PUBLIC WORKS AND UTILITIES COMMITTEE

QUESTION ON NOTICE

Asked on 6 September 2017

THE PUBLIC WORKS AND UTILITIES COMMITTEE ASKED THE DEPARTMENTAL WITNESSES —

QUESTION 1:

Proposed clauses 28, 31 and 32 of the Bill – while these clauses provide a relatively clear idea of how the clauses are intended to work in practice, each of the proposed sections also enable payments to be made 'as prescribed by regulation'. This opens up on undefined category of payments or 'prescribed payments' as the Bill defines it without any idea of what those payments would be for. Can the department provide a definition of 'prescribed payments'?

ANSWER:

- Clause 28 sets out limited purposes for which money may be deposited into a project bank account (PBA).
- Clause 31 sets out limited purposes for which money may be withdrawn from a PBA.
- Clause 32 sets out how money in a PBA is payable if there are insufficient funds in the PBA to pay all beneficiaries in full.
- These provisions set out limited circumstances for payments into and withdrawals from the PBA.
- If circumstances arise in the future requiring additional payments to be included in the legislation, the regulation-making powers will allow the government the flexibility to accommodate such circumstances by prescribing other permissible payments into or withdrawals from the PBA in the regulation.

QUESTION 2:

With regard to mandatory and prohibited contracts clauses proposed in the Bill, insertion of section 67GA and 67B to the *Queensland Building and Construction Commission Act 1991* (QBCC Act) – including mandatory and prohibited clauses into building contracts (which are not defined) while including fines for non-compliance leaves uncertainty. Could the department provide clarification on the type and wording of the proposed mandatory or prohibited clauses?

ANSWER:

- Clause 276 provides for proposed new section 67GA prohibits a building contractor from entering into a building contract that does not include mandatory conditions prescribed by regulation.
- Clause 276 also provides for proposed new section 67GB prohibits a building contractor from entering into a contract that includes a prohibited condition prescribed by regulation.
- The proposed new powers to prescribe by regulation mandatory conditions and prohibited conditions for building contracts will create a fairer and more accountable industry.
- The types of mandatory conditions intended to be prescribed by regulation include 'best practice' conditions contained in relevant Australian standards for contracts and conditions which will facilitate the implementation of PBAs.
- The types of prohibited conditions intended to be prescribed include certain unfair and unconscionable conditions in building contracts.
- Including a power to address conditions such as this via a regulation provides the government with the flexibility to prescribe the technical detail in the regulation and to respond to rapid changes in Australian contract standards for the building and construction industry.

QUESTION 3:

Please provide an overview of the Queensland Home Warranty Scheme and how it operates.

ANSWER:

- The Queensland Home Warranty Scheme (Scheme) is administered by the Queensland Building and Construction Commission (QBCC). It insures consumers for residential construction work that is defective or not completed because, for example, the builder's licence is suspended or cancelled.
- The types of work covered include:
    - the construction or alteration of houses, related roofed buildings (such as garages), townhouses, or multiple unit dwellings of no more than three storeys
    - building work on or within a residence or related roofed building, such as painting or tiling
    - building work on a structure, such as a deck or verandah, attached to a residence or related roofed building
    - swimming pools.
- Consumers who enter a contract for residential construction work must pay an insurance premium. This is collected from the consumer by the licensee who passes it onto the QBCC.
- The Scheme provides consumers with coverage for six months for non-structural work (such as painting) or six years and six months for structural work (such as construction of a new home).
- The maximum amount that may be paid for a claim under the Scheme is $200,000, however, consumers may purchase optional additional coverage and increase their maximum entitlement to $300,000.
- The Scheme is required by legislation to be not for profit and managed in accordance with actuarially sustainable principles.
- The *Queensland Building and Construction Commission Act 1991* also requires insurance premiums to be reviewed at least once every 12 months to ensure that the amounts paid are sufficient to satisfy the costs of both administering the Scheme and paying out claims under the Scheme.
- The provisions of the Bill are not expected to impact the Scheme.

QUESTION 4:

Please provide a comparison (flow chart) of the proposed PBA scheme and the current requirements.

ANSWER:

Payment process – Project Bank Accounts

The **red** below indicates new steps for a Project Bank Account.

Head Contractor sets up project bank account, and advises principal of subcontractor beneficiaries

Subcontractor submits payment claim to the head contractor

Head Contractor gives payment schedule to the subcontractor

Head Contractor submits payment claim to the principal

Principal gives the payment schedule to the head contractor

Head Contractor provides Payment Instruction to Principal and the bank. This tells the bank how to pay the money out of the PBA's general account.

Principal checks beneficiaries are as identified to it by Head Contractor. If any issues, Principal advises the QBCC for investigation

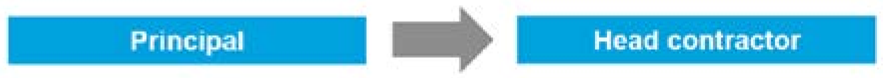
Head Contractor makes 'top up' payment into PBA if required

Principal makes payment into PBA's general account

The bank pays out the money in the PBA general account in accordance with the Payment Instruction. The money is paid to the head contractor and subcontractor beneficiaries. Money is also paid from the PBA general account into the PBA retention account, and if necessary, the disputed funds account.

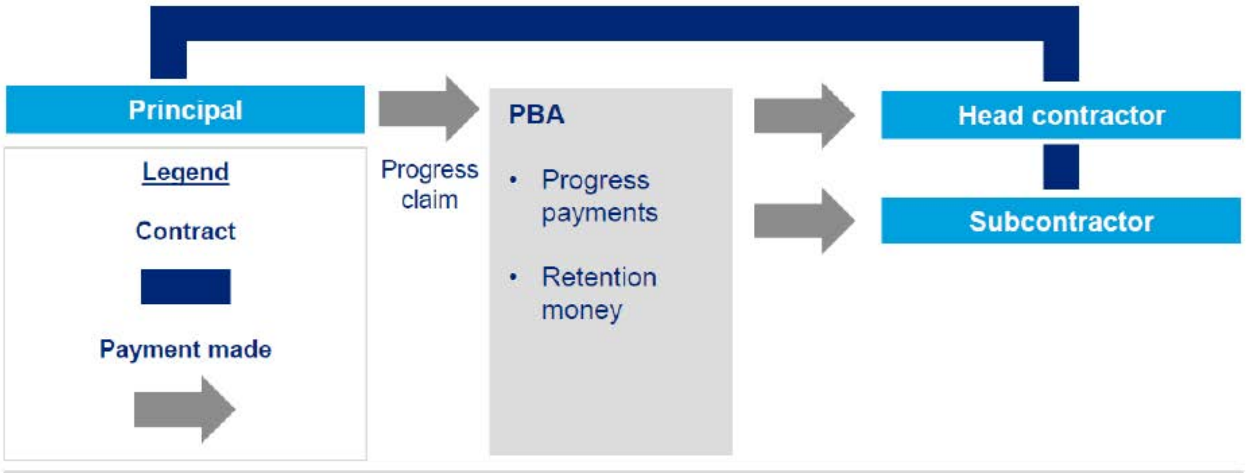
The current contractual chain

Under the current contractual chain, the principal pays the head contractor directly.



The head contractor is then responsible for paying its subcontractors.

Project Bank Accounts change this chain.



QUESTION 5:

Please provide the estimated cost to QBCC of the proposed legislation.

ANSWER:

- As Queensland's building regulator, the QBCC already has the responsibility for taking enforcement action under the QBCC Act, the *Building Act 1975* and the *Plumbing and Drainage Act 2002*.
- During the first phase of the implementation of project bank accounts (PBAs) from 1 January 2018, oversight will be provided by the Government in its role as principal. Following rollout to the private sector, the principal will still have visibility of the PBA, but the QBCC will provide third party oversight through its compliance and enforcement role.
- The QBCC will also continue to meet the costs of administering the adjudication process for disputed progress payments, which currently exists within the *Building and Construction Industry Payments Act 2004* and has been transferred into the Bill. This process will be funded through fees, as is currently the case.

QUESTION 6:

Please provide a list of building company collapses in Queensland in the last 3 years.

ANSWER:

- According to Australian Securities & Investments Commission (ASIC) data, 912 construction companies in Queensland have entered into external administration between 1 July 2014 and 30 June 2017.
- ASIC data also provides that financial management generally, which includes financial control, cashflow and under capitalisation, was cited as the top reason for these failures.
- There have been multiple high-profile collapses in the building and construction industry in Queensland within the last 3 years, including:
    - Glenzeil Pty Ltd in 2014
    - Carmichael Builders Pty Ltd in 2015
    - N1 Homes in 2015, with media claiming subcontractors and suppliers were left owed $1.5 million
    - Trac Construction Qld in 2016, with media claiming subcontractors and suppliers were left owed $20 million
    - JM Kelly (Project Builders) Pty Ltd in 2016, with media claiming subcontractors and suppliers were left owed hundreds of thousands of dollars
    - Cullen Group Australia in 2017, with media claiming subcontractors and suppliers were left owed $18 million
    - Bloomers in 2017, with media claiming subcontractors and suppliers were left owed $14 million

QUESTION 7:

Please provide links to all publicly available documents from the review process which preceded the drafting of the legislation.

ANSWER:

- The Security of Payment Discussion Paper was released on 17 December 2015 and consultation closed on 31 March 2016.
- The Security of Payment Discussion Paper is available for download at: http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDiscussionPaper.pdf.
- Feedback on a suite of proposed security of payment reforms was sought as part of the Queensland Building Plan, between 30 November 2016 and 31 March 2017.
- The Queensland Building Plan Discussion Paper and security of payment fact sheets are available for download at: http://queenslandbuildingplan.engagementhq.com/why-do-we-need-a-building-plan/documents.
- As noted in the Explanatory Notes for the Bill, the department also considered the results of the Senate Economics References Committee's 2015 inquiry into insolvency in the Australian construction Industry.
- The Committee's report is available for download at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report.

CORRECTIONS

The department wishes to correct the record regarding certain matters raised during the public briefing on 6 September 2017:

- The Bill describes a project bank account as a general account, a retention account and a disputed funds account. These three accounts (not sub-accounts) form a PBA. They are trust accounts.
- Regarding the disputed funds account, the Bill provides that money only moves into that account if the head contractor certifies an amount to be paid to a subcontractor via a payment schedule, and then that same head contractor puts a lower amount in the payment instruction. The amount of the difference between the amount in the payment schedule and the amount in the payment instruction is the 'disputed amount' and it will need to be placed in the disputed funds account.
- The department advised that no provisions from the *Building and Construction Industry Payments Act 2004* (BCIPA) or the *Subcontractors' Charges Act 1974* were removed by the Bill. However, some provisions were not replicated in the Bill. This was largely due to adopting modern drafting practices and expression, consolidating provisions or removing redundant provisions, improving and streamlining processes, and policy reforms.
- For example, section 101 of the BCIPA, which allows the Queensland Building and Construction Board to make policies under the Act, was omitted from the Bill as this power has now been conferred on the Adjudication Registrar.