

September 2017, Brief for the Public Works and Utilities Committee



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Summary of acronyms

BCIPA	<i>Building and Construction Industry Payments Act 2004</i>
Bill	<i>Building Industry Fairness (Security of Payment) Bill 2017</i>
DHPW	Department of Housing and Public Works
FLP	Fundamental Legislative Principles
HIA	Housing Industry Association
MBAQ	Master Builders Association of Queensland
OQPC	Office of Queensland Parliamentary Counsel
QBCC	Queensland Building and Construction Commission
QBCC Act	<i>Queensland Building and Construction Commission Act 1991</i>
QBP	Queensland Building Plan
QCAT	Queensland Civil and Administrative Tribunal
SCA	<i>Subcontractors' Charges Act 1974</i>

Background

The objectives of the Building Industry Fairness (Security of Payment) Bill 2017 are to:

- improve security of payment for subcontractors in the building and construction industry by providing for effective, efficient and fair processes for securing payment, including the establishment of a framework for Project Bank Accounts (PBA);
- enhance the process for making a progress claim;
- modernise and simplify the legislative provisions for making a subcontractors charge;
- increase ease of access to security of payment legislation;
- improve legislation to provide increased ability of the Queensland Building and Construction Commission (QBCC) to provide regulatory oversight to the building and construction industry.

The building and construction industry is the third largest employer in Queensland, employing around 220,000 Queenslanders and contributing approximately \$44 billion to the State economy in 2015-16.

Following a series of high profile collapses in the industry, the Government made an election commitment to review the issue of security of payment for subcontractors and to consult widely.

Consultation outcomes revealed systemic problems in the building and construction industry, including late or non-payment and unfair contractual requirements. What was once considered poor business practice has become a standard operating model for some licensees in the industry – some higher contractors often do not make, or delay payments to subcontractors. This could be to supplement cash flow or to offset the costs of other projects.

The results of consultation were supported by the Senate Economics References Committee's 2015 inquiry into insolvency in the Australian construction industry, which found that security of payment in the building and construction industry is a problem across all jurisdictions.

The Australian Securities and Investments Commission's submission to the Senate Committee noted that from 2009 to 2014, the construction industry experienced the highest number of external administrator appointments of all industry sectors, except for the business and personal services sectors. The Senate Committee's report also found that the Australian building and construction industry's rate of insolvencies is out of proportion to its share of national output.

Delaying payments to subcontractors, or non-payment, can have a significant impact on the cash flow of the subcontractor and can contribute to subcontractor insolvency. Subcontractors also typically have more lending risk than higher contractors due to reliance on payments, and they consequently incur higher costs associated with accessing short term finance to meet cash flow commitments.

Feedback from subcontractors suggests it is common practice to embed additional costs in all contracts to offset the loss of funds from bad debts and to counteract the effects of delayed cash flow from other projects.

Insolvency has an adverse impact on business owners and their families, employees and their families, suppliers and the wider community. In addition to financial impacts, harmful social impacts include relationship breakdowns, loss of reputation and stress-related mental illnesses, including suicide. Moreover, it can include families losing their homes, livelihoods and marriage breakdown due to a lack of security of payment. It is not acceptable for subcontractors to not get paid, or to routinely be left waiting for payment.

Purpose of the Bill

The Bill incorporates a range of reforms relating to security of payment, including:

- implementing PBA in the building and construction industry in phases;
- enhancing the process for making a progress payment claim;
- modernising and simplifying the legislation relating to making a subcontractor's charge;
- improving legislation to provide increased ability of the Queensland Building and Construction Commission (QBCC) to provide regulatory oversight of the building and construction industry with respect to financial reporting and security of payment;
- combining security of payment legislation into one Act, to provide ease of access to the security of payment legislation.

The Bill provides for implementation of PBAs in two phases. Phase 1 will apply to government building and construction projects between \$1-10 million, excluding engineering projects for projects tendered after 1 January 2018. Engineering projects include infrastructure such as bridges, roads and ports. Phase 2 will implement PBAs in all building and construction projects valued over \$1 million, again excluding engineering projects, no sooner than 1 year from commencement of Phase 1.

PBAs are trust accounts where progress payments and retention monies are safely held in trust, independent of the head contractor and principal. PBAs are intended to provide greater security in events such as insolvency, where money within the account is effectively quarantined for subcontractors who are beneficiaries to the trust.

PBAs are also expected to result in faster progress payments to subcontractors, as the head contractor and subcontractors are paid out of the PBA simultaneously. Phases 1 and 2 will apply to first tier subcontractors, that is, subcontractors who contract directly with the head contractor. The Bill also enables application of PBA to lower tier contractors and suppliers at a later date.

The Bill provides for a more level playing field for subcontractors through improvements to the process for progress payment claims. The *Building and Construction Industry Payments Act 2004* (BCIPA) will be repealed and its provisions placed into the new Act. New progress payment claims provisions will reduce opportunities for head contractors to delay payment and allow subcontractors to take action to resolve payment issues faster. Amendments will also enhance the independence and operation of the Adjudication Registry within the QBCC, and streamline the adjudication process for greater ease of use.

The Bill also repeals the *Subcontractors' Charges Act 1974* (SCA) and places its provisions within the new Act. While it is intended that the legal effect of the provisions that are currently in the SCA will remain unchanged, the Bill seeks to improve usability of the SCA provisions.

Amendments to the *Queensland Building and Construction Commission Act 1991* (QBCC Act) will enhance the QBCC's enforcement capability and compliance. The QBCC administers the building and construction licensing system and the Bill introduces licensing reforms in relation to influential and excluded persons. The current definition of 'influential person' is expanded to ensure that not only is the role of the person captured but also the function that the person performs in the company. For example, a person may appoint their spouse as the director of a company and effectively run the company through their spouse, but without officially being an officer of the company.

The Bill also increases the rigour around the 'excluded individual' provisions, so that a person who was involved in a company failure in other jurisdictions, or who was the director of a company up to two years prior to a failure, will be excluded from obtaining a QBCC licence. Amendments in the

Bill are aimed at preventing illegal phoenixing activity. This occurs when a new company is created to continue the business of a company that has been deliberately liquidated to avoid paying its debts. The Bill will allow the QBCC to more effectively target defaulting contractors who restructure their corporate affairs in order to keep operating after their licence has been cancelled.

Amendments in the Bill will also provide the QBCC with greater insight into a company's financial position so it can more effectively act on any potential problems, to reduce the harm to licensees and consumers.

The Bill also increases penalties for breaches related to unlicensed building work. Further, the Bill increases the number of persons on the Queensland Building and Construction Board to make the Board more representative of the building and construction industry.

To streamline and improve accessibility to the security of payment legislation generally, the Bill creates a single Act containing the requirements for PBAs and the provisions of the BCIPA and SCA that will be repealed under the new Act.

These measures work together towards the overarching objective to make systemic changes designed to effect cultural change in the industry and protect subcontractor payments. This is expected to lead to reduced family breakdown, greater business confidence and more fairness in the industry.

Consultation

The Government made an election commitment to undertake a wide-ranging review of security of payment for subcontractors, and to consult widely. To deliver on this commitment, the Minister for Housing and Public Works released the Security of Payment discussion paper (SoP discussion paper) on 17 December 2015, which was followed by extensive consultation between December 2015 and March 2016.

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

The policy objectives in the Bill were informed by each consultation process.

Fundamental Legislative Principles

The Explanatory Notes address potential inconsistencies with fundamental legislative principles (FLPs) in provisions of the Bill.

Public Submissions

The Public Works and Utilities Committee (the Committee) received 33 submissions in response to the Bill. Overall there was support for the introduction of laws to enhance security of payment in the building and construction industry.

The following section provides a high-level summary and discussion of the main issues raised in these submissions, with commentary on the intent of the amendments.

Appendix 1 provides a more detailed response to issues on specific clauses of the Bill raised in the submissions.

Summary of main issues raised

PBAs

Establishment of PBA scheme and its application

Some submissions raised a concern that PBAs will result in increased construction and administration costs, delays in payment process, delays in construction of projects, increased construction finance costs to the principal and increased litigation. Concerns were also raised that PBAs would slow payments to subcontractors.

Independent economic analysis commissioned by the Department of Housing and Public Works (the department) demonstrates that PBAs will benefit the building construction industry. It is expected that the initial 'government only' phase (Phase 1) will enable any issues arising from implementation to be addressed before PBAs are applied more broadly.

Requirement for head contractor to cover shortfalls

Some submissions expressed concern about the requirement for head contractors to meet shortfalls through payment into the PBA. They suggested that it represented a significant change in the risk profile to a portfolio, will place increasing pressure on funding approval from financiers and will seriously impact the cash flow of businesses.

The department does not expect any significant change in risk profile or cash flow for head contractors who currently make appropriate provision for prompt payment of money due to subcontractors.

Concern was also expressed about how the head contractor can comply with the requirement to 'top up' the PBA in an insolvency event. This matter will be considered further.

Disputed funds/payment disputes

Several submissions expressed concern over the present drafting and the intent of the 'disputed fund' clauses. Some submissions were unsure about the aim of the provisions. Submissions highlighted uncertainty about the term 'instructed amount' and the reference to amounts 'no longer needed for the purpose it is held'.

The intent of these provisions is to establish a process for when a payment dispute occurs. A payment dispute will occur when there is a difference between the amount that the head contractor specifies that they will pay the subcontractor in the payment schedule and the amount that the head contractor later specifies in the payment instruction. In the case of a discrepancy the Bill provides that the difference between the amount in the payment schedule and the amount in the progress payment instruction should be placed into the disputed funds account until the matter is resolved. A matter can be resolved in a number of ways which might include negotiation, a progress payment claim or court action.

The department will consider the issues raised in the submissions.

Payment instructions and oversight role

Some submissions expressed concern that the payment instruction information the head contractor must provide to the principal and subcontractors may be 'commercial in confidence'.

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

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

Principal 'step in' rights

Some submissions raised concerns about the principal's ability to undertake the role as trustee on the insolvency of the head contractor or when the contract is terminated by the principal. One submission suggested that the principal will not be privy to sufficient contractual and commercial details to properly exercise its duties as trustee without negligence. The consequence of this will be that subcontractors will need to prove their entitlement in court, significantly increasing costs and timeframes. Another submitter queries how an insolvent head contractor will be able to fulfil their top up obligations and suggests the Bill may be inconsistent with the Corporations Act.

The intent of these clauses is to establish the powers of the principal acting as a 'step in' trustee and to enable distribution of monies in the PBA in the event of an insolvency. The clauses also clarify the process to be followed in the event of head contractor insolvency.

The department will consider the submissions.

Progress payments

Payment claims

The provisions in Chapter 3 ('Progress Payments') of the Bill replace and enhance the provisions of the BCIPA. Currently, a payment claim must state that it is made under the BCIPA. Multiple stakeholders expressed concern about the removal of this requirement. However, other stakeholders are in favour of the removal of endorsement.

The policy to remove the need for endorsement of a claim under Chapter 3 make it open for this jurisdiction to apply at an earlier time. This followed feedback from consultation that revealed it would be useful to have the provisions of the BCIPA apply from the start of the payment process. Currently, a party may submit an invoice, then await payment. When this does not eventuate, in part or in full, the party may then consider submitting a payment claim under the provisions of the BCIPA. Further, the claimant must wait for the time limits under that legislation in order to seek adjudication.

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

The policy of removing the endorsement of payment claims, means the jurisdiction and mechanisms of Chapter 3 apply from the start of the payment process, which means that claimants can move more quickly to address non-payment and without the stigma.

It is expected that this reform will result in more prompt payment of claims for payment. The change is expected to deliver a cultural change to one of payment, rather than non- or delayed payment. It is expected that industry will adapt to the change, however the department will consider the various issues raised as they impact on implementation.

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

Payment schedules

There is concern about increased administration as a result of mandatory payment schedules. As discussed above, there is also concern that as payment claims will no longer be endorsed as a claim made under the Act it may be difficult for a respondent to know what is actually a payment claim, and therefore whether a payment schedule is needed.

It is intended that a payment schedule should be provided for every payment claim. The aim is to provide early communication between the parties. It will also allow the claimant to know earlier whether the respondent intends to pay, thus allowing them to proceed to recover the claimed amount more quickly. This policy change is intended to bring about a positive change in the industry with respect to payment, as claimants will be able to take earlier action to recover payment. It is proposed that further guidance will be provided on how to identify a payment claim and payment schedule.

It is important to remember that there can be only one payment claim per reference date. This is intended to minimise large numbers of payment claims per month. Amongst other things, the intent of this policy is to bring about cultural change in the industry.

Responding to a payment claim with a payment schedule

The Bill provides that if given a payment claim the respondent must respond to the payment claim by giving a claimant a payment schedule whether or not the respondent intends to pay the amount stated in the claim, unless the respondent has a reasonable excuse. Some stakeholders have concerns about the extent of what constitutes a 'reasonable excuse.' It is envisaged that examples of a reasonable excuse might include that the respondent was not aware of a payment claim being made because it was sent to wrong address or the respondent was seriously ill in hospital when the payment claim was made.

Application for adjudication

Submissions were in favour of provisions that extend the timeframes for claimants to make an adjudication application.

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

Adjudication response - no new reasons

Submissions were largely in favour of these provisions, particularly removing the ability to raise new reasons. However, one submission considered the removal of the ability to raise new reasons to be unreasonable in the case of complex claims.

The removal of the ability to provide new reasons for complex claims is to encourage early communication between the parties. As payment schedules will be mandatory, these should specify the reasons for any lack of acceptance of the whole amount of a payment claim. If a respondent provides this information with the payment schedule early on, this may mean the claimant decides the information and reasons provided by the respondent are valid. As a result, the claimant may not decide to go to adjudication.

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

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

Adjudicators

Suitability criteria and continuing professional development requirements

Some submissions suggested that additional criteria should be prescribed about suitability of adjudicators. Two submissions were supportive of the continuing professional development being in the Act, while another submission raised concerns about the type of development that would be prescribed by regulation.

The Bill provides for the possibility of additional conditions of registration should the registrar consider it appropriate.

The intention for the introduction of a requirement of continuing professional development as prescribed by regulation is to ensure that adjudicators maintain the requisite level of skill and knowledge needed to undertake their role.

Subcontractors' charges

Notice of claim

One submission proposes removal of the certificate of a qualified person (required to confirm the amount of a claim when lodging a notice of claim) as they view it as an extra expense, a delay, and the qualified person does not have the requisite knowledge. Another submission expressed concern that subcontractors often do not know if there is any money payable or to become payable by the person they are giving the notice of claim to. They suggested that the recipient of the notice of claim should be obliged to provide a notice to the subcontractor and higher contractor advising whether there is any money still payable.

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

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

Amendments to QBCC Act

Excluded individuals

Amendments to the provisions relating to ‘excluded individuals’ will exclude an individual if they were a director, secretary, or influential person for a company within 2 years of a relevant company event (e.g. the winding up of a company).

Submissions raised concerns that the amendment could exclude a person who sold or left a company while it was in good financial health. Some submissions have suggested that a defence be introduced to protect persons in this situation.

The department will consider the issues raised in the submission.

Influential persons

A submission suggests that the new definition of ‘influential person’ is not necessary and that the current definition is broad enough to capture most of the individuals identified in the new definition.

Furthermore, it raises particular concerns about new section 4AA(3)(e) in clause 252 which states that a person who ‘makes, or participates in making decisions that affect the whole or a substantial part of the company’s business or financial standing’ may be an influential person, suggesting this could potentially capture employees like in-house lawyers and book keepers who provide input into company decisions.

The department considers that the list of roles and activities in section 4AA(3) is necessary to clarify what is intended to be captured by the definition of ‘influential person’, and to help guide the courts when making their determination. Ultimately, section 4AA(3) will need to be read in conjunction with section 4AA(1).

New offence for causing significant financial loss

A submission suggests that the new offence provision for deliberate avoidance of contractual obligations causing significant financial loss is flawed. It seeks clarification on what many of the terms in the provision mean. Furthermore, it suggests that it is an essential element of commercial law for parties to a contract to enforce their rights by going to Court. It suggests that breach of contract is not a matter to be regulated and that this provision offends the doctrine of separation of powers.

The department considers this offence provision necessary due to the prevalence of poor contractual practices in the building and construction industry. Unlike large companies, most subcontractors often do not have the financial means to pursue a matter through the courts – they are “mum and dad” operators who rely on timely payment to survive. The department will consider the issues raised by the submission.

Building contract conditions

The amendments create new powers to prescribe by regulation mandatory and prohibited conditions for building contracts.

Some submissions express concern that imposing mandatory and prohibited conditions in building contracts will restrict the fundamental right of parties to make and agree to their own contractual arrangements.

Feedback received on consultation revealed that subcontractors are often in a poorer bargaining position and are offered to enter unfair contractual on a 'take it or leave it' basis.

One submission expressed concern that creating a power to prescribe these conditions by regulation will mean they are not subject to debate within Parliament.

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

The department will consider the submissions further.

Requirements for defect liability period and retention money

Generally, submissions were supportive of the penalty for failure to release a retention amount. However, one submission expressed concern regarding maximum penalty including 1 year's imprisonment for what is a breach of a contractual obligation.

Due to the prevalence of this industry practice, the department considers a significant penalty is necessary to provide a significant deterrent to those who do not fulfil this important contractual obligation. Consultation feedback revealed that failure to release retention monies to subcontractors is a major problem in the building and construction industry and the aim of the amendments are to deter this practice.

Demerit points for receiving a direction to rectify or remedy

Some submissions suggested that the imposition of 4 demerit points for simply receiving a direction to rectify is unfair, especially given that head contractors are being penalised for work carried out by subcontractors.

The department believes that a strong penalty for receiving a direction to rectify or remedy will reinforce the expectation that building work should be free of defects and carried out to completion.

The department will consider the issues raised in the submissions.

Appendix 1

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
Chapter 1 – Preliminary		
<p>Clause 2 – Commencement</p> <p>Issue: A submission raised a concern that ‘chapter 9, part 1, division 2’ is not included in the provisions listed against the bullet points in clause 2(1).</p> <p>Another submission favoured introduction of PBAs in a phased manner as it will allow for any difficulties to be ironed out before PBAs are rolled out to the industry generally.</p> <p>Relevant submissions: 30, 31</p>	<p>The omission of reference to chapter 9, part 1, division 2 from the provisions listed against the bullet points in clause 2(1) was intentional and has the effect that those provisions only commence on proclamation. This is appropriate as the provisions relate to the extended application of project bank accounts following the ‘government only’ phase.</p>	<p>No change proposed</p>
<p>Clause 6 – Subcontractor, subcontractors and subcontracted work</p> <p>Issue: A submission raised a concern that the definition of ‘first tier subcontract’ in clause 6(5) is too narrow and should refer to related entities (rather than only capturing contracts where the same person is contractor and subcontractor).</p> <p>Relevant submissions: 30</p>	<p>Head contractors may seek to circumvent the requirement to establish a PBA by having a related company, with which the head contractor has no specific contract, engage subcontractors for the job. Under such an arrangement, however, there would arguably be an implied subcontract between the related companies and the anti-avoidance provisions in clauses 19 – 21 would apply. Nevertheless, the submission will be considered by the department.</p>	<p>No change proposed</p>
Chapter 2 – Project bank accounts		

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Clause 8 – Definitions for chapter</p> <p>Issue: Definition of 'building work' - a concern was raised that the definition may not include work for 'power supply' or 'power lines'. This was said to be particularly so because of the exclusion of 'suppliers' (clauses 9 and 11). It was suggested that the definition of 'building work' have a paragraph added saying "work under the Electrical Safety Act".</p> <p>Definition of 'building work' - another concern was raised regarding the definition of 'building work' that paragraph (c) is confusing when read with paragraph (b) and should be amended to ensure clarity.</p> <p>Definition of 'defects liability period' – a concern was raised that as paragraph (b) is currently worded, it could be argued that if the contract does not provide for a definition that aligns with paragraph (a), the statutory defects liability period applies.</p> <p>Definition of 'practical completion' – a concern was raised that the definition is expressed to be 'for building work' whereas a PBA can be required for a 'building contract' under which only a portion of the work is 'building work'.</p> <p>Definition of 'retention amount' – a concern was raised that the expression as defined only relates to</p>	<p>The definition of 'building work' is intended to align broadly with the definition of that expression in the QBCC Act. It was not intended to exclude subcontracted work by an electrician related to the erection or construction of a building from the protection afforded by PBAs.</p> <p>The definitions of 'defects liability period', 'practical completion' and 'retention amount' are intended to align with industry practice.</p>	<p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>a head contract and not, as it should, to an amount retained under a subcontract.</p> <p>Relevant submissions: 14, 17, 19, 20, 25, 30, 31</p>		
<p>Clause 9 – What is a PBA</p> <p>Issue: A concern was expressed regarding clause 9(4)(a) that in the case of oral subcontracts, it may be difficult to determine commencement date. It was suggested that ‘site mobilisation’ or ‘site induction’ be used as an alternative in such cases.</p> <p>A concern was raised that the beneficial interest for a subcontractor is “an amount the Subcontractor is entitled to be paid under its subcontract...” However, the beneficial interest for the Subcontractor should be an amount identified against the Subcontractor’s name in the relevant payment instruction.</p> <p>Definition of ‘remainder’ in clause 9(5) – a concern was raised that the phrase “entitled to be paid under a first tier subcontract” is unclear as it potentially includes work yet to be done under the subcontract and should more narrowly relate to work done in accordance with the subcontract.</p> <p>Relevant submissions: 3, 19, 21</p>	<p>The department recommends the use of written building contracts.</p>	<p>The department will consider the issue raised</p>
<p>Clause 13 – Building contracts requiring a PBA</p>	<p>Independent economic analysis demonstrates that PBAs will benefit the building construction industry.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Issue: This is the key provision in the Bill requiring PBAs. Some submissions raised the concern that PBAs will result in increased construction and administration costs, delays in payment process, delays in construction of projects, increased construction finance costs to the principal and increased litigation. Concerns were also raised that PBAs would actually slow payments to subcontractors.</p> <p>Relevant submissions: 1, 2, 5, 16, 26</p>	<p>It is expected that the initial ‘government only’ phase will highlight any issues arising on implementation before PBAs are rolled out across the private sector.</p>	
<p>Clause 14 – Particular government building contracts</p> <p>Issue: A submission queried whether clause 14 should be amended to include a similar paragraph to proposed section 14(c) which under clause 214 of the Bill is required to be inserted into the legislation after the ‘government only’ phase. The proposed section 14(c) says ‘the head contractor enters into a subcontract for all or part of the contracted building work’.</p> <p>A submission expressed concern about the cost implications for industry of requiring PBAs for contracts at the lower end of the \$1m to \$10m range.</p> <p>Relevant submissions: 17, 26, 30</p>	<p>A PBA will be required during the government only phase when the head contractor enters a relevant subcontract (clauses 9(1) and 23(1)).</p>	<p>No change proposed.</p>
<p>Clause 16 – Building contracts for residential construction work</p>	<p>Paragraph (b) of the definition of ‘residential construction work’ is intended to supplement</p>	<p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Issue: A submission raised concerns about a minor drafting error in the definition of ‘residential construction work’ and suggested the error could be rectified by changing the introductory part of the definition to, “residential construction work means and includes” and then deleting the word “includes” in subparagraph (b).</p> <p>A submission expressed concern that the definition of ‘residential construction work’ includes the word ‘residence’ yet that word is not itself defined.</p> <p>Relevant submissions: 14, 19, 31,</p>	<p>paragraph (a) by clarifying the inclusion of certain work for ‘residential purposes’.</p> <p>The word ‘residence’ is intended to have the same meaning as it does in the QBCC Act.</p>	
<p>Clause 20 – Application of chapter if parties to a subcontract are related entities</p> <p>Issue: A submission expressed concern that this provision could potentially be circumvented if the main contractor inserted a controlled entity not just as the first tier subcontractor but inserted another controlled entity ‘beneath’ the controlled first tier subcontractor.</p> <p>Relevant submissions: 14</p>	<p>The intention for the ‘government only’ phase is to protect genuine ‘arms-length’ first tier subcontractors. It is recognised that head contractors may seek to side-step the requirements by artificially inter-posing related subcontractor companies. Clause 20 is intended to address this possibility. Also, the reporting requirements of clause 21 are expected to highlight whether this becomes a significant issue in practice.</p>	<p>The department will consider the issues raised. .</p>
<p>Clause 21 – Notices of related entities</p> <p>Issue: A submission suggested the Bill should require that every contracted party be provided a</p>	<p>It is considered that the requirements for disclosure statements are satisfactory.</p>	<p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>mandatory disclosure statement prior to a subcontract being entered into of all related entities of a contracting party and that all related entities are jointly and severally bound to the contracting party's PBA responsibilities.</p> <p>A submission express concern this provision exposes the principal to a penalty of up to 50 penalty units for failing to report any activity that is genuinely unknown to them.</p> <p>Relevant submissions: 3, 24, 31</p>	<p>The concern about exposing principals to a penalty for an activity that is genuinely unknown to them, appears to be contrary to the requirement of clause 21(2) that the principal 'knows that the subcontractor beneficiary is a related entity'.</p>	
<p>Clause 23 – Head contractor must establish PBA</p> <p>Issue: A submission supported establishment of PBAs however suggested that rather than the head contractor establishing the PBA, this should be done by government which should then pass management to the head contractor to ensure that the PBA is operated in accordance with required procedures.</p> <p>A submission observed that where a subcontract is entered into before the day a PBA is required – a failure to establish the required PBA trust accounts within 10 business days after the start date of the PBA building contract (e.g. due to a variation) will attract a penalty of 500 penalty units (\$63,075) for an individual, and five times this amount for a corporation – clause 23(3). The submitter stated that this is a significant fine, and that by way of</p>	<p>The process of establishing a PBA is not expected to be unduly burdensome for industry.</p> <p>Regarding the penalty under clause 23(3), the obligation to establish a PBA is central and requires a significant penalty to maintain the integrity of the scheme.</p> <p>It is not expected that there would be any significant cost saving for industry by opening two rather than three bank accounts. In the interests of simplicity, it is preferred to keep the requirements consistent for all PBAs.</p> <p>The reference to '90 days' in clause 23(4) was not intended to be '90 business days'.</p> <p>As regards a head contractor entering into a contract with a subcontractor 6 months in advance</p>	<p>No changes proposed, however, the department will consider the issues raised. .</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>comparison, it is the same penalty imposed for a person who is a participant in a criminal organisation that recruits or attempts to recruit another person to become, or associate with, a participant in a criminal organisation. The submitter also said that the same penalty applies for the dangerous operation of a vehicle while adversely affected by an intoxicating substance or speeding.</p> <p>Submissions contended that to impose a requirement for a retention account to be opened on projects that do not provide for retentions, is of no benefit yet will add additional costs and administration for the head contractor. The submitter suggested an amendment should be made to remove the requirement for a retention account where the head contractor shows that no retentions are permitted to be withheld in any of the subcontracts that relate to the project.</p> <p>One submission queried whether the reference to '90 days' in clause 23(4) should be '90 business days'.</p> <p>A submission commented that the drafting of clause 23 is 'circular and confusing'. The submission gave an example where the head contractor enters into a subcontract '6 months in advance' to secure the subcontractor's availability for a forthcoming project.</p> <p>Relevant submissions: 15, 19, 20, 21, 26, 30, 31</p>	<p>of the head contract, it is not intended that this would trigger the requirement for a PBA. It is doubtful that such a contract would be regarded as a 'subcontract' for the purposes of clause 23.</p>	

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Clause 24 – Particular requirements for trust accounts</p> <p>Issue: A submission raised a concern that electronic payment may be too slow where ‘urgent payment’ is required. The submitter argues that this may cause delays of ‘up to two to three days’ for the funds to transfer firstly from the head contractor to the trust account and then from the trust account to the subcontractor.</p> <p>A submission recommended that if funds are required on an urgent basis, payment can be made directly, if agreed, between the head contractor and the subcontractor.</p> <p>A submission was concerned the clause requires the head contractor to ensure the principal can view “account payment reports”, however, this is not defined. A definition of what is required in this regard should be inserted in the Bill to provide clarity for the head contractor and principal.</p> <p>Relevant submissions: 16, 19</p>	<p>It is not expected that the requirement for electronic payments will impede the timeliness of payment. Subcontractors who require frequent payments should negotiate frequent reference dates.</p> <p>It is not proposed to allow direct payments outside the PBA as this would tend to subvert the integrity of the scheme.</p> <p>The intent is that the principal be able to view historical reports of payments into and out of the PBA as well as transfers between the three accounts.</p>	<p>No change proposed.</p>
<p>Clause 27 – All payments from principal to be deposited in PBA</p> <p>Issue: A submission expressed concern that clause 27 requires that all payments made under the building contract from the principal are to be</p>	<p>The intent of clause 27 is that it only applies to an amount paid by the principal ‘to the head contractor’ or ‘that otherwise reduces the unpaid amount of the contract price’ – clause 27(1). It is not intended that amounts held or retained in security or escrow</p>	<p>No changes proposed, however, the department will consider the issue raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>deposited into the PBA. The submitter said that this requirement should be subject to the terms of the building contract, as some building contracts may require that payments made by the principal are to be held or retained in security or escrow accounts for the benefit of the principal. Further the submitter said that if there is a dispute between the principal and head contractor, the principal may wish to have their disputed funds held in trust or paid into court.</p> <p>Relevant submissions: 21</p>	<p>accounts for the benefit of the principal would be required to be deposited into a PBA.</p>	
<p>Clause 29 – All payments to subcontractor beneficiaries to be paid from PBA</p> <p>Issue: A submission expressed concern that the threat of jail time for builders who pay contractors directly and not from the PBA is ‘absurd’. It should not matter where the money comes from as long as the contractor is paid.</p> <p>Relevant submissions: 3, 5, 21</p>	<p>Clause 29 is one of the central provisions in Chapter 2 and needs to have a strong deterrent penalty attached to it, so as to maintain the integrity of the scheme.</p>	<p>No changes proposed.</p>
<p>Clause 30 – Head contractor to cover shortfalls</p> <p>Issue: Submissions did not support the requirement to meet shortfalls via payment into the PBA.</p> <p>A submission advised that this provision represents a significant change in the risk profile to a portfolio and will place increasing pressure on funding approval from financiers.</p>	<p>In order to enhance protection for progress payments and for simplicity and to facilitate auditing, all payments are to be made via the PBA.</p> <p>The department does not expect any significant change in risk profile or cash flow for head contractors who currently make appropriate provision for prompt payment of money due to subcontractors.</p>	<p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>A submission advised that this provision will seriously impact the cash flow of a business if the builder is to wait until the end of the job before receiving payment and that the penalties are 'more than extreme'.</p> <p>A submission advised that clause 30 may be interpreted as requiring a head contractor to pay money to the PBA in relation to a subcontract, even though the subcontractor is not entitled to be paid any money under the subcontract at the relevant time and that clause 30(2) 'indicates that the entire amount of the subcontractor's contract may need to be held in the PBA for future payments'.</p> <p>A submission also advised that the obligation to cover a shortfall should only arise when the head contractor knows that the payment deposited by the principal is less than the amount that is due and owing to the subcontractors. The present drafting requires the amount to be paid too soon.</p> <p>A submission advised that it is unclear when a head contractor may 'know' of insufficient funds. This provision should provide a defence to the head contractor to give them reasonable time to deposit funds in circumstances where the principal fails to make payment in accordance with the head contract.</p> <p>Relevant submissions: 3, 5, 16, 18, 19, 21</p>	<p>It is not intended that clause 30 operate in the manner suggested (<i>i.e.</i> requiring a head contractor to pay money to the PBA <i>before</i> money is due to the subcontractor).</p> <p>The intent is that the head contractor pay the shortfall amount to the PBA in time to facilitate money which has been paid into the PBA by the principal, flowing through to subcontractors as indicated in the payment instruction.</p> <p>Again, the intent is that the head contractor pay the shortfall amount to the PBA in time to facilitate money which has been paid into the PBA by the principal, flowing through to subcontractors as indicated in the payment instruction.</p>	

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Clause 31 – Limited purpose for which money may be withdrawn from PBA</p> <p>Issue: A submission outlined concerns the current wording referring to “an amount that the head contractor is liable to pay the subcontractor” is likely to create confusion as the head contractor is liable to pay the subcontractor the full amount of the subcontract price although the subcontractor is only entitled to be paid what is due and owing at the time the payment instruction is issued.</p> <p>A submission advised that as the Bill is currently written, there is no mechanism for the head contractor to transfer an amount from the general account to the retention account or the disputed funds account. A new subparagraph should be inserted under clause 31(1) to permit these transfers to be noted on a payment instruction. If no such amendment is made to the Bill, the head contractor will not be permitted to withdraw such amounts from the general account but is required, pursuant to clause 34(1) and 36(2), to deposit such amounts in the retention account and the disputed funds account respectively.</p> <p>Relevant submissions: 19</p>	<p>It is not intended that the head contractor be liable to pay the ‘full amount of the subcontract price’ into the PBA. Only amounts due and owing to the subcontractor are required to be paid.</p> <p>It is intended that head contractors be able to transfer moneys between the accounts by means of a payment instruction – clause 24(1)(c).</p>	<p>The department will consider the issues raised.</p>
<p>Clause 32 – Order of priority</p> <p>Issue: Submissions suggested that, for consistency, and to ensure clarity regarding the</p>	<p>The reference in clause 32(1)(a) to ‘an amount a subcontractor beneficiary is entitled to be paid under its subcontract’ is intended to catch amounts due and owing.</p>	<p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>payments to be made to the subcontractors, clause 32(1)(a) should be amended to reflect that the amount referred to is the amount due and owing to the Subcontractor.</p> <p>Relevant submissions: 19, 21</p>		
<p>Clause 33 – Insufficient amounts available for payment</p> <p>Issue: Submissions suggested that the right of a subcontractor to ‘stop work’ needs to be added.</p> <p>A submission advised that the requirement for pro rata payments under clause 33 may not provide sufficient flexibility for commercial agreements, for example, if one subcontractor ‘is more urgently requiring payments than another subcontractor’. In such a case, if the head contractor can reach an agreement ‘between the parties’ then it should be able to do so rather than being mandated to follow clause 33(2)’.</p> <p>Relevant submissions: 16, 20, 25</p>	<p>Entitlements to ‘stop work’ are contained in chapter 3 of the Bill (the current BCIPA provisions).</p> <p>The government does not propose to create different rules for subcontractors requiring payment ‘more urgently’ than others.</p>	<p>No change proposed.</p>
<p>Clause 34 – Dealing with retention amounts</p> <p>Issue: A submission expressed concern that as the Bill is currently written, the head contractor is permitted to withdraw an amount “to secure, wholly or partly, the performance of a subcontract by a Subcontractor beneficiary”. As set out in clause 8 of</p>	<p>It is not intended that head contractors be permitted to withdraw the full amount of retention held from the subcontractor leaving nothing in the retention account, as suggested. It is intended that the head contractor only have access to amounts to correct defects in the building work, or otherwise to exercise a right of recourse to a retention amount as provided for in the subcontract.</p>	<p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>the Bill, such an amount is the definition of a “retention amount”. Therefore, by permitting the head contractor to withdraw this amount, the head contractor will be entitled to withdraw the full amount of retention held from the subcontractor leaving nothing in the retention account.</p> <p>Other submissions expressed support for retention moneys being held in a PBA.</p> <p>Relevant submissions: 19, 26, 32</p>		
<p>Clause 35 – When payment dispute occurs</p> <p>Issue: Various submissions expressed confusion over the present drafting and intent of this clause, particularly the term ‘instructed amount’.</p> <p>Relevant submissions: 14, 19, 26, 30, 31</p>	<p>The intent of this clause (and Division 6 of the Bill more broadly) is to establish a process when a payment dispute occurs. A payment dispute is will occur when there is a difference between the amount in a payment schedule and the amount later specified in the payment instruction. In this case it is intended to transfer this difference into the disputed funds account until the matter is resolved.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 36 – Dealing with amounts if payment dispute occurs</p> <p>Issue: Various submissions sought clarity on the intent of this clause and questioned what this division will achieve. Industry bodies have sought particular clarity on the words ‘no longer needed for the purpose it is held’.</p>	<p>The intent of this clause is to specify what happens to an amount if a payment dispute occurs. Generally, the head contractor must deposit the difference between the amount in a payment schedule and the amount later specified in the payment instruction. This is to place the difference amount in the protected trust account until the matter can be resolved.</p>	<p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
Relevant submissions: 16, 19, 30, 32		
<p>Clause 41 – Power to employ agents</p> <p>Issue: Two submissions raised minor issues with this section. The first queried whether the delegate must be a resident in the State of Queensland. The second suggested various defined terms should be updated.</p> <p>Relevant submissions: 16, 30</p>	<p>The intent of clauses 41 and 42 is to provide flexibility for the head contractor to employ agents and delegate various powers. Given the head contractor need not reside in the State of Queensland, there does not appear to be a risk if the delegate is also not a person residing in the State.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 46 – Right of head contract to apply to Supreme Court for directions</p> <p>Issue: One industry body suggested that there be an ability for a head contractor to apply to the Queensland Building and Construction Commission rather than solely the Supreme Court. This was recommended as it will reduce the cost and timeframe required.</p> <p>Relevant submissions: 16</p>	<p>The intent of this clause is to grant the ability for the head contractor to apply to the Supreme Court for directions about various matters including an amount held in trust, the administration of the project bank account and the exercise of a power by the head contractor.</p>	<p>No change proposed.</p>
<p>Clause 47 – No assignment of entitlement by head contractor</p> <p>Issue: One industry body has expressed concern that a head contractor cannot assign their entitlement of an amount held in the project bank account.</p> <p>Relevant submissions: 21</p>	<p>The intent of this clause is to restrict head contractors from assigning their entitlement of an amount held in the project bank account. This is intended to simplify the arrangements to more easily track money to beneficiaries. If an entitlement is assigned to a non-beneficiary this complicates the reporting arrangements when reviewing payment instructions etc.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Clause 50 – Principal to be given information about subcontracts</p> <p>Issue: One industry body has sought clarity on what information the head contractor will be required to provide the principal after establishing the project bank account.</p> <p>Relevant submissions: 21</p>	<p>The intent of this clause is to provide the principal with sufficient information about the beneficiaries to be able to perform its oversight role. For example, the regulation may prescribe the name and nominated bank account details of all subcontractor beneficiaries. This will assist the principal in its role under clause 52 to inform the QBCC Commissioner of any discrepancies in a payment instruction, for example, if a non-beneficiary is listed.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 51 – Principal and subcontractor to be given copy of payment instruction</p> <p>Issue: Various submissions have expressed concern that the payment instruction information the head contractor must provide to the principal and subcontractors may be ‘commercial in confidence’.</p> <p>Relevant submissions: 16, 19, 21</p>	<p>The intent of this clause is for the head contractor to provide a copy of the payment instruction to the principal and relevant subcontractors. This copy is to be used by the principal and subcontractor as a level of oversight to ensure the payment instructions are correct and identify the correct beneficiaries and correct entitlement to each subcontractor.</p> <p>It is not intended for the information in the payment instruction to breach ‘commercial in confidence’ arrangements. It is intended that the regulation will prescribe the payment instruction information necessary for each party. For example, this may include the beneficiary name, bank account details and the payment amount. It is not envisaged to include specific contractual information such as the payment arrangements and agreed rates between the head contractor and subcontractors for specific work. It is intended that the regulation will specify that each subcontractor will only receive an extract of the complete payment instruction i.e. they will</p>	<p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
	only receive the information relevant to them and no information relating to other subcontractors.	
<p>Clause 52 – Principal to inform commissioner of discrepancies</p> <p>Issue: Two industry bodies have expressed concern that the requirement to report discrepancies to the QBCC Commissioner are particularly onerous and should be further qualified.</p> <p>Relevant submissions: 16, 24</p>	<p>The intent of this clause is for the principal to oversee payments and inform the QBCC Commissioner if there is a discrepancy in a payment instruction.</p> <p>It is acknowledged that the obligation to report discrepancies could be considered onerous on the principal. For this reason, only particular discrepancies which have the potential to undermine the project bank account system have been specified. For example, an incorrect account number, non-subcontractor beneficiary and non-matching account name have the potential to result in a payment from the trust to a non-beneficiary. Such action places the trust at risk. While the head contractor may quickly resolve the matter, and deem it an honest mistake, it is important that the discrepancy is flagged with the QBCC to investigate ongoing discrepancies.</p>	No change proposed.
<p>Clause 54 – Right of principal to step is as trustee</p> <p>Issue: One submitter has requested that step in rights should be changed so that only an independent trust agent can be appointed as a replacement trustee. The submitter is concerned that the principal may not be independent, particularly for higher value projects.</p>	<p>The intent of this clause (and Part 5 more broadly) is to establish a process for the replacement of the trustee in circumstances where the head contractor is no longer deemed suitable.</p> <p>.</p>	The department will consider the issues raised.

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
Relevant submissions: 25		
Clause 55 – Information to be given to principal as trustee Issue: One submission requested that step in rights should be changed so that only an independent trust agent can be appointed as a replacement trustee. The submitter is concerned that the principal may not be independent, particularly for higher value projects. Relevant submissions: 25	see response to Clause 54.	The department will consider the issues raised.
Clause 56 – Principal as trustee Issue: Several submissions raised concerns about the principal's ability to undertake the role as trustee. One submission suggests the principal will not be privy to sufficient contractual and commercial details to properly exercise its duties as trustee without negligence. The consequence of this will be that subcontractors will need to prove their entitlement in court, significantly increasing costs and timeframes. Another submission queries how an insolvent head contractor will be able to fulfil their top up obligations and suggests the Bill may be inconsistent with the Corporations Act. Relevant submissions: 19, 21, 24, 25	<p>The intent of this clause is to establish the powers of the principal acting as a step-in trustee. The clause also clarifies the entitlements of the trustee and head contractor in the event of step in.</p> <p>It is intended that should the principal undertake the role of Trustee, the principal will have access to all relevant information.</p>	The department will consider the issues raised.
Clause 57 – Protection from civil liability	The intent of this clause is to protect the principal from incurring civil liability by exercising power as	No change proposed.

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Issue: One submission welcomes the inclusion of provisions which protect the principal from incurring civil liability. They stress it is imperative that the legislation does not shift payment liabilities on to the principal.</p> <p>Relevant submissions: 24</p>	<p>trustee if acting in good faith and without negligence.</p> <p>No provision in the Bill is intended to shift payment liabilities on to the principal.</p>	
<p>Clause 58 – Limited liability of principal</p> <p>Issue: One submission welcomes the inclusion of provisions which protect the principal from liability. They stress it is imperative that the legislation does not shift payment liabilities on to the principal.</p> <p>Relevant submissions: 24</p>	<p>The intent of this clause is to clarify that Chapter 2 of the Bill does not create a right of action against the principal by a subcontractor beneficiary or the head contractor.</p> <p>No provision in the Bill is intended to shift payment liabilities on to the principal.</p>	No change proposed.
<p>Clause 59 – Application of PPSA</p> <p>Issue: One submission claims that it is not clear that this clause is valid in so far as it prioritises project bank accounts over other security interests.</p> <p>Relevant submissions: 30</p>	<p>The intent of this clause is to clarify that beneficiary interests to money in a project bank account have priority over all other security interests in relation to money held in trust under the project bank account.</p>	The department will consider the issues raised.
<p>Chapter 3 – Progress payments</p>		
<p>Clause 61 – Application of chapter</p> <p>Issue: There is a gap in the transitional coverage of the Bill. It does not appear to cover payment claims made after Chapter 3 of the Bill commences, but</p>	<p>It is the policy intent that the provisions of chapter 3 commence, and from that time, only the new provisions apply. The reasoning for this is to avoid the situation that arose following previous amendments where two sets of rules were in operation at the same time. This was confusing for</p>	The department will consider the issues raised.

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
where contracts are entered into before the time of Chapter 3's commencement. Relevant submissions: 4, 30	adjudications, as it was not immediately clear which rules applied to each dispute.	
Clause 64 – Definitions for chapter Issue: Certain stakeholders do not like the distinction between simple and complex claims. Relevant submissions: 8, 25	The Bill does not alter the existing policy intent about simple and complex claims.	No change proposed.
Clause 67 – Meaning of reference date Issue: Submissions advise the requirement for an additional reference date on termination to increase certainty for industry. Relevant submissions: 3, 8, 12, 19, 20, 21, 25, 26, 31, 32	The policy is to have an additional reference date if a contract is terminated. This allows the parties to recover funds even where a contract is terminated before the next reference date. Currently, industry practice includes terminating just prior to a reference date, so that no work can be claimed for a certain period.	No change proposed.
Clause 68 – Meaning of payment claim Issue: Submissions expressed concern about the removal of the 'endorsement' of a claim under chapter 3. Currently, endorsement means stating words that signify a claim is a claim under the provisions of the Building and Construction Industry Payments Act 2004. However, other stakeholders are in favour of the removal of endorsement. Relevant submissions: 4, 6, 8, 12, 14, 15, 16, 17, 19, 31	The policy to remove the need for endorsement of a claim under chapter 3 is to make the jurisdiction of the provisions of the chapter 3 apply to all invoices in the industry. This position followed feedback from consultation that revealed it would be useful to have the provisions of the BCIPA apply as soon as possible. Currently, a party may submit an invoice, then await payment. When this does not eventuate, the party may then consider submitting a payment claim under the provisions of the BCIPA. The party then waits for the time limits under that legislation in order to seek adjudication. Parties are reticent to	No change proposed.

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
	<p>include the words for BCIPA endorsement on their invoices, to make them into payment claims, due to a stigma about using the BCIPA.</p> <p>The policy of removing the endorsement of payment claims, means the jurisdiction and mechanisms in chapter 3 apply.,</p> <p>While the department understands that this is a departure from the status quo, it is the intent of this change to create a culture of on time payment in the industry.</p> <p>It is important to remember that there can be only one payment claim per reference date. This is intended to avoid a large number of payment claims per month.</p>	
<p>Clause 69 – Meaning of payment schedule</p> <p>Issue: One submission supports the clarification of what constitutes a payment schedule. Another submission recommends certain matters be prescribed by regulation regarding payment schedules.</p> <p>Relevant submissions: 3, 8</p>	<p>It is not considered necessary to expand the scope of a payment schedule.</p>	<p>No change proposed.</p>
<p>Clause 70 – Right to progress payment</p> <p>Issue: Stakeholders point out a subtle difference in the wording of this section. In current legislation, parties are able to make a progress claim 'from'</p>	<p>It was not intended to alter the wording regarding reference dates in this context.</p>	<p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>each reference date. The current drafting says 'for' each reference date.</p> <p>Relevant submissions: 3, 9, 19</p>		
<p>Clause 71 – Amount of progress payment</p> <p>Issue: The drafting of the clause removes the word 'undertaken to be carried out under a construction contract'.</p> <p>Relevant submissions: 6, 20</p>	<p>It was not intended to alter the meaning of this phrase.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 72 – Valuation of construction work and related goods and services</p> <p>Issue: The wording in s72(1)(b)(i) and s72(2)(b)(i) is not appropriate for lump sum contracts, as there is no break down for the part of the work.</p> <p>Relevant submissions: 6, 33</p>	<p>It is considered that this wording should be clarified.</p>	<p>The department will consider the issues raised</p>
<p>Clause 73 – Due date for payment</p> <p>Issue: There is a typographical error in the section.</p> <p>Relevant submissions: 3, 6, 19, 30, 32</p>	<p>It is considered that this wording should be clarified.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 75 – Making payment claim</p> <p>Issue: Multiple submissions express a desire for the term 're-agitation' be defined.</p>	<p>It is consistent with the policy position to provide for the definition of re-agitation. This is not a new term, and exists in the current version of legislation.</p>	<p>The department will consider the issues raised.</p>

Clause number and issue <small>(represents a compilation of issues raised in the submissions)</small>	Comment on issues <small>(with reference to policy and recommendation)</small>	Ways issues can be addressed
Relevant submissions: 4, 6, 14, 19, 20, 25, 26, 31		
<p>Clause 76 – Responding to payment claim</p> <p>Issue: Submissions expressed concerns about the extent of what a reasonable excuse is, about having to provide a payment schedule even if they intend to pay the payment claim amount in full. There is concern about increased administration as a result of mandatory payment schedules. As payment schedules are no longer ‘endorsed’ it may be difficult for a respondent to know what is actually a payment claim, and therefore whether a payment schedule is needed.</p> <p>Relevant submissions: 1, 2, 3, 6, 8, 9, 12, 15, 19, 22, 31, 32,</p>	<p>The policy intent is that a payment schedule should be provided for every payment claim. It is considered that communication about payment between parties should occur early. This clause is intended to facilitate such an outcome. The claimant should not have to wait until the due date for payment to find out whether the respondent intends to pay them, and how much the respondent intends to pay them. If a respondent does not intend to pay the claimed amount, the claimant is expected to find out earlier than the due date. This is designed to achieve faster adjudication, to resolve the dispute, rather than waiting for the due date for payment. It is not the intent that the payment schedule be an onerous process. Also refer to commentary in Clause 68.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 77 – Consequences of failing to give payment schedule</p> <p>Issue: One submission was concerned about the increased administrative burden.</p> <p>Relevant submissions: 17</p>	<p>see commentary regarding Clauses 68 and 76.</p>	<p>No change proposed.</p>
<p>Clause 79 – Application for adjudication</p> <p>Issue: Stakeholders strongly support the extension of timeframes for making an adjudication</p>	<p>The extension of timeframes for applicants is necessary in order to allow claimants time to assemble their application. This allows the protections of chapter 3 to be available longer.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>application. Lack of support for no extension of timeframes for respondents. Some opposition to the introduction of limits of the amount of material for an adjudication.</p> <p>Relevant submissions: 4, 8, 12, 16, 17, 19, 20, 21, 25, 26, 31, 32, 33</p>		
<p>Clause 80 – When adjudicator ineligible to adjudicate</p> <p>Issue: General support for when an adjudicator is ineligible to adjudicate. The regulation should include apprehended bias.</p> <p>Relevant submissions: 4, 8</p>	<p>The comments are consistent with the policy intent.</p>	<p>No change proposed.</p>
<p>Clause 81 – Appointment of adjudicator</p> <p>Issue: One submission argues the requirement for adjudicators to accept or reject a referral within 4 business days is unreasonable and unnecessary.</p> <p>Relevant submissions: 33</p>	<p>Four days is considered appropriate based on advice from the Queensland Building and Construction Commission, which indicates that applications are generally accepted or rejected within 4 business days.</p>	<p>No change proposed.</p>
<p>Clause 82 – Adjudication response</p> <p>Issue: Submissions advise this reform as useful. However, one submission considered the removal of the ability to raise new reasons to be unreasonable in the case of complex claims.</p> <p>Relevant submissions: 4, 21, 25, 26, 31, 32, 33</p>	<p>The removal of the ability to provide new reasons for complex claims is to encourage early communication between the parties. As payment schedules are mandatory, these should specify the reasons for any lack of acceptance of the whole amount of a payment claim. If a respondent provides this information with the payment schedule early, the claimant may decide the information and</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
	<p>reasons provided are valid. As a result, the claimant may not decide to continue adjudication proceedings.</p> <p>Respondents should not wait until adjudication to provide their reasons.</p>	
<p>Clause 83 – Time for making adjudication response</p> <p>Issue: One submission noted that claimants have an extended timeframe to make applications.</p> <p>Relevant submissions: 16, 20</p>	<p>It is not considered necessary to provide the respondent additional time to respond to an adjudication application. This is because the respondent should already have detailed reasons in its payment schedule.</p>	<p>No change proposed.</p>
<p>Clause 84 – Adjudication procedures</p> <p>Issue: Submissions considered that if a conference was called legal representation should be allowed during conferences at the adjudicator's discretion in certain cases, such as complex claims.</p> <p>Relevant submissions: 14, 31</p>	<p>It is considered unnecessary for legal representation in this respect.</p>	<p>No change proposed.</p>
<p>Clause 85 – Time for deciding adjudication application</p> <p>Issue: One submission suggested removing complex claims entirely.</p> <p>Relevant submissions: 25</p>	<p>It is not considered that the complex claims provisions should be removed.</p>	<p>No change proposed.</p>
<p>Clause 86 – Extending time for deciding adjudication</p>	<p>Clarification of a typographical error from s86(1)(a) is considered necessary.</p>	<p>The department will consider the issue raised</p>

Clause number and issue <small>(represents a compilation of issues raised in the submissions)</small>	Comment on issues <small>(with reference to policy and recommendation)</small>	Ways issues can be addressed
<p>Issue: A typographical error was identified in clause 86(1)(a). It was also suggested that an adjudicator may not know whether the parties have attempted to reach an agreement and that clause 86(1)(b) therefore be revised.</p> <p>Relevant submissions: 4</p>	<p>Regarding s86(1)(b) it is considered that an adjudicator would likely be aware if parties have attempted to reach agreement, as a party would likely inform the adjudicator of this scenario.</p>	<p>No change proposed.</p>
<p>Clause 87 – Valuation of work etc. in later adjudication application</p> <p>Issue: Submissions advised that it was not reasonable for an adjudicator to be bound by a determination as to value made by another adjudicator in relation to the same job in a dispute between the same parties.</p> <p>Relevant submissions: 4, 14, 31, 33</p>	<p>The policy intent is that if one adjudication on a certain matter has decided a certain value, this is upheld in later matters. However, if for example, a person seeks review in a court, the court would, of course, be free to decide this matter.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 88 – Adjudicator’s decision</p> <p>Issue: Some submissions questioned an adjudicator’s ability to give a decision to the parties and the registrar at the same time.</p> <p>Relevant submissions: 6, 8, 20, 33</p>	<p>The adjudicator can give the parties and the registry the adjudication decision at the same time. For example, via email or post.</p>	<p>No change proposed.</p>
<p>Clause 89 – Adjudicator may correct clerical mistakes etc.</p> <p>Issue: One submission supported (and one submission did not support) the ability for the</p>	<p>It is considered that this reform is necessary to ensure clerical errors are corrected. This will uphold legitimate decisions from the adjudication process.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>registrar to direct an adjudicator to correct a decision.</p> <p>Relevant submissions: 31, 33</p>		
<p>Clause 90 – Respondent required to pay adjudicated amount</p> <p>Issue: One submission expressed concern about applying a penalty for failure to pay an adjudicated amount when other appeal and remedy options are available. One submission raised a general concern with the offence provision.</p> <p>Relevant submissions: 1, 8</p>	<p>This clause is necessary to ensure effective enforcement of the chapter 3 reforms. Consultation has revealed that often claimants struggle to have successful adjudication claims enforced as there is no compulsion on the respondent to pay. Rather, the claimant must then undertake court proceedings to recover the money as a judgment debt. This takes further time and money, and is often cited as another tactic that encourages late and non-payment.</p>	<p>No change proposed.</p>
<p>Clause 95 – Adjudicator’s fees</p> <p>Issue: Two submissions opposed prescribing a maximum amount for fees and expenses that an adjudicator may be paid. One submission expressed support for prescribing a maximum amount.</p> <p>Relevant submissions: 12, 21, 33</p>	<p>It is considered necessary to prescribe these amounts to ensure adjudication is a cheaper and faster alternative to the courts, as is the policy intent.</p>	<p>No change proposed.</p>
<p>Clause 96 – Deciding fees payable by claimant and respondent</p> <p>Issue: One submission considered the requirement for an adjudicator to consider the conduct of the claimant and respondent unwarranted and</p>	<p>This policy is necessary, to encourage the parties to undertake the adjudication process in good faith and provides an incentive for parties to be cooperative with each other and the adjudicator.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>problematic. Another submission considered the same requirement unnecessary.</p> <p>Relevant submissions: 4, 21, 33</p>		
<p>Clause 98 – Claimant’s right to suspend work</p> <p>Issue: One submission suggested the claimant’s right to suspend work should be extended to include defaults by the head contractor.</p> <p>Relevant submissions: 25</p>	<p>It is not considered necessary to expand the right to suspend work in this regard.</p>	<p>No change proposed.</p>
<p>Clause 99 – Notice required before starting particular proceedings</p> <p>Issue: Submissions advised support for the removal of the “second chance” notice. However, one submission noted that the removal of the “second chance” notice and the requirement to provide payment schedules in all cases would mean respondents who fail to comply would need to pay the full amount claimed. This could increase the cost and burden of contract administration for respondents.</p> <p>Relevant submissions: 17, 22</p>	<p>A second chance payment claim is considered unfair to claimants. They should not have to ask twice to be paid by a respondent, before the respondent has to effectively take notice. The notice prior to commencing proceedings is necessary for legal procedure.</p>	<p>No change proposed.</p>
<p>Clause 101 – Effect of Part 3 on civil proceedings</p> <p>Issue: One submission suggested that a court could be given a power akin to section 89 to correct</p>	<p>It is not considered that this is necessary. A party is able to take their contractual matter to court. It was never the intention of the adjudication regime to replace the resolution of contractual matters via the courts. Rather the adjudication regime allows a</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>clerical mistakes or to allow the court to order payment of the decision that is not in error and to remit the part that is in error to the present or new adjudicator.</p> <p>Relevant submissions: 4</p>	<p>‘pay now, argue later’ system, designed to encourage timely payment in the industry.</p>	
<p>Clause 102 – Service of notices</p> <p>Issue: Service of notices does not allow for email. It refers to section 39 of the Acts Interpretation Act 1954, which allows for facsimile but not email. Emailing invoices is a standard industry practice. With an overwhelming proportion of payment claims being emailed, it would be nonsensical that the Act did not allow for payment claims to be emailed.</p> <p>Relevant submissions: 9</p>	<p>It is the intent that email would be contemplated when notices are served. .</p>	<p>The department will consider the issues raised.</p>
<p>Chapter 4 – Subcontractors’ charges</p>		
<p>Clause 104 – Definitions</p> <p>Issue: Further clarification was sort about whether definition of defect liability period may override contractual agreement.</p> <p>Relevant submissions: 19</p>	<p>It is intended that t the defects liability period is appropriately provided for in contractual agreements.</p>	<p>No change proposed.</p>
<p>Clause 105 – Meaning of work</p> <p>Issue: Concern was expressed about the different definitions of “work”, “building work,</p>	<p>The use of different definitions is necessary because of the different types of work that project bank accounts, progress payment adjudications and subcontractor’s charges are designed to protect.</p>	<p>The department will work with the Queensland Building and Construction Commission to development education and communication</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>and “construction” in the Bill that it may confuse users.</p> <p>Relevant submissions: 16</p>		<p>materials to ensure industry is aware of the scope of the three security of payment measures.</p>
<p>Clause 110 – Limits on amount recoverable under contractor’s charge</p> <p>Issue: Submissions raised concern that subcontractors do not know what amount is payable to a higher contractor.</p> <p>Relevant submissions: 20, 25</p>	<p>For the purposes of preparing a notice of claim it is not necessary for a subcontractor to know what amount is owing to a higher contractor.</p> <p>This section provides that irrespective of the amount claimed the person who if given notice of claim is not liable to pay the subcontractor an amount the exceeds the amount payable as identified in clause 110.</p>	<p>No change proposed.</p>
<p>Clause 122 – Notice of claim</p> <p>Issue: One submission seeks to remove the certificate of a qualified person as they view it as an extra expense, a delay, and the qualified person does not have the requisite knowledge.</p> <p>Relevant submissions: 25</p>	<p>The changes to clause 122 are designed to assist the user in understanding the requirements for a notice of claim. However, they not make substantive changes to the policy currently in section 10 of the Subcontractors’ Charges Act 1974. The certificate has a long-standing history and is understood by industry.</p>	<p>No change proposed.</p>
<p>Clause 126 – Person given notice of claim must retain money</p> <p>Issue: One submission expressed concern that subcontractors often do not know if there is any money payable or to become payable by the person that they are giving the notice of claim. They suggested that the recipient of the notice of claim should be obliged to provide a notice to the</p>	<p>The charge can only attach to money once the notice of claim has been given and the money has become payable. It is therefore not possible for the principle to definitively provide notice of any future money that may become payable.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
subcontractor and higher contractor advising whether there is any money still payable. Relevant submissions: 19		
Clause 128 – Contractor given copy of notice of claim must respond Issue: Some submissions raised concerns about the reduced timeframe for providing the contractor's response and for the addition of the penalty for failure to respond. Relevant submissions: 16, 21, 25	The penalty is designed to encourage compliance. The reduced timeframe is necessary to assist the subcontractor should they be required to start an action to enforce their claim of charge.	No change proposed.
Clause 136 – Proceedings for subcontractor's charges Issue: Submissions raised concerns that the 1-month timeframe to start actions is too short. Relevant submissions: 20, 25	Once a person has been given a notice of claim they have an obligation to retain money that is payable or is to become payable to the higher contractor up to the amount claimed by the subcontractor. This right to a subcontractors' charge must be balanced with the broader need for cash flow through the industry. A subcontractors' charge effectively restricts cash flow and so it necessary that a subcontractor should start their action so that the matter may be resolved efficiently.	No change proposed.
Clause 147 – Qualified person Issue: One submission suggested that an adjudicator of progress payment disputes should be included as another type of qualified person. Relevant submissions: 4	The certificate has a long-standing history and is understood by industry.,	No change proposed.

Clause number and issue <small>(represents a compilation of issues raised in the submissions)</small>	Comment on issues <small>(with reference to policy and recommendation)</small>	Ways issues can be addressed
<p>Clause 104 – Definitions</p> <p>Issue: Further clarification was sort about whether definition of defect liability period may override contractual agreement.</p> <p>Relevant submissions: 19</p>	<p>It is intended that the defects liability period is appropriately provided for in contractual agreements.</p>	<p>No change proposed.</p>
Chapter 5 – Administration		
<p>Clause 149 – Registry</p> <p>Issue: One submission advocated for a return to the pre-2014 structure of adjudications using authorised nominating authorities (ANA), a second submission advocated for altogether new bodies to appoint adjudicators while a third submission expressed support for the Registry and opposed re-introducing ANAs.</p> <p>Relevant submissions: 4, 6, 25</p>	<p>Consultation indicated support for the creation of an independent adjudication registry to appoint adjudicators as was the uniformity of approach provided through the centralised registry.</p>	<p>No change proposed.</p>
<p>Clause 154 – Registrar’s functions and powers</p> <p>Issue: One submission raised various concerns about the functions and powers of the registrar, while acknowledging that clause 154 does not substantively change these scope of the previous provisions concerning these matters.</p> <p>Relevant submissions: 33</p>	<p>Clause 154 does not substantively amend the provisions of section 38 of the BCIP Act.</p>	<p>No change proposed.</p>

Clause number and issue <small>(represents a compilation of issues raised in the submissions)</small>	Comment on issues <small>(with reference to policy and recommendation)</small>	Ways issues can be addressed
<p>Clause 160 – Consideration of application</p> <p>Issue: One submission suggested reinstating the requirement for the registrar to decide an adjudicator application within 28 days.</p> <p>Relevant submissions: 4</p>	<p>Clause 163 requires that the registrar must inform the applicant of their decision on the application for registration. The removed BCIP Act, section 63 provided additional administration requirements to this requirement.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 161 – Suitability of person to be registered</p> <p>Issue: Submissions suggested that additional criteria should be prescribed for adjudicators.</p> <p>Relevant submissions: 8, 33</p>	<p>Clause 165(1)(c) provides for the possibility of additional conditions of registration should the registrar consider it appropriate.</p>	<p>No change proposed.</p>
<p>Clause 165 – Conditions of registration</p> <p>Issue: Two submissions advised support of the introduction of statutory continuing professional development, while a third submission raised concerns about the type of development that would be prescribed by regulation.</p> <p>Relevant submissions: 8, 19, 33</p>	<p>The intent for the introduction of a requirement of continuing professional development as prescribed by regulation is to provide greater rigour.</p>	<p>No change proposed.</p>
<p>Chapter 6 – Legal proceedings</p>		
<p>Clause 189 – Proceedings for offences</p> <p>Issue: One submission expressed concerns about the number of new offences in the Bill.</p>	<p>The offences and penalties within the Bill are considered necessary to ensure compliance with the reforms designed to encourage a culture of payment.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>They acknowledge the importance of regulators to have enforcement mechanisms but that a heavy-handed approach would be counterproductive to legislative intent.</p> <p>Relevant submissions: 8</p>	<p>The majority of offence provisions are consistent with similar offence provisions within other current legislation.</p>	
Chapter 8 – Transitional and repeal		
<p>Clause 205 – Unfinished matters for existing payment claims etc.</p> <p>Issue: Various submissions have expressed concerns that this clause exposes a potential gap for existing contracts in place prior to commencement of the Bill and payment claims have been made after commencement of the Bill.</p> <p>Relevant submissions: 4, 30</p>	<p>It is not intended that a ‘gap’ exist in relation to this matter.</p>	<p>The department will consider the issues raised.</p>
Chapter 9, Part 1 – Amendment of this Act		
<p>Clause 214 – Replacing s 14 (Particular private and government building contracts)</p> <p>Issue:</p> <p>In relation to the expansion of PBA’s to the private sector, one submissions suggests review of legislation within 9 months and before being expanded to include private sector, due to potential concerns of increase of costs and will make Queensland less competitive.</p>	<p>The intent of this provision is to allow a mechanism to expand PBA’s to the private sector following the evaluation of Phase 1 (government building construction projects), no sooner than 12 months.</p>	<p>The application of PBA’s to government will be closely monitored and evaluated to ensure application to industry occurs smoothly. ..</p>

Clause number and issue <small>(represents a compilation of issues raised in the submissions)</small>	Comment on issues <small>(with reference to policy and recommendation)</small>	Ways issues can be addressed
Relevant submissions: 21, 26		
<p>Clause 215 – Replacing s 16 (Building contracts for residential construction work)</p> <p>Issue: One submission expressed opposition to application of PBA's across private residential projects as they consider this would result in an increase of construction and administration costs, delays in construction projects, increased construction finance cost for developer and possible increase in litigation matters.</p> <p>The submission also advised that that the reforms would have serious effects on the cost of housing and housing affordability.</p> <p>Relevant submissions: 16</p>	<p>It is intended that PBA's shall be expanded to the private sector for building contracts valued at \$1 million or more but no sooner than 12 months</p>	<p>The application of PBA's to government will be closely monitored and evaluated to ensure application to industry occurs smoothly</p>
<p>Clause 217 – Inserting ch 2, pt 2, div 4 (Multiple contracts at same or adjacent sites)</p> <p>Issue: One submission has raised whether reference to the head contractor should be changed to contracted party and principal should be changed to the contracting party.</p> <p>Relevant submissions: 30</p>	<p>It is intended that references to head contractor etc in this context be clear.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 219 – Amending s 9 (What is a PBA)</p>	<p>Clause 9(1)(b) is considered sufficiently clear as currently drafted. This clause will be necessarily</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Issue: One submission considers that reference to 'first tier' should be omitted from clause 9(1)(b) of the Bill.</p> <p>Relevant submissions: 30</p>	<p>amended by Clause 219 if application of PBA's to all subcontractors via regulation in the future.</p>	
Chapter 9, Part 4 – Amendment of the <i>Queensland Building and Construction Commission Act 1991</i>		
<p>Clause 252 – Inserting s 4AA (Who is an influential person for a company)</p> <p>Issue: A peak industry body suggests that the new definition of 'influential person' is not necessary and that the current definition is broad enough to capture most of the individuals identified in the new definition.</p> <p>Furthermore, particular concerns are raised about section 4AA(3)(e) which states that a person who 'makes, or participates in making decisions that affect the whole or a substantial part of the company's business or financial standing' may be an influential person, suggesting this could potentially capture employees like in-house lawyers and book keepers who provide input into company decisions.</p> <p>Relevant submissions: 21, 26, 32</p>	<p>The list of roles and activities in section 4AA(3) is designed to help clarify what is intended to be captured by the definition of 'influential person', and to help guide the courts when making their determination.</p> <p>Ultimately, section 4AA(3) will need to be read in conjunction with section 4AA(1). If a person is making or participating in making decisions that affect the whole or a substantial part of the company's business or financial standing, and this constitutes controlling or substantially influencing the company's conduct, then they should rightfully be considered an 'influential person'.</p>	<p>No change proposed.</p>
<p>Clause 260 – Amending s 42 (Unlawful carrying out of building work)</p>	<p>The amendment is intended to provide a strong deterrent to those unlawfully carrying out building work. Higher penalties are considered appropriate</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Issue: A peak industry body suggests that the imposition of a penalty of imprisonment for a third or later offence for undertaking building work without a contractor’s licence is excessive. It also suggests that it is unnecessary to make such a breach a crime.</p> <p>Relevant submissions: 19</p>	<p>due to the significant safety and financial implications of performing defective building work.</p> <p>The penalties also align Queensland more closely with other states and territories, which generally have higher maximum penalties for unlicensed building work.</p> <p>The possibility of imprisonment is aimed at repeat and high-level offenders. Only for a third or later offence, or if the building work carried out is tier 1 defective work (that for example may cause grievous bodily harm or death to a person), will the offence will be considered a crime. Ultimately, the courts will have the discretion to impose penalties as they see fit.</p>	
<p>Clause 264 – Inserting s 42E (Avoidance of contractual obligations causing financial loss)</p> <p>Issue: One submission suggests that there is potential for head contractors to use this provision against subcontractors who are unable to comply with ‘draconian’ or unfair contract provisions.</p> <p>A peak industry body suggests that this provision is flawed, as is the Government’s justification for it. It seeks clarification on what many of the terms in the provision mean. Furthermore, it suggests that it is an essential element of commercial law for parties to a contract to enforce their rights by going to Court. It suggests that breach of contract is not a</p>	<p>The department considers this offence provision necessary due to the prevalence of poor contractual practices in the building and construction industry. Unlike large companies, most subcontractors often do not have the financial means to pursue a matter through the courts – they are “mum and dad” operators who rely on timely payment to survive financially. The department will consider the issues raised by the submission. submitters further and determine whether amendments are appropriate to clarify the intention of the provision.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>matter to be regulated and that this provision offends the doctrine of separation of powers.</p> <p>Another peak industry body supports the intention of the provision, but suggests that a simpler and more effective way of protecting subcontracts would be to make adjudication decisions private and confidential.</p> <p>Relevant submissions: 4, 19, 21, 26</p>		
<p>Clause 271 – Amending s 56AC (Excluded individuals and companies)</p> <p>Issue: Submissions have raised concerns that the amendment to section 56AC could exclude a person who sold or left a company while it was in good financial health. Some submitters have suggested that a defence be introduced to protect persons in this situation.</p> <p>Relevant submissions: 14, 15, 21, 26, 31</p>	<p>The amendment has the effect of excluding an individual if they were a director, secretary, or influential person for a company within 2 years of a relevant company event (e.g. the winding up of a company).</p>	<p>The department will consider the issues raised.</p>
<p>Clause 272 – Amending s 67AQ (Demerit point matters)</p> <p>Issue: Peak industry bodies suggest that the imposition of 4 demerit points for simply receiving a direction to rectify is unfair, especially given that head contractors are being penalised for work carried out by subcontractors.</p>	<p>A strong penalty for receiving a direction to rectify or remedy will reinforce the expectation that building work should be free of defects and carried out to completion.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
Relevant submissions: 19, 21		
<p>Clause 275 – Amending s 67A (Definitions)</p> <p>Issue: A peak industry body suggests that the current drafting of the definition of ‘defects liability period’ may be problematic.</p> <p>It is concerned that the way paragraph (b) is currently worded, it could be argued that if the contract does not provide for a definition that aligns with paragraph (a), the statutory defects liability period will apply.</p> <p>Relevant submissions: 19</p>	<p>It is not intended to create confusion with the definition of ‘defects liability period’.</p>	<p>The department will consider the issues raised.</p>
<p>Clause 276 – Inserting ss 67GA and 67BA (Building contract conditions)</p> <p>Issue: Peak industry bodies are concerned that imposing mandatory and prohibited conditions in building contracts will restrict the fundamental right of parties to make and agree to their own contractual arrangements.</p> <p>One peak industry body is concerned that creating a power to prescribe these conditions by regulation will mean they are not subject to debate within Parliament.</p> <p>Two submissions suggested that the drafting of section 67GA(2) and 67GB(2) will mean that</p>	<p>New powers to prescribe by regulation mandatory and prohibited conditions for building contracts will create a fairer and more accountable industry.</p> <p>Placing the conditions in a regulation will provide flexibility for the government to respond to the dynamic nature of the building and construction industry.</p> <p>For a contract between subcontractors, it is intended the contracting party be caught by these provisions.</p>	<p>No changes proposed.</p> <p>The department will consider the issues raised.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>contracts between subcontractors will not be captured by these provisions.</p> <p>Relevant submissions: 4, 19, 21, 26</p>		
<p>Clause 278 – Inserting ss 67NA – 67NC (Defects liability period and retention amounts)</p> <p>Issue: Generally, submissions supported the penalty for failure to release a retention amount.</p> <p>However, one peak industry body does not support the penalty of up to 1 year’s imprisonment for what it considers a breach of a contractual obligation.</p> <p>Relevant submissions: 19, 20, 26, 31, 32</p>	<p>It is a prevalent industry practice to not pay subcontractors the retention money they are owed at the end of the defects liability period.</p> <p>A high maximum penalty will provide a significant deterrent to those who do not fulfil this important obligation.</p>	<p>No change proposed.</p>
<p>Clause 283 – Inserting s 72B (Extending time for direction to rectify or remedy)</p> <p>Issue: One peak industry body suggests that an application for an extension of time for a direction to rectify or remedy should be a reviewable decision.</p> <p>Relevant submissions: 21</p>	<p>The new provision allows a person to apply to the commission for an extension of time to comply with their direction to rectify or remedy.</p> <p>This provision aims to achieve a reasonable balance between the interest of contractors and consumers.</p> <p>Making this a reviewable decision could result in significant delays for consumers seeking to have rectification work performed. An additional review process has the potential to delay the QBCC’s ability to assist a consumer under the Queensland Home Warranty Scheme.</p>	<p>No change proposed.</p>

Clause number and issue (represents a compilation of issues raised in the submissions)	Comment on issues (with reference to policy and recommendation)	Ways issues can be addressed
<p>Schedule 2 – Dictionary</p> <p>Issue: One submission suggests that terms should be defined consistently across different chapters.</p> <p>One peak industry body supports consistency with respect to the meaning of ‘business day’ for legislation governing the building and construction industry.</p> <p>One submissions queried whether references to ‘financial institution’ throughout the Bill should be references to ‘recognised financial institution’ as defined in Schedule 2.</p> <p>Relevant submissions: 4, 30, 31</p>	<p>Terms have been defined differently in certain chapters to ensure the mechanics of the legislation function as intended.</p> <p>It is not intended to create confusion with references to ‘business day’ and ‘financial institution’ throughout the Bill.</p>	<p>The department will consider the issues raised.</p>