Discussion Paper – Workshop 2
Security of payment reform
April 2018
## Terminology used in this Discussion Paper

The following is a summary of key terms used in this Discussion Paper. The definitions listed will apply to these terms throughout the Discussion Paper, unless a contrary intention is indicated.

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>AFSA</td>
<td>Australian Financial Security Authority</td>
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<tr>
<td>ASIC</td>
<td>Australian Securities and Investments Commission</td>
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<tr>
<td>BCIIPA</td>
<td>Building and Construction Industry Payments Act 2004 (Qld)</td>
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<td>BCISPA</td>
<td>Building and Construction Industry Security of Payment Act 2009 (SA)</td>
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<tr>
<td>BMW</td>
<td>Department of Finance – Building Management and Works Division</td>
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<tr>
<td>BR Act 1939</td>
<td>Builders’ Registration Act 1939 (WA) (repealed)</td>
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<tr>
<td>BRB</td>
<td>Builders’ Registration Board established under the BR Act 1939</td>
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<tr>
<td>BSR Act</td>
<td>Building Services (Registration) Act 2011 (WA)</td>
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<tr>
<td>BSR Regulations</td>
<td>Building Services (Registration) Regulations 2011 (WA)</td>
</tr>
<tr>
<td>BSB</td>
<td>Building Services Board established under section 65 of the BSR Act</td>
</tr>
<tr>
<td>BSCRA Act</td>
<td>Building Services (Complaint Resolution and Administration) Act 2011 (WA)</td>
</tr>
<tr>
<td>Building Act</td>
<td>Building Act 2011 (WA)</td>
</tr>
<tr>
<td>Building Code 2016</td>
<td>Code for the Tendering and Performance of Building Work 2016 (Cwlth)</td>
</tr>
<tr>
<td>Building Commissioner</td>
<td>Department of Mines, Industry Regulation and Safety – Building and Energy Division</td>
</tr>
<tr>
<td>Building Commissioner</td>
<td>An executive office created under section 85 of the BSCRA Act</td>
</tr>
<tr>
<td>CCA</td>
<td>Construction Contracts Act 2004 (WA)</td>
</tr>
<tr>
<td>Corporations Act</td>
<td>Corporations Act 2001 (Cwlth)</td>
</tr>
<tr>
<td>IAG</td>
<td>Industry Advisory Group</td>
</tr>
<tr>
<td>Discussion Paper/s</td>
<td>The series of documents (including this document) prepared by the IAG Secretariat to facilitate the IAG’s inquiry into the Terms of Reference; or a document in the above described series (such as this document).</td>
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<tr>
<td>Minister</td>
<td>Hon William (Bill) Johnston MLA, Minister for Commerce and Industrial Relations</td>
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<tr>
<td>NSW</td>
<td>New South Wales</td>
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<tr>
<td>SA</td>
<td>South Australia</td>
</tr>
<tr>
<td>SAT</td>
<td>State Administrative Tribunal</td>
</tr>
<tr>
<td>SERC Inquiry Report</td>
<td>Report of the Senate Economics Reference Committee Inquiry into Insolvency in the Australian Construction Industry</td>
</tr>
<tr>
<td>Terms of Reference</td>
<td>The Terms of Reference for the Industry Advisory Group approved by the Minister.</td>
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<tr>
<td>QBCC</td>
<td>Queensland Building and Construction Commission</td>
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<tr>
<td>QBCC Act</td>
<td>Queensland Building and Construction Commission Act 1991 (Qld)</td>
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<tr>
<td>QLD</td>
<td>Queensland</td>
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<td>WA</td>
<td>Western Australia</td>
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Purpose

This Discussion Paper is the second in a series of Discussion Papers designed to assist the IAG with carrying out its inquiry into improving fairness and security of payment for subcontractors and suppliers in Western Australia’s building and construction industry.

This Discussion Paper comprises two parts:

- Part I provides a synopsis of the former and current registration framework for builders in WA.
- Part II details potential reforms and strategies to improve the registration framework. This part is intended to assist the IAG with its inquiry into item 1 of the Terms of Reference.

The reforms and questions presented in Part II will be considered in the second workshop. The options for reform presented in Part II do not represent final government policy.

IAG members may make written submissions on the reform proposals and discussions questions in Part II. Please direct any written submissions to:

**IAG Secretariat**  
SoPreform@dmirs.wa.gov.au

All written submission on this Discussion Paper must be received no later than **close of business Wednesday 16 May 2018**. Any requests for extensions must be submitted to the IAG Secretariat in writing. Requests will be granted on a case-by-case basis.
Part I Registration framework for builders in WA

All Australian States and Territories have legislation in place requiring the licensing or registration of builders as a prerequisite to the carrying on of the business of performing building works.¹

Although similar in nature, the legislation and associated licensing or registration requirements differ between jurisdictions, both in the types of building works where a licence or registration is required, and the obligations and conditions imposed on the holders of the licence or registration. Having said this, the licensing and registration frameworks generally require that building practitioners have the relevant technical qualifications and experience in relation to the class of licence or registration applied for; operate in a professional and honest manner; and have the required financial capacity to carry on a business.²

These licensing and registration frameworks have long been considered important risk management processes for ensuring consumer and supplier protection, maintaining minimum standards and protecting public safety and amenity.³

Registration of builders in WA – historical context

A Builders’ Registration Bill was first introduced into the WA Legislative Assembly on 17 October 1934. The Second Reading of the Bill was moved on 24 October 1934, at which time the policy rationale for the registration of builders was outlined as follows:

“The aim of the measure, and the basic principle upon which it has been based, is to ensure that those engaged in the industry shall possess the measure of competency that is essential”, and that “a person indulging in nefarious practices may be brought to book...”⁴

The public benefit attached to securing registration was multi-faceted. It would “raise the standard of building”, ensure that “a building shall conform to all the standards of hygiene and stability”, and mean that “buildings will have a longer life”.⁵

However, beyond improving building standards, it was also considered that registration of builders would improve security of payment for other participants in the building and construction industry, in that it would “prevent people from evading their just responsibilities towards those for whom they are working, or to whom they may owe money for the building they are erecting.”⁶ In this regard, it was noted in the Second Reading of the Bill that “some people of no repute or standing may owe money to merchants, who, when they come to get their accounts paid, find the debtors have left the State.”⁷ A key reason for establishing a registration framework was thus to facilitate accountability with respect to the commercial dealings of builders with other participants in the industry.

The Builders’ Registration Bill 1934 was passed by the WA Legislative Assembly with only a small number of amendments. On 27 November 1934, it was transmitted to the WA Legislative Council, but ultimately lapsed.⁸ The issue of builder registration was not visited again until some five years later, when a new Builder Registration Bill, in similar terms to the previous one, was introduced into the WA Legislative Assembly on 30 August 1939.⁹ The Second Reading Speech for this new Bill echoed the significance of registration as a way of improving commercial dealings in the industry, including payment of suppliers of materials and those persons who carry out the actual physical building works:
“At present, competent and genuine builders have to compete with the person known in the trade as the jerry-builder… This measure, if it becomes law, will protect [registered builders] against the incompetent and speculative builders… on frequent occasions merchants have not had their bills met on presentation during the construction or at the completion of the work, and… complaints have been made of workmen not receiving their wages regularly. If this legislation is enacted the merchants supplying the material and the man who erects the building will not again have to meet that competition.”

The Second Reading Speech in the WA Legislative Council on 16 November 1939 was cast in similar terms and emphasised the protection to be afforded to owners, suppliers and workers through the registration of builders:

“Probably most honourable members know that reputable builders have in the past had – and no doubt, unless the Bill passes, will in the future have – to contend with unfair competition from irresponsible and incompetent persons who practically blow into the building trade, make a nuisance of themselves by doing bad jobs and letting owners down or by getting into financial difficulties and letting suppliers down, in most cases by doing both. The Bill seeks to protect the owner, the supplier and the workman from the danger of incompetent and unreliable persons engaging in the building industry”.

This Bill was passed as the BR Act 1939 on 16 December 1939.

The BR Act 1939 established the BRB to administer a registration scheme for persons wishing to trade as a builder. In this regard, only an individual could seek registration – the scheme did not extend to registering the business structures under which the trade of a builder might be undertaken, such as partnerships, companies and other bodies corporate. The only registration criteria were that the applicant was at least 21 years old, of good character, and had the requisite training or experience.

Over time, the BR Act 1939 was significantly amended. Notably, it was amended on a number of occasions with a view to:

- providing greater protections to the public and other participants in the industry who contracted with builders; and
- bolstering the powers of the BRB to deal with failed building entities and the persons who managed or controlled them.

An outline of how builder registration has been utilised over time as a mechanism for promoting standards of conduct and behaviour, together with protecting other industry participants, is as follows.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>2 February 1962</td>
<td>Registration is extended to partnerships, companies and other bodies corporate. This was in response to the findings of an Honorary Royal Commission into the BR Act 1939 that partnerships, companies and other bodies corporate were being utilised by persons in the industry seeking to evade the builder registration scheme – &quot;a company and at times a partnership can have its registered builder de-registered and yet carry on business by the simple expedient of employing another registered builder.&quot; It became necessary for partnerships, companies and other bodies corporate engaged in the business of building to apply for registration and to have at least one person involved in the business - either a director, a partner or an employee, who was a registered builder.</td>
</tr>
</tbody>
</table>
| 1 December 1984 | Additional measures are introduced into the BR Act 1939 to empower the BRB to take proactive steps to protect the public from dealing with builders who have financial troubles. The key amendments included:  
  - Applicants for registration to trade as a builder – both individuals as well as partnerships, companies and other body corporates, are subjected to a discretionary power of the BRB to require them when applying for registration, to satisfy the BRB that the applicant has sufficient material and financial resources available to enable the applicant to meet its financial obligations as and when they become due. If the applicant cannot so satisfy the BRB, their application can be refused.  
  - Giving the BRB the power to suspend or cancel the registration of a builder "where the builder does not have sufficient material and financial resources available to enable the builder to meet his or its financial obligations as and when they become due." |
| September 1987 | A Review of the BRB and Painters’ Registration Boards in September 1987 recommends that the discretionary power to inquire into the financial circumstances of an applicant for registration, be substituted with specific financial criteria for an applicant to demonstrate – namely that the applicant provide to the BRB a cash redeemable guarantee from a bank or other approved financial institution for $10,000 (in the case of individuals), $20,000 (in the case of partnerships) and $30,000 (in the case of companies). These proposed reforms were never implemented. |
| 22 August 1995 | Further amendments are proposed to the BR Act 1939 to protect the public and subcontractors from building company failure. This would involve, amongst other things, the BRB being granted the power to ban persons from becoming a registered builder or being involved in the management of a registered builder where that person had held a management position in failed building companies. The amendments were slated to take effect from early 1996, however, an Amending Bill was not introduced until 24 May 2000. The Amending Bill was passed in 7 December 2000 and came into effect from 1 August 2001. |
| 1 August 2001 | From 1 August 2001, the BRB is vested with the power to prevent any person, who had been involved in the management of a building company that has been deregistered, from being involved with other registered builders, in any management capacity, for a period not exceeding three years. This power is exercised only where the BRB is satisfied that the person has contributed to the circumstances that have given rise to the entity being deregistered. |
| 20 August 2011 | The BR Act 1939 is repealed. |
Registration of builders in WA – present context

On 20 August 2011, the BR Act 1939 was repealed and replaced by the BSR Act. The BSR Act was part of a suite of new building legislation, which included the Building Act and BSCRA Act.

The impetus for the BSR Act was explained by the then Minister for Commerce, the Hon Bill Marmion MLA, in his Second Reading Speech on the Building Services (Registration) Bill, as:

“…bringing much-needed reform to the registration and control of persons and entities operating in the building industry today. The current Builders’ Registration Act has its genesis in the period before World War II. Despite being amended no fewer than 27 times since 1939, it remains an antiquated and inflexible piece of legislation with significant anomalies, inconsistencies and anachronisms.”

The BSR Act abolished the BRB and in its place established the BSB, which administers builder registration in WA. The BSB is assisted and advised in administering builder registration by the Building Commissioner.

The BSR Act establishes two categories of builder registration:

**Building Practitioner**

Only a *natural person* may apply for registration as a building practitioner in WA. The applicant needs to satisfy the BSB that they have the required qualifications and experience, are a fit and proper person to be registered, and have complied with any other requirements prescribed by the BSR Regulations. Registration as a building practitioner does not entitle the person to do anything other than use the title of ‘builder’ and be a ‘nominated supervisor’ for a building contractor which is a partnership or company.

**Building Contractor**

In order to enter into contracts with consumers for building works valued over $20,000 for which a building permit under the Building Act is required, a party must be registered as a building contractor. Building contractor registration may be applied for in the name of a natural person (e.g. a sole trader), or in the name of a partnership or company.

There are currently 5,189 registered building practitioners and 4,686 building contractors in WA.
Under the BSR Act, the requirements for registration as a building contractor include demonstrating to the BSB sufficient financial and organisational capacity. These are prescribed in the BSR Regulations as the financial capacity for the building service contractor to meet debts as and when they fall due, and to have arrangements to ensure building work (as defined in the Building Act) is managed and supervised in a proficient manner.

Applicants’ financial capacity is assessed by the BSB having regard to the factors prescribed in regulation 18 of the BSR Regulations. These are:

- net assets;
- liquidity;
- availability and extent of off-book sources of liquidity;
- proposed scale of business operation; and
- any other matters the BSB considers relevant.

A financial assessment policy for building contractors has been established by the BSB. The policy requires those applying for registration as a building contractor, or renewing their registration, to hold $50,000 in cash or other liquid assets and provide the BSB with a statement from an accountant attesting to their capacity to meet their debts as and when they fall due.

The application assessment process includes credit history checks for the company, directors and secretary. If these checks reveal any previous involvement with an insolvent company, the applicant is then asked for further information, including:

- what money was owed at the time the liquidation was finalised, and
- the steps that have been, or will be, taken to avoid that company’s failure adversely affecting the new company.

A building contractor who satisfies the financial assessment policy is considered to meet the financial capacity requirement prescribed by the BSR Regulations. Once registered a building service contractor is required to notify the BSB of any changes to their financial or organisational capacity.

**Enforcement of standards for building practitioners and building contractors**

Once a building practitioner or building contractor is registered, they are bound by the requirements in the BSR Act, BSR Regulations, BSCRA Act and any other conditions imposed by the BSB.

The BSCRA Act establishes the Building Commissioner and gives the person holding the office the powers to, among other things, receive and investigate complaints about building practitioners and contractors.

In respect to building contractors, the Building Commissioner is empowered to receive and investigate two broad types of complaints:

1. building service complaints; and
2. disciplinary complaints.

Building service complaints include those concerning the manner and quality of building services carried out by building contractors. Building services complaints may be received from the consumer of the building service, but also any other person adversely affected, such as a neighbour, subcontractor or other regulatory agency.
Disciplinary complaints are those concerning the conduct of building practitioners and contractors. Disciplinary matters are prescribed by section 53 of the BSR Act, and include:

- convictions for serious offences or offences against the BSR Act, BSR Regulations, Building Act and *Home Building Contracts Act 1991* (WA);
- failure to satisfy the ongoing requirements for registration, such as financial and organisational capacity;
- contravening a condition of registration;
- engaging in fraudulent conduct; and
- engaging in harsh, unconscionable, oppressive, misleading or deceptive conduct in connection with a contract for the carrying out of building work or a variation to that contract.

Disciplinary complaints may be received from any person who has a reasonable belief that a disciplinary matter has occurred or is occurring.

The BSCRA Act provides a two-tiered complaint resolution system. Complaints are received and investigated by the Building Commissioner, who either reaches a determination or, where a complaint is intractable, or its value exceeds a financial or jurisdictional threshold, refers the complaint to the SAT.

For building service complaints, the Building Commissioner may make a range of orders to rectify substandard building services or correct any work that requires remedying. Complex complaints, or where the value of rectification work exceeds $100,000, are referred to the SAT for determination. If satisfied the complaint is made out, the SAT may make orders requiring the substandard building service to be rectified.

In respect to disciplinary complaints received and investigated, section 56 of the BSR Act allows the Building Commissioner to refer the complaint along with recommendations for action to the BSB. The BSB may then decide on a range of actions including cautioning or reprimanding, imposing conditions on the ongoing registration or requiring certain undertakings.

Alternatively, the BSB may refer the complaint to the SAT for determination and direct the Building Commissioner to issue an interim disciplinary order suspending the building practitioner or building contractor’s registration until the order is revoked or the complaint is determined by the SAT. An application for a disciplinary order must then be made to the SAT within 28 days of the issue of the interim disciplinary order.

Where satisfied a disciplinary matter exists in respect to a building practitioner or building contractor, the SAT may then make a range of orders, including:

- suspending registration for up to 2 years;
- cancelling registration and requiring their name to be removed from the register; and
- requiring the payment of a fine of up to $25,000 to the Building Commissioner.

Only the SAT is empowered to suspend or cancel a building practitioner or building contractor’s registration. The BSB does not currently have the power to cancel or suspend a building practitioner’s or contractor’s registration unless the holder of the registration consents.

Since the BSR Act commenced operation, the SAT has cancelled a builder contractor’s registration in one instance for a disciplinary matter.

The table below summarises the outcomes of all disciplinary complaints between 2012/13 – 2016/17:
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</thead>
<tbody>
<tr>
<td>Complaint refused by Building Commissioner</td>
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<td>Complaint dismissed by Building Commissioner</td>
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<td>No action/no breach</td>
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<td>Administrative warning</td>
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<td>1</td>
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<td>0</td>
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<td>Referred to SAT</td>
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<td>Other</td>
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<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>108</strong></td>
<td><strong>99</strong></td>
<td><strong>82</strong></td>
<td><strong>102</strong></td>
<td><strong>55</strong></td>
</tr>
</tbody>
</table>
Part II – Discussing reforms

Item 1 of the Terms of Reference requires that:

Ensuring a robust registration framework for businesses performing building works has long been emphasised as a means for upholding not only building standards, but standards of commercial behaviour and proper conduct in the industry.

For example, in 1998 the NSW Joint Standing Committee on Small Business recommended a comprehensive registration framework for builders be introduced in NSW as a measure for improving behaviour in the industry and security of payment for subcontractors.29 Similar recommendations to introduce a registration framework for builders, or enhance an existing framework, have been echoed by a number of inquiries into payment issues in other jurisdictions, including QLD30 and the Northern Territory.31

More recently, the SERC Inquiry Report acknowledged the importance of licensing or registration arrangements, and concluded that:

“…in light of the low barriers to entry and incidence of insolvencies in the construction industry, some form of financial and business skills training should be a pre-requisite for the registration of a builder’s or contractor’s licence. In many states and territories this is already the case. The committee therefore encourages the states and territories to engage with industry and develop appropriate and consistent standards. Advanced training in business, including principles of construction contract law, should be undertaken at post-trade level.”32

While registration frameworks cannot remedy all payment related issues, or improve the standard of conduct of every person in the industry, the Government proposes measures to:

- through a demerit point system, ban building contractors who consistently fail to comply with contractual and payment obligations to subcontractors and suppliers;
- appropriately sanction persons who engage in conduct that directly or indirectly threatens or intimidates another person against exercising their rights under the CCA;
- remove persons from the industry who have a history of bankruptcy or insolvency; and
- improve the level of business skills among industry participants.
Introducing a Demerit Point System and other sanctions to improve behaviour in the industry

Background

Security of payment problems in the building and construction industry can arise from non-payment due to a debtor being unable or unwilling to pay. An unwillingness to pay can stem from the existence of legitimate commercial dispute between the parties; or a desire on the part of the debtor to delay payment (possibly to cover a cash flow shortage); or a desire to avoid payment entirely.

Reports provided to inquiries and regulators over the years show a culture of wilful payment default in the building and construction industry. Often there are reports that wilful default is not the result of any legitimate commercial dispute; leaving creditors with little choice but to commence costly proceedings (e.g. court action or adjudication) to recover payment, or write the debt off entirely. The same debtor may continue the practice on other construction projects leaving a trail of unpaid creditors.

While it is difficult to quantify the frequency and cost of payment default in building and construction, figures sourced from the Royal Commission into Productivity in the Building Industry in NSW showed monies lost from late payment were 0.34% of business turnover, while losses from payment default were 2.50% of turnover. Data compiled by Illion (formerly Dun & Bradstreet) also show that the building and construction industry has one of the highest rates of late payment.33

In 2016-17, the Australian Small Business and Family Enterprise Ombudsman conducted a survey on standard payment practices in Australia. The survey covered all industry sectors, receiving a total of 2,783 responses, of which 510 were from businesses in the construction industry. The survey found that:

- 44 per cent of respondents in the construction industry reported that on average their invoices remain unpaid for more than 30 days after the due date;
- 20 per cent of respondents reported payment delays of more than 60 days; and
- 21 per cent of respondents have over $100,000 in payments owed to them, with 4 per cent having more than $500,000 owed.34

A separate, but related, issue is the deliberate use of tactics designed to intimidate or dissuade subcontractors from commencing proceedings under the CCA to recover late and outstanding payments. Submissions provided during the 2015 review of the CCA suggested some industry participants were using harsh contractual clauses and other practices to pressure subcontractors against using the adjudication process.

In evidence later provided by the reviewer, Professor Phil Evans, to the SERC Inquiry, he stated:

“One submission told me that when they [the subcontractor] were contracting for work they had to fill out a section that said: ‘Have you ever used the security of payment legislation?’ Naturally enough, they found that to be intimidatory. Another person said to me that they had been told that if they appeared before me they would not get any work from that unnamed contractor.”35

The evidence provided by Professor Evans and others led to the recommendation in the SERC Inquiry Report that:

“...it be made a statutory offence to intimidate, coerce or threaten a participant in the building and construction industry in relation to the participant’s access to remedies available to it under security of payment legislation.”36
The Commonwealth Government has encouraged the States and Territories to consider the recommendations in the SERC Inquiry Report.\textsuperscript{37}

Shortfalls with the current registration framework for building contractors

(1) Registration framework only deals with those who are ‘unable to pay’

The only requirement imposed under the BSR Act is that a building contractor is able to ‘meet their debts as and when they fall due.’ Where a building contractor is unable to satisfy this requirement, because it is likely insolvent, the BSB may – at the request of the building contractor – suspend or cancel the registration\textsuperscript{38}, or alternatively, direct the Building Commissioner to issue an interim order suspending registration and initiate disciplinary action in the SAT.

While the current requirements allow the BSB to remove building contractors who are unable to pay their debts, thereby reducing the potential for further harm, there is no power for the BSB, or the Building Commissioner, to deal with building contractors who consistently fail to comply with their contractual payment obligations, and/or fail to make payments ordered by a court or other body. In other words, the current registration framework does not set standards for building contractors with respect to the appropriate payment of debts owed to subcontractors and suppliers.

In many cases a debt (or the quantum owed) to a subcontractor or supplier may be the subject of a legitimate dispute between the parties, however in those cases where it is not, subcontractors or suppliers are left with little choice but to commence often costly adjudication and/or court proceedings to try and recoup payment.

The Government proposes that additional powers are needed to set standards for building contractors on the appropriate payment of debts to improve payment practices in the industry.

The following case studies illustrate standards imposed on builders in QLD, and head contractors working on projects managed by BMW.
Case Study 1 – QLD model for Demerit Points and Moneys Owed

Since 2002, the QLD Government has made successive changes to the QBCC Act to impose greater standards on licensed builders and other trade contractors with respect to the payment of debts and compliance with certain contractual obligations. The standards are enforced through two mechanisms, being a:

(1) Demerit Point system; and
(2) Moneys Owed Complaint system.

Demerit Point system

The QBCC Act provides a range of mechanisms for the removal of a builder or trade contractor’s licence due to performance or conduct issues. Included within these mechanisms is an ability to disqualify (or permanently disqualify) an individual or entity from holding a licence due to the accumulation of demerit points.

Part 3E of the QBCC Act provides requirements and procedures relating to the allocation of demerit points for demerit offence and unsatisfied judgements debts. Demerit points are issued to a person who has a conviction for a demerit offence or is the judgment debtor for an unsatisfied judgement debt. The Queensland Building and Construction Commission Regulation 2003 (QBCC Regulations) prescribes the amount of demerit points to be allocated for demerit offences, with the amount currently ranging between 2 and 10 depending on the offence. An unsatisfied judgement debt attracts 10 demerit points. Where demerit points are allocated, these will be publicly published against the licensee’s name on the register.

The accumulation of 30 demerit points in a 3-year period will, after a relevant notice and show cause procedure, result in the QBCC cancelling an individual or company’s licence for a period of time (3 years for a first disqualification or permanently disqualified for a subsequent accumulation of 30 demerit points over a 3-year period within 10 years of the first disqualification). In the three financial years up to and including 2016-17, the QBCC has issued 410 demerit points in relation to non-payment of unsatisfied judgement debts.

Moneys Owed Complaint system

The QBCC Act provides that the QBCC may suspend or cancel a contractor’s licence, if, among other things, the licensee has contravened a condition of the licence. Section 35 of the QBCC Act provides that a “contractor’s licence is subject to the condition that the licensee’s financial circumstances must at all times satisfy the relevant financial requirements stated in the board’s policies.”

The QBCC Board has made and published a Minimum Financial Requirements policy (MFR policy). The MFR policy commenced operation on 10 October 2014 and applies only to licensed builders. Among other requirements, the MFR policy provides that a licensed builder must at all times pay all undisputed debts as and when the debts fall due and within industry trading or agreed terms. Failure to pay a legitimately owed debt that is not subject to genuine dispute may result in loss of licence.

To enforce the requirements of the MFR policy, the QBCC has a complaint system whereby subcontractors or suppliers owed money by a licensee may make a complaint about an undisputed debt. QBCC will then investigate the complaint to determine if the licensee has breached the MFR policy, and, by extension, the QBCC Act.39

From the commencement of the MFR policy up to and including 31 January 2018, the QBCC has received 3,191 complaints, with 1,336 of those complaints resulting in the debt being paid in full (41.87%).
Case Study 2 – BMW Supplier Demerit Scheme

On 30 September 2017, BMW expanded the ‘Supplier Demerit Scheme’ that applies to prequalified contractors and consultants working on construction projects under the agency’s management. The Supplier Demerit Scheme applies as a condition of prequalification.

Under the Supplier Demerit Scheme where a prequalified contractor or consultant commits an infraction, BMW may issue a demerit point. Where the contractor or consultant accumulates 3 demerit points within 3 years, BMW may then apply a sanction. The sanction can include downgrade or suspension of a contractor’s prequalification status or contracting framework membership, downgrade or suspension of a consultant’s panel membership, or being deemed ineligible to be awarded contracts for a prescribed period. An infraction includes, among other things, where there has been unsatisfactory payment of subcontractors or sub consultants.

Before a demerit point or sanction is imposed, contractors and consultants are given an opportunity to advise BMW of any extenuating circumstances. Failure to advise of extenuating circumstances within two weeks is deemed to indicate acceptance of the infraction.

(2) No powers to adequately deal with building contractors who intimidate subcontractors from commencing proceedings under the CCA

As discussed above, one of the recommendations made in the SERC Inquiry Report was that the State and Territories make it a statutory offence to “intimidate, coerce or threaten a participant in the building and construction industry in relation to the participant’s access to remedies available to it under security of payment legislation.”

The SERC Inquiry was strongly persuaded by evidence provided by a number of participants in the WA building and construction industry, including Mr Mick Buchan, Mr Ross McGinn Jnr and Mr Rob Nolan. The evidence provided suggested many subcontractors fear builders and head contractors will exact commercial retribution against those who seek to take court or other action to recover payments.

WA does not have a statutory offence or specific provision in the BSR Act that aligns with the recommendation in the SERC Inquiry Report.

Currently, section 53(1)(j) of the BSR Act allows for disciplinary orders to be made against a building contractor found to have “engaged in conduct that is harsh, unconscionable, oppressive, misleading or deceptive in connection with a contract for the carrying out or completion of a building service.” However, the limited judicial consideration given to this provision thus far suggests it may not be sufficient to prohibit the types of conduct contemplated in the SERC Inquiry Report.

Amendments proposed by the former South Australian Government to the BCISPA, as well as section 11D of the Building Code 2016, provide useful examples of provisions designed to sanction those found to have engaged in behaviour to intimidate, coerce or threaten another person from accessing remedies under security of payment legislation.
Case Study 3 – Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA)

Following a review of the BCISPA by retired District Court Judge Alan Moss in 2015, the South Australian Government announced it would pursue a number of initiatives to improve security of payment for subcontractors in the state. As part of these initiatives, the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (the Bill) was introduced into the South Australian Parliament on 5 July 2017.

Among other things, the Bill proposed to insert a new section 32A into the BCISPA, which would make it an offence for a person (natural or corporate) to directly or indirectly assault, threaten or intimidate, or attempt to assault, threaten or intimidate, a person in relation to an entitlement to, or claim for, a progress payment under the Act. A maximum penalty of $50,000 or 2 years imprisonment, or both would apply to individuals, and $250,000 for body corporates.

On 30 November 2017, the Bill lapsed following the conclusion of the 53\textsuperscript{rd} Parliament. An election was held in SA on 17 March 2018 with the Liberal Party replacing the Labor Party in government.

Case Study 4 – Section 11D of the Building Code 2016

Under section 34 of the Building and Construction Industry (Improving Productivity) Act 2016 (Cwlth), a building contractor becomes subject to the Building Code 2016 from the first time they submit an expression of interest or tender for Commonwealth funded building work on or after 2 December 2016. Once subject to the Building Code 2016, the building contractor becomes a “code covered entity”.

Code covered entities are required to comply with a number of obligations on all building works (Commonwealth-funded and private). Included within these requirements is section 11D(3) which provides:

A code covered entity must not:

(a) organise or take or threaten to organise or take action with intent to coerce a contractor, subcontractor or consultant to:
   (i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or
   (ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.

(b) apply or attempt to apply undue influence or undue pressure on a contractor, subcontractor or consultant to:
   (i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or
   (ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.

To date, there has been no reported instances where code covered entities have been sanctioned under the Building Code 2016 for breaching the requirements of section 11D (3).
Options for Reform

The Government proposes to improve the registration framework by setting standards for building contractors with respect to the satisfactory payment of debts, and address the recommendation made in the SERC Inquiry Report.

The possible reform options set out below do not represent an exhaustive list of available options. Some of the options are complementary, and any recommendations stemming from the IAG’s feedback may contain elements from each of the different options.

Option 1 – Do nothing

Option 1 is to make no changes to legislation. Timely payment and satisfaction of debts will continue to be set by reference to market-based practices.

Advantages

- Places no additional regulatory cost on government or industry.
- Does not interfere with market practices and standards.

Disadvantages

- Conduct identified by the SERC Inquiry will continue to go unsanctioned under the current builders’ registration framework.
- Costs associated with payment default will continue to be incurred down the contracting chain.

Option 2 – Amend the BSR Act to make it a disciplinary matter for a building contractor to directly or indirectly intimidate, coerce or threaten another person in relation to their remedies under the CCA

Option 2 is to amend section 53 of the BSR Act to expressly make it a disciplinary matter for a building contractor to directly or indirectly intimidate, coerce, threaten, or apply undue influence to, another person from using the adjudication process under Part 3 of the CCA.

Option 2 would implement the recommendation made in the SERC Inquiry Report.

Where a complaint is received that a building contractor has engaged in the conduct described above, the current processes and powers under the BSR Act and BSCRA Act for the investigation and commencing disciplinary action will apply.

Advantages

- Specific legislation may serve to reduce some of the reluctance of subcontractors in using the adjudication process.
- WA would be in line with the recommendation made in the SERC Inquiry Report.
- Costs to government would be relatively low as the scope of the powers to receive complaints, conduct investigations and commence any action will be confined to only to persons that hold registration under the BSR Act.
Disadvantages

- Legislation may seem 'heavy handed' given only limited evidence is available to quantify the extent of the behaviour in the industry.
- May create duplication if a building contractor is also subject to the requirements of the Building Code 2016.
- May create legal uncertainty for building contractors in determining what type of conduct constitutes 'intimidation,' versus typical commercial behaviour.
- There will be ongoing costs to government in investigating complaints and taking disciplinary action.

Option 3 – Amend the CCA to create a civil penalty for any person who directly or indirectly intimidates, coerces or threatens another person from accessing remedies under Part 3 of that Act.

Option 3 is an alternative, or complementary reform to Option 2. This civil penalty would apply to any person (not just building contractors) found to have directly or indirectly intimidated, coerced, threatened or applied undue influence against another person from using the adjudication process under Part 3 of the CCA.

The civil penalty would be set at a sufficiently high level to act as a deterrent to deliberate and calculated non-compliance. For example, a maximum fine of $50,000 for individuals and $250,000 for companies.

Advantages

- Specific legislation may serve to reduce some of the reluctance of subcontractors in using the adjudication process.
- WA would be in line with the recommendation made in the SERC Inquiry Report.

Disadvantages

- Legislation may seem 'heavy handed' given only limited evidence is available to quantify the extent of the behaviour in the industry.
- Could create duplication if a building contractor is also subject to the requirements of the Building Code 2016.
- May create legal uncertainty for building contractors in determining what type of conduct constitutes 'intimidation,' versus typical commercial behaviour.
- Reluctance to take action under the CCA may be due to other factors, not just intimidation. These factors could include:
  - cost;
  - complexity and unfamiliarity with the process;
  - time; and
  - commercial reality that parties may not work together in the future as a result of the dispute.
- Higher costs to Government due to implementation and enforcement.

Option 4 – Amend the BSR Act to make it a disciplinary matter for a building contractor to fail to pay an undisputed judgement or adjudication debt

Option 4 is to amend section 53 of the BSR Act to make it a disciplinary matter for a building contractor to fail to pay a debt ordered by a court, or an adjudicator under the CCA. This disciplinary matter would apply where a court or adjudicator has made an order that payment be made in respect to a debt owed under a contract for the carrying out of construction work, and payment has not been made within a specified time. Where a court or adjudicator
makes an order that payment be made, the specified time could be within 28 days after the date ordered.

Similar to the position under the QBCC Act, if the building contractor can show that the court order is subject to an appeal, a disciplinary matter would not be made out, except if the appeal is ultimately unsuccessful and any payment ordered then becomes outstanding. Building contractors would also be obligated to inform the Building Commissioner if a debt ordered to be paid by a court in respect to a contract for construction work for has not been paid.

With respect to adjudication determinations, a disciplinary matter would not exist if the determination is the subject of an application for judicial review in the Supreme Court, or the building contractor has entered administration or liquidation.

**Advantages**

- Will ensure that payments ordered to be made by a court or adjudicator is paid, potentially reducing costs for subcontractors and suppliers from having to commence civil enforcement proceedings.
- Rights of building contractors to appeal court orders or seek review of adjudication determination remain unaffected.
- Would be in line with other States which have similar requirements in place (e.g. QLD and Victoria).
- Costs to Government would be relatively low as the frequency of building contractor’s failing to pay judgement debts and determinations is not estimated to be high.

**Disadvantages**

- Will impose a requirement on building contractors that does not currently apply to other business. In all other industry sectors, where a judgement debt is outstanding it is incumbent on the judgement creditor to commence enforcement proceedings. While this will remain the case in the building and construction industry, it is likely given the proposed requirements that most building contractors will make payment once an investigation is commenced by the Building Commissioner.
- Some costs to government due to implementation and enforcement.

**Option 5 – Amend the BSR Act to create a ‘demerit point’ system to ban building contractors that continually fail to comply with contractual payment obligations**

Option 5 is to amend the BSR Act and BSR Regulations to create a ‘demerit point’ system for building contractors.

Under the demerit point system, the registration of all building contractors would be subject to the requirement that the building contractor must at all times pay all legitimately owed debts in connection with a construction contract as and when the debts fall due.

A building contractor would not breach this requirement if the BSB were reasonably satisfied that:

- The debt is the subject of a genuine dispute between the parties and that measures are being taken to resolve the dispute;
- any undisputed portion of the debt has been paid;
- legal proceedings, or adjudication under the CCA, has been commenced in respect to the debt;
- a court, adjudicator or other body has made a judgement or determination that the debt is not owed; and/or
an appeal or other process has been commenced to appeal or review the decision of the court, adjudicator or other body.

Where reasonably satisfied (based on an investigation) that the building contractor has breached the requirement to pay a legitimately owed debt, the BSB would have the jurisdiction to:

- caution or reprimand the building contractor; and/or
- issue a ‘demerit point’ and direct the Building Commission to publish the details of the demerit point on the register.

Under this option, where a building contractor has accumulated a set amount of demerit points within a specified period (e.g. 3 years), the BSB would also be empowered to issue a ‘show cause’ notice to the building contractor that their registration should be suspended. In this regard:

- A building contractor that is an individual or partnership will have their registration suspended if the individual or one of the partners has accumulated a set amount of demerit points within the specified period;
- A company will have their registration suspended if one of its officers has been the officer of a company that has accumulated a set amount of demerit points within the specified period.

The individual or company (through its officers) would be required to respond to the show cause notice within a specified period of time (e.g. 28 days) from the date of the notice. Should the individual or company take the position that the suspension is not warranted, then within this specified period they will have the opportunity to provide a formal submission to the BSB outlining their reasons in this regard, together with any other information they wish the BSB to consider in determining whether or not to suspend their registration.

If the BSB does not receive a response to the show cause notice or is not satisfied with the reasons provided in response as to why the registration should not be suspended, then they may proceed to suspend the registration. The suspension would apply for the duration of up to 2 years. However, the decision of the BSB would be reviewable by the SAT.

The purpose of a demerit point system is not to act as a method for recovering monies on behalf of creditors. Rather, it would provide the BSB with the power to take action where the building contractor fails to meet its contractual payment obligations and provides an incentive to ensure payments are made appropriately, and any amounts disputed are appropriately managed. Subcontractors and suppliers will continue to be responsible for enforcing their contractual rights to payment, including commencing court or adjudication proceedings to enforce those rights.

**Advantages**

- Establishes a set of clear and transparent rules defining the BSB’s expectations for commercial conduct in the industry.
- Establishes a flexible regime to dealing with non-payment issues in the industry. To this end, there are two possible outcomes from the administration of the regime—either a building contractor is assessed by the BSB to be withholding a sum of money where there is no genuine dispute, in which case a sanction in the form of a demerit point will be applied, or it is not – in which case no further action is taken. If the first scenario occurs on set number of times – that is to say, a set amount of demerit points are incurred within the specified period, then this paves the way for the BSB to remove that entity from the industry to avoid further harm to other industry participants by withholding payment where it is genuinely owed.
- Will speed up cash flow in the contracting chain by ensuring the timely payments of all legitimate debts owed under construction contracts.
Disadvantages

- Costs will be imposed on Government to administer the demerit point system, including in assessing whether or not a ‘genuine dispute’ exists with respect to a debt.
- If a building contractor is effectively named and shamed through accruing a demerit point, this may have adverse consequences on their ability to continue to operate their business. In effect, enforcement of the legislation could force a building contractor into insolvency, particularly if they were already experiencing cash-flow issues.
- A building contractor will not breach a requirement to “pay all legitimately owed debts in connection with a construction contract” if the entity can demonstrate to the BSB that there is a “genuine dispute” in connection with the alleged debt. There is a risk that rogues in the industry may manufacture a dispute with a view to effectively sidestepping their compliance with this requirement.

Discussion Questions

(1) Do you think that there is a need for reforms to the current registration framework to impose standards for the appropriate and timely payment of debts owed under contracts? If not, why not?
(2) Do you support the SERC Inquiry Report recommendation for a statutory offence to sanction those who engage in behaviour to intimidate, coerce or threaten another person against using security of payment legislation? If not, why not?
(3) If such an offence is introduced in WA, do you support Option 2 or 3, or both Option 2 and 3, or an alternative option?
(4) Do you support the BSB having the powers to take action against building contractors that fail to pay a debt ordered by a court, or an adjudicator under the CCA? If not, why not?
(5) Should the BSB have the power to take action against all building service contractors (i.e. building, painting, plumbing and building surveyor contractors)?
(6) Should the power apply for debts owed under all construction contracts, or certain types of construction contracts?
(7) Under Option 4 and 5, should the BSB discontinue any action if the debt is subsequently paid?
(8) Do you support the introduction of a demerit point system for building contractors as contemplated in Option 5? If not, why not? What, if any, benefits or costs to you foresee?
(9) How many demerits should be accrued before a building contractor’s registration is suspended?
(10) Should demerit points be accrued for other breaches of the Building Act, BSR Act, BSR Regulations or HBCA?
(11) Should the decision of the BSB to impose a demerit point be subject to review by the SAT?
Banning persons with a history of insolvency or bankruptcy

Background

A personal bankruptcy or corporate insolvency in relation to the business of a registered building contractor, previously referred to above as where a person is ‘unable to pay’, can have devastating financial effects on multiple parties, including project owners, employees, subcontractors and suppliers.

Subcontractors and suppliers are particularly vulnerable in the event of a bankruptcy or insolvency up the contractual chain as they are generally treated as unsecured creditors. In most cases, unsecured creditors will recoup nothing or very little of outstanding payments following an insolvency process. This is especially the case in Western Australia, where external administrator reports for 2016-17 indicated that 86 per cent of unsecured creditors received a cents-in-the-dollar dividend of zero.

However, there is nothing illegal about a business entering into bankruptcy or insolvency. Some building contractors may experience a business failure for reasons that are beyond their control. For example, if a major customer goes into liquidation, the resultant cash flow difficulties could cause the building contractor significant financial distress and ultimately lead to their bankruptcy or insolvency.

On the other hand, it may well transpire that the reasons for the business failure are attributable to the conduct of persons who were responsible for the operation and financial management of the business.

Where the business failure of a building contractor is attributable to the conduct of persons responsible for the management and control of the business, the current powers under the BSR Act to address the situation are both extremely limited and administratively cumbersome to apply in practice.

Shortfalls with the current registration framework for building contractors

The BSB is required to consider applications for building contractor registration under the provisions of section 18(1) of the BSR Act. Under this section the BSB is prohibited from registering, or renewing the registration, of an applicant unless all of the requirements are met.

Of particular relevance is section 18(1)(f) which establishes as a precondition to registration or renewal of registration that the applicant “is not a body of which an ineligible person is an officer”.

An “ineligible person” is defined as a person who has been the subject of a declaration of ineligibility under section 60(1) of the BSR Act. Specifically, section 60(1) provides:

“If, in a proceeding under this Division, the State Administrative Tribunal cancels or suspends the registration of a building service contractor which is a body, the State Administrative Tribunal may, if satisfied that it is appropriate to do so, make an order declaring an officer of the contractor to be an ineligible person”.

However, in practice it is virtually impossible to obtain a declaration of ineligibility against an officer of a failed building contractor and prevent them from obtaining a new registration. Since the BSR Act commenced operation there has only been one instance where an officer of a building contractor has been declared ineligible under section 60(1).
The practical difficulties associated with obtaining a declaration of ineligibility under section 60(1) of the BSR Act are attributable to three factors:

(1) The SAT needs to first cancel or suspend the building contractor’s registration in connection with conduct occurring that is a “disciplinary matter”

The crux of the problem with the power to make a declaration of ineligibility against an officer of a building contractor which is a body, is that the exercise of this power by the SAT is contingent upon:

a) the bringing of an anterior action against the building contractor under the disciplinary provisions of the BSR Act; and
b) the SAT making orders to suspend or cancel the building contractor’s registration.

(2) The difficulty in taking disciplinary action against a building contractor in connection with alleged financial mismanagement

Under the BSR Act a disciplinary matter exists in connection with issues of financial management, where:

“the registered building service provider does not satisfy one or more of the matters referred to in section 17(1) or 18(1), as the case may be, that must be satisfied if an application for registration or renewal of registration is to be granted.”

In this regard, a building contractor:

“must have the capacity to meet debts as and when they fall due”.

An assessment as to whether a building contractor can meet its debts ‘as and when they fall due’ is required to be made having regard to the following non-exhaustive list of criteria under the BSR Regulations:

- net assets;
- liquidity;
- availability and extent of off-book sources of liquidity;
- proposed scale of business operation; and
- any other matters the BSB considers relevant.

The application of this test to identify whether the disciplinary matter exists - that the building contractor cannot meet its debts as and when they fall due, involves an all-or-nothing determination to be made at a particular point in time. The question is not one of “is this entity fundamentally insolvent?”, rather it is one of: “If at this moment in time, this entity holding the building contractor registration, were to apply to renew its registration or applied for the grant of a new registration, could it satisfy the registration criterion that it must meet its debts as and when they fall due?”

The determination as to whether the disciplinary matter has occurred can thus go only one of two ways: either the entity can meet its debts as and when they fall due, or it cannot. It is only in the case of the latter scenario that the disciplinary matter will have manifested and disciplinary action against the entity holding the building contractor registration can be initiated.

However, there is an important difference to be born in mind between the mechanics of:

- initiating disciplinary action in connection with the disciplinary matter occurring; and
- The SAT having jurisdiction to make orders with respect to the disciplinary matter.
While disciplinary action may be initiated in respect of the disciplinary matter having manifested at a particular point in time, the circumstances of the business of the building contractor may change during the course of the disciplinary proceedings.

For example, at the point in time of applying to the SAT for orders that the registration of the building contractor be cancelled or suspended, the business of the building contractor may have been turned around. This could be the result of the building contractor having sourced additional work, with a subsequent improvement in cash flow, or by way of a one-off injection of funds into the business. Either way, the practical effect is that at the point in time of the SAT considering whether to make orders cancelling or suspending the registration of the building contractor, the building contractor may satisfy the registration criterion of “must have the capacity to meet debts as and when they fall due”.

In such circumstances, the SAT has no basis to make the orders of cancellation or suspension, as the disciplinary matter is no longer in existence. If these orders cannot be made, then by extension declarations of ineligibility against officers of the building contractor cannot be made.

(3) Difficulties associated with initiating disciplinary action against an insolvent building contractor

It is almost always the case that a building contractor will enter external administration before disciplinary action for not having the capacity to meet debts as and when they fall due can be initiated.

In fact, the very act of the Building Commissioner issuing an interim disciplinary order suspending the building practitioner or building contractor’s registration, can trigger a building contractor entering external administration.

Where a building contractor, which is a company, is under external administration, the company cannot be a party to legal proceedings without either:

- written consent of the administrator or liquidator;\(^{53}\) or
- leave of the court.\(^{54}\)

Under the Corporations Act, the rationale for having this stay of proceedings against a company under external administration is to ensure that the role of the external administrator is not frustrated or interfered with or distracted by other matters that may prejudice a return to creditors.\(^{55}\) However, this also means that disciplinary proceedings in the SAT seeking the suspension or cancellation of the building contractor’s registration cannot be brought without either the written consent of the external administrator, or leave of the court.

An additional complication also exists where disciplinary action is initiated against a company that has subsequently been wound up and re-deregistered. In these circumstances, it would be necessary to:

a) apply to the Supreme Court for an order reinstating the company to an ‘in-liquidation’ status;

b) arrange for the appointment of a liquidator who is willing to act as liquidator of the newly reinstated company, noting that the company holds no assets from which the liquidator’s fees may be paid out of; and

c) apply to the liquidator for written consent to initiate disciplinary proceedings against the reinstated company or, in the absence of written consent, apply for leave of the court to bring proceedings against the reinstated company.

Hence, it can be a very costly process to undertake disciplinary action to suspend or cancel the building contractor registration of an insolvent company, to have an officer declared ineligible. This makes such action justifiable in only the most serious of cases.
While the BSR Act does not contain an effective mechanism to enable persons who have a history of bankruptcy or insolvency in connection with a building or construction business to be excluded from the industry, the position is significantly different in QLD.

**Case Study 4 – QLD model for ‘excluded individuals and excluded companies’**

The licensing system administered by the QBCC contains detailed machinery to remove “excluded individuals” and “excluded companies” from the industry.

Under the QBCC Act, an individual may be considered by the QBCC to be an excluded individual in connection with the happening of a “relevant event”. A “relevant event” may occur in one of two ways - either through a “relevant bankruptcy event” or a “relevant company event”. The terms are defined as follows:

- A “relevant bankruptcy event” occurs where an individual takes advantage of the laws of bankruptcy or becomes bankrupt, and 3 years have not elapsed since the “relevant bankruptcy event” happened.
- A “relevant company event” occurs where an individual was a director, secretary or “influential person” for a “construction company” at any time up to 2 years before that company had a provisional liquidator, liquidator, administrator or controller appointed or was wound up or ordered to be wound up, and 3 years have not elapsed since the “relevant company event” happened.

A “relevant company event” applies in connection with a “construction company”, which is defined under the QBCC Act to include a company that did not hold a licence under the QBCC Act. An “influential person” for a company means an individual, other than a director or secretary, who is in a position to control or substantially influence the conduct of the company’s affairs.

A company may be considered by the QBCC to be an “excluded company” if an individual who is a director or secretary of, or influential person for, the construction company is an excluded individual for a “relevant event”, that is, a relevant bankruptcy event or relevant company event.

If an individual or company is deemed to be an excluded individual or excluded company, then the QBCC must give the individual or company a ‘show cause notice’ containing certain information:

- For an excluded individual, the written notice must identify the relevant event, provide the QBCC’s reasons why it considers the person to be an excluded individual, and advise the person that they may make a submission to the QBCC in response to the notice. If no submission is received within 28 days of the notice, or if after receiving and considering a submission the QBCC still considers the person to be an excluded individual for a relevant event, the QBCC must cancel the person’s licence.
- For an excluded company, the written notice must identify the relevant individual (who is the director, secretary, or influential person for the company who is an excluded individual for a relevant event), it must state the particulars of the relevant event, and it must also state that the “relevant individual” must stop being a director, secretary or influential person of the company within 28 days after the QBCC gives the company the notice. If the relevant individual does not stop being a director, secretary or influential person of the company within 28 days after the QBCC gives the company the notice, then the QBCC must cancel the company’s licence.

The effect of an exclusion is that the license of the entity will be cancelled, and the QBCC will be prohibited from granting them a license for the duration of the period of exclusion.

The length of the exclusion period will be as follows:

- 5 years - from the date of a relevant event that occurred before 1 July 2015.
- 3 years - from the date of a relevant event that occurred from 1 July 2015.

An individual who has twice been an excluded individual for a relevant event faces life exclusion.
Options for reform

Given the impact insolvency events can have on creditors, the Government proposes more effective mechanisms be introduced to allow the BSB to manage individuals who have demonstrated their incapacity to manage building companies.

The possible reform options set out below do not represent an exhaustive list of available options. Not all of the options set out below are mutually exclusive, and any recommendations stemming from the IAG’s feedback may contain elements from multiple different options.

Option 1: Do nothing

Option 1 is to make no changes to the legislation. Industry participants will continue to be responsible for undertaking due diligence when contracting with an entity which is a building contractor. In this regard:

- if the building contractor entity is an individual and goes into bankruptcy – then most unsecured debts will be released under the bankruptcy laws and unsecured creditors will receive nothing; and
- if the entity is a company - creditors will receive a return in accordance with the preference rules under the Corporations Act, which, as previously discussed, is either nothing or a small percentage for unsecured creditors.

Further, individuals who held building contractor registration, or were an officer of a company which was a building contractor, will be at liberty to apply for a new building contractor registration, or to become an officer of an existing entity which holds building contractor registration.

**Advantages**

- Places no additional regulatory cost on Government or industry.
- Does not introduce any additional level of interference with market practices and standards.

**Disadvantages**

- Conduct identified in the SERC Inquiry Report will continue to go unsanctioned under the current builders’ registration framework.
- Costs associated with payment default will continue to be incurred down the contracting chain.
- Individuals who pose a risk to the industry because they cannot be trusted to responsibly manage the business of a registered building contractor will continue to be at liberty to participate in the industry by way of obtaining building contractor registration, whether in their own capacity or through another entity.

Option 2: Provide the BSB with the power to refuse registration where an insolvency event has occurred, and to issue a ‘show cause’ notice

Amend the BSR Act along the lines of the QBCC Act to incorporate the concepts of ‘excluded individuals’ and ‘excluded companies’ into the WA registration framework. This will involve two key pillars of reform.
Step 1 – dealing with entities before they apply for registration, or renewal of registration, as a building contractor

Empowering the BSB to issue a ‘show cause’ type notice to an individual or company that is deemed to be an excluded individual or excluded company. In this regard:

- An individual will be deemed to be an excluded individual if they experience an event of bankruptcy in connection with the carrying on of a construction business, or where they were an officer of a construction company (whether or not that company was a registered building contractor) that experienced an event of insolvency, and 3 years have not elapsed since the event of bankruptcy or insolvency occurred; and
- A company will be deemed to be an excluded company if one of its officers is an excluded individual.

The individual or company (through its officers) would be required to respond to the show cause notice within a specified period of time (e.g. 28 days) from the date of the notice. Should the individual or company take the position that the exclusion is not warranted, then within this specified period they will have the opportunity to provide a formal submission to the BSB outlining their reasons in this regard, together with any other information they wish the BSB to consider in determining whether or not to apply an exclusion.

If the BSB does not receive a response to the show cause notice, or is not satisfied with the reasons provided in response as to why the individual or company should not be excluded, then they may apply the exclusion. The effect of the exclusion would be that:

- any existing registration of the entity as a building contractor is immediately suspended for the duration of the period of exclusion; and
- the entity would be recorded on the register of building contractors maintained by the Building Commissioner as being an excluded individual or excluded company.

With respect to the first bullet point, the entity would also be prohibited from applying to renew its building contractor registration during the period of the exclusion, if it were to come up for renewal during this exclusion period. As such, if the building contractor registration of the entity should lapse during the period of the exclusion, then it would become necessary for the entity to apply for a brand-new building contractor registration at the end of the exclusion period.

The decision of the BSB would be reviewable by the SAT.

Step 2 – dealing with entities at the time they apply for registration or renewal of registration as a building contractor

Amend the BSR Act to prohibit the BSB for a set period of time (e.g. up to 3 years) from registering, or renewing the registration of, an applicant for the grant or renewal of a building contractor registration, where within 3 years of the date of the application for the grant or renewal of registration, the applicant –

- in the case of an individual or member of a partnership has been bankrupt; or
- in the case of a company, has an officer, who was in a position (up to 2 years prior) to control or substantially influence the conduct of a construction business, that had an administrator, liquidator or controller appointed, or was wound up, or ordered to be wound up by a court in insolvency.

This prohibition would apply by default, unless the BSB is satisfied that there has been a material change of circumstances with respect to the individual or company such that the applicant can be safely registered due to having sufficient managerial and financial arrangements in place.
In other words, despite the exclusion, the BSB would nevertheless have a discretion to register or renewal the registration of an individual or company that has been the subject of exclusion.

Under this option, a decision by the BSB not to grant a building contractor registration, or refuse to renew registration would be reviewable by the SAT.

It is also proposed as part of Option 2 that the BSR Act be amended to allow the BSB to suspend the building contractor registration upon a company entering administration – this will remove the current requirement to make a separate application to the SAT where the building contractor does not voluntarily surrender the registration.

**Advantages**

- Provides greater powers but also flexibility to the BSB to deal with registered building contractors who have experienced an event of bankruptcy or insolvency, together with applicants for the grant of a new building contractor registration. The option works in three simple steps – an event of bankruptcy or insolvency triggers a deemed exclusion, a show cause notice is then issued to the entity, and depending on the information (if any) provided by the entity in response to that show cause notice the BSB may either formalise the exclusion or be satisfied that the entity does not pose a risk to the industry and decline to formalise an exclusion.
- Will remove the need for lengthy disciplinary proceedings through the SAT, which will reduce costs for Government.

**Disadvantages**

- There is an element of uncertainty built into Option 2, in that, if a building contractor was to provide false or misleading information in response to a ‘show cause’ notice, the BSB may be persuaded not to formalise exclusion. While providing misleading information to the BSB will constitute a disciplinary matter, ultimately there remains the potential for rogue operators to manipulate the system and get away with operating the business of a registered building contractor in circumstances where they cannot be trusted to do so responsibly.
- Some costs to Government associated with setting up excluded individuals/excluded companies system.

**Option 3: Permanent exclusion where 2 separate insolvency events have occurred**

The BSR Act is amended in accordance with option 2, but the BSB is also obligated to permanently refuse an application for registration or renewal of an applicant for builder contractor registration where at least two bankruptcy or insolvency events have occurred within a 5-year period.

**Advantages:**

- Communicates a clear and definitive rule to participants in the building and construction industry: ‘two strikes and you’re out’.
- Will operate to remove those who have a demonstrated an inability to properly manage a construction business, thereby reducing the risk to subcontractors, suppliers and customers of further expose to payment default.
**Disadvantages**

- Means that the BSB has no flexibility to deal with applications for registration or renewal by applicants who have experienced at least two bankruptcy or insolvency events within a 5-year period. The application must be refused, irrespective of whether the circumstances of the applicant may have significantly changed from the time when the relevant events of bankruptcy or insolvency occurred.
- Could result in outcomes that are perceived to be unfair, where an applicant experienced at least two bankruptcy or insolvency events for reasons beyond their control, but is then denied the opportunity to earn a livelihood by participating in the industry as a registered building contractor.
- Some costs to government in administering this regime.

**Discussion Questions**

(1) Do you support the exclusion of a company or an individual from the building and construction industry in circumstances where:
   a. In the case of a company - its officers have previously been involved in the management of a company, which has experienced an event of insolvency?
   b. In the case of an individual - the individual has experienced a personal bankruptcy, or was an officer of a company which experienced an event of insolvency?
(2) Further to Question 1(a) above, should the exclusion also apply where the company entered into a Deed of Company Arrangement with its creditors?
(3) What benefits/costs do you foresee with Option 2?
(4) If the BSB were to be given the powers in Question 1:
   a. should the BSB still have the discretion as to whether to register or renew the registration of an applicant, or should the BSB be prohibited outright from granting the registration or renewal?
   b. should the relevant event that triggers the exclusion – that of bankruptcy or insolvency, be limited to bankruptcy or insolvency in connection with the running of a construction business, or should it be any business at all?
   c. should the exclusion be confined to applicants for the grant or renewal of building contractor registration, or should it also be applied in relation to the other occupations that the BSB registers – painting contractors, building surveying contractors, and plumbing contractors?
(5) How long after the bankruptcy or insolvency event occurred should a new registration be refused by the BSB?
(6) Should the BSB have the power to permanently deny registration where the same individual or officer has been involved in two or more failed businesses, within a short period of time?
(7) What benefits/costs do you foresee with Option 3?
Improving business skills in the industry

Background

Previous inquiries into the security of payment problem in the building and construction industry have identified a structural shift in the way building work is delivered. Where formerly, builders owned construction plant and equipment, and directly purchased materials and employed labour, today they rent plant and equipment for the duration of specific projects and break work into discrete packages to tender it to specialist subcontractors. Large subcontractors operate in a similar manner, often acting as 'system integrators' who may engage multiple layers of sub-subcontractors to carry out the trade works that form the subject of the overall project.

Even on the simplest of residential building projects, dozens of layered contracts may be in operation. Consider the diagram below:

The layers of contractual arrangements, that may include building owners (or principals), builders, subcontractors, suppliers, sub-subcontractors and so on, is commonly referred to as the contractual chain of a construction project. The contracts between these parties form...
the links in that chain. On larger and more complex construction projects the number of contractual layers or links in the chain, number of distinct contracting parties, and complexity of contractual arrangements will typically increase.

Each party in the contractual chain will seek to maximise its return while minimising its exposure to risk. In a commercial contracting environment, the party with the strongest negotiating position will, within limits and to differing degrees, control the allocation of risk.

In a market where the supply of building services, or the supply of particular trade services, is greater than the demand for those services, a party higher in the contractual chain will have the stronger negotiation position. While the opposite proposition should hold true, it is predicated on the negotiating parties having equal access to and understanding of relevant information. This is not always the case, with the party lower in the contracting chain often being at an informational disadvantage.

In discussing the subcontract-based model of service delivery, the SERC Inquiry Report commented:

This structure has distorted the construction market by concentrating market power at the top of the contracting chain and inequitably reallocating risk from the large contracting companies to those who are least able to bear it namely, subcontractors, suppliers and their employees.66

It is also noted that there may be strategies employed by parties in the contracting chain to effectively shield themselves from the full extent of their liabilities in connection with a particular project. Contracting through a limited liability company is a simple and common example of this, whereby an artificial legal entity is brought into existence as a vehicle for contracting with another party. In the ordinary course of things, those individuals who are the controlling minds of the company are protected from liabilities that may be incurred by the company itself.

Other common examples of how parties higher in the contracting chain may seek to minimise their liabilities include:

- Keeping little or no equity in a company that takes on commercial risks. In the event that a liability materialises, e.g. a claim is made against the company, then the company may go into administration or liquidation, but the individuals who were controlling that company will (by virtue of the artificial legal existence of the company) be shielded from liability in their personal capacity. Those individuals may seek to subsequently incorporate a new company through which to trade in the building and construction industry.
- Owners providing funding to at-risk companies via secured related party loans, instead of seeking additional capital contributions such as from shareholders or retaining profits in the account of the company itself. Similar to the first point above, in the event that a claim is made against the company, the company may go into administration or insolvency but the individuals controlling that company will be protected – in other words, the liabilities incurred by the company will not be imputed to them in their personal capacities.
- Holding operational plant, equipment and other business assets in separate holding companies.
- Entering into transactions with related parties to funnel revenue out of at-risk companies (e.g. plant and equipment lease arrangements, charging for the provision of back-office services, interest on related party loans, paying inflated salaries to owners and their family members that are not representative of fair market rates, etc.)
- Subcontracting works to related companies at or below cost, rather than sub-subcontracting the work to an external party at market rates.
• Utilising trust arrangements to minimise disclosure obligations and to obfuscate related party transactions and ownership structures.

Given the described structure of the market and strategies employed by industry participants, the need for registered building contractors to possess a base level of business education cannot be understated. Past inquiries into the security of payment problem in the building and construction industry have considered this issue, with most concluding that there is a widespread lack of basic business skills.

For example, the 2001 Western Australian Security of Payment Taskforce report noted:

“Participants in the commercial construction industry must have commercial capabilities commensurate with the contracting partners…. As in any industry, poor business practices will lead to disaster. The construction industry is perhaps more prone to this because it is usually technical skill rather than business acumen that induces people to become contractors or subcontractors. Particularly amongst smaller contractors, the key personnel are usually engaged on site during the day and attempt to manage the business at night or with the assistance of a spouse or family member. As a result, it is likely that many contractors do not have a good day to day understanding of the financial health of the business.”

Similarly, Professor Phil Evans remarked in his 2015 report on the review of the CCA:

“There was a lack of understanding that adjudication determinations are interim in nature and do not affect the parties’ rights under the common law of contract…. Additionally, many issues raised related to a general lack of understanding of the basic principles of contractual rights and obligations.”

The SERC Inquiry Report also noted:

The combination of low barriers to entry and a shift within the industry away from large construction companies with directly employed workforces towards smaller subcontractors has opened up the industry to individuals that may not have appropriate or adequate skills. Unfortunately, when these businesses fail they do not only harm themselves but inexorably affect other businesses…. It is not only low levels of business acumen and financial skills, but also the lack of legal understanding and the inability to afford legal advice, which negatively affects the ability of industry participants to exercise their legal rights.

Aside from the conclusions drawn following the inquiries mentioned above, empirical data also suggests limited business skills could be a contributing cause of insolvencies and bankruptcy in the building and construction industry.

Data on the causes of insolvency and bankruptcy

Insolvencies

External administrators are required to report certain information and findings regarding their appointments to ASIC. ASIC aggregates this data and publishes it annually in a series of statistical reports.

One of the data sets published by ASIC relates to the cause or causes of a company’s insolvency. There are 13 causes to select from and external administrators are free to select as many as they feel are appropriate. The average number of causes selected for insolvent companies, based in WA, that were identified as operating in the construction industry, has held constant at approximately three over the past five years.
For the 2016-17 financial year, 218 WA based companies, identified as operating in the building and construction industry, were placed under external administration.\(^71\) In 50 per cent of these instances poor management of the business was identified as a cause of business failure. The related cause of poor financial controls including lack of records was identified in 30.27 per cent of these instances.\(^72\)

ASIC’s data relates to the industry as a whole – it does not delineate between builders and subcontractors or between the types of construction work (some of which do not require builders’ registration.) The builders’ registration database maintained by the Building Commissioner shows that for the 2016-17 financial year, 12 of the 218 insolvencies in the WA construction industry were in respect of registered building contractors.

**Bankruptcies**

With respect to personal bankruptcy, statistical data is collected and published by AFSA.

One of AFSA’s reports breaks bankruptcies down by occupation and distinguishes between business-related and non-business-related bankruptcies. The most recent version of the report covers the financial years between 1 July 2010 and 30 June 2013. While the data is not broken down by jurisdiction, another AFSA report, which encompasses the same financial years, shows the total number of bankruptcies experienced nationally and by State.

Applying WA’s proportion of total bankruptcies from AFSA’s second report to the business related data from the first report allows the following estimation:

<table>
<thead>
<tr>
<th>Year</th>
<th>Business Related Construction Trade Worker Bankruptcies(^73)</th>
<th>WA Proportion of Total National Bankruptcies(^74)</th>
<th>Estimate of WA Business Related Construction Trade Worker Bankruptcies</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010/11</td>
<td>504</td>
<td>7.54%</td>
<td>38.00</td>
</tr>
<tr>
<td>2011/12</td>
<td>574</td>
<td>7.63%</td>
<td>43.80</td>
</tr>
<tr>
<td>2012/13</td>
<td>655</td>
<td>7.42%</td>
<td>48.60</td>
</tr>
<tr>
<td>2013/14</td>
<td>669</td>
<td>7.86%</td>
<td>52.58</td>
</tr>
</tbody>
</table>

If it is assumed the rate of business related bankruptcies for construction trade workers in WA is roughly the same as the rate of construction company insolvency in WA, then it is possible to generate the following estimate on the number of business related bankruptcies for construction trade workers in WA up to the 2016/17 financial year:

<table>
<thead>
<tr>
<th>Year</th>
<th>Growth Rate of Insolvencies of WA Based Companies Operating in the Construction Industry(^75)</th>
<th>Estimate of WA Business Related Construction Trade Worker Bankruptcies</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014/15</td>
<td>-15.72%</td>
<td>44.31</td>
</tr>
<tr>
<td>2015/16</td>
<td>37.31%</td>
<td>60.84</td>
</tr>
<tr>
<td>2016/17</td>
<td>18.48%</td>
<td>72.08</td>
</tr>
</tbody>
</table>

It is possible that these estimates in fact understate the actual position as the classification of business-related bankruptcy, as distinct from non-business related bankruptcy, is derived from the reports of individual bankrupts who may have incorrectly characterised the nature of their bankruptcies.

AFSA data on the causes of bankruptcies is not broken down by industry or by jurisdiction. However, for business related bankruptcies in the 2016-17 financial year the data shows:
<table>
<thead>
<tr>
<th>Identified Cause of Bankruptcy</th>
<th>Proportion of Total Business Related Bankruptcies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic conditions affecting industry, including competition and price cutting, credit restrictions, fall in prices, increases in costs</td>
<td>31.38%</td>
</tr>
<tr>
<td>Excessive drawings, including failure to provide for taxation</td>
<td>5.47%</td>
</tr>
<tr>
<td>Excessive interest payments on loan monies and capital losses on repayments</td>
<td>3.95%</td>
</tr>
<tr>
<td>Failure to keep proper books of account and costing records</td>
<td>1.99%</td>
</tr>
<tr>
<td>Gambling or speculation</td>
<td>0.99%</td>
</tr>
<tr>
<td>Inability to collect debts due to disputes, faulty work or bad debts</td>
<td>1.89%</td>
</tr>
<tr>
<td>Lack of business ability including underquoting or failure to assess potential of business</td>
<td>4.99%</td>
</tr>
<tr>
<td>Lack of sufficient initial working capital</td>
<td>2.73%</td>
</tr>
<tr>
<td>Personal reasons, including ill health of self or dependents, domestic discord &amp; other personal reasons</td>
<td>8.31%</td>
</tr>
<tr>
<td>Seasonal conditions including floods &amp; droughts</td>
<td>0.51%</td>
</tr>
<tr>
<td>Other business reason</td>
<td>37.80%</td>
</tr>
</tbody>
</table>

The cause of ‘lack of business ability’ is roughly analogous to the cause of ‘poor management of [the] business’ in the corresponding ASIC reports. The significantly lower representation of this cause in the AFSA data (4.99 per cent of personal bankruptcies, compared to 50 per cent of business insolvency) is likely due to the following reasons:

- The ASIC data captures multiple causes whereas the AFSA data only captures a single cause; and
- The AFSA data is provided by actual bankrupts who may be more inclined to nominate an external factor, such as the economy, rather than blame themselves or may be inclined to select the non-specific catch all of ‘other business reasons’ instead of disclosing specific reasons for their personal financial failures.

Registration framework in WA

As discussed earlier in the Discussion Paper, the builders’ registration framework in WA is set out in the BSR Act and BSR Regulations. The BSR Act distinguishes between building practitioners who are entitled to oversee and manage building work and building contractors who are entitled to enter into contracts to provide building work. Each building contractor is required to either be or employ a building practitioner to supervise the building work it carries out.

Section 18(1) of the BSR Act states that in order to attain registration as a building contractor, an applicant must satisfy the BSB that the applicant meets:

(b) the financial requirements, if any, prescribed by the regulations for a class of building services contractor; and

(g) any other requirements prescribed by the regulations for registration as a building services contractor in that class.
The requirements referred to in sections 18(1)(b) and (g) are prescribed in regulations 18 and 19 of the BSR Regulations. Neither of these regulations impose any obligation on applicants for registration to have completed any relevant business related education.

In order to attain registration as a building practitioner, an applicant must satisfy the BSB that the applicant has met requirements set out in section 17 of the BSR Act. One of these requirements relates to necessary qualifications and/or experience. Regulation 16 of the BSR Regulations prescribed five different sets, or combinations, of qualifications and/or experience that an applicant may use in order to meet the requirement in section 17 of the BSR Act. Set 1 consists of:

- the completion of a Diploma of Building and Construction or an approved equivalent; and
- seven years’ experience in carrying out and supervising building work.

The Diploma of Building and Construction is referenced as CPC50210 and is a defined qualification on the National Register on Vocational Education and Training. The Diploma builds on the corresponding Certificate IV qualification (CPC40110). Together, the Certificate IV and the Diploma consist of 26 core units and eight elective units. These core units include the following relevant business units:

- Managing small business finance;
- Selecting and preparing a construction contract;
- Applying legal requirements to building and construction projects;
- Preparing and evaluating tender documentation; and
- Monitoring costing systems on medium rise building and construction projects.

People who qualify to become a building practitioner via the possession of the qualifications and/or experience prescribed under Sets 2 – 5 may have undertaken relevant business education, however this education is not mandatory and accordingly it is not possible to establish a baseline for minimum relevant business education undertaken for any of these sets.

The WA approach can be contrasted with the approaches taken in SA and QLD where business education is explicitly required in the registration frameworks.
Case Study 5 – Business education requirements in SA

The licensing of builders in South Australian is regulated through the Building Work Contractors Act 1995 (SA). Section 9(1)(e) provides that in order to attain a licence, the Commissioner of Consumer Affairs must be satisfied that the applicant:

Has sufficient business knowledge and experience … for the purpose of carrying out the business authorised by the license.

Where the applicant is a company, this business knowledge and experience needs to be held by the company’s director(s). Part 1 of Schedule 2 of the Building Work Contractors Regulations 2011 (SA) sets out a series of 28 performance criteria that need to be satisfied for the purpose of section 9(1)(e). South Australia’s Attorney General’s Department has published a guide to how these performance requirements may be satisfied. The options are as follows:

- To have previously held an occupational licence in South Australia (this is essentially a grandfathering provision);
- To hold an equivalent licence in another state (e.g. registration under the BSRA);
- To have completed the following units:
  - Establish legal and risk management requirement of small business; and
  - One of the following:
    - Plan small business finances;
    - Manage small business finances; or
    - Undertake small business planning.

These are all vocational educational (TAFE level) units that can be undertaken as part of a building and construction qualification or undertaken separately;

- To have completed one of two vocational educational units on developing and implementing a business plan;
- To have completed a degree or diploma in business, economics or accounting;
- For the applicant to be an ASX listed company or the subsidiary of an ASX listed company;
- To have complete a Certificate IV and/or Diploma in Building and Construction; or
- To have complete a bachelor’s degree in construction management and economics.77

Similar business knowledge and experience requirements apply to plumbing, gas fitting and electrical contractors.

Case Study 6 - Business and financial education requirements in QLD

QLD has a comprehensive builder and trade licensing framework. This framework is contained in the QBCC Act and the QBCC Regulations. In order for a natural person to attain a building contractor’s licence, they must have completed a Certificate IV, Diploma or Advanced Diploma (CPC60212) in Building and Construction, depending upon the class of licence sought (builder – low rise, medium rise, open, restricted to shop fitting).78

In order for a company to attain a building contractor’s licence, it must employ a nominee who holds either a building contractor’s licence or a nominee supervisor’s licence in that same class.79 To attain a nominee supervisor’s licence, a person must, at the very least, have completed a number of units of technical competency relevant to the class of building work that they are seeking to supervise. These units are parts of the Certificate IV, Diploma and Advanced Diploma of Building and Construction qualifications but none cover relevant business topics.

For a further 45 classes of trade contractor licence, the regulations provide that an approved managerial qualification must be completed. The QBCC website lists this qualification as ‘BSBSMB401 – Establishing legal and risk management requirements of small business’.80 This is a single vocational educational unit that is provided in QLD by TAFE and numerous private registered training organisations.
Options for reform

Four possible options to improve the level of business skills in the industry have been identified below. Not all of the options set out below are mutually exclusive, and any recommendations stemming from the IAG’s feedback may contain elements from each of the different options.

Option 1 – Do nothing

This option is to maintain the status quo and could be justified on the basis that the introduction of mandatory business education requirements represents:

a) a cost to an already struggling industry;
b) a drain on the time of industry participants; and
c) a barrier to entry that is not imposed upon professionals in other industries.

**Advantages**

- Will not impose time or cost burdens on industry or government.
- Increased levels of business skills may have limited impact as:
  - Education does not necessarily instil a risk adverse, responsible mind-set in industry participants; and
  - Current problems in the WA industry are, in part, being driven by underlying market fundamentals, being an excess of market participants relative to a shrinking pool of construction work.

**Disadvantages**

- A key contributing cause of the rates of bankruptcy and insolvency will continue to remain unaddressed.

Option 2 – Voluntary education (building contractors)

Option 2 is to continue the work currently being undertaken by the Building Commission and industry associations to offer voluntary education programs for building industry participants, including registered building contractors.

The Building Commission could also work with other agencies to coordinate and develop specific programs targeting different types of industry entrants (e.g. new apprentices, new small business operators, and newly registered building contractors). This option will require the allocation of dedicated government funding.

**Advantages**

- Will not impose significant time or costs burdens on the industry.
- Will lead to increased levels of business skill of some participants in the industry.

**Disadvantages**

- Being voluntary means that any increases in business skill will not be industry wide.
- Voluntary education may attract low proportionate interest from industry participants.
- There will be ongoing costs to government in delivering the education.
Option 3 – Amend the BSR Act/BSR Regulations to prescribe minimum defined level of relevant business education (building contractors)

Amend the BSR Act and BSR Regulations to introduce a related competency framework, similar to that contained in South Australian legislation. These competencies would be aligned with existing vocational education training units and programs, and would cover such topics as:

- business law;
- construction contract administration;
- risk analysis and management;
- management accounting;
- business planning;
- cost estimating; and
- time and resource scheduling.

Where a building contractor undertakes or has undertaken some other form of business education, this could be assessed against the framework of the abovementioned units to identify which competencies had been satisfied. In other words, it would be open for the applicant for the grant or renewal of building contractor registration to have prior training recognised.

The requirement for business education would be linked to the registration of a building contractor not a building practitioner and would apply to the officers (per the definition in the Corporations Act) of the company. As part of applying for building contractor registration, an applicant which is a company would be required to demonstrate in its application that the officers of the company had each completed vocational training in the abovementioned areas of competency.

**Advantages**

- The majority of registered building practitioners have attained registration by virtue of having undertaken a Diploma of Building and Construction. As noted earlier in the Discussion Paper, this qualification contains a number of units of study relevant to business skills. Building contractors whose nominated supervisors have attained their registration through the completion of a Diploma of Building and Construction, and who are officers of the company, would likely be able to point to that qualification to satisfy many of the requirements of such a competency framework. A competency framework may therefore only impose a cost on a limited number of building contractors.
- A competency framework would establish a baseline of minimum business skill for all building contractors.

**Disadvantages**

- Will impose time and cost burdens on some industry participants.
- Will potentially create a barrier to entry for some industry participants, particularly those in regional areas.
- Will not improve business skills among subcontractors and suppliers.

Option 4 – Voluntary education programs (other building related trade contractors)

Option 4 is essentially the same as option 2, however it relates to industry participants other than registered building contractors. The content of such programs would differ slightly to reflect the fact that such participants are typically engaged as subcontractors.
Advantages

- Will not impose significant time or costs burdens on the industry.
- Will lead to increased levels of business skill of some participants in the industry.

Disadvantages

- Being voluntary means that any increases in business skill will not be industry wide.
- Voluntary education may attract low proportionate interest from industry participants.
- There will be ongoing costs to government in delivering the education.

Discussion Questions

(1) Do you agree with the proposition that there is a need to improving the level of business skills of participants in the building and construction industry? If not, why not?
(2) If a voluntary or mandatory education program was to be introduced, what topics would be of the most benefit for building contractors? And for sub-contractors? (e.g. business planning, management account, risk analysis and management, and business law)
(3) If mandatory business education requirements were to be imposed, should these requirements apply to all registered building contractors renewing their building contractor registration, or only to new applicants for building contractor registration?
(4) What benefits/costs do you foresee if mandatory business education requirements were to be imposed?
Endnotes

1. Home Building Act 1989 (NSW); Building Act 1993 (Vic); Queensland Building and Construction Commission Act 1991 (Qld); Building Services (Registration) Act 2011 (WA); Building Work Contractors Act 1995 (SA); Building Act 2000 (Tas); Construction Occupations (Licensing) Act 2004 (ACT); Building Act (NT).


4. Western Australia, Hansard, Legislative Assembly, 24 October 1934, p920.

5. Western Australia, Hansard, Legislative Assembly, 24 October 1934, p925.

6. Western Australia, Hansard, Legislative Assembly, 24 October 1934, p925.

7. Western Australia, Hansard, Legislative Assembly, 27 November 1934, p1579.

8. Western Australia, Hansard, Legislative Assembly, 30 August 1939, p430.

9. Western Australia, Hansard, Legislative Assembly, 6 September, p528.

10. Western Australia, Hansard, Legislative Assembly, 16 November 1939, p2004.

11. BR Act 1939, No. 29 of 1939, s. 10.

12. Builders’ Registration Act Amendment Act 1961, no. 54 of 1961, s. 9(e).


15. Builders’ Registration Amendment Act 1984 no 14 of 1984, s.4.

16. Western Australia, Hansard, Legislative Council, 4 April 1984, pp6657-6658.

17. Builders’ Registration Amendment Act 1984 no 14 of 1984, s.7.


22. Western Australia, Hansard, Legislative Assembly, 10 November 2010, p8495b:8496a.


25. Section 31 of the BSCRA Act.


27. Data available at < >

28. This includes disciplinary matter complaints for building practitioners, building contractors, painters and building surveyors.


36. Ibid p. 142.


38. Section 26(1) of the BSR Act.


40. Government of Western Australia. Department of Finance. 8 September 2017. Supplier Demerit Scheme Fact Sheet.

43 Above n 32 at pp 140.
44 Above n 32 at pp 140-141
45 Above n 32 at pp 141.
46 See for example Builders’ Registration Board of Western Australia and Utopia Industries Pty Ltd [2006] WASAT 295 at [19-21]; Building Services Board and Jeffrey West [2016] WASAT 143.
47 Section 179(1)(n) of the Building Act 1993 (Vic).
48 Ibid p. 32.
50 Section 18(2) of the BSR Act.
51 This occurred in a unique set of circumstances, involving consent orders to settle disciplinary proceedings against a building contractor and its sole director in the matter of Orders For BUILDING SERVICES BOARD, FRAYSON PTY LTD, ARMANO NOOR VR:59/2015.
52 Section 53(1)(b) of the BSR Act.
53 Section 440D of the Corporations Act 2001 (Cth).
54 Section 471B of the Corporations Act 2001 (Cth).
56 Schedule 2 of the QBCC Act – Dictionary.
57 Section 56AC(1) of the QBCC Act.
58 Section 56AC(2) of the QBCC Act.
59 Section 4AA of the QBCC Act.
60 Section 56AC(6) of the QBCC Act.
61 Section 56AG of the QBCC Act.
62 Section 56AE of the QBCC Act.
63 Section 57(1) and (2) of the QBCC Act; Schedule 1: “Transfer and validating provisions: Transitional provisions for the Queensland Building and Construction Commission and Other Legislation Amendment Act 2014” of the QBCC Act.
64 Section 58 of the QBCC Act.
70 Australian Securities and Investments Commission, Series 3.2 Statistics for 2012-2013 - Table 3.2.2.2, Series 3.2 Statistics for 2013-2014 - Table 3.2.2.2, Series 3.2 Statistics for 2014-2015 - Table 3.2.2.2, Series 3.2 Statistics for 2015-2016 - Table 3.2.2.2, Series 3.2 Statistics for 2016-2017 - Table 3.2.2.2, accessed on 10 March 2018 at http://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-3-external-administrator-reports/.
72 Ibid
76 Building Work Contractors Act 1995 (SA) section 2(c).
Queensland Building and Construction Commission Act 1991 (QLD) s.42B