Association
<b>NSW</b>	New South Wales
<b>Panel</b>	Building Industry Fairness Reforms Implementation and Evaluation Panel
<b>PC</b>	Practical completion
<b>PBAs</b>	Project Bank Account/s
<b>principal</b>	Any entity that engages a builder to carry out building work including government bodies, developers and owners
<b>QBCC</b>	Queensland Building and Construction Commission
<b>QBCC Act</b>	<i>Queensland Building and Construction Commission Act 1991</i>
<b>SERC Inquiry Report</b>	Senate Economics References Committee (SERC), Commonwealth Parliament, <i>Insolvency in the Australian Construction Industry</i> (2015)
<b>TOR</b>	Terms of Reference
<b>UK</b>	United Kingdom
<b>USA</b>	United States of America
<b>WA</b>	Western Australia

# PART A – Introduction

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## 1. Background

The building and construction industry is one of the pillars of the Queensland economy. It contributes \$43 billion to the State economy each year and employs around 230,000 people which is about 10% of Queenslanders. About half of all building work performed in Queensland is performed in the housing and commercial sectors whilst the other half is performed in the civil or infrastructure sector.

Governments across Australia have grappled with how to respond to concerns about high rates of insolvency and a lack of security of payment in the construction industry over many years. Since 1999, each jurisdiction has introduced security of payment legislation to try to improve cash flow by establishing a fast track adjudication process.

There have been numerous government reviews and reports which have considered the effectiveness of security of payment laws. One of the more recent was the Senate Economics References Committee Inquiry into Insolvency in the Australian Construction Industry (the SERC Inquiry Report).<sup>1</sup> The SERC Inquiry Report found that:

- Businesses operating in the construction industry are at a higher risk than any other single industry of either entering into insolvency themselves or becoming a victim of insolvency further up the contracting chain.<sup>2</sup>
- The construction industry's rate of insolvencies is out of proportion to its share of national output. Over the past decade the construction industry has accounted for 8–10% of Gross Domestic Product (GDP), but also accounted for 20–25% of all insolvencies in Australia.<sup>3</sup>
- This results in an industry burdened by nearly \$3 billion in unpaid debts per year including an average of \$630 million per year relating to unpaid subcontractors, employee entitlements and tax debt.<sup>4</sup>
- '... A principal cause of insolvency in the construction industry is poor payment practices'.<sup>5</sup> These practices are compounded by the difficulties arising from the pyramidal structure of the industry, which inequitably allocates risk to those least able to bear it.<sup>6</sup>

Coinciding with the work of the SERC, the Queensland Government began extensive consultation on proposed reforms to its building and construction laws. The *Security of Payment Discussion Paper* was released in December 2015. In November 2016 the *Queensland Building Plan* was released for consultation. There was a high level of interest during the consultation process. Consultation sessions on the Queensland Building Plan were attended by over 1100 people. The *Building Industry Fairness (Security of Payment) Bill 2017* (BIF Bill) was subject to review by the Public Works and Utilities Committee. The report of the Committee was informed by 33 written submissions and a public hearing attended by 36 witnesses ([Report No. 50](#)).

In 2017, the Queensland Government passed the following legislation:

- the *Building and Construction Legislation (Non-conforming Building Products-Chain of Responsibility and Other Matters) Amendment Act 2017* (NCBP Act), which received Royal Assent on 31 August 2017; and
- the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act) which received Royal Assent on 10 November 2017 and was later amended by the *Plumbing and Drainage Act 2018*.

The suite of reforms affects a diverse range of industry participants. The reforms have been controversial, in part because some aspects impose requirements on the industry which other jurisdictions in Australia do not have. Because of this, the reforms have been described as nation-leading in imposing the strictest controls to ensure security of payment that the industry has ever seen. At the time the BIF Bill was introduced, concerns were raised about the unintended impacts of the reforms. Stakeholders were polarised in their views for and against the reforms. This remains the case today.

Because of the nature of these reforms and the reaction from stakeholders, in passing the BIF Act, the Government agreed that a review of the operation and effectiveness of the 2017 reforms be conducted and that a report on the outcome of the review be tabled by the Minister in Parliament.<sup>7</sup> This document is that report.

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1 Senate Economics References Committee (SERC), Commonwealth Parliament, [Insolvency in the Australian Construction Industry](#) (2015)

2 *Ibid*, Chapter 2

3 *Ibid*, xviii

4 *Ibid*

5 *Ibid*, p. 121

6 *Ibid*

7 Section 200A of the BIF Act provides for this evaluation

## 2. Role of the BIF Panel

### 2.1 Terms of Reference

The Panel was appointed on 12 May 2018 for a term of approximately 12 months.

The Panel's Terms of Reference (TOR) are set out in **Attachment B**. The task of the Panel was to review the operation and effectiveness of the suite of building and construction reforms. The Panel was required to work with the Government and stakeholders to determine:

1. the effectiveness of the Government's implementation of the suite of building industry reforms;
2. the effectiveness of the legislative framework in achieving policy intent;
3. opportunities to realise improved security of payment outcomes for industry prior to the commencement of project bank accounts in the private sector; and
4. the indicative economic impacts and outcomes of the building industry reforms.

Although the TOR require the Panel to include in its work an evaluation of the NCBP Act, in September 2018, by agreement with the Minister, the initial focus of the Panel's work was limited to the reforms in the BIF Act.

### 2.2 Industry Reference Group

The Panel's TOR required the establishment of an Industry Reference Group (IRG), which was intended to complement the work of the Panel.<sup>8</sup>

The IRG was established in October 2018. The list of members of the IRG is at **Attachment C**. The TOR of the IRG included participation in meetings; providing written and oral feedback to the Panel; assisting the Panel to develop its evaluation strategy and discussion paper; and facilitating stakeholder feedback from each of the groups that the IRG members represent.

### 2.3 Evaluation Plan

The Panel developed an *Evaluation Plan*, Stakeholder Engagement Plan and Work Plans in consultation with the Minister and the IRG. These plans were published on the Panel's webpage in November 2018.<sup>9</sup> Pursuant to these plans, the Panel undertook a range of activities grouped as follows:

- consultation with parties to PBAs in Phase 1 of the reforms, which included engagement with principals, head contractors, first-tier subcontractors and financial institutions offering PBAs;
- a broad stakeholder consultation process, which consisted of:
  - › seeking submissions to a discussion paper;
  - › providing an opportunity to complete a questionnaire; and
  - › conducting seven industry forums and two subcontractor sessions across nine locations around the State;
- seeking information from the DHPW and the QBCC about their implementation activities;
- regular meetings with the IRG;
- the collection and assessment of relevant industry data; and
- meetings with other relevant groups, individuals and advisors to the building and construction industry including representatives from the WA and NSW Governments, Queensland's Solicitor General, Australian Restructuring Insolvency and Turnaround Association, the Queensland Law Society, the Property Council of Australia, Fair and Square Payments and Mates in Construction.

The Panel was assisted in some of its evaluation activities by consultants PriceWaterhouseCoopers.

**Attachment D** to this report lists all activities undertaken by the Panel.

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<sup>8</sup> second reading speech for the BIF Act on 25 October 2017

<sup>9</sup> <http://www.hpw.qld.gov.au/construction/BuildingPlumbing/Building/SecurityOfPayment/Pages/BIFReformsImplementationEvaluationPanel.aspx>

In addition to the above, the Panel undertook a review of relevant recent reports including:

- Public Works and Utilities Committee *Report 50*, related submissions and public hearing records;
- SERC Inquiry Report;
- Australian Small Business and Family Enterprises Ombudsman report on [Payment Times and Practices](#);
- Review of Security of Payment Laws: Building Trust and Harmony by John Murray ([Murray Report](#)); and
- Security of Payment Reform in the WA Building and Construction Industry by John Fiocco ([Fiocco Report](#)).

The Panel also undertook research of relevant laws in other jurisdictions including the United Kingdom (UK), Canada, New Zealand and the United States of America (USA), in particular laws relating to liens, statutory trusts and project bank accounts.

### 3. Policy intent and objectives of the reforms

As part of this work, the Panel was asked to determine the effectiveness of the legislative framework in achieving policy intent. In determining the Government's policy intent, the Panel has had regard to:

- the [explanatory notes](#) to the BIF Bill;
- the [second reading speech](#) for the BIF Bill; and
- the objectives as stated in the BIF Act.

The BIF Act states that its purpose is to help people working in the building and construction industry in being paid for the work they do (s 3(1)).

The policy objectives set out in the explanatory notes to the Bill include:

- to improve security of payment for subcontractors in the building and construction industry by providing effective, efficient and fair processes for securing payment, including a framework to establish PBAs; and
- increased ease of access to security of payment legislation.

The intent of this legislation is that:

- PBAs will provide greater security in events such as insolvency, where money within these trust accounts is effectively quarantined for subcontractors who are beneficiaries to the trust;
- faster progress payments will be made to those who carry out work; and
- the systemic changes in the BIF Act will effect cultural change in the industry and protect subcontractor payments leading to reduced family breakdown, greater business confidence and more fairness in the industry.

In his introduction speech on 22 August 2017, Minister de Brenni stated:

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*For far too long subcontractors have suffered an unreasonably high level of risk and burden of financial loss associated with the building and construction industry. The majority of the risk in a \$44 billion industry has been placed on the shoulders of those who have the least power, and the result has been a disaster for small and medium sized subcontracting businesses. Non-payment has busted apart families. It has made people homeless. It has been a mental health disaster...*

*It is clear that what would normally be considered poor business practice has become a standard operating model for some licensees in the industry. Higher contractors often delay or do not make payments to subcontractors in order to supplement their own cash flow, offset the costs of other projects or to siphon off funds for their own personal benefit. Builders who do the right thing are forced to compete with rogue players who do not pay their subcontractors...*

*The bill will establish a framework for project bank accounts for both government and private sector building and construction projects. Project bank accounts are trust accounts where progress payments, retention moneys and disputed funds will be safely held in trust for the subcontractor...*

*One of the most important things about a PBA is that, in the event of head contractor insolvency, money in the PBA will be protected from other creditors. This means that progress payments in the PBA are protected, retention moneys in the PBA are protected and payments in dispute in the PBA are protected.*

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## 4. Overview of BIF

The BIF Act contains a number of measures intended to improve security of payment in the construction industry as follows:

1. **QBCC powers** were strengthened to include greater penalties for unlicensed building work and clarifying influential person provisions to combat illegal phoenixing. These reforms commenced in November 2017.
2. **PBA reforms** which are new and require the opening of bank accounts, which are trust accounts, through which money from the principal must flow to subcontractors. The PBA framework requires separate bank accounts for project funds, retentions and disputed funds. The PBA reforms prevent funds due to subcontractors from being used for purposes other than the project. Phase 1 of the reforms require PBAs on State Government projects with a contract value between \$1 million and \$10 million (including GST) (Phase 1). Phase 1 commenced on 1 March 2018. Phase 2 requires PBAs on all government and private sector building contracts over \$1 million. Phase 2 is yet to commence.
3. **Payment reforms** which modify previous laws to improve protections and processes for payment claims and payment schedules and streamline adjudication. The reforms are also commonly referred to by stakeholders as the 'Chapter 3 reforms'. These commenced on 17 December 2018.
4. **Adjudicator reforms** which introduce a requirement for adjudicators to hold qualifications, undertake compulsory training and comply with a code of conduct. These reforms commenced on 17 December 2018.
5. **Retentions and security for performance reforms** which are new provisions that apply to all building contracts which provide for retentions or security for performance. These provisions give greater certainty about the time period for the withholding of retentions or security for performance. They also create a process for the return of retention monies. These also commenced on 17 December 2018.
6. **Minimum Financial Requirements (MFR)** which strengthen the obligations on licensed contractors to demonstrate that they meet MFR. These changes enable the QBCC to have greater oversight of the financial position of contractors. They also require the MFR to be set out in regulations. The enhancements commence over two phases, on 1 January 2019 and 2 April 2019.
7. **Improving the fairness of contracts** which will consist of new requirements for building contracts to include 'mandatory conditions' prescribed by regulations. The content of these new regulations is under development.

## 5. Structure of this report

In this report, the Panel has evaluated the commencement of the reforms set out in 2, 3, 4 and 5 above as well as the overall implementation approach taken by Government. This report is structured as follows:

- Part B – PBA Reforms and in particular Phase 1 of those reforms which commenced on 1 March 2018.
- Part C – Payment Process, Adjudicator and Retentions Reforms which commenced on 17 December 2018.
- Part D – Overall implementation approach of Government including its implementation activities and the overall staging for introduction of the reforms.

## 6. Was there sufficient information for the Panel to conduct a useful evaluation of the BIF Act reforms?

Since its appointment, the Panel has been aware that some stakeholders have questioned the ability of the Panel to effectively evaluate the BIF Act reforms given the timing of their commencement and the timing of the Panel's work. There have also been many stakeholders, sometimes the same ones, that have been critical of the lack of certainty that has resulted from changes to commencement dates for the Chapter 3 reforms and unknown dates for the commencement of future phases of the PBA reforms. Other stakeholders have continued to raise concerns about the delays to full implementation of the reforms because of our work. They are anxious to ensure that the BIF Act is fully operational as soon as possible so that its policy intent can be realised for the benefit of the industry as a whole.

Stakeholders are entitled to raise these issues. The Government has recognised there needs to be a balance between the responsible introduction of new, untested reforms and the Government's ability to deliver on its clearly stated intentions for the industry.

The Panel has been careful to communicate clearly its understanding that this evaluation process was not intended to be a re-prosecution of the core elements of the Government's policy intent, in particular the Government's decision to introduce PBAs. This evaluation provided a process to consider a model for PBAs and determine whether it would be as effective as it could be in the context of the BIF reforms.

Arguably, the most controversial aspect of the BIF reforms is the introduction of PBAs. Whilst some governments in other Australian jurisdictions and the UK have required PBAs on government projects, the Panel is not aware of any government ever requiring a PBA for private sector projects. However, there are many examples around the world of other types of statutory trusts which apply to project funds or retentions withheld from contractors. PBAs are a form of statutory trust. A key difference between a PBA and many of the statutory trusts which operate in parts of North America is the requirement for separate bank accounts for each project. Another difference is that statutory trusts apply along the contractual chain whereas the PBA only protects funds held for a first-tier subcontractor.

There have also been recommendations in the Murray Report for all Australian jurisdictions to introduce statutory trusts for public and private sector projects. Murray does not recommend that separate project bank accounts be created. Therefore, whilst the PBA reforms are new to Queensland, the concept of statutory trusts over project funds is not. Queensland is ahead of other Australian jurisdictions with these reforms, but it seems more likely than ever that over the coming years some form of statutory trust will be applied to project funds in the building and construction industry across Australia.

Other aspects of the BIF Act reforms are amendments to existing requirements. Whilst they will change payment practices, they are not entirely new.

The Panel's evaluation needs to be considered in the context of the above backdrop. The Panel has had an opportunity to evaluate information about Phase 1 of the PBA reforms. It has participated in approximately 30 hours of meetings with parties directly affected by PBA contracts and financial institutions. The Panel has also been able to hear reports about the early changes occurring in the lead up to and the first months following the commencement of other BIF Act reforms in December 2018.

It is plain that most of the BIF Act reforms are in the early period of operation. The Panel cannot assess the impact of PBAs on private sector projects as there are no PBAs on private sector projects as yet. However, it can make assessments about indicative impacts of PBAs on Government projects and how they might translate to PBAs on private sector projects.

It is also plain that the full impact of the BIF reforms will vary as the transition occurs and stakeholders become more familiar with the new requirements. The reforms involve a number of elements that will eventually operate as a package. The impacts and effectiveness will change over time as each component becomes part of business as usual practice. It will take years for the full impact to occur and any changes to the sector will also be influenced by market forces, global trends and innovative disruptions.

The Panel is satisfied that it has had sufficient information to inform its evaluation and to make the recommendations set out in this report. The Panel considers that Phase 1 has been an effective ‘trial’ of PBAs and has allowed it to understand potential impacts and ways to enhance the PBA framework prior to its commencement on private sector projects.

In making our recommendations the Panel recognises that if our recommendations are accepted, this will require amendment to the BIF Act before PBAs can commence in the private sector. This is likely to further delay full implementation of the BIF Act. However, parts of the BIF Act are operational and should result in ongoing improvements to security of payment in the sector pending the expansion of PBAs to a broader range of projects.

The Panel is also mindful that if its reforms are accepted, this will result in a very different PBA framework. The three bank accounts per project will go down to one plus a single retention trust account per contractor. The oversight by principals will be removed and trust accounting records will need to be kept and audited to give integrity to the framework. This does not mean that the current framework for PBAs would not have met the policy intent of the legislation or that it should not have been trialled. To the contrary, establishing a framework based on models that have been in operation elsewhere and operationalising it in a meaningful way was a responsible way to test the potential impacts and allow for adjustments before expanding it to the private sector.

# PART B – PBA Reforms

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## 7. Introduction

### 7.1 What are PBAs?

A PBA is a trust account set up for a particular project into which the principal pays progress payments. The head contractor and the first-tier subcontractors are beneficiaries of the trust account.

The PBA framework operates to ensure that monies, which a head contractor is liable to pay<sup>10</sup> to subcontractors remain in the PBA until they are due to be paid to the subcontractor, ensuring that those monies are protected and held on trust for the benefit of subcontractors. The practical effect of this is that a head contractor is only able to withdraw monies it is not liable to pay to subcontractors. PBAs provide transparency over where and when payments from the principal are being distributed on a project by project basis.

### 7.2 Main features of PBAs

The main features of PBAs are:

- the head contractor establishes and is the trustee of the PBA;
- the head contractor and first-tier subcontractors are beneficiaries of the PBA;
- the head contractor must set up three bank accounts for each project, being:
  - › general trust account;
  - › retention trust account; and
  - › disputed funds trust account.
- all payments from the principal must be made into the general trust account;
- any money withheld by the head contractor from a subcontractor as retentions must be held in the retention trust account;
- all funds the subject of a ‘payment dispute’<sup>11</sup> must be held in the disputed funds trust account;
- the head contractor must provide specified information to principals and subcontractors;
- all payments from the PBAs due to subcontractors take priority over payments to the head contractor;
- where there are insufficient funds to pay subcontractors, the head contractor must deposit funds to cover the shortfall;
- the principal must:
  - › be provided with the ability to view transactions;
  - › be given written notice for all withdrawals and transfers between accounts and to beneficiaries of the PBA; and
  - › report certain discrepancies identified in the bank accounts to the QBCC.
- in the event of insolvency of the head contractor, or termination of the head contract, the principal may take over the administration of the trust funds and the head contractor must provide the principal with enough information to undertake ongoing administration.

Failure to comply with many of the provisions which make up the PBA reforms will be an offence by the head contractor and some offences are punishable by imprisonment.

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<sup>10</sup> As defined in s10A BIF Act

<sup>11</sup> As defined in Chapter 2, Part 3, Division 6 BIF Act

### 7.3 Commencement of the PBA reforms

The Government has divided the implementation of PBAs into three phases as follows:

- **Phase 1** commenced on 1 March 2018 on government building and construction projects (excluding engineering projects) valued between \$1 million and \$10 million (including GST).
- **Phase 2** will extend the operation of PBAs to all building and construction projects (public and private) valued over \$1 million (including GST), except for those contracts outside of the scope of ‘building work’. Projects captured in Phase 2 will include:
  - › projects where the principal is the Government, a local government or private sector;
  - › building contracts where more than 50% of the contract price is for ‘building work’, the contract price is \$1 million (including GST) or more, and the building contract is not a subcontract;
  - › private sector residential construction work for 3 or more living units in the same contract;
  - › multiple contracts at same or adjacent sites entered between the same principal and head contractor; and
  - › contracts entered into after the commencement of Phase 2 provisions.

The date for commencement of Phase 2 has been postponed pending the Government’s response to this report.

- **Phase 3+** The BIF Act provides for the application of PBAs to lower tier contractors and suppliers at a later date.

## 8. Evaluation of the PBA reforms

### 8.1 Phase 1 of PBAs

- Between 1 March 2018 and 28 February 2019, the Government awarded 100 PBA projects totalling a tender value sum of almost \$405 million. Of the 100 contracts commenced, 12 had reached practical completion by the end of February 2019.
- A total of 41 head contractors were awarded contracts requiring a PBA. The QBCC licence category of the 41 contractors varied from category 2 to 7 with most projects awarded to category 7 contractors.

**Table 1: PBA projects as at 28 February 2019, by QBCC financial licence category of the head contractor**

Financial category	Number of projects	Value of projects	Unique head contractors
<b>Category 1</b> Revenue from \$600,000 to \$3 million	0	0	0
<b>Category 2</b> Revenue from \$3 million to \$12 million	3	\$4,414,036	3
<b>Category 3</b> Revenue from \$12 million to \$30 million	11	\$26,663,030	9
<b>Category 4</b> Revenue from \$30 million to \$60 million	12	\$25,478,799	8
<b>Category 5</b> Revenue from \$60 million to \$120 million	29	\$82,549,394	8
<b>Category 6</b> Revenue from \$120 million to \$240 million	14	\$55,959,476	6
<b>Category 7</b> Revenue over \$240 million	30	\$148,564,120	6

Source: PwC analysis of DHPW pipeline (collation of self-reported department data) and QBCC register of licensees

Note 1: Excludes one PBA project that had the Council identified as the head contractor

Head contractors involved in Phase 1 are all pre-qualified to work on government projects meaning their financial viability is assessed regularly and they all identify as being committed to paying their subcontractors fairly and on time. These contractors are often large businesses with dedicated accounting resources that are able to adapt to new administrative requirements relatively easily.

The principals on the Phase 1 PBA projects are the Department of Education and Building and Asset Services (BAS) on behalf of all other State Government project principals.

Notifications and other information lodged by head contractors with the principals indicate that 1082 subcontractors have been engaged across all PBA projects as at the end of February 2019.<sup>12</sup>

## 8.2 What information did the Panel have access to involving Phase 1 PBAs

At the end of October 2018, the Panel requested information from principals relating to any project where a PBA had been established. At that time, 37 projects had been established and 21 head contractors had been appointed on projects requiring a PBA.

All 21 head contractors were invited to meet one-on-one with the Panel. That invitation was accepted by 18 head contractors. The Panel selected 11 projects involving 10 head contractors as case studies. A summary of the feedback from meetings with 10 of the head contractors is set out in **Attachment E**. By the time the Panel spoke to the 18 head contractors, many of them had been awarded additional contracts which required the establishment of PBAs. As a result, the Panel obtained feedback from head contractors collectively involved in 56 PBA projects.

The Panel also met with eight banks offering PBAs. Of these, one was yet to establish a PBA. The other seven had opened multiple PBAs.

The Panel met with representatives of the two principals on Phase 1 PBA projects. The principals also provided the Panel with two tranches of documents relating to the 37 PBA projects established before the end of October 2018.

The Panel obtained only limited feedback from subcontractors that are beneficiaries under Phase 1 PBA projects. The Panel gathered a list of contact details for approximately 200 subcontractors from the notifications lodged with the principals under section 50 of the BIF Act as at the end of October 2018. That group of 200 were invited to provide comment to the Panel. In total, the Panel received feedback from seven subcontractors who were beneficiaries under a PBA. Three responded to the Panel's questionnaire, two attended industry forums or the subcontractor session and two provided written submissions.

## 8.3 Broader feedback

In addition to the activities with parties to PBA contracts, subcontractor beneficiaries and banks, the Panel's stakeholder engagement process sought feedback from a broader range of stakeholders. This process comprised the release of a discussion paper with a questionnaire and the holding of seven industry forums and two subcontractor sessions in various locations around the State.<sup>13</sup>

**Table 2: Responses to Panel's public consultation process**

Submissions in response to discussion paper	27
Respondents to questionnaire	104
Attendees at Industry Forums	77

A detailed summary of the feedback received from the Panel's broader consultation activities is compiled in **Attachment F**.

The Panel sought written submissions from the IRG members on TOR 3, namely what improvements could be made prior to PBAs applying on private sector projects. IRG members also had opportunities to give feedback about the experiences of their members and were informed by the Panel about its activities and findings during the evaluation process.

<sup>12</sup> It is likely that many of the 1082 subcontractors are engaged on more than one PBA project

<sup>13</sup> Cairns, Townsville, Rockhampton, Maroochydore, Mackay, Brisbane, Loganholme, the Gold Coast and Eagle Farm

## 9. Key findings from the evaluation of Phase 1 of the PBA reforms

### 9.1 Principals

The principals on the Phase 1 PBA projects are the Department of Education and BAS. The Panel met with representatives from both principals in December 2018 including external consultants appointed by the Department of Education to assist with project management.

#### Key findings from feedback from principals on Phase 1 PBA projects

- Between the passing of the BIF Act and the commencement of Phase 1 extensive work was undertaken in collaboration with the DHPW to prepare systems and processes.
- A number of government projects were commenced before 1 March, prior to PBAs commencing, and the first PBA contract was awarded in May 2018.
- Considerable resources were dedicated to ongoing education and resolution of queries both internally and from external stakeholders. Confusion over definitions and obligations was initially high, but had improved over the first three months as head contractors got their first project up and running.
- Principals received large volumes of documents in a variety of formats preventing automation and making the risk of administrative error high.
- No new staff had been employed, but work practices and workloads of some officers had completely changed; principals reported that an increase to head count was inevitable as the number of projects increased.
- A high level of proactive monitoring through review of documents lodged and bank accounts was possible but becoming more difficult as the numbers of projects increased.
- One matter had been notified to the QBCC as required by section 52 of the BIF Act, which had been resolved promptly.
- In relation to electronic viewing of PBA accounts, which was a requirement under the state government contracts rather than the BIF Act, some banks required officers to attend branches to provide identification. In some cases where the officer had an existing personal banking profile with a bank, viewing access to the PBA was linked to their personal account information. Gaining access was easy where the bank's process was for the head contractor to authorise viewing access.
- Once access to view PBA accounts was gained, navigating different bank platforms to find relevant information was initially time consuming, and managing multiple log-in details required the development of protocols.
- A small number of contractors offered to reduce their tender value to avoid PBAs and at least one contractor had advised a principal that they no longer wished to tender for government work.
- There had been one or two errors in making payments into the head contractors trading account instead of the PBA. These were corrected promptly.
- Whilst they considered themselves fairly good at making payments on time, the principals conceded that administrative errors sometimes resulted in slight delays in payment and that it sometimes took weeks or months to assess variation claims.
- In relation to the Department of Education, in addition to the information sessions run for head contractors by DHPW, the principals instigated 'start up' meetings with the awarding of each PBA contract whereby relevant parties met to ensure all obligations were understood.
- They had not observed increases in tender prices or the administration costs of head contractors.

## 9.2 Head contractors

The 18 head contractors who participated in one-on-ones with the Panel had businesses ranging in size and diversity. Key findings from the feedback are set out below, however, their experiences were varied. A further summary of the feedback from 10 of the head contractors can be found in **Attachment E**.

### Key findings from feedback from 18 head contractors on Phase 1 PBA projects

- Most expressed support for the policy intent of the BIF reforms, but said there is very limited evidence of the intended benefits at this early stage.
- Education materials were sometimes confusing or conflicting and the need for clarity was the major theme.
- Time was needed to educate the whole industry with some noting the lack of awareness of subcontractors and the lack of readiness of banks, software providers and private sector principals.
- All reported levels of confusion and investment of time into education and development of processes to establish their first PBA. Establishing second and subsequent PBA contracts was easier.
- Many advocated for a single bank account (per project or preferably per head contractor) and said this would reduce administration without compromising the intent of the BIF Act.
- Most believe the disputed funds trust account would never be used. Two said their bank had issues with having a zero balance because of anti-money laundering legislation. The common feedback was to remove this account.
- Many were doubtful that principal oversight will work in Phase 2 with comments that either private sector principals would try to leverage information in relation to the monies being paid into or out of the trust accounts or would not engage with the system at all. The alternative of QBCC taking the oversight role was broadly accepted.
- Some were confused about the definitions of subcontractor and supplier. The amendments in October 2018 alleviated this. Some preferred to have subcontractors and suppliers 'all in' for the avoidance of doubt and to streamline internal payment processes, but most preferred current definitions with the addition of a minimum subcontract value threshold for payment via the PBA.
- Many were concerned about the punitive nature of the legislation. They sought clarity on whether penalties would apply to inadvertent mistakes e.g. five days for submission of s50 forms was short when sometimes the head contractor had difficulty in obtaining required information from the subcontractor.
- Many saw PBAs as a compliance exercise that may protect some monies in some parts of the sector but would not change the behaviour of those who lack integrity or who have no option but to continue to use monies owed to subcontractors to run their business.
- None had observed a reduction in subcontractor prices and most said they did not expect a reduction to ever occur.
- Increases in costs comprised administration, software investments, bank charges, reduced interest, borrowing costs and/or liquidation of assets.
- Whilst a number had gone to some effort to calculate actual and likely costs attributable to PBAs so far (and project forward to Phase 2 implementation), many found it difficult to estimate ongoing costs as these would depend on the availability of software solutions and market conditions (See Table 3).
- Only two reported including additional costs in their project pricing. Many anticipate doing this soon, while others believe this will not be possible given the competitive environment.

- Of those reporting liquidity impacts as PBAs roll out, these head contractors estimate it will take 2-3 years for them to rebuild the required capital as a result of not having access to retentions as part of cashflow.
- 14 of the 18 said they pay some subcontractors on 7 and 14-day terms. Of the 14, four said they were thinking about or were already requiring their subcontractors to move to 30-day terms.

### 9.3 First -tier subcontractors

#### Key findings from feedback from subcontractor beneficiaries on Phase 1 PBA projects

- They had no problems with payments via the PBA, but had not previously had payment problems with these head contractors.
- Some head contractors were now insisting on payment claims being in on time and responses were being provided promptly; subcontractors reported “knowing exactly where they stand”.
- There have been no changes to administration to get paid through a PBA.
- Costs have not changed for PBA projects.

### 9.4 Banks

The Panel met one-on-one with the eight banks, namely Commonwealth Bank of Australia, National Australia Bank, Westpac, Australia New Zealand bank, Suncorp, Hong Kong and Shanghai Banking Corporation, Macquarie Bank, and the Bank of Queensland. Each bank’s internal structures, banking platforms, approach to markets, level of knowledge and interest in PBAs was different.

#### Key findings from feedback from banks providing PBAs during Phase 1 PBA projects

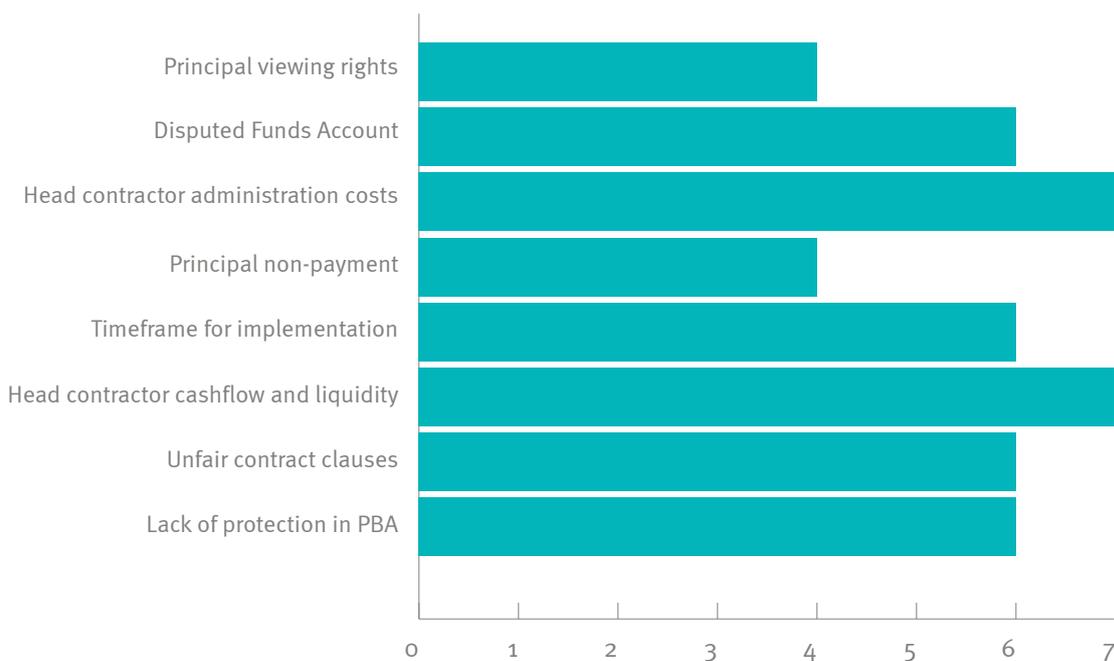
- Some banks had no problem offering PBAs from their existing product range and had made no or only minor adjustments to their account opening and operating systems to accommodate PBAs. Others had issues providing compliant products.
- Some have had to make adjustments but are now mostly on top of things. A number of banks have both ‘retail’ and ‘corporate’ platforms. For some, the features of the retail platform (where most smaller builders bank) are more limited. They are working to ensure compliance or ways to allow those customers access to ‘corporate’ platform features.
- Major investment has been required for one bank such that they took several months to be in a position to offer PBAs.
- Some banks’ processes for providing viewing rights require the user to use an existing personal profile and/or present identification at a branch. For others, none of this is required. Access is very easy and arranged by the account holder (i.e. the head contractor).
- Many banks compared the PBA framework to solicitor and real estate agent trust accounts. Some involve high numbers of individual trust/bank accounts held by a trustee.
- In relation to fees and interest on PBA accounts, the responses were varied. Some, but not all, were charging account fees and/or transaction fees and/or providing interest on money held in PBAs. Some applied interest across all accounts, including PBAs and trading accounts. Most were still developing costing and some said that it would be a matter negotiated depending on the whole of a customer’s business with the bank.

- When asked whether they consider PBAs will give rise to the need for builders to re-establish credit worthiness, most said, if additional credit is required to fund working capital, this will be assessed on a case by case basis taking into account lending policies when the application is made.
- A small number spoke about emerging technology, which enables ‘virtual accounts’ or ‘floats’. This is where the bank account can have sub-accounts where money is allocated without the need for separate bank accounts. These products provide transparency over the movement of money between sub-accounts. It was suggested that the legislation be flexible enough to allow for this technology as it could minimise the administrative burden of having three accounts per project.
- Most had issues with the prescribed naming convention for the accounts and identifiability of individual transactions as their systems have a limited number of characters for account names and transaction details. Some suggested the legislation be flexible to allow the use of abbreviations or codes as identifiers.
- Most were unsure of how things will work if the principal steps in in the case of insolvency. They raised concerns about their ability at law to allow a non-government non-account holder to deal with the accounts.
- All were familiar with government/regulators requesting information. Some referred to deeds or other agreements being in place to manage these requests. Some said they currently give regulators access to information upon the opening of trust accounts under other trust account frameworks. Some are willing and able to establish arrangements to proactively provide regulators with agreed data at agreed intervals provided that the correct laws are in place to allow for this sharing to occur.

### 9.5 Other information from broader stakeholder engagement

The observations from the broader stakeholder group were largely consistent with issues raised by head contractors on Phase 1 PBA projects. The most frequent issues raised in the 27 submissions received by the Panel in response to the discussion paper are set out in the table below. More detailed information about the response to the Panel’s broader stakeholder engagement is found in **Attachment F**.

**Graph 1: Issues raised most frequently in the 27 submissions received by the Panel in response to the discussion paper.**



## 10. General observations and recommendations relating to PBAs

### 10.1 Support for the PBA reforms?

The policy intent underpinning the PBA reforms is supported by many stakeholders. A broad range of stakeholders told the Panel that they believed there is a problem in the industry with delayed or late payments to subcontractors, which puts undue risk and stress on those least able to manage it. They made comments such as ‘the industry needs a clean-up’ or ‘we agree with what the Government is trying to do as things need to change’. These comments reflect the unequivocal findings of numerous government reports including the SECR Inquiry Report.

There is evidence that subcontractors have confidence that the PBA reforms will improve their ability to get paid. Stakeholders, usually subcontractors, believe the PBA reforms will be an effective way to provide transparency over the movement of project funds and a level of security in the event of insolvency.

#### The WA model for PBAs

There have been 82 PBA contracts awarded by the WA Government (not including the seven projects that formed part of the initial trial).

The PBA model adopted in WA requires detailed legal documentation to establish each PBA and the payment process requires the principal to have oversight of each payment cycle.

PBAs are used on projects administered by Building Management and Works (BMW), which is part of the Department of Finance. Contracts valued between \$1.5 million and \$100 million awarded by BMW require a PBA. Recently the WA Government has decided to expand the operation of PBAs to contracts over \$1.5 million.

All PBA bank accounts must be established with the Commonwealth Bank of Australia.

All first-tier subcontractors with a subcontract greater than \$20,000 are automatically beneficiaries under the PBA. Subcontractors with a lower value subcontract can ‘opt in’.

In recent years the Department of Finance has introduced a range of measures to improve security of payment, including the introduction of PBAs, improvements to prequalification requirements and the formalisation of a complaints handling system (amongst other things).

Whilst there has not been a formal evaluation of the effectiveness of PBAs the following information has been obtained from BMW:

- › Prior to the use of PBAs there were instances of insolvencies of head contractors and first-tier subcontractors on government projects that were similar in nature to the projects that are now required to have a PBA.
- › Since the introduction of the requirement for PBAs, there have been no insolvencies of head contractors. A small number of first-tier subcontractors have become insolvent and as far as BMW are aware, there have been a small number of insolvencies of lower tier subcontractors on projects using a PBA.
- › Anecdotally, there seem to be less disputes about payments on PBA projects than on other government projects.
- › BMW has put in place robust complaints management mechanisms and conducts spot checking of contractor payments on most of its construction contracts. Subcontractors seem willing to use these pathways when they have concerns about payments.
- › BMW has not detected a change in tender numbers related to the introduction of PBAs.
- › It is common for head contractors to make payments to first-tier subcontractors on 7 or 14-day terms and claim these paid amounts as part of their monthly claims to BMW.
- › BMW made an initial investment to manage oversight of PBAs including establishing systems and process, adjusting IT and training staff. Efficiencies continue to be developed.

The Panel considered other PBA models, in particular the WA model. WA has required PBAs on some government projects over the past two years. There has not been a formal evaluation of PBAs in WA, but the Panel spoke to government officials involved in PBA projects to gain insights into the effectiveness of their model. This information was useful and indicates that PBAs have been successful in WA. In a recent review of security of payment laws in WA, the Fiocco Report<sup>14</sup> recommended an increase in the use of PBAs on government projects. The Fiocco report also recommended cascading statutory trusts apply to private sector projects.

## 10.2 Key concerns about the PBA reforms

For a large number of stakeholders, although they agree change is needed, they question whether PBAs will lead to the right change and some insist that the current business models are acceptable and should not be disrupted by the BIF Act reforms.

The biggest concerns were in relation to the costs to administer three bank accounts per project and the details required to be recorded within the bank accounts.

The BIF Act requires all movements of money from and between PBA accounts to be shown as individual transactions in the bank accounts. These requirements turn a bank account into a detailed accounting ledger. This is reported to be administratively burdensome and prone to the making of errors. It duplicates what is in business accounting records and in some cases, banks have had difficulty ensuring the bank accounts can meet this requirement.

In addition, the reporting required to be given to principals as part of Phase 1 has been described as onerous and time consuming. Many see the PBA reforms as imposing burden on the vast majority of head contractors who are good payers. An overly burdensome regulatory framework should not be an intended consequence of the BIF Act reforms.

In addition to the administrative burden, stakeholders expressed concerns over the ability for head contractors to adjust their business models to no longer rely on monies owed to or retained from subcontractors as part of cash flow. PBAs are intended to prevent head contractors from using money retained from a subcontractor or owing to subcontractors to fund other projects or expenses. Changes to the financial management practices of the industry are an intended consequence of the reforms and many head contractors will need time to recapitalise by increasing cash holdings or debt. If the PBA requirements are commenced too quickly, well intentioned head contractors may not have sufficient time to adjust and businesses may face stress or failure. Destabilisation of the sector through head contractor stress or failure will not be good for head contractors, subcontractors or the community as a whole.

*Money paid to a builder, under a contract with a home owner is the builders' legitimate property and is not in any legal or moral sense the property of the subcontractor. The builder is fully entitled to use it as he or she pleases, provided that payment (out of this money or out of other money) is made in full to the subcontractor when due and payable under the relevant subcontracts. To upset this arrangement by introducing even further regulation to 'manage' business to business risk or control are counterproductive and will aggravate the difficulties faced by business.*

**HIA submission to the Panel dated 15 February 2019**

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14 John Fiocco, Security of Payment Reform in WA Building Construction Industry, October 2018

### 10.3 Indicative impacts of the PBA reforms

In evaluating indicative impacts of the PBA reforms, as noted above, the Panel has heard from head contractors involved in PBAs that the transition and increased administrative costs have been burdensome. Table 3 below summarises the examples of costs reported to the Panel by head contractors.

**Table 3: Summary of report to Panel by head contractors about costs incurred relating to PBAs**

Measure of cost/impact	Range of responses (noting a number of head contractors identified costs on more than one measure in column 1)
<b>Specific examples</b>	<p>Contracts Administrator 1 – 1.5 additional days per month dedicated to PBAs + 1 additional day for each set up</p> <p>Additional staff will be employed</p> <p>20-30 additional hours per month, per project</p> <p>Estimate 1.2-1.6% of project cost</p> <p>Additional 10-14 hours per PBA project administration + 25% accounting FTE weighted heavily to end of month</p> <p>50% increase on accounts administrator work</p> <p>One Contract Administrator (\$60K) so far 50% dedicated to PBAs, time equating to \$100/project/month for bank reconciliations, \$900/project/month for reporting, \$1,700/project to prepare notices, \$600 in time to open accounts for 1 PBA project</p> <p>40-60% more administration (per project) than a non-PBA project</p> <p>15-20 hours per project, per month</p> <p>10% increase work for Contract Administrators</p> <p>1-2 hrs/week per project (estimate a day for every 5 projects)</p> <p>\$20K-30K for 1 project</p> <p>Doubled time for administration across 5 PBAs</p> <p>1 FTE for every 8 projects</p>
<b>Costs likely to be passed on (most could not say this early)</b>	<p>Depending on job size \$8-20K</p> <p>Increase contract price by 2-3% for PBAs</p>
<b>Associated banking costs</b>	<p>\$900-\$1600/monthly increase on interest on overdraft</p> <p>\$40 month/account plus transaction fees</p> <p>\$45 month/account x 3 projects</p> <p>No fees charged or interest earned</p>
<b>Other one-off costs</b>	<p>\$12,500 legal fees</p> <p>\$33K software upgrade</p> <p>\$15K software upgrade</p> <p>\$165K upgrade to systems</p>
<b>Predicted costs in Phase 2</b>	<p>1% of turnover</p> <p>0.5% of turnover</p>

The Panel has also heard that subcontractor prices have not reduced and there is no evidence of improved payment times to subcontractors on Phase 1 PBAs. This is to be expected and does not lead the Panel to conclude that the costs of PBAs outweigh their potential benefits. The Phase 1 PBAs involve a group of head contractors that pride themselves on having strong relationships with their subcontractors and paying them on time. The few subcontractors being paid via PBAs the Panel heard from confirmed that nothing had changed in terms of payment times, but also that they had never had issues with late payment from the head contractor that was now paying them via a PBA.

The Panel considers it was always unlikely that it would be able to detect noticeable changes to payment times as part of this evaluation. Further, the fact that subcontractors' prices have not decreased is not surprising. If this does occur, one would expect that it would occur over a much longer period when the full effect of the BIF Act is up and running and part of 'business as usual'.

What the Panel can say on the indicative impacts of the reforms is that the administrative and financial transition costs of the current framework for PBA reforms are high. The Panel considers these can be reduced or their impact managed by simplification of the framework for PBAs and by adopting a gradual introduction of the requirements for PBAs over at least three further phases.

#### 10.4 Approach to recommendations

Each of the 20 recommendations made in this part of the report are intended to address the key concerns about the PBA reforms, namely management of administrative burden and management of financial transition. In formulating its recommendations, the Panel has considered the following competing factors:

*Level of administrative burden versus enforceability of the PBA requirements* – If the administrative requirements for PBAs result in a lack of clarity and transparency over the movement of money via the PBA, this will make the requirements difficult to enforce and may result in some contractors lacking an incentive to comply. The record keeping requirements and oversight mechanisms need to be effective, but at the same time reasonable and logically connected to common accounting and record keeping practices.

*Providing for financial transition versus lack of clarity for industry* - Industry needs to have certainty about the timing of the reforms so that head contractors can take active steps to educate themselves and transition business practices. The PBA reforms rely on banks and accounting software systems to be adapted to assist with compliance. Market readiness for these products requires certainty of timing and content so that banks and software providers can plan and invest in products that head contractors will need. The QBCC will also need time to resource its oversight capability and set up intelligence platforms to enable it to monitor and enforce compliance.

Taking the above into account, our recommendations are summarised as follows:

- That the PBA requirements be streamlined to require only one bank account per project through which all project payments from the principal must flow.
- That any contractor holding subcontractor cash retentions be required to open a separate retention trust account in which all cash retentions across all projects must be held. The retention trust account would operate similar to a solicitor or real estate agent trust account requiring compulsory training in order to hold retentions and the keeping of trust accounting records and periodic auditing of those records by an external auditor.
- Oversight of compliance with both the PBA trust account and the retention trust account requirements will be undertaken by the QBCC rather than the principal. However, in certain circumstances, the principal or subcontractor beneficiaries should be entitled to access relevant records.
- Whilst recommending the removal of the disputed funds trust account, the Panel recommends that non-payment of debts due be an offence. It also recommends alternative mechanisms be introduced to improve the chances of a successful claimant being paid following an adjudication. The Panel proposes new mechanisms such as a payment withholding request and a charging order over land.
- Other recommendations will further simplify the PBA framework including reducing the complexity of definitions such as 'building work' and 'supplier' and simplifying the reporting requirements for head contractors.
- That future phases of PBA reforms be commenced only after the BIF Act is amended to address the Panel's recommendations and that the rollout of PBAs be expanded over three further phases.

**Attachment I** diagrammatically compares the current PBA framework with the framework that would apply if the Panel's recommendations were adopted.

# Recommendation 1

## Timing of further phasing and expansion of the PBA reforms

The Panel is aware of the following potential impacts of the PBA reforms, which could be managed by phasing in the requirement for PBAs over an extended period of time:

- the intended change to the way contractors fund working capital for their business;
- the need for Government to have time to educate industry and support the reforms with guidance material and training;
- the need for the QBCC to develop the resources and capacity to effectively monitor and enforce the BIF Act reforms;
- the need for accounting systems to be updated to help manage the administrative burden associated with PBAs and retention trust accounts; and
- the need for banks to be willing and able to offer bank accounts, which will comply with the BIF Act.

### Changes to the funding of working capital

Many stakeholders reported concerns about the impact of the PBA reforms on their financial capacity to operate. Most head contractors the Panel heard from advised that they use retentions as part of their cash flow. This is understandable, given that until these reforms, there has been no prohibition against using retentions as part of working capital. The PBA reforms change this. This is an intended consequence. Nevertheless, contractors will need time to find sources of working capital from savings, increased debt and/or liquidating assets.

The PBA reforms will also force head contractors not to use money owed to subcontractors in working capital, but to hold it separately in an account in readiness to pay subcontractors on time. The requirement to pay subcontractors on time has always been a legal requirement. 'Pay when paid' clauses have been void in Queensland since 2004, however, the practice of 'pay when paid' is still common. The PBA reforms are intended to change this practice.

*It is unethical for a contractor who has received funds, a significant proportion of which represents the work carried out by its subcontractors, to treat such funds as if it were its own. It is immoral to argue that the subcontractor should supply the contractor with interest-free working capital. Further, the notion of free working capital not only undermines the integrity of the industry but encourages undercapitalised companies to operate in the industry and compete, unfairly, with better capitalised firms. The notion of protecting the use of such free working capital should be condemned, not condoned.*

**Murray Report p 309**

*Current market sensitivities should also be considered in determining an implementation date that will minimise the impact on the economy. Concerns surrounding debt finance availability, the recommendations of the Hayne Royal Commission, and an impending federal election are currently resulting in a subdued appetite for investment in property projects.*

**Property Council submission to Panel dated 15 February 2019**

Adjusting to the intended consequences of the reforms will take time. The Panel has heard from some head contractors that re-capitalising their businesses to account for the loss of working capital brought about by PBAs could take two to three years. The Panel is concerned that if the Government phases the PBA reforms in too quickly this could negatively impact otherwise diligent and well intending contractors resulting in increased financial stress or business failure. Our evaluation activities have not been able to detect this occurring. All of the head contractors involved in Phase 1 PBAs are managing the change so far. However, a number of them are feeling anxious about the financial impact once PBAs apply to a broader range of projects.

### Government and QBCC readiness

The roll out of these reforms will require Government to resource implementation activities to support industry and encourage compliance.

If the Panel's recommendations are accepted, the powers and responsibilities of the QBCC will increase. We anticipate that this will require the QBCC to increase resources and investment in workforce capability. This will inevitably take time.

By phasing in the commencement of PBAs, it is the Panel's view that Government and the QBCC will be able to provide better support and any implementation activities will have the best chance of being effective.

## Banking and accounting products and services

The Panel heard that some banks have been unable to open bank accounts in a timely and efficient manner. These challenges mostly relate to the limitations in banking technology and the need for further development of bank products to meet the requirements of the BIF Act and state government contracts. Fortunately, those banks with difficulties early in Phase 1 reported that the issues they came across had improved rapidly and internal processes were under development to work towards market readiness in time for PBAs to be applied to private sector projects.

The Panel asked the banks about the potential impact of PBAs on the creditworthiness of contractors and their likely capacity to assist contractors to find new sources of working capital. Whilst this had not been an issue in Phase 1, some banks confirmed that the creation of trust accounts may impact the way they view their customer's financial position.

Head contractors involved in Phase 1 reported having to make adjustments to their accounting practices and engaging with software providers about the development of software upgrades. Most had developed a manual report to comply with the contractual obligation for the monthly subcontractor payment summary. This was reportedly time consuming to set up.

A number of the recommendations in this report, specifically those relating to reporting and oversight requirements, are aimed at simplifying and reducing the complexity and administrative burden for all parties while maintaining effective levels of protection, transparency and accountability. Implementation of these recommendations may address some of the technology issues being encountered. Some of these issues will also be an inevitable outcome of banks and accounting software providers transitioning to meet the new reforms.

## No amount of delay will avoid disruption

Whilst a phased approach to commencement is warranted, no amount of delay to commencement will alleviate some level of the disruption. In addition, the BIF Act was passed in October 2017, some 18 months ago, and contractors have been aware that changes are coming for some time.

To assess the number of projects and contractors affected by different options for timing of a phased approach, the Panel sought information from QLeave which is set out in Table 4. The information estimates the number and value of contracts likely to be commenced on private and government projects over time. Based on this information, there are approximately 2200 new projects each year valued at over \$1 million which would be subject to a PBA. Of those, over 1400, or 63% are valued between \$1 million and \$3 million. A further approximately 29% are valued between \$3 million and \$10 million with the remainder valued at over \$10 million.

The Panel had regard to how phasing of the commencement of PBAs based on different values of projects could stagger the number of contracts requiring a PBA and the number of contractors that would be required to start using a PBA over a 10-14 month phase in period following commencement of an amended BIF Act. The outcomes of this analysis are set out in Table 5.

The Panel had regard to whether there could be an expansion of the scope of projects required to have a PBA pending legislative amendments to address our recommendations. The Panel considers that if our recommendations are adopted, any expansion of PBAs before amendments to the BIF Act would be detrimental. It would require educating additional principals and head contractors on the current requirements only to have them adjust to an amended BIF Act within a short period of time. This would create more confusion and cost. Further, the Panel questions whether the drafting of the BIF Act allows for phasing other than in accordance with the Government's currently stated intention for Phase 2 (being all projects valued over \$1 million).

**Table 4: Estimated number of projects valued over \$1 million which are likely to be for 'building work' requiring a PBA.**

Estimated number of projects 17/18					
Value of project (inc. GST)	State government	Other government	Private sector	Total	Estimated value
\$1 - \$2 million	69	58	943	1,070	\$1,362,696,801
\$2 - \$3 million	42	20	373	435	\$967,424,989
\$3 - \$4 million	13	12	169	194	\$608,802,901
\$4 - \$5 million	20	5	154	179	\$732,437,255
\$5 - \$6 million	7	5	81	93	\$466,549,606
\$6 - \$7 million	7	1	56	64	\$379,829,642
\$7 - \$8 million	5	4	49	58	\$396,902,763
\$8 - \$9 million	3	4	43	50	\$387,446,335
\$9 - \$10 million	7	3	24	34	\$294,606,083
\$10 - \$12 million	3	3	36	42	\$424,600,501
\$12 - \$15 million	8	3	45	56	\$676,022,539
\$15 - \$20 million	4	3	42	49	\$769,177,806
\$20 - \$25 million	3	0	14	17	\$344,794,879
Over \$25 million	5	5	87	97	\$7,301,169,956
<b>Total</b>	<b>196</b>	<b>126</b>	<b>2,116</b>	<b>2,438</b>	<b>\$15,112,462,056</b>

Source: QLeave

### Threshold for requiring a PBA

If our recommendations are adopted, a PBA will not be required for building contracts under \$1 million. The Panel considers that this value-based threshold provides a reasonable balance between the costs required to establish and manage a PBA and the value of the project.

The Panel also confirms the Government's current position that PBAs should not be required for domestic building contracts involving less than three dwelling units. This means that renovations to homes and the construction of homes for first home buyers will not require a PBA.

### Amounts exclusive of GST

The BIF Act defines the phases for PBAs by reference to amounts that are inclusive of GST whereas other provisions in the BIF Act and QBCC Act refer to amounts exclusive of GST<sup>15</sup>. The Panel suggests that for consistency, contract amounts should be expressed as GST exclusive.

<sup>15</sup> For example s 64 of the BIF Act which defines complex claims as claims for amounts more than \$750,000 excluding GST. See also QBCC licence categories which are based on revenue excluding GST.

**Table 5: Showing commencement in the private sector for higher value projects before dropping down to lower value contracts – three further levels of phasing**

	Phase 1	Phase 2	Phase 3	Phase 4
<b>Commencement Date</b>	1 March 2018	Approx. 2 months post commencement of amended BIF Act <sup>17</sup>	4-6 months post commencement of Phase 2 <sup>18</sup>	4-6 months post commencement of Phase 3
<b>Projects requiring a PBA – total head contract value of more than 50% ‘building work’</b>	State Government \$1-10 million ‘building work’ – 3 PBAs per project	Add Government and private \$10 million plus Single PBA/project on all Government projects over \$1 million PLUS all private projects over \$10 million	Add private \$3-10 million Single PBA/project on all Government projects over \$1 million PLUS all private projects over \$3 million	Add private \$1-3 million Single PBA/project on all Government and private projects over \$1 million
<b>Likely number of new projects captured by this phase in first year</b>	188	242	527	1,284
<b>Estimated number of contractors requiring a PBA in this phase<sup>16</sup></b>	171	198	428	1,131
<b>Retention trust account required</b>	As part of Phase 1 PBA retention trust account	Single retention trust account per head contractor where all cash retentions held on any PBA project are to be kept AND private sector principals to hold cash retentions in a separate trust account on any project where a PBA is required.		Single retention trust account for any contractor in the contractual chain for any cash retentions held on any project for ‘building work’ AND private sector principals to hold cash retentions in a separate trust account on any project where a PBA is required.

## Recommendation 1

That further phasing of the PBA reforms be as follows:

- (a) Phase 2: add all Government and private projects valued at \$10M (excluding GST) or more;
- (b) Phase 3: add private projects in the range of \$3M to \$10M (excluding GST); and
- (c) Phase 4: add private projects in the range of \$1M to \$3M (excluding GST).

The timing of the commencement of each phase be as follows:

- i. Phase 2: at least 2 months after the passing of any amendments to the BIF Act;
- ii. Phase 3: 4-6 months after Phase 2; and
- iii. Phase 4: 4-6 months after Phase 3.

<sup>16</sup> Number of contractors are not absolute as they may contain duplicates.

<sup>17</sup> Commencement of PBAs in the private sector for projects valued over \$10 million will require education and training of a larger group of stakeholders than for Phase 1. However, contractors undertaking projects over \$10 million are likely to be relatively well resourced to manage the change. Re-education of parties involved in Phase 1 will also be required.

<sup>18</sup> Commencement of PBAs in the private sector for projects valued over \$3 million will introduce a number of new, smaller contractors to PBAs. There are still a relatively small number of new PBA projects in the \$3-\$10 million value so market impact would be managed by this level of phasing. Contractors will be able to commence transitioning their business as the numbers of projects with a PBA increases.

## Recommendation 2

### Clarifying the scope of the framework

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A PBA is currently required to be opened by a head contractor under a contract for ‘building work’. Importantly, the BIF Act further defines which contracts for building work trigger the requirement for a PBA (s 14). Further definition is given to the term ‘building work’ in the BIF Regulations. The Act also provides for a PBA to be held by subcontractors that are ‘related entities’ to a head contractor (s 19-21). To determine who are beneficiaries under a PBA, the Act includes definitions of subcontractor (s 9(5)) and supplier (s 11). Understanding these definitions is critical to understanding the scope of PBAs, when they will be required to be held, by whom and who will be paid from the PBA.

These scoping questions raise important issues including:

- the extent to which civil and infrastructure works are captured by the PBA framework;
- the extent to which designers such as architects and engineers are captured by the framework;
- how to distinguish between suppliers and subcontractors; and
- when a first-tier subcontractor should also be required to establish a PBA.

We consider each of these issues below.

#### The definition of ‘building work’ – civil works and design work

The BIF Act results in three definitions of building and construction work for the industry to reconcile and distinguish. These are:

1. the definition of ‘building work’ found in Chapter 2 and section 4 of the BIF Regulation;
2. the definition of ‘building work’ under the QBCC Act; and
3. the definition of ‘construction work’ under Chapter 3.

The definitions of ‘building work’ in Chapter 2 and the QBCC Act are similar, but sufficiently different to have caused confusion about what work requires a PBA and who is required to be a beneficiary under the PBA. Some clarification was given in amendments to the BIF Act passed in October 2018. Despite this, the Panel heard that head contractors under Phase 1 were confused about the inconsistent definitions of ‘building work’, ‘subcontractor’ and ‘supplier’.

The Chapter 3 definition for ‘construction work’ is quite different to the Chapter 2 and QBCC definitions of ‘building work’ as it covers, for example, civil and infrastructure work. This work is not included in the Chapter 2 or QBCC definition of ‘building work’ presumably because civil and infrastructure contractors are generally not required to be licensed by the QBCC. Consistent with the historical approach taken to the regulation of the Queensland construction industry, it is unsurprising and we understand why the BIF Act does not require a PBA for civil and infrastructure work contracts. However, there is evidence that the issues of delayed and non-payment to subcontractors in the civil and infrastructure sector are no different to those in the building sector.<sup>19</sup> The Panel also received anecdotal evidence to this effect. Given that, the Panel is unable to discern a good reason why subcontractors carrying out civil works under a contract for ‘building work’, which requires a PBA, should not be beneficiaries under the PBA.

Further, a PBA is required for ‘building work’, which includes the preparation of plans and specifications for the performance of building work and contract administration carried out by a person in relation to the construction of a building designed by the person.

This means that engineers, architects and other design professionals are captured by the PBA reforms. Not only can they be subcontractors who are beneficiaries paid from the PBA, but they may also need to establish a PBA as a head contractor if they are directly engaged by a principal for ‘building work’, which exceeds the threshold amount for triggering a PBA.

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<sup>19</sup> The SERC Inquiry Report makes its findings about insolvency risks and problems with security of payment in relation to the whole of the building and construction industry.

None of the Phase 1 PBAs had an engineer or architect head contractor. However, several Phase 1 PBAs involved payment of architects, engineers or other design consultants.

Some head contractors with Phase 1 PBAs reported that whereas they usually paid consultants on invoice, under a PBA, they had begun requiring consultants to enter into terms the same as other subcontractors.

Consult Australia made submissions to the Panel requesting that their members' work not be captured by the PBA reforms. They are particularly concerned about having to establish a PBA. Feedback during IRG meetings from representatives of the Subcontractors Alliance was that there have been many examples of design consultants experiencing delayed or non-payment in the same way that other subcontractors do.

*There is no evidence that the payment issues experienced by trade contractors through the construction chain exists through the professional consultancy chain. It is common for consultants to be initially engaged directly to principals and subsequently novated to contractors. As a result, projects might then have multiple sets of PBAs applying to the design chain of subcontracts as well as the construction firm chain.*

**Consult Australia submission to the Panel dated 15 February 2019**

Weighing up the feedback about design consultants, the Panel has concluded that design consultants:

- should be beneficiaries under a PBA; and
- should not be head contractors of a PBA.

### The definitions of 'suppliers' and 'subcontractors'

There has been some confusion experienced in Phase 1 over which subcontractors are suppliers and therefore not beneficiaries under the PBA. Amendments made in October 2018 clarified this issue, however despite the clarification, the Panel received feedback from stakeholders that they wanted greater clarity over who was a supplier and who was a subcontractor beneficiary. The Panel believes that the simplest way for stakeholders to understand when a subcontractor is a supplier is by referring to existing definitions of construction work and related goods and services in sections 65 and 66 of the BIF Act, which have been used in the industry since 2004.

### When a first-tier subcontractor should also be required to establish a PBA

The BIF Act currently provides that where a first-tier subcontractor is a related entity to the head contractor, it must also establish a PBA (s 19, 20 and 21). This is an important anti-avoidance mechanism to prevent head contractors from interposing a related entity to the contractual chain. This arrangement would undermine the intention of the PBA because subcontractors that would otherwise be first-tier subcontractors would become second tier subcontractors and therefore not be beneficiaries to a PBA.

The Panel has been concerned that similar avoidance practices could develop with subcontractors that are not 'related' to the head contract. This could occur when the subcontractor is asked to sub-subcontract a range of work that the head contractor would usually have subcontracted directly. The incentive for the head contractor to do this may be to avoid the administration costs associated with having to pay large numbers of first-tier subcontractors from the PBA. If this practice were to develop it would reduce the number of subcontractors that would be protected by PBAs and undermine the intention of the reforms.

The Panel was not able to discern any change in the number of first-tier subcontractors on PBAs in Phase 1 compared with non-PBA projects. This is partly because there is no available benchmarking data that the Panel could use to objectively assess whether the number of subcontractors in Phase 1 projects was any different to the number on similar projects without a PBA.

Despite the lack of evidence of any change in the numbers of first-tier subcontractors on PBA projects in Phase 1, the Panel did receive reports from members of the IRG about subcontractors being approached and asked whether they would agree to sub-subcontract additional works not usually part of their scope of works under future contracts that may require a PBA.

The Panel is not able to say at this time whether avoidance practices will develop. The Panel notes that if subcontractors are requested to increase their usual scope of work by sub-subcontracting other work, they will need to ensure that they are not putting themselves into a situation where they are acting outside the scope of work allowed by their QBCC licence class. This would have consequences, including committing an offence or increasing revenue which could affect the contractor's MFRs.

The Panel also notes that even if a head contractor adjusts their practices to have fewer first-tier subcontractors, they will still be required to have a PBA and all project funds will be paid into that PBA. It seems the only incentive for the head contractor to reduce the number of first-tier subcontractors would be to avoid their administration costs. The Panel hopes that the recommendations it makes in this report to reduce the administrative burden associated with operating a PBA will alleviate growing concerns by stakeholders about costs to operate a PBA.

The Panel has recommended that the Act be amended to provide a power for it to prescribe when a first-tier subcontractor will also be required to open a PBA. This will enable the Government to monitor any changes in practice and if necessary, make regulations to require a PBA to be established in certain circumstances. If it becomes necessary for Government to use this regulation making power, it could, for example, provide that first-tier subcontractors that represent over a certain percentage of the value of the head contract, be required to establish a PBA.

Given the above issues, the Panel recommends clarification of definitions in Chapter 2 to:

- simplify the framework;
- align the Chapter 2 definition with existing and well understood definitions in the QBCC Act and Chapter 3 (formerly BCIPA);
- provide for subcontractors carrying out civil works when the head contract is for 'building work' that requires a PBA to be beneficiaries under the PBA;
- provide that building contracts solely for design work are not required to have a PBA, but that design consultants subcontracting to head contractors should be beneficiaries under the PBA; and
- provide the Government with the ability to require first-tier subcontractors to also establish a PBA if there is evidence of a change in contracting practices, which undermines the intentions of the PBA reforms.

## Recommendation 2

The BIF Act be amended to provide that:

- (a) 'building work' is as defined in the QBCC Act;
- (b) revoke section 4 of the BIF Regulation;
- (c) in section 9(5) of the BIF Act, amend definition of 'subcontractor' to provide that 'subcontractor' for a building contract means a party who enters into a first-tier subcontract for construction work or services within the meaning of section 65 or 66(1)(b) of the BIF Act regardless of the value of the first-tier subcontract unless a minimum value is prescribed by regulation.
- (d) revoke section 11 of the BIF Act;
- (e) amend section 14 to provide that a building contract solely for services within the meaning of section 66(1)(b) of the BIF Act is not a PBA contract; and
- (f) amend Chapter 2 of the BIF Act as necessary to provide that a building contract that is a subcontract for another building contract is not a PBA contract unless otherwise prescribed.

## Recommendations 3–5

### Disputed funds trust account

The PBA framework provides for the creation of a disputed funds trust account for every project requiring a PBA. During Phase 1, the disputed funds trust account was used only once in error. All head contractors using PBAs that the Panel spoke to said they did not expect to ever use this account. Feedback from many other stakeholders was the same.

*An inability to manage our own cashflow by using profit on one project to deal with losses on another project is a negative impact on our business. This is particularly exacerbated by the “disputed funds” account, where monies in dispute have to sit (even if the claim by the subcontractor is entirely bogus) until resolved. The administration time in administering 3 bank accounts per project also has a negative impact on our business and is far more than that estimated in the initial Deloitte report.*

#### **BMD Group submission to the Panel dated 15 February 2019**

subcontractor’s payment claim and the subcontractor wishes to dispute that decision, the disputed sum is not an “amount in dispute” under the BIF Act so it is not required to be moved to the disputed funds trust fund. This remains the case even where the subcontractor proceeds to make an adjudication application. This means that in the event of a successful adjudication claim, the disputed amount is not set aside in the disputed funds trust account for payment of the adjudicated amount.

The Panel notes that section 90 of the BIF Act introduced a new offence where a respondent to an adjudication application does not pay an adjudicated amount within five business days or any later date decided by the adjudicator. However, there are no other provisions in the BIF Act which provide an ability for a claimant to secure the adjudicated amount so that they are available for payment following a successful adjudication.

The limited circumstances where the disputed funds trust account must be used are where the head contractor:

- fails to issue a payment schedule and fails to pay the full amount of the payment claim by the due date; or
- issues a payment schedule but fails to pay the full amount scheduled by the due date.

Both these circumstances are situations where the head contractor has a ‘debt due’ because it has not disputed the payment claim or has issued a payment schedule, but not paid the agreed amount set out in the schedule. These situations are most likely to occur where there is no dispute but the head contractor does not have sufficient funds to pay the undisputed amount. Whilst the failure to pay in these two circumstances is not condoned, it seems unlikely that a head contractor that has the money to pay these amounts would pay money into a disputed funds trust account rather than simply pay the undisputed amount.

Rather than have a disputed funds account, alternative mechanisms could be required to:

- deter underpayment of agreed amounts; and
- try to ensure that the subcontractor receives payment if it is successful in an adjudication.

In this regard, the Panel has considered mechanisms used in other jurisdictions to facilitate payment of adjudicated amounts. In Victoria and NSW, a claimant may serve a payment withholding request on a party above the respondent requiring it to withhold payment from the respondent sufficient to cover the claim of money that is or becomes payable to the claimant. In NSW this request can be issued at the time that an adjudication application is made by the claimant.<sup>20</sup> In Victoria, it can be issued only after an adjudicated amount has not been paid by the date due and a judgement debt has been obtained.<sup>21</sup>

20 Sections 26A-26F of the *Building and Construction Industry Security of Payment Act 1999 (NSW)*

21 Division 4 of Part 3 of the *Building and Construction Industry Security of Payment Act 2002 (VIC)*

The payment withholding request is a similar tool to a subcontractor's charge, which may be issued under Chapter 4 of the BIF Act. However, under the BIF Act, a subcontractor's charge and adjudication proceeding cannot be on foot at the same time.

The Murray Report considered the benefits of the NSW payment withholding request provisions and recommended that they be provided for.<sup>22</sup>

Further, a mechanism to ensure payment following adjudication should be available to all claimants, not just those that are beneficiaries under a PBA. The Panel therefore recommends the introduction of provisions similar to the NSW payment withholding request provisions even though the BIF Act includes PBAs.

One shortcoming of a payment withholding request is that a head contractor would not be able to make the request if they make an adjudication claim against a principal given there is no one in the contractual chain above the principal. The Panel believes that the following should be available to head contractors in these circumstances:

- the ability to issue a payment withholding request on a financier of the project; and
- the ability to issue a charging order against the property on which the building work the subject of the adjudication has been carried out but only if an adjudicated amount is not paid by the due date.

The ability to issue a charging order or impose a lien over property has long been a feature in security of payment laws in a number of countries including New Zealand, Canada and the USA.<sup>23</sup>

The above mechanisms for protecting money in dispute that is the subject of an adjudication should be available where any adjudication application is lodged under Chapter 3 of the BIF Act and therefore they would not just apply to projects requiring a PBA.

### Recommendation 3

That Chapter 2 of the BIF Act be amended to remove the requirement for a disputed funds trust account as part of the PBA framework.

### Recommendation 4

That Chapter 3 of the BIF Act be amended to make it an offence for a person given a payment claim to pay less than the amount stated in a payment schedule.

<sup>22</sup> Recommendation 53 of the Murray report

<sup>23</sup> For example, *Construction Lien Act R.S.O 1990* (Ontario), *Builders Lien Act S.B.C 1997* (British Columbia), New York Lien Law

## Recommendation 5

That Chapter 3 of the BIF Act be amended to provide that:

- (a) on or after making an adjudication application a claimant may serve a payment withholding request on a party above the respondent in the contractual chain to require that party to retain sufficient money to cover the claim out of the money that is or becomes payable by that party to the respondent;
- (b) a person receiving a payment withholding request who fails to comply with such a request will become jointly and severally liable with the respondent;
- (c) where the claimant is a head contractor and the adjudication application is made against the principal:
  - (i) the claimant may issue a payment withholding request on a financier or funder of the project; and
  - (ii) the claimant may issue a charging order on the property on which the building work the subject of the adjudication application is being carried out but only if the adjudicated amount is not paid by the due date as stated in the adjudicated decision.

### *Considerations for implementation*

The ability to issue a payment withholding request should be referred to in any adjudication application materials issued by the QBCC so claimants are aware that they have an option to use this process when making an adjudication application.

If the Panel's recommendation is accepted, the payment withholding request provisions could be based on sections 26A to 26F of the *Building and Construction Industry Security of Payment Act 1999 (NSW)* which already has a body of case law to provide certainty around its application.

The charging order provisions could be based on section 30 and 31 of the *Construction Contracts Act 2002 (New Zealand)* although the Panel recommends that the ability to issue a charging order only be triggered if an adjudicated amount is not paid.

## Recommendations 6–10

### Retention trust account

The PBA reforms prevent a head contractor from using cash retentions as working capital by requiring that they be deposited into the retention trust account. The BIF Act requires a retention trust account for each project that is subject to a PBA regardless of whether cash retentions are held by a head contractor.

Head contractors using PBAs in Phase 1 reported that having a retention trust account per project is onerous. They also stated that the obligation to ensure that each separate transaction into and out of the retention trust account is shown in the bank account is burdensome. Some noted they already give subcontractors details of all retention amounts withheld and their accounting systems also record those individual transactions, making the requirement for individualised transactions in the bank account unnecessary.

Another shortcoming of having the retention trust account as part of the PBA framework is that retentions held outside of that framework by private sector principals and subcontractors are not required to be separated from other bank accounts thus resulting in co-mingling of monies.

The retention account is different from the general trust account under a PBA in that there should be a steady increase in funds deposited into the retention account over early phases of a project up to 5% of the subcontract value. The funds then reduce when 2.5% is paid out at practical completion with the remaining 2.5% paid out at the end of the defects liability period. In contrast, the balance in the general trust account can rise and fall monthly as payments are made, subcontractors are paid and the head contractor withdraws amounts to pay overheads and suppliers.

The Panel believes that the policy intent will have the best chance of being met if retention funds are not co-mingled with other project funds or the head contractors' own money. However, it accepts the representations from industry that the requirement for a separate retention account for each project is burdensome. On balance the Panel is of the view that the policy intent could be achieved with the efficiency of having a single retention trust account per contractor.

The Panel has reviewed other legal frameworks which impose obligations on the withholding of trust funds such as those required for solicitors and in the property sector.<sup>24</sup> Under these regimes, detailed trust account records are required to be kept to account for all transactions into and out of the trust accounts. The accounts are externally audited on a regular basis to ensure compliance. Specific conditions are set down for the operation of the accounts including allowable and outlawed transactions. The account holder also has the onus of proving that the removal of any monies from the trust account has been appropriate. These existing models also require compulsory training be undertaken by those wishing to operate a trust account. The statutory trust accounting models that apply to solicitors and in the property sector have been in place for decades. In Queensland each year there are approximately 12,700 trust accounts operated by real estate agents, motor dealers, chattel auctioneers, debt collectors and solicitors. Many banks are accustomed to providing trust accounts to support these regimes. The Panel considers that these legislative models could be adapted and incorporated into the BIF Act to require cash retentions to be held on trust in a separate bank account by building contractors and private sector principals.

To ensure that money held in a retention trust account is a secured interest, the Panel recommends that it be deemed to be a charge in favour of the person from which the retention is held, but only to the extent that that person is entitled to return of that money. To give effect to this recommendation, the statutory charge could be expressed in a way that removes any obligation for the interest in the trust to be registered on the Personal Property Securities Register under the *Personal Properties Securities Act 2009 (Cth)*.

*Retention monies need to be protected and returned in accordance with contracts and the new legislation. The only way to do this is to remove the money from the Builders to ensure it is repaid to those business (sic) who have completed work. A possible solution of one trust account could be established for all projects and secured from liquidation. Any interest then would flow to the Builder, but funds would be secured in the event of liquidation. This would not address the disputed funds issue however currently in the PBA trial the disputed funds account is ineffectual.*

**Master Electricians Australia Submission to the Panel dated 15 February 2019**

<sup>24</sup> *Agents Financial Administration Act 2017 (Qld)* and the *Legal Profession Act 2007 (Qld)*

## Recommendation 6

That the BIF Act be amended to remove the requirement for a retention trust account as part of a PBA and instead require the creation of a retention trust account by all contractors in the contractual chain and any private sector principals withholding cash retentions in relation to any:

- (a) project which requires a PBA; or
- (b) prescribed work.

## Recommendation 7

The BIF Act require that the retention trust account requirements proposed in Recommendation 6 require:

- (a) all retentions to be held in a single bank account that is only for retentions;
- (b) the bank account name must include the word 'trust';
- (c) the trustee of the retention trust is the person entitled to hold retentions;
- (d) the beneficiaries of the retention trust are the trustee and any persons from whom the retentions have been held;
- (e) monies held on trust for a beneficiary other than the trustee are deemed to be a charge in favour of the beneficiary, but only to the extent that that beneficiary is entitled to the money withheld from them;
- (f) section 59 of the BIF Act be amended to also apply to the retention trust account;
- (g) detailed trust accounting records must be kept; and
- (h) mandatory external auditing of trust accounting records.

## Recommendation 8

That there be a requirement for all contractors in the contractual chain and any prescribed person wishing to hold retentions to undergo compulsory training and assessment by an approved training organisation on the management of a retention trust account by a specified time, after which, any contractor who has not successfully completed the compulsory training will not be entitled to hold retentions.

## Recommendation 9

That the QBCC be given adequate powers to:

- (a) monitor and enforce compliance with the retention trust account requirements set out in Recommendation 7;
- (b) freeze retention trust accounts; and
- (c) administer a retention trust account in certain circumstances such as where an account holder becomes insolvent or unable to manage the account.

## Recommendation 10

That a phase in of the requirement for a retention trust account be aligned to the phases for the expansion of PBAs as set out in Recommendation 1 such that:

- (a) in Phases 2 and 3 where a PBA is required, all head contractors and private sector principals must hold any retentions from those projects in a retention trust account; and
- (b) in Phase 4
  - (i) all contractors in the contractual chain holding retentions on a project for ‘building work’; and
  - (ii) private sector principals on projects requiring a PBA, must hold any retentions from those projects in a retention trust account.

### *Considerations for implementation*

If the Government adopts these recommendations, it could consider whether the obligation to hold a retention trust account should apply to cash retentions held on all building and construction work, including civil and infrastructure work.

The Government should have regard to the legislative requirements relating to solicitor trust accounts and property related trust accounts when formulating any response to these recommendations such as:

- oversight by regulators;
- record keeping;
- auditing of trust accounting records to ensure all funds are identifiable;
- compulsory training;
- bank charges and interest; and
- the oversight and step in powers of the QBCC.

The Government may also wish to consider whether interest on retention trust accounts should be able to be retained by the holder of the account to offset the costs associated with loss of working capital. However, the Panel notes that interest on solicitor trust accounts and real estate agent trust accounts is returned to Government under those schemes.

### Oversight of PBA and retention trust accounts

The PBA framework requires details of individual transactions to be recorded within the three bank accounts. This is combined with multiple obligations to issue information to the principal including notification of the opening of the bank accounts, notification of information about each subcontractor as they are engaged and information about all payment instructions issued by the head contractor. In addition to the obligations under the BIF Act, government contracts have imposed additional obligations on the head contractor to notify the principal of any change in details of any subcontractor and to submit a monthly subcontractor payment schedule (a progress claim history showing details of each payment claim from each subcontractor and each payment made to each subcontractor).

The head contractor must also ensure that the principal can view deposits and withdrawals from the PBAs and information relevant to payment instructions given to the bank about the PBA.<sup>25</sup> In Phase 1, this requirement has been met by the provision of electronic viewing access to PBAs.<sup>26</sup> Principals must also report certain discrepancies to the QBCC as soon as practicable after they become aware.<sup>27</sup>

The consequences of the above requirements are twofold, namely, that the principal:

- must administer the collection and review of extensive information to oversee the actions of the head contractor; and
- is able to examine details about the head contractor's commercial management of the project, which they would not otherwise be privy to.

Our evaluation has led us to conclude that both of the above consequences are likely to have negative impacts and may undermine the policy intention of the Government.

*The Act uses 'the Principal' as a quasi policing authority over the PBA model, with responsibilities to check that the Head Contractor is complying with the Act and report discrepancies to the QBCC. These significant legal obligations are both impractical and unreasonable.*

#### **Property Council submission to the Panel dated 15 February 2019**

that would be imposed on them by the PBA framework. Most of the head contractors involved in Phase 1 did not object to the Government having access to details about the head contractor's commercial management of the project. They said that the pre-qualification requirements of Government already resulted in them having to share extensive commercial information. However, many of them said they were uncomfortable with private sector principals having access to this commercial information. Feedback was to the effect that this viewing access was likely to adversely impact negotiations over variations or future projects. This view was also shared by many stakeholders not involved in Phase 1 of the PBA reforms.

The principals in Phase 1 have reported high levels of administration involved in collecting, filing and reviewing documents and navigating viewing access to multiple banking platforms. Whilst some high-level monitoring has been possible this is becoming difficult as the numbers of PBA contracts increase. Some banks offering PBAs in Phase 1 reported concerns about the provision of viewing access and potential security issues in future phases when access would be given to private sector principals. The Panel also heard from many stakeholders not involved in Phase 1 PBAs, that private sector principals were concerned about the administrative burden

*Remove the principal's viewing rights. Providing principals with a clear view of the builder's business costs & profit margin is an intrusion into commercial-in-confidence information. This would be a disaster in the private sector.*

#### **MBAQ submission to the Panel dated 14 February 2019**

All stakeholders, when asked for suggested alternatives to principals having oversight of PBAs, said they would prefer for the QBCC to have oversight. Given the QBCC's role as industry regulator, giving it oversight of PBAs is a logical fit with the functions already undertaken by them and accordingly the Panel has made recommendations to this effect. However, it would not be reasonable to assume that the QBCC should be given the same information that

<sup>25</sup> BIF Act s 24

<sup>26</sup> The requirement for electronic viewing access is found in state government contracts, not the BIF Act.

<sup>27</sup> BIF Act s 52

is given to principals under Phase 1 or that it would have electronic viewing access to every PBA opened as a matter of course. Instead, the QBCC needs to have adequate powers and information to enable it to undertake monitoring, proactive and reactive oversight and enforcement.

*The reforms won't be optimally rolled out unless the QBCC undertakes a proactive audit regime that does not rely exclusively on tips and similar activation measures*

**Plumbers Union on behalf of AMCA, MPAQ and NFIA submission to the Panel dated 15 February 2019**

The QBCC's role needs to be supported by some amount of mandatory reporting of information by head contractors and by requirements for head contractors to maintain detailed records related to PBA transactions, which can be accessed when required by the QBCC and within reason, by the principal and first-tier subcontractors. It could be useful for the QBCC to know when a head contractor has had to apply pro-rata payments from the PBA. This only occurs where there is a shortfall in the PBA account and the head contractor has not been able

to top up, suggesting they are in financial difficulty. We therefore recommend a mandatory obligation be imposed on head contractors to notify the QBCC if pro-rata payments are made from the PBA.

This oversight will likely require additional resources for the QBCC, which will need to be considered by Government if our recommendations are accepted.

Given the Panel's recommendation that oversight of PBAs be carried out by the QBCC, the information to be submitted to the QBCC would be much more limited than that currently required to be provided to principals.

The principal should still be given details of the PBA account's opening and closing. The Panel further recommends that the head contractor should also provide the principal with a supporting statement with any payment claim stating that payments to subcontractors have been made. Presently many building contracts require statutory declarations to be provided by head contractors. The supporting statement recommended by the Panel provides for a declaration about similar matters. The failure to provide a supporting statement or the provision of false information in a supporting statement should be offences, which the QBCC can prosecute. The Panel notes that the use of a supporting statement was recommended in the Murray report.<sup>28</sup> Murray recommends that a copy of supporting statements be provided to the relevant subcontractor. The Government could also add this obligation in the BIF Act although the Panel does not consider this to be essential.

## Recommendation 11

That the BIF Act be amended to remove the requirement for lodgement of information with the principal other than:

- (a) details of the PBAs opening, closing or name change; and
- (b) a supporting statement with any payment claim, which includes a declaration that:
  - (i) all subcontractors have been paid the amounts due and payable to them for construction work done; or
  - (ii) identifies those subcontractors which have not been paid and the amounts outstanding, if any.
- (c) The failure to comply with (b) or the provision of false information in a supporting statement should be an offence.

In making this recommendation, it follows that the Panel recommends that section 24(2), 24(3), 50, 51 (as it relates to principals) and 52 of the BIF Act be repealed.

<sup>28</sup> Recommendations 32-34 of the Murray report which endorse sections 13(7) – (9) of the *Building and Construction Industry Security of Payment Act 1999 (NSW)*.

## Recommendation 12

That section 23(1) of the BIF Act be amended to provide that for each building contract requiring a PBA, the head contractor must:

- (a) open a separate bank account that is a project trust account;
- (b) the bank account must have the name 'trust'; and
- (c) the project trust account must correlate to the trust accounting records required by Recommendation 13.

## Recommendation 13

That section 45 of the BIF Act be amended to require that for projects requiring a PBA the head contractor must keep detailed trust accounting records, which include:

- (a) information relating to all transactions to and from the PBA;
- (b) details of all beneficiaries;
- (c) all payment claims and supporting statements, if any;
- (d) all payment schedules;
- (e) any documentation relating to payment claims, schedules and payments; and
- (f) any information prescribed by regulations.

The trust accounting records must be:

- (i) made available to the QBCC on request;
- (ii) made available to the principal or a beneficiary in certain circumstances; and
- (iii) subject to mandatory external auditing at specified intervals.

## Recommendation 14

That the head contractor be required to lodge the following information within a specified number of days after entry into a contract that requires a PBA with the QBCC:

- (a) site address;
- (b) value of contract;
- (c) name of principal;
- (d) description of building work;
- (e) bank in which the PBA will be or is established;
- (f) commencement date;
- (g) date for practical completion; and
- (h) any other prescribed information.

### Recommendation 15

That the QBCC's powers be reviewed and, if necessary, amended to ensure that it has the power to freeze PBAs, obtain any information related to PBAs from any person or class of persons including a principal, head contractor, beneficiary or bank including:

- (a) relevant building contracts, subcontracts or supply contracts;
- (b) documents relating to the establishment and operation of a PBA; and
- (c) all trust accounting records required to be kept by Recommendation 13.

### Recommendation 16

There be a requirement for head contractors to notify the QBCC if a pro rata payment is made pursuant to section 33 of the BIF Act.

### Recommendation 17

That the BIF Act provide for:

- (a) principals on a project requiring a PBA; or
- (b) beneficiaries to the PBA or to a retention trust account,  
to have reasonable access to appropriate trust accounting information.

#### *Considerations for implementation*

The Government may wish to explore whether the information lodged under Recommendation 14 could be lodged via the QLeave lodgement platform. If this can occur, then information in the QLeave lodgements would need to be shared with QBCC.

Any new provisions based on trust models for the operation of solicitors' trust accounts or trust accounts in the property sector should be consistent with those recommended in relation to retention trust accounts under the Panel's Recommendations 7, 8 and 9.

## Recommendation 18

### Administration of PBAs on termination of contract or insolvency

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The BIF Act provides that on termination of the contract or insolvency of the head contractor, the principal may step in and administer the PBA (Part 5 of Chapter 2 of the BIF Act). Whilst it is necessary for the BIF Act to provide for what will happen in these circumstances, the Panel does not recommend that principals be given responsibility for that task.

#### Recommendation 18

That the BIF Act be amended to remove the ability for a principal to replace the head contractor as trustee of the PBA on insolvency of the head contractor or termination of the contract. Instead the QBCC, at its discretion, should be able to administer the PBA in these circumstances. The QBCC's powers should be reviewed to ensure that it can effectively administer the PBA in these circumstances.

#### *Considerations for implementation*

Any amendments relating to this recommendation ought to consider and provide for the administration of the retention trust account in the event of insolvency of the head contractor, if such trust account is introduced as recommended above by the Panel.

If accepted, the result of the above recommendation is that amendments will need to be made to Part 5 of Chapter 2 of the BIF Act.

## Recommendation 19

### Subcontractor beneficiaries to a PBA

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The Panel has heard concerns from a range of industry stakeholders about the administrative burden of having to pay subcontractors with low value subcontracts out of the PBA. For each subcontractor engaged on a project that has a PBA, the head contractor must:

- provide a notice to the subcontractor that the project has a PBA (s49);
- provide a notice to the principal with details about each subcontractor's bank accounts (s50);
- issue payment instructions to the bank for every payment to the subcontractor and every transfer to the retention trust account in the name of the subcontractor;
- issue payment instruction information about all payments to the subcontractor (including retention transfers) to both the subcontractor and the principal;
- issue payment instruction information about head contractor payments to the principal; and
- include information about each claim in the subcontractor payment summary to be lodged with each head contractor progress claim.

The recommendations to remove principal oversight will take away 4 of the 6 requirements referred to above. The Panel therefore does not recommend that there be a threshold value for a subcontract in order for a first-tier subcontractor to be a beneficiary under the PBA. However, in Recommendation 2 we have recommended an ability to prescribe a minimum subcontract value in regulations if it becomes apparent after further evaluation that this is warranted.

The Panel recommends that the obligation to notify a first-tier subcontractor that they will be a beneficiary under the PBA should remain (s49). In addition, the Panel recommends that the BIF Act should require the head contractor to issue subcontractors with payment information within a specified period after a payment instruction is made relating to that subcontractor.

In relation to the section 50 notice that the head contractor must issue to the principal with details of each subcontractor within 5 days of their appointment, the Panel heard that this timeframe was difficult to achieve when a new subcontractor was appointed and their bank details were not known. Several head contractors told us that they had trouble getting this information from the new subcontractor, which meant they could not submit on time and they committed an offence. If our recommendation regarding the removal of the obligation to deliver a section 50 notice is not adopted, the Government should amend section 50 to increase the timeframe to 10 business days and also provide that, where a subcontractor does not respond to a reasonable request to provide information to enable the form to be completed, they will commit an offence.

## Recommendation 19

That section 51 of the BIF Act (as it relates to subcontractors) be replaced with a requirement that within 5 business days of each payment instruction being issued to the bank in relation to a subcontractor, the head contractor is to issue a statement to that subcontractor with the following information:

- (a) the amount to be paid to the subcontractor under the payment instruction in relation to that project; and
- (b) where cash retentions are held from that subcontractor for that project:
  - (i) the amount to be transferred to the retention trust account on behalf of that subcontractor in relation to that payment, if any; and
  - (ii) the total amount held in the retention trust account on behalf of the subcontractor following that payment, if any; and
- (c) any prescribed information.

### *Considerations for implementation*

Recommendations 11 and 19 read together capture the information to be shared between the head contractor and the principal, and the head contractor and the subcontractor.

## 11. Other observations and comments on PBAs

There have been a number of other matters raised by stakeholders during the evaluation, which the Panel makes comments and observations about below.

### 11.1 Increased protection for head contractors

A number of stakeholders have raised concerns that the PBA reforms focus on one part of the contracting chain, offering no protection to head contractors from delayed payment by principals.

Whilst the concerns about late payments by principals are valid, the Panel notes that there has been a prohibition against ‘pay when paid’ clauses in contracts for many years. The PBA framework reinforces the head contractors’ obligation to pay subcontractors when they are due even if they have not received payment under the head contract. If a principal does not pay, it is the head contractor that has a direct relationship with the principal and has contractual rights to enforce payment. It is the head contractor that has negotiated the contract and had an opportunity to manage the risk of non-payment in those negotiations. The subcontractor has no ability to influence that relationship and should not carry the risk of delayed payment from the principal. Shifting this risk back up the contractual chain is an intended consequence of these reforms.

*Until the source of funds for each project are adequately brought into the process and quarantined and guaranteed at source (the Client or its financier) then the current legislation shall always be suboptimal in providing security of payment for Head Contractors, subcontractors and sub-subcontractors.*

**Queensland Major Contractors Association submission to the Panel dated 15 February 2019**

*A major source of strain on the cashflow in the industry is delayed payments by clients at the top of the chain, including government clients, and the inappropriate use of technical arguments and prolonged dispute resolution requirements for clients to avoid payment for work which has clearly been done. Any reforms which do not address this element of the industry will not ever fix the problem in relation to subcontractors.*

**BMD Group submission to the Panel dated 15 February 2019**

Many stakeholders have called for the Government to consider creating a statutory obligation on principals to pay head contractors on time. Such reform would require the weighing up of competing and complex policy considerations, which could affect private sector investment in the State and are beyond the Panel’s remit.

If the recommendations in this report are adopted together with the Chapter 3 reforms, the following measures would be in place to improve protections to head contractors from non or late payment by principals:

- A head contractor would be able to issue a payment withholding request on the financier of the principal on lodgement of an adjudication application (Recommendation 5);
- A head contractor would be able to issue a charging order on land related to the building work if an adjudicated amount has not been paid (Recommendation 5);
- Principals under PBA contracts must hold cash retentions in a separate retention trust account on trust for the head contractor (Recommendation 6);
- Principals must issue a payment schedule within 15 days (or earlier under a contract) of a payment claim being given by a head contractor, unless it pays the whole amount claimed, and if it does not do so the principal commits an offence;
- Principals must pay the amount scheduled by the due date or they will be committing an offence (Recommendation 4);
- All of the other protections in Chapter 3, which give head contractors more effective tools to enforce payment.

## 11.2 Security over money held in or paid from the PBA to subcontractors

A stated policy intention of the BIF Act is to secure money held in the PBA in the event of an insolvency.

The framework created by the BIF Act is capable of ensuring that money being held in a PBA or retention trust account that is liable to be paid to a subcontractor beneficiary:

- would not form part of the assets of a head contractor on insolvency; and
- could not be called on to satisfy a debt (secured or otherwise) of the head contractor.

*“One of the most important things about a PBA is that, in the event of head contractor insolvency, money in the PBA will be protected from other creditors. This means that progress payments in the PBA are protected, retention moneys in the PBA are protected and payments in dispute in the PBA are protected.”*

**Mick de Brenni - First reading speech  
22 August 2017**

However, the BIF Act does not alter the preferencing laws under the Commonwealth’s *Bankruptcy Act 1996* and *Corporations Act 2001*. It is arguable that there may be certain circumstances where money paid from a PBA could be the subject of an unfair preference claim. On advice, the Panel has been able to conclude that these circumstances are likely to be very rare in practice. The Queensland Government has done all that it can to ensure the funds in a PBA liable to be paid to a subcontract beneficiary are unable to be distributed to secured creditors in the event of head contractor insolvency.

In relation to the retention trust account, the Panel has recommended that the monies held in trust be characterised as a charge. This will make those monies a secured interest protecting them, as much as possible from the Commonwealth’s unfair preferences laws.

## 11.3 Potential that 7 and 14-day payment terms will be increased to 30 days

Of the 18 head contractors the Panel spoke to that were involved in Phase 1 of the PBA reforms, 14 said that they paid some of their subcontractors on 7 or 14-day terms. Of those 14, four said they were or were likely to move those subcontracts out to 30-day terms. The other 10 head contractors said they saw no need to move their payment terms or that their subcontractors would not agree to longer payment terms. The ones that spoke about extending 7 and 14-day payment terms to 30-day payment terms, said this was necessary in order to simplify their payment processes under the PBA and to ensure that at any point in time each month they would know when they could remove money from the PBA without being in breach of the BIF Act.

The concern that PBAs would result in subcontractors being paid more slowly because of this change in practices was also raised by other stakeholders.

Notwithstanding the concern, the Panel heard from 10 head contractors that they did not intend to adjust payment terms for those contractors on 7 or 14-day terms. This suggests that many subcontractors will not tolerate pressure to lengthen payment periods and/or that the position taken by some head contractors to push subcontractors down this path is unnecessary.

*Subcontractor members are also concerned about the negative impact the PBA reforms will have on the terms of their subcontracts. Subcontractors are likely to lose the flexibility for early/interim payments due to the additional administration required for all payments out of PBAs*

**MBAQ Submission to the Panel dated  
14 February 2019**

The Panel hopes that the recommendations it has made, if adopted, will simplify the administration associated with PBAs and alleviate any perceived need for head contractors to lengthen payment times for subcontractors.

## 11.4 Cascading statutory trusts

The Murray report recommends the introduction of cascading statutory trusts.<sup>29</sup> This call was echoed in a number of submissions made to the Panel.

The PBA is a form of statutory trust. It requires a separate bank account for project funds and detailed records of transactions. John Murray's recommendation is for a deemed trust that would allow for project funds to remain co-mingled with the contractor's own money and would not require detailed trust accounting records, which are subject to audit. The PBA is not cascading whereas the Murray Report recommends that the statutory trust apply to any money received by any contractor in the contractual chain that is payable to any person subcontracted to them.

The Murray recommendation draws on the recommendations in the Collins' Inquiry from November 2012 and its reference to the Canadian, Ontario model for a cascading statutory trust. The Ontario laws, which create a statutory trust, were the subject of an extensive review in 2016.<sup>30</sup> Under those laws, a statutory trust is created over monies received on behalf of subcontractors. There is no requirement for a separate bank account for trust money and therefore the money held on trust is co-mingled with the head contractor's own money. The review noted that some courts had refused to recognise the trust as operating to prevent trust money from being available to creditors in a winding up. The cases say that the co-mingling of funds and lack of detailed record keeping on transactions resulted in the trust being too uncertain to be recognised as a common law trust.<sup>31</sup> The Ontario review recommended amendments to the laws to require stricter trust accounting records. It also recommended that the Ontario Government explore the need for a separate bank account for project funds to be held on trust. The Panel notes that the insolvency laws in Canada, whilst similar to Australian laws, are not the same and that these cases need to be viewed in the Canadian context.

*The ASA support the implementation of a deemed cascading statutory trust model that applies across the entire industry as the required industry standard for payments. Project Banks Accounts can co-exist with cascading statutory trusts.*

**Australian Subcontractors Association submission to the Panel dated 14 February 2019**

More recently the Fiocco Report<sup>32</sup> recommended statutory trusts be introduced in WA. Whilst Fiocco recommended against PBAs in the private sector, some of the criticisms he raises appear to be based on a presumption that a PBA framework must impose a requirement for trust deeds to be established and strict oversight obligations to be imposed on a principal (as is the case under the WA model for PBAs). These would not be requirements of the Queensland PBA framework if our recommendations are adopted.

The PBA model provides a greater level of traceability and transparency over the movement of project funds between head contractors and first-tier subcontractors than the deemed statutory trust model proposed by the Murray Report.

The PBA model is more likely to result in head contractors not using money owed to subcontractors as working capital given:

- project funds are physically separated from a head contractor's trading accounts;
- detailed trust accounting records must be kept for PBAs;
- offences are committed when money that is liable to be paid to a subcontractor is wrongly moved from the PBA; and
- the inappropriate movement of money from the PBA is more likely to be detected due to the requirement for separate bank accounts, record keeping obligations, auditing requirements and oversight powers of the QBCC.

<sup>29</sup> Murray Report recommendations 85 and 86

<sup>30</sup> Reynolds, B. and Vogel, S. (2016), [Striking the Balance: Expert Review of Ontario's Construction Lien Act](#), Report prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, Ministry of the Attorney General, Ontario, Canada

<sup>31</sup> Ibid p 116-123

<sup>32</sup> John Fiocco, Security of Payment Reform in WA Building Construction Industry, October 2018

*We support the attachments of all monies to each project. This is vital to:*

- › *Implement one of the key motivators for these reforms – ensuring that funds are attached to projects*
- › *Enabling cultural change*
- › *Administrative ease.*

*Our advice is that sifting through a single giant account would be more burdensome than individual accounts*

**Plumbers Union on behalf of AMCA, MPAQ and NFIA submission to the Panel dated 15 February 2019**

In deciding not to recommend a cascading statutory trust, the Panel notes that its recommendations in relation to the retention trust account (including the obligation to keep detailed trust accounting records) are intended to operate along the entire contractual chain. Therefore, the Panel concludes that the combination of the PBA and retention trust account proposed by these recommendations represents the most effective model to achieve the policy intent of the Government.

### 11.5 Timeframes for meeting obligations

There are a number of provisions in the BIF Act which provide for actions to be taken ‘as soon as practicable’, ‘as quickly as possible’, ‘fastest way possible’ or like timeframes. These expressions create uncertainty for stakeholders and difficulty for enforcement. Some of our recommendations above will result in the repeal of some of these provisions; where they do not, the Panel suggests consideration be given to aligning the expressions in these provisions, setting clear timeframes or enabling a timeframe to be calculated. For example ‘within 24 hours of becoming aware’. Provisions which should be reviewed and amended include section 27(4), 30(2), 31(2), 84(1), 91(1), 94(4) and 97(2).

### 11.6 Should there be a reasonable excuse provision for offences?

The offence provisions in the BIF Act are an important deterrent. The maximum penalties that apply are onerous and reflect Parliament’s intention that these offences be treated seriously if they come before the courts. The building industry includes some very large entities that may not necessarily be deterred from non-compliance if the potential punishment for non-compliance is considered or assessed as being trivial compared with the commercial gains to be made.

The maximum penalties only apply if the QBCC decides to prosecute in the courts and the offence is proven. Even then, the penalties are a maximum that a court can apply taking into account many factors relevant to the commission of the offence.

*Include ‘reasonable excuse’ provisions for the head contractor so that if there are reasonable attempts made to comply, the fines and other penalties do not apply e.g. not providing subcontractor bank account details within 5 business days of entering into the subcontract. If the subcontractor does not provide this information to the head contractor when requested, the head contractor should not be penalised.*

**MBAQ submission to the Panel dated 14 February 2019**

The Government may give further consideration to the need for a statutory trust that applies to the parts of the contractual chain that are not covered by a PBA. The Panel notes the Government has agreed to work with the Building Ministers Forum to consider these issues further. The Panel can see no reason why the Government could not introduce cascading statutory trusts to the parts of the contractual chain not covered by PBAs if it decides to do so.

*While the Property Council appreciates that the Government is seeking to ensure compliance through these hefty fines, the unrealistic nature of the timeframes could see firms acting in good faith to achieve their PBA obligations stung with punitive penalties.*

**Property Council submission to the Panel dated 15 February 2019**

Overall, the Panel does not consider that the offence provisions should provide for a ‘reasonable excuse’. These types of limitations in offence provisions make them difficult to enforce. The QBCC as a government regulator has an obligation to exercise reasonable discretion when determining what action to take in response to an alleged offence. This includes an obligation to have regard to mitigating circumstances, such as one-off administrative errors or innocent oversights. There is also an overarching obligation to only bring matters to a court where there is a public interest in doing so. The QBCC’s Compliance and Enforcement Strategy confirms that it will consider a range of factors when responding to alleged offences.

The Panel considers the QBCC should be given as many enforcement options as possible to choose from when responding to breaches of the BIF Act. For example, if the QBCC could issue an infringement notice instead of prosecuting, then the maximum fines set out in the Act would only apply if the infringement notice was not paid and the matter was prosecuted. The penalty under an infringement notice would be considerably lower than the maximum fines for an offence.

*The compliance priorities will foster integrity and probity in the sector by developing and implementing risk-based frameworks to detect non-compliance, as well as facilitating education, engagement and partnership activities within the industry.*

*If an offence is established as a result of a compliance activity, an enforcement response may be taken after consideration of factors including the severity of the offence, impact on individuals and the community, prevention of further harm and general deterrence.*

**QBCC 2018/19 Compliance and Enforcement Strategy p 4 & 5**

# PART C – Payment Processes and Adjudication and Retention Repayment provisions

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## 12. Introduction

### 12.1 BIF Act reforms that commenced on 17 December 2018

The following reforms commenced in December 2018:

- Progress payment reforms;
- Adjudication reforms; and
- Retentions and security for performance reforms.

#### Progress payment reforms – Chapter 3

The progress payment and adjudication reforms replaced BCIPA. The changes from BCIPA are summarised as follows:

- Unless a respondent pays the payment claim in full by the due date, it must issue a payment schedule within the earlier of the time stated in the contract or 15 business days of the date that the payment claim was given. The failure to do so is an offence with a maximum penalty of approximately \$13,000 (100 penalty units).
- The due date for payment is the date provided for in the contract, or, if no date is provided or the payment provision is void, 10 business days after the payment claim is given.
- Payment claims no longer need to be ‘endorsed’ to trigger the protections of security of payment. Instead payment claims are required to be in writing and include a request for payment. A document bearing the word invoice is taken to satisfy this requirement.
- Claimants do not need to give a second chance notice before lodging an adjudication application.
- An adjudication will need to be commenced within:
  - › 30 business days of the due date for payment, if there is no payment schedule and the full amount of the payment claim has not been paid;
  - › 30 business days of receiving the payment schedule, if there is a payment schedule that provides for payment of less than the full amount claimed;
  - › 20 business days of the due date for payment, if there is a payment schedule and the amount provided for is not paid in full;
- To enforce an unpaid payment claim in court, claimants must give the respondent a warning notice within 20 business days after the due date for payment; and
- The process for adjudication of ‘complex claims’ (claims valued over \$750,000 ex GST) has been varied in that reasons that were not stated in the payment schedule can no longer be introduced by the respondent during the adjudication process.

#### Adjudication reforms – Chapter 5

- Adjudicators now need to hold qualifications to be registered with the Adjudication Registry.
- There is a code of conduct applying to adjudicators and they will be required to undertake compulsory professional development.
- Registered adjudicators may have their registration suspended or cancelled if they contravene the code of conduct or are no longer suitable for registration.

## Retentions and security for performance – amendments to the QBCC Act s 67NA, 67NB and 67NC

Under all building contracts which provide for retentions or security for performance, the retentions and/or security must be released to the claimant at the end of 12 months starting on the day of practical completion for the contract (the statutory defects liability period), unless the building contract provides otherwise.

Failure to release a retention amount on or before the date it is due is an offence with a maximum penalty of approximately \$26,000 (200 penalty units) or one year's imprisonment, unless there is reasonable excuse or the retentions are the subject to a subcontractor's charge or a dispute between the parties to the building contract. The party holding the retention or security is required to give the person entitled to the retention amounts a notice within 10 business days before the end of the defects liability period which sets out:

- the date the defects liability period ends;
- the retention amount;
- the amount to be paid at the end of the defects liability period; and
- the date that amount will be paid.

Failure to issue the notice is an offence with a maximum penalty of approximately \$13,000 (100 penalty units). Principals are not required to comply with the notice requirements.

## 13. Observations made from our evaluation

The Panel sought feedback on the above reforms in its discussion with head contractors with Phase 1 PBAs and as part of its broader stakeholder feedback activities.

A summary of common feedback relating to these reforms is:

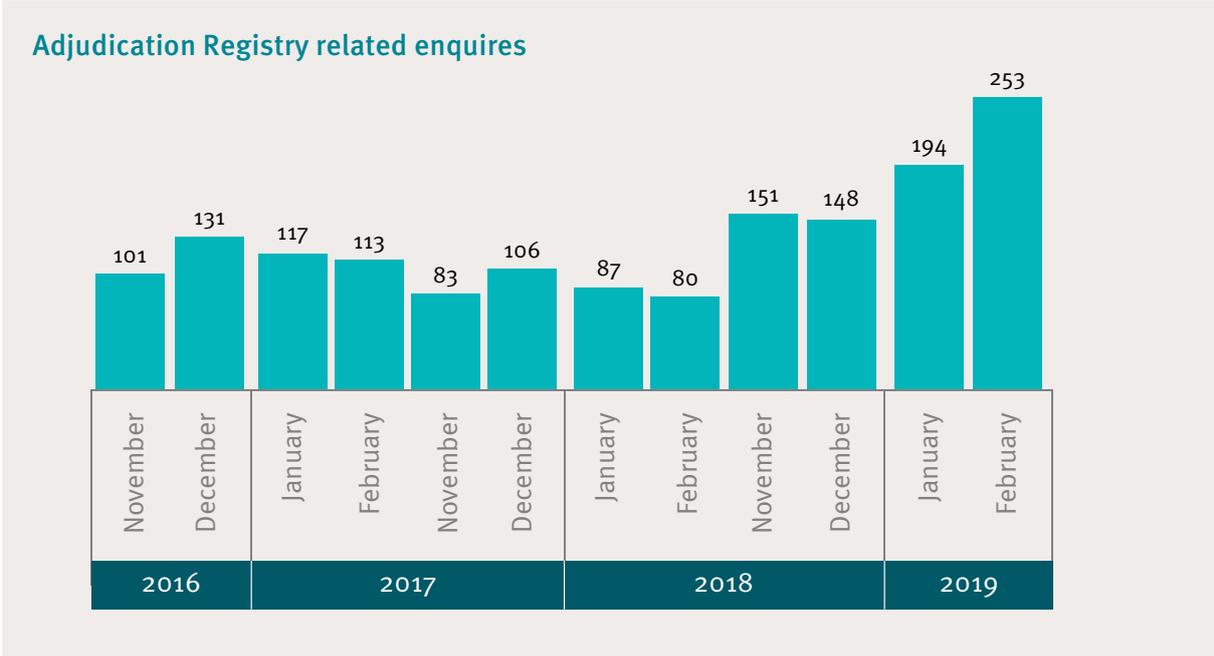
- the changes to Chapter 3 will increase administration for all progress payments regardless of whether adjudication is sought. They also apply to progress claims made by anyone, including sub-subcontractors and suppliers, which means that everyone needs to be aware of the new requirements;
- many were not aware of the BCIPA requirements previously so are finding these changes difficult to understand;
- the prospect of committing an offence if a payment schedule is not issued and no payment is made is onerous and unnecessary;
- the requirement to set out all reasons in every payment schedule is onerous. Many have called for the endorsement requirement to be reintroduced and note that recent amendments to bring back the endorsement in NSW. This has been used as evidence that the removal of the endorsement is a bad idea;
- there is confusion about reference dates and what constitutes a payment claim. There is mixed understanding of the difference between a payment claim and a record of work done or materials supplied. Some say claimants will be worse off as they will use up reference dates and lose their opportunity to claim for any outstanding amounts due;
- the Chapter 3 processes should be able to be used against resident owners;
- that the time for issuing a warning notice (20 business days) is too short;
- it will be burdensome and sometimes impossible for a retention repayment notice to be issued as subcontractors can be difficult to find after the defects liability has ended.

The Panel sought information from the adjudication registry about indicative impacts since the commencement of the reforms. In summary the adjudication registry reported that:

- there has been minimal change in the numbers of adjudications lodged in the months of November, December 2018 and January, February 2019 when compared with those same months in the previous three years;
- there was a large increase in the number of enquiries received by the adjudication registry about the Chapter 3 reforms since November 2018 (Graph 2).

Further details obtained from the adjudication registry are found in **Attachment G**.

Graph 2: Shows the number of enquiries received by the adjudication registry for selected months over the past 3 years.



## 14. General observations and recommendation relating to the payment process reforms

The Panel is reluctant to recommend changes to the above reforms given their commencement is so recent. Most of the feedback received about these reforms is reflective of common transitional issues or are arguments previously raised, which were not accepted by Government. Having said this, the Panel notes that the BIF Act was passed before the Murray Report was issued. The Panel believes it would be helpful to comment on some of the feedback raised and also consider whether any recommendations of the Murray Report should be considered by the Government.

### 14.1 The Murray Report

The Murray report made 87 recommendations. Many are already in place in Queensland or are contrary to the position taken by Government when the BIF Bill was being developed. Some of the recommendations made in this report are consistent with some of the Murray recommendations, namely Recommendations 6-10 relating to the establishment of a trust over retentions<sup>33</sup>, Recommendation 11 relating to supporting statements<sup>34</sup> and Recommendation 5 relating to payment withholding requests.<sup>35</sup> The Panel has also considered the Murray recommendation for a cascading statutory trust over projects funds above.

The following additional matters warrant further comment:

#### Murray recommendation 12 – resident owners

Murray says that security of payment requirements should apply to contracts between builders and resident owners. Murray says that safeguards should be built in to ensure ‘mum and dad’ owners have clear information about their obligation to respond to payment claims within the statutory time periods or contract requirements. This is consistent with the HIA submission to the Panel.

33 Murray recommendation 81

34 Murray recommendations 32 to 34

35 Murray recommendation 53

*The exemption provided by section 61(2)(b) of the BIF Act prevents residential builders who are often mum and dad businesses carrying out domestic building work for a resident owner are not entitled to utilise Chapter 3. In contrast, almost every other participant in the construction industry can use the rapid adjudication system provided by the BIF Act.*

*This is inherently unfair to the builders operating in the residential market who are reliant on the under-resourced Queensland and Civil Administrative Tribunal which has exclusive jurisdiction for domestic building disputes. Such disputes often take many years to resolve through QCAT leaving small builders financially vulnerable.*

**HIA submission to the Panel dated  
15 February 2019**

The Panel does not have a strong view on whether the Chapter 3 process should apply to contracts involving resident owners however recognises that many of these consumers, particularly who only use builders infrequently, will be unfamiliar with the industry. A compromise position could be to have Chapter 3 apply only where the contract involving resident owners is valued over a certain amount, say \$3 million. One might expect on a larger residential project the parties would have relatively equal bargaining power and therefore the builder should have the protections of the BIF Act. If such a compromise were agreed to by Government, the safeguards recommended by Murray should be required.

The Panel notes however, that Queensland unlike other jurisdictions has Statutory Home Warranty Insurance and any inclusion of resident owners under the Chapter 3 payment process would need to be carefully contemplated by the Government given the nature of the insurance and its policy conditions.

### **Murray recommendation 23 – endorsement**

The BIF Act removes the requirement for a payment claim to be ‘endorsed’ with a reference to the BIF Act in order for it to trigger the protections of Chapter 3. Many stakeholders disagree with this decision and refer to the fact that the NSW Government removed the endorsement, but recently reinstated it having found its removal had negative impacts.

It is too soon for the Government to tell whether the removal of the endorsement in the context of the BIF Act will have negative impacts. Although the NSW Government chose to reinstate the requirement for an endorsement, this does not mean that it will not be effective in improving communication between parties in Queensland.

### **Murray recommendation 75 – service by email**

The BIF Act provides for service of documents in any way provided for under a contract (s 102). The Panel heard from some stakeholders that they receive multiple copies of documents served by different means because subcontractors are unsure which method of service is required. Murray recommends that legislation provide for various forms of service to be able to be used. He includes service by personal delivery, post, facsimile, e-mail or other means provided for by contract. The Panel suggests that Government gives consideration to amending the BIF Act in the manner set out in Murray recommendation 75.

## Recommendation 20

### Warning notices

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The only additional matter the Panel has identified for recommendation is in relation to section 99 of the BIF Act concerning warning notices.

The BIF Act provides that if a person wants to go to court to enforce a 'debt due' they must issue a warning notice within 20 business days after the due date for payment. This timeframe was introduced into BCIPA as part of the 2014 amendments. The Panel has considered how warning notices are used in other jurisdictions and notes that where warning notices are required in similar circumstances there is no timeframe.<sup>36</sup> The current timeframe is shorter than the timeframe for making an adjudication application and may defeat the policy intent of the BIF Act reforms. The Panel recommends that Government extend this timeframe to at least 60 business days, with the ability for the Government to make regulations to adjust the timeframe following further evaluation of the reforms.

### Recommendation 20

That section 99(3) of the BIF Act be amended to provide that a warning notice must be issued within 60 business days after the due date for payment or other alternative timeframe prescribed.

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<sup>36</sup> For example section 16 of the *Building and Construction Industry Security of Payment Act 2002 (VIC)*; section 15 of the *Building and Construction Industry Security of Payment Act 2009 (SA)*; section 15 of the *Building and Construction Industry Security of Payment Act 1999 (NSW)*.

## 15. Observations relating to other BIF reforms

### 15.1 Adjudicators and the adjudication process

The amendments relating to adjudicators in Chapter 5 of the BIF Act require adjudicators, for the first time in Queensland, to hold qualifications, undertake compulsory professional development and comply with a code of conduct. These amendments commenced in December 2018.

The only amendment to the adjudication process was related to ‘complex claims’, that is, claims over \$750,000 (ex GST). This amendment was to remove the ability for a respondent to raise defences in an adjudication that were not already raised in a payment schedule.

The timing of this evaluation does not allow the Panel to assess indicative impacts of the above reforms.

The Panel received submissions raising numerous issues to do with adjudicators and the adjudication process. John Murray also made several recommendations about these issues. In summary, issues raised include:

- a number of stakeholders the Panel spoke to expressed a general sense of dissatisfaction with the adjudication process with comments such as:
  - › they do not get a fair hearing;
  - › the quality of decision making is poor;
  - › using adjudication negatively impacts the commercial relationship with the respondent; and/or
  - › the common practice for principals (including state government) to require a tenderer to disclose whether they have been involved in an adjudication claim is seen as resulting in a bias against tenders that have used adjudication.
- there is a lower number of valid adjudication applications lodged in Queensland compared to other states where Adjudication Nominating Authorities are in place and assist applicants to prepare their applications;
- adjudicator’s fees in Queensland are alleged to be higher than in other states because Queensland does not have Adjudication Nominating Authorities;
- there should be an option for an ‘on the papers’ review of an adjudication decision by a more senior adjudicator; and
- the publication of adjudication decisions contributes to the fear of retribution or loss of reputation.

These issues are not new nor has the veracity of some of the issues raised been tested by the Panel as it falls outside the Panel’s TOR. The reforms in Chapter 5 were intended to improve the quality and integrity of adjudications and in doing so address some of these issues. The Government is at liberty to review the impacts and effectiveness of the Chapter 5 reforms in due course and in doing so reconsider whether some of the above issues should be addressed in future reforms to improve the adjudication process and encourage its use.

### 15.2 Unfair contract terms

The Panel notes that the BIF Act reforms include a new requirement for building contracts to have ‘mandatory conditions’ prescribed by regulation. No regulations have been made. There is a working group that includes members of the Panel’s IRG, which is formulating advice to Government on potential regulations. The Panel spoke to the chair of that group about the status of their work. There were also a number of comments in submissions to the Panel about the impact of contract terms including requiring more than 5% retentions, processes for claiming variations, unreasonable time bars, negative variations, and termination for convenience. This does seem to be an area where legislative intervention may be necessary and we acknowledge Government is progressing with the development of regulations.

### 15.3 Minimum Financial Requirements

The MFR reforms commenced in two parts on 1 January and 2 April 2019. The Panel was aware of concerns raised about the interaction between the MFRs and monies held in a PBA. However, these were addressed in material published by the QBCC. A small number of stakeholders raised concerns about whether the net tangible assets required for each licence category were adequate. The general impression of the Panel is that the industry is accepting of the reforms. The impact of the reforms will turn on the ability of the QBCC to effectively enforce compliance and use the information obtained through lodgement of financial reports to inform its proactive regulatory activities.

# PART D – Overall implementation approach of Government

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## 16. Introduction

As part of its work the Panel is asked to consider the effectiveness of the Government's implementation of the suite of reforms. The Panel has approached this task in two parts, namely:

- reviewing the Government's implementation activities; and
- considered the timing for commencement of the various parts of the BIF Act chosen by Government.

## 17. Timing of Commencement of Reforms

The Panel has made recommendations for further staging of the expansion of the PBA reforms in Recommendation 1.

## 18. Implementation activities of Government

The Panel received information about the implementation activities conducted by DHPW and the QBCC. It also asked its IRG members to advise of implementation activities with their members to support the BIF Reforms.

Those activities have covered education, the development of resources, fielding questions about interpretation of the Act and other ongoing support.

Ensuring parties to Phase 1 PBA contracts were prepared to meet their obligations and managing ongoing implementation queries and issues has involved considerable resources from Government.

Key events in the implementation activities undertaken by DHPW are summarised as follows:

- An interdepartmental advisory committee was established in February 2017. The purpose of the committee was to communicate about the reforms across Government and coordinate implementation activities. This committee met regularly until May 2018 when it was replaced by the BIF Project Board;
- Separately to the interdepartmental advisory committee, a special projects PBA Implementation team was established within DHPW in July 2017, before the BIF Bill was passed;
- From October 2017 when the BIF Act was passed, weekly meetings with the QBCC commenced and the development of education and training materials also commenced;
- Various implementation plans, engagement plans, communication plans and management plans were developed to identify the approach that would be taken;
- Amendments for state government contracts were discussed and developed and the IT systems used by BAS and the Department of Education were adapted in readiness for the commencement of Phase 1;
- Consultation with banks began in November 2017 with all meetings held one-on-one on a commercial in confidence basis;
- On 1 March 2018, the day of commencement of Phase 1, the first version of education and development materials was published;
- From March 2018, information sessions were rolled out for each stakeholder group. By December 2018, 38 information sessions had been held in eight locations around the State and were attended by over 400 head contractors and consultants; and
- The amendment of guidance and fact sheets continued as amendments to the BIF Act were made and issues were raised by stakeholders which were worthy of inclusion in guidance material. A suite of education videos was published in September 2018.

More detailed information about the department's implementation activities is found in **Attachment H**.

Key events in the implementation activities undertaken by QBCC are summarised as follows

- Various planning activities to establish plans, identify resources and set timeframes for activities leading up to the commencement of the reforms
- Online activities such as updates to the QBCC website, social media posts and blog posts
- Roadshows on security of payment (including PBAs) in June/July 2018 – five sessions with 395 attendances
- Roadshows on MFR in February 2019 – 11 sessions and four webinars with over 2000 participants
- Partnering with QBCC roadshows in 10 locations with QBCC officers on panel sessions
- Operating a call centre which has received 87 calls about PBAs
- Investigating two complaints relating to PBAs, both were resolved with education.

The Panel also received information from three of the IRG members about its education and implementation activities as follows:

The MBAQ conducted over 80 workshops attended by approximately 2,095 members between September and December 2018. Of these, 34 workshops were focussed on Chapter 3 of the BIF Act, 29 were focussed on providing an overview of the BIF Act and 20 were conducted one-on-one with member companies of the MBAQ. The sessions were conducted at 17 locations around the State.<sup>37</sup>

The HIA conducted three workshops (two in Brisbane and one on the Gold Coast) focussed on Chapter 3. It also produced one webinar about Chapter 3 and the MFR, and one breakfast seminar about the MFR changes. The HIA also produced four factsheets to support its members with the BIF reforms and promoted these materials through its electronic newsletters and member alerts.

The NFIA partnered with a legal firm to provide a series of five security of payments workshops including two in February 2018 (Brisbane), two in June 2018 (Brisbane) and one in May 2018 (Townsville). In addition, the NFIA included specific sessions on the building reforms (presented by NFIA and Plumbers Union of Queensland) within member meetings conducted in November 2017, and July and November 2018. The NFIA also distributed legal updates regularly to its members.

<sup>37</sup> Townsville, Cairns, Toowoomba, the Gold and Sunshine Coasts, Rockhampton, Mackay, Gladstone, Hervey Bay, Bundaberg, Mission Beach, Atherton, Airlie Beach, Gympie, Beaudesert and Brisbane

## 19. Observations About Implementation

Many of those involved in Phase 1 of the PBA reforms were complimentary of the activities of DHPW. They said that guidance material was helpful, the information sessions were clear and concise and assisted them to understand their obligations. Whilst there were some reports of confusion, conflicting advice and questions left unanswered, on the whole the feedback about interactions with DHPW was positive and complimentary.

The Panel notes that guidance material was not published until 1 March 2018 when Phase 1 commenced. Similarly, information sessions only began after commencement with information sessions for subcontractors not commencing until September 2018. The resources in the implementation team were a staff of 4.5 resulting in a heavy workload for a small number of people over many months. Members of the implementation team were also part of the Panel's secretariat. This was a good way for the Panel to be kept informed of implementation activities and any issues being raised, although it meant additional duties for the already stretched implementation team.

Education sessions run by QBCC have been very well attended. Over 2000 people attended roadshows in early 2019 demonstrating a strong awareness and interest in the BIF Act reforms from the sector.

The information from MBAQ, HIA and NFIA shows that industry bodies have been proactive in offering their members education and support. They have an important role to play in the ongoing implementation for the BIF reforms. Arguably given the nature of the changes, their members have never needed their support more. The Panel heard allegations from industry bodies that some of the content of training materials provided by Government was not accurate. Similarly, there were reports from Government that some of the content of training materials of industry bodies was not always accurate. This demonstrates a need for greater collaboration between industry bodies that intend to offer training and Government.

The task to educate and support those affected by future phases of PBAs will require more resources than Government has allocated for Phase 1. The Panel estimates that there will be between 700 and 1000 head contractors required to establish PBAs once the reforms are fully implemented. In its first year, there could be up to 2200 projects requiring PBAs. New retention trust accounts are likely to be required by thousands of contractors and principals. There will also be more banks and financial institutions being asked to open PBAs and assist contractors to meet their obligations under the BIF Act.

The Panel has had regard to all of the above when recommending phasing of further stages in Recommendation 1. We have recommended 4-6 months between phases. This is intended to allow for transition including time for educational activities by Government and industry bodies.

A detailed implementation plan should be established as soon as the timeframes for commencement of further stages are known. This plan must be supported by adequate resources. It would be beneficial for Government to work in collaboration with industry bodies as part of its implementation. Industry bodies and Government could share and agree on content of training materials and engage in an ongoing dialogue to ensure that questions from stakeholders are answered consistently.

# Attachment A – Consolidated List of Recommendations

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## Recommendation 1

That further phasing of the PBA reforms be as follows:

- (a) Phase 2: add all Government and private projects valued at \$10M (excluding GST) or more;
- (b) Phase 3: add private projects in the range of \$3M to \$10M (excluding GST); and
- (c) Phase 4: add private projects in the range of \$1M to \$3M (excluding GST).

The timing of the commencement of each phase be as follows:

- (i) Phase 2: at least 2 months after the passing of any amendments to the BIF Act;
- (ii) Phase 3: 4-6 months after Phase 2; and
- (iii) Phase 4: 4-6 months after Phase 3.

## Recommendation 2

The BIF Act be amended to provide that:

- (a) 'building work' is as defined in the QBCC Act;
- (b) revoke section 4 of the BIF Regulation;
- (c) in section 9(5) of the BIF Act, amend definition of 'subcontractor' to provide that 'subcontractor' for a building contract means a party who enters into a first-tier subcontract for construction work or services within the meaning of section 65 or 66(1)(b) of the BIF Act regardless of the value of the first-tier subcontract unless a minimum value is prescribed by regulation.
- (d) revoke section 11 of the BIF Act;
- (e) amend section 14 to provide that a building contract solely for services within the meaning of section 66(1)(b) of the BIF Act is not a PBA contract; and
- (f) amend Chapter 2 of the BIF Act as necessary to provide that a building contract that is a subcontract for another building contract is not a PBA contract unless otherwise prescribed.

## Recommendation 3

That Chapter 2 of the BIF Act be amended to remove the requirement for a disputed funds trust account as part of the PBA framework.

## Recommendation 4

That Chapter 3 of the BIF Act be amended to make it an offence for a person given a payment claim to pay less than the amount stated in a payment schedule.

## Recommendation 5

That Chapter 3 of the BIF Act be amended to provide that:

- (a) on or after making an adjudication application a claimant may serve a payment withholding request on a party above the respondent in the contractual chain to require that party to retain sufficient money to cover the claim out of the money that is or becomes payable by that party to the respondent;
- (b) a person receiving a payment withholding request who fails to comply with such a request will become jointly and severally liable with the respondent;
- (c) that where the claimant is a head contractor and the adjudication application is made against the principal:
  - (i) the claimant may issue a payment withholding request on a financier or funder of the project; and
  - (ii) the claimant may issue a charging order on the property on which the building work the subject of the adjudication application is being carried out but only if the adjudicated amount is not paid by the due date as stated in the adjudicated decision.

## Recommendation 6

That the BIF Act be amended to remove the requirement for a retention trust account as part of a PBA and instead require the creation of a retention trust account by all contractors in the contractual chain and any private sector principals withholding cash retentions in relation to any:

- (a) project which requires a PBA; or
- (b) prescribed work.

## Recommendation 7

The BIF Act require that the retention trust account requirements proposed in Recommendation 6 require:

- (a) all retentions to be held in a single bank account that is only for retentions;
- (b) the bank account name must include the word 'trust';
- (c) the trustee of the retention trust is the person entitled to hold retentions;
- (d) the beneficiaries of the retention trust are the trustee and any persons from whom the retentions have been held;
- (e) monies held on trust for a beneficiary other than the trustee are deemed to be a charge in favour of the beneficiary, but only to the extent that that beneficiary is entitled to the money withheld from them;
- (f) section 59 of the BIF Act be amended to also apply to the retention trust account;
- (g) detailed trust accounting records must be kept; and
- (h) mandatory external auditing of trust accounting records.

## Recommendation 8

That there be a requirement for all contractors in the contractual chain and any prescribed person wishing to hold retentions to undergo compulsory training and assessment by an approved training organisation on the management of a retention trust account by a specified time, after which, any contractor who has not successfully completed the compulsory training will not be entitled to hold retentions.

## Recommendation 9

That the QBCC be given adequate powers to:

- (a) monitor and enforce compliance with the retention trust account requirements set out in Recommendation 7;
- (b) freeze retention trust accounts; and
- (c) administer a retention trust account in certain circumstances such as where an account holder becomes insolvent or unable to manage the account.

## Recommendation 10

That a phase in of the requirement for a retention trust account be aligned to the phases for the expansion of PBAs as set out in Recommendation 1 such that:

- (a) in Phases 2 and 3 where a PBA is required, all head contractors and private sector principals must hold any retentions from those projects in a retention trust account; and
- (b) in Phase 4:
  - (i) all contractors in the contractual chain holding retentions on a project for ‘building work’; and
  - (ii) private sector principals on projects requiring a PBA, must hold any retentions from those projects in a retention trust account.

## Recommendation 11

That the BIF Act be amended to remove the requirement for lodgement of information with the principal other than:

- (a) details of the PBAs opening, closing or name change; and
- (b) a supporting statement with any payment claim, which includes a declaration that:
  - (i) all subcontractors have been paid the amounts due and payable to them for construction work done; or
  - (ii) identifies those subcontractors which have not been paid and the amounts outstanding, if any.
- (c) The failure to comply with (b) or the provision of false information in a supporting statement should be an offence.

In making this Recommendation, it follows that the Panel recommends that section 24(2), 24(3), 50, 51 (as it relates to principals) and 52 of the BIF Act be repealed.

## Recommendation 12

That section 23(1) of the BIF Act be amended to provide that for each building contract requiring a PBA, the head contractor must:

- (a) open a separate bank account that is a project trust account;
- (b) the bank account must have the name ‘trust’; and
- (c) the project trust account must correlate with the trust accounting records required by Recommendation 13.

### Recommendation 13

That section 45 of the BIF Act be amended to require that for projects requiring a PBA the head contractor must keep detailed trust accounting records, which include:

- (a) information relating to all transactions to and from the PBA;
- (b) details of all beneficiaries;
- (c) all payment claims and supporting statements, if any;
- (d) all payment schedules;
- (e) any documentation relating to payment claims, schedules and payments; and
- (f) any information prescribed by regulations.

The trust accounting records must be:

- (i) made available to the QBCC on request;
- (ii) made available to the principal or a beneficiary in certain circumstances; and
- (iii) subject to mandatory external auditing at specified intervals.

### Recommendation 14

That the head contractor be required to lodge the following information within a specified number of days after entry into a contract that requires a PBA with the QBCC:

- (a) site address;
- (b) value of contract;
- (c) name of principal;
- (d) description of building work;
- (e) bank in which the PBA will be or is established;
- (f) commencement date;
- (g) date for practical completion; and
- (h) any other prescribed information.

### Recommendation 15

That the QBCC's powers be reviewed and, if necessary, amended to ensure that it has the power to freeze PBAs, obtain any information related to PBAs from any person or class of persons including a principal, head contractor, beneficiary or bank including:

- (a) relevant building contracts, subcontracts or supply contracts;
- (b) documents relating to the establishment and operation of a PBA; and
- (c) all trust accounting records required to be kept by Recommendation 13.

## Recommendation 16

There be a requirement for head contractors to notify the QBCC if a pro rata payment is made pursuant to section 33 of the BIF Act.

## Recommendation 17

That the BIF Act provide for:

- (a) principals on a project requiring a PBA; or
  - (b) beneficiaries to the PBA or to a retention trust account,
- to have reasonable access to appropriate trust accounting information.

## Recommendation 18

That the BIF Act be amended to remove the ability for a principal to replace the head contractor as trustee of the PBA on insolvency of the head contractor or termination of the contract. Instead the QBCC, at its discretion, should be able to administer the PBA in these circumstances. The QBCC's powers should be reviewed to ensure that it can effectively administer the PBA in these circumstances.

## Recommendation 19

That section 51 of the BIF Act (as it relates to subcontractors) be replaced with a requirement that within 5 business days of each payment instruction being issued to a bank in relation to a subcontractor, the head contractor is to issue a statement to that subcontractor with the following information:

- (a) the amount to be paid to the subcontractor under the payment instruction in relation to that project; and
- (b) where cash retentions are held from that subcontractor for that project:
  - (i) the amount to be transferred to the retention trust account on behalf of that subcontractor in relation to that payment, if any;
  - (ii) the total amount held in the retention trust account on behalf of subcontractor following that payment, if any and
- (c) any prescribed information.

## Recommendation 20

That section 99(3) of the BIF Act be amended to provide that a warning notice must be issued within 60 business days after the due date for payment or other alternative timeframe prescribed.

# Attachment B – Terms of Reference

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## Department of Housing and Public Works

Building Industry Fairness Reforms Implementation and Evaluation Panel

### *Terms of Reference*

#### *Introduction*

The *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act) received royal assent on 10 November 2017. The BIF Act includes a suite of reforms including the introduction of project bank accounts, improved provisions for progress payments and subcontractors' charges and changes to the adjudication registry. The objective of these reforms is to improve the security of payment for subcontractors and support long term industry growth and efficiencies.

Project bank accounts (PBAs) will be implemented in three phases, with the first phase of implementation of PBAs, applying to government building and construction projects between \$1 million - \$10 million, commencing on 1 March 2018. Phase 2 of PBAs applying to all building and construction projects valued over \$1 million and Phase 3 extending application of PBAs to cover lower tiers of subcontractors will commence at a later date.

In relation to PBAs specifically, the Government has committed to an evaluation of Phase 1 of PBA implementation to inform roll out of PBAs to the private sector.

The BIF Act requires that a review of the operation and effectiveness of the 2017 suite of building and construction industry reforms be conducted and that a report on the outcome of the review be tabled by the Minister in Parliament. The BIF Act requires that the review be started no later than 1 September 2018. The Building Industry Fairness Reforms Implementation and Evaluation Panel (the Panel) has been established early to ensure appropriate opportunity for industry stakeholders to engage with the process.

Section 12 of the Building Industry Fairness (Security of Payment) Regulation 2018 prescribed the Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017 as part of the 2017 suite of building and construction reforms for the purposes of the review.

#### *Objective*

Established under s200A of *Building Industry Fairness (Security of Payment) Act 2017*, the Panel will be established to support the review of the operation and effectiveness of the 2017 suite of building and construction reforms.

#### *Terms of Reference*

The Panel will work with the Government, building and construction industry and other stakeholders to determine:

1. the effectiveness of the Government's implementation of the suite of building industry reforms;
2. the effectiveness of the legislative framework in achieving policy intent;
3. opportunities to realise improved security of payment outcomes for industry prior to the commencement of project bank accounts in the private sector; and
4. the indicative economic impacts and outcomes of the building industry reforms.

### *Scope and functions*

The Panel will be appointed to provide external and independent advice and for ensuring stakeholder and community access to the evaluation process.

The Panel will be responsible for the following:

- a) agreeing in consultation with the Minister and the Department the Panel's evaluation plan, work program and stakeholder engagement plan;
- b) advising on the overarching design and direction of the evaluation of the suite of building reforms;
- c) making recommendations to the Minister for establishment and membership of an Industry Reference Group to advise the Panel and support the evaluation process;
- d) agreeing data metrics and overseeing the collection of baseline, benchmark and cost-benefit data;
- e) consulting with building industry stakeholders;
- f) reviewing reports of external consultants engaged by the Department to undertake evaluation programs and data analysis; and
- g) reporting to the Minister on the findings of evaluation programs at agreed milestones.

The Department of Housing and Public Works will provide secretariat support to the Panel as required.

It is expected the Panel will meet at least every six weeks (excluding holidays periods) for the duration of the appointment in accordance with the Panel's agreed work programs and Stakeholder engagement plan.

### *Commencement and Duration*

The Panel is not intended to continue beyond the introduction of project bank accounts in the private sector. Panel members will be appointed for a term of approximately 12 months commencing on 14 May 2018.

The Minister must table in Parliament a report on the outcome of the review as soon as practicable after the review is completed (S200A(5)).

### *Remuneration*

The Chair and members of the Panel will be remunerated under a consultancy arrangement and are eligible to be reimbursed for reasonable out of pocket expenses including domestic travel, accommodation costs, motor vehicle allowances and meals.

## Attachment C – List of Industry Reference Group Members

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The Panel was supported by an industry reference group comprising these representatives:

- Graham Mackrill, Air Conditioning and Mechanical Contractors Association
- Diane Tate, Australian Banking Association
- Stacy Kennedy, Australian Institute of Building Surveyors
- Jillian Carney, Consult Australia
- Chris Lynch, Electrical Trades Union
- Stacey Rawlings, Engineers Australia
- Michael Roberts, Housing Industry Association
- Grant Galvin, Master Builders Queensland
- Malcolm Richards, Master Electricians Australia
- Penny Cornah, Master Plumbers Association of Queensland
- Wayne Smith, National Fire Industry Association
- Gary O'Halloran, Plumbers Union
- Juanita Gibson, Subcontractors Alliance.

## Attachment D – Summary of Consultation Activities

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### **Consultations:**

- Australian Restructuring Insolvency & Turnaround Association (ARITA)
- Building and Asset Services, Security of Payment team – DHPW (Principals on Phase 1 project bank account projects)
- Building Legislation & Policy – QBCC strategic policy team, DHPW
- Chair of Ministerial Construction Council subcommittee appointed to consider and advise government on potential unfair contract terms
- External consultant engaged (PwC)
- Fair and Square
- Financial Institutions (x eight one-on-one meetings)
- Head Contractors using project bank accounts (x 18 one-on-one meetings)
- Infrastructure Services Branch, Finance and Procurement team, Department of Education (Principals on Phase 1 project bank account projects)
- Mates in Construction
- New South Wales Government, Finance Services & Innovation team
- Property Council of Australia
- Queensland Building and Construction Commission (Commissioner, Deputy Commissioner, Chief Legal Officer)
- Queensland Law Society
- Solicitor-General
- Western Australia - Building and Management Works team, Department of Finance – Principal Policy Officer, Department of Mines, Industry Regulation and Safety – Small Business Commissioner.

### **Industry Forums and Subcontractor Sessions:**

- Brisbane (West End, Eagle Farm)
- North Brisbane (Chermside)
- South Brisbane (Sunnybank, Loganholme)
- Gold Coast
- Cairns
- Sunshine Coast
- Rockhampton.

### **Published Documents:**

- Evaluation Plan, Stakeholder Engagement Plans and Work Plans
- Operating Procedures
- Discussion Paper (Online and PDF)
- Questionnaire (Online and PDF).

### **Panel Meetings:**

- Fourteen (14) Panel meetings.

### **Industry Reference Group meetings:**

- Four (4) meetings.

# Attachment E – Summary of Feedback from Head Contractors Operating PBAs Under Phase 1

Category 3-5		Category 6		Category 7	
<b>Number of case studies</b>	Three	Three	Four		
<b>Software experience</b>	Two head contractors stated that the software was inadequate. One head contractor stated that its software provider was not motivated to develop updates so the head contractor purchased new software at a significant cost.	All three head contractors stated that the software was inadequate. One head contractor stated they were having to use manual workarounds.	All four head contractors stated that the software was inadequate. One head contractor had already invested in software to produce reports required. Other head contractors stated more time was needed to automate. One head contractor stated that its software provider was waiting for review outcome.		
<b>Compliance views</b>	The following concerns were raised: <ul style="list-style-type: none"> <li>One head contractor was investigated by QBCC because a subcontractor would not provide 550 notice. The head contractor was very frustrated.</li> <li>All three head contractors found the 550 notice timeframes difficult.</li> <li>One head contractor found the compliance was burdensome and reduced the head contractor's ability to function as a builder.</li> <li>One head contractor was considering leaving industry or merging.</li> </ul>	The following concerns were raised: <ul style="list-style-type: none"> <li>Receiving multiple identical claims from subcontractors.</li> <li>Confusion about what to do when replacing a subcontractor.</li> <li>550 notices tedious and inefficient (especially when a subcontractor changes bank account).</li> <li>Payment Instructions also tedious.</li> </ul>	The following concerns were raised: <ul style="list-style-type: none"> <li>549 and 550 notices tedious.</li> <li>Difficulties getting subcontractors to comply with 550 notices.</li> <li>Issues where subcontractor uses 'factoring arrangements.'</li> <li>Five-day timeframe for notices confusing and too short.</li> <li>Multiple payments from multiple accounts for the same subcontractor.</li> <li>Wanted more clarity about who was to provide notices.</li> <li>Concerns about penalties if a mistake was made.</li> </ul>		
<b>Sub-contractors threshold</b>	One head contractor thought a \$20,000 threshold for low value subcontractors would be useful.	One head contractor provided a mixed response from within its own company as to what the threshold should be.	Three out of four head contractors thought a monetary threshold for subcontractors was a good idea. With varying minimum thresholds suggested from: <ul style="list-style-type: none"> <li>\$100,000 (mostly sole traders under this limit).</li> <li>\$50,000.</li> <li>\$20,000 to be the same as WA.</li> </ul>		
<b>Views on Principal oversight</b>	One head contractor stated it had no concerns (but did not mention the private sector). Two head contractors stated they were concerned that the Principal oversight would be used to the Principal's commercial advantage in the private sector. One head contractor stated it would prefer QBCC oversight. One head contractor stated that the Principal changed password locking builder out of own accounts.	Two head contractors were concerned about the Principal oversight putting them in a vulnerable commercial position. Two head contractors preferred QBCC to have oversight. One head contractor stated there was confusion confirming Principal had viewing rights.	Three out of four head contractors expressed concerns about Principal oversight: <ul style="list-style-type: none"> <li>The Principal having commercial advantage in private sector.</li> <li>Principals will not understand and misconstrue head contractor payments as all profit.</li> <li>The information gathered would be used for future contract negotiation.</li> </ul> All four head contractors preferred QBCC, but one head contractor was hesitant due to the existing load on the QBCC as regulator.		

### Category 3-5

### Category 6

### Category 7

#### Bank experience

Two head contractors experienced significant difficulties including:

- PBA linked to Principal’s viewing officer’s personal accounts.
- Retention and disputed funds accounts were closed by the bank without notice due to \$0 balance (as a result of anti-money laundering obligations on bank).
- Funds transfer limit meant monthly cycle carried out over three days.
- Bank struggles to provide compliant product. One head contractor experienced some delays, but now sets up ‘spare’ accounts to comply with timeframes.

Two head contractors had positive experiences (although first account was delayed).

One head contractor experienced difficulty establishing Principal viewing rights due to Principal’s officers’ concerns re privacy. Took 40 business days to set-up and the Principal still does not have viewing rights.

Individual concerns raised:

- The volume of projects in Phase 2 for banks to cope with.
- Account opening requires three directors to sign for one head contractor.
- Bank industry awareness.
- Character limit on transactions too small for compliance.

Two head contractors noted that there were initial delays (up to month) from bank in opening a PBA and as a result they had set up spare accounts to comply with the time frames.

One head contractor was forced to change banks because its bank was not ready, but noted the new bank was good.

One head contractor noted although they experienced initial delays, their bank was cooperative and was excellent now.

#### General account including top up provision

Two head contractors had had to top up the general account especially at the beginning of the project.

Individual concerns:

- One head contractor stated that it saw no value in this account.
- Security concerns still remain as a head contractor can still remove the funds.

Suggestions:

- One PBA account per project.

Two head contractors had topped up.

One head contractor had left a buffer in the account and only paid itself once to do so.

One head contractor stated it was not concerned about the cashflow impact.

One head contractor was uncertain when to top up.

The following comments were made:

- One head contractor preferred this account replaced by security held by QBCC.
- Two head contractors commented that there were too many accounts.
- Two head contractors suggested that there should be one PBA per head contractor (as per solicitor’s trust fund) with a reconciliation ledger.
- One head contractor noted it expected to pay itself after 1-3 months.
- One head contractor had made 2-3 top ups per PBA project.
- One head contractor had not topped up yet but recognised the need for accurate forecasting.
- Suggest one general account per head contractor + reconciliation ledger.
- Difficult to close accounts at end of DLP (can take time).
- One head contractor not required to top up yet.
- One head contractor now leaves a ‘buffer’ amount in this account.

#### Retention account views

Individual concerns:

- Difficult to manage impact on cashflow.
- Asked larger subcontractors for bank guarantees instead and no retentions for smaller subcontractors – the risk was not worthwhile.
- Where a subcontractor bank guarantee provided, head contractor liquidator would likely cash the bank guarantee and the subcontractor would become an unsecured creditor.
- Significant impact on capital and has the effect of doubling head contractor retention held by Principal.
- Prefer Principal retains 5% and head contractors use subcontractor retention for cashflow.
- Bank could not match transactions to subcontractors and so the head contractor could not hold retentions. This caused a significant risk.
- Questions around treatment of GST.

One head contractor stated it agree with intent.

One head contractor stated:

- It was prepared to take money out of retention to pay subcontractors if Principal pays late;
- The risk of paying offences worth the risk; and
- Retentions not as important to subcontractors as progress payments.

One head contractor stated that:

- It found ensuring that the retentions balances were individually identifiable was troublesome and time consuming.

Two head contractors agreed with the intent.

One head contractor already held retentions separately and did not use it as cashflow.

Suggestions:

- Only one retention account per head contractor.

Individual concerns:

- Volume of accounts.
- Due to the impact of MFR on one head contractor, the head contractor may need to use funds from other states.
- Retention accounts will take a significant amount of liquidity out of the industry.
- Retentions are relatively unimportant to subcontractors.
- Do “more harm than good” as smaller builders will go insolvent in Phase 2.

### Category 3-5

### Category 6

### Category 7

<p><b>Disputed account views</b></p>	<p>Two head contractors did not use the account. One head contractor used the account when a subcontractor invoiced for work not contracted to do. The matter was resolved after three months.</p>	<p>One head contractor was neutral about the account. Two head contractors doubted it would ever be used. One head contractor stated it would only use it if a subcontractor 'goes under' before payment is made, but after the payment schedule agreeing to pay the subcontractor was sent.</p>	<p>All four head contractors thought the account would not be used. Two head contractors raised concerns that the definition of dispute may be broadened.</p> <p>Suggestions:</p> <ul style="list-style-type: none"> <li>• Only one disputed funds account per head contractor.</li> </ul> <p>Individual concerns:</p> <ul style="list-style-type: none"> <li>• Dormant accounts will create anti-money laundering issues.</li> </ul>
<p><b>Sub-contractor payment terms</b></p>	<p>A mixture of payment terms between the head contractor, including:</p> <ul style="list-style-type: none"> <li>• One head contractor maintaining shorter payment terms (7 &amp; 14 days) for selected subcontractor, but usually using 30-day terms as per MBAQ contracts.</li> <li>• One head contractor had all subcontractors on monthly terms.</li> <li>• One head contractor had subcontractors on 2, 7 &amp; 14-day payment terms.</li> </ul> <p>Individual concerns:</p> <ul style="list-style-type: none"> <li>• Burden of educating subcontractors.</li> <li>• Separate payments to same subcontractor on different projects.</li> <li>• Suppliers make multiple claims per month.</li> <li>• Head contractor had to top up out of own funds for early payments.</li> </ul>	<p>Two head contractors had usually had mix of payments terms including 7 &amp; 14 days terms but had moved now to monthly payment terms.</p> <p>One head contractor had subcontractor on 25 business days' terms with a few on 14-day terms. This head contractor thought it would keep 14 days for selective subcontractors.</p> <p>One head contractor had subcontractor now on contracts, where they have previously been on purchase orders.</p> <p>One head contractor put subcontractor payments on hold where claim received, but not other documentation having been received (e.g. contract).</p>	<p>Individual responses:</p> <ul style="list-style-type: none"> <li>• Two head contractors had a variety of payment terms, including 7 &amp; 14 days.</li> <li>• Two head contractors had moved from 7 &amp; 14-day terms to monthly.</li> <li>• One head contractor had lost one subcontractor due to changing payment terms to monthly.</li> <li>• One head contractor stated it was unable to pay a subcontractor who claims 'out of cycle'.</li> <li>• Separate payments to same subcontractor due to being on different projects.</li> </ul> <p>Individual concerns:</p> <ul style="list-style-type: none"> <li>• Believe they will have to stop paying until Principal pays them.</li> </ul>
<p><b>Late payment from Principal</b></p>	<p>The head contractors all experienced delayed payments, but experiences differed from:</p> <ul style="list-style-type: none"> <li>• Two head contractors often experienced late payment, including government (usually 3-4 days late).</li> <li>• Paid on time 95% of the time, 5% of the time Principal pays 1-2 weeks late.</li> </ul> <p>Individual comments:</p> <ul style="list-style-type: none"> <li>• Late Principal payment primary reason for late payment to subcontractor.</li> <li>• Late payment by Principal is a significant cause of financial distress.</li> <li>• Private sector - impossible to get retentions where developer winds-up development entity (no legal respondent).</li> </ul>	<p>The head contractors all experienced delayed payments, but experiences differed from:</p> <ul style="list-style-type: none"> <li>• Not often and only 1-2 days late.</li> <li>• Often between 1-4 weeks late.</li> <li>• Often 2-3 weeks late.</li> </ul> <p>Individual comments:</p> <ul style="list-style-type: none"> <li>• Critical aspect of protecting subcontractors is obtaining payment from the Principal.</li> <li>• The Principal should be accountable.</li> <li>• Some clients require 60-day payment terms.</li> <li>• Late payment by Principal is aggravated by PBAs because of multiple accounts to pay into.</li> <li>• One head contractor stated both government and non-government pay late.</li> </ul>	<p>The head contractors all experienced delayed payments, but experiences differed from:</p> <ul style="list-style-type: none"> <li>• 60% do not pay on time.</li> <li>• Around 5 days late.</li> <li>• Sometimes months late.</li> <li>• Usually paid on time but first few payments are most likely delayed.</li> <li>• There is an industry wide culture of Principals not paying on time.</li> </ul> <p>Individual comments:</p> <ul style="list-style-type: none"> <li>• Government usually pays on time.</li> <li>• The head contractor tries not to enforce contract.</li> </ul> <p>One head contractor considered requesting advance payment for PBA projects.</p>
<p><b>Agreeing variations with Principal</b></p>	<p>One head contractor commented that variations are a much greater risk to head contractor and variations can take up to 150 days to be processed.</p>	<p>All head contractors had difficulties with variations, including:</p> <ul style="list-style-type: none"> <li>• Difficulty in agreeing/payment of variations.</li> <li>• Sometimes it took six months to agree and be paid variations.</li> <li>• Head contractor had to pay subcontractors from own capital.</li> </ul>	<p>Individual concerns:</p> <ul style="list-style-type: none"> <li>• Often variations are dealt with after end of project.</li> <li>• Variations are a major contributor to head contractor insolvency.</li> <li>• Variations are the most troublesome aspect of late Principal payments.</li> <li>• Variations will complicate PBA administration.</li> </ul> <p>Individual suggestions:</p> <ul style="list-style-type: none"> <li>• Push for funds in escrow, bank guarantees etc.</li> </ul>

Category 3-5		Category 6		Category 7	
<b>Views on adjudication process</b>	One head contractor stated that it had not used adjudication.	Two head contractors were negative about adjudication: <ul style="list-style-type: none"> <li>One head contractor had used adjudication on a number of occasions but found it not to be effective.</li> <li>One head contractor felt there was an unfair bias to subcontractor as the subcontractor had more time to prepare for adjudication.</li> </ul>	One head contractor had two negative experiences of adjudications. The head contractor also noted it was reluctant to use adjudication because of requirement to state involvement in adjudication in government tenders.		
<b>Scope of PBA</b>	Individual suggestions: <ul style="list-style-type: none"> <li>Should exclude consultants (especially design).</li> </ul>	Three head contractors wanted clarity of who was a supplier vs subcontractor. <p>One head contractor preferred an ‘all or nothing’ approach.</p> <p>One head contractor expressed confusion around:</p> <ul style="list-style-type: none"> <li>\$1M threshold (PBA costs in or out).</li> <li>Contract diversity (e.g. separable portions).</li> </ul> <p>One head contractor stated that contractors in Phase 2 less likely to cope with PBAs.</p>	Three head contractors wanted clarity of who was a supplier vs subcontractor. <p>Individual concerns:</p> <ul style="list-style-type: none"> <li>The efficiency of PBA protected subcontractor without (around 40%) sub-subcontractors included in PBA.</li> <li>Conflict of head contractor as trustee and beneficiary.</li> <li>Order of payment from account.</li> <li>Would prefer consultants were excluded.</li> </ul> <p>Individual suggestions:</p> <ul style="list-style-type: none"> <li>PBA should remain only in government sector or set a project size threshold.</li> <li>Stronger MFR is the answer instead of PBAs.</li> <li>There should be an obligation on subcontractors to provide 550 notice to head contractors.</li> <li>All parties in the contract chain need protection – clients to provide security to head contractor.</li> </ul>		
<b>Capital and liquidity</b>	Individual concerns: <ul style="list-style-type: none"> <li>Loss of working capital will be difficult to manage.</li> <li>Ability to remain solvent in Phase 2.</li> <li>Not able to increase debt due to Net Tangible Assets.</li> <li>Builders will pare back turnovers.</li> <li>Fragmentation of working capital.</li> <li>Transfers into trust accounts to lower administrative burden but increases negative impact on capital.</li> <li>Three years to rebuild capital to pre-PBAs.</li> </ul>	Individual concerns: <ul style="list-style-type: none"> <li>Loss of cashflow for their business.</li> <li>Tier 3 and 4 contractors will ‘fall into significant financial distress with lock-up of working capital’.</li> <li>Predict ‘pare back turnover’ to cope.</li> <li>About negative cashflow at beginning of projects.</li> <li>Will need to secure additional working capital in Phase 2.</li> </ul>	Individual concerns: <ul style="list-style-type: none"> <li>Loss of cashflow will have a material impact on working capital.</li> <li>Believes tier 3 and 4 builders will struggle.</li> <li>Cashflow planning exacerbated due to head contractor’s funds split into many accounts.</li> <li>Concerned about impact on MFR calculations.</li> <li>Retentions account will impact liquidity.</li> <li>Two to three years to replenish capital.</li> <li>How subcontractor retentions will be calculated on the balance sheet.</li> </ul>		
<b>Head Contractor suggestions</b>	Individual suggestions: <ul style="list-style-type: none"> <li>BIF should hold all parties in contractual chain to account (not just head contractors).</li> <li>550 notices should be required when subcontractors onsite (not acceptance of subcontractor).</li> <li>Online portal for completion of notices.</li> <li>MFR and QBCC should be strengthened.</li> <li>Better communication across government and QBCC.</li> <li>More should be done regarding phoenixing.</li> <li>Change record-keeping to five years (ATO).</li> <li>Give QBCC discretion regarding compliance enforcement.</li> <li>Provide head contractors struggling with compliance temporary dispensation.</li> </ul> <p>Individual concerns:</p> <ul style="list-style-type: none"> <li>There will be fewer industry participants due to loss of capital = less competition.</li> <li>Why must bank accounts be domiciled in Qld? There appeared to be no obvious benefit.</li> </ul>	Two head contractors stated they agreed with the policy intent. <p>Individual suggestions:</p> <ul style="list-style-type: none"> <li>Set a claim date in legislation.</li> <li>There should be a subcontractor claim template.</li> <li>Amalgamate QBCC forms.</li> <li>Amend timeframe for notices.</li> <li>More time to phase-in.</li> <li>More emphasis on MFR’s Net Tangible Assets.</li> <li>Subcontractors don’t claim on time.</li> <li>A single retention account only (NSW model).</li> </ul>	Two head contractors suggested a consistent definition of ‘building work’. <p>Individual suggestions:</p> <ul style="list-style-type: none"> <li>Enhance the powers of the QBCC and mandatory reporting requirements.</li> <li>Defined date for payment every month (for cashflow certainty).</li> <li>Ability to close accounts sooner.</li> <li>A QBCC insurance fund.</li> <li>Ability to close accounts 12 months after defects liability period and where balance is below a specified amount.</li> <li>Suggest prohibited and required contract terms for head contracts.</li> <li>More time needed to adjust.</li> <li>Subcontractor should be able to nominate whatever account they like.</li> <li>Want Principal to reduce withheld retentions to return liquidity to head contractor.</li> </ul>		

# Attachment F – Summary of Feedback from Broader Stakeholder Engagement Activities

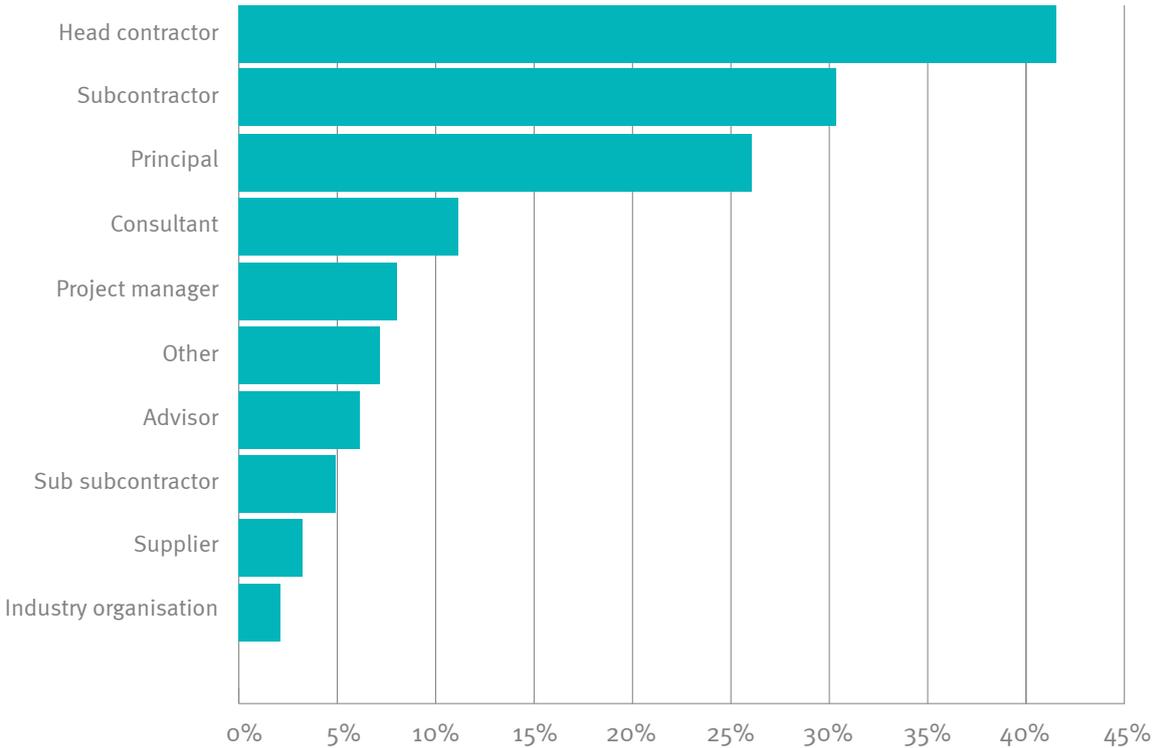
Broader stakeholder engagement activities included seeking written responses to a discussion paper, creating a questionnaire and conducting seven state wide Industry Forums and two subcontractor sessions. All activities were available to the public and advertised through a number of channels including but not limited to targeted emails, distribution of flyers to industry associations, QBCC Facebook posts and DHPW website updates.

The DHPW engaged PriceWaterhouseCoopers (PwC) to assist the Panel with its evaluation of the questionnaire. The figures in this attachment were prepared by PwC.

### Overview of consultation activities

The discussion paper and questionnaire were available to the public for consideration and completion from 28 November 2018 to 15 February 2019. Stakeholders could provide a written submission via post or e-mail. The questionnaire could be completed online or downloaded and provided via post or e-mail. The Panel received 27 written submissions from 23 stakeholders in response to its discussion paper. A full list of submitters can be found below. The questionnaire received 104 responses of which 97 were completed online and seven submitted via post or email. The majority (76%) of respondents to the questionnaire were from south east Queensland and identified as a head contractor. Figure 1 details the self-identified roles of each respondent. Fifteen of the 104 respondents to the questionnaire had been involved in a project with a PBA.

**Figure 1: Respondents’ roles in the construction industry, percentage of respondents (n=99)**



Industry Forums were held in Brisbane, Cairns, Gold Coast, Maroochydore and Rockhampton from December 2018 until February 2019. The Industry Forums were attended by 77 industry stakeholders, who identified as sub-subcontractors, subcontractors, head contractors, consultants, private sector principals, accounting staff and suppliers. The majority of stakeholders who engaged the broader consultation activities had no experience with PBAs in Phase 1.

### *Key issues raised across consultation activities*

The table below sets out the key issues raised on multiple occasions in the written submissions, the questionnaire and at Industry Forums.

#### **Key Issues – Project Bank Accounts**

- Administrative burden and financial strain of managing PBAs on head contractors
- Impact of PBAs on head contractor cash flow and liquidity
- Cumbersome nature of a three-account per project PBA model
- Head contractor not protected from principal non-payment
- Inconsistent definition of disputed funds in the PBA model to the understanding of disputed funds in the industry
- Principal oversight responsibility for private sector projects risk of exposing head contractor’s commercially sensitive information
- Lack of protection extended to sub-subcontractors in PBA model
- Concerns that PBAs don’t protect monies in the event of a head contractor insolvency
- PBA model does not address core reasons for insolvency in the sector such as unfair contract provisions and lack of subcontractor bargaining power
- Industry unprepared for implementation of PBAs in private sector
- Concerns over the technical and prescriptive nature of PBAs
- PBA framework will restrict flexible payment terms.

### *Additional findings – Written Submissions*

Further issues were identified in written submissions:

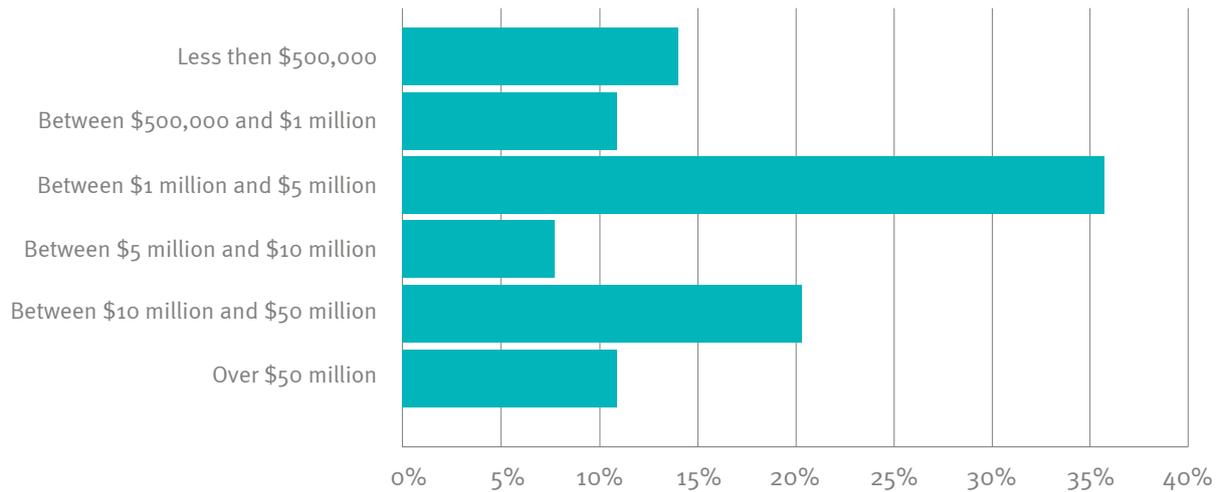
- Calls for a nationally consistent approach to security of payment reform
- Call for consistent record keeping timeframes and definitions for industry
- The prescriptive approach to security of payment, particularly for PBAs, restricts innovative approaches and possible technological solutions to security of payment problems
- Concerns that resident owners were excluded from new progress payment provisions
- Support for a cascading trust or deemed trust for individual contractor models
- Lack of clarity for architects and consultants operating within PBAs
- Need for ‘reasonable excuse’ defences to aid against prosecution or penalty in the case of administrative errors when managing the PBA
- Effects of tripartite agreements and non-bank lending arrangements in a PBA model needs further consideration
- Need for QBCC proactive auditing regime for PBAs
- Need for security of payment reforms to address unfair contract provisions.

### Additional findings – Questionnaire

The number of respondents to the questionnaire was low therefore, the Panel must give these responses appropriate weight.

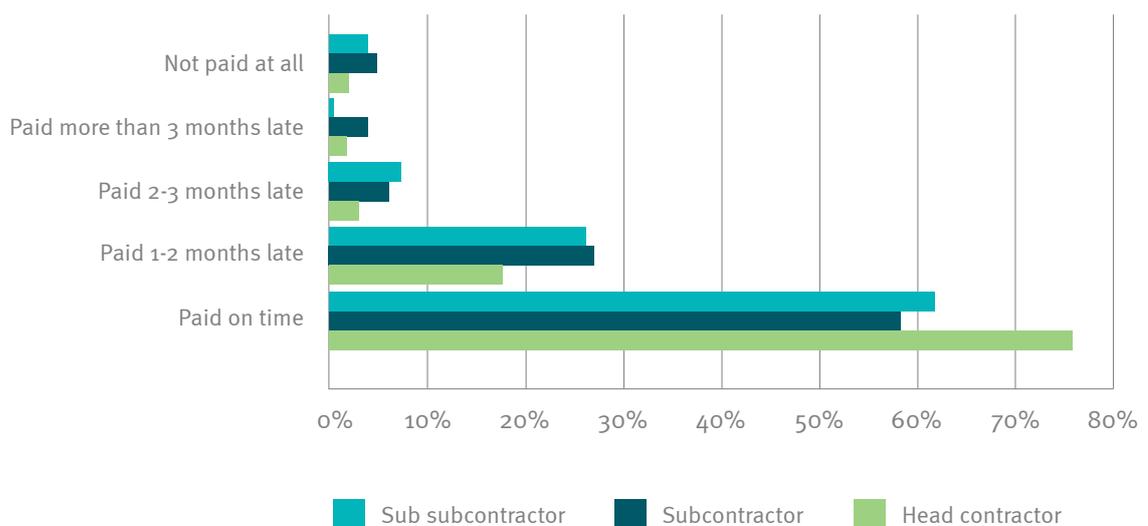
- Respondents represented businesses of a broad range of sizes. Respondents most commonly were in the bracket of businesses generating between one and five million dollars in annual turnover (Figure 2).

**Figure 2: Respondents’ average yearly gross turnover, percentage of respondents (n=64)**



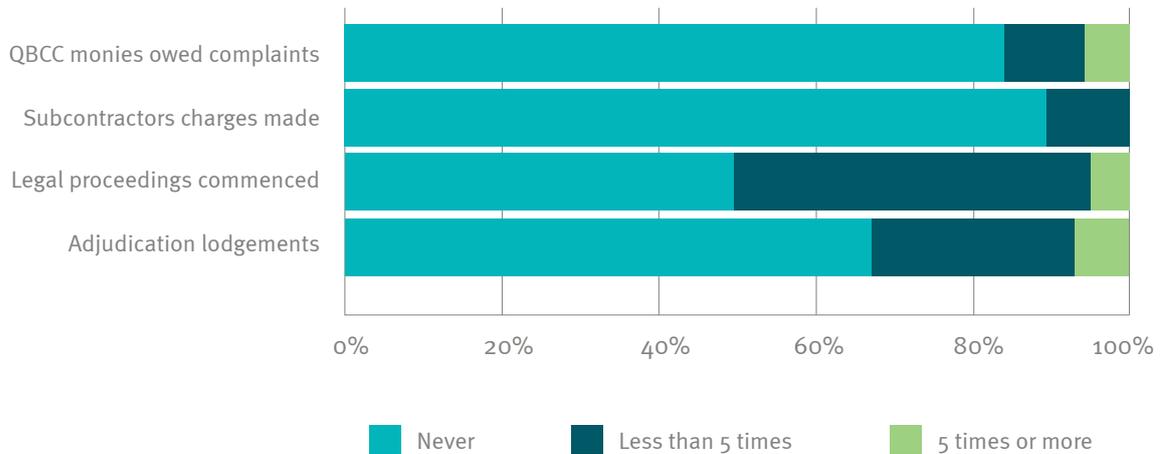
- Respondents identifying as head contractors reported a greater proportion of their non-disputed claims were paid on time, as opposed to subcontractors and sub-subcontractors (Figure 3).

**Figure 3: Distribution of average payment times for non-disputed claims (by dollar value): head contractors, subcontractors and sub-subcontractors, (n=67)**



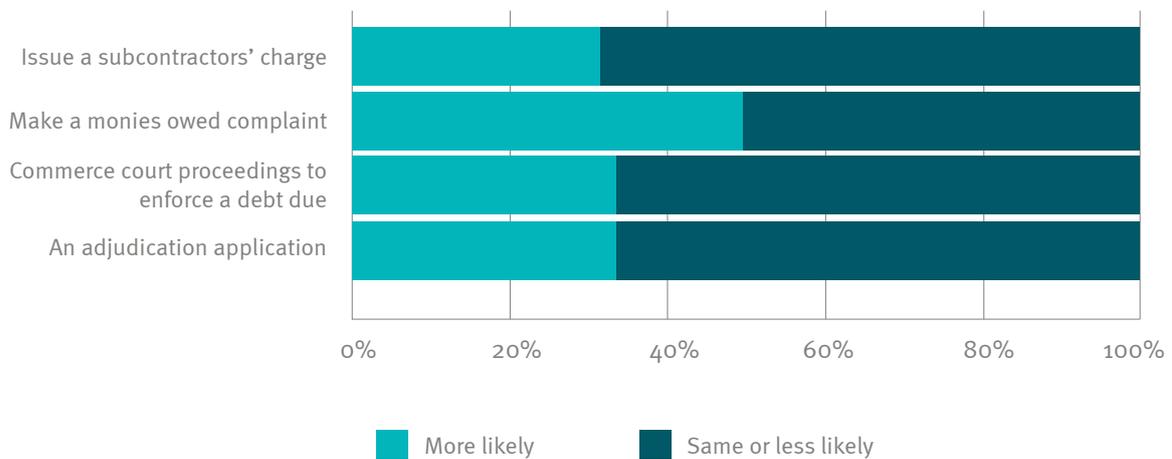
- The majority of respondents had not taken action on payment disputes in the last 5 years (Figure 4).

**Figure 4: Actions taken by respondents in the last five years, percentage of respondents (n=57)**



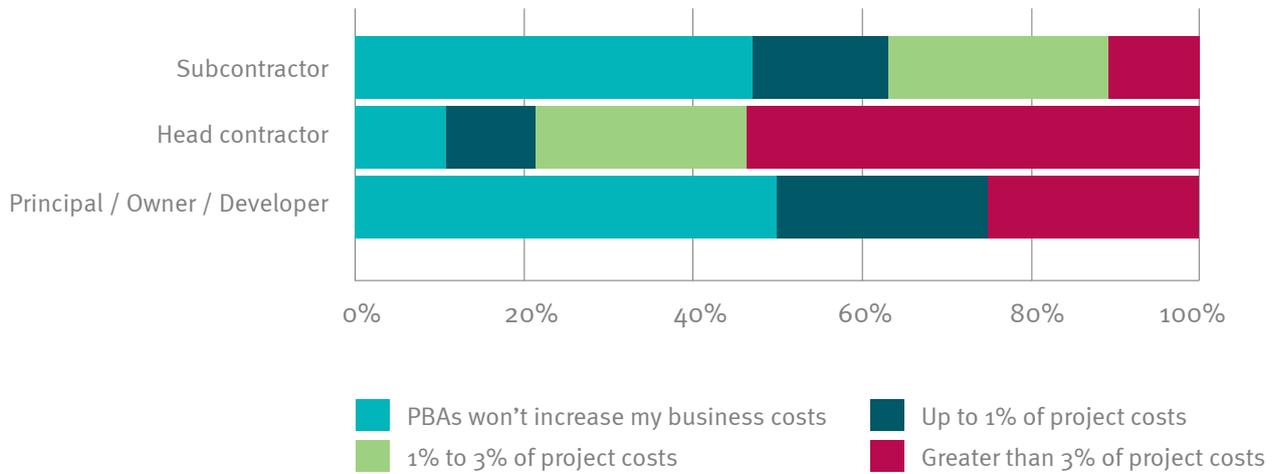
- Most of the 53 respondents that responded to the question ‘would you be more likely to take action on a payment dispute as a result of the BIF Act reforms’ said no. (Figure 5).

**Figure 5: Likelihood of respondents to take the following actions as a result of the BIF Act reforms, percentage of respondents (n=53)**



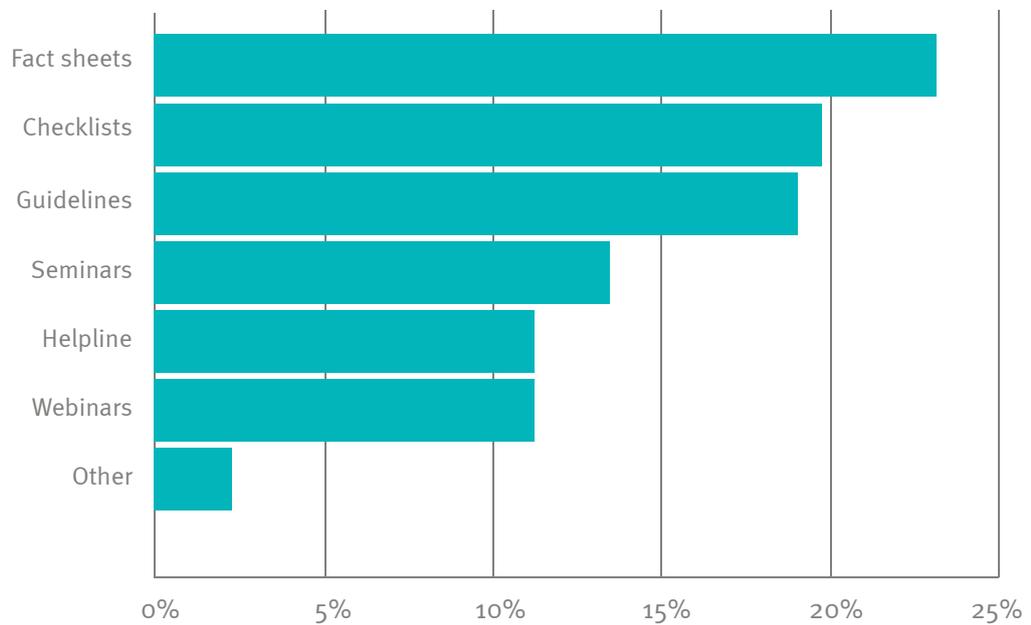
- The most common source of information about PBAs was provided by industry associations, the DHPW’s website and the DHPW’s information sessions.
- All those identifying as a head contractor or subcontractor reported that they would not decrease their prices as a result of the introduction of PBAs.
- 89% of head contractor respondents believe the introduction of PBAs will increase their business administration costs for each project.
- Approximately 50% of subcontractor and private sector principal respondents indicated that the introduction would not have an impact on the business administration costs.

**Figure 6: Increase in business administration costs for each project as a result of PBAs, by respondent role (n=51)**



- Respondents across all roles indicated that the provision of fact sheets, checklists and guidelines by the department or the QBCC would be useful before the commencement of Phase 2 (Figure 7).

**Figure 7: Most useful activities to be carried out by the QBCC or DHPW before commencement of Phase 2 percentage of respondents (n=74)**

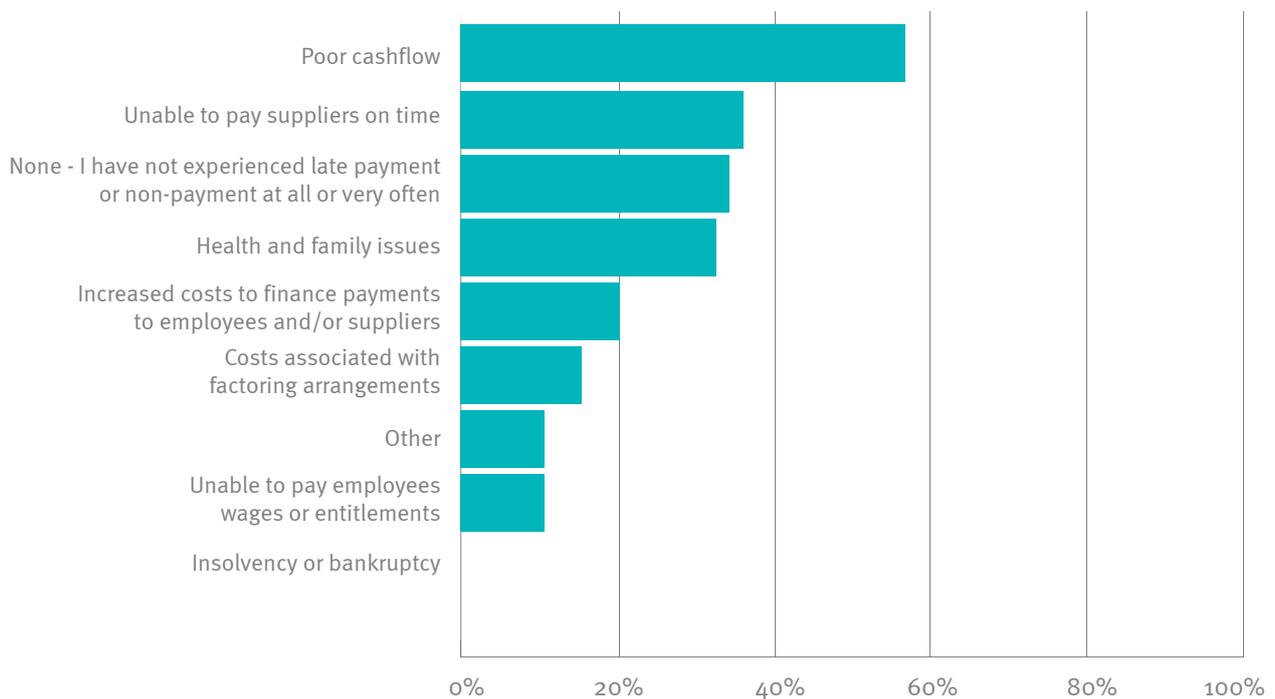


### Questionnaire – Subcontractor Findings

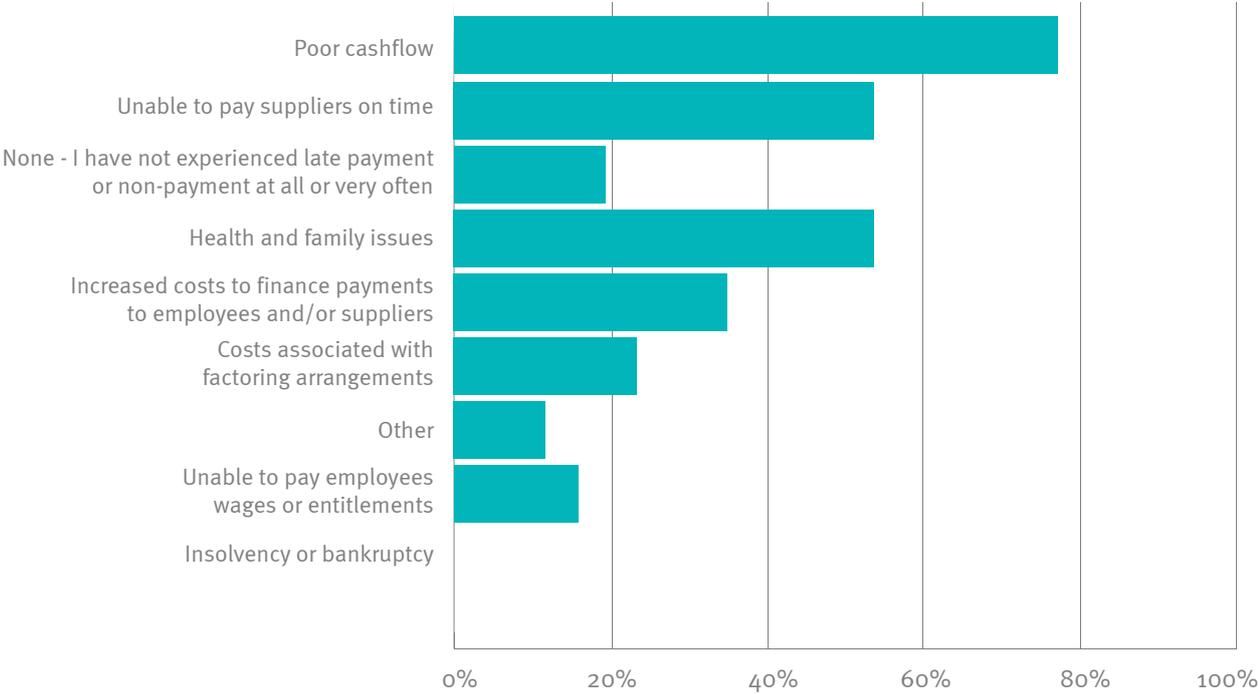
There were differences in the responses between subcontractors and other respondents. Thirty respondents identified as subcontractors.

- Only two subcontractor respondents were in PBA projects and they both thought their business will get paid a greater amount of funds claimed in invoices, or that their business will be paid quicker on PBA projects.
- The impact of late payment showed different results for subcontractors compared with the broader group. The top three negative effects of late payment are more prevalent for subcontractor respondents (Figure 9). Just under 60% of the broader group responded that poor cash flow was a consequence of late payments, compared to almost 80% of subcontractors that indicated poor cash flow was an impact of late payments.
- Similarly, just over 30% of the whole group indicated that they had been unable to pay suppliers on time as a result of late payment in comparison to over 50% of the subcontractor group. There was also higher indication of health and family issues as a result of late payments for subcontractors (almost 60%) in contrast with the broader group (approximately 30%). The costs associated with factoring arrangements and financing as a result of late payment were reported at a higher rate for subcontractors compared with the whole group (Figure 8, Figure 9).
- The likelihood of not having experienced late payment is lower for subcontractors compared to the whole group.

Figure 8: Impact of late payment, percentage of respondents (n=58)

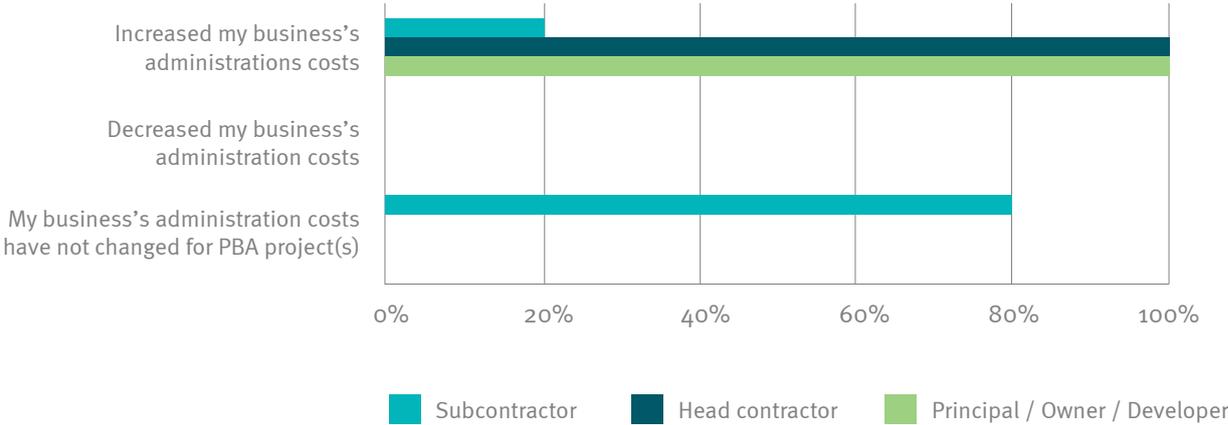


**Figure 9: Impact of late payments on subcontractor respondents, percentage of respondents (n=26)**



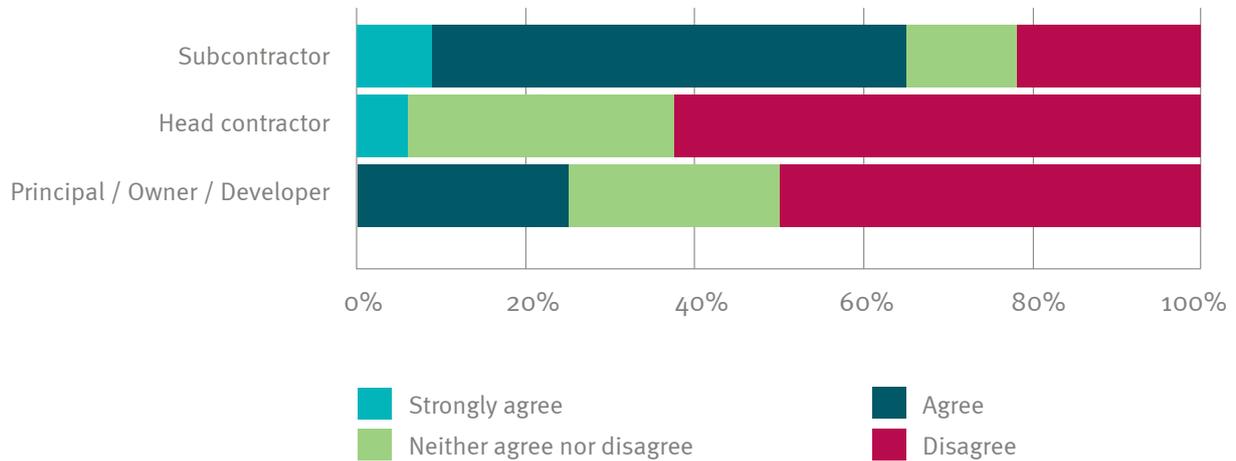
- Only 20% of subcontractors indicated that they had increased their business’s administration costs due to PBAs compared with 100% of head contractor respondents (Figure 10).

**Figure 10: Change in administrative business costs as a result of PBAs, percentage of respondents by role (n=12)**



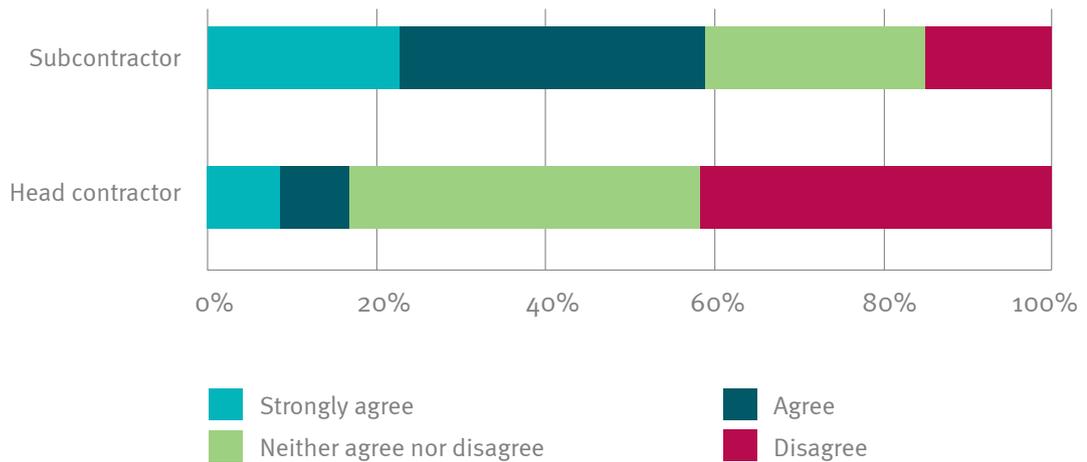
- The majority of respondents identifying as subcontractors agreed that the introduction of PBAs will give them confidence to invest in their businesses. The majority of head contractor respondents disagreed (Figure 11).

**Figure 11: Percentage breakdown of responses to the statement ‘PBAs will give me confidence to invest in my business’, by respondent role (n=43)**



- There were also differences for the subcontractor group when asked if PBAs would make it easier to manage their business finances. The majority of subcontractors ‘agreed’ or ‘strongly agreed’ with this statement compared with less than 20% of head contractors who responded the same (Figure 12).

**Figure 12: Percentage breakdown of responses to the statement ‘PBAs will make it easier for me to manage my business finances’, by respondent role (n=37)**



- Head contractors and private sector principals indicated that they would try and avoid projects where a PBA is required (just over 60%) compared to subcontractor respondents (approximately 28%) (n=54).

### *Additional Findings – Industry Forums*

The Industry Forums provided an opportunity for stakeholders to meet with the Panel and openly discuss the security of payment reforms under evaluation. A number of issues were raised at the forums that were not present in the Discussion Paper Submissions or the Questionnaire including:

- Financial capacity of business in the industry should be regulated by ASIC or the ATO, not by QBCC.
- Further education required on Chapter 3 reforms.
- General support for the notion of the QBCC having PBA oversight responsibilities.
- Queries about transitional arrangements for new retention provisions.
- Anecdotal evidence suggesting subcontractors are receiving more payment schedules for claims and more claims being paid in full since commencement of new BIF Act provisions in December 2018.
- Concern that some businesses require payment claims to be made through a program or application that requires a fee payable by the subcontractor. This payment requirement is often not disclosed before the contract is signed.

#### **Written Submissions were made by**

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A Mudnic Development

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Adjudicate Today Pty Ltd

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Air Conditioning and Mechanical Contractors' Association

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Applied Air Services

---

Australian Institute of Architects

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Australian Subcontractors Association

---

BMD Group

---

Cameron Chisholm Nicol Architects Queensland

---

Cement, Concrete and Aggregates Australia

---

Civil Contractors Federation Queensland

---

Consult Australia

---

Mr Darcy Ringland

---

Dr Samer Skaik

---

Fair and Square Payments

---

GPS Investment Fund Limited

---

Housing Industry Association Limited

---

Master Builders Association Queensland

---

Master Electricians Australia

---

Master Plumbers' Association of Queensland

---

Multiplex Constructions Pty Ltd

---

National Fire Industry Association

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Plumbing and Pipe Trades Employees Union Queensland (Plumbers Union Queensland)

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Property Council of Australia

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Queensland Building and Construction Commission

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Queensland Major Contractors Association

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## Attachment G – Information from the Adjudication Registry

The Panel requested information from the Adjudication Registrar that could provide early insights into the impact of the commencement of Chapters 3 and 5 of the *Building Industry Fairness (Security of Payment) Act 2017*.

### Adjudication applications

Minimal changes were observed in the number of adjudication applications lodged in the months of November and December 2018 (when the new provisions came into effect), and January and February 2019 when compared with the same months in the previous three years.

Adjudication applications lodged to QBCC Registry				
Year	Month	BCIPA	BIF	Total Monthly Applications
2016	January	46		46
	February	67		67
	October	46		46
	November	55		55
	December	62		62
2017	January	42		42
	February	73		73
	October	46		46
	November	38		38
	December	37		37
2018	January	41		41
	February	55		55
	October	40		40
	November	49		49
	December	30		30
2019	January	27	5	32
	February	21	39	60

Following commencement of the BIF Act in December 2018, the consumer advisory service provided by the Registry received an increased number of enquiries about the adjudication process, which is reflected in the data below.



Since the commencement of the BIF Act provisions on 17 December 2018, the Adjudication Registry has received a number of enquiries related to BCIPA, BIF Act Chapter 3 and BIF Act Chapter 4.

Monthly break down of Registry enquiries (17 December 2018 – 26 February 2019)					
Year	Month	BCIPA	BIF Ch. 3	BIF Ch. 4	Total
2018	December	18	36	5	59
2019	January	36	150	8	194
	February	25	225	3	253
<b>Total</b>		<b>79</b>	<b>411</b>	<b>16</b>	<b>506</b>

### Adjudicator Referral Policy

In relation to BIF applications, as at 28 February 2019:

- a total 44 applications had been lodged with the Registry.
- 13 were withdrawn before referral to an adjudicator.
- 31 were referred to an adjudicator for determination.
- Two were withdrawn after referral to an adjudicator.

### Continuing Professional Development

The Adjudication Registrar detailed additional resourcing and compliance measures being implemented by the Registry to support the new CPD regime. Activities include:

- Scoping for the requirements of a tailored system to enable effective administration of the CPD requirements for adjudicators.
- New information available on the [QBCC website](#).
- Communication and engagement with adjudicators.

# Attachment H – Information on Implementation Activities of DHPW, QBCC and Industry Bodies

## DHPW Implementation Activities

The DHPW Special Projects team commenced the development of education and training materials in October 2017 and these were published on 1 March 2018. Amendments to the Act made in February and September 2018 saw amendments to this suite of information which were also being routinely reviewed, updated and republished. The materials published include:

- Detailed guidelines for head contractors, subcontractors, principals
- Summary guidelines for head contractors, subcontractors, principals
- Information for banking institutions
- Frequently Asked Questions (FAQs)
- A series of seven factsheets (developed over time to address specific industry concerns)
- A suite of seven educational videos on PBAs (six targeted at head contractors plus one specifically for subcontractors).

The Special Projects team monitored traffic to the Project Bank Accounts webpages and documents commencing in March 2018 when the first documents were published.

In the first month after commencement of Phase 1 of PBAs (1 – 31 March 2018), the Department’s Project Bank Accounts’ webpage received over 3,500 visits from 1,562 users. The most frequently visited documents during the month of March 2018 were the long guidelines for both head contractors and principals:

PDFs	Downloads
<b>Long guidelines for principals</b>	342
<b>Long guidelines for head contractors</b>	295
<b>Information for banking institutions</b>	176
<b>Summary guidelines for head contractors</b>	175
<b>Summary guidelines for principals</b>	166

In the months since<sup>38</sup>, the webpage has been visited a further 12,895 times by over 5,300 users. The most frequently visited documents continue to be the long and summary guidelines for head contractors and the long guidelines for Principals. In addition, the long guidelines for subcontractors and the FAQs on PBAs have also been accessed over 300 times.

Since September 2018, when the Panel’s own webpage and the PBAs video webpage were published, the Panel’s webpage has been visited over 2,200 times by approximately 1,000 users, and the PBAs video page has received over 1,000 hits by over 420 users.

The most frequently watched videos are ‘When is a Project Bank Account required?’ and ‘The payment process using a PBA’, but it is interesting to note that the most frequently viewed transcripts (scripts of the voiceover accompanying the videos) were ‘Project Bank Accounts overview’ and ‘When is a Project Bank Account required?’. It is also interesting, from a reach perspective, that the transcripts have been viewed overall (241 times) almost as often as the videos have been viewed (251 times).

<sup>38</sup> In late February 2019, the Department restructured and migrated much of its Project Bank Accounts materials and information to the Business Queensland website.

Video	Video Views	Transcript views
Project Bank Accounts overview	11	48
When is a PBA required?	65	47
Post-contract award	11	29
Setting up the PBA – banking information	13	36
The payment process using a PBA	53	23
Payment process – documentation	48	29
Subcontractors and PBAs	50	29

Information sessions were developed specifically for each stakeholder group (government departments, Head Contractors, consultants, subcontractors, banking institutions) and were rolled out throughout Queensland commencing in March 2018 and continuing until December 2018 when a series of webinars were provided industry-wide. The table below sets out all sessions provided by stakeholder group:

Target audience	Content	Period	Number of sessions	Locations	Attendances
<b>Principals (departmental officers and external Project Managers)</b>	Separated into three presentations: 1. Procurement 2. Finance/Accounts 3. Project Management/ Superintendents	Mar - Nov 2018	19	Brisbane	219
<b>Head Contractors and Consultants (PQC registered)</b>	Head Contractor-specific content	Feb 2018 (pilot) Mar - Dec 2018	38	Brisbane (various locations) Cairns Townsville Mackay Maryborough Gladstone Rockhampton Gold Coast Sunshine Coast Toowoomba Ipswich	480+
<b>Consultants ONLY</b>	Consultant-specific content	Aug - Dec 2018	10	Brisbane Webinar	216
<b>Subcontractors</b>	Subcontractor-specific content	Sept - Dec 2018	12	Brisbane (various locations) Townsville Mackay Rockhampton Gold Coast Sunshine Coast Cairns Ipswich Webinar	1149 registered (although attendances lower)
<b>Banking Institutions</b>	Bank-specific; operationally focused	Nov 2017 - ongoing	25+	Brisbane Rockhampton	–
<b>QBCC</b>	The Special Projects team attended QBCC roadshows to speak to and answer questions about PBAs	June - July 2018	4+	Logan Gold Coast Ipswich Cairns	See QBCC activities for further information

### *QBCC Implementation Activities*

The QBCC worked closely with the DHPW in preparation for the commencement of Phase 1 of PBAs on 1 March 2018. DHPW led engagement and education to industry and the QBCC played a supportive role.

The QBCC established the Queensland Building Plan Implementation Team of three FTEs shortly after assent of the BIF Act in November 2017. (It is expected that the team will grow by a further seven FTEs for the commencement of Phase 2 PBAs.)

The team developed a detailed implementation plan, which classified implementation activities into the following groups of activities:

1. Planning, (project) management and governance deliverables;
2. Change (including change management) and communications;
3. Process, policies and procedures; and
4. Technology and data.

While much of the work of the QBCC in readying for Project Bank Accounts was necessarily internally focussed, there was also significant investment in external facing activities to support industry to prepare.

The QBCC updated its website upon commencement of Phase 1 of PBAs to provide information on PBAs including an overview of PBAs, information about the scope of Phase 1 (and future Phase 2) projects, direction to the HPW website for further information and information about the PBA written notices including the forms themselves.

Blog posts were created to support the media release announcing the commencement of Phase 1 PBAs and, in December 2018, to invite industry to provide feedback to the BIF Evaluation Panel. Social media posts were also used upon commencement of PBAs to educate industry (and included a video of the QBCC Commissioner announcing the PBAs) as well as later to promote the BIF Evaluation Panel. An email, from the Honourable Mick de Brenni, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport, was sent to all licensees (almost 70,000 licensees) on 1 March 2018 announcing the new building reforms.

The QBCC delivered two series of roadshows, including face-to-face delivery as well as via webinars, which contained PBA specific content.

The first roadshow occurred in June 2018, was broadly focussed on security of payment but included specific information about PBAs and targeted mostly licensees. This roadshow included five sessions conducted in Brisbane, Gold Coast, Ipswich and Cairns and was attended by 395 people.

The second roadshow focussed on the new MFR but also covered the interaction of MFR with PBAs (in terms of asset calculations), was held in February 2019 and targeted licensees and their accountants. The MFR roadshow included 11 separate face-to-face sessions conducted at locations throughout Brisbane, along the east coast of Queensland and included Toowoomba. These were attended by a total of 1,192 people. In addition, there were four webinars conducted during March 2019 and attracting 861 participants.

Target audience	Content	Period	Number of sessions	Locations	Attendances
MBAQ members (in partnership with MBAQ)	Building industry reforms (including PBAs)	February – March 2018	10	Brisbane Sunshine Coast Hervey Bay Bundaberg Gold Coast Toowoomba Rockhampton Mackay Townsville Cairns	–
Licensees	Security of Payment (including PBAs)	June/July 2018	5	Brisbane Ipswich Gold Coast Cairns	395
Licensees and industry accountants	MFR (including PBAs)	February 2019	11	Brisbane (3) Cairns Sunshine Coast Gold Coast Maryborough Rockhampton Mackay Toowoomba (Accountants sessions)	1192
Licensees and industry accountants	MFR (including PBAs)	March 2019	4	Bundaberg	861

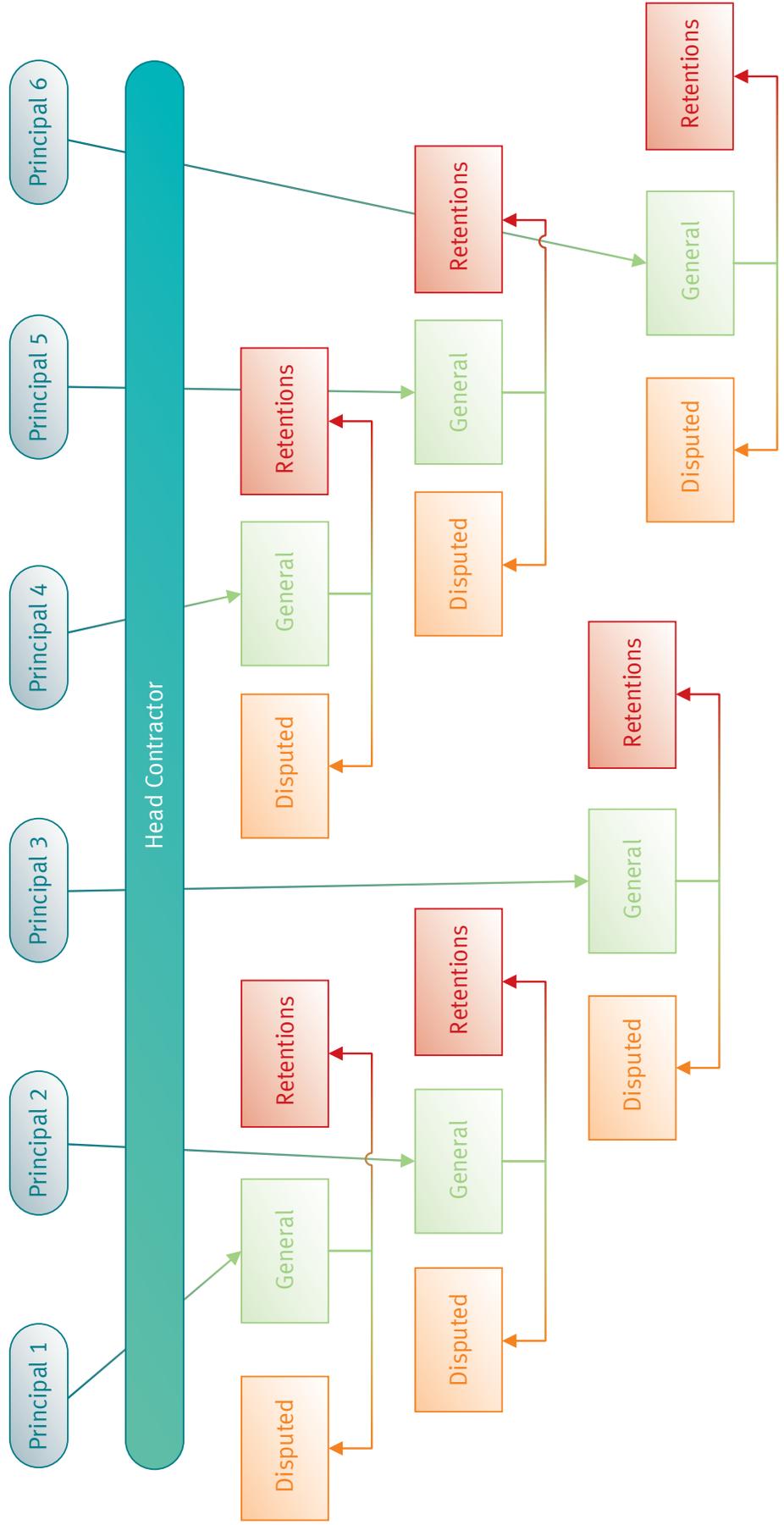
The QBCC also supported the MBAQ’s roadshow which was conducted at 10 locations along the east coast of Queensland as well as Brisbane and Toowoomba, during the months of February and March 2018. QBCC officers participated in panel-style discussions and answered several questions concerning PBAs.

A total of 87 enquiries have been received to date to the QBCC’s state wide call centre. This figure does not include face-to-face, on-site or over the counter enquiries nor those made at regional offices. Two complaints have been made – both by Principals. The only action taken by the QBCC was educational.

# Attachment I – Comparison of Current PBA Framework and Framework Recommended by the Panel

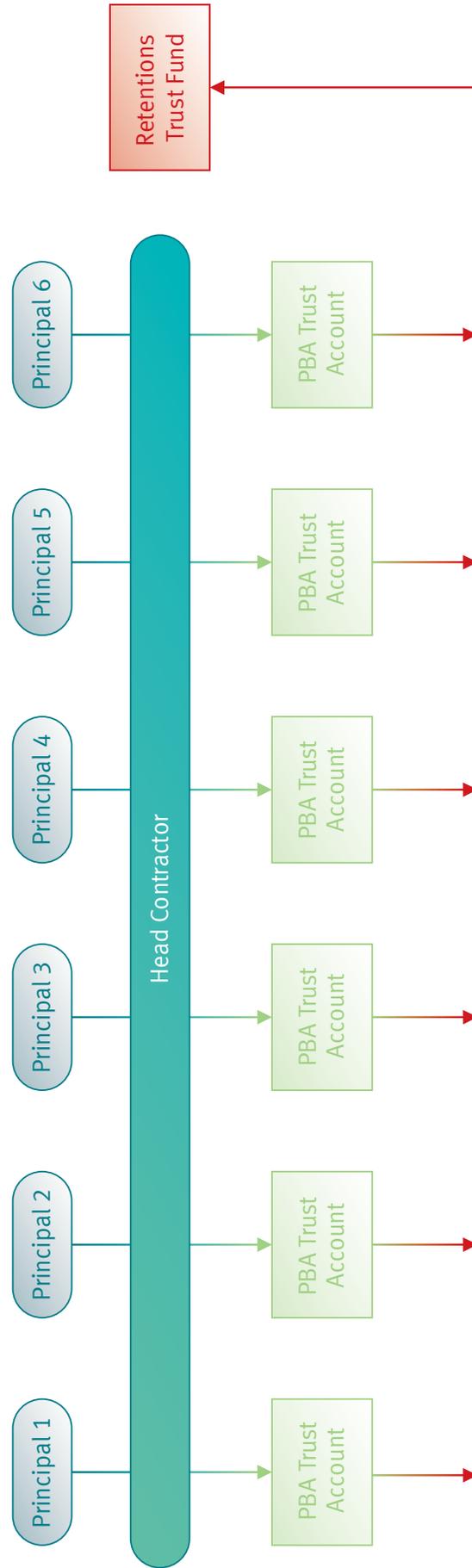
## Bank accounts required under current PBA model

Outlines the number of bank accounts required by the Head Contractor under the current PBA model across six PBA projects for the same head contractor.



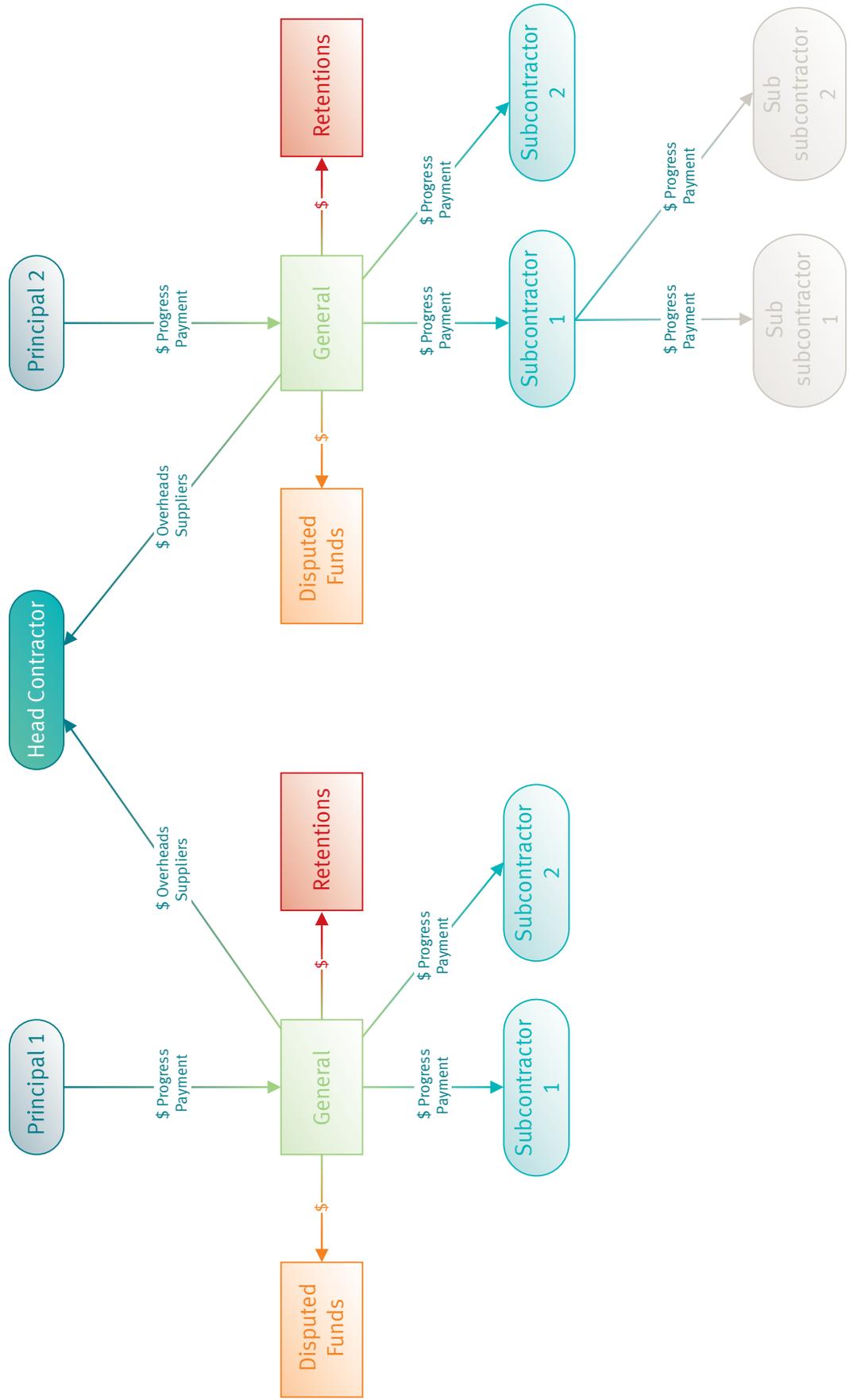
## Bank accounts required under recommended PBA model

Outlines the number of bank accounts required by the Head Contractor under the recommended PBA model across six PBA projects for the same contractor.



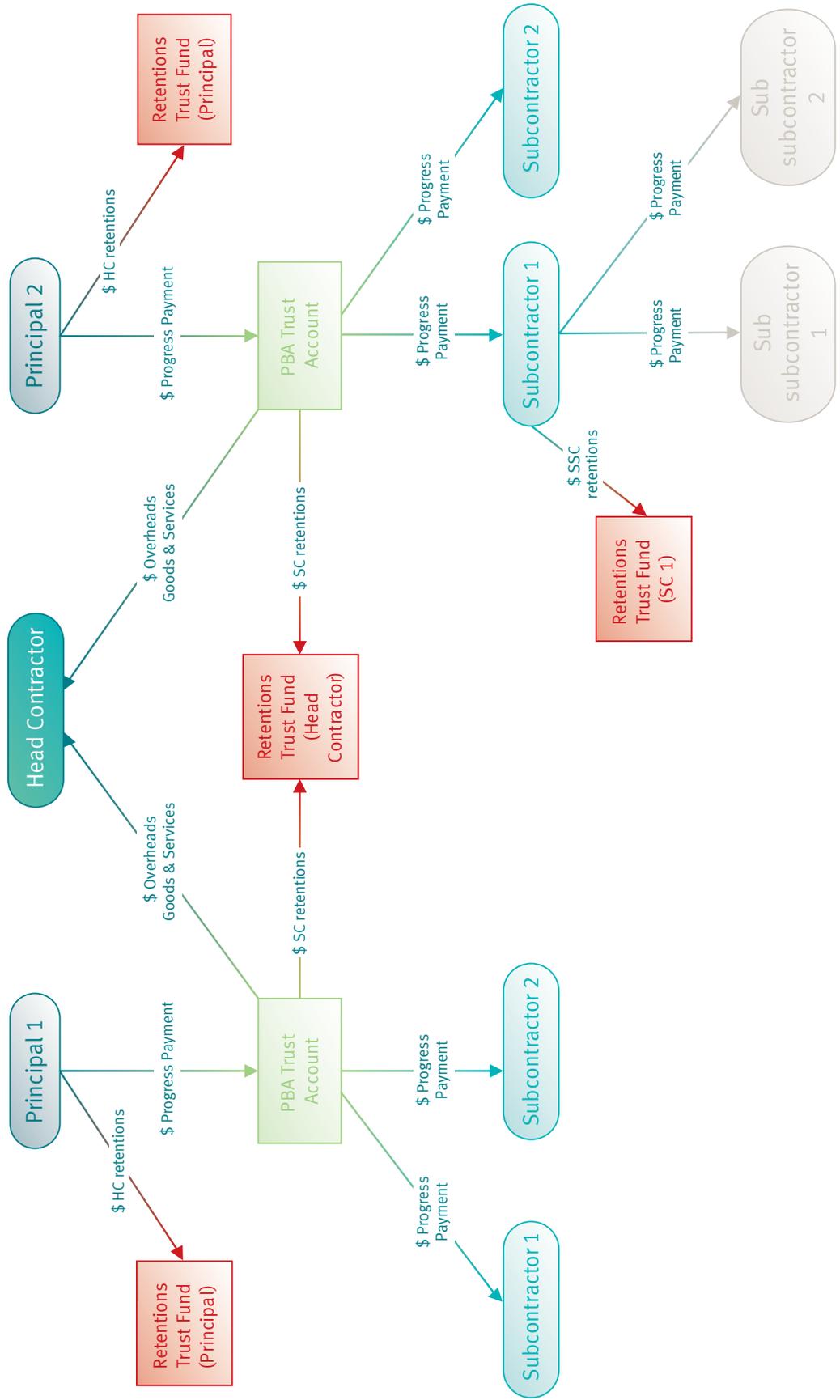
## Current PBA Framework

Outlines the flow of progress payments under the current PBA framework.



## Recommended PBA Framework

Outlines the flow of progress payments under the recommended PBA framework.



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