

	RECOMMENDATION	GOVERNMENT RESPONSE
1A	<b>The NSW Building and Construction Commission:</b> That the NSW Government conduct a cost benefit analysis to establish whether to proceed with recommendation 1B.	<i>Examine benefits of the consolidation of government functions relating to the building and construction industry. Consideration of the establishment of Commission to be subject to cost benefit analysis and outcomes of Planning Review.</i>
1B	<b>The NSW Building and Construction Commission:</b> If the cost benefit analysis demonstrates that the overall benefits outweigh the costs, that the NSW Government establish a separate autonomous statutory authority entitled the "NSW Building and Construction Commission" with the sole responsibility for control and regulation of all aspects of the building and construction industry.	
2	<b>All building and construction under the one roof:</b> The NSW Building and Construction Commission, as the name suggests, will include under its umbrella all of the administrative oversight, regulatory and operational responsibilities relating to the NSW <i>Home Building Act 1989</i> . This will be a separate specialised division within the NSW Building and Construction Commission carrying out its activities in much the same way as it does now.	<i>Contingent on decision to establish Commission.</i>
3	<b>A licensing system for all:</b> The first key role of the NSW Building and Construction Commission will be to establish a licensing system which requires all builders and construction contractors operating in the commercial building sector to qualify within a particular graduated licence category according to the net financial backing they are able to demonstrate, in respect of proposed projects. The result will be that the work of builders and construction contractors will be restricted to the category of project value for which they have demonstrated financial backing and licensed accreditation.	<i>Subject to development and public release of a regulatory impact statement.</i>
4	<b>Financial health checks:</b> The second key role of the NSW Building and Construction Commission will be the financial monitoring and auditing of the accounts and financial affairs of all builders and contractors in NSW. There will be a formal set of standard financial and accounting requirements. In addition to those requirements, the NSW Building and Construction Commission will have the power, acting upon reasonable information, to conduct spot audits and to require the production of relevant financial information from building contractors and construction contractors who in the reasonable view of the Commission, may be in or may be in impending financial difficulties.	<i>Contingent on decision on licensing recommendation.</i>
5	<b>Discipline, complaints and standards:</b> The third key role to be assigned to the NSW Building and Construction Commission is the role of discipline, complaints and standards.	<i>Contingent on decision to establish Commission.</i>
6	<p><b>The Construction Trust:</b> Any payment by a principal to a head contractor or by a head contractor to a subcontractor on account of, or in respect of, any work done or materials supplied by the head contractor, any subcontractor, sub-subcontractor or supplier whether as a result of a favourable adjudication under SOPA or not, shall be made and treated in the following way:</p> <ul style="list-style-type: none"> <li>any cheque drawn upon a bank account in favour of the head contractor in respect of such work shall be held on trust for the head contractor, subcontractor, sub-subcontractor and supplier; and</li> <li>the proceeds of any such cheques when banked will be held upon the same Trust for the head contractor, subcontractor, sub subcontractor and supplier;</li> <li>where moneys are paid by electronic transfer they will be deemed to be held in Trust by the head contractor the instant they are received by electronic transfer from the principal.</li> </ul> <p>The statutory Construction Trust requirement should apply to all building projects valued at \$1,000,000 or more.</p> <p>The statutory Construction Trust will be established for the purposes of paying the subcontractors and suppliers.</p>	<i>Not supported at present time. The Government's response to the Inquiry's Trust recommendation is to trial the use of Trust Accounts on selected government construction projects before consideration of wider application.</i>
7	<b>Project value threshold for the Construction Trust:</b> The Construction Trust requirements shall not apply to projects of less than \$1 million.	<i>Not supported at present time – see response to recommendation 6.</i>

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8	<p><b>All subcontractors to be paid what is due and owing before head contractor draws from the fund:</b> The Inquiry recommends that a provision in or to the effect of 8 (2) of the Ontario Act be inserted into SOPA:</p> <p>The contractor or subcontractor is the Trustee of the Trust Fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the Trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.</p>	<i>Not supported at present time – see response to recommendation 6.</i>
9	<p><b>Certificate to bank to pay:</b> Before the head contractor/Trustee makes any payment out of the Trust Account to a subcontractor, it shall submit a certificate to the bank which:</p> <ul style="list-style-type: none"> <li>• Certifies that the payment is of an amount due and payable to a subcontractor engaged on (<i>here state the project</i>); and</li> <li>• That it is in order (<i>here state the sum</i>) that the sum be paid out to the named subcontractor from the Trust Account.</li> </ul>	<i>Not supported at present time – see response to recommendation 6.</i>
10	<p><b>Trustee may elect to deposit Trust funds into an authorised investment:</b> After the principal has made a progress payment into the Trust Account, the contractor/Trustee may elect to deposit the proceeds of the principal's progress payment into an authorised investment pursuant to the provisions of the <i>Trustee Act 1925</i> NSW. If the contractor elects to do so, the funds paid to the contractor by the principal by way of progress payment must be paid into a separate segregated and properly named Trust Account which plainly describes the nature of the Trust Account and specifies that the account and the proceeds thereof are being held by the contractor upon trust for specific subcontractors in a named project.</p>	<i>Not supported at present time – see response to recommendation 6.</i>
11	<p><b>Interest earned:</b> When moneys are paid out of the Trust bank account in the manner described in recommendations 6 and 8 hereof and the effect of such payments is to pay subcontractors in full, the head contractor is then entitled to retain any interest earned on the deposited funds from the date they were deposited into the Trust Account until the date of the payment out to the subcontractors.</p>	<i>Not supported at present time – see response to recommendation 6.</i>
12	<p><b>Third parties with knowledge of breach of trust are liable:</b> To ensure that the provisions are all embracing and to ensure that where Trust funds are dissipated wrongfully, subcontractors and suppliers remain protected, a provision similar to section 13(1) of the Ontario Act should be enacted in NSW. Under the heading "Liability for Breach of Trust by Corporation", section 13(1) provides:</p> <p>"In addition to the persons who are otherwise liable for breach of trust under this Part,</p> <ol style="list-style-type: none"> <li>a) Every director or officer of a corporation; and</li> <li>b) Any person including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,</li> </ol> <p>who has sensed to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust."</p>	<i>Not supported at present time – see response to recommendation 6.</i>
13	<p><b>Subcontractors' right to information:</b> The subcontractor who is the beneficiary under the Construction Trust of which the head contractor is the Trustee may, in accordance with its rights as a beneficiary and notwithstanding that payment to them may not be due at any particular time, exercise their rights as a beneficiary to call upon the Trustee to provide information as to the time, date of payment and details of payment made to the head contractor Trustee by the principal and payments out of the account to any subcontractor including the right to be informed of any reasons for non-payment or retention.</p>	<i>Not supported at present time – see response to recommendation 6.</i>
14	<p><b>Accounts and records to be maintained by Trustee:</b> Accounts and records shall be maintained by the contractor Trustee and the subcontractor Trustee. Such accounts and records shall record all payments into the Trust Account by the principal and all payments out of the Trust Account by the Trustee contractor and the purposes of such payments.</p>	<i>Not supported at present time – see response to recommendation 6.</i>
15	<p><b>Right to inspect the books of account:</b> All subcontractors who have made claims for payment upon a contractor have the right to inspect the accounts of the Trust referred to in recommendation 14.</p>	<i>Not supported at present time – see response to recommendation 6.</i>

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16	<b>Appointment of new Trustee:</b> Upon the insolvency of the head contractor/Trustee, the beneficiaries, any of them, shall be entitled to make application to the Supreme Court of NSW to a Master in Chambers for the appointment of a new Trustee and such application may be made notwithstanding that the due date for payment of the subcontractor's payment claims has not yet occurred. The court may make rules to facilitate the speedy and cheap disposition of such applications including whether such applications may be made ex parte.	<i>Not supported at present time – see response to recommendation 6.</i>
17	<b>No breach if payment made in accordance with adjudication:</b> It shall not constitute a breach of trust if a contractor or subcontractor pays money out of a Trust Account in accordance with, and on the basis of a SOPA adjudication and it is later determined by a court, arbitrator or by expert determination, that the amount owing to the subcontractor or the sub-subcontractor or supplier, as the case may be, is more or less than the adjudicated sum paid out.	<i>Not supported at present time – see response to recommendation 6.</i>
18	<b>Retention sums:</b> Retention sums as between principals and head contractors and head contractors and subcontractors shall be held in the construction Trust Account referred in to recommendation 6. Those retention sums shall be paid out of such account in accordance with any relevant certificate, agreement between the parties, SOPA determination, or a decision of a court of competent jurisdiction, an arbitrator or expert determination, as the case may be.	<i>In principle support. Retention to be held in Trust fund administered by Office of Small Business Commissioner under Retention Trust model to be developed and subject to regulatory impact assessment and industry consultation.</i>
19	<b>Interest in retention sums:</b> (A) Subject to the resolution of any dispute concerning the entitlement to the return of the retention sum, the head contractor and the subcontractor, as the case may be, shall be entitled to the interest earned on the fund. (B) Where the corpus of the fund is insufficient to provide for the cost of any necessary rectification work, then the interest earned shall also be available to provide for such work.	<i>Not supported. Interest earned to fund administration of Trust fund and education campaign for industry.</i>
20	<b>Certificate needed to pay:</b> No moneys shall be paid by the principal to the head contractor unless and until, the head contractor has provided to the principal a statutory declaration in the form required by recommendation 21.	<i>In principle support. To reduce administrative burden the legal requirement will be for a written statement rather than statutory declaration.</i>
21	<b>Legal requirement to provide statutory declarations:</b> Contractors should be obliged to swear statutory declarations that subcontractors have been paid what is due and payable to them. An appropriate amendment to SOPA should be made.	<i>In principle support. To reduce administrative burden the legal requirement will be for a written statement rather than statutory declaration.</i>
22	<b>Power to prosecute for breach of the Oaths Act:</b> As prosecutions for a breach of the <i>Oaths Act 1900</i> (NSW) are at present, essentially in the hands of the police, they should be brought under the umbrella of SOPA so that the NSW Department of Finance and Services which administers that Act, may have the power to prosecute those who commit offences against section 25 and 25A of the <i>Oaths Act</i> .	<i>In principle support. However, Government is to develop an alternative mechanism under the Building and Construction Industry Security of Payments Act to address this issue.</i>
23	<b>Endeavouring to circumvent Oaths Act is an offence:</b> It should be made an offence to endeavour to circumvent the operation of section 25 and 25A of the <i>Oaths Act</i> by "renegotiating" the terms of payment by in effect, extending those terms of payment by oral agreement at the request of the head contractor, so that the statutory declarant may feel more comfortable in swearing to the truth of the statement that all moneys "due and payable" to subcontractors have been paid.	<i>In principle support. However Government proposes consideration of a requirement under the Building and Construction Industry Security of Payments Act rather than relying on statutory declarations under the Oaths Act.</i>
24	<b>Statutory requirement which sets a maximum time for principals' payment to head contractor:</b> The principal must pay progress payment claims to the head contractor within 15 days of the receipt of progress payment claims in proper form.  Such a requirement should be inserted into SOPA.	<i>Supported</i>
25	<b>Offence and penalty rates of interest if head contractor not paid on time:</b> In the event that the principal does not pay the head contractor's progress payment claim in full within 15 days of the receipt of the progress payment claim in proper form, the principal shall be guilty of an offence under SOPA and in addition shall pay penalty rates of interest (to be specified) upon the full amount of such claim.	<i>In principle support for penalty rates of interest. Issues to be considered once impact/effectiveness of amendments are known and assessed.</i>

	RECOMMENDATION	GOVERNMENT RESPONSE
26	<b>Disputed progress payment to head contractor:</b> Where there is a genuine dispute concerning whether the whole or part of a particular progress payment claim is due and payable to the head contractor, it shall not be necessary for the principal to pay the amount in dispute within the 15 day period and that dispute shall be dealt with in accordance of the provisions of SOPA.	<i>Supported</i>
27	<b>Prompt payment of amount not in dispute to head contractor:</b> That part of the progress payment claim which is not disputed by the principal shall be paid to the head contractor by the principal within 15 days of receipt of the progress payment claim.	<i>Supported</i>
28	<b>Adjudicated sum to be paid into construction Trust Account – dispute between principal and head contractor:</b> In the event that the principal and the head contractor are not able to resolve the dispute and a claim is taken to SOPA, then any amount the SOPA adjudicator determines is due and payable by the principal to the head contractor shall be paid directly into the Trust fund referred to in recommendation 6.	<i>In principle support for payment of adjudicated sum to be paid into existing trading account of head contractor rather than Trust Account.</i>
29	<b>Statutory requirement which sets a maximum time for head contractor’s payment to subcontractor:</b> The head contractor must pay progress payment claims to the subcontractor within 28 days of the receipt of progress payment claims in proper form. Such a requirement should be inserted into SOPA. Recommendation 32 describes the reasons behind the difference in timing of payments from the principal to the head contractor and from the head contractor to the subcontractor.	<i>In principle support. Extended to 30 days to provide head contractors with some additional time to consider and approve payment claims from subcontractors.</i>
30	<b>Offence and penalty rates of interest if subcontractor not paid on time:</b> In the event that the head contractor does not pay the subcontractor’s progress payment claim in full within 28 days of the receipt of the progress payment claim in proper form, the head contractor shall commit an offence under SOPA and shall be liable to pay penalty rates of interest (to be specified) upon the full amount of such claim.	<i>In principle support for penalty rates of interest. Issues to be considered once impact/effectiveness of amendments are known and assessed.</i>
31	<b>Disputed progress payment to subcontractor:</b> Where there is a genuine dispute concerning whether the whole or part of a particular progress payment claim is due and payable to the subcontractor, it shall not be necessary for the head contractor to pay the amount in dispute within the 28 day period and that dispute shall be dealt with in accordance of the provisions of SOPA.	<i>Supported – 30 days in line with response to recommendation 29.</i>
32	<b>Prompt payment of amount not in dispute to subcontractor:</b> That part of the progress payment claim which is not disputed by the head contractor shall be paid to the subcontractor by the head contractor within 28 days of receipt of the progress payment claim.	<i>Supported – 30 days in line with response to recommendation 29.</i>
33	<b>Adjudicated sum to be paid into construction Trust Account – dispute between head contractor and subcontractor:</b> If the SOPA adjudicator decides that there is money due and payable by the head contractor to the subcontractor, then such amount shall be paid by the head contractor directly into the Trust Account referred to in recommendation 6.	<i>In principle support for payment of adjudicated sum. Adjudicated sum to be paid into existing trading account of subcontractor rather than Trust Account.</i>
34	<b>Contract term void if payment to head contractor is longer than 15 days:</b> That any contractual or non-contractual stipulation in or to the effect that moneys properly due and payable by the principal to a head contractor should be paid later than 15 days from the receipt by the principal of a progress payment claim in proper form, shall be void and of no effect.  Failure to comply with the provisions relating to prompt payment will result in penalty rates of interests being paid by the principal.	<i>Supported</i>
35	<b>Contract term void if payment to subcontractor term longer than 28 days:</b> That any contractual or non-contractual stipulation in or to the effect that moneys properly due and payable by a head contractor to a subcontractor should be paid later than 28 days from the receipt by the contractor of a progress payment claim in proper form, shall be void and of no effect. Failure to comply with the provisions relating to prompt payment will result in penalty rates of interests being paid by the head contractor.	<i>Supported – 30 days in line with response to recommendation 29.</i>

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36	<p><b>Subcontractor option to suspend work:</b> A statutory provision should be enacted which ensures that in the event of non-payment within 28 days, a subcontractor shall be entitled to suspend the work until it has been paid and that such a suspension will be deemed not to be a breach of contract and any provision which purports to deem or define a subcontractor suspension of work in those circumstances as a breach of contract, shall be void and of no effect.</p>	<p><i>In principle support. Extended to 30 days in line with recommendation 29.</i></p>
37	<p><b>Dispute Resolution Boards:</b> That in every Government contract with a project value of ten million dollars or more there would be some kind of dispute prevention and dispute resolution process following the lines of those recommended by Dispute Resolution Boards Australia.</p>	<p><i>In principle support, subject to value for money consideration in respect of alternative dispute resolution methods.</i></p>
38	<p><b>SOPA payment claims:</b> The requirement that contractors' and subcontractors' progress payment claims include the words required under Section 13(2)(c) of SOPA, should be abolished.</p>	<p><i>Supported</i></p>
39	<p><b>Expand SOPA jurisdiction:</b> The jurisdiction and powers given to adjudicators under SOPA should be augmented by:</p> <ol style="list-style-type: none"> <li>1. Enabling the adjudicator to decide on an interim basis disputes concerning bank guarantees and whether or not a party was entitled to cash a bank guarantee.</li> <li>2. Providing for the resolution of disputes concerning the entitlement or otherwise to retain retention sums.</li> <li>3. Expanding the jurisdiction to enable adjudicators to resolve disputes in the home building sector in respect of projects valued at \$1,000,000 or more.</li> <li>4. Giving adjudicators power to issue a final certificate after hearing both sides to a dispute involving sums less than \$40,000.</li> <li>5. Time limits be increased yet remaining consistent with speedy resolution.</li> <li>6. Removing the right of a claimant to choose its own adjudicator.</li> </ol>	<ol style="list-style-type: none"> <li>1. <i>In principle support.</i></li> <li>2. <i>In principle support. Subject to development of Retention Trust model.</i></li> <li>3. <i>In principle support.</i></li> <li>4. <i>In principle support.</i></li> <li>5. <i>In principle support.</i></li> <li>6. <i>In principle support though relates to selection of authorised nominating authority.</i></li> </ol> <p><i>Issues to be considered in comprehensive review of the Act in 2015.</i></p>
40	<p><b>Training of adjudicators:</b></p> <ol style="list-style-type: none"> <li>1. In the light of the additional functions which have been recommended to be carried out by adjudicators under the provisions of SOPA, there should be instituted a more intensive and detailed training course to be successfully completed before any person can qualify to act as an adjudicator and exercise functions under SOPA.</li> <li>2. Adjudicators' training and refresher courses should be devised and conducted by an independent neutral and competent body qualified to do so, such as the Institute of Arbitrators and Mediators Australia. Payment for such courses shall be made by the applicants and the Institute of Arbitrators and Mediators Australia shall be entitled to levy reasonable charges for the development and conduct of such courses.</li> <li>3. Such courses of instruction and training should be open only to those who have had substantial relevant experience in the building and construction industry and shall consist at least of the following modules: <ul style="list-style-type: none"> <li>• Analysis of the <i>Building and Construction Industry Security of Payment Act 1999</i> (NSW);</li> <li>• Overview of the law of contract;</li> <li>• Analysis of building contracts;</li> <li>• Analysis of costs and claims in the building and construction industry;</li> <li>• Detailed analysis of building construction claims and contractor entitlements; and</li> <li>• An overview of the law of building and construction.</li> </ul> </li> </ol>	<p><i>In principle support</i></p>

	RECOMMENDATION	GOVERNMENT RESPONSE
41	<p><b>Concerning Government:</b></p> <ol style="list-style-type: none"> <li>1. Require Government to re-evaluate its order of priorities in the tender situation. Government should not be contributing to the production and submission of tenders which can drive building contractors down to unacceptably low margins.</li> <li>2. Project Bank Accounts should be utilised on every Government project.</li> <li>3. Financial checks should be carried out on a rolling basis.</li> </ol>	<ol style="list-style-type: none"> <li>1. <i>Supported.</i></li> <li>2. <i>In principle support. PBAs to be trialled on selected government construction projects and subject to assessment of cost and effectiveness, rolled out to all government construction projects.</i></li> <li>3. <i>Supported.</i></li> </ol>
42	<p><b>Mischief and unintended consequences:</b> In order to guard against any attempt to tie up funds in the Trust and prevent the free flow of cash to intended recipients the Government should legislate to ensure that when a subcontractor or sub-subcontractor as the case may be, disputes the amount owing to it, that the subcontractor or sub subcontractor shall in the first instance be required to make its claim through SOPA.</p>	<p><i>In principle support. This recommendation assumes implementation of the statutory Trust recommendation.</i></p>
43	<p><b>Education:</b> The industry as a whole has the capacity to draw upon a wide range of education material. However the industry needs to take the whole of that material, work with experts in the education field and produce targeted syllabuses for particular purposes. This recommendation does not stop at those subjects which will improve financial education and administrative skills. The time has passed for off-hand comments to be made about the lack of education in the industry.</p> <p>An education committee consisting of representatives from the Office of the Small Business Commissioner, the Housing Industry Association, the Master Builders Association, the Institute of Arbitrators and Mediators Australia and representatives from the Department of Education and Communities should be brought together to develop programs which cover the full range of skills and subjects in the building and construction industry aside from those specialist trade and certificate courses the purpose of which is to provide certification.</p>	<p><i>Supported</i></p>
44	<p><b>Transition:</b> That any legislative reforms enacted in accordance with the recommendations of this Report should:</p> <ul style="list-style-type: none"> <li>• Be the subject of an advisory and education program;</li> <li>• Be set out in the form of an Exposure Draft; and</li> <li>• Be transitioned into law over a two year period.</li> </ul>	<p><i>In principle support</i></p>