

# Have your say on the Security of Payment discussion paper

## Survey

The Queensland Government has released a discussion paper on security of payment to seek feedback from industry and the community on how best to tackle this issue for subcontractors.

Security of payment is about making sure everyone in the contractual chain gets paid for work done or goods supplied by a subcontractor. Subcontractors are particularly vulnerable because they are generally further down the payment chain.

Security of payment is also important as it is about making sure subcontractors get paid in a timely manner. This is not just important for subcontractors and their families, it is important for Queensland's economy and productivity.

The discussion paper has a series of options for the public to consider:

- **Option 1—Project Bank Accounts:** A project bank account facilities simultaneous payments of a projects head contractor and all participating subcontractors through a trust arrangement.
- **Option 2—Retention Trust Fund Scheme:** This option requires subcontractors' retention money to be held in a separate trust account.
- **Option 3—Insurance schemes:** This option includes a range of insurance schemes to safeguard against defects, late completion and insolvency of contractors.
- **Option 4—Federal legislative changes:** This option seeks to lobby the Commonwealth government for reform to Commonwealth legislation relating to security of payment.
- **Option 5—Education:** This option proposes education for the building and construction industry stakeholders regarding matters such as financial management and business management.

Finally, the discussion paper seeks feedback on the 2014 amendments to the *Building and Construction Industry Payments Act 2004*, and seeks feedback on the *Subcontractors' Charges Act 1974* and the Queensland Building and Construction Commission's Minimum Financial Requirements Policy.

We encourage you to let us know your feedback by reviewing the discussion paper and either completing this survey or making a written submission to us.

Written submissions can be sent by:

- Email: [securityofpayment@hpw.qld.gov.au](mailto:securityofpayment@hpw.qld.gov.au)  
Security of Payment discussion paper (as email subject line)
- Post:  
Security of Payment discussion paper  
GPO Box 2457  
Brisbane QLD 4001

If you have any questions regarding the discussion paper, please email [securityofpayment@hpw.qld.gov.au](mailto:securityofpayment@hpw.qld.gov.au)

The Department of Housing and Public Works (department) is seeking input for the review of the security of payment framework in Queensland including the 2014 amendments to the *Building and Construction Industry Payments Act 2004* (BCIP Act).

All personal information collected will be treated in accordance with the *Information Privacy Act 2009*. The department may contact you for further consultation regarding the review.

The department will not disclose or publish, in full or part, any submissions in response to this discussion paper except as required under the *Right to Information Act 2009*.

Submissions close **5pm, Thursday 31 March 2016**. Submissions will not be accepted after this date.

## About you

### A. Contact details: (mandatory)

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone \_\_\_\_\_

### B. Is your submission confidential? (mandatory)

Yes

No

### C. Notify me of consultation updates and results:

Yes. If yes, please provide your email address: \_\_\_\_\_

No

### D. Are you: (You may tick more than one)

a builder or building inspector

a waterproofer

a bricklayer

a termite manager

a concreter

a fire protection licensee

a gasfitter

a private building certifier

an air duct installer

a local government employee

a carpenter/cabinet maker

a building designer or architect

an electrician

a planner

a glazier

representing an industry association within the building industry

a joiner

a bookkeeper/ accountant/ administrator

a refrigeration and air conditioning licensee

a consumer of building or construction services

a site classifier

a plumber or drainer

a stonemason

a tiler

a landscaper

a painter

other \_\_\_\_\_

a plasterer

**Are you:**

- a subcontractor
- a head contractor
- a principal
- other. Please specify \_\_\_\_\_

**E. Which region do you live in?**

- Cairns and Far North Queensland
- Mt Isa and North West Queensland
- Townsville
- Mackay and Whitsunday
- The Central West
- Rockhampton
- Gladstone
- Wide Bay-Burnett
- South East Queensland
- Brisbane
- Gold Coast
- South West and Darling Downs
- other: \_\_\_\_\_



## Options to improve security of payment

### Option 1—Project Bank Accounts (PBAs)

(Refer to pages 10-13 of the discussion paper).

This option would introduce Project Bank Accounts (PBAs) for the building and construction industry, initially as a trial on government projects. Pending the outcome of the trial, PBAs could be used on private contracts.

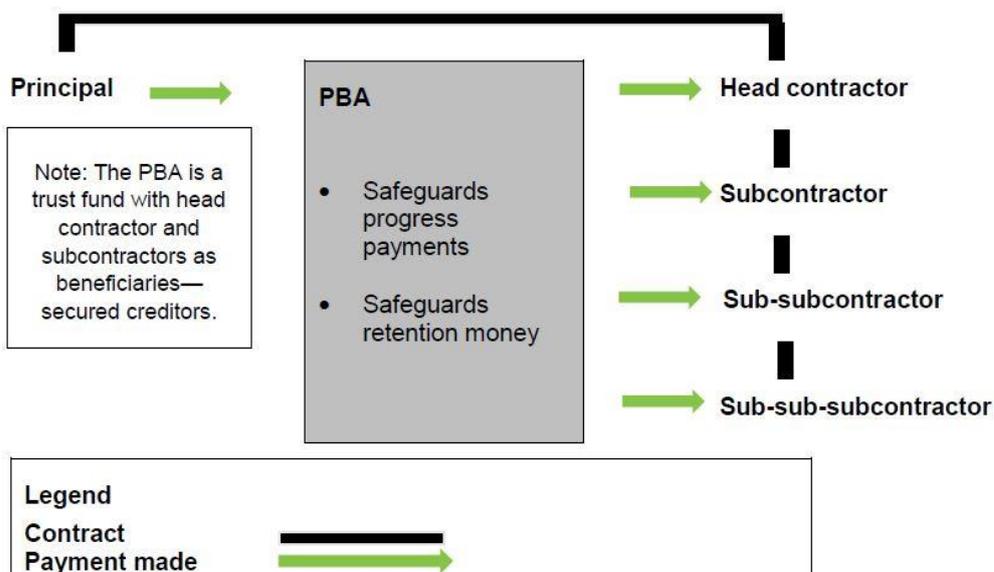
A PBA is a trust account that is normally set up by the principal (the employer or person/entity requesting the work) and a head contractor. The account is set up with a banking institution to facilitate the prompt payment of progress claims by contractors.

In this proposed option, subcontractors will submit their payment claims to the head contractor. The head contractor then submits a progress payment claim to the principal for the work done. This claim sets out the amount due to each subcontractor, and the amount due to the head contractor. The principal verifies the work has been completed, through the superintendent. When this has been verified, the principal counter signs the progress payment claim, and the principal makes the payment for the work done into the PBA.

The two signatures of the principal and the head contractor on the progress payment claim give the bank authority to disperse the funds in the PBA in accordance with the amounts in the progress payment claim. That is, the bank pays the head contractor and all subcontractors from the PBA at the same time by transferring money from the PBA directly into the bank accounts of the head contractors and subcontractors. This means there is no longer a contractual chain where the head contractor receives the payment for a subcontractor, and passes it down. In the event a payment claim needs to be reduced or delayed, the BCIP Act provisions apply.

While PBAs are primarily used in government projects, they can similarly be used on private projects, as is the case on some projects in Victoria. PBAs have been used on projects with a value of only \$1.5 million so may be suitable for both small and large scale projects.

A key feature of the PBA is that it is a trust fund, so the money paid into it—in accordance with the progress payment claim—is held on trust, with the head contractor and subcontractors as beneficiaries. In the event of insolvency, the money is held safely for the subcontractor as a secured creditor. This means that if a head contractor becomes insolvent, subcontractors will not be at risk of not being paid, because the head contractor cannot access the funds held in the PBA for the subcontractor.



**Explanation:** In this model, instead of a chain of payments that is vulnerable to insolvency, everyone gets paid from the PBA at the same time. The PBA safeguards progress payments and retention money.

**1. Would you support a project bank account trial on government projects?**

Yes

No

Why?

**2. Do you think the use of PBAs in the private sector is feasible in Queensland?**

Yes

No

Why?

**3. Do you think that the use of PBAs in the private sector would improve security of payment?**

Yes

No

Why?

**4. Should there be a minimum amount necessary to use a PBA?**

Yes

If yes, what value? \_\_\_\_\_

No

Please specify:

## Option 2—Retention Trust Fund Scheme (RTFS)

(Refer to pages 13-15 of the discussion paper).

This option proposes the use of a Retention Trust Fund Scheme (RTFS) to hold subcontractors' retention money in a secure manner.

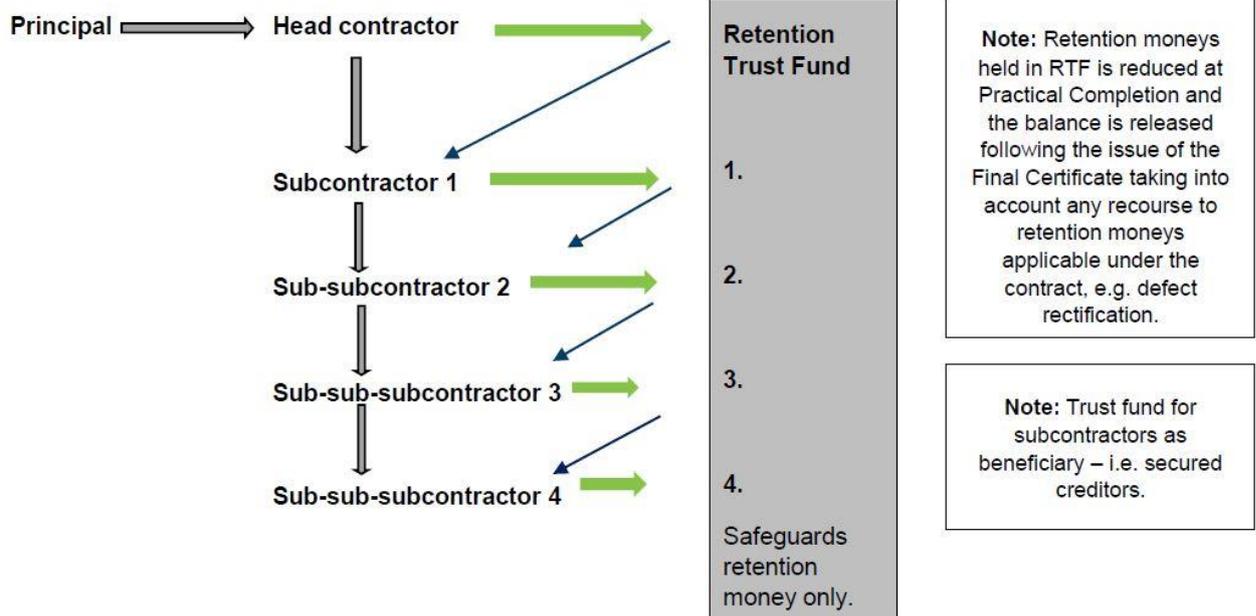
A typical construction contract includes a form of performance-based security. This security is used to pay for costs associated with:

- late completion of work
- work not complying with contractual requirements
- remedying defects
- non-completion because of the insolvency of the subcontractor.

A RTFS requires a head contractor to hold retention money in an account with an authorised deposit taking institution—like a bank. Head contractors can only withdraw money from the trust account as set out in the terms of the contract, otherwise financial penalties apply. A RTFS prevents the head contractor from using retention money as cash flow. Subcontractors are beneficiaries of the trust account, and are seen as secured creditors. In the case that the head contractor/contractor becomes insolvent, the retention money is securely held in the RTFS. This means the money is secured and can't be accessed by liquidators. This is important as often retention money represents a subcontractor's entire profit margin of a project.

A RTFS places reporting obligations on head contractors. Head contractors must report when an account is established, closed and if an account is overdrawn, and the reason why. Penalties will apply for providing false or misleading information. A RTFS requires annual audits with results reported to government.

Financial institutions are obliged to report overdrawn accounts or dishonoured cheques, however, they are under no obligation to control or supervise transactions in relation to the account.



**Explanation:** In this model, the contractual chain of payments is used. Only retention money is safeguarded in a trust account. Progress payments are still subject to insolvency in the contractual chain.

There are two options for the management of the scheme:

### Option 2.1—Retention Trust Fund Scheme administered by Government

This option comprises Government involvement as both an authorised deposit taking institution and a compliance and auditing body.

**Option 2.2—Retention Trust Fund Scheme with only compliance and audit provided by Government**

This option requires the private banking sector as the deposit taker with Government involved solely in the compliance and auditing functions.

**5. Would you support a RTFS?**

Yes

No

Why?

**6. Should a minimum contract value be required before mandating the use of a RTFS?**

Yes. If yes, what value? \_\_\_\_\_

No

Why?

**7. How would this scheme be best administered, and by who?**

Please provide your reasons.

## Option 3—Insurance schemes

(Refer to pages 15-17 of the discussion paper).

### Option 3.1—Insurance scheme in place of retention money

The concept of retention money is similar in nature to an insurance scheme. For example, retention money is held by a contractor to essentially insure against: late completion of work by the subcontractor; a subcontractor's work not complying with contractual requirements; remedying defects in the subcontractor's building work; and non-completion because of the insolvency of the subcontractor.

This option proposes an insurance scheme to replace the concept and function of retention money.

The insurance scheme would eliminate the need for contractors to hold retention money, which would ensure that subcontractors would receive their retention money. This is important as it often represents the entirety of the subcontractor's profit.

For this option to be successful, legislative changes would be needed in order to prevent retention money clauses from being included in contracts. This would encourage reliance on the insurance scheme rather than continuing to use retention clauses.

This approach proposes an alternative to the traditional method of retention funds.

### 8. Is this a viable option for industry?

Yes

No

Why?

### Option 3.2.1—Head contractor insurance scheme

This option proposes two sub-options for insurance schemes to provide protection for a subcontractor in the case of a head contractor/contractor insolvency.

#### Option 3.2.2—Head contractor takes out comprehensive insurance for subcontractors

This would require the head contractor to take out an insurance policy that would protect all subcontractors in the event of the head contractor becoming insolvent. This option would offer protection of both progress payments and retention money for subcontractors. For this option to be successful, legislative changes would be necessary to mandate insurance coverage prior to the engagement of subcontractors for a project.

The scheme would operate by the subcontractor making a claim directly to the insurer once evidence was brought forward of the contractors' inability to make payments.

The success of this option would hinge upon the affordability of the premium specified for insurance. The premium would depend upon the degree of risk of the contractor, contract scope and terms.

#### Option 3.2.3—Head contractor takes out retention insurance for subcontractors

This option would see subcontractors providing retention money to a head contractor as occurs under the current framework, however, the head contractor would be required to take out insurance to cover the subcontractor's retention money in the event the head contractor becomes insolvent. This option would only protect retention money.

**9. Is a head contractor insurance scheme a viable option?**

Yes

No

Why?

## Option 4—Federal legislative changes

(Refer to pages 17-18 of the discussion paper).

This option proposes to change the balance of corporations law to better favour subcontractors. This option would seek to review relevant Commonwealth legislation including the *Corporations Act 2001 (Cth)* and the *Bankruptcy Act 1966 (Cth)* to grant subcontractors a priority payment in the event a head contractor becomes insolvent.

Such an option would require a collaborative approach with all states and territories by lobbying the Commonwealth Government to review and amend the legislation.

### 10. Do you support a review of legislation including the *Corporations Act 2001 (Cth)* and the *Bankruptcy Act 1966 (Cth)*?

Yes

No

Why?

### 11. Do you see any major barriers to these changes operating effectively?

Yes

No

Please provide your reasons:

## Option 5—Education

(Refer to page 18 of the discussion paper).

This option proposes an education program to increase the financial and business skills of industry. This aligns with submissions to the Senate Committee. These submissions reveal that the building and construction industry lacks skills in financial management, particularly in smaller businesses.

### 12. Do you think an education program is needed?

- Yes
- No

Why?

For what in particular?

### 13. Should the education program be voluntary or mandatory?

- Voluntary
- Mandatory

Why?

**14. Who do you think should take part in the education program? (May select more than one)**

- Subcontractors
- Head contractors
- Principals

Why?

**15. How do you think an education program should be implemented, and by whom?**

## Amendments to the *Building and Construction Industry Payments Act 2004*

(Refer to page 19 of the discussion paper).

In addition to establishing the right to payments, the BCIP Act established an adjudication process to enable quick resolution of disputed or outstanding progress and final payments. This is important because if a subcontractor has not been paid, they may not have the financial resources to go to court. In 2014, amendments were made to the BCIP Act to:

- reallocate responsibility for assigning adjudication applications to an Adjudication Registry within the QBCC instead of through authorised nominating authorities;
- require adjudicators to decide if they have jurisdiction to make a decision;
- provide claimants with an opportunity to withdraw an adjudication application if desired;
- provide respondents with a second opportunity to lodge a payment schedule. A payment schedule sets out the money to be paid in response to a payment claim, and establishes if there is any dispute in the amount claimed;
- extend the statutory time allowed to respond to a complex claim (payment of more than \$750,000);
- amend the definition of 'business day' to reflect industry shutdown periods over Christmas and New Year. Therefore, the time between 22 December and 10 January does not count as business days under the BCIP Act;
- reduce the amount of time during which a payment claim can be made, generally from 12 months to 6 months;
- allow the provision of additional information to an adjudicator for complex claims, including reasons for withholding payment, and whether or not these matters were raised in the payment schedule; and
- allow for the consideration of additional matters in deciding the apportionment of payment of adjudicator's fees. These include the relative success of the parties and reasonableness of conduct of parties in the adjudication.

**16. Do you think the 2014 amendments to the BCIP Act improved security of payment?**

- Yes
- No

Why?

**17. Could the BCIP Act be improved?**

- Yes
- No

How?

## Minimum financial requirements policy

(Refer to pages 19-20 of the discussion paper).

The Minimum Financial Requirements policy (MFR Policy) is made under the QBCC Act—this Act regulates the building industry and establishes a licensing and regulatory system for the conduct of building work in Queensland. The QBCC Act identifies the circumstances when proper grounds exist for taking disciplinary action against a licensee or former licensee (refer section 74B). These circumstances include where the licensee, or former licensee, fails to pay a subcontractor in compliance with a building subcontract. The MFR Policy commenced operation in October 2014 replacing the former Financial Requirements for Licensing Policy. The MFR Policy introduced more rigorous requirements for licensees to manage debts appropriately or face possible suspension or cancellation of their licence. Under the MFR Policy, the QBCC is permitted to take action as soon as there is an undisputed debt owing for a period beyond industry trading terms as defined in the policy.

The MFR Policy has been amended over time to provide additional protections to minimise the incidence of building and construction industry contractors becoming insolvent. A new version of the MFR Policy commenced on 9 October 2015 and replaces the version published in 2014.

The new policy contains changes including:

- a requirement that a licensee make a report to the QBCC if its Net Tangible Asset (NTA) position ever decreases by more than 30% from its NTA position as last reported to the QBCC;
- new provisions that will:
  - ensure that licensees are required by law to provide an audit report or review report to the ASIC or the Australian Securities Exchange (ASX). The licensee would also have to provide a copy of that report to the QBCC within 30 days of providing it to the ASIC or the ASX. This will ensure that the QBCC receives this important financial and audit information about licensees routinely;
  - clarify the format of the financial reporting required of a licensee when the QBCC has concerns that the licensee's financial circumstances may not satisfy the requirements of the MFR Policy; and
  - place stricter disclosure requirements on accountants where they provide a licensee's financial information to the QBCC based on qualified audited financial statements.

The previous Financial Requirements for Licensing Policy required licensees to provide a declaration or report to the QBCC regarding their financial position when their licence was due for renewal and whenever their NTA position decreased by more than 10% for more than one month.

### 18. Should the NTA reduction trigger remain at 30%?

Yes

No. If no, what is a reasonable figure? \_\_\_\_\_

Please provide your reasons:

**19. Do you think the trigger event for reporting to the QBCC should continue to be defined by reference to a comparison of the licensee’s NTA position from time to time with its last advised and QBCC accepted NTA position?**

Yes

No

Please provide your reasons:

**20. Would some other comparison be more appropriate?**

Yes

No

What and why?

**21. Would you support a review of the effectiveness of prompt payment provisions in the QBCC Act?**

Yes

No

Why?

**22. Would you support harsher penalties for late or missing payments to subcontractors?**

Yes

No

Please provide your reasons:

## Subcontractors' Charges Act 1974

(Refer to pages 20-21 of the discussion paper).

If a subcontractor is owed payment by a contractor higher in the contractual chain, in certain circumstances, the subcontractor can seek to recover this money from another contractor yet higher in the contractual chain than the contractor that owes the subcontractor. The subcontractor can put in place a statutory charge over the money the higher contractor intends to pay the defaulting contractor. Court action is required to secure the payment.

This means that even if a subcontractor isn't paid by a party it has a direct contract with, the subcontractor can quarantine payments owed to the defaulting contractor by other contractors, so that this money can be paid to the subcontractor. In this way, the SC Act gets around the flow on effects of insolvency in the contractual chain. The SC Act is only useful if the higher contractor has not yet paid the defaulting contractor.

The subcontractor is required to commence court action to secure the payment, if the claim is not accepted by the contractor.

The statutory charge gives the subcontractor priority of payment, ahead of both secured and unsecured creditors. The charge stops the higher contractor from paying money to a defaulting contractor and the higher contractor must retain that money or pay it into court. The monies are frozen pending final contractual resolution through the courts, which can be a lengthy and costly exercise.

The main difference between this Act and the BCIP Act is that under the SC Act, monies payable by the higher contractor to a defaulting contractor are secured straight away.

It has been suggested that this Act is hard to understand and use, with only minor non-compliances with the legislation resulting in claims being ruled invalid.

### 23. How do you think the *Subcontractors' Charges Act 1974* is working?

- I am very satisfied
- I am satisfied
- I am not satisfied
- I don't know

Please provide your reasons:

### 24. What changes are necessary, if any, to the *Subcontractors' Charges Act 1974*?

## Other Suggestions

**25. Do you think we should consider other options?**

Yes

No

If so, what are these?

**26. Do you have ideas about implementation of an option?**

Yes

No

If so, please provide relevant detail: