

# Terms of Reference

## Review of the role of developers within the Queensland building and construction industry

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### Introduction and purpose

In 2019-20, Queensland's building and construction industry employed around 240,000 people and contributed approximately \$45 billion to Queensland's economy. The industry is supported by a strong regulatory framework that is conducive to investment and public confidence. This is achieved through a robust licensing system that legislates the conduct and financial capacity of industry participants and by building codes which govern the design, construction and performance of buildings.

The regulatory framework comprises legislative requirements, including the *Building Act 1975*, the *Plumbing and Drainage Act 2018*, *Queensland Building and Construction Commission Act 1991* (QBCC Act) and the *Building Industry Fairness (Security of Payment) Act 2017*, associated subordinate legislation, building codes and standards and minimum contractual requirements.

The Queensland Government further strengthened this framework through the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (BIFOLA Act). The BIFOLA Act implements the government's responses to two independent reports into the building and construction industry: The Building Industry Fairness Reforms Implementation and Evaluation Panel (evaluation panel) report and the Special Joint Taskforce report. The reports made recommendations about how to further enhance Queensland's security of payment reforms, including the Project Bank Account (PBA) system, and how to address fraudulent practices that contribute to subcontractor non-payment. The BIFOLA Act also contains amendments to strengthen Queensland's building laws, as part of a continuing response to the Building Confidence Report (BCR), including by enhancing regulatory oversight capabilities.

In its examination of the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020, the Transport and Public Works Committee (Committee) heard submissions from industry stakeholders concerned that while property developers play a critical role in the industry, they are not held to the same standard as other participants, such as head contractors and subcontractors. Consequently, the Committee recommended that the Minister consider undertaking a review of property developers in the Queensland building and construction industry taking into consideration the impact of their financial and operational capacity, ethical behaviour, and work practices<sup>1</sup>.

The BIFOLA Act then inserted new section 115D into the QBCC Act, which requires the Minister to undertake a review of developers in the building and construction industry. This provision also requires the Minister to appoint a Panel of up to four appropriately qualified people to undertake the review. The Minister must table the Panel's report in the Legislative Assembly as soon as practicable after the review is completed.

In addition, the BCR which was commissioned by the Building Ministers' Forum (BMF), made observations and recommendations about the risks associated with developers engaging builders including in design and construct projects. The BCR indicated that this practice may lead to cost-

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<sup>1</sup> Refer to recommendations 11 and 12, page 81 -

<https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2020/5620T455.pdf>

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cutting, lower quality and unsafe practices. For this reason, these Terms of Reference ask the independent Panel to consider the impact that developers have on the quality and safety of design, construction, certification of buildings and other work practices, including the incidence of defective works.

The work of the Panel should include:

1. Further advancing the work already done by the Queensland Government in obtaining security of payment in the building and construction industry to now examine the role of developers in this context.
2. Expanding on the work undertaken through the BCR about the risks associated with developers engaging builders, particularly in design and construct projects.

### *Security of payment*

There has been a multi-layered approach to the security of payment reforms to date. This has included nation-leading trust account reforms, which have primarily focussed on head contractors, to secure payment for subcontractors. The Minimum Financial Requirements for licensing (MFR) have also sought to protect subcontractors by ensuring financial liquidity of head contractors. Charge on property and payment withholding request reforms (which were recommended by the evaluation panel) have given head contractors the opportunity to protect monies owed to them following adjudication, by entities who are above them in the contractual chain.

All of these reforms have been aimed at effecting change from a culture of late or non-payment, to a culture of on-time payment, mainly in relation to subcontractors. However, all levels of the contractual chain must be scrutinised to determine where issues of non-payment or insolvency are arising, and what can be done to address them. The role and influence of entities at the apex of the contractual chain i.e. developers, have not yet been examined. It is appropriate that this occur to ensure that there is a comprehensive and balanced approach to late or non-payment.

Small businesses experience the most insolvencies, though it is the larger contractors who are most at risk of becoming insolvent on a per capita basis and where the largest impact is felt across the industry and the community. Experience has shown that in relation to financial liquidity in particular, financial failure on a project has the potential to cause devastating effects for workers involved in the project, all the way down the contractual chain. This is particularly the case for a large-scale project.

Building and construction industry stakeholders have also asserted that developers will direct head contractors to use certain products, or subcontractors who are known to use certain products, that are suspected to be non-conforming, due to the reduced costs associated with them.

The Panel is being asked to identify the factors and activities at the top of the contractual chain that contribute to, or pose a risk of, contributing to project failure through for example, non-completion, delay or non-payment. It is being asked to identify the types of activities by developers that pose a risk of project failure and measures that may address this.

### *BCR*

The BCR passed some commentary on the role of developers. It:

- noted it is common for developers to engage a builder to undertake a design and construct project for multi-storey buildings through contractual arrangements and that as the developer is not a builder, observed there is no requirement to be registered.
- indicated the builder takes responsibility for development of both the design and construction components of the building with architects and engineers often engaged as sub-contractors. As the builder is responsible for the delivery of a completed building at an agreed price, attempts at cost savings will often occur throughout the design and construction process.

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- observed many aspects of the design and construct project may change after initial building approval is obtained, meaning the as-designed building documentation may be significantly different from the as-built building and indicated this creates a number of issues, especially for purchasers of apartments ‘off the plan’ as they have no rights to oversee the construction process and instead generally assume that regulatory controls have delivered a compliant building.

In July 2019 the BMF (now Building Ministers’ Meeting) made a commitment around design, construction and certification of complex buildings as part of the implementation of recommendations made in the BCR. The BCR recognised the importance of addressing design and documentation in construction as, often, documentation prepared and approved as part of the building approvals process is inadequate. The BCR suggested poor documentation is regularly accepted by building certifiers in the building approval stages, in part due to owners and developers endeavouring to minimise documentation costs. This can present particular maintenance challenges for the first purchaser and then subsequent owners.

The BCR also highlighted the importance of ensuring there is no perceived conflict of interest between those engaged in the certification of a building during construction and developers, builders and owners. This provides assurance people that performance standards are adhered to during the construction process without interference.

## Composition

As required by the QBCC Act, the review will be led by an independent Panel consisting of up to four members, appointed by the Minister. The Panel will be appointed for a period of up to 17.5 months.

Members of the Panel will have extensive and diverse experience with, and understanding of, the operation of Queensland’s building and construction industry, specifically in relation to development, contractual practices, construction law, work health and safety the planning and development framework and the applicable legislative framework. In addition, knowledge of finance practices and business models associated with development, as well as general business and management would be highly desirable. Experience in accounting, finance and cost/benefit analysis would also be highly desirable.

The Department of Energy and Public Works will provide secretariat support for the Panel as required, including:

- providing administrative support
- taking minutes of Panel meetings, circulation of minutes and other information for members
- providing technical support, policy advice and provide assistance with obtaining legal advice
- assisting the Panel in drafting its report.

## Scope

In undertaking the review, the Panel will consider the role of entities at the top of the contractual chain in the building and construction industry (the industry) in urban, regional and rural Queensland, and respond to the matters outlined below:

1. identify who will be considered a developer for the purpose of this review
2. identify any practices and behaviours of developers that are contributing to non-payment and insolvency in the industry, in particular:

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- (a) how the financial and operating capacity of developers impacts on security of payment. This consideration should include the influence of financial institution lending requirements and project approval frameworks
  - (b) identify, by function or business model, developer behaviours and activities that contribute to contractor non-payment and insolvency
  - (c) further to (b) above, whether a distinction should be made between developers who engage in development activity as their primary activity as compared to developers who may undertake building and construction activity as part of a portfolio of activities (for example through superannuation funds or other investment)
  - (d) examine the prevalence and scale of, and contributing factors towards, non-payment and insolvency by developers. This could include consideration of developers' business models, contracting, ethical behaviour and advertising practices
  - (e) whether developers may be engaging in illegal phoenixing activity
3. determine any risks associated with developers engaging builders in building and construction projects, in particular the:
    - (a) role and influence developers have in the contractual chain, including accountability for work practices and standards on projects
    - (b) impact developers have on the quality and safety of design, construction, certification of buildings and other work practices, including incidence of defective works
  4. the ability of industry regulators (including local, state and commonwealth government authorities), both current and future, to address issues that arise from (2) and (3)
  5. any current or proposed regulation of developers under commonwealth, state, territory and international legislation
  6. any other relevant matters identified by the Panel or referred to the Panel by the Minister.

In addressing the scope of the review, the Panel should consider the following **objectives** when providing its recommendations:

- appropriately distributing risk, liability and the need for regulatory intervention across participants in the building and construction industry
- if a recommendation will impact on an industry regulator such as the Queensland Building and Construction Commission or local government, consider ways in which the regulatory burden and cost to the regulator could be minimised
- maintain or enhance security of payment, safety and industrial relations standards and consumer protection
- duplication of regulation or other regulatory activity should be avoided
- complement any regulation of developers under any relevant Commonwealth and state and territory legislation
- to the extent possible, align with the Queensland Government 's overarching policy framework – *Unite and Recover - Queensland's Economic Recovery Plan*, Priority Area 4, Building Queensland.

In making its recommendations, the Panel should:

- clearly identify how the evidence that was considered, the Panel's findings, and the reasoning behind its recommendations, support the recommendations
- if legislative change is recommended, how this is supported based on the Panel's findings, the evidence considered and legislative schemes in Queensland and other jurisdictions
- if legislative change is recommended, detail how the policy findings of the Panel should be reflected/represented in the recommended legislative provisions

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- if relevant, recommend what alternatives to legislative change could be considered by government, for example, administrative options
  - if relevant, recommend a combination of legislative and administrative change and detail how these might interact
  - provide preliminary potential costs and benefits of a proposal, noting however that if Government accepts a recommendation a Regulatory Impact Statement may be undertaken as part of the Government's policy process
  - what further action may be necessary to implement a recommendation
  - if no further action is required, specify why this not appropriate.

## Deliverables

The Panel will provide the Minister with a report detailing its findings and any relevant recommendations for the Minister's consideration. The Panel may also be required to report on its findings to date at particular milestones.

The Panel will be required to prepare and publish governance documentation including a workplan identifying key milestones and associated timeframes and a stakeholder engagement plan.

## Timeframe

The Panel must deliver its report to the Minister within 17.5 months of being appointed.

The Minister must table the outcome of the review by the Panel in the Legislative Assembly as soon as practicable after the review is completed.

## Industry Reference Group

An Industry Reference Group (IRG) will be appointed by the Minister. The IRG will be a key forum of industry engagement for the Panel. It will consist of Ministerial Construction Council members who express an interest in taking part, as well as peak industry bodies who represent developers, the finance and insurance sectors, building and construction unions, the legal profession and relevant industry regulators.

## Stakeholder Engagement

The Panel will develop a stakeholder engagement plan to ensure stakeholder and community access and input into the review process. Key stakeholders will include:

- building and construction industry organisations, advocates and unions, representing—
  - developers
  - head contractors
  - subcontractors
  - suppliers
  - workers
  - real estate sector
  - insurance sector
  - legal sector
  - architects
  - engineers
- building certifiers

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- consumer organisations and advocates
  - banking and financial institutions
  - representatives from regional Queensland
  - local government
  - not for profit housing sector
  - Queensland and interjurisdictional government agencies and regulators
  - individuals and businesses.