SUBMISSION TO THE PRODUCTIVITY COMMISSION

Housing Supply, Construction Productivity and Security of Payment

The Institutional Conditions Necessary to Convert Housing Approvals into Completed Dwellings



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THE ORIGIN AND PURPOSE OF THIS SUBMISSION

The origins of Security of Payment legislation in Australia are rooted in the protection of vulnerable subcontractors from unfair payment practices and financial collapse. When Morris Iemma introduced the *Building and Construction Industry Security of Payment Act 1999 (NSW)*, the legislative objective was clear: **to prevent the systemic exploitation of sub-contractors and trade contractors whose cash flow was routinely weaponised against them**.

The NSW SOP Act commenced on 26 March 2000 and became the first fully-operational statutory payment protection regime in Australia.

By late 2014 and into 2015, the scale of insolvency in the Australian construction industry had reached crisis levels. The Senate Economics References Committee conducted a comprehensive inquiry into insolvency in the construction industry, delivering its Final Report on 3 December 2015 and stated:[1]

Businesses operating in the Australian building and construction industry face an unacceptably higher risk than any other stand-alone industry of either entering into insolvency themselves, or becoming the victim of insolvency further up the contracting chain.

The industry's rate of insolvencies is out of proportion to its share of national output. Over the past decade the industry has accounted for between 8 per cent and 10 per cent of annual GDP and roughly the same proportion of total employment. Over the same period, the construction industry has accounted for between one-fifth and one-quarter of all insolvencies in Australia.

This outcome isn't, as some have argued, the result of market forces. While the construction industry is highly competitive and market forces play a part, there are other powerful factors at play. The structure of the commercial construction sector, serious imbalances of power in contractual relationships, harsh oppressive and unconscionable commercial conduct play a major role when combined with unlawful and criminal conduct and a growing culture of sharp business practices all contribute to market distortions. As a result, the industry is burdened every year by nearly $3 billion in unpaid debts, including subcontractor payments, employee entitlements and tax debts averaging around $630 million a year for the past three years.

Insolvency and poor payment practices in the industry are not a new problem. This report is the latest in a long serios of inquiries and reports dating back to at least 1995 that have considered the merits of changes to the law to regulate the payment of head contractors, subcontractors, workers and others in the building and construction industry. These inquiries have provided report after report, recommendation after recommendation to State and Commonwealth governments, providing compelling evidence that any participant in a construction project who holds or receives money on account of the contract and is under an obligation to pay another participant, should be subject to a statutory obligation to hold the money as a trustee.

Similarly, a number of inquiries and reports have recommended the introduction of uniform, national security of payments legislation in the construction industry.

Yet, little or nothing has been done. To the extent that regulatory responses have been implemented, Australia now has a fragmented and disparate legislative regime covering security of payment in the construction industry.

In the view of the committee, the relative inaction that has characterised most government responses to the completely unacceptable payment practices in the construction [industry] has to end. The

[1] The Senate Economics References Committee, 'I just want to be paid' – Insolvency in the Australian construction industry, Final Report, December 2015, Executive Summary starting at page 13.

continued viable of the industry in its current structure requires Commonwealth intervention to ensure that businesses, supplier and employees that work in the industry's subcontracting chain get paid for the work they do.

The construction industry market must be supported so that it operates in as efficient a manner as possible and distortions of the kind discussed in this report should be rectified as far as possible.

The Commonwealth Government did not provide a response to the Senate Economics References Committee Final Report – Insolvency in the Australian Construction Industry – until May 2017. While the Commonwealth expressed nominal support for a nationally aligned SOP regime, it decided – "… not my circus, not my monkeys" – when deferring the broken but nevertheless sticky ball of wax back to the individual States and Territories. This choice has deeply institutionalised Australia's fragmented regulatory landscape in a materially negative way. While individual states have scrambled to pass patchwork fixes in some instances and new regimes in others, the systemic risk to subcontractors remains severely unmitigated and is worse today than it was nearly 12 years ago.

The financial consequences of this prolonged regulatory failure have now eclipsed the warnings of 2015. According to ASIC insolvency data, construction remains Australia's worst-affected industry, accounting for approximately 24.5% of all companies entering external administration for the first time in 2025–26. Approximately 3,472 construction companies entered external administration during that financial year.

The contemporary scale of the problem is illustrated by the voluntary administration of the **Bathla Group on 25 August 2026**. The administration extends across 542 companies and presently involves approximately **$3.4 billion in known creditor claims**, making it one of the largest construction insolvencies in Australian history.

The subsequent events make the point more starkly. By 24 September 2026, Bathla had reduced to a skeleton staff and was ceasing construction activity on the project for which funding was unavailable, leaving approximately 2,000 dwellings under construction and another 13,000 in its development pipeline exposed to the consequences of financial failure.

Bathla is therefore not merely another corporate insolvency. Its collapse returns this submission directly to the vulnerability identified by the Senate Economics References Committee in December 2015 – when a major participant in the construction chain fails, those further down that chain face the risk of not being paid for work already performed. That is why government attention must be directed to **this end of the conveyor belt**.

The Senate Committee's findings were not new. More than twenty years earlier, Sir Michael Latham had identified the relationship between payment security, confidence and construction industry performance. In his landmark report *Constructing the Team*, Latham stated that "*it is absolutely fundamental to trust within the construction industry that participants should be paid for the work which they have undertaken*".

For Latham, security of payment was not separate from productivity. It was one of the institutional conditions necessary to achieve it. His proposed modern construction framework required clearly defined payment periods, compensation for late payment, secure trust-fund payment mechanisms and rapid adjudication. He expressly recognised that securing payment in advance would provide "*much greater confidence for contractors and subcontractors*".

The economic proposition is straightforward. A contractor or subcontractor who has confidence that payment for work performed is secure can concentrate its capital, labour and management upon performing the work. A contractor who does not know whether or when it will be paid must instead preserve cash, manage payment risk, pursue debt, price uncertainty and divert management resources away from production. Productivity cannot sensibly be examined independently of that commercial reality.

Put more simply: secure the payment for the person doing the work and give that person confidence that payment will arrive. Much of what government now describes as a construction "productivity problem" then begins to resolve itself at the place where productivity actually occurs — on the construction site.

I made submissions to that inquiry and was subsequently invited by Senator Doug Cameron to give evidence. My evidence is discussed in Chapter 6 of the Final Report, *The Collapse of Walton Constructions*, where the Committee documented the catastrophic consequences of builder insolvencies on subcontractors, suppliers, and small businesses. The Senate Committee made 44 recommendations and concluded that the fragmented Security of Payment laws across Australia were failing to protect subcontractors.

The Senate inquiry found that the existing Security of Payment regimes were split between the "East Coast model" and the "West Coast model," creating confusion, inconsistency, and loopholes for businesses operating across borders. The Committee explicitly recognised that the absence of a harmonised national framework was contributing to widespread non-payment, commercial disputes, and the collapse of thousands of small subcontracting businesses.

In late 2016, the Turnbull Government sought crossbench support to reinstate the Australian Building and Construction Commission (ABCC) through the *Building and Construction Industry (Improving Productivity) Bill 2016*. As part of the political negotiations required to secure passage of the Bill, the Government agreed to establish a Security of Payments Working Group and commission a national review of Security of Payment laws.

On 21 December 2016, Mr John Murray AM was formally appointed to conduct that review.

Mr Murray's task was to examine the broken, inconsistent, and conflicting Security of Payment laws across Australia and design a single, coherent national framework capable of ensuring subcontractors were actually paid for the work they performed. Murray selected *the Building and Construction Industry Security of Payment Act*

1999 (NSW) as the model legislation because it was the original, proven, judicially-settled, and operationally effective Security of Payment framework.

The New South Wales SOP legislation had the strongest enforcement architecture, the clearest separation of payment and dispute processes, and the most coherent adjudication system.

Although Murray says the policy objective is preserving the cashflow of the party that performed the construction (or supplied the related goods and services) and that prompt payment is critical to maintaining that cashflow, he spends no time at all measuring the thing he says the legislation exists to achieve in the way I show it should be measured.

Murray does use statistics. He looks at numbers of adjudications, fees, late-payment surveys, insolvencies, claim sizes and Queensland "fall-over" rates. His contents even identify tables for Queensland adjudication fees and fall-over statistics. However, my concern regarding the claimed-amount / adjudicated amount focuses on a but critically important question, namely:

"**Of the money that industry participants say is not flowing and therefore engage both parts of statutory adjudication contemplated by the legislation, how much money does that mechanism actually determine should flow?**"

My approach is an outcome measure. This is important because Murray himself describes (as does the Senate Economics Reference Committee) the construction industry as a pyramid in which subcontractors at the bottom depend upon money flowing back down the contractual chain. Moreover, Murray says the subcontractor heavily depends upon timely and full payment to operate its construction business in a very demanding environment, meet payroll, and to make the critical and timely purchase of materials. So, if cash flow is the statutory objective (as shown in the table at the end of this section), the obvious monitoring question therefore focuses on:

"**How much cash is the statutory mechanism actually restoring to the payment chain?**"

This is the reason why I have insisted on publication and data for over 12 years:

- The number of applications tells us how often the statutory machinery is being invoked by claimants.
- The claimed amount tells us **the value of the alleged payment blockage entering the statutory payment system**.
- The adjudicated amount tells us how much the independent statutory process determines should be released back into the chain.

The relationship between the claimed amount and the adjudicated amount – especially tracked annually and by claim size – becomes an important indicator of how the statutory payment mechanism is functioning. This indicator does not prove why the gap exists, because some claims will legitimately fail or be reduced. This is contemplated by the statutory process. However, without that figure, the issue of

what is causing the gap and why it exists in the manner it does cannot be investigated or assessed until such fundamental information is known.

Murray himself provides us with an extraordinarily useful foundation in support of this position. He says: "What matters for a subcontractor when submitting a payment claim is that it is advised as to the status of its claim as early as possible". Murray then says the legislation's objective is to promote prompt payment "so as to enhance the cash flow of subcontractors". Yet when he gets to **data collection and reporting**, Recommendation 79[2] merely calls for jurisdictions to develop consistent standards for reporting data collected from ANAs/adjudicators, based on the NSW format and published annually.

My submissions to the various inquiries over the years have been focused on the data and what it is telling us. Without big data analytics like the claimed amount and the adjudicated amount, the industry, the regulators, and the Parliament are blind and deaf, a situation no different than a kangaroo wandering onto a motorway at night.

Murray recognised that monitoring mattered. He recommended nationally consistent reporting. However, he did not elevate the **claimed amount versus adjudicated amount** into a primary performance measure of whether the legislation was actually achieving its cashflow purpose.

If the government reports –

Applications received	→	Applications decided	→	Average decision time	→	Adjudicator fees

it can say the machinery is operating, which is exactly what I have been confronted by in Queensland at every administrative level — from regulator to Minister.

The relevant question is not merely whether an administrative outcome was reached, which appears to be the Queensland approach. The real question is: WHAT HAPPENED TO THE MONEY?

If **$X** entered adjudication as claimed unpaid progress payments and only **$Y** was adjudicated as payable, **that relationship is something the regulator should be monitoring, publishing and investigating over time**. It is the financial throughput of the statutory mechanism and assists in showing us whether the object (or main purpose) of the legislative regime is being achieved and to what financial extent.

If cash flow is the lifeblood of the construction industry, then the relationship between the amount claimed and the amount adjudicated is one of the industry's vital signs. A regulator that does not monitor that relationship is counting procedures while failing to take the patient's pulse.

[2] Recommendation 79 states (page 304 of 382 (268)): "*The jurisdictions should cooperate to develop a consistent set of standards for reporting data collected from authorised nominating authorities/adjudicators about the use of security of payment legislation. The reporting of such information should be based on the NSW format and published annually*".

Before 2014, Queensland's BCIPA model preserved the core NSW architecture. I am on the record praising the concept of Queensland's legislative portfolio as it stood before 2014. The Committee's own 2012 Report recognised that Queensland had a coherent, integrated regulatory framework, noting that the QBSA oversaw licensing, rectification, insurance, and dispute processes under a unified statutory structure. As the Report states, the QBSA was intended to be a "one stop shop" for building regulation and consumer protection.[3]

However, once the Newman–Mander Government dismantled the system — disbanding the QBSA, fragmenting its functions, and later with the Palaszczuk-de Brenni replacing BCIPA with the BIF Act — Queensland ceased to be a credible legislative benchmark. The Committee itself warned that the system required "a clear and transparent divide between the roles of licensing; management of directions to rectify… and the home warranty scheme" because the existing structure had become dysfunctional.[4]

Murray's position followed logically: **Queensland's post-2014 framework was no longer stable, coherent, or internally consistent, and therefore could not serve as the foundation for national harmonisation**. NSW remained the only jurisdiction with an intact, judicially-tested, operationally effective Security of Payment model.

The discussion that follows builds upon these historical foundations and demonstrates why federal Security of Payment legislation is now essential. It also explains why a new Commonwealth Building and Construction Commission (CBCC) must be established as the federal administrator responsible for harmonising licensing, regulating construction industry conduct, and ensuring that subcontractors, consumers, and the public are protected from shoddy work, unfair practices, and fraudulent business behaviour.

This submission proceeds from diagnosis to remedy:

- It first examines the conception of productivity underlying the present inquiries;

[3] Inquiry into the Operation and Performance of the Queensland Building Services Authority 2012, Report No. 14, Transport, Housing and Local Government Committee November 2012: "The Committee received submissions raising concerns about the organisational culture of the QBSA, including allegations of bullying, unequal bargaining power and the use of contractual devices that unfairly disadvantage subcontractors". This is precisely the language of my submission, which stated: "…adhesive relationships… illegitimately and indiscriminately concentrate power in the hands of the building contractor… permitting offensive and unconscionable terms to interrupt the flow of money through the contractual chain…" (Submission No. 82). My submission argued that statutory adjudication should be expanded beyond payment disputes. Parts 3, 4A, 5, 6, 7 of the then Queensland Building Services Authority Act 1991 should be amended for consistency, and subcontractors were exposed to irreparable harm due to regulatory gaps. The Committee reflected this in Recommendation 22: "The Committee recommends that the Minister… review the evidence provided… about payments and contractual issues relating to subcontractors with a view to improving the current system" (Report No. 14, Rec 22). This recommendation exists because of my submission. My submission was one of the only ones that provided a systemic analysis of subcontractor disadvantage. My submission strongly praised Queensland's legislative portfolio as a coherent regulatory framework, especially at Part 4B (DBC Act 2000), Part 5 (Home Warranty Scheme), BCIPA 2004, and the integrated nature of the QBSA portfolio. The Committee echoed this in Section 4.2.2: "Evidence was received that the QBSA genuinely seeks to achieve balance… and that the legislative framework provides important protections for consumers" (Report No. 14, s 4.2.2). This is exactly the theme of my submission, which stated: "…the legislative reform commencing in 1999 has been highly successful and is a model that other jurisdictions are carefully considering…" (Submission No. 82). The Committee did not name me by name but used my argument.

[4] Committee Report No. 14, Recommendation 2 (2012).

- then examines the construction industry as it actually operates, including the movement of performance and money, insolvency and the position of small business; compares the Australian institutional framework with California; and
- finally returns to the Four-Point Plan I placed before the Senate in 2015 and develops the implementation measures necessary to give that plan practical effect.

If any of these statutes –

- *Building and Construction Industry Security of Payment Act 1999 (NSW)*,
- *Building and Construction Industry Security of Payment Act 2002 (Vic)*,
- *Construction Contracts (Security of Payments) Act 2004 (NT)*,
- *Building and Construction Industry Security of Payment Act 2009 (ACT)*,
- *Building and Construction Industry Security of Payment 2009 (Tas)*,
- *Building and Construction Industry Security of Payment Act 2009 (SA)*,
- *Building Industry Fairness (Security of Payment) Act 2017 (Qld)*,
- *Building and Construction Industry (Security of Payment) Act 2021 (WA)* –

are to make any sense at all, they must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is NONSENSE.

This submission does not originate from an academic think-tank, a government agency, or a sheltered economics committee. Rather, it has been written by a frontline construction law practitioner and security of payment adjudicator who deals daily with the real-world execution, commercial friction, and financial wreckage of the Australian construction sector.

While the Federal Treasury, the Senate Select Committee, and the Queensland Productivity Commission engage and engaged in a collective, hand-wringing exercise over housing numbers, they have crippled their own inquiries from the outset.

The Federal Treasury, the Senate Select Committee, and the Queensland Treasury have all made what I consider to be a fundamental, fatal error, that is, **they have each failed to define what "productivity" actually means on a live construction site when drafting their respective Terms of Reference for each of the reviews being undertaken with respect to productivity and the housing crisis.**

In each Terms of Reference, there is a nonsensical policy illusion that immediately stands out to me. Here, each government body is making the mistake of front-end approval throughput for systemic economic health.

"Production on Paper" and Ministry of Plenty Statistics

This is administrative nonsense in the first degree. The government bodies, and each of them, have the bureaucratic blindness of Goodhart's Law and are running the "Red Queen's Race" from Lewis Carroll's Through the Looking Glass.

The silliness of such bureaucratic nonsense is best illustrated by the "I Love Lucy" episode entitled Job Switching. The conveyor belt hysterics and antics highlight a fatal flaw in the government's administrative logic. A system that measures and forces speed at the "front-end" (approvals) completely breaks the actual processing unit at the "back-end" (the actual construction workforce on the ground).[5]

The Ministry of Plenty (called Miniplenty in Newspeak) in George Orwell's dystopian novel 1984 is the government department responsible for Oceania's economy, rationing, and state-controlled production. Despite its name, the Ministry of Plenty does not create abundance. Instead, the Ministry operates to maintain permanent scarcity, poverty, and severe food and supply shortages.

In *1984*, the Ministry of Plenty constantly announces massive increases in production, for example, the output of boots. Yet, the citizens face severe shortages and walk around barefoot. The bureaucracy only cares about the reported statistic and is completely, as here, detached from what is happening on the ground and the lack of any physical utility created by those sitting in the ivory tower of bureaucracy.

The housing policy responses enacted by both State and Federal governments over the past two years represent a classic manifestation of **Goodhart's Law**: [6] *"When a measure becomes a target, it ceases to be a good measure"*.

By treating "planning approval throughput" as the primary proxy for addressing the housing crisis, the government has introduced a severe metric distortion. The government has failed to evaluate how this metric balances against physical and economic capacity. In public policy risk design, **Materiality** is determined by balancing two distinct factors at the time an objective is set:

Materiality	=	**Probability** that the event will occur	X	Anticipated magnitude of the event

In this context, the "event" is the systemic failure of approved dwellings to transition into completed homes, a state of regulatory affairs that creates a pipeline of "*phantom supply*".

[5] "Housing construction productivity: Can we fix it?", Australian Government Productivity Commission, Research Paper, 16 February 2025: https://www.pc.gov.au/inquiries-and-research/housing-construction/

[6] Goodhart's law is an adage named after British economist Charles Goodhart. Goodhart observed that when you reward or penalise people based on a specific metric, these same people will find ways to change their behaviour to maximise the metric being promoted. However, these same people become blinded by the metric and only focus on the metric while completely ignoring the actual goal behind the metric and the policy in support. In other words, people start "gaming the system". The metric becomes the target to hit rather than a true reflection of quality, productivity, or even progress. George Goodhart originally formulated the idea in 1975 to describe monetary policy. He noted that if a central bank tries to regulate the economy by targeting a specific supply metric, the relationship between that metric and the wider economy breaks down because banks and businesses shift their financial structures to adapt. Anthropologist Marilyn Strathern later rephrased it into the popular, broader version – "*When a measure becomes a target, it ceases to be a good measure*" – commonly used today.

An examination of recent productivity inquiries and final reports reveals a complete absence of this balancing equation.

The probability that the event will occur sits on a continuum that ranges from uncertain to absolute certainty with the likelihood now sitting at high to absolute certainty. The government's focus has remained stubbornly fixed at the ministerial level on a single indicator, that is, SPEED OF PROCESSING. By operating under the flawed assumption that faster approvals somehow equate to more keys in the doors, the government has virtually guaranteed a widening gap. The statistical record now shows with near-absolute certainty that an approval no longer correlates with a commencement.

The magnitude of the event, that is, the market-wide impact of the accelerating conveyor belt represents the volume of unbuilt, stalled or collapsed projects accumulating on the conveyor belt within the pipeline created by government policy. This whole process distorts the true market capacity and fails to recognise that for real productivity to be achieved, cash must be flowing downstream in the construction industry contractual chain. The Bathla Group collapse serves as a stark, real-world timely case study of this unaddressed magnitude. A developer can hold vast portfolios of approved land or density permits, yet in an environment of cash flow not moving down the contractual chain as being shown statistically in Queensland (the only State where the pulse of cash flow can be taken); of soaring material costs; of labour scarcity; and of tightening credit, the approvals now being produced at faster speeds cannot be converted.

By failing to apply a materiality lens, the governments' "ivory tower" reviews have built a regulatory conveyor belt that pumps out paperwork while the actual marketplace remains completely bottlenecked.

The overlooked determinative factor, as I discussed in my submissions to the Queensland Productivity Commission and to the Queensland Minister of Public Works, becomes focused on security of payment and protecting the contracted party in the contractual chain. This is the omission that is obvious in each of the reviews being undertaken by the government, that is, the statistical bottleneck and how it operates to crush economic survival on the ground.

When a project stalls between "Approved" and "Completed", the financial strain automatically flows downstream. Subcontractors, trades, and suppliers under the current system and even though security of payment has been a part of the Australian Construction Industry since 1999, the ultimate risk unfairly and unjustifiably remains with the downstream contracted party. The contracted party is the person under a construction contract who is doing the work. However, as the statistics show (especially as it relates to the collapse of security of payment in Queensland), the contracted party has been financially trampled upon by the higher chain participants, and this is occurring day-in-and-day out by the operation of a legislative regime designed to protect the most vulnerable in the contractual chain hierarchy. The object of the Act is not being achieved in any stretch of the imagination and cashflow is not moving downstream where it must go.

This systemic breakdown gives rise to what can be characterised as the destruction of business doctrine – a predictable mechanism of corporate distress where cashflow strangulation imposed from above destroys otherwise viable, solvent, and productive downstream businesses. As outlined in the Senate Economics References Committee's 2015 Final Report (*'I just want to be paid'*), commercial construction functions as a contractual pyramid where market power is concentrated at the top while 80% to 85% of the physical work and operational risk is pushed onto subcontractors. Subcontractors routinely fund labor, equipment, and materials upfront, effectively acting as interest-free lenders to principal contractors.

Under the destruction of business doctrine, when higher-chain participants deliberately delay, reduce, or withhold progress payments, or exploit statutory loopholes, the financial damage multiplies geometrically as it flows downward. Operating on thin profit margins, downstream trades cannot absorb these unpaid debts or prolonged payment terms (often stretching 60 to 90 days). The financial starvation forces viable trade businesses into involuntary liquidation, destroying capital, asset value, and livelihoods while leaving unsecured creditors – who perform the actual work – recovering zero cents on the dollar. The current framework does not merely fail to prevent insolvency; it actively facilitates the systematic destruction of honest businesses carrying out essential work.

Tying a metric to control the flow onto the conveyor belt of construction creates an incentive to optimise the speed of conveyor belt without first understanding whether the process that the conveyor belt is feeding can handle the flow being desired. As British economist Charles Goodhart originally concluded, any statistical regularity collapses when pressured for control because people and systems adapt their behaviour to game the metric. This is exactly what is occurring in Queensland. Therefore, the indicator being promoted by the government stops reflecting reality and, instead, the measure begins to show how well a process can be manipulated.

By treating housing approvals as the target for metric success, the government, and each layer of government, has wrongly incentivised a "paper storm" of approvals while ignoring the structural collapse of the actual production line. Queensland provides the best illustration because Queensland reports the data better than any of the other states.

Here the concern I have been voicing for over 12 years is that the construction industry marketplace is not working efficiently and effectively, and this breakdown in the marketplace was well before the concern of the government to speed up the conveyor belt. Here, the conveyor belt of approvals is speeding up exponentially. However, because the workers at the end of the line (the contracted party / subcontractor) are not being paid, they are unable to package the dwellings fast enough, leading to systemic chaos and a massive backlog of uncompleted homes.

Inadequate access to Security of Payment data is a long-standing issue that the record shows I have been making known for over 14 years. One of the major handicaps that impedes proper regulation of the construction industry is the difficulty in obtaining pertinent statistical information about whether the object or main purpose of the SOP regime is readily available and in intelligible form.

If, as the idiom states, a picture is worth a thousand words, then the diagrams presented in this submission speak volumes. These diagrams assist in understanding the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality contemplated, that is, a potential tsunami of construction industry insolvencies and failures hitting Australia.

The diagrams I have constructed quickly and effectively convey why the government's focus is not believable at all and why the federal government must give focused attention to the real problem identified in this submission, that is, if the workhorse of the construction industry is not getting paid on time and in full, the security of payment legislation is not doing the job it was enacted to do, that is, to protect and secure the interests of the most vulnerable participants in the construction industry.

There is nothing currently at all in any jurisdiction to show that the metric being targeted – progress payments in relation to the carrying out of that work and the supplying of those goods and services – is being monitored in a way that allows timely proactive intervention to address problems as they occur.

As presented in the table below, that objective standard across each jurisdiction is not part payment. The policy and object is to be paid for the work that has been tendered and accepted by the person who is now refusing to make payment at all.

Underground Regulations

An underground regulation is any guideline, criterion, bulletin, manual, instruction, order, or general application issued or enforced by an agency or department that operates like a regulation but was never formally adopted or filed in accordance with the lawmaking rules set out in the legislation that established the subject matter of the action being contemplated or in the state lawmaking procedures.

This type of administrative oversight is desperately and urgently needed in the construction industry because it ensures public transparency. Such oversight prevents state actors from secretly creating binding rules without first giving the public notice or a chance to comment. This type of administrative oversight, moreover, ensures rules comply with the law and the statutory authority rather than, as what is occurring in Queensland, expanding agency power unchecked and operating in an arbitrary and capricious manner. The process of review, which is a critical component of such oversight, prevents arbitrary enforcement by requiring administrative standards to be clear, necessary, and published openly in the regulations as demanded by law.

Why this matters to productivity

The significance of underground regulation extends well beyond administrative law. A statutory entitlement is economically meaningless if an administrative agency can alter, impede or defeat that entitlement through unpublished practices, criteria or procedures having no foundation in the legislation.

This is why the institutional architecture examined later in this submission is as important as the substantive law itself. It is also why Australia requires an independent administrative oversight mechanism analogous to California's Office of Administrative Law: somebody outside the administering agency must be capable of asking the elementary question — **where is the legislative authority for the rule being applied?**

Statutory Benchmark: What Parliament Actually Required

Every object clause – NSW, Vic, SA, Tas, ACT, Qld, WA – expresses the same underlying statutory policy, that is, securing payment for the person who carries out the work or supplies the related goods and services. Most use substantially the same formulation:

"***entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work…***"

There is no jurisdiction in Australia where the object or main purpose of the Act makes it known that "part payment" or "some payment" or even "payment if it is convenient" is the standard to be achieved and the public policy of the legislation. The policy of the statutory entitlement is FULL PAYMENT FOR THE WORK

CARRIED OUT, unless the respondent proves otherwise through the statutory mechanism provided in the respective legislative regime.

The standard for such a review, depending on the jurisdiction, is either duly made or properly made under both the construction contract that regulates the parties and the Security of Payment regime that regulates where the construction work or related goods and services is being performed by the claimant.

For the respondent to be able to withhold payment, the respondent must show that it had, in the first instance, the fundamental authority under the contract to give the reasons it does for withholding and to take the action it states in the payment schedule provided to the claimant. In the second instance, whether the respondent perfected a right under the security of payment regime to advance such reasoning set out in the written document provided to the claimant.

My experience as an adjudicator is that the respondents with alarming frequency fail to establish that such fundamental authority exists under the contract in the manner being asserted or at all.

A further and other equally important determinative factor making up the basis of this submission is that each security of payment regime contains a restitution mechanism. As with the object or main purpose of the legislative regime, I have also included a table for identifying each restitution mechanism.

Therefore, if the respondent pays under an adjudication determination and later succeeds as spelled out in the “effect” of the relevant statutory regime on “civil proceedings”, the claimant must repay the difference.

This statutory machinery only makes sense if the default presumption of the object or main purpose of the legislative regime is full payment of the claimed amount. If the legislature in each jurisdiction intended “part payment”, the restitution architecture embedded in the legislation would be unnecessary.

Therefore, the object or main purpose of the legislation creates a presumption that full payment is to be made in relation to the carrying out of the work and the supplying of goods and services by the claimant. The trier of fact under the statutory proceeding (the adjudicator) must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence to the extent shown.

[Redacted]

[Redacted]

1. [Redacted]

The diagrams I present in this submission show the real failure and further assist to show that it is not what is being suggested by the Commissioner. The number of no jurisdiction decisions discussed in the two papers presented to the Minister (and the one presented to the Queensland Productivity Commission) continue to increase in an alarming way. This is further evidence of the prior restraint mechanism embedded within the centralised administration imposed by the Newman government and blindly and wholeheartedly adopted by the Palaszczuk government is working to defeat the entitlement of the claimant, the person who is supposed to be paid is not being paid and is not being protected by the legislative regimes in Queensland. Nevertheless, the diagrams presented in this submission unequivocally show that:

- approvals are accelerating;

- construction is bottlenecking at the point where approvals are converted to dwellings for various reasons;
- subcontractors remain unpaid;
- insolvency is rising in an alarming way;
- projects are stalling with most projects coming to a standstill because of the current hostile economic environment which only encourages the menacing conduct of nonpayment.

This is the **materiality lens** the Commissioner completely ignored and continues to ignore.

At the time I met with the Minister on 5 September 2025, the Adjudication Registry had been without a lawfully appointed Adjudication Registrar for approximately five years. This fact alone is determinative. Section 150 of the BIF Act requires the Adjudication Registrar to operate as an **independent statutory office**, and section 29A of the QBCC Act requires the Registry to be **institutionally separated** from all other QBCC functions. A five-year vacancy means these statutory obligations were not merely neglected — they were structurally impossible to fulfil.

[Redacted]

This is the very definition of **underground regulation**: rules, practices, and decision-making criteria enforced by an agency that have never been authorised, published, scrutinised, or subjected to lawful oversight. The Commissioner's letter is not merely incorrect. Rather, it is evidence of an underground regulatory regime operating inside the QBCC.

The silent appointment of a new Registrar in June 2026 confirms this. No announcement was made. No explanation was offered for the five-year vacancy. No acknowledgement was given that the Registry had been operating unlawfully for half a decade. The new Registrar immediately began engaging in the same practices that characterised the unlawful period: reclassification of adjudication applications, refusal to correct misrouting, collapsing adjudication into complaints processes, and procedural gatekeeping designed to prevent claimants from accessing the statutory remedy. This is not reform. It is continuity. It is the quiet perpetuation of an administrative structure that has operated outside the statutory framework for years.

The Commissioner's statistical misrepresentations must be understood in this context. They are not analytical errors. They are the administrative smoke screen of a system that has been unlawfully administered, structurally compromised, and institutionally choreographed to suppress the statutory entitlement to payment for

work done. The underground regulatory regime operating inside the QBCC is not merely failing to deliver the object of the Act — it is actively defeating it.

[Redacted]

- [Redacted]

[Redacted]

The origin of this underground regulatory regime begins with the Premier himself. Premier David Crisafulli issued a directive to both the Treasurer (David Janetzki) and the Minister for Housing and Public Works (Sam O'Connor) on 8 November 2024 — *five months before the Queensland Productivity Commission was legally re-established*.

The Premier instructed:

- the Treasurer to "establish the Productivity Commission and instruct the body to conduct a regulatory review of the building industry as its first order of business"; and
- the Minister for Housing and Public Works to "lift productivity across Queensland's construction industry" and "as soon as practicable, implement

recommendations that are handed down by the re-established Productivity Commission".

This directive is questionable for a much more fundamental reason. The problem is not the Premier's direction to re-establish the QPC. The problem is that, before the QPC had been re-established, before it had conducted its inquiry, before it had received evidence, and before any recommendations existed, the Minister responsible for Housing and Public Works had already been directed to "*implement recommendations that are handed down*". The direction therefore did not merely establish machinery for an independent inquiry. It prospectively prescribed the governmental response to the product of that inquiry before the product existed.

The Cabinet Handbook says Cabinet is Queensland's principal decision-making body and that Cabinet decisions are given formal effect through legislation, Executive Council action, or the executive powers held by Ministers for administration of their portfolios. More specifically, it says Cabinet proposals must involve rigorous examination, regulatory best-practice principles and whole-of-government coordination. Ministers are accountable to the Crown, Parliament, and ultimately the electorate.

The Handbook identifies the kinds of matters ordinarily requiring Cabinet consideration, and they include significant or sensitive policy issues, major policy reviews, matters significantly affecting the public or private sectors, significant legislative proposals, and regulatory proposals. The direction from the Premier matters because the instruction in the expectation letter is not merely saying, "consider the QPC's recommendations" but is directing the Minister in no uncertain terms to "implement recommendations that are handed down".

This predetermination reveals a calculated exercise in result-oriented outcomes. Rather than using an independent body to conduct a genuine, objective inquiry, the Executive has engineered a process designed to manufacture and legitimise a predetermined policy goal. This manufactured legitimacy is structurally locked in through the deliberate sequencing of the commission's establishment in the following ways:

- By securing the machinery,
- by giving the illusion of independence, and
- laundering executive will.

The structural predetermination of this inquiry is exposed by the QPC's absolute refusal to engage with expert, practitioner-led evidence. I afford the QPC's Final Report virtually no credence for a fundamental reason: despite my formal standing as a cited authority, registered adjudicator, and architect of construction law doctrines, my comprehensive submissions detailing systemic regulatory failure were entirely ignored. They were not weighed and found wanting; they were simply omitted from consideration altogether. Therefore, the concern I have with the QPC Final Report is that before any reliance can be placed upon it, the person investigating the QPC Final Report needs to examine the legitimacy of the process that produced it.

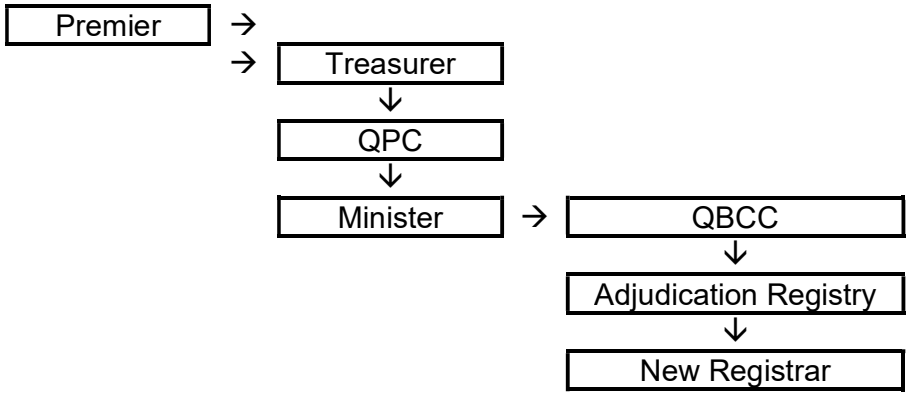
This calculated exclusion reveals that the QPC is repeating a dangerous historical cycle in Queensland's regulatory architecture. It mirrors the exact strategy deployed by the Newman Government when it hijacked the highly efficient, decentralized marketplace of Authorised Nominating Authorities (ANAs) using the Wallace Report. Just as it did then, the Executive has used a rubber-stamp review to justify replacing a functioning, market-driven ecosystem with an old Soviet-style system of prior restraint under a heavy-handed, centralised administration.

When a commission deliberately blinds itself to evidence that contradicts its political mandate, it ceases to be an inquiry. It becomes an administrative theatre. The QPC did not evaluate the safety and flow of cash down the contractual chain. Instead, it functioned precisely as its result-oriented architecture intended: as a mechanism to manufacture legitimacy for an executive takeover, laundering a predetermined political dogma while silencing the very practitioners who warned them of the systemic attrition it would cause.

The significance of that predetermination becomes more troubling when considered against what subsequently occurred. As discussed later in this submission, the QPC's treatment of contrary practitioner evidence raises the question whether the inquiry operated as an independent examination of the problem or instead supplied institutional legitimacy to a policy direction already established by the Executive.

When the QPC was finally re-established, its board members were appointed by the Governor in Council on the recommendation of the Treasurer under section 15 of the *Queensland Productivity Commission Act 2025*. Because the QPC falls under Queensland Treasury, the Treasurer holds the statutory authority to recommend board appointments. This is the same structural method used by the Newman government when it dismantled the decentralised marketplace of Authorised Nominating Authorities and replaced it with a Soviet-style centralised regime of prior restraint under the QBCC.

The Premier's directive therefore created the chain of administrative influence through which the underground-regulation problem examined here must be understood:



This chain is the architecture of underground regulation in Queensland and how the players interact within the chain, when considered with the statistical data presented and discussed in this submission, assists in understanding:

- the five-year vacancy in the Registrar's office;
- the concealment of the Acting Registrar's attendance in the Commissioner's communication dated 12 December 2025;
- the misclassification of adjudication applications;
- the explosion of "No Jurisdiction" decisions;
- the collapse of statutory independence within the Adjudication Registry;
- the Minister's April 2026 administrative fiction; and
- the silent appointment of the new Registrar in June 2026.

[Redacted]

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There is another dimension to this exercise of administrative power that cannot be ignored. The *Human Rights Act 2019 (Qld)* applies to public entities exercising statutory administrative functions. Administrative legality therefore concerns not merely whether an administrator can identify some statutory power, but whether that power is exercised compatibly with protected human rights and with proper consideration being given to those rights. Where unpublished administrative practices regulate the expression, independence, reputation or professional activities of a statutory decision-maker, the issue extends beyond ordinary administrative convenience. It raises the anterior question whether the administrator has identified lawful authority for the interference and whether the limitation imposed by that exercise of power is demonstrably justified.

The significance of Boxer is not that Napoleon did not like him. Boxer had been indispensable to the productive enterprise in Orwell's *Animal Farm*. His strength, labour and unquestioning commitment had sustained it. However, when Boxer ceased to be useful to those controlling the system, the principles supposedly governing Animal Farm provided him no protection. The rules meant whatever those administering them decided they meant.

The concept of underground regulation is perhaps best illustrated by what happens to the original commandment — **"All animals are equal"**. By Chapter X, it has become: **"All animals are equal, but some animals are more equal than others."**

The significance lies not merely in Orwell's manipulation of language. **The governing rule has been retained in form while being destroyed in substance.** Those administering the system have progressively altered what the rule means until the rule ultimately produces the opposite of the principle it was created to protect.

That is the essential danger of underground regulation. By small, almost imperceptible administrative steps, a statutory scheme can continue to exist on paper while unpublished practices, criteria and administrative discretions progressively alter how it operates in practice.

The analogy with Security of Payment is particularly uncomfortable because Boxer is the workhorse. The object of the legislation is to protect the person doing the work by securing payment for that work. Yet the statutory protection becomes illusory if those administering the scheme can impose requirements, restrictions or practices for which no legislative authority can be identified.

That is the institutional danger illustrated here. An adjudicator exists because Parliament created an independent statutory adjudication process. Yet if an administrator can decide, without identifiable legislative authority, which decisions will be published, which complaints will be entertained, what additional standards adjudicators must satisfy, and how adjudicators are to be monitored, the statutory scheme begins to operate according to administrative preference rather than the law enacted by Parliament.

Boxer therefore provides an uncomfortable conclusion to this discussion. It is not enough to create statutory rights and independent statutory actors on paper. If the administrator of the system can progressively rewrite the conditions under which those rights and actors operate, independence exists only for so long as the administrator chooses to respect it.

That is why an OACL is necessary. The question cannot be left solely to the agency making the rule. Somebody independent of that agency must be empowered to ask: **where is the legislative authority for what you are doing?**

State / Territory	Section	Object / Main Purpose
New South Wales	s.3	The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
Victoria		The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments, and is entitled to the release of a performance security, in relation to the carrying out of that work and the supplying of those goods and services.
Queensland	s.3	The main purpose of this Act is to help people working in the building and construction industry in being paid for the work they do.
South Australia		The object of this Act is to ensure that a person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
Western Australia		The object of this Act is to provide an effective and fair process for securing payments to persons who undertake to carry out construction work, or to supply related goods and services, in the building and construction industry.
Tasmania		The object of this Act is to ensure that any person who undertakes to carry out building work or construction work (or who undertakes to supply building or construction-related goods and services) under a building or construction contract, including such a contract that relates to a residential structure, is entitled to receive, and is able to recover, progress payments in relation to the work or goods and services.
Northern Territory	s.3	The object of this Act is to promote security of payments under construction contracts.
Australian Capital Territory	s.6	The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person— (a) undertakes to carry out construction work under certain construction contracts; or (b) undertakes to supply related goods and services under certain construction contracts.

State / Territory	Section	Effect of this Part on civil proceedings
New South Wales	32(3)(b)	the court or tribunal – … may make orders it considers appropriate for the restitution of any amount so paid …
Victoria	47(3)(b)	the court or tribunal – … may make orders it considers appropriate for the restitution of any amount so paid …
Queensland	101(3)(b)	the court or tribunal – … may make orders it considers appropriate for the restitution of any amount so paid …
South Australia	32(3)(b)	the court or tribunal – … may make orders it considers appropriate for the restitution of any amount so paid …
Western Australia	55(3)(b)	the court or tribunal – … may make orders it considers appropriate for the restitution of any amount so paid …
Tasmania	10(3)(b)	the court or tribunal – … may make orders it considers appropriate for the restitution of any amount so paid …
Northern Territory	47(4)(b)	An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract … may make an order for the restitution of the amount paid
Australian Capital Territory	38(3)(b)	the court or tribunal – … may make orders it considers appropriate for the restitution of any amount so paid …

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PRELIMINARY

Over the last 18 months, government bodies have successfully addressed the housing crisis by producing an abundance of paperwork rather than focusing on what is needed to produce physical homes. In so doing, they have consumed vast reserves of timber for bureaucratic nonsense that could have otherwise been used to construct actual dwellings.

- The Queensland Productivity Commission spent its resurrection meticulously calculating that bad state planning and red tape cost Queenslanders exactly 77,000 unbuilt homes.

- The federal Productivity Commission fast tracked an interim report to bravely and boldly go where no other report has gone before by suggesting that Australia simply is not building enough houses where people actually want to live.

- Not to be undone in this race, the Senate Select Committee on Productivity held extensive hearings and tabled an interim report to groundbreakingly conclude – while patting itself on the back – that you cannot fix housing affordability without fixing productivity.

Ultimately, the collective tri-level government effort has proven that while the construction sector cannot efficiently deliver a two-bedroom apartment, bureaucracy has zero supply issues when it comes to churning out multi-page inquiries confirming that the system is broken.

The Conceptual Failure of "Productivity"

The central flaw in every inquiry examined in this submission is not merely analytical. It extends way beyond that – it is conceptual.

Each inquiry repeatedly invokes "*productivity*" without ever defining what productivity means in the construction delivery system and then proceeds to treat administrative throughput as though it were productive output. In doing so, these inquiries commit the same error, that is, they each measure the speed at which projects enter the pipeline, not the capacity of the system to convert that pipeline into completed dwellings.

This confusion is not a minor methodological oversight. Rather, it is a fundamental breach of the Commission's statutory obligation to provide rigorous, independent economic analysis. Treating administrative throughput as though it were productive output is the economic equivalent of Lewis Carroll's Caucus-race in *Alice in Wonderland*, where the characters run in circles, there is no finish line, and yet the Dodo solemnly decrees that "*everybody has won, and all must have prizes*". The Commission celebrates a high-speed race of paperwork where every approval is awarded a prize, while the actual physical track remains empty.

In his landmark 1994 UK report, *Constructing the Team*, Sir Michael Latham famously invoked this same Dodo quote, noting that management jargon calls the pursuit of genuine industry improvement "seeking win-win solutions". However, where Latham used the analogy optimistically to advocate for shared rewards born of enhanced physical performance, the inquiries under review here have inverted it into something entirely cynical. They have institutionalised a broken variant of the Caucus-race where the bureaucracy awards itself the "win-win" prize purely for managing the paperwork, completely detached from whether a single brick is laid or a single asset is delivered.

Statutory Obligations vs Political Alignment

The *Productivity Commission Act 1998 (Cth)* does not authorise the Commission to equate paperwork with production, approvals with dwellings, or administrative velocity with physical output. Yet that is precisely what the Commonwealth Productivity Commission — and the inquiries before the inquiry the subject of this submission and after it – have done.

The result is a series of reports that accelerate the wrong end of the system, diagnose the wrong bottleneck, and prescribe the wrong remedy. They push more approvals into a pipeline that is choked and broken, while ignoring the productive machinery downstream:

- cashflow,
- payment security,
- insolvency, stalled projects,
- abandoned sites, and
- the financial capacity of the contracted party who is the person who physically determines whether an approved project ever becomes a completed dwelling.

A careful review of the *Productivity Commission Act 1998 (Cth)* reveals that nowhere in this enabling legislation does it say explicitly, implicitly, or by any stretch of statutory interpretation that the Productivity Commission is engaged to become the government's "yes-man". The Productivity Commission is not empowered to endorse flawed assessments or produce conclusions designed to align with the preferences of the executive government – even when the underlying assumptions are substantively or procedurally wrong and the Terms of Reference are fundamentally misguided or misconceived.

Similarly, there is no provision requiring the Commission to balance out a government's flawed policy approach by providing an equally flawed response, as if "*two wrongs make a right*" could be the operative effect of an inquiry's Terms of Reference.

The Section 6 Mandate

Section 6 of the *Productivity Commission Act 1998* provides for the functions of the Commission. The commission must hold inquiries, provide advice, undertake research, and promote public understanding. However, nothing in section 6 authorises bias, predetermined conclusions, or political obedience.

The *Productivity Commission Act* structures the Commission as an independent analytical body that is "*to hold inquiries and report to the Minister about matters relating to the industry, industry development and productivity*".

The Productivity Commission is engaged by the government to report. There is no statutory duty or obligation to agree.

Section 8 of the *Productivity Commission Act* provides general policy guidelines to assist the Commission, and this provision becomes the closest thing to a direction. Even here, however, the legislation requires the Commission to consider broad economic principles and makes it known to the Commission that it has no authority to rubber-stamp government positions without first showing the analytical path between the raw evidence and the findings when arriving at such a conclusion.

Key obligations under section 8 of the *Productivity Commission Act* include, but are not limited to:

- understanding whether the marketplace is functioning effectively, efficiently, and productively and, where the conditions for such marketplace do not exist, the factors that are missing and how these missing factors relate to legislative measures and the legislative measures needed;
- improving overall economic performance;
- reducing regulation where consistent with social and economic goals;
- encouraging efficient, innovative industries,
- recognising the interests of industries, employees of industries, consumers or industries, and how they interact with the community at large;
- ensuring ecological sustainability;
- making sure that Australia is meeting international obligations and, if not, what measures are needed to bring Australia back into alignment.

None of these can be achieved by giving deliberately wrong assessments. To this end the legislation is clear: "*the Commission must have regard to the need to improve the overall economic performance of the economy*".

This is a statutory directive requiring the Commission to maintain rigour rather than any obedience to a misconceived Terms of Reference.

Section 8(3) of the *Productivity Commission Act* mandates that the Commission should seek out multiple viewpoints. That statutory direction is inconsistent with an inquiry methodology confined to a single analytical explanation: "*The commission . . . must provide a variety of viewpoints and options representing alternative means of addressing the issues …*".

This is the opposite of a “yes-man” requirement that seems to present itself in the reports I have been reviewing and discussed in this submission. Quite the contrary, the *Productivity Commission Act* mandates plurality and is not interested in the Productivity Commission acting in conformity with the Terms of Reference when any reasonable independent reviewing body could see that such a position being taken is clearly untenable as this submission assists in showing.

Section 9 of the *Productivity Commission Act* provides flexibility and independence in the working methods adopted by the Commission. For example, the Commission may inform itself “*in any way it thinks fit*”; may consult with anyone it thinks fit; may receive written and oral submissions; and may hold seminars, workshops, task forces.

Section 9 of the *Productivity Commission Act* is the provision that gives the Commission statutory independence.

Section 11 of the *Productivity Commission Act* says that the Minister may require hearing, draft reports, and recommendations. The Minister, for this reason, can set procedural requirements but cannot create a procedural approach that reaches a substantive conclusion.

Nothing in section 11 allows the Minister to require the Commission to adopt a particular conclusion or to endorse incorrect findings.

There is nothing in the *Productivity Commission Act* stating that:

- the Commission must agree with the Minister;
- the Commission must validate the Terms of Reference even if flawed;
- the Commission must produce conclusions that “fit” political narratives;
- the Commission must ignore evidence that establishes the misconceived nature of the Terms of Reference;
- the Commission must adopt wrong assumptions because in the end “two wrongs make a right” when it comes to inquiries.

The *Productivity Commission Act* contains nothing – zero, zip, nada – that supports any of these propositions.

Section 11 requires the Commission to make a written report to the Minister and permits the Minister, when referring a matter, to require the Commission to make a draft report publicly available during the inquiry. However, it does not require the Commission to provide a politically convenient report. The statutory obligation is to report on the inquiry, having regard to the requirements imposed by the Act, including the general policy guidelines in section 8 of the *Productivity Commission Act*.

The Minister may direct the *process*, but the Minister cannot direct the *substance* of what the process produces. Importantly, section 11(4) of the *Productivity Commission Act* separately provides that the Commission “*may also make recommendations in the report on any matters relevant to the matter referred*”.

The Productivity Commission is structured as an independent statutory authority. The credibility of such a statutory creature depends entirely on evidence-based analysis, transparent reasoning, multiple viewpoints, and independence from political pressure.

If the Commission were legally required to act as a “yes-man”, the Act would say so. It does not.

The *Productivity Commission Act* does not require the Commission to accept or endorse misconceived Terms of Reference.

The Commission is not required to “fit” its findings within the political narrative embedded in the Terms of Reference. Where the Terms of Reference are misconceived, the Commission must say so. The Act requires the Commission to:

- identify flawed assumptions,
- correct analytical errors,
- present alternative viewpoints, and
- recommend reforms based on evidence rather than political framing.

This is not optional. It is the statutory architecture of the Commission.

The Act requires independent analysis, multiple viewpoints, correction of flawed assumptions, and transparent reporting.

The Commission’s statutory independence means that it has a duty to correct (and not allow to perpetuate) analytical errors embedded in the Terms of Reference. Section 8 of the *Productivity Commission Act* requires the Commission to consider economic efficiency, regulatory burden, innovation, competition, ecological sustainability, and international obligations. These statutory criteria continue to govern the Commission's performance of its functions notwithstanding the framing adopted in the Terms of Reference.

If the Terms of Reference assume that “regulatory delay is the primary cause of housing undersupply”, but evidence shows that insolvency cycles, market structure, procurement failures, and financial fragility are the dominant drivers, the Commission must report that conclusion.

The Commission is not a vehicle for political validation. It is a vehicle for correction.

Where the Terms of Reference are defective, the Commission is *statutorily obliged* to make that clear to the Treasurer. Any suggestion that the Commission is “bound” to adopt wrong assumptions is inconsistent with sections 6, 8, 9 and 11 of the *Productivity Commission Act*.

The point is not that the Commission is free to disregard the matter referred to it by the Treasurer. It plainly and simply is not. The point of an obligation being imposed is fundamentally different. A Terms of Reference identifies the subject matter to be

investigated. It does not predetermine the factual conclusions the investigation must reach.

The Terms of Reference bind the Commission only as to subject matter but not as to conclusions. This distinction is fundamental in administrative law. A minister may lawfully define the scope of an inquiry, but a minister cannot lawfully predetermine the findings of that inquiry.

The High Court has repeatedly held that statutory bodies must "address the real question" and cannot "confine themselves to an artificial question constructed by the decision-maker" (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[7]).

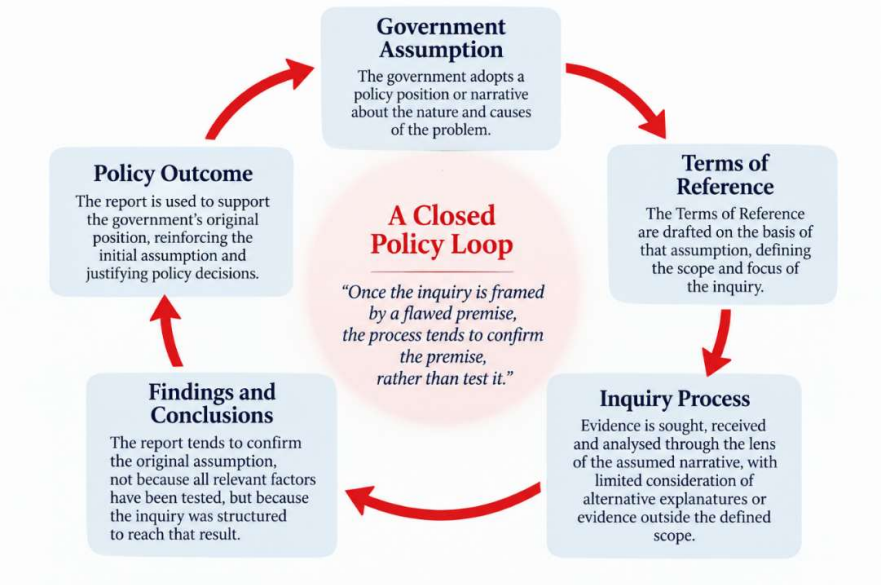
Where a Terms of Reference embeds an assumption that is contradicted by evidence, the Commission is not only permitted but required to identify the flaw. A statutory inquiry cannot be converted into a political endorsement exercise by embedding incorrect premises into the Terms of Reference.

The Commission's duty is to investigate the matter referred but it is not to validate the assumptions accompanying the referral.

If an assumption embedded in the Terms of Reference does not withstand examination against the evidence (as presented in the discussion that follows in this submission), the function of the Commission is not to preserve that assumption by constructing an analytical pathway around contradictory evidence. The function of the Commission is to report what the investigation reveals.

That distinction becomes critically important here. If the Government begins with the proposition that the housing problem is substantially a problem of regulatory delay, and the Commission then confines its investigation to identifying regulatory delay, the inquiry risks becoming circular:

[7] The reasoning of the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 is directly relevant to the Commission's obligation to confront – rather than ignore – material showing that an inquiry has proceeded on a false factual premise. In *Peko-Wallsend*, the Court is reasonably interpreted to be saying that a statutory decision-maker must address the real question and cannot confine itself to an artificial question constructed by the decision-maker. The Minister's decision was invalid because he failed to consider material in his possession demonstrating that the Commissioner's factual assumptions were wrong. As Mason J explained, a decision-maker is **bound** to consider material showing that the inquiry's factual foundation is erroneous, because the statutory task must be performed "*in the light of the actual facts*" rather than on "*a false assumption*" (for example, that Ranger 68 lay outside the recommended grant). The relevance here is straightforward. If the Terms of Reference assume that "*regulatory delay is the primary cause of housing undersupply*", but evidence demonstrates that insolvency cycles, market structure, procurement failures, and financial fragility are the dominant drivers, the Commission is legally obliged to confront that evidence. Just as in *Peko-Wallsend*, the statutory body cannot lawfully proceed on an erroneous factual premise merely because it appears in the Terms of Reference. The Terms of Reference define **subject matter**, not **conclusions**. A statutory inquiry is not a vehicle for political validation; it is a vehicle for correction. Sections 6, 8, 9 and 11 of the *Productivity Commission Act* require the Commission to identify flawed assumptions and report the true drivers of the problem to the Treasurer. Failure to do so would replicate the precise legal error condemned in *Peko-Wallsend*: ignoring material that shows the inquiry has been framed on a mistaken factual foundation.



The risk of circular reasoning is amplified because three separate inquiries — the QPC Construction Productivity Inquiry, the Productivity Commission Housing Supply Inquiry, and the Senate Select Committee on Productivity — all embed similar assumptions about regulatory delay, planning systems, and approval processes.

When multiple inquiries begin from the same flawed premise, the institutional risk is that each inquiry reinforces the other, creating a self-referential policy loop rather than an evidence-based diagnosis.

The Commission's statutory independence exists precisely to prevent this phenomenon.

The Australian Building and Construction Commission (ABCC) no longer exists and is not operative. The ABCC was officially abolished on 6 February 2023. The Albanese (Labor) Government passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* in December 2022 to wind down and dissolve the agency. The Labor government campaigned on abolishing the ABCC, viewing it as a politicized watchdog that unfairly targeted construction unions and workers. The responsibilities of regulating the commercial building and construction sector were transferred to a single uniform regulator, the Fair Work Ombudsman.

The abolition of the ABCC removed the Commonwealth's only specialised, sector-specific construction regulator. **More importantly, it exposed a much larger regulatory vacuum: there is no federal body charged with monitoring the commercial, financial and payment health of an industry clothed with the public interest.**

This observation should not be misunderstood. The ABCC was sector-specific, but it was not a holistic regulator of the construction industry's commercial, financial, and payment health.

Following the abolition of a specialised sector-specific agency like the ABCC, the Australian Federal Government monitors and oversees aspects of the building and construction industry through standard national regulators, funding frameworks, and collaborative bodies. While state and territory governments handle direct licensing, building certification and safety regulation, the federal government attempts, in an indirect and **fragmented** way, to regulate or influence the sector through four primary mechanisms:

1. National Workplace Relations & Union Compliance
2. Building Standards and Regulations
3. Procurement and Government Funding Leverage
4. Safety Policy and Strategy

The federal government, through the National Construction Industry Forum (NCIF), attempts to maintain some awareness of conditions within the construction industry. The NCIF, however, is a consultative forum rather than a construction-industry regulator charged with continuously monitoring the commercial and financial health of industry participants, payment behaviour, insolvency warning signs or the operation of security of payment across Australia.

In addition to the NCIF, there is the Building Ministers' Meeting, a governmental forum made up of federal, state and territory ministers responsible for building and construction policy. This is the body that met in 2018 to address harmonisation of security of payment laws following the Senate Economics References Committee Final Report into construction-industry insolvencies and the subsequent appointment of John Murray AM to review how those laws might be harmonised.

These arrangements therefore raise an anterior and much more important question. If neither the NCIF nor the Building Ministers' Meeting is charged with continuously monitoring the commercial, financial and payment health of the construction industry, and those functions are instead fragmented across Commonwealth, State and Territory institutions, who is actually taking the pulse of the Australian construction industry?

Who Is Taking the Pulse of the Australian Construction Industry

The ABCC was never a general overseer of the construction industry's commercial practices, safety standards, or corporate operations. Instead, it was strictly a specialist industrial relations regulator whose jurisdiction was confined to civil offences under designated industrial relations laws.

Therefore, the ABCC only regulated industrial relations and not the whole of the construction industry. The ABCC did not possess a broad mandate to oversee the structural or economic health of the construction sector. The ABCC had no jurisdiction over criminality, fraud, or general corporate misconduct. When broader issues like high insolvency rates, massive unpaid debts, or phoenix compliance arose, these matters fell outside of the scope of the ABCC.

Despite arguments that the ABCC was designed to regulate the entire sector equally, the agency's primary operational focus was heavily weighted toward the workforce, unions, and industrial action. For example, collective bargaining over site agreements was the real target of much of the enforcement activity undertaken by the ABCC. The regulatory framework for the ABCC ended up targeting building workers and their unions in a most discriminatory way rather than acting as a neutral, industry-wide manager that was envisioned by the Cole Royal Commission when making a recommendation for such a regulatory body.

The Cole Royal Commission provided the quasi-legal cover for the ABCC and Howard's WorkChoices legislation, but the ABCC was distinct from WorkChoices even though they shared the same political and chronological origin. The ABCC was established as a separate, standalone statutory body specifically empowered with extraordinary coercive powers to police the building-sector industrial disputes.

Despite the building and construction sector being deeply clothed with the public interest (given its scale, its economic impact, and its role in critical infrastructure), there has **never been a holistic, federal-level regulator** tasked with overseeing the industry's broad commercial health, financial viability, or market ethics.

This systemic gap is primarily driven by the Australian Constitution, which splits powers between the states and the Commonwealth.

Constitutional Boundary

Under Section 51 of the Constitution, people have argued that Federal Government does not have a specific head of power to directly regulate the "construction industry". To intervene nationally, the Federal Government relied on the Industrial Relations Power (s.51(xxxv) and the Corporations Power (s.51(xx)). Because the power of the federal government was narrowly interpreted, regulation of building and construction activity sits with the states in an ad hoc, piecemeal fashion.

I completely disagree. That narrow construction proceeds from the mistaken premise that, because Section 51 of the Australian Constitution does not expressly identify the 'construction industry', the Commonwealth lacks constitutional authority to regulate that sector of the economy.

In my **August 2015 testimony before the Senate Economics References Committee**, I strongly advocated for a **national, federal model of construction-industry law**. I argued that the Commonwealth had a clear obligation to step in and stabilise a marketplace plagued by fragmented, anti-competitive state laws and systemic subcontractor exploitation.

The core points I made to support federal intervention included but were not limited to:

1. The Constitutional Justification Grounded in "Clothed with Public Interest"
2. The Vulnerability of the Supply Chain ("Screwing Down the Subbies")
3. The House of Cards – "Predatory and Menacing Conduct"

During my testimony I made it known that the federal government possesses massive, untapped levers to regulate the sector nationally.

My argument then, as it still is today, is founded on the fact that the construction sector can and should be heavily regulated from “Canberra” via the **Bankruptcy and Insolvency power (Section 51(xvii))** and the **Trade and Commerce power (Section 51(i))**.

Because the building sector standardly leads the nation in corporate collapses and unpaid debts, my position is that the prevalence and consequences of construction-industry insolvency provide a substantial constitutional foundation for Commonwealth intervention under the bankruptcy and insolvency power in s 51(xvii) of the Constitution, operating together with other available heads of Commonwealth power. The federal government does not need a “construction power” when it already has the power to govern the financial demise of companies. I contend that these Commonwealth powers provide a constitutional foundation upon which a national construction trust, lien and security-of-payment framework could be developed.

As discussed more fully and completely below, the construction industry has very special characteristics. More importantly, however, these special characteristics mean that construction is not a localised, isolated hobby. Although it reacts to the economic machinery engaged by the federal government, the construction sector becomes a critical transmission mechanism through which economic growth is translated into physical productive output and heavily impacts commercial networks across state borders. Massive tier-1 builders operate nationally, moving capital, labor, and materials across the country. This cross-border economic footprint gives the Commonwealth the right to step in under the trade and commerce power to ensure the stability of the commercial marketplace.

When the Acting Chair questioned whether the Commonwealth possessed the necessary constitutional heads of power to “cover the field” (especially concerning unincorporated subcontractors), I confidently asserted that the power exists:

“*My initial impression is, I believe that the power would be there... in some capacity, to do that. It is of public interest”.*

I argued that because the protection of the construction supply chain is fundamentally clothed with the public interest, the federal government cannot simply retreat behind constitutional technicalities while the industry was suffering then which is far worse than it is suffering today.

My testimony highlighted how the current business model allows large tier-1 contractors to “devolve their responsibility and risk” onto the 85 to 90 per cent of the industry made up of small subcontractors and workers. When economic pressures mount, the weakest links in the supply chain bear the brunt of the volatility, leading to a “nosedive” in payment reliability and an escalation of insolvencies.

I also addressed the cyclical, brutal nature of construction markets where builders or successful tenderers submit bids far below a realistic or sustainable price. I noted

that these operators trade at a loss or skip margins strictly to secure immediate cash flow to keep their heads above water, which ultimately forces the industry to collapse like a **house of cards**. This is exactly what Walton Construction was doing for years before the music stopped and the house of cards collapsed.

I argued then and continue to argue today that a federal framework must mandate due diligence and some form of assurance to ensure winning bids are sustainable before contracts are ever signed.

My solution was and still is the **FOUR-POINT PLAN**.

To counteract state systems that I described as being based on the old-Soviet style of prior restraint and failures of regulatory compliance, I put forward a unified, federalised strategy:

1. **Federal Construction Law Enforcement**. I proposed a national model designed to support and enforce security of payments.

2. **Statutory Liens**. The lien mechanism ensures anyone who performs improvement work on land has a constitutional right to place a lien on that property.

3. **Construction Escrows / Trust Funds**. The construction trust is the vehicle needed to earmark and secure monies down the line so project funds cannot be shifted or stolen to pay for separate, failing jobs.

4. **Expanded Adjudication**. I proposed expanding the current security of payment mechanism to address and resolve performance disputes alongside payment disputes, stopping predatory builders from creating manufactured, fake performance issues to illegally withhold cash flow.

The failure to use these powers is a result of **political choice and risk-aversion, not constitutional prohibition.**

History shows successive federal governments have hidden behind the excuse that “contract law and property licensing belong to the states” to avoid taking on the complex commercial cleanup of the building sector.

Instead, they preferred to narrowly use the Industrial Relations power to police unions and site behavior because it was politically expedient, leaving the economic “house of cards” completely exposed.

The point I made during my Senate testimony has never changed. When an industry is deeply clothed with the public interest and its failures routinely drag down the national economy through insolvency epidemics, the federal government has a clear constitutional pathway – and a moral obligation – to use its bankruptcy and commerce powers to steady the ship.

National Regulatory Failure

In 2018, the Murray Review explicitly recommended a single, national framework based on the "East Coast model" to protect subcontractor cash flows. While there was a high-level consensus at the Building Ministers' Forum to improve these protections, states maintained legislative control.

Instead of adopting a harmonised uniform national model, Queensland pushed forward with its own specific regime – the Building Industry Fairness (Security of Payment) Act 2017, with major rollouts continuing through 2018 and beyond.

Knowing that the Senate inquiry had commissioned a review to determine how to harmonise security of payment legislation, Queensland thumbed its nose at everything recommended by the Senate in the Final Report and “jumped the gun” by locking in its own highly distinct legislation while the Commonwealth-commissioned national review was still underway.

The Commonwealth government appointed John Murray AM in **December 2016** to review the country’s heavily fragmented Security of Payment (SOP) laws. The primary goal was to find a path toward a **harmonised, uniform national model** to protect subcontractor payments.

However, as usual, Queensland was dealing with its own severe domestic insolvencies and chose to thumb its nose at the Senate Report and the appointment of John Murray and chose not to wait for the federal outcomes:

December 2016	Senate Final Report
December 2016	John Murray AM appointed to lead National SOP Review
August 2017	Queensland introduces the BIF Bill to State Parliament
November 2017	BIF Act passes Qld Parliament / Enacted (Royal Assent)
May 2018	Murray Review ("Building Trust and Harmony") released
December 2018	BIF Act officially commences in Qld replacing BCIPA
2018 – 2026	Queensland continues phased rollouts of Project/Retention
February 2026	Minister halts (indefinitely) Project Trust Accounts

Because the BIF Act was introduced to parliament in August 2017 and enacted in November 2017, the **Queensland Government had finalised its legislative architecture six months before John Murray published his final recommendations** in May 2018. As Mr. Murray noted in his final report, because of the timing, he was only able to evaluate Queensland's reforms in their initial "Bill" format.

When the John Murray Review Report was published, its core recommendation was for all states to adopt a harmonised model based on a modified version of the New South Wales "East Coast" framework.

Queensland's BIF Act directly clashed with Murray's vision of simplicity and national uniformity in two major ways: (1) The Trust Account Model; (2) Complexity vs Simplification.

Because Queensland pressed ahead independently, the Australian construction industry faced exactly what the Murray Review was designed to prevent: **interstate fragmentation**.

For head contractors and subcontractors operating across state borders (for example, handling projects in both Tweed Heads, NSW, and the Gold Coast, QLD), the rules diverged sharply. While other jurisdictions moved closer to a streamlined East Coast adjudication model, Queensland created an insular, highly prescriptive compliance regime that does not even come close to achieving the main purpose of the BIF Act.

The industry reality is that Queensland made up its mind early and elected to prioritise a messy, convoluted but otherwise rapid, localised political response to construction industry insolvencies over the slower path of national alignment.

Using 13 January 2020 as the cycle initiation period and excluding the Bathla Group collapse, the following table sets out Five Major Construction Industry Collapses and the Queensland Regulatory Position:

Rank	Construction Company	Collapse Date	Estimated Debt / Size	QBCC Licence & Regulatory Action Taken by Queensland
1	Probuild	Feb 2022	**$311 million+** in liabilities; $5B+ project pipeline	**Fully regulated by QBCC.** Held a high-category building licence to construct massive QLD projects like the 47-level *443 Queen St* tower in Brisbane. Following its collapse, the QBCC triggered its enforcement protocols, monitoring its 28-day administration grace period before formally **cancelling its Queensland operating licence**.
2	Clough Group	Dec 2022	**$248 million+** in debt; $8B+ project pipeline	**Fully regulated by QBCC.** Despite its WA roots, Clough operated heavily in Queensland infrastructure for over 50 years and was required to hold active QBCC credentials to trade, binding its financial solvency directly to QLD's annual review framework.
3	Grocon	Nov 2023	**$100 million+** to external creditors	**Aggressively targeted by QBCC long-arm powers.** Grocon operated via local arms like *Grocon Constructors (Qld) Pty Ltd*. The QBCC famously used its long-arm powers to **slap severe trading restrictions on Grocon's QLD licence** and leveraged cross-border provisions to **cancel head director Daniel Grollo's personal QLD building licence** due to insolvencies tied to their Victorian entities.
4	Porter Davis	Mar 2023	**$147 million+** in debt; 1,700+ homes disrupted	**Fully regulated by QBCC.** Operated in Queensland via its subsidiary *PDH Qld*, holding a major QBCC Category 5 licence allowed to build up to $120 million in projects annually. The QBCC stepping in to **cancel their QLD licence** is what legally dissolved the contracts, allowing the watchdog to step in and pay out hundreds of QLD consumer claims.
5	Condev Construction	Mar 2022	**$50 million+** in debt	**Primary QBCC Oversight.** Based directly on the Gold Coast, this was a homegrown Queensland entity entirely under the day-to-day regulatory thumb and financial reporting scrutiny of the QBCC.

If a construction company performs work in Queensland, that construction company is legally required to hold a valid licence with the Queensland Building and Construction Commission (QBCC). By holding that licence, that construction company is fully bound by Queensland's strict Minimum Financial Requirements (MFR) and long-arm statutory frameworks, giving the QBCC active, concurrent regulatory oversight over them regardless of where their corporate headquarters sit.

Each of the five companies identified above operated in Queensland through entities holding or subject to relevant Queensland licensing requirements, bringing those Queensland operations within the QBCC regulatory framework.

Nothing has fundamentally changed since I testified at the Senate Inquiry into construction industry insolvencies in Australia.

The catastrophic pattern of major construction collapses leaving subcontractors devastated has repeated itself from Walton Construction through to Probuild, Porter Davis, and Condev. The exact structural failures highlighted in my **2015 parliamentary testimony** making it known that the QBCC (BSA as it was then) failed to act on early financial warning signs before a company went over the cliff, and this remains the defining crisis of the industry today.

The 2015 inquiry exposed how **Walton Constructions (Qld)** used pre-insolvency maneuvers to shield assets and transfer profitable projects, leaving local subcontractors holding millions in worthless debt. Despite a decade of promise, recent giants like **Probuild** and Gold Coast-based **Condev** operated up until the literal day of liquidation, using subcontractors as interest-free credit lines under the active licensing oversight of the **Queensland Building and Construction Commission (QBCC)**.

While Queensland introduced Project Trust Accounts and stricter Financial Requirements post-2018, the reality on the ground shows the **QBCC** still largely steps in *after* the collapse occurs and reactively suspends licences only when the damage to small businesses is already done rather than proactively intervening to prevent financial harm. This continuing failure reinforces why lien rights and construction trust accounts are imperative.

When comparing construction industry insolvencies in Australia to the United States, Australia suffers a far more significant and devastating impact than the United States. While both countries face macroeconomic headwinds like inflation and elevated interest rates, the operational, structural, and regulatory differences mean that a construction collapse in Australia triggers a severe economic cascading domino effect that is largely mitigated in the United States by the lien and construction trust mechanism.

While every state has a statutory framework for mechanics' liens, California[8] and Texas[9] uniquely elevate this right to a constitutional level.

Currently, 19 states have statutory construction trust fund laws, and California relies instead on an extensive system of statutory mechanics' liens, stop notices, and bond claims rather than a blanket statutory trust fund.

The following 19 States have enacted statutory construction trust fund laws: (1) Arizona, (2) Colorado, (3) Delaware, (4) Florida, (5) Illinois, (6) Maryland, (7) Michigan, (8) Minnesota, (9) Nevada, (10) New Jersey, (11) New York, (12) Oklahoma, (13) Pennsylvania, (14) South Carolina, (15) South Dakota, (16) Texas, (17) Vermont, (18) Washington, and (19) Wisconsin. Thus, there is a large number of states that have statutory construction trusts.

Some States like California do not have a statewide mandatory statutory trust. However, there is nothing restricting the parties from creating construction trusts voluntarily via contract provisions. Thus, there are a few states that rely on contractual trusts.

Some States like Arkansas, Georgia, and Virginia impose criminal penalties for misapplying funds without creating formal civil trust obligations. Thus, there are a selected few states that believe criminal liability is the solution rather than a construction trust.

California prefers an intricate framework of mechanic's liens, stop notices (for public and private works), and payment bonds to secure lower-tier contractors. Rather than a statutory trust scheme, California has enacted a comprehensive statutory scheme instead of the statutory trust. Nevertheless, California law permits project participants to establish trust relationships by writing them directly into private construction contracts rather than imposing a universal state mandate. Past judicial and federal rulings in California complicated broad statutory attempts to tie worker benefit and trust funds directly to automatic property liens, steering state policy toward traditional recorded mechanics' liens and stop notices.

My personal experience (*Woonona-Warrane-A-Civil* litigation) confirms why California lawmakers elected to steer state policy to recordation and stop notices with freedom of contract providing the trust mechanism.

In California, though, diversion of funds has been criminalised. Diversion of funds occurs when a contractor applies revenue from one job to expenses on another. In a construction job, the owner expects that the funds paid to the head contractor, usually as progress payments, will be used by the head contractor to advance the work. If not, subcontractors and suppliers may remain unpaid, exposing the owner

[8] The right is enshrined in Article XIV, Section 3 of the California Constitution. This provision unequivocally states that mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property where they have bestowed labor or material.
[9] The right is established under Article XVI, Section 37 of the Texas Constitution. This provision grants a self-executing constitutional lien directly to original contractors who deal directly with the property owner.

to the risk of a mechanics lien. Thus, in California, construction funds resemble trust funds in that the owner entrusts them to be used for a specific purpose.

It is therefore a criminal offence in California to divert funds to a use other than that for which they were received. California Penal Code Section 484b.[10]

The significance of section 484b extends beyond the contractor. California law also places lawyers on notice of the consequence associated with the diversion of consequences of failing to properly advise a client about section 484b.[11]

Factor	Australia	United States
Share of National Insolvencies	**~24.5% to 27%** of all corporate collapses nationwide are construction firms.	**~17.3%** of national business failures occur in construction.
Exposure of Downstream Parties	**Severe.** Subcontractors operate as unsecured creditors; if a builder fails, "subbies" lose everything.	**Protected.** Constitutional and Statutory Mechanics' Lien are combined with other mechanisms (civil and criminal), for example, construction trust funds isolate project cash to ensure subcontractors are paid first.
Macroeconomic Drag	**High.** Broadly considered "construction central" due to heavy reliance on the sector for GDP and housing.	**Moderate.** The massive scale and diversity of the US economy dilutes the systemic shock of builder failures.

A significant structural reason the US is better insulated from catastrophic industry contagion is the long-standing Mechanics' Lien mechanism packaged with a civil or criminal remedy. Approximately 38% of the States have, in addition to the lien mechanism, enacted Construction Trust Fund States. In those US jurisdictions possessing statutory construction trust regimes, project funds received by contractors may be subject to statutory obligations protecting subcontractors and suppliers and restricting their diversion to unrelated purposes.

[10] This provision of the California Penal Code (484b) states: "*Any person who receives money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully fails to apply such money for such purpose by either willfully failing to complete the improvements for which funds were provided or willfully failing to pay for services, labor, materials or equipment provided incident to such construction, and wrongfully diverts the funds to a use other than that for which the funds were received, shall be guilty of a public offense and shall be punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by both that fine and that imprisonment if the amount diverted is in excess of two thousand three hundred fifty dollars ($2,350). If the amount diverted is less than or equal to two thousand three hundred fifty dollars ($2,350), the person shall be guilty of a misdemeanor*".

[11] *Goebel v Lauderdale* (1989) 214 CA3d 1501, 263 CR 275 remains good law in California for the proposition that a lawyer can be held liable for professional negligence without requiring expert testimony when that lawyer fails to research or understand obvious statutory duties – such as California Penal Code section 484b regarding the diversion of construction funds – leads to a client's criminal exposure. Goebel is an interesting case because it stands for the rule that expert testimony is unnecessary to establish the standard of care when a lawyers negligence or failure to perform basic research is so obvious that a lay trier of fact can readily recognise it.

Australia lacks these unified protections, and this submission believes that this type of protection must be federally mandated, so the legislation is uniform across the country. When an Australian builder collapses, the money vanishes into a pool managed by liquidators, leaving vital subcontractors exposed as **unsecured creditors**. A single major builder insolvency frequently triggers a fast-moving, multi-tiered bankruptcy chain reaction among local trade companies

Australia's crisis has been heavily concentrated in the residential sector. Australian builders traditionally lock into inflexible, fixed-price consumer contracts months before breaking ground. When the cost of local materials and labor soared in recent years, builders operating under fixed-price contracts were frequently unable to pass substantial post-contract cost escalation through to owners, severely compressing or eliminating project margins. Conversely, US commercial and residential markets adapt more dynamically with cost-plus pricing structures and floating cost clauses.

In Australia, construction insolvencies directly derail a critical national priority: **housing supply**. Because the Australian economy is disproportionately dependent on residential building to sustain its wealth and accommodate population growth, a massive surge in builder collapses directly stalls the delivery of thousands of homes. This creates an intense public drag, leaving consumers stranded with unfinished slabs, wiped-out deposits, and diminished consumer confidence

I have been discussing this menacing, predatory behaviour that permeates the construction industry in Australia for at least two decades and well before my testimony to the Senate Economics Committee in August 2015.

Chapter 6 of the Final Report presents my concern that still exists today of structural insolvency being propelled by regulatory gatekeeping failure and protective measures for the contracted party.

The construction industry operates on a strict, vulnerable hierarchical structure where principal contractors heavily pass financial risks down the chain. When a major builder like Walton Constructions collapses, it creates a cascading failure that pushes dozens of specialized subcontractors over the fiscal cliff. Australia now has the fallout from the Bathla Group Collapse.

This systemic insecurity creates acute market friction. Subcontractors, if they are still around after the cascading domino effect, are forced to price in extreme default risks, directly escalating the cost of residential construction and decreasing overall sector productivity.

My evidence established that the **Queensland Building and Construction Commission (QBCC)** completely failed in its primary gatekeeper duty. Despite massive, industry-wide warnings that Walton was in deep financial distress between 2012 and 2013, the QBCC allowed the company to maintain and extend its operating licence. The regulator treated licensing requirements as a passive **"snapshot in time"** rather than executing proactive financial health monitoring.

This failure allowed an effectively insolvent operator to continue trading for over 15 months on interest-free credit supplied by the small businesses on the ground.

When regulators fail to purge insolvent entities early, they trap critical trade labor and supply pipelines in doomed projects, stalling housing delivery.

As the table above shows (excluding Bathla Group) Queensland has been home to the top 5 construction industry collapses. As discussed more fully later in this submission, in 2024–25 almost $957 million was claimed through adjudication in Queensland, yet only approximately $82 million was adjudicated — an adjudicated amount equivalent to just 8.56 cents for every dollar claimed.

Regulatory incompetence from bodies like the QBCC directly undermines housing productivity. By functioning reactively rather than proactively, regulators protect the corporate facade of major builders while allowing the systemic erosion of the foundational trade workforce that actually builds Australia's housing supply.

This submission spends **165 pages** demonstrating the enormous amount of work required to "unpack" what appears to be a superficially simple proposition, namely:

Speed up regulatory approvals at a much faster pace
and
available constructed housing units increases
at the same rate!

The response making up this submission has taken a hard-, and at times even a steely-eyed-, look at:

- Sir Michael Latham's landmark report – Constructing the Team;
- The Cole Royal Commission;
- Bruce Collins QC Final Report into New South Wales Construction Industry Insolvencies;
- The Senate Economics Committee Inquiry into Construction Industry Insolvencies in Australia (Final Report and Recommendations, December 2015);
- Statutory Adjudication;
- Cashflow;
- Financing in the construction industry;
- Liens;
- Trusts;
- Bathla Group Collapse;
- Woonona/Warrane/A-Civil litigation;
- The Movement of Money & Performance in the construction industry;
- Small Business construction companies;
- Women-owned Small Business in a male dominated industry;
- Construction Insolvency;
- California's Institutional Architecture; and
- Amdahl and Theory of Constraints.

This is why Brandolini's principle becomes useful at the very outset of this discussion. It takes vastly more effort to dismantle a superficially plausible but badly framed proposition than it takes to assert it.

Brandolini's principle assists me in explaining why this submission has become so substantial. Its length is itself a consequence of having to unpack the assumptions embedded within an apparently simple proposition.

The Cost of Correcting a Misconceived Premise — Brandolini's Law

The difficulty confronting a person responding to an inquiry framed upon a misconceived premise is captured by what has become known as Brandolini's Law, or the "*Bullshit Asymmetry Principle*":

The amount of energy required to refute bullshit is an order of magnitude greater than the amount required to produce it.

The expression is deliberately inelegant. The phenomenon it describes is not.

It takes only a sentence to assert that faster development approvals will increase housing supply. In contrast, it takes considerably more work to demonstrate:

- why an approval is not a dwelling;
- why construction is not manufacturing;
- why the contracted party performs before being paid;
- why performance and money move in opposite directions through a vertically stratified contractual hierarchy;
- why interruption to payment destroys productive capacity;
- why a trust without corresponding security may be incomplete;
- why thousands of approved dwellings can disappear upon insolvency; and
- why accelerating one component of a system cannot produce the assumed improvement where another component remains the dominant constraint.

The difficulty becomes compounded when the proposition requiring examination originates not merely as political rhetoric but becomes embedded within the analytical framework adopted by the institution charged with testing the Government's proposition.

I am not just saying the inquiries are wrong. This submission painstakingly walks through the CIE, QPC, Productivity Commission, Senate, Latham Report, and the Bathla Group collapse to demonstrate why an approval does not, and cannot, equate to productive output in the construction industry.

Nor am I saying that the Queensland Productivity Commission and Productivity Commission are "yes-men", even though the resulting analysis may create that appearance. My concern is more fundamental. The State and Federal Treasurers respectively gave these bodies an inquiry function, required consideration of alternative viewpoints, and provided broad powers by which they could inform themselves.

If those inquiries nevertheless begin and end with the Government's original assumption, an explanation is required as to what the inquiry process added and why the inquiry was needed in the first place.

These inquiries, and each of them, represent the Mad Hatter's Tea Party.

Just as the Hatter and the March Hare are trapped at 6:00 PM, the federal and state productivity inquiries cycle through substantially the same talking points while overlooking earlier investigations, findings and recommendations concerning the construction industry.

For decades, the prescriptive remedy has remained substantially the same: "cut red tape" and pursue regulatory reform. Yet other inquiries have identified a fundamentally different problem — the failure to keep the lifeblood of the construction industry moving through its vertically stratified contractual hierarchy. Not one of the recommendations made by the Senate Economics References Committee in its December 2015 Final Report into construction-industry insolvencies has been implemented in any substantive or procedural way.

By focusing overwhelmingly on removing external regulatory hurdles, these inquiries treat productivity principally as a compliance and approval problem while overlooking the internal structure through which construction is actually performed and paid for. That structure operates much like a caste system.

The construction industry mirrors a caste system because it operates through a deeply entrenched hierarchy in which risk is pushed downward while capital and contractual power concentrate upward. The resulting vertical striation creates sharp divisions between tiers of participants and systemic power imbalances capable of producing unbargained-for windfalls and unconscientious bargains in favour of the stronger contracting party. I am already on the public record saying that much stronger regulatory oversight is needed.

The construction industry functions through a strict, predatory multi-tiered contractual chain:

- Tier 1 (The Ruling Class): Clients, developers, and head contractors. These participants control the capital, dictate contract terms, and wield true structural power.

- Tier 2 & 3 (The Intermediaries): Specialised subcontractors and project managers. These construction industry participants execute the developer's vision while absorbing complex coordination risks.

- The Sub- and Trade- Contract Base (The Underclass): This is the bottom of the vertically stratified contractual hierarchy. It consists of trade contractors, sole traders and manual labourers — the people who physically perform the work required to realise the developer's vision — yet it is the class possessing the least bargaining power.

In this ecosystem, risk and reward are inversely proportional. Financial risk is systematically pushed downward toward the most vulnerable tiers while capital and profit move upward. Although security of payment legislation expressly prohibits "pay-when-paid" provisions, contractual risk continues to be transferred downward through increasingly sophisticated drafting, indemnities, set-offs and other contractual mechanisms.

The consequence is structural. When delay, disruption or financial stress affects a project, the participants possessing the least bargaining power and financial resilience are frequently those required to absorb its immediate cashflow consequences. Non-payment at the bottom of the contractual hierarchy can therefore become insolvency remarkably quickly.

This is precisely the concern identified by Mr Iemma (Lakemba—Minister for Public Works and Services, and Minister Assisting the Premier on Citizenship) during the Second Reading of the *Building and Construction Industry Security of Payment Bill 1999 (NSW)*:

> Today marks an important occasion for small business and the construction industry. Today also marks an important step in the Government's support of the long fight by subcontractors in the construction industry for justice and security of payment. The Building and Construction Industry Security of Payment Bill is a key component of the Government reform package for security of payment in the New South Wales construction industry. It follows the 15 February announcement by the Premier of the Government's intention to stamp out the unAustralian practice of not paying contractors for work they undertake on construction. It is all too frequently the case that small subcontractors—such as bricklayers, carpenters, electricians and plumbers—are not paid for their work. Many of them cannot survive financially when that occurs, with severe consequences for themselves and their families.
>
> The Government is determined to rid the construction industry of such totally unacceptable practices. The Government recognises that any action taken to achieve this should not add unnecessary cost to industry, its participants and
> Clients …
>
> …
>
> Hundreds of subcontractors in New South Wales struggle to survive when they do not receive money owed to them for work undertaken. They do not have the cash flow allowing them to keep on working while waiting for payment. This causes
> hardship not only to them but also to their families.

The underlying structural problem has not changed since the introduction of security of payment legislation in Australia in 1999.

Without the robust external intervention outlined in this submission — and in the submission previously made to the Minister for Housing and Public Works and the Queensland Productivity Commission — the industry continues to default to this hierarchical structure, with the bottom tiers effectively financing the activities of those above them at their complete expense and often with devastating results.

Government inquiries routinely obsess over planning approvals – a highly visible, quantifiable metric – while ignoring systemic payment failure, which is the invisible bottleneck dictating whether those approvals ever get built. The inquiry system

simply moves pieces around the board by issuing more reports, launching more inquiries, and proposing superficial reforms. The underlying constraints never shift.

Like the Mad Hatter's Tea Party, the conversation remains circular. In Lewis Carroll's novel, the characters periodically move around the table to find a clean cup, but the underlying mess remains. Similarly, shifting the productivity inquiry from a State Commission to a Federal Commission — and then establishing a Senate Select Committee — merely moves the participants to different seats at the same broken table.

Without addressing the core issues detailed in the **Ministerial Briefing Paper** submitted to both the Queensland Minister for Housing and Public Works and the Queensland Productivity Commission on **5 September 2025**, these inquiries continue to ask their own version of an unanswerable riddle.[12] The problem was perfectly illustrated by the Minister for Housing and Public Works, Sam O'Connor, in February 2025:

> "*We want Queensland to be the building capital of the nation but at the moment our construction sites are the least productive in Australia*."
> Minister for Housing and Public Works
> Sam O'Connor (Feb 2025)

My response to the Minister at that time went directly to the issue missing from the productivity analysis now under examination: the failure to consider the position of performance vis-à-vis the government's expected outcome and the menacing conduct found within the vertically stratified hierarchy:[13]

Minister, if "money makes the mare go", then the mare in Queensland is not only starving but also has "HEADED FOR GLUE FACTORY" written all over it in the same way the carthorse "Boxer" in Orwell's dystopian novel "Animal Farm" when he was no longer useful to the pigs. The current state of statutory affairs, as presented and discussed in this briefing paper, symbolises the betrayal and exploitation of the contracted party (working class) as adopted by Labor's Palaszczuk Government (Minister de Brenni) in the Building Industry Fairness (Security of Payment) Act 2017.

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[12] These inquiries, like Lewis Carroll's famous riddle "Why is a raven like a writing desk?" created many questions because, when Lewis Carrol published the book in 1865, the Mad Hatter's riddle was entirely nonsensical, and Carroll stated he had no answer in mind. Because readers spent decades trying to solve it, Carroll added a new preface to the 1896/1897 edition offering a retrospective solution. Carroll suggested, "*Because it can produce a few notes, though they are very flat; and it is never put with the wrong end in front!*" (playing on "nevar" as raven spelled backwards). This is the exact problem confronting the inquiries — they are putting the wrong end in front of the inquiry while overlooking the critical end at which completed output is actually produced.

[13] My submissions over the years have focused on protecting cash flow movement and ensuring it gets to where it is supposed to go and is desperately needed. The term cash flow becomes nothing more than a *Cri de Coeur* expressing entitlement for the person who first makes such declaration. In the case of the head contractor, it means to bring forth the operative effects of the *Golden Rule*, that is, "*he who has the gold makes the rules*" or "*their cash, my flow*". The problem has never been examined properly, and, in my opinion, the inquiries have never focused on the real question – "*How can the subcontractor's cash be used by the head contractor while guaranteeing that the subcontractor will not ultimately suffer the loss of payment for its work and materials?*" California has a mechanics' lien and makes it a criminal offence to divert funds to a use other than that for which they were received. Lord Denning in *Dawnays v F.G. Minister Ltd* (1971) 1 WLR 1205 at 1209-1210 described the problem thusly: "That seems to me to run counter to the very purpose of interim certificates. Every businessman knows the reason why interim certificates are issued and why they have to be honoured. It is so that the subcontractor can have the money in hand to get on with his work and the further work he has to do. Take this very case. The subcontractor has had to expend his money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it. An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims, whether good or bad – except so far as the contract specifically provides. Otherwise any main contractor could always get out of payment by making all sorts of unfounded cross-claims. All the more so in a case like the present, when the main contractors have actually received the money."

Moreover, the current statutory adjudication environment illustrates how the Newman Government (Minister Mander) prioritised fairness and prior restraint for the contracting party through the old Soviet-style form of centralised administration when removing the decentralised marketplace of Authorised Nominating Authorities. The Palaszczuk Government (Minister de Brenni) not only continued but also augmented this centralised form of prior restraint by complicating the statutory regime to the point that John Fiocco in his report to the Minister of Commerce (Western Australia) warned the Western Australia government not to consider the Queensland model after 2013, the year in which the Newman Government through Minister Mander believed the system needed to be fairer for the contracting party (The Golden Ruler – "your cash, my flow").

In his 2018 Report to the Minister of Commerce (WA), John Fiocco expressly noted that Queensland's model after 2013 (when the Newman government amended the Building and Construction Industry Payments Act 2004) had become too complex and prescriptive, introducing distinctions between "standard" and "complex" claims, with different timelines. Fiocco cautioned the Western Australia government not to replicate Queensland's post-2013 approach, saying it undermined the objective of quick, simple, and cost-effective adjudication.

Fiocco favoured the NSW-style system, and this is the regime that has been adopted to replace the previous West-Coast model

The movement of Western Australia to the East Coast Model means that the vision of the Senate Inquiry into Construction Industry Insolvencies in Australia of a Federal Model is in place, at least from the standpoint of practice and procedure. Queensland is completely out of touch with security of payment, and this paper assists in highlighting how cash flow is the lifeblood of the construction industry. Without cash flow, there will be no productivity that the Honourable Minister seeks to establish in Queensland.

Two of the more difficult challenges encountered by construction industry participants, when performing within the ever-changing nature of a construction project, especially in relation to the subcontractor, appear and reappear under two important themes: (1) Getting paid the full amount of a progress claim on time; and (2) Having access to "ready money".

As discussed in the preceding paragraph, the failure of the centralised form of administration overseen by the QBCC to achieve, even remotely, means that the ability of the contracted party to have access to "ready money" is challenging in its best light, if not outright impossible without other forms of collateral.

Without cashflow the performance of men and machine in a construction project is disrupted. Interruption of cashflow in one link of the contractual chain has negative consequences all throughout the contractual chain.

Thus, the failure to get paid promptly, when combined with the failure of not having a pre-planned supply line to "ready money" to augment cashflow, is not only disruptive but can also be fatal, especially for a subcontractor. This is a project consideration that takes priority over any project work performance by the subcontractor because no matter how brilliantly a work crew may perform for the subcontractor on any project, there may never be the chance for the employees of the subcontractor to do so if the subcontractor does not focus on mitigating these two negative impacts on cash flow. The disruption or even worse the demise of the subcontractor disrupts the marketplace and allocation of resources within the marketplace. Disruption or demise of one element of the contractual chain impacts other elements of the contractual chain with the overarching negative impact on the marketplace being the demise or disruption of contracted party sovereignty—one of the perquisites to a marketplace functioning efficiently and fairly.

The record now shows that the Queensland Productivity Commission did not engage with my submission and structurally excluded it from its analysis. The extract reproduced above establishes that the submission expressly addressed:

- Security of Payment (SOPA);
- adjudication outcomes (in Queensland);

- cashflow failure in the construction industry and how it occurs;
- Projects Trust Accounts and why they do not work without the sister mechanism of a mechanics' lien;
- lien rights and why they are important to the contracted party;
- the collapse of contracted-party sovereignty;
- the Building Ministers' Forum 2018 harmonisation commitment completely ignored by Queensland;
- the Fiocco Report's criticism of Queensland's model;
- the statistical failure of QBCC adjudication and how and why it is collapsing;
- the centralised prior-restraint model I presented to the Senate Economics References Committee when inquiring about construction industry insolvency;
- the standard/complex claim distinction adopted in Queensland; and
- the absence of the decentralised marketplace of Authorised Nominating Authorities in Queensland.

The significance of that evidence becomes apparent when it is compared with the Terms of Reference directing the Queensland Productivity Commission:

In considering policy responses, the inquiry should focus on the key systemic policy and regulatory settings that impact construction sector productivity. Similarly, the inquiry should primarily focus on those areas that can be influenced by the Queensland Government. However, where there are critical issues that fall within the scope of local government or Australian Government policy, the inquiry should identify such issues and provide options to inform the Queensland Government's engagement on these matters.

how government procurement and contracting arrangements, including Best Practice Industry Conditions, affect productivity in the construction sector, and how practices and policy settings can be improved

current conditions in the housing market, residential development sector, infrastructure delivery and construction sector in Queensland, including in both housing and non-residential construction as they relate to the delivery of additional housing supply and housing affordability

Not one of Terms of Reference expressly mentions any of the following matters:

- Security of Payment,
- adjudication,
- cashflow,
- payment disputes,
- trust accounts,
- lien rights,
- QBCC performance in adjudication,
- SOPA harmonisation.

But that is not the end of the inquiry. The Terms of Reference expressly required the QPC to consider "*key systemic policy and regulatory settings that impact construction sector productivity*". Whether interruption to payment and cashflow affects construction productivity therefore turns upon substance, not upon whether the expressions "Security of Payment", "adjudication" or "cashflow" appear verbatim in the Terms of Reference.

The Queensland Productivity Commission explicitly states:

Not every policy or regulatory issue affecting the construction industry raised by stakeholders or the associated literature is addressed in this report. Rather, the Commission has identified the key issues that are affecting productivity in the Queensland construction industry, and the key actions most likely to 'shift the dial' over the next decade. Some of these actions will deliver immediate positive outcomes, while others will take time to implement and take effect.

This is the bureaucratic code for –

"***We have ignored submission that did not fit the Terms of Reference or our preferred narrative***".

Translated into practical effect, the QPC is saying that it selected which stakeholder issues it considered sufficiently important to "shift the dial" and excluded the remainder from substantive analysis. The critical question therefore becomes: *"By what criterion did Security of Payment, adjudication and cashflow fail that test?*"

The submission I made in 2025 was excluded from the QPC's chosen analytical scope even though it directly addressed systemic policy and regulatory settings capable of affecting construction-sector productivity.

The QPC's own 72-page report proves that the QPC ignored Security of Payment entirely. A search of the report reveals:

- No mention of **Security of Payment**;
- No mention of **BIF Act**;
- No mention of **BCIPA**;
- No mention of **Fiocco**;
- No mention of **ANAs**;
- No mention of **adjudication**;
- No mention of **cashflow**;
- No mention of **payment disputes**;
- No mention of **statutory charges**;
- No mention of **trust accounts** (except in the narrow context of financial regulation, not SOPA).

The submission I made last year to the Minister and the QPC demonstrated with evidence that:

- "*Without cashflow the performance of men and machine in a construction project is disrupted*";
- "*Interruption of cashflow in one link of the contractual chain has negative consequences all throughout the contractual chain*".

The Final Report issued by the QPC (October 2025) never once acknowledges cashflow as a productivity determinant.

That omission cannot simply be dismissed as immaterial. It reflects the analytical methodology adopted by the QPC.

A hard-look review of the methodology engaged by the QPC shows that it structurally excludes security of payment considerations. The diagnosis of productivity by the QPC focuses only on the following:

- demand pressure;
- BPICs;
- procurement complexity;
- land use regulation;
- building regulation;
- labour shortages.

The result is a politically safe list that avoids confronting a very different collection of matters directly affecting the operation and productive capacity of the construction industry:

- the failures of the QBCC;
- adjudication failures;
- payment failures in the construction industry;
- the cascading domino effect by which insolvency propagates through contractual chains;
- the resulting collapse of subcontractors;
- statutory inconsistencies between jurisdictions;
- Building Ministers' Forum commitments that have not been honoured;
- national harmonisation that has not occurred
- the absence of any meaningful measurement of cashflow through the construction industry across security of payment jurisdictions;
- Fiocco's longstanding criticism of the Queensland model after 2014.

My 2025 submission did not raise peripheral matters. It directly challenged the operation of the QBCC, the substantive and procedural architecture of the BIF Act, the centralised nomination model, the standard/complex claim distinction, the statistical performance of adjudication and Queensland's departure from national harmonisation.

Nor are these merely Queensland-specific concerns. They raise broader questions about the effectiveness of security of payment legislation, the movement of cash through construction contracting chains and the capacity of statutory adjudication to protect the productive participants for whose benefit the legislation was enacted.

The stakeholder material reproduced in the Final Report reinforces the same concern. The QPC quotes stakeholders extensively in relation to BPICs, procurement, WHS misuse, land use, planning delays and labour shortages. Yet not one of the stakeholder quotations reproduced in the Final Report concerns security of payment, adjudication, payment delays, lien rights, QBCC nomination, jurisdictional failure rates, Fiocco's warnings or national harmonisation.

That pattern requires explanation. My submission raised precisely those matters, yet none entered the QPC's published stakeholder narrative. My submission was

therefore not merely absent from the conclusions; the issues it raised were absent from the analytical discussion leading to those conclusions.

The QPC's silence on Security of Payment is impossible to justify intellectually in an investigative way.

The QPC claims:

- "*Productivity has declined by 9% since 2018*";
- "*The industry needs 9% more labour to produce the same output*";
- "*297 construction companies collapsed in FY2024*";
- "*23% of all insolvencies in Queensland are construction*".

Curiously, having identified those insolvency figures, the QPC never thought to ask:

- Why are construction companies collapsing?
- Why is cashflow failing?
- Why are subcontractors unable to survive?
- Why are payment disputes producing such poor outcomes for contracted parties?
- Is statutory adjudication achieving the legislative object for which it was created?
- What role does regulatory performance play in the continuing insolvency problem?

The submission I presented to both the Minister and the QPC answered these questions. The QPC avoided them.

The QPC's omission is not neutral in its effect. The matters excluded from substantive consideration included criticism directed at:

- Minister de Brenni;
- Minister Mander;
- the Palaszczuk Government;
- the Newman Government;
- the QBCC;
- the Sullivan training monopoly;
- the BIF Act;
- the 2014 amendments and the unlawful takeover of the decentralised marketplace of ANAs;
- the 2017 repeal and the continuation of the unlawful takeover of the marketplace of ANAs that was replaced with an old-Soviet style of prior restraint being centrally administered by the QBCC;
- the breach of the BMF agreement.

Whatever the reason for their exclusion, the consequence is objectively the same, that is, the Final Report does not confront evidence alleging statutory failure, regulatory failure, Queensland's departure from national harmonisation, Fiocco's

criticism of the Queensland model, or the statistical evidence I presented concerning adjudication and cashflow.

Those matters were put before the QPC. They did not disappear because they were never raised. They disappeared between submission and Final Report.

This omission cannot be explained on the basis that these matters were never placed before the QPC. They were. My submission is expressly identified by the QPC as IR-104 — Mr Jonathan Sive (PDF, 568.61 KB). Nor can the omission simply be explained by saying that these matters fell outside the Terms of Reference. The Terms of Reference expressly required consideration of systemic policy and regulatory settings affecting construction-sector productivity and government contracting arrangements.

The observable fact is therefore that the analytical methodology adopted by the QPC filtered these matters out.

That is the point requiring explanation.

How did an inquiry into construction productivity receive evidence that interruption to cashflow disrupts "*the performance of men and machine*", receive statistical evidence concerning the operation of the statutory payment regime, acknowledge elsewhere that construction operates through highly leveraged hierarchical contracting chains dependent upon cashflow, and nevertheless arrive at a conception of productivity in which security of payment, adjudication and cashflow disappeared from the analysis?

What was the criterion of relevance by which that evidence was excluded?

The Senate and the Productivity Commission are currently treating the housing crisis like a real-life version of the *I Love Lucy* "Job Switching" episode in which Lucy and Ethel try to wrap chocolates travelling along an increasingly fast conveyor belt. The Government's apparent solution to the housing shortage — reflected across three inquiries concerned with housing and productivity — is to turn up the speed dial by accelerating the approval process.

But the Government refuses to look further down the production line at the people actually tasked with producing the finished product. Without functional security of payment protection, the participants at the productive end of the conveyor belt are being overwhelmed and forced into external administration, liquidation or bankruptcy.

The result is the construction-industry equivalent of the Red Queen's Race in Lewis Carroll's *Through the Looking-Glass*. The industry is being required to run faster merely to remain in the same place while the productive capacity beneath it is being progressively eroded.

The Bathla Group collapse provides a contemporary illustration of the contradiction. Accelerating the approval of housing cannot produce the Government's desired output if the economic foundation of the participants required to convert those approvals into completed dwellings is simultaneously being destroyed.

The reason for addressing this matter at the outset is not historical grievance. It is procedural notice.

I have already encountered the response that an inquiry body "has to follow the Terms of Reference". I accept that proposition. What I reject entirely is the conclusion that appears to follow from it.

Terms of Reference identify the matter to be investigated. They do not authorise an investigating body to define relevance so narrowly that evidence capable of disproving the premise upon which the inquiry proceeds is filtered from the analysis.

That distinction matters now because the present Productivity Commission inquiry remains underway. The Queensland experience is therefore not raised merely to criticise a completed inquiry. It is placed before the Productivity Commission as a warning.

If the evidence presented in this submission demonstrates that payment security, cashflow, insolvency and the financial capacity of the contracted party materially affect the conversion of an approved development into completed housing, that evidence cannot rationally be excluded merely because those expressions do not appear verbatim in the Terms of Reference.

If the evidence presented in this submission is wrong, reject it — but explain why it is wrong. If the reasoning is defective, identify the defect. If my interpretation of the legislation, the statistical evidence, the operation of security of payment, or the structure of the construction marketplace is wrong, confront it and demonstrate the error.

I have no difficulty accepting that a proposition I advance is wrong when somebody demonstrates why it is wrong.

What I do have difficulty accepting is the institutional silence.

I have been advancing these concerns publicly for nearly two decades. Most significantly, on 31 August 2015 I appeared before the Senate Economics References Committee and expressly asserted that the Newman Government's takeover of the decentralised marketplace of Authorised Nominating Authorities was unlawful under the National Competition Agreement.

That proposition was questioned during the hearing. I maintained it and explained the basis upon which it was advanced.

That hearing demonstrates precisely the process I am asking for here: challenge the proposition; test the evidence; require me to defend it. If the proposition does not survive that process, reject it. That is what an inquiry is supposed to do.

What an inquiry cannot legitimately do is avoid the anterior proposition altogether by defining it out of relevance. That substitutes **selection for investigation**.

Accordingly, if the evidence in this submission is wrong, reject it and explain why. If it is right, follow it wherever it leads — even if the destination is inconvenient to the assumptions upon which the inquiry commenced. Do not make the evidence disappear by saying that it is "outside the Terms of Reference".

The Terms of Reference are the starting point of the investigation. The Terms of Reference cannot become a shield against what the investigation reveals.

However, it is important to recognise that the Terms of Reference issued by the Treasurer do not commence with an open-ended diagnosis of the housing problem. They commence from an existing policy premise, namely that regulation is materially constraining housing supply and that regulatory reform can "*speed up delivery of new housing and boost construction productivity*".

The Terms of Reference therefore do not merely ask the Productivity Commission to diagnose why Australia is failing to produce sufficient completed housing. They direct attention toward a pre-existing regulatory diagnosis and ask the Commission to identify and prioritise reforms within that frame.

The Terms of Reference are therefore not diagnostically neutral. They identify regulation as the field of inquiry before the anterior question examined in this submission has been answered, namely:

"***What is actually preventing approved housing from becoming completed housing?***"

That framing does not exist in isolation. It forms part of a broader Commonwealth approach built around national housing targets, intergovernmental coordination, regulatory streamlining and accelerated approvals. The approach seeks to improve the operation of existing institutional machinery.

The comparison developed later in this submission with California is fundamentally different. California did not merely attempt to make existing machinery run faster. It constructed institutional mechanisms capable of altering the machinery itself.

One example is the California Office of Administrative Law (OAL), established in 1979 during Governor Jerry Brown's administration. Rather than relying exclusively upon political direction, intergovernmental persuasion or judicial review after the event, California created an administrative mechanism for reviewing regulations against prescribed legal standards before they became effective.

At the federal level in the United States, the Office of Information and Regulatory Affairs (OIRA), established under the Paperwork Reduction Act of 1980, performs a different but related regulatory-review function.

Feature	California Office of Administrative Law (OAL)	Federal Office of Information and Regulatory Affairs (OIRA)

Primary Mandate	Reviews regulations for strict compliance with **six statutory standards** (Necessity, Authority, Clarity, Consistency, Reference, Nonduplication).	Reviews "significant" draft regulations to ensure alignment with the **President's policy priorities** and rigorous **cost-benefit analysis**.
Legal Power	**Can formally disapprove and block** a regulation from taking effect if it fails to meet the six legal standards.	Returns rules to agencies for revision if they fail economic or policy checks; cannot technically "veto" statutory text but can delay or halt implementation through executive leverage.
Underground Regs	Actively reviews and invalidates **"underground regulations"** (agency guidance/manuals issued without public notice).	Oversees agency guidance documents but traditionally focuses on formal rulemakings.
Institutional Location	Part of the state's Government Operations Agency.	Division within the **Office of Management and Budget (OMB)**, directly inside the Executive Office of the President.

The distinction lies principally in the nature of the review. California's OAL is directed toward legal and procedural compliance with prescribed statutory standards, providing institutional scrutiny of whether an agency has remained within the authority conferred upon it. OIRA performs a broader federal regulatory-review function with substantial emphasis upon economic analysis and executive regulatory policy.

Against that institutional comparison sits Australia's target of 1.2 million new homes. The Government has coupled that quantitative objective with accelerated approvals and regulatory reform. The danger is that the metric becomes confused with the productive capacity required to achieve it.

Faster approvals can increase the number of projects entering the construction conveyor belt. They do not establish that the productive system at the other end possesses the financial, labour and institutional capacity necessary to convert those approvals into completed dwellings.

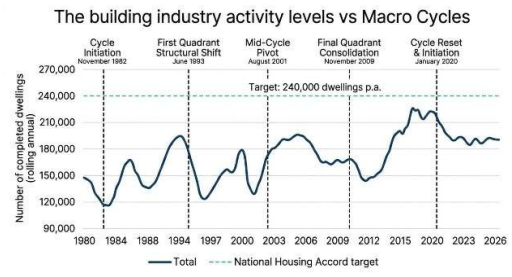
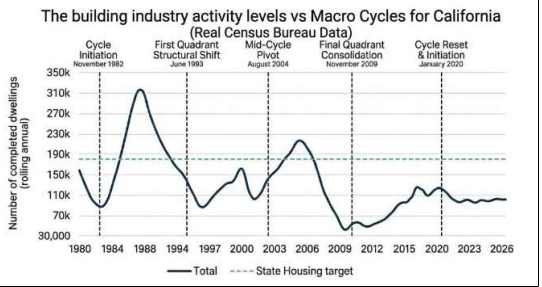
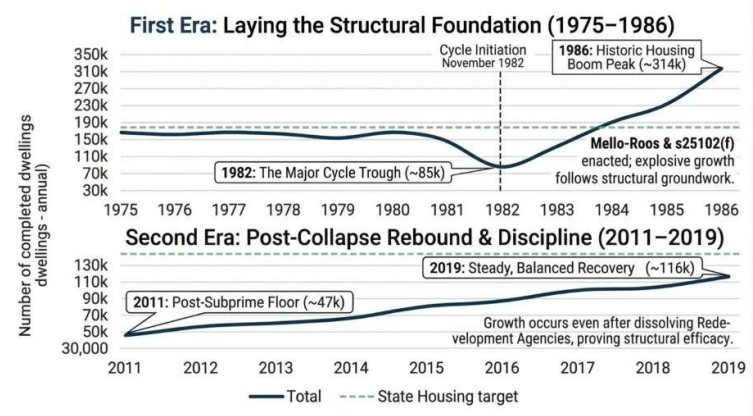
A numerical housing target establishes the desired output, no matter how that figure may have been conjured up. The Government's aggregate target of 1.2 million homes requires an annualised output of 240,000 completed dwellings. The declaration of that target does not establish the productive capacity necessary to achieve it. More importantly, there has been no attempt by the Government to explain why an annual output of 240,000 dwellings has never previously been achieved in Australia, or what has fundamentally changed within the productive capacity of the construction industry to make that unprecedented level of output achievable now.

The significance of this distinction becomes much clearer when housing output is viewed over an economic cycle rather than as an isolated annual target.

The following charts compare completed dwelling activity in California and Australia across the macroeconomic cycles identified in this submission. They reveal something that is easily obscured when housing is treated as the economic objective rather than as an output responding to the productive and economic environment in which construction occurs.

California provides the more dramatic illustration. At the commencement of the cycle identified in November 1982, annual housing completions were below 100,000 dwellings. Within several years, annual completions had risen above 300,000 before subsequently declining. Following the Global Financial Crisis, California again reached a profound cyclical low before housing activity recovered.

The important point is not simply that California once constructed an extraordinary number of dwellings. The important question is: what changed within the economic, legislative, administrative and regulatory environment that enabled productive capacity to respond so dramatically?

<table>
<tr><th>Australia</th><th>California</th></tr>
<tr><td>
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<tr><th colspan="2">Governor Jerry Brown's Vision & Resulting Growth</th></tr>
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The economic principle that best describes housing and construction is the "accelerator effect". To this end, housing and construction work alongside the investment multiplier established by the government. Housing and construction are systemic stabilisers or amplifiers and not structural growth drivers.

By incorrectly framing housing and construction as standalone structural growth drivers rather than systemic stabilisers and cyclical amplifiers, the Productivity Commission directs its attention to the wrong end of the conveyor belt. The empirical data tracking the macro cycles of Australia and California demonstrates

that housing construction does not function as an isolated growth engine. Rather, housing and construction responds dynamically to the underlying administrative, legislative, and regulatory foundations of the broader economy. By not understanding this relationship and, for this reason, mischaracterising how housing and construction work within the economy, the Productivity Commission misinterprets how the construction sector structurally integrates within the macroeconomic cycles. The inescapable consequence is policy recommendations that treat the symptoms of systemic volatility rather than the root cause.

The Australian experience provides a critical comparison. Australia is now attempting to prescribe an annual housing output of 240,000 dwellings by target while simultaneously concentrating policy attention upon accelerating the regulatory front end of the construction process.

The historical series raises the anterior question, namely:

"**What expansion in productive capacity has occurred that makes this unprecedented, sustained output achievable**?"

California did not become an economic behemoth because it constructed 300,000 houses in a particular year. The alternative proposition examined in this submission is that California was capable of constructing housing at extraordinary rates because an expanding economy, supported by institutional architecture capable of facilitating capital, infrastructure, innovation and productive activity, generated the conditions to which housing construction responded.

Housing, viewed in this way, is not the piston driving economic growth. It is substantially a reaction to the operation of the economic engine.

California did not become an economic powerhouse because the Golden State "picked winners". California lives up to its name as the Golden State and as an economic powerhouse because, after being admitted to the union as the 31st State of the United States,[14] the lawmakers progressively constructed the administrative, legislative and regulatory architecture within which competing participants could present themselves to the marketplace and the marketplace could determine which would succeed.

The distinction lies in the conception of government's role. *Future Made in Australia* establishes a framework through which government identifies priority sectors and directs public support toward activities considered to be in the national interest. The alternative examined through the California experience begins one level higher: government first establishes and regulates the institutional prerequisites within which the marketplace itself can allocate capital and productive resources.

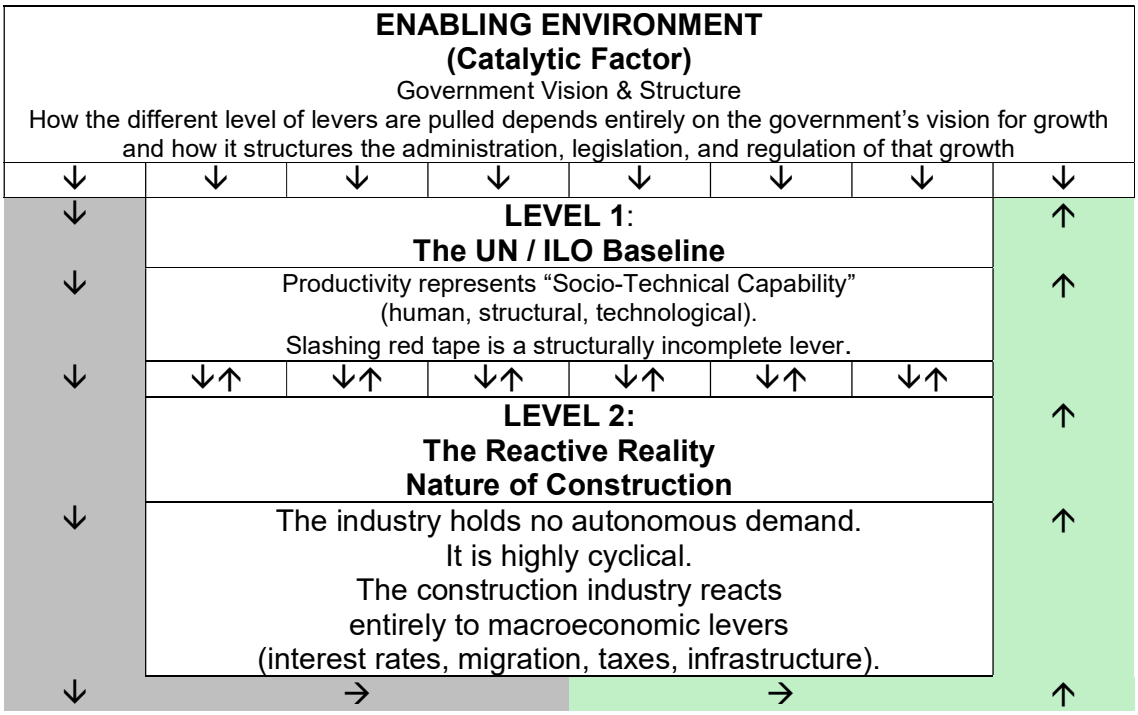
[14] California was admitted as a state on 9 September 1850. California's admission was part of the Compromise of 1850, the arrangement and packaging of five separate bills passed by the United States Congress in September 1850 that temporarily defused tensions between slave and free states leading up to the American Civil War and the battle that began the American Civil War, that is, the Battle of Fort Sumter that began with bombardment of Fort Sumter on 12 – 13 April 1861 that ended with the surrender of the fort by the United States Army and the commencement of the American Civil War.

The approach taken by Governor Jerry Brown emanates from the overall assumption that the marketplace functions to allocate resources fairly and where the PREREQUISITES for the marketplace are present for the marketplace to so function, the marketplace should be initially relied on to that end.

It is a rare occasion that such prerequisites exists. Therefore, for the State to regulate it must have its own administrative affairs in order, and this is what Governor Jerry Brown did during his first eight years (1975 to 1983) as the Governor for the State of California.

The approach taken by Governor Brown and his administration was to regulate the hell of the prerequisites so that the marketplace can function efficiently, effectively, and productively.

A government that lacks the institutional architecture to regulate a marketplace cannot accelerate that marketplace by selecting winners within it.



As demonstrated by the vertical hierarchy above, the "Enabling Environment" or the catalytic factor of the productivity crisis is not a downstream failure of, for example, council timelines or a tome of National Construction Code but is in fact related to a failure of high-level government vision and structure.

As shown above, this structural domain governs and catalyses everything below it. This diagram assists in understanding why California became an economic behemoth after Governor Jerry Brown laid out a cohesive, long-term structural vision for the Golden State on 6 January 1975.

If the overarching administration and regulation of growth are unstable, contradictory, and short-sighted, macroeconomic levers will be pulled erratically. This resulting volatility forces the construction industry into a permanent state of triage, permanently destroying its capacity for long-term structural, human, and technological productivity.

Government has an essential regulatory role, but that role begins with establishing the prerequisites that allow productive markets to function. Selecting desired outputs or sectors is not a substitute for constructing those prerequisites.

What an Enabling Environment Actually Requires

The distinction is fundamental. An enabling environment is not created by selecting an output target and then subsidising activity in the hope that productive capacity will follow. Nor is it created by accelerating one administrative process within a much larger economic system.

An enabling environment concerns the institutional conditions within which private economic activity is permitted to emerge, obtain capital, acquire infrastructure, develop human capability, undertake productive activity and retain sufficient security in the fruits of that activity to continue participating in the marketplace.

This is where the comparison with California becomes important. The significance of the Brown architecture was not any single statute viewed in isolation. It was the interaction between a collection of institutional mechanisms operating at different points within the economic system.

Governor Brown started with the principle that for an “enabling environment” to be just that, there must be “Administrative legality”. Administrative legality becomes the basis for the Office of Administrative Law. Governor Brown’s vision is that the government itself must be constrained by rules of how regulation may be created.

The next concern following Administrative legality was provided the necessary legislative mechanisms to sponsor economic growth – Capital formation. Section 25102(f) of the California Corporations Code is the landmark mechanism that allowed private capital to be raised without unnecessarily forcing every transaction through public-registration machinery. Section 25102(f) of the California Corporations Code was originally established as part of the broader **Corporate Securities Law of 1968**, but its modern incarnation as the well-known **Limited Offering Exemption** (the 35-purchaser rule) was introduced and enacted in **1981**. Prior to 1981, Section 25102(f) of the California Corporations Code applied to a much narrower “partnership” exemption. AB 1581 completely rewrote the subdivision to mirror aspects of federal safe harbor rules (such as SEC Regulation D). This change allowed startups and private companies to sell securities to up to 35 unaccredited investors (and an unlimited number of accredited or sophisticated investors) without undergoing a costly state qualification process.

This rewriting of the law opened the floodgates of capital with a megatsunami like wave that established Silicon Valley as the premier technology capital in the world.

That result was not accidental.

I had the considerable benefit of studying Corporations and Securities Law under Professor Hugh Friedman, who was directly involved in the architecture of this reform after being commissioned by Governor Jerry Brown.[15] Professor Friedman explained the significance of the mechanism from the standpoint of somebody directly involved in its creation: California needed to liberate private capital from an unnecessarily burdensome qualification process while retaining the regulatory protections necessary for the marketplace to function.

That is the distinction that matters. California did not deregulate the marketplace and hope for the best. It regulated the prerequisites necessary for the marketplace to function while removing a regulatory impediment that unnecessarily constrained access to private capital.

Government did not select the enterprises that would succeed. It constructed the regulatory environment in which capital could reach competing enterprises and allowed the marketplace to determine the winners.

That distinction is critical to the concept of the "Enabling Environment" developed in this submission. The State did not select the companies that would become California's economic winners. It established the regulatory architecture through which capital could reach competing enterprises and allowed the marketplace to determine which enterprises would succeed.

Silicon Valley was therefore not a government-selected "winner". The State regulated the conditions within which capital formation could occur, entrepreneurs could obtain that capital, innovation could be financed and successful enterprises could emerge. Government constructed the playing field; it did not decide the score.

That is the distinction between *enabling* productive capacity and attempting to manufacture a predetermined economic outcome through government selection.

The last concern focused on how to establish and form the needed infrastructure. The *Community Facilities Act* was a law enacted by the California State Legislature in 1982. The name Mello-Roos is derived from its co-authors, Senator Henry J. Mello (D-Watsonville) and Assemblyman Mike Roos (D-Los Angeles).

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[15] Professor Casil Hugh Friedman (1931–2013) was the longest-serving faculty member in the history of the University of San Diego (USD) School of Law, where he taught Corporations and Securities Law for more than five decades from 1958. Professor Friedman was deeply embedded in California's corporate and securities-law architecture during the period in which California comprehensively overhauled its small-business capital-raising exemptions. He served extensively on State Bar committees and corporation-law advisory groups and participated in the drafting and development of legislative reforms. The reform that created the modern, expanded iteration of section 25102(f) of the California Corporations Code was enacted through Assembly Bill 1581 (Statutes of 1981, Chapter 1120) during Governor Jerry Brown's administration. The legislation was enacted as an urgency statute and took effect on 1 November 1981. Contemporary practitioners, including Harold Marsh and Robert Volk, described the reform as "the most significant change made by the Legislature in the securities law since 1968" because it transformed the exemption from its substantially narrower predecessor into a generally available mechanism for private capital formation. Professor Friedman was a principal contributor to the State Bar's Committee on Corporations, which collaborated with the Department of Corporations in developing the reform. I was Professor Friedman's student in 1995. In his lectures he frequently referred, with characteristic humour, to the "(f)" in section 25102(f) as standing for "Friedman" — not as a literal explanation of the alphabetical designation of the subsection, but as a light-hearted reference to the considerable work he had undertaken in helping to architect the exemption. That recollection has remained with me for more than thirty years.

When Proposition 13 passed in California in 1978, it limited the property tax rate and the ability of local governments to increase the assessed value of real property by not more than an annual inflation factor. As a result, the budget for public services and for the construction of public facilities could not continue unabated. New ways to fund local public improvements and services were considered and adopted by the California State Legislature. A Mello-Roos tax is a parcel tax that circumvents Proposition 13 (which limits property taxes based on the assessed value of real property) because it is not levied on the assessed value of real property.

Community Facilities Districts (CFDs), more commonly known as Mello-Roos, are special districts established by local governments in California as a means of obtaining additional public funding. Counties, cities, special districts, joint powers authority, and school districts in California use these financing districts to pay for public works and some public services.

Development-supporting infrastructure could now be financed through a mechanism connected to the development benefiting from it.

These changes were placed on a world-class education system created by Governor Pat Brown (Jerry Brown's father) under the 1960 Master Plan for Higher Education. This master plan established a framework for California's public postsecondary education system at a time when state officials anticipated a large increase in university enrollment as the baby boom generation came of age. The plan sought to make higher education available regardless of economic means while differentiating the functions of the University of California (UC), the state colleges that were later reorganized as the California State University (CSU), and the junior colleges that were later organized into the California Community Colleges (CCC) system. By assigning distinct missions to each segment, the plan sought to avoid duplication of programs, reduce costs, and coordinate the growth of higher education in the state.

This master plan augmented and amplified the cutting-edge technology districts in Silicon Valley, Orange County, and San Diego.

The ability to secure capital and the voiding of non-competition clauses had already been deeply engrained within California's economic psyche since the 1800s. California created the first mechanics lien statute on 12 **April 1850** and subsequently enshrined it in the state constitution in **1879**.

California made non-compete clauses void in 1872. The ban was intentionally designed to protect workers, prevent companies from suppressing wages, and encourage open market competition and innovation. In 1941, this historical rule was moved and re-codified into the California Business and Professions Code Section 16600, which remains the bedrock of California's strict anti-non-compete policy today.

Ultimately, Senate Bill 35 (SB 35) is a legislative response operating downstream within an economy already possessing these critical institutional characteristics that enable economic activity to function within the marketplace efficiently, effectively, and productively.

The Australian approach examined in this submission operates differently. Much of the policy architecture is directed toward prescribed outcomes: a specified number of dwellings, targeted public investment, subsidies, incentives and accelerated approvals. Those measures may stimulate particular activities, but stimulation of an output is conceptually different from establishing the institutional environment within which productive capacity develops.

	ADMINISTRATIVE LEGALITY		
↓	↓	↓	↓
Capital	Infrastructure	Human capability	Security of performance/ payment
↓	↓	↓	↓
	ENABLING ENVIRONMENT		
↓	↓	↓	↓
Investment	Enterprise	Innovation	Productive Capacity
↓	↓	↓	↓
	Macroeconomic Growth & Demand		
↑↓	↑↓		↑↓
	CONSTRUCTION RESPONDS		
↓	↓		↓
Housing Output			

That distinction brings this submission to the point where the Government's apparently simple proposition must be tested against the construction industry as it actually operates. If accelerating approvals does not itself create productive capacity, and housing construction is substantially a reactive output of the economic and institutional environment within which it operates, the inquiry must travel further down the construction conveyor belt to identify where productive capacity is actually being created, constrained or destroyed.

SB 35 cannot sensibly be extracted from California's institutional architecture and treated as though streamlined approval itself created California's productive capacity. SB 35 operates within that architecture; it did not create it.

DOWN THE RABBIT HOLE

"*Would you tell me, please, which way I ought to go from here?*" Alice asked.
"*That depends a good deal on where you want to get to*," said the Cat.
"*I don't much care where*—" said Alice.
"*Then it doesn't matter which way you go*," said the Cat.

The familiar paraphrase of this exchange — *if you do not know where you are going, any road will get you there* — captures the difficulty confronting the present inquiries. Both the Federal and Queensland Governments have established ambitious population and housing targets. Yet a target identifies a destination; it does not identify the road by which that destination can realistically be reached.

What remains missing is the demonstrated, long-horizon pathway connecting population growth, economic expansion, infrastructure, construction capacity and completed housing output. Without that pathway, the published targets risk becoming little more than administrative aspirations.

Neither the Commonwealth nor Queensland material examined in this submission identifies an integrated master plan or structural blueprint demonstrating how the stated population and housing objectives are to be converted into productive capacity and ultimately completed dwellings. What is missing is the navigational chart – **the sequencing of economic growth, infrastructure, capital, labour, construction capacity and regulatory architecture necessary to reach the nominated destination**.

Without that demonstrated pathway, population projections and housing targets tell us where government wishes to arrive, but not how the economy and construction industry are expected to get there.

The Australian Labor Party Senators' Additional Comments to the Senate Select Committee's Interim Report provide a useful test of that proposition. The comments identify numerous initiatives and areas of government activity, but they do not identify an integrated analytical pathway demonstrating how population growth, economic expansion, infrastructure capacity, construction capacity and housing delivery are intended to operate together.

Instead, what emerges is a collection of measures directed at different parts of the system. The question for this submission is whether those individual measures constitute a coherent structural plan or merely movement without a demonstrated destination and route.

What the Labor Senators present is a collection of reactive measures and initiatives directed toward different parts of the system, without demonstrating the structural relationship between those measures and the scale of the crisis they describe.

The further difficulty is institutional responsibility. Across the various inquiries examined in this submission, responsibility repeatedly moves between Commonwealth, State and local government, regulators and industry participants. In

colloquial terms, the institutional response begins to resemble a game of "passing the buck".[16]

The Additional Comments illustrate the problem. The Government points to having "*paused and streamlined elements of the National Construction Code*" while simultaneously acknowledging that the Code has "*more than doubled in size*". It identifies action directed toward housing supply while acknowledging that projects on land already zoned for housing may require "*more than a decade for construction to commence*". It refers to rebuilding the construction workforce while acknowledging that "*almost half of permanent migrants … are working below their level of skill and qualification*".

These propositions expose the absence of an integrated causal model. Each identifies activity somewhere within the system; none demonstrates how those activities combine to produce the completed housing output against which the Government's target must ultimately be measured.

Describing these simultaneous conditions as evidence of progress risks becoming the very kind of linguistic inversion Orwell warned about in his dystopian novel "Nineteen Eighty-Four": administrative activity becomes a substitute for demonstrated productive outcome.

The Labor Senators also identify substantial zoning restrictions across the major cities: "*more than 80 per cent of Sydney and Melbourne… allow housing of just three storeys or fewer*", while "*three-quarters of land*" in Brisbane, Perth and Adelaide is restricted to two storeys or less.

But identifying another constraint does not answer the structural question. Even if every identified planning restriction were removed tomorrow, what demonstrates that the construction system possesses the financial, labour, infrastructure and institutional capacity necessary to convert the resulting approvals into completed dwellings?

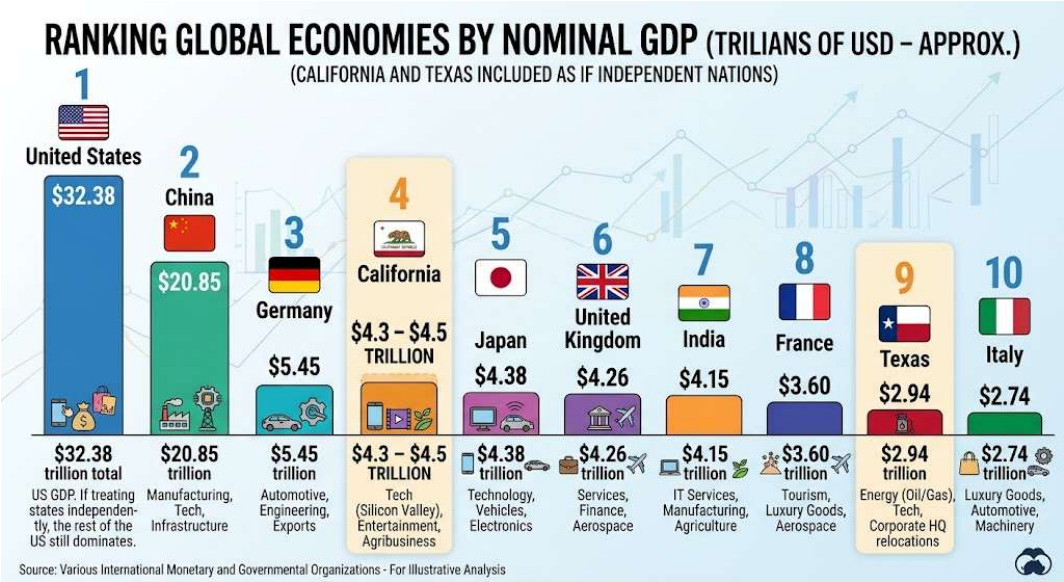
The problem is therefore not an absence of government activity. There is considerable activity. The problem is the absence of a demonstrated structural pathway connecting that activity to the nominated economic and housing destination.

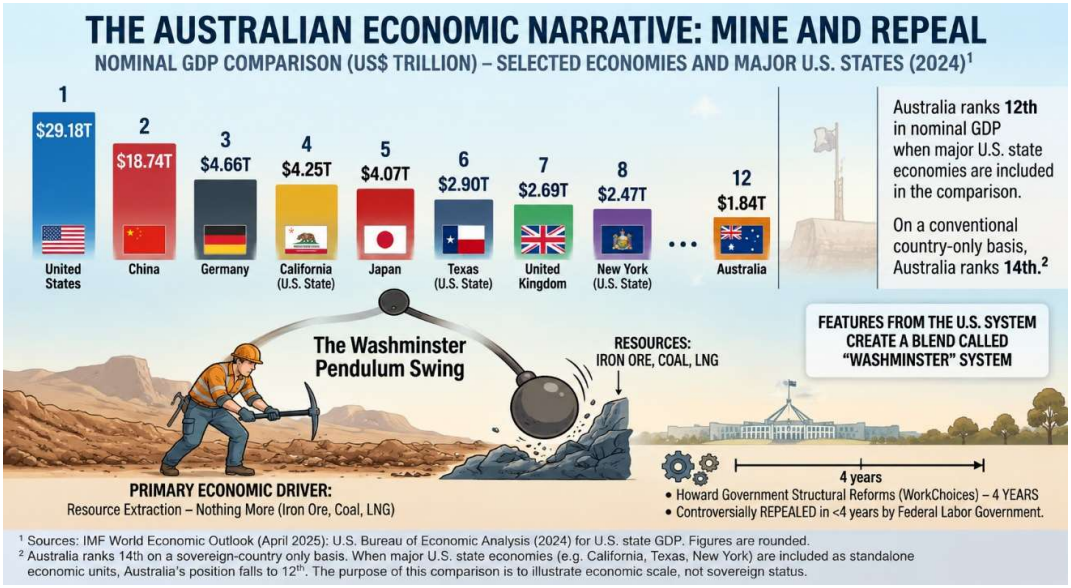
That is precisely the problem identified by Alice's exchange with the Cheshire Cat: **considerable movement tells us very little if the destination and the road required to reach it have not first been established**.

The two images below identify the structural contrast that frames this submission. California, operating merely as one state within a federal union, has developed an economy larger than almost every sovereign nation. Australia, despite possessing

[16] A game that originated in the United States – the American frontier – as a poker game where a marker, often a buckhorn knife handle, was passed to the player whose turn it was to deal. If, as here, the player (for example, the regulatory body) found the round too hard and did not want to be distracted by dealing, that player would "pass the buck" to the next player, an action that has evolved into the figurative meaning of shifting responsibility to another player. For example, local government may point to the volume of land zoned for infill development and the number of development approvals already issued and say that the planning opportunity has been created, yet industry has not converted that opportunity into completed dwellings. Responsibility can then be passed further down the construction conveyor belt. The very act of passing responsibility in this way exposes the question this submission asks, that is "Where is the actual constraint?"

sovereign fiscal, monetary, legislative and regulatory powers, remains heavily dependent on resource extraction and repeatedly subjects its economic framework to short-cycle legislative reversal.





The issue being explored in this submission is not simply why California became larger. It is why one system developed enduring administrative architecture capable of supporting long-term economic complexity, while the other continues to treat structural economic problems as a succession of isolated policy events — notwithstanding one inquiry after another, and even Royal Commissions, investigating those very problems.

Economic Scale and Productive Capacity

The significance of the comparison presented above is not that nominal GDP and productivity are synonymous. They plainly are not. Rather, sustained economic scale of this magnitude provides evidence of an economy possessing substantial productive capacity, capital formation, technological capability, human capital and institutional capacity.

California is now an economy of world-class scale. Although merely one constituent state within a federal union, its nominal economic output exceeds that of all but a handful of sovereign nations. The comparison with Australia is therefore not one of sovereign status, but of the economic complexity and productive capacity developed within the respective institutional environments.

Australia has not achieved economic scale comparable to the largest global economies. When Governor Jerry Brown delivered his inaugural address on **6 January 1975**,[17] Australia ranked approximately 12th among world economies. In the comparison used here, which includes major US states as standalone economies for purposes of economic scale, Australia appears at approximately 19th.[18]

The comparison becomes more significant when viewed across the intervening half-century. Both economies expanded enormously in nominal terms. California, however, progressively developed extraordinary concentrations of technology, innovation, advanced industry and private capital, supported by the higher-education and institutional architecture discussed earlier in this submission.

Australia also developed a sophisticated modern economy, but its external economic position remained substantially dependent upon resource extraction and commodity exports. The distinction being drawn is therefore not between an economically successful California and an economically unsuccessful Australia. It is between the different structural foundations upon which that economic activity increasingly came to depend.

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[17] Governor Jerry Brown's inaugural address on 6 January 1975 stands out as a radical departure from traditional political rhetoric. Rather than mirroring the grand, expansionist, visions of leaders like John F Kennedy ("*We Choose to Go to the Moon*", address at Rice University on the Space Effort and vision of the United States) and Dr Martin Luther King Jr ("*I have a Dream*" speech made during the March on Washington for Jobs and Freedom framing civil rights struggle not as a radical rebellion but as a demand for America to fulfill its original promise – the "promissory note" of life, liberty, and the pursuit of happiness for all citizens), Brown famously introduced an "era of limits", asserting that the state would have to "do more with less". Paradoxically, this austere vision of ecological stewardship, fiscal discipline, and regulatory restraint did not stifle California; instead, it laid the foundations for a world-class green economy driven by high-tech innovation, proving that a sovereign-scale economy could decouple massive GDP growth from raw resource consumption. In stark contrast, modern Australian economic leadership has historically leaned toward **reactive, incremental management** rather than an overarching sovereign vision. While leaders like Bob Hawke and Paul Keating successfully introduced major structural reforms in the 1980s and 1990s to internationalise the Australian economy, subsequent Australian Prime Ministers have largely operated within a commodities-driven, risk-averse framework. The absence of a bold, long-term state-directed vision comparable to California's pivot toward innovation and technological dominance helps explain why Australia – despite its immense natural wealth – has slipped in global nominal GDP rankings from approximately **12th in 1975 down to 19th today**.

[18] "Ranked: The World's 50 Largest Economies, Including U.S. States", Visual Capitalist, Dorothy Neufeld, 20 February 2026: https://www.visualcapitalist.com/worlds-largest-economies-including-u-s-states/.

Running the Red Queen's Race

The structural contrast can perhaps best be understood through Lewis Carroll's Red Queen's Race. Australia has certainly been running. Governments have legislated, regulated, reviewed, investigated and reformed. The question is whether all that movement has produced a corresponding transformation in the productive architecture of the economy.

When Alice observes that running in her country ordinarily gets you somewhere, the Red Queen explains[19] that in her world it takes all the running one can do merely to remain in the same place or, even worse, to go backwards. The recent collapse of the Bathla Group on 25 August 2026 starkly exposes this reality.

This is the structural danger confronting a resource-dependent economy. To remain in place, an economy substantially dependent upon the extraction and export of finite natural resources must continuously replenish the value being extracted.[20] To move "somewhere else" requires something qualitatively different, namely the conversion of human knowledge, technological capability, innovation and capital into increasingly complex forms of economic output.

Put more simply, the productive engine must progressively shift from what lies beneath the ground to what lies between our ears.

California provides an extraordinary illustration of that transition. Its natural advantages did not disappear. Rather, they became supplemented by a world-class higher-education system, technological innovation, sophisticated capital formation and advanced industries.

The Red Queen's Race metaphor captures the distinction and concern being presented by this submission. Over the same half-century in which California progressively developed a highly complex economy built upon technology, innovation, advanced industry, education and capital formation, Australia has repeatedly investigated, reviewed, amended and reformed its economic and regulatory settings while becoming increasingly dependent upon the same underlying resource-extraction model.

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[19] When Alice points out that in her country running actually gets you somewhere, the Red Queen snaps: *"Now, here, you see, it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!"* Current government reviews – such as productivity commission recommendations to force faster local council approvals – mirror the Red Queen. They operate under the delusion that making the approval conveyor belt run "twice as fast" automatically builds the homes they have promised. Contrary to this ivory tower approach, the building sector operates in a physical world bound by hard constraints, that is: cash flow delays, severe labour shortages, fragile supply chains, and strict safety margins. Therefore, forcing approvals at lightning speed does not build houses. Instead, it forces the actual workforce to act like Lucy and Ethel on the assembly line – dropping chocolates, skipping crucial steps, and choking under the sheer velocity of the intake. Ultimately, it traps the entire industry in the Red Queen's deficit, sprinting intensely just to lose ground.

[20] This illustrates a vulnerability associated with substantial dependence upon finite-resource exports. Economic literature distinguishes the broader "resource curse" hypothesis from the more specific mechanism commonly described as "*Dutch disease*". Whereas the "*Resource Curse*" is a broad term for the paradox where countries like Australia are rich in natural resources – oil, gas, or minerals – often experience slower overall economic growth, poverty, or political corruption within them, the term "*Dutch Disease*" (coined by The Economist in 1977) is a more specific term describing the economic mechanism (currency appreciation and de-industrialisation) that causes a major part of that "curse". To stay in place, a resource-dependent nation like Australia must continuously extract more. While healthcare employs the most people in Australia and consumers spend the most money internally, mining is the ultimate external driver. This sector of the Australian economy accounts for nearly 58% of all national export earnings. When iron ore, coal, and Liquid Natural Gas (LNG) prices surge globally, this price surge floods the Australian government and private sector with revenue that funds the rest of the economy.

The present inquiries risk repeating the Red Queen's Race. Faster planning approvals, shorter statutory timeframes, reduced regulatory burden and accelerated housing targets all represent **movement**. The anterior question is whether that movement increases the productive capacity of the system expected to convert an approval into a completed dwelling.

Making one component of the system run "twice as fast" cannot produce the intended economic outcome if the productive architecture downstream cannot absorb the increased velocity.

The California comparison is therefore fundamentally a productivity comparison.

The California comparison identifies the convergence of two important economic facilitators: first, institutional and legal architecture facilitating the movement of human knowledge, entrepreneurial activity and capital; and secondly, mechanisms protecting those who convert the resulting economic demand into physical productive output**.**

What Does Productivity Mean?

Before proceeding any further, a threshold difficulty must be addressed. The present Productivity Commission repeatedly invokes "*productivity*", as did the Queensland Productivity Commission inquiry before it, without first establishing what productivity means when applied to particular characteristics of the construction delivery system.

In conventional economic terms, productivity concerns the relationship between outputs and inputs required to produce them. Labour productivity and multifactor productivity are measures of that relationship. However, an inquiry concerned with the delivery of housing must distinguish between administrative throughput and productive output.

A development approval is not a dwelling. Yet, in different ways, each of the inquiries examined below places development approvals, development rights or regulatory throughput at the centre of its analysis of housing supply. The difficulty is not that every inquiry expressly says that an approval is a completed dwelling. The difficulty is that the analytical models repeatedly assume a sufficiently direct progression from approval to construction and ultimately completed housing without adequately examining the conditions necessary for that progression actually to occur.

The critical question is what happens after the administrative process ends. An approval creates an opportunity to construct; it does not perform the construction necessary to convert that opportunity into physical housing stock.

The following comparison demonstrates how approval processes become conflated with, or treated as the principal determinant of, actual housing supply.

CIE Report (Commissioned by QPC)

In the report commissioned by the Queensland Productivity Commission (*Costs of Housing Regulation in Queensland*), the CIE places planning regulation and approval delay at the centre of its housing-supply analysis. Its Executive Summary identifies the "zoning premium", reflecting the cost of planning regulation that limits housing supply, as the most significant regulatory cost.

The CIE then treats approval delay as a direct impediment to delivery by noting that "*While a developer waits for approval, they must continue to pay interest and other holding costs*" (pp. 8–9). Approval time is therefore treated as an important determinant of dwelling delivery.

The CIE Report then treats development timeframes as a pipeline to a dwelling. Its "Assumed Development Timeframes" table places planning approval, site preparation and construction within a continuous sequence culminating in completed housing.

What that model does not capture is the risk that an approved project may never reach completion. No matter how brilliantly a work crew may be capable of performing, there may never be an opportunity for it to do so if the contractor is not paid or lacks the pre-planned supply line to "ready money" necessary to maintain performance.

For that reason, the CIE's implied linear productivity schema is completely fanciful:

Approvals	→	Construction	→	Completed Dwelling
Cost Stacking:				
Planning		Building		
		Labour		

That sequence identifies stages involved in delivering a dwelling, but it does not adequately distinguish between them as separate risk stages. An approval creates the legal opportunity to proceed. Construction requires the financial, contractual, human and material capacity to perform. Completion requires that those conditions survive throughout the delivery process.

This distinction becomes particularly important when the statistical evidence shows approvals materially outpacing completed dwellings while completions remain comparatively flat. The existence of an approved pipeline therefore does not, without more, establish the productive capacity necessary to convert that pipeline into completed housing.

Productivity Commission Report

The Productivity Commission places regulatory and approval processes at the centre of its diagnosis of the housing supply problem. The resulting prescription is familiar: reduce regulatory burden and accelerate the front end of the development process. In terms of the conveyor-belt analogy developed in this submission, the proposed solution is to increase the speed at which projects enter the construction system.

The critical question, however, is whether increasing the velocity of the administrative input necessarily increases the velocity of completed dwellings emerging at the other end.

The Productivity Commission expressly records the evidence before it in these terms:

"*Evidence… focused predominantly on the failure of housing construction to keep pace with demand, chiefly due to the regulatory burden placed on the sector through excessive red tape, which is stymieing development and growth*".

The Commission then characterises the issue in productivity terms:

"*Housing policy affecting both affordability and supply is therefore at heart a productivity challenge*".

The difficulty is not with characterising housing delivery as a productivity challenge. I agree that it is. The difficulty lies in identifying what part of the productive system is actually constraining the conversion of demand into completed housing.

The analysis therefore concentrates heavily upon regulatory throughput without undertaking the corresponding downstream analysis required to determine whether construction viability itself constitutes a constraint upon housing output.

That omission is important. Housing supply is discussed extensively through zoning, approvals and regulatory processes, but the analysis does not undertake an equivalent examination of the "ready money" available to the downstream contracted party, payment failure, insolvency, stalled projects or abandoned sites. These are not peripheral matters. They concern whether an approved project possesses the productive capacity to survive the journey from administrative approval to physical completion.

The Productivity Commission's analysis risks treating administrative throughput as a proxy for productive output. That is the distinction this submission says the Commission must reconsider.

Senate Select Committee (Interim Report)

The Senate Select Committee's Interim Report adopts substantially the same analytical emphasis. Regulatory burden and approval delay are treated as

significant constraints upon housing supply, with accelerated approvals presented as an important mechanism for accelerating housing delivery.

The Interim Report records the evidence before the Committee in these terms: "*Evidence… focused predominantly on the failure of housing construction to keep pace with demand, chiefly due to the regulatory burden placed on the sector through excessive red tape, which is stymieing development and growth*" (page 1).

The emphasis is therefore again placed upon regulatory burden at the front of the development process.

The analytical emphasis therefore establishes a close causal relationship between regulatory burden at the approval stage and inadequate housing supply.

The significance of that emphasis becomes apparent in Chapter 4, which is headed "**Delayed approval processes**". The placement of that discussion within the Committee's consideration of construction productivity makes approval speed an important component of its explanation for inadequate housing delivery.

The question left unanswered is whether accelerating an administrative process necessarily accelerates construction output once the project enters the physical, contractual and financial construction system.

This discussion appears under **Construction Productivity**, implying that **approval speed determines construction output and how productive the project will become**.

The Committee carries this emphasis upon administrative acceleration into Recommendation 14, recommending a national pattern book containing pre-approved standard housing designs and Modern Methods of Construction: "*4.21 The committee recommends that the Australian Government develop and adopt a national pattern book containing pre-approved standard housing designs and Modern Methods of Construction. The pattern book should complement a revised National Construction Code and support the introduction of a Basic Australian Standard by streamlining approval processes, reducing compliance costs and accelerating the delivery of new housing*".

The Senate Select Committee's proposal for a "national pattern book" reads less like a modern housing policy and more like a direct excerpt from George Orwell's dystopian novel "Nineteen Eighty-Four".

The Orwellian concern, however, is not merely architectural uniformity. It is the danger that bureaucratic language converts an administrative act into the appearance of a productive outcome. A "pre-approved" dwelling remains a design. It has not been financed, procured, constructed or paid for. Calling the design "pre-approved" removes an administrative step; it does not remove the physical, financial and contractual constraints that determine whether the dwelling will ever exist.

In that sense, the pattern book risks becoming another Victory Mansion: **the bureaucratic representation of housing taking the place of the physical dwelling itself**.

The Interim Report does not then follow the proposed acceleration downstream and ask how the person actually constructing the dwelling — the contracted party — is to maintain the "ready money" necessary to perform, or how payment failure, insolvency, stalled projects and abandoned sites interrupt the conversion of an approved design into completed housing.

The same analytical gap therefore reappears and, like the other inquiries, is problematic with respect to efficiency, effectiveness, and productivity. Administrative acceleration is examined extensively, while the productive capacity required to convert that acceleration into completed dwellings receives no equivalent examination.

Queensland Productivity Commission (Final Report)

The Queensland Productivity Commission is the most nuanced in the reports reviewed in this discussion. Unlike the other reports, the Queensland Productivity Commission expressly acknowledges that development rights are not themselves housing supply. The difficulty arises in the analytical treatment that follows, where the construction pipeline becomes a central measure of the supply problem without equivalent examination of why that pipeline is not being converted into completed output.

The Queensland Productivity Commission explicitly states that approvals do not equal dwellings: "*Local planning does not fully control housing supply – it can only control the flow of development rights, not housing supply*" (p. 25).

This is a statement that generally supports the concerns expressed in this submission. However, the QPC then identifies the growing construction pipeline as a central feature of the productivity problem: "The value of the pipeline of construction works has more than doubled since June 2020, while the value of total work done has increased by only 42 per cent." "The gap between total work done and total work yet to be done has almost tripled…" (p. 10).

The problem is therefore subtler than a simple equation of approvals with dwellings. The QPC recognises that development rights are not housing supply, yet its pipeline analysis identifies an expanding volume of work awaiting completion without adequately interrogating the financial and contractual conditions preventing that work from becoming completed output.

In a Wonderland-like fashion, the completed dwelling begins to resemble the Cheshire Cat: **the physical output progressively disappears from the analysis while the "grin" of the pipeline remains**.

Approvals	→	Construction	→	Completed Dwelling

The unresolved question is what proportion of "work yet to be done" will actually become completed construction, and what prevents the remainder from doing so. The QPC nevertheless returns to planning regulation as an important constraint upon commercially viable development opportunities: "*Local planning schemes… are not providing sufficient commercially viable development opportunities where people prefer to live*" (p. 25).

There is nothing inherently wrong with examining whether planning schemes constrain commercially viable development opportunities. The problem arises if increasing those opportunities is treated as sufficient to resolve the housing-output constraint.

The QPC's own figures reveal the deeper problem, that is, the pipeline of work has expanded substantially faster than the work actually completed. That divergence should itself trigger the downstream inquiry — why is an expanding pipeline not being converted into physical output at a corresponding rate?

That is where construction viability, cashflow, payment security, insolvency and the financial capacity of the contracted party become productivity questions rather than peripheral construction-industry concerns.

Approvals	→	Construction	→	Completed Dwelling
"Doubled"	This Gap has TRIPLED since 2020	"Work done increased only 42%"		

The QPC says the pipeline more than doubled while work done increased only 42%, with the gap rising from $13.3 billion to $34.3 billion.

This is exactly what I am saying – the pipeline is growing extraordinarily faster than the industry's capacity to convert it into output.

Final Assessment

- The CIE – *Final Report Costs of Housing Regulation in Queensland*
- The Queensland Productivity Commission – *Opportunities to Improve Productivity of the Construction Industry Final Report Summary October 2025*
- The Productivity Commission – *Creating a more dynamic and resilient economy Inquiry report No. 109 10 December 2025*
- The Senate Select Committee on Productivity in Australia – *Interim report: Housing August 2026*

Across these four reports, the same analytical imbalance appears in different forms:

- substantial attention is directed toward increasing development opportunities,
- reducing regulatory burden and accelerating administrative throughput,

- **without equivalent examination** of the downstream productive conditions necessary to convert those opportunities into completed dwellings.

The CIE places planning regulation and approval delay at the centre of its housing-supply analysis and treats the development process as a progression from approval through construction to completed dwelling. What it does not adequately examine are the separate financial, contractual and productive risks capable of interrupting that progression after approval has been obtained.

The Productivity Commission places regulatory burden prominently within its diagnosis of inadequate housing supply and examines the potential gains from reducing that burden. What is missing is an equivalent examination of construction viability — including payment failure, insolvency, stalled projects and the financial capacity of the contracted party — as potential constraints upon completed housing output.

The Senate Select Committee similarly emphasises delayed approval processes and carries that emphasis into Recommendation 14 through its proposed national pattern book of pre-approved standard housing designs. The proposal may remove an administrative step, but a pre-approved design remains an administrative input. It does not establish that the dwelling can be financed, procured, constructed and paid for.

The Queensland Productivity Commission goes further than the other reports by expressly recognising that development rights are not housing supply. Yet its own figures expose the unresolved productivity problem, namely that **the construction pipeline has expanded far more rapidly than completed work**. The QPC reports that the pipeline has more than doubled since 2020 while the gap between work done and work yet to be done has almost tripled.

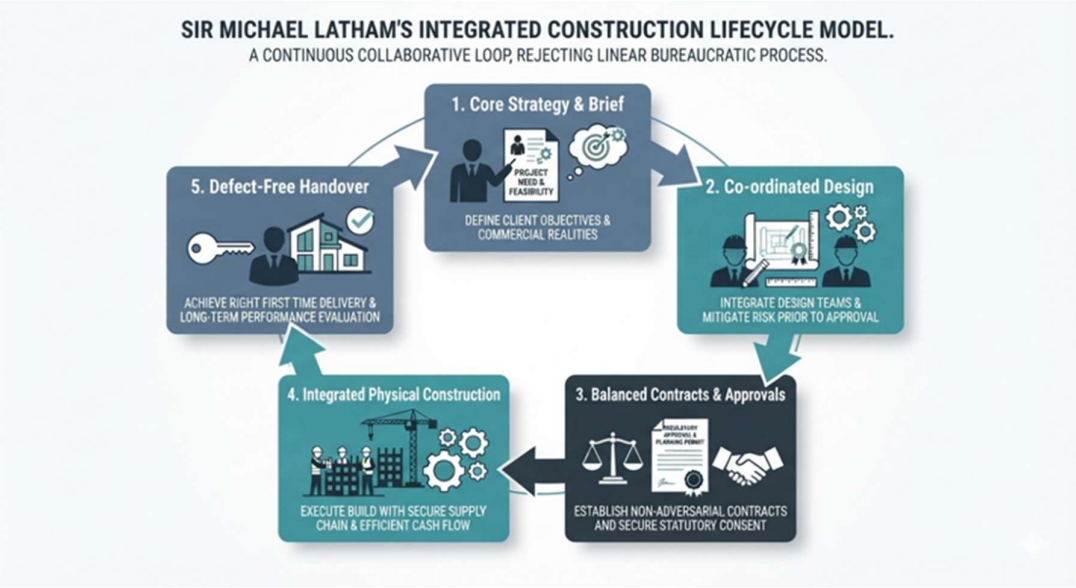
That divergence should direct attention downstream. The relevant productivity question is no longer merely how quickly additional work can enter the pipeline, but why the productive system is not converting the existing pipeline into completed output at a corresponding rate.

The common weakness is therefore not that each inquiry literally says, “approval equals dwelling”. The weakness is that administrative throughput receives substantially greater analytical attention than the productive machinery required to transform that throughput into physical output. An approval creates an opportunity to build. It does not provide the labour, capital, cashflow, contractual stability, materials or continuing solvency required to complete the dwelling.

In his landmark 1994 report *Constructing the Team*, Sir Michael Latham directs attention away from administrative intention and toward the commercial and physical process by which a project is actually delivered. Applied to the present inquiries, three propositions emerge from his analysis:

1. Paperwork is Not Production
2. Pushing Approvals into a Broken Pipeline Creates “Muddle”
3. Commercial Realities vs Bureaucratic Metrics

Latham's recommendations ultimately converge upon the objective of getting projects built "*right first time, every time*" (p. 103).[21] That objective depends upon considerably more than regulatory permission to commence. It depends upon the organisation, coordination and commercial relationships through which the project is actually delivered. The diagram below illustrates that relationship.



This image shows three interlocking gears in the process and how they align with "right first time, every time":

- GET IT RIGHT – prequalification / client leadership / competent contractors
- TEAMWORK – partnering / collaborative contracts / design coordination
- DELIVERY – efficient construction / reduced defects / value for money

Applied to the present housing inquiry, an approved design remains an intention to construct. Treating regulatory approval as though it establishes productive output bypasses the procurement, contractual and physical construction processes upon which completion depends.

A fast-tracked approval process does not build a house. A completed dwelling emerges from the performance of a competent, properly resourced and coordinated team of contractors, tradespeople, consultants and suppliers.

The significance of Latham's analysis is that productive failure can occur well after regulatory approval. Constructing the Team identifies fragmentation, adversarial relationships, deficient coordination and commercial practices within the construction process itself as impediments to successful project delivery. His discussion of the "muddle" produced by inadequate design coordination demonstrates that accelerating the front end of the process does not remove downstream delivery constraints.

[21] Earlier, at page 79, the Report gives the TQM working definition as every job and process being carried out "right, first time and every time". That definition is attributed to the Henderson Committee.

Indeed, Latham expressly warned against confusing haste with productive efficiency: "***a hasty project is unlikely to proceed smoothly. Everyone will lose, and the client most of all***" (p. 65).

This exposes the limitation in the present emphasis upon "pre-approval". The Senate's national pattern book may remove or shorten an administrative stage, but, without more, it cannot resolve the delivery constraints identified by Latham. Unless contractual structures, trade interdependencies, design coordination and on-site management operate effectively, a standardised design remains exposed to many of the same delays, variations, disputes and financial pressures encountered by a bespoke design. The same distinction applies to the Productivity Commission's treatment of California's Senate Bill 35 (SB 35).

SB 35 operates within an institutional environment that long predates its enactment. California's mechanics' lien protection was constitutionally entrenched in 1879; the administrative, legislative and regulatory architecture examined earlier in this submission developed substantially during Governor Jerry Brown's first administration; and California subsequently enacted construction prompt-payment protections from 1990 onward.

SB 35 therefore cannot be examined as though streamlined approval itself created the productive capacity necessary to construct the resulting housing. It operates downstream within an institutional architecture already directed toward capital formation, infrastructure, productive performance and payment protection. [22]

Latham famously pointed out that the construction industry "*… cannot create its core activities out of nothing*" and that its workload is bound by "commercial reality" (page 17). Measuring housing supply purely by the "pipeline of approvals" is a hollow metric if the industry lacks the capacity, capital, and skilled labour to execute them (pages 17 and 72). If the pipeline is stuffed with approvals that cannot be commercialised or built due to capacity constraints or poor cash flow, the pipeline ceases to be a reliable measure of achievable housing output (pages 17 and 96).

Latham says "If there is more work around, there may be more money for efficient firms. If there is more money, there may be more trust". Latham calls this "a simple statement of commercial reality" which "pervades virtually every decision taken every day by every participant in the construction process".

Latham says that when construction firms are struggling to avoid losses, teamwork becomes difficult and – "If the economy is wrong, little will go right in the construction industry".

[22] Prompt-payment legislation exists at both federal and State levels in the United States, but the mechanisms for resolving disputed payment entitlements vary considerably between jurisdictions and do not constitute a uniform national statutory-adjudication regime comparable to the Security of Payment regimes operating in Australia. Australian legislation instead provides an expedited extra-curial adjudication process designed to maintain construction cashflow while preserving ultimate contractual rights. In *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* [2020] QSC 133, Bond J, applying *Craig v South Australia* (1995) 184 CLR 163 and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, explained that Payment Act adjudicators may be characterised as the "anomalous" tribunals referred to in *Craig*, and confirmed that their determinations remain subject to the supervisory jurisdiction of the Supreme Court for jurisdictional error. The significance for present purposes is institutional: Australian Security of Payment legislation interposes a rapid interim decision-making mechanism between performance of construction work and conventional litigation, thereby protecting the movement of cash through the contractual chain while leaving ultimate contractual rights to be finally determined through ordinary legal processes.

The distinction between administrative throughput and productive delivery can therefore be summarised as follows:

Inquiry / Bureaucratic Stance	Sir Michael Latham's Counter-Perspective
Approvals = Dwellings (The Pipeline Metric)	**False Equivalence.** An approval is a legal permit; a dwelling is the output of a complex, high-risk assembly process (pages 17 & 30).
Speeding up approvals automatically increases supply	**Misplaced focus.** True speed is achieved by eliminating adversarial contracts, ensuring healthy cash flow, and avoiding rushed procurement (pages 65 & 96).
Pre-approved designs mean accelerated delivery	**Oversimplification.** Without on-site design coordination, contractor prequalification, and teamwork, standard designs still stall on the ground (pages 30 & 73)

The position advanced in this submission is therefore that policy cannot stop at administrative inputs. Applying Latham's approach requires attention to the productive execution of construction itself, including:

1. Fostering the "win-win" approach. By equalising the playing field (see movement of money diagram), the industry's vertical striation that concentrates powers becomes regulated from adversarial, lowest-cost tendering models that lead to contractor insolvencies and abandoned sites (pages 6 and 65).

2. Securing cash flow. The government must ensure that funding and trust accounts are structured properly (lien and trust mechanism) so that capital flows quickly to the subcontractor and the flow of this lifeblood in the construction industry keeps projects moving (pages 96 and 99).[23]

Latham's emphasis upon prequalification can be taken one step further when read together with the recommendations made by the Senate Economics References Committee in its December 2015 Final Report into construction-industry insolvencies. Together, they identify three complementary elements of a more robust contractor registration and prequalification system:

- Financial Backing Graduation (Senate Recommendation 33)
- Mandatory Commercial and Legal Training (Senate Recommendation 33)
- Continuous Compliance Auditing & "Red Flag" Data Sharing (Senate Recommendations 15 & 34)

[23] The mechanics' lien discussed earlier in this submission supplies the missing security component. A trust protects the movement and segregation of money; a lien protects the contracted party's interest in being paid for the value incorporated into the land. The two mechanisms therefore perform complementary functions within the payment architecture.

Latham's Original Focus (1994)	The Senate Inquiry Amplification
Technical Prequalification: Focuses on safety records, past project delivery, and trade execution capabilities.	**Financial Prequalification:** Focuses on tangible liquidity metrics and net-asset requirements matching contract value.
Defect Mitigation: A structural drive to lower post-completion rework and administrative gridlock.	**Insolvency Protection:** Protecting sub-contractors, suppliers, and buyers from sudden head-contractor collapse.
Adversarial Reduction: Using smarter contracts to ensure the construction team remains aligned.	**Regulatory Deterrence:** Using random audits and enforcement to root out bad actors before they damage the pipeline.[24]

The Reality – Bathla Group Collapse

The preceding analysis identifies a common imbalance across the CIE Report, the Productivity Commission's housing analysis, the Senate Select Committee's Interim Report and, in a more nuanced form, the Queensland Productivity Commission Final Report. Each devotes substantial attention to the regulatory and administrative conditions governing the entry of proposed housing into the development pipeline. None undertakes an equivalent examination of the financial and contractual conditions necessary to ensure that projects already within that pipeline survive through to completion.

The distinction is not theoretical. An approved project can fail at any point between regulatory permission and physical completion. When that occurs, the administrative pipeline may remain visible on paper while the anticipated housing output disappears.

The Bathla Group collapse provides the contemporary case study against which that distinction can be tested.

Bathla held **13,000 to 14,000 approved dwellings** across its pipeline — dwellings counted in supply projections, planning models, and political commitments. Yet these "approved homes" now exist only on paper. They will not be constructed anytime soon, and many will never be constructed at all.

Bathla's financial wreckage is staggering:

- **$3.4 billion in total debt**, owed primarily to private lenders
- **$145 million claimed by the ATO**
- **219 development projects** under external administration
- **45 sites stalled**, with **2,000 to 2,500 apartments half-built**
- **Over 200 employees stood down** — more than **60% of staff**

[24] This is where my evidence referred to in Chapter 6 of the Senate Final Report becomes critical: effective regulation requires proactive engagement by the regulator before financial distress becomes insolvency, rather than intervention only after the productive capacity of the contractor and the security of downstream participants have already been destroyed.

- A Supreme Court-ordered **12-month extension**, now running to **13 September 2027**, merely to allow administrators to triage what can be saved

The Bathla Group collapse demonstrates, in the most brutal and public way possible, that a development approval is not a dwelling. It is not completed housing supply. It is not a guarantee of construction. It is not a promise of delivery. An approval creates the legal opportunity to construct; whether that opportunity becomes a dwelling depends upon the productive system surviving through to completion.

Bathla held an enormous pipeline of approved or proposed housing that had been incorporated into expectations of future supply.

However, Bathla's pipeline is now **frozen**, **insolvent**, and **non-existent** as actual housing. The collapse demonstrates that the existence of a pipeline does not guarantee its conversion into actual housing. Where the financial and payment chain collapses, an approval may have little practical value unless another participant possesses the capacity and capital necessary to complete the project.

This is the wake-up call the inquiries must confront.

The lesson is not that approval speed, zoning or design standardisation are irrelevant. It is that none of them can, by themselves, overcome structural fragility within the construction delivery and payment chain. An accelerated approval entering a financially unstable construction system remains exposed to insolvency, stalled performance and non-completion.

That is the fragility exposed in adjudications such as Woonona–Warrane and now illustrated at vastly greater scale by the Bathla collapse.

Until policymakers stop treating approved pipelines as though their conversion into completed dwellings can be assumed, Australia will continue to publish housing targets that cannot be met, count supply that that does not exist yet, and rely on pipelines that evaporate the moment financial pressure hits the construction chain.

Bathla is not an anomaly. Bathla is the warning.

Bathla is the proof that:

1. Approval DOES NOT EQUAL Construction
2. Approval DOES NOT EQUAL Supply

Any inquiry that fails to preserve those distinctions risks diagnosing only part of the problem and prescribing solutions incapable, by themselves, of producing the intended output.

Accelerating the rate at which approvals enter the construction pipeline does not, without more, increase the rate at which completed dwellings emerge from it.

For present purposes, construction productivity must be examined through three interconnected dimensions:

1. **Human and operational productivity**. This dimension represents the capacity of industry participants to perform and convert inputs into completed construction;

2. **Institutional and regulatory productivity**. This dimension represents the regulatory and administrative framework governing the performance; and

3. **Macroeconomic and market productivity**. This dimension represents the financial and capital environment within which construction is funded and performed.

Movement of Performance & Money

The medium of exchange for performance of construction work or supply of related goods and services is **money**.

The movements depicted in the diagram on the next page occur in opposite directions. Performance and resources move up the contractual chain from lower-tier participants toward the principal, while the money constituting the exchange for that performance must move down the hierarchy. When both movements occur as intended, the commercial exchange approaches the equilibrium contemplated by the contractual transactions.

The difficulty identified throughout this submission is that these reciprocal movements do not necessarily occur symmetrically. Performance may continue to move upward through the contractual hierarchy while payment is delayed, withheld, reduced or lost as it moves downward.

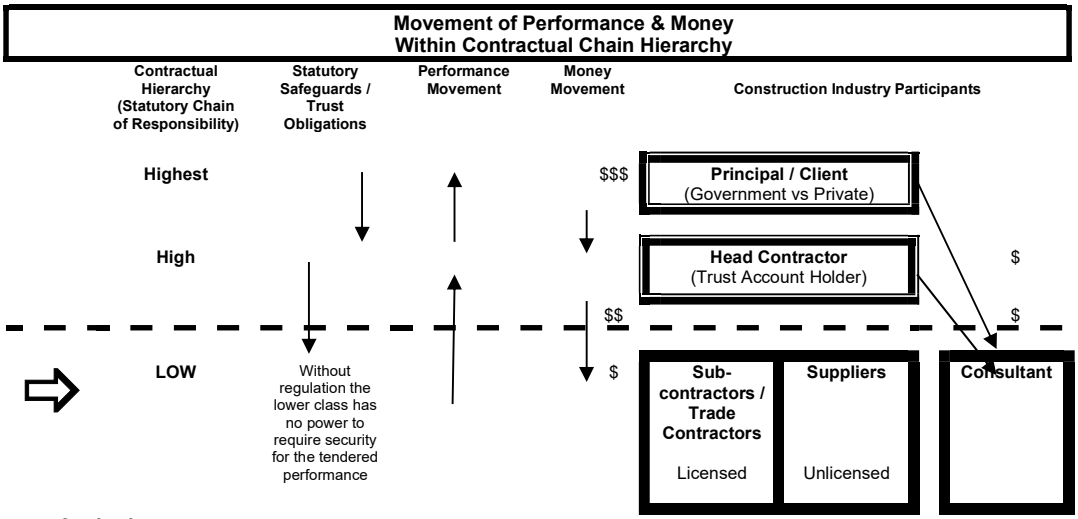
Latham's *Constructing the Team* provides the institutional explanation for that breakdown. He identified an industry characterised by adversarial relationships, fragmented contractual structures and payment practices capable of concentrating commercial power within the contracting hierarchy.[25]

Viewed economically, the performance of construction work and the supply of related goods and services constitute a transfer and reallocation of productive resources upward through the vertically stratified contractual hierarchy. The corresponding payment obligation is the reciprocal transfer of money downward through that hierarchy.

Latham concluded that the industry could not be expected to cure its entrenched problems voluntarily and recommended statutory intervention. Those recommendations materially influenced the subsequent enactment of the *Housing Grants, Construction and Regeneration Act 1996 (UK)*.

[25] Latham pointed to several systemic reasons why money fails to flow down the hierarchy as intended: (1) A deep-rooted adversarial culture. (2) The abuse of "pay-when-paid" clauses. (3) Arbitrary contract amendments and bespoke terms. (4) Vulnerabilities in the "Cascade System" and insolvency. (5) Weaponising set-offs and withholding tactics. (6) Destructive focus on the "Lowest Tender".

The exchanges of performance and money are best illustrated with the following diagram presented below:

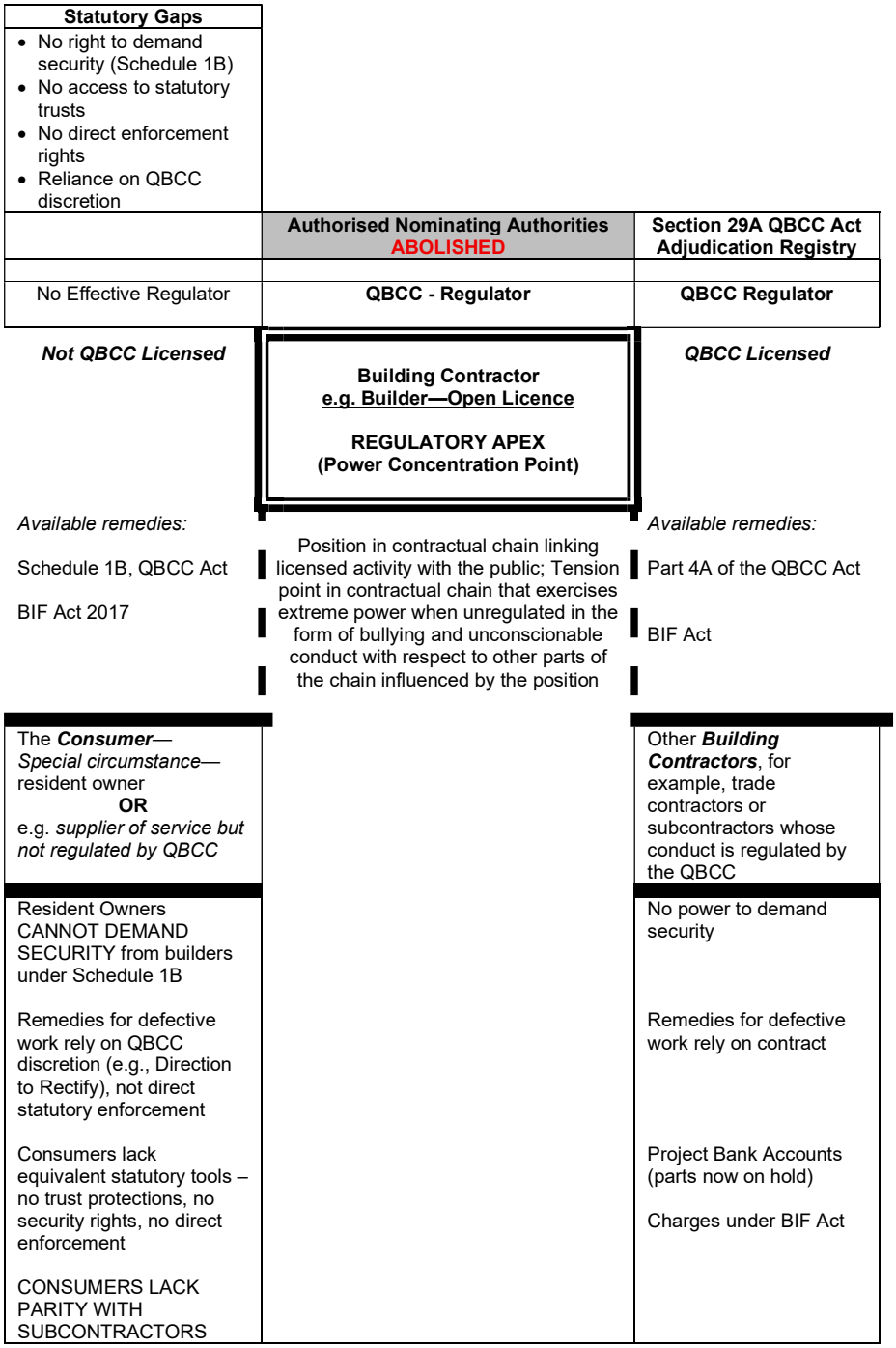


Statutory Anchoring
Building Industry Fairness (Security of Payment) Act 2017 – Chapter 3 (Adjudication), Chapter 4 (Trust Accounts), Part 6 (Subcontractors' Charges)

Queensland Building and Construction Commission Act 1991 – Schedule 1B (Domestic Building Contract), Licensing & Enforcement

Consultant may be licensed under QBCC Act 1991 (Designer or Draftsman) or regulated under Professional Engineers Act 2002 or Architects Act 2002. A Consultant is subject to disciplinary action under respective legislation and may be a party to a construction contract with corresponding rights and remedies under BIF Act if scope qualifies. It is important to distinguish between QBCC licensed design roles and those regulated by professional boards. Statutory remedies depend on contractual engagement and scope of work.

Without regulatory intervention, lower-tier participants generally lack the bargaining power necessary to insist upon security for performance already incorporated into the project. The concentration of contractual and economic power higher within the hierarchy means that effective security cannot reliably be left to private bargaining alone. The following diagram identifies where that concentration of regulatory and contractual power occurs within the Queensland system:



The preceding diagrams graphically illustrate the structural conditions within which adversarial and predatory payment behaviour can arise. They also explain why statutory protection of the contracted party should not be characterised as conferring an unwarranted privilege; it operates as a counterweight to an existing concentration of contractual and economic power.

The observations made by Latham and Cole identify conduct occurring within an industry structure characterised by pronounced disparities in contractual and economic power. The preceding diagrams locate that behaviour structurally rather than treating each payment dispute as an isolated event.

This was central to the concern I placed before the Senate Economics References Committee in August 2015: **Whether the contracted party performing work and supplying materials should receive statutory security commensurate with the value being transferred upward through the contractual hierarchy**.

The Evolution of Avoidance

Landmark interventions such as the Latham Report and the Cole Royal Commission identified destructive non-payment and unconscientious practices within the construction industry. Subsequent security of payment reforms changed the legal environment, but they did not eliminate the underlying concentration of contractual power. The conduct capable of producing non-payment therefore did not necessarily disappear. It evolved.

Creative Non-Compliance

The evolution can be seen in the movement away from blunt refusal to pay toward increasingly sophisticated contractual, administrative and forensic mechanisms by which payment may be resisted, reduced or delayed. Set-offs, bespoke contractual provisions, procedural objections and increasingly complex adjudication arguments can produce the same cashflow consequence through more sophisticated means.

My 2025 submission to the Minister and the Queensland Productivity Commission argued that Queensland adjudication outcomes provide empirical evidence requiring examination against that structural background.

"Here Today, Gone Tomorrow" – The Short "Shelf-Life" of Inquiries

A central concern arising from this history is the remarkably short institutional shelf-life of major regulatory reviews. Latham, Cole, Collins, the Senate Economics References Committee and, subsequently, the Murray Review each examined structural problems within the construction industry. Yet recommendations directed toward payment security, insolvency protection and national harmonisation have repeatedly failed to produce enduring structural reform.

The December 2015 Senate Final Report provides a particularly important example. Its 44 recommendations included measures directed toward Project Bank Accounts, statutory trusts, financial oversight and national harmonisation. My concern regarding construction trust accounts — first promoted in Australia by Bruce Collins QC in his November 2012 Final Report of the Independent Inquiry into Construction Industry Insolvency in New South Wales — was therefore squarely before the

Senate when it published 'I just want to be paid': Insolvency in the Australian construction industry.

Recommendations 29 to 31 are particularly significant.[26] The Committee recommended a Commonwealth trial of Project Bank Accounts, subsequent evaluation with a view to broader mandatory application, and referral to the Australian Law Reform Commission of the question of a statutory trust model for the construction industry. The Australian Government ultimately did not proceed with the recommended ALRC reference, leaving security of payment and trust arrangements principally within the fragmented State and Territory framework.

The present housing crisis now brings that decision back into focus. The construction industry operates nationally; insolvency propagates through corporate and contractual chains; Commonwealth taxation, corporations and insolvency laws intersect with the industry; yet payment security remains substantially fragmented by jurisdiction. That fragmentation is precisely the problem the 2015 Senate inquiry was attempting to confront.

In the absence of a unified Commonwealth model, individual jurisdictions continued to develop different mechanisms. New South Wales maintained a statutory trust regime directed principally toward retention money. Queensland developed its Project Trust Account framework under the *Building Industry Fairness (Security of Payment) Act 2017*. Other jurisdictions adopted different security of payment structures.

The result was not the national architecture contemplated by the Senate recommendations. It was the continuation of jurisdiction-specific payment and trust protections operating with different scopes, procedures and enforcement mechanisms.

The further rollout of Queensland's Project Trust Account framework has since been paused. As explained in my submission to the Queensland Productivity Commission, I regard that pause as preferable to extending a trust mechanism that remains structurally incomplete without the corresponding security provided by a lien.

That is what I mean by "**Here Today, Gone Tomorrow**". The inquiry occurs; the structural problem is identified; recommendations are made; attention moves elsewhere; and the underlying architecture remains substantially intact.

[26] Recommendation 29 states: "*10.55 The committee recommends that commencing as soon as practicable, but no later than 1 July 2016, the Government undertake a two year trial of Project Bank Accounts (PBAs) on no less than twenty construction projects where the Commonwealth's funding for the project exceeds $10 million*". Recommendation 30 states: "*10.56 The committee recommends that after the trial has concluded, a timely evaluation of the trial of PBAs on Commonwealth funded projects be conducted with a view to making the use of PBAs compulsory on all future Commonwealth funded projects and mandating extending the use of PBAs to private sector construction projects*". Recommendation 31 states: "*The committee recommends that, while the Commonwealth trial of Project Bank Accounts is underway, the Attorney-General refer to the Australian Law Reform Commission for inquiry and report a reference on statutory trusts for the construction industry. This inquiry should recommend what statutory model trust account should be adopted for the construction industry as a whole, including whether it should apply to both public and private sector construction work*".

The present Productivity Commission and Senate Select Committee inquiries therefore have the benefit of something their predecessors did not—the accumulated record of what has already been investigated, recommended and left unresolved.

The significance of those recommendations becomes clearer when compared with the evidence I gave to the Senate inquiry in August 2015. The concerns I advanced were directed precisely toward disrupting the existing hierarchy, protecting payment for performance and replacing fragmented State approaches with a coherent national structure.

I am on the record saying (my Opening Statement (page 17):

Mr Sive: "... My belief in what is submitted in the submissions is that there is a four-point plan to resolving construction-industry insolvencies. I believe that at the state level a constitutional mandate should be made that permits builders not just subcontractors. Any person in the construction industry who has performed work in improvement on land should have a right to place a lien on that land.

Second, there should now be a federal model of construction-industry law that assists that lien. Third, there should be a construction escrow. Fourth, adjudication should be expanded to performance disputes in addition to payment disputes because, in my experience, all payment disputes arise out of a performance dispute. I am here to answer any questions of the committee."

In the subsequent exchange with the Acting Chair, I addressed the inconsistency inherent in an *ad hoc* State-based approach, the public-interest character of the construction industry and the case for federal regulation. When asked whether I was recommending a national approach, I answered: "**Yes, in no uncertain terms**".

The exchange then turned to Commonwealth constitutional power, including the position of unincorporated subcontractors. I maintained that a constitutional pathway existed for Commonwealth intervention and offered to provide a further submission should the Committee wish to pursue it.

There is no national uniform security of payment legislation.

The Senate Committee expressly recommended movement toward a single, nationally consistent security of payment framework to address the fragmented and disparate State and Territory regimes. The Commonwealth did not implement a national model. The subsequent Murray Review again produced a detailed harmonisation blueprint, but national uniformity still did not follow.

The result is that the very fragmentation identified by the Senate remains embedded within the present system.

Recommendation 15 stated that "*6.59 The committee recommends that licensing regulators should undertake random financial health spot-checks throughout the life of a licence-holder's licence. Where a business fails to meet the standards required, it should be required to show cause as to why its licence should not be conditioned, downgraded, suspended, or cancelled, depending on the extent to which business has not met required standards*".

Recommendation 15 is particularly important when viewed against subsequent major contractor collapses. The Committee was advocating proactive financial surveillance

during the life of the licence — intervention before financial deterioration became insolvency.

That is materially different from a regulatory system that principally records and administers the consequences after collapse has occurred.

Some subsequent measures improved the Commonwealth's capacity to identify or respond to corporate misconduct and insolvency. The Phoenix Taskforce, increased ASIC–ATO data sharing and the introduction of Director Identification Numbers are examples.

But those measures principally operate at, or close to, the corporate-failure end of the problem. Better identification of phoenix activity and better information about corporate collapse do not themselves secure payment for work already performed or prevent the productive destruction occurring upstream before insolvency.

Improving the recording and administration of corporate death is not the same thing as preventing the commercial conditions that produce it.

Inquiry over Action

The historical record therefore presents the current inquiries with a recurring pattern:

- investigation,
- diagnosis,
- recommendation,
- partial implementation and renewed fragmentation.

That history matters because non-payment practices do not remain static while regulation stands still. The blunt practices identified by Latham and Cole can migrate into more sophisticated contractual, administrative and forensic mechanisms capable of producing substantially the same cashflow consequence.

The industry's underlying structural problem is therefore not necessarily less menacing than the conduct investigated by Latham in 1993–94[27] and Commissioner Cole from 2001.[28] The mechanisms have simply become more sophisticated.

That is why the present inquiries cannot begin again at the regulatory front end as though the preceding thirty years of investigation never occurred. The Rabbit Hole already exists. Latham, Cole, Collins, the 2015 Senate Inquiry and Murray have already travelled substantial distances through it. The task now is to confront what they found and determine why the structural problem remains.

[27] The UK Government (under Prime Minister John Major) and industry organisation jointly commissioned Sir Michael Latham in July 1993. He was instructed to conduct a comprehensive, independent review of the procurement and contractual arrangements within the UK construction industry. He published an interim consultation report entitled "Trust and Money" in December 1993 before delivering his landmark final report "Constructing the Team" in July 1994.
[28] Prime Minister John Howard announced the establishment of the Cole Royal Commission into the building and construction industry on 26 July 2001 which was then followed by the formal appointment of Commissioner Terence Cole QC on 29 August 2001.

Understanding Productivity in the Construction Industry

To understand productivity in the construction industry, it is first necessary to understand the movement of performance and money through the contractual hierarchy.

This is a matter I have examined throughout my professional experience in the construction industry. The observations expressed in the preceding diagrams form an important part of my understanding of security of payment and its relationship with productive capacity.

The medium of exchange for the performance of construction work and the supply of related goods and services is money. However, performance and money travel through the contractual hierarchy in opposite directions. Performance — labour, materials, plant, expertise and the resulting improvement to property — moves from the contracted party upward through the contractual chain. Money, being the medium exchanged for that performance, is required to move from the contracting party downward through that chain.

The movements are not simultaneous. **The contracted party performs first.** Once labour has been supplied, concrete poured, steel erected or materials incorporated into the works, that performance cannot simply be recovered and taken elsewhere if payment does not follow. The contracted party has transferred value upward through the contractual hierarchy while remaining dependent upon the corresponding movement of money downward.

This creates the fundamental asymmetry illustrated above in the first diagram. **Without effective regulation, the participant lower in the contractual hierarchy ordinarily lacks the bargaining power necessary to require corresponding security for the value of the performance tendered to the participant above it**.

Against the ceaseless change that characterises construction performance, the contracted party depends upon two critical financial conditions:

1. the ability to receive **prompt and full payment** for the value of work performed; and

2. access to the "**ready money**" necessary to maintain positive cashflow and continuing performance.

When either condition fails, productive performance is disrupted. When both fail simultaneously, the disruption can cascade through the contractual chain. The Queensland adjudication data examined later in this submission provides an empirical basis upon which that proposition can be tested.

The difficulty is that the contracted party ordinarily possesses no readily realisable security against the value of construction work already supplied. Conventional accounts-receivable or working-capital finance may therefore require security extending substantially beyond the debt represented by the unpaid work. For small

contractors, that may include personal assets — including the family home — in addition to the assets of the business.

This is where security of payment assumes a significance extending far beyond dispute resolution.

As I have argued since at least 2007, a properly functioning security of payment regime has the potential to transform the payment claim from an ordinary commercial invoice into an enforceable statutory entitlement to payment. That transformation is economically significant. It creates an identifiable statutory receivable capable, in principle, of supporting access to working capital or "*ready money*".

The contracted party has thereby created value through performance and obtained a legally enforceable entitlement corresponding to that value. The unresolved financial question is why that entitlement cannot more readily be converted into liquidity without requiring the contracted party to pledge unrelated personal or business assets as security.

The significance for productivity is immediate. The contracted party has already supplied the productive input — labour, materials, plant and expertise — and has generated an account receivable through that performance. The productive problem is not simply that payment may subsequently be delayed. It is that, while awaiting payment, the value already created cannot readily be converted into the liquidity required to finance continuing performance.

For that reason, the absence of a pre-planned supply line to "ready money" can become fatal to continuing construction performance. Productive capability alone is insufficient if the contracted party lacks the liquidity necessary to deploy labour, plant and materials when required.

It therefore follows that the ability to secure payment and convert the resulting entitlement into "ready money" is a critical element of productive capacity. No matter how capable the workforce may be and no matter how brilliantly a work crew may perform on any project at any given time, that productive capacity cannot be deployed if the contracted party cannot convert the value of work already performed into the liquidity required to finance the work that follows.

The central proposition of this submission is not that cashflow is itself productivity. It is that cashflow is an indispensable input into productive capacity.

Senate's Financing Discussion is Fundamentally Misdirected

The Senate's Interim Report discusses construction finance, developer finance, mortgage innovation, macroprudential settings, risk-weighting, lenders mortgage insurance, foreign investment taxes, APRA mandates and capital neutrality. Those are legitimate financing questions. However, they are predominantly concerned with financing above or around the productive construction process rather than the liquidity of the contracted party actually performing the work.

In my opinion, this misses the most immediate financial question confronting the productive unit after prompt and full payment itself:

The contracted Party	—	the actual productive unit and the most vulnerable in the vertical chain	—	cannot obtain "ready money"

This is not a theoretical concern. Failure of liquidity at the productive end of the contractual chain contributes to:

- cascading subcontractor insolvency when the first significant payment failure occurs;
- stalled projects;
- disruption to productive performance;
- secondary insolvencies throughout the contractual chain;
- additional barriers to entry and survival for participants with limited access to capital and collateral, including women seeking to establish construction businesses; and
- failure of the construction conveyor belt at the delivery end.

The structural imbalance is that the financing discussion concentrates heavily upon developers and purchasers while giving no equivalent attention to financing the contracted party's continuing performance. Developers may have access, according to their circumstances, to bank facilities, private credit, mezzanine finance, equity partners and other forms of development capital. The small, contracted party ordinarily operates in a fundamentally different financial environment.

The sub- or trade contractor ordinarily does not possess equivalent access to those financing mechanisms. That distinction becomes even more important when considering participants entering the industry without established collateral, capital reserves or accumulated business wealth. I return to that issue below in considering gender participation.

The sub- or trade contractor may therefore confront:

- little readily realisable collateral beyond the assets of the business;
- no statutory security over the land improved by its performance;
- no mechanics' lien of the kind examined earlier in the California model;
- limited or no access to statutory trust protection, depending upon the project and jurisdiction;

- no established mechanism by which the value of completed performance can readily be converted into liquidity; and
- difficulty obtaining “ready money” without pledging substantial business or personal assets.

Gender Discussion in Construction

The financial architecture also provides a different lens through which to examine gender participation in construction. A useful comparator is the legal profession — another historically male-dominated, hierarchical, highly competitive and adversarial profession in which women have nevertheless achieved substantial participation and reached its highest professional and judicial offices.

Having practised within that profession, my point is not that women encountered no discrimination or inequality within law. Plainly they did, including disputes concerning equal remuneration and professional opportunity. The narrower comparison concerns the financial exchange for professional performance: legal practitioners operate within a system in which mechanisms exist to obtain, secure and enforce payment for professional services.

Payment, and particularly the ability to secure payment, is therefore an important point of structural difference. The legal profession is adversarial, hierarchical, competitive and historically male-dominated, but its financial architecture contains mechanisms designed to protect payment for professional performance.

A solicitor may require money to be deposited into trust before work is undertaken. Legal practitioners possess established mechanisms for billing and recovering professional fees, and liens may arise in recognised circumstances. The exchange is not risk-free, nor does every invoice get paid immediately, but the profession contains mechanisms by which payment can be secured before or in connection with performance.

That financial architecture has not removed gender discrimination from law. It does, however, mean that a practitioner establishing a legal practice is not ordinarily required to finance the client's matter by permanently incorporating unrecoverable labour and materials into somebody else's land before acquiring a right to payment.

Construction presents a materially different financial structure. A woman establishing or operating a construction business encounters not only the cultural barriers associated with a historically male-dominated industry, but the same payment and insolvency risks confronting every small, contracted party within the vertically stratified hierarchy.

That means operating in an environment in which payment may be delayed, cashflow can deteriorate rapidly, insolvency risk is transferred downward through the contractual chain, and the contracted party commonly performs as an unsecured creditor.

Payment, and the ability to secure payment, is the difference. Law is completely adversarial, hierarchical, competitive, and historically male-dominated. Yet, women have stormed the gates because the cashflow architecture of the profession works:

- A solicitor bills and the client pays.
- A barrister invoices and the solicitor pays.
- A firm invoices and the client pays.

Before being engaged, the solicitor may require money to be placed into a trust account and the solicitor can impose a lien. The medium of exchange flows.

Women can enter, remain, and rise because the profession pays for the value delivered. With that said, women have had to fight to show that their value is equal or greater than the men in the profession. However, payment occurred.

Construction is the opposite. Women face not only cultural values, but they face structural insolvency barriers. Women entering construction not only face a male-dominated culture but also a payment system that routinely starves the contracted party of cash.

Women already have two strikes against them, and this becomes the real reason why women struggle to enter construction. It is not simply sexism. It is structural financial starvation.

A woman entering construction must be prepared to:

- work in an industry where payment is delayed,
- operate in a system where cashflow collapses without warning,
- survive in a hierarchy where insolvency risk is pushed downward, if not thrusted, and
- compete in a sector where the contracted party is treated as an unsecured creditor.

The point is not that payment insecurity is exclusively a gender barrier. It is a structural barrier affecting all contracted parties. The question requiring investigation is whether that barrier has a disproportionate effect upon women entering or attempting to establish businesses in construction because of differences in access to collateral, accumulated capital and the capacity to absorb prolonged non-payment.

If the inquiries are serious about increasing female participation in construction, that financial question should form part of the analysis rather than participation being examined solely through cultural or workforce measures.

The omission matters because participation and productivity are connected. If the financial architecture makes entry and survival unnecessarily difficult for small, contracted parties, policies directed toward increasing participation — including female participation — cannot be examined independently of payment security and access to working capital.

The productivity question is therefore broader than how many people can be attracted into construction. It includes whether the commercial system permits those participants to remain productive once they arrive.

Scale of Small Business Presence in Construction

The Queensland Building and Construction Commission (QBCC) explicitly confirms in official communications that it regulates “more than 122,700 licensees”.

According to both the Australian Bureau of Statistics (ABS) and the Australian Small Business and Family Enterprise Ombudsman, a small business is defined as an entity employing fewer than 20 people.

HIA material describes a membership ranging from single-person trade operations and family businesses through to major developers. Yet the overwhelming small-business presence within that membership identifies who actually occupies the productive end of the construction conveyor belt. These are the participants required to convert government housing targets, development approvals and project intentions into the physical product ultimately delivered to the consumer.

The HIA considers the small business construction company as the true “engine component” of the association and the broader Australian building sector.

Despite being mostly comprised of small operators, HIA members are collectively responsible for performing over 80% to 85% of all new home builds and renovations across Australia.

The Master Builders Association explicitly states that 99% of its 32,000 members nationwide are small and medium-sized businesses consisting of subcontractors, trade operators, and family-run businesses.

This produces an interesting structural reality. HIA and Master Builders have traditionally occupied different positions in the public imagination: HIA as the residential or “cottage industry” body and Master Builders as representing the broader commercial building industry. Yet, once we travel further down the industry rabbit hole, the distinction becomes considerably less important at the productive base.

Both organisations are substantially powered by small and medium-sized construction businesses. Their branding, sectoral emphasis and lobbying positions may differ, but the participants actually performing work include the same broad classes of builders, subcontractors, trade contractors and suppliers.

As an adjudicator who has decided or determined approximately 300 payment disputes since first becoming an adjudicator in 2008, I have repeatedly encountered both HIA and Master Builders standard-form contracts. In practical adjudication, the choice of form frequently reflects the contractor's project and contracting circumstances rather than some absolute division between two fundamentally different classes of construction participant.

Attribute	Housing Industry Association (HIA)	Master Builders Association (MBA)
National Members	~60,000	~32,000
Small Business Share	Predominantly small businesses	Predominantly small businesses
Primary Focus	Residential building and domestic renovations.	All sectors: Residential, Commercial, and Civil construction.
Membership Makeup	Heavily single-dwelling builders, trade subcontractors, and suppliers.	Ranges from tier-global developers down to local bricklayers and sparkies.

Whatever differences exist between the two peak bodies, their membership profiles expose the same underlying fact, namely that small and medium-sized businesses constitute a substantial part of the productive base of Australian construction. Policy directed toward construction productivity therefore necessarily operates upon small businesses, even when expressed in the language of industry-wide reform.

The reports issued by the QPC, Productivity Commission and Senate reveal another version of the problem illustrated by the parable of the blind men and the elephant. Each institution is examining the same broad structural subject — Australia's building, construction and housing sector — but each approaches it from a different point of contact.

The danger is that a partial observation becomes the diagnosis of the whole system. Planning regulation, business dynamism, labour participation, finance and construction productivity may each describe part of the elephant. None, viewed in isolation, necessarily explains how the entire productive system operates.

The Productivity Commission's report Creating a more dynamic and resilient economy provides an important example. Its business-dynamism framework is concerned with the movement of capital and labour toward more productive uses and the removal of unnecessary impediments to entry, expansion, contraction and exit.

The difficulty arises when that framework is applied to a construction marketplace without first examining whether the prerequisites necessary for that marketplace to allocate resources efficiently are themselves functioning. The preceding analysis suggests that payment security, access to liquidity and the contractual allocation of power are among those prerequisites.

Removing unnecessary administrative and regulatory barriers may increase the speed at which work enters the construction conveyor belt. However, if the small-business participant at the productive end lacks the cashflow and liquidity necessary to absorb that increased throughput, acceleration at the front end can simply transfer greater pressure downstream.

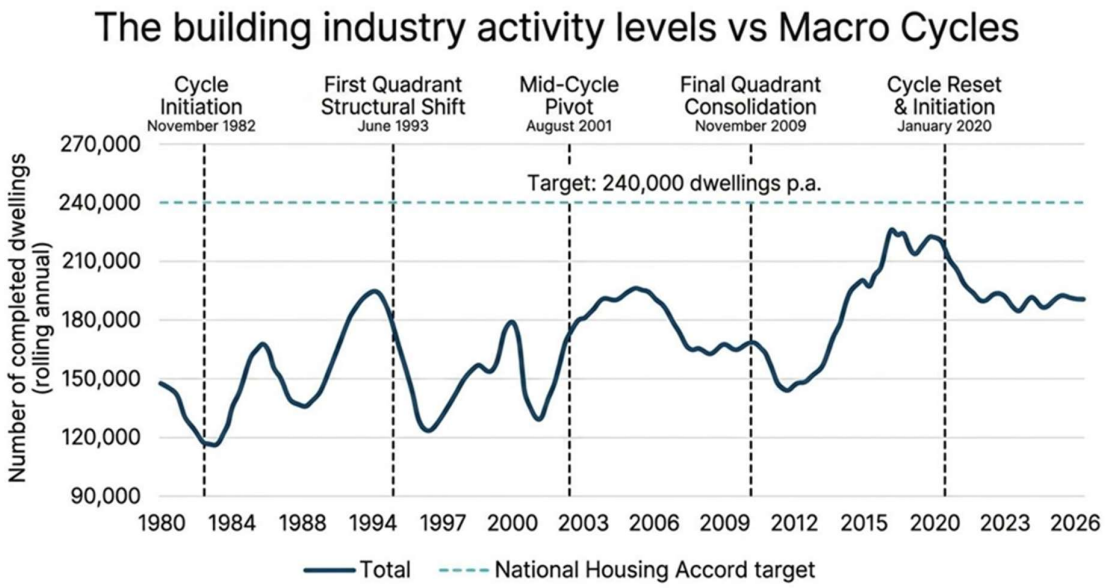
Speeding up the conveyor belt does not package more product.

The Productivity Commission examines macroeconomic levers including corporate taxation, regulatory frameworks and the reallocation of capital and labour toward more productive uses. Those matters operate at the level of the wider economy. The construction question examined in this submission is what happens when the resulting economic demand reaches the productive delivery system.

Housing and construction do not arise merely because an administrative or macroeconomic lever has been moved. They respond to economic demand through a physical production system requiring labour, materials, capital, liquidity and continuing contractual performance.

This returns the analysis to the National Housing Accord target of 1.2 million homes over five years — an annualised output of 240,000 dwellings. The historical significance of that target has already been examined. Its significance here is different: the overwhelming small-business productive base described above is the system upon which government relies to convert that numerical target into physical housing.

The chart below places the demanded output against Australia's historical construction performance.



Within a conventional business-dynamism model, a high rate of labour reallocation may indicate a dynamic labour market. Viewed from the position of a small contractor or subcontractor, however, excessive churn can produce a very different operational reality: loss of skilled labour, disruption to established teams, increased replacement costs and additional pressure upon already fragile cashflow.

When macro-policy values movement without examining the productive capacity required to absorb that movement, the result begins to resemble the I Love Lucy

conveyor belt discussed earlier in this submission. For a small business with fewer than five employees, the loss of a skilled worker can materially disrupt performance. When that disruption coincides with delayed payment and no reliable access to "ready money", the effect can cascade rapidly through the business and the project.

The HIA and Master Builders material examined above demonstrates why that microeconomic perspective matters. Small and medium-sized businesses comprise a substantial part of the productive base upon which Australian construction depends. While the Productivity Commission examines economy-wide questions concerning taxation, capital allocation and emerging industries, the local construction business operates much closer to the immediate requirements of predictable regulation, skilled labour, functioning supply chains, prompt payment and continuing liquidity.

Those businesses are the mechanism through which wider economic demand is ultimately converted into physical construction.

Business entry, exit and labour reallocation may be indicators of dynamism at an economy-wide level. They cannot, however, be assumed to represent productive improvement in every market. In construction, the collapse of an established contractor can destroy accumulated capability, disrupt projects, strand subcontractor receivables and transmit financial loss through the contractual chain.

The relevant question is therefore not whether movement occurs but whether that movement reallocates resources productively or destroys productive capacity in the process.

Bathla Revisited — Where the Financial Loss Falls

The Bathla Group collapse has already demonstrated why an approved pipeline cannot be treated as completed housing. It serves a second purpose here. The structure of the reported liabilities demonstrates where financial loss falls when a major participant in the construction hierarchy collapses.

The preliminary figures relied upon in this submission identify approximately $3.4 billion in group liabilities, distributed across materially different classes of creditor.

1. **Secured Lenders.** Under this class of creditor in the insolvency estate, approximately $3.08 billion is owed across 43 (or more) private credit funds and financiers (for example, PAG, Centuria Bass, La Trobe).

2. **Australian Taxation Office & Land Tax.** Under this class of creditor in the insolvency estate, there is approximately $145 million in federal tax and $42 million in land tax outstanding and owing.

3. **Employee Claims**. Under this class of creditor in the insolvency estate, approximately $4 million is owed and outstanding.

4. **Unsecured Creditors**. Under this class of creditor in the insolvency estate, approximately $130 million is owed to subcontractors, trades, material suppliers, and service providers.

While the precise number of subcontractor and supplier entities remains subject to the creditor records, the reported scale of the group — 45 active projects involving approximately 2,500 homes and a pipeline of approximately 14,000 dwellings — demonstrates the potential reach of the financial contagion through the small-business construction base.

Position of Unsecured Creditors & Market Recovery Expectations

In an insolvency, unsecured trade contractors occupy a fundamentally different position from secured creditors. Secured creditors may have recourse to assets subject to their securities, while section 556 of the *Corporations Act 2001 (Cth)* establishes statutory priorities among unsecured claims, including priority treatment for specified employee entitlements. Ordinary unsecured trade creditors rank behind those priority claims in the distribution of available unsecured assets.

Historical ASIC data indicates that 92% to 93% of liquidations return 0 cents on the dollar to unsecured creditors. Even under a Deed of Company Arrangement (DOCA), returns average approximately 21.3 cents in the dollar. The DOCA Median Return is approximately 11.5 cents in the dollar.

The reported concentration of Bathla's liabilities in secured private credit illustrates the structural problem for the contracted party. The subcontractor may have transferred labour, materials and value into the development, yet the resulting debt for that performance ordinarily remains unsecured while financiers may hold security over the underlying project assets.

Work performed before administration therefore gives rise to an unsecured claim unless some separate security or statutory protection applies. Continuing work undertaken after the appointment of administrators stands on a different footing and ordinarily requires specific arrangements for payment.

The resulting contagion risk is obvious. A substantial unpaid claim can deprive a small trade contractor of the liquidity required to meet wages, suppliers, taxation obligations and the cost of continuing work on other projects. The insolvency of one participant can thereby transmit financial distress into otherwise separate businesses and projects throughout the contractual network.

Administration also restricts the ordinary enforcement environment. Claims arising before administration become subject to the external-administration regime, and enforcement proceedings may be stayed or require leave. The practical consequence is that an entitlement to payment does not necessarily provide immediate liquidity when liquidity is most urgently required.

Bathla therefore brings the Rabbit Hole back to where it began. Productivity in construction cannot be understood merely by counting approvals, measuring administrative throughput or encouraging greater movement of labour and capital.

The productive system depends upon the participant actually performing the work possessing the financial capacity to continue performing it.

Performance moves first. Payment follows. If payment does not follow promptly, and the resulting entitlement cannot be converted into “ready money”, productive capacity is progressively impaired and may ultimately disappear through insolvency.

That is the construction-productivity problem the Terms of Reference must be capable of seeing.

TERMS OF REFERENCE

Queensland Inquiry Completed

The completed Queensland inquiry provides an immediate case study of the conceptual problem identified in this Prologue. The QPC diagnosed declining construction productivity principally through regulatory burden, planning, procurement, workforce and industrial-relations settings.

The Crisafulli Government substantially accepted that diagnosis and has begun accelerating the front end of the construction pipeline. What neither the diagnosis nor the resulting reforms adequately confront is whether the industry responsible for converting that expanding pipeline into completed construction units possesses the financial capacity to do so.

The failure of contracted parties to obtain payment — and, as a direct and inevitable consequence, their inability to secure the "ready money" required to fund labour, materials, and machinery — is not a peripheral inconvenience. These are two distinct but inseparable transactions, and together they constitute the foundational structural defect that has crippled Queensland's construction industry for decades. This defect was already entrenched long before I began making submissions to government nearly twenty years ago, and it has continued to erode the financial stability, performance capacity, and survival prospects of contractors ever since..

As I explained in 2007 to anyone who had an obligation to listen, the legislative intent of the then *Building and Construction Industry Payments Act 2004 (Qld)* was not merely to provide a fast adjudication process.

The purpose of the payments legislation was to transform a contractor's commercial invoice into a statutory instrument creating a statutory debt. This statutory instrument was, and remains, necessary to achieve the policy and object of the legislation.

As I saw it then, and as I still do today, this statutory instrument was capable of functioning as collateral if the legislative regime operated as intended. It has not operated, and has never operated, so as to achieve the object and main purpose of the legislation. Because security of payment has never, on average, achieved a recovery rate approaching the amount being claimed, the statutory entitlement never developed into reliable collateral against which lenders would advance cash immediately.

Clothed with the Public Interest

According to the Property Council of Australia, which combines the broader ecosystems of property and construction in presenting its economic assessments, this broader conception of "Construction" represents the largest industry by output, employment and economic contribution. On this broader measure, Construction represents 1 in 7 workers in Australia and accounts for approximately 24.2% of total GDP through its direct and indirect contribution.

The construction sector therefore underpins housing delivery and infrastructure expansion and is a critical factor in national productivity.

In Queensland, construction ranks as the State's third-largest industry by economic output and its second-largest employer. It contributed $41.2 billion, representing 8.3% of total State output, and employs approximately 288,000 workers. Nationally, Queensland ranks third for total construction workforce size behind New South Wales and Victoria.

Queensland's construction pipeline is expected to surge from $53 billion during the 2025–2026 financial year to $77 billion by 2027. That increase confronts the stark reality of an "*average worker shortfall of 18,200 a year over the next eight years*".

The broader construction activity forecasts have this pipeline of construction mushrooming to approximately $120 billion. The principal drivers for this surge in construction value are the rapid population growth, the energy transition to net zero, and infrastructure preparations for the Brisbane 2032 Olympic and Paralympic Games. Roughly 79% of this construction pipeline is centred in Southeast Queensland, which is led by the Greater Brisbane area ($26.2 billion), the Gold Coast ($8.1 billion), and the Sunshine Coast ($4.4 billion).

The construction industry has such substantial social and economic impact, not only in Queensland but throughout Australia, that federal intervention and regulation with respect to security of payment and the impact of cashflow failure upon productivity requires serious consideration.

Under the Australian Constitution, the states and territories have broad plenary power to legislate for the "*peace, welfare, and good government*" of the state or territory in question.

The Commonwealth Parliament, in contrast, relies on specific enumerated heads of power under section 51 of the Australian Constitution, such as trade, commerce, and corporations.

The proposition that the construction industry is "clothed with the public interest" is therefore no nebulous rationale.

The businesses comprising the construction industry operate in a manner that profoundly affects the community at large, thereby taking their activities beyond matters of purely private concern and subjecting those activities to extensive regulation.

The High Court of Australia recognises the capacity of government to regulate private property and economic activity in furtherance of broader public interests and societal welfare, including where private enterprise produces profound social consequences or engages the need for consumer protection**.**

Outside construction, a powerful illustration of the Commonwealth's capacity to regulate the internal relationships of private enterprise is the landmark Work Choices case — *New South Wales v Commonwealth* [2006] HCA 52. The High Court upheld the use of the corporations power in section 51(xx) of the Australian Constitution to support Commonwealth regulation extending beyond the external trading activities of constitutional corporations and into their employment relationships, including obligations governing their employees.

The significance of the decision for present purposes is the breadth of the corporations power. The fact that an activity concerns the internal commercial relationships of a private corporation does not, by itself, place that activity beyond Commonwealth regulation supported by section 51(xx) of the Australian Constitution.

Within the construction industry itself, another major statutory intervention — on this occasion by State Parliament — came before the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4.

By the time the High Court was presented with this dispute, each state and territory in Australia had adopted the concept of security of payment and enacted legislation along two models – the East Coast Model and the West Coast Model. This legislation subjects private commercial parties to a fast-tracked statutory adjudication process for payment disputes, deliberately altering the ordinary contractual and litigation environment so that payment disputes cannot simply await the conclusion of lengthy and resource-consuming court proceedings.

This case was immensely significant for the broader Australia sector. The High Court ultimately ruled that adjudication determinations made under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* **cannot be judicially reviewed or quashed for non-jurisdictional errors of law**.

The significance of the ruling extended well beyond the immediate dispute. Security of payment legislation deliberately creates a rapid, interim statutory payment regime in which disputed contractual rights are not finally determined by the adjudicator. Probuild confirmed that the statutory scheme excludes judicial review for non-jurisdictional error of law on the face of the record; judicial intervention remains available for jurisdictional error.

The result reinforces the legislative architecture of "pay now, argue later". Interim cashflow is protected while the parties' final contractual rights remain available for subsequent determination.[29]

The High Court unanimously upheld the operation of the statutory regime in this respect.[30] The significance for this submission is that Parliament deliberately reshaped the ordinary commercial environment governing construction payment disputes in order to create an immediate interim payment mechanism, while preserving the parties' ultimate contractual rights.

A further and particularly important construction-industry example is the High Court's recent decision in *Pafburn Pty Limited v The Owners – Strata Plan No 84674* [2024] HCA 49.

Pafburn v The Owners involves the intervention of the state to regulate. The NSW Parliament enacted the *Design and Building Practitioners Act 202*0 (DBPA), which imposed a retrospective statutory duty of care upon persons carrying out construction work to exercise reasonable care to avoid economic loss caused by defects.

The developer and head building contractor sought to rely upon proportionate liability to limit their potential liability by reference to the responsibility of other persons involved in the construction work. By majority, the High Court rejected that route in respect of persons to whom the relevant construction work had been delegated or entrusted.

The majority held that the statutory duty was non-delegable. A developer or head building contractor subject to that duty could not exclude or limit its liability by apportioning responsibility to persons to whom it had delegated or otherwise entrusted the relevant construction work. For that purpose, the statutory scheme treats the person owing the duty as responsible for failures to exercise reasonable care by those to whom the work was delegated.

In that respect, the statutory result is the opposite of a proportionate-liability model under which responsibility for the same loss could simply be distributed among the various participants.

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[29] The ACT Court of Appeal in *Harlech Enterprises v Beno Excavations* [2022] ACTCA 42 confirmed that adjudication determinations are interim only, do not finally determine contractual rights, and operate solely to secure statutory cashflow. The Court held that SOPA adjudications are "not intended to be conclusive of rights under the contract" and that the regime provides "interim payments… erected to protect a class of enterprises for which cash flow is often critical to survival". The Court further emphasised that nothing in Part 4 affects any party's ultimate contractual rights, and that adjudication findings cannot create issue estoppel or bind later proceedings. Special leave to appeal was refused, confirming the finality of this position. The security of payment regime is not a regime for enforcing contracts. Rather, it is a regime for providing interim payments. Nothing the security of payment legislation suggests that a decision on an adjudication application is intended to be conclusive rights under the contract.

[30] This statement is referring to the unanimous decision of the High Court in *Probuild*. In *Pafburn*, however, the Court was split 4:3 on the construction of the DBPA/CLA interaction and was, for this reason, not unanimous. The majority in *Pafburn* was Gageler CJ, Gleeson, Jagot and Beech-Jones JJ with Gordon, Edelman and Steward JJ dissenting on that issue. *Pafburn* nevertheless is a critical case with respect to the social-impact justification of regulation. The Majority itself traces the DBPA to the Opal and Mascot Tower failures, the resulting crisis of consumer confidence, and Parliament's decision to create stronger redress and "individual and collective responsibility" for construction industry participants and practitioners. The majority says the legislation's **"intended strength and scope"** responded to that crisis and that Parliament deliberately prevented those performing construction work from delegating or contracting out of the statutory responsibility.

The person at the top of the contractual chain is treated as the insurer of the activity. This means that:

- The head contractor cannot escape the statutory duty merely by delegating construction work to subcontractors.
- The developer cannot escape the statutory duty merely by entrusting construction work to the head contractor.
- The statutory responsibility therefore remains with the person subject to the non-delegable duty notwithstanding that the physical work is performed by another.

This reflects the vertical striation I have been describing for years. *Pafburn*, in the context of the NSW statutory duty, demonstrates that legal responsibility cannot necessarily be pushed down the contractual hierarchy merely because physical performance has been delegated downward.

Even though the High Court was construing specific NSW legislation, the decision provides a striking legal illustration of the hierarchy examined in this submission: responsibility may remain concentrated higher in the contractual chain notwithstanding that physical performance occurs lower within it.

The resulting contrast is stark:

- Risk sits at the top of the chain.
- Liability sits at the top of the chain.
- HOWEVER, cashflow does not.

The analyses undertaken by the QPC, PC and Senate do not reflect this allocation of responsibility, risk and movement of money. Instead, their analyses proceed substantially upon assumptions that:

- construction capacity can be analysed substantially through aggregate industry measures;[31]

[31]The "Acknowledgements" in the Productivity Commission's Housing construction productivity: Can we fix it? research paper is not innocuous. Rather, it is a structural tell about the Commission's analytical method and the institutional blind spot examined throughout this submission. There is a corresponding risk of "The Emperor's Clothes" — institutional silence in which high-level bodies repeatedly validate the same analytical narrative because the foundational assumptions themselves are never tested. The Acknowledgements identify the administrative datasets upon which important parts of the research rely. Those datasets were collected for taxation, welfare, border administration, family assistance, parental leave, student assistance and ABS statistical purposes. What they do not contain are the operational variables examined throughout this submission as determinants of construction performance: cashflow movement through contractual chains; payment timing and failure; adjudication outcomes; security-of-payment recovery; insolvency propagation; subcontractor survival; supply-chain liquidity; lien rights; trust-account efficacy; project-financing architecture; access to "ready money"; asymmetrical security rights; contractual risk allocation; performance disruption; and cascading failure. That distinction is fundamental. Administrative datasets may permit sophisticated macroeconomic analysis of firms, employment, taxation, entry, exit and labour reallocation. But a dataset cannot reveal a variable it does not contain. If the variables governing the movement of performance and money through the construction hierarchy are absent from the analytical dataset, the resulting analysis cannot, without additional evidence, explain whether those variables are constraining productive performance. The problem is particularly acute in a research paper entitled *Housing construction productivity: Can we fix it?* The Productivity Commission is examining the productivity of a construction delivery system through datasets capable of describing important aggregate economic characteristics, but which do not themselves describe the contractual and financial machinery through which construction is actually delivered. That is precisely the distinction developed in this submission between measuring the movement of the economy at an aggregate level and understanding what happens at the productive end of the construction conveyor belt. The relevant question is not merely how many firms enter or exit, how labour reallocates, or how aggregate productivity changes. It is why the contracted party performing the work can or cannot continue converting labour, materials and expertise into completed construction.

- regulatory and planning constraints can be examined independently of the movement of payment through the contractual hierarchy;
- insolvency can be treated as an industry outcome without tracing its cascading effects through individual contracting chains;
- payment failure can be treated as peripheral to the regulatory productivity analysis; and
- increased administrative throughput can be treated as an important pathway toward increased housing output.

Read together for the purposes of this submission, Probuild and Pafburn expose a very different structural reality. Pafburn demonstrates how statutory responsibility may remain concentrated higher in the contractual hierarchy notwithstanding delegation of physical performance downward; Probuild demonstrates the legislative importance attached to maintaining the movement of interim payment through that hierarchy. The resulting structure is one of concentrated responsibility and diffuse vulnerability.

This is why a construction project and the middle of a battlefield have much in common:

- Orders flow down the chain of command.
- Responsibility and risk ultimately flow upward through the chain of command.
- Chaos does not respect the formal structure of command and can propagate throughout the entire system.
- Payment failure operates as a catastrophic disruption to logistics by breaking the chain and depriving those required to perform of the resources necessary and critical to continue so doing.

There is a commercial reason why the statutory security-of-payment regime adopts this compulsory interim-payment structure. Its effectiveness depends upon the regulatory machinery operating consistently with the mischief, policy and purpose for which the legislation was enacted.

Construction is not an ordinary commercial activity. It is a regulated public-interest activity, and this means that payment security is not a private contractual matter and is a public policy imperative.

When the necessary supply of money stops flowing through a construction project — just as essential supplies may cease to flow on a battlefield — the operational chain begins to break down.

Ultimately, orders can only flow down if the baseline requirements for survival and compensation flow with them. In both worlds, if the bottom of the chain is starved, the top of the chain loses its right to command.

In *Probuild*, the High Court of Australia ruled that security of payment legislation establishes an interim dispute resolution regime. The primary purpose of security of payment is to secure immediate interim cashflow for the contracted party, whether that party is a head contractor or subcontractor. The statutory architecture places the immediate financial risk of the interim determination upon the contracting party.

As set out in the object or main purpose of security payment legislation, payment is regulated to occur now and is required not only to be prompt but in full, while the parties' final contractual rights are preserved for determination later.

For present purposes, three commercial analogies assist in explaining how this interim-payment architecture supports the object and main purpose of security of payment:

1. The Retail Analogy: "*You Can't Drive the Car Off the Lot While Disputing the Invoice*"
2. The Commercial Core: The "*Interim Bank*" Fallacy
3. The "*Pay Now, Argue Later*" Insurance Premium

In a standard retail or consumer transaction, the transfer of possession requires the immediate transfer of cash.

If you buy a refrigerator from an appliance store, you cannot say, "*Oh, by the way, I am taking this fridge home today, but I am withholding 30% of the price because I suspect the ice maker might break next month, or because my own boss has not paid me my salary yet*". The store would call the police. You (as the consumer) must pay the retail price upfront. If the fridge later breaks down, you do not get to run into the store and steal your cash back. You rely on warranties, consumer guarantees, or a refund process later.

In construction, the subcontractor gives away the subcontractor's product (labour, steel, concrete) on credit every single day. Once the concrete has been laid, the subcontractor cannot "repossess" it if the head contractor refuses to pay.

The security-of-payment regime restores something resembling that commercial sequence to the construction transaction: YOU HAVE TAKEN THE BENEFIT OF THE WORK; THE INTERIM PAYMENT MUST NOW BE MADE. If you have a dispute about a defect, that is a warranty claim under the contract that has a procedure to be followed.

The strongest commercial argument centres on who should act as the project's bank. Historically, head contractors used subcontractors as an interest-free overdraft. By withholding a $100,000 progress payment over a minor $5,000 defect dispute, the builder has wrongfully retained that cash in the builder's own bank account, and this menacing state of contractual affairs means that the builder has created for itself available funds to fund construction operations or other projects.

The statutory security-of-payment regime strips this unilateral "banking power" away from the contracting party. If there is a dispute, the builder cannot unilaterally decide to hold the cash. The security of payment regime operates on the fundamental principle of 'pay now, argue later'.

The primary purpose of the not used restitution provision in the security of payment regime is to preserve a party's final legal rights. This provision ensures that payments made under the statutory adjudication framework remain interim rather than final. The preservation of final contractual rights is the necessary counterweight

to the “pay now, argue later” regime. An adjudication determination is interim. Payment pursuant to it does not finally determine the parties’ contractual rights, and subsequent proceedings may establish that some or all of the adjudicated amount paid was not ultimately due.

The statutory framework therefore performs two functions simultaneously:

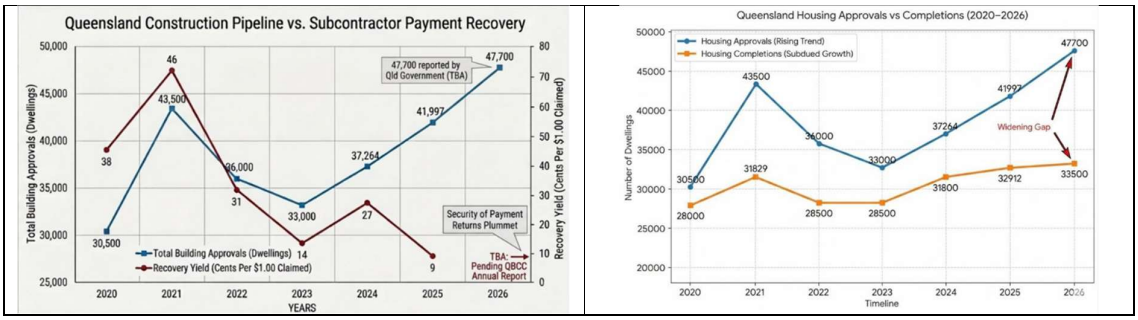
1. it protects immediate cashflow by requiring interim payment; and

2. it preserves the ability of the parties to obtain a final determination and appropriate financial adjustment later.

Accordingly, if subsequent proceedings establish that the claimant was overpaid or was not ultimately entitled to the adjudicated amount under the contract, the parties’ final rights can be adjusted and any appropriate repayment ordered. The interim payment mechanism therefore protects cashflow without converting the adjudicator’s temporary determination into the final contractual bargain.

The High Court in Probuild established that the legislative regime priority is immediate interim cashflow. The justices of the High Court unanimously dismissed the appeal and explicitly made it known that the final rights were to be sorted later via statutory restitution.

Yet, despite this binding judicial authority across Australia, the real-world statistical performance of the statutory regime demonstrates that the interim cashflow engine has completely broken down, as the empirical data below shows in Queensland.



The real-world evidence demonstrates a widening disconnect between the volume of work entering the construction pipeline and the capacity of the delivery system to convert that pipeline into completed output. The deterioration in the statutory cashflow mechanism forms an important part of that evidence.

The Queensland Productivity Commission formally commenced its inquiry into how policies and regulation affect construction-industry productivity on 24 April 2025, when the Queensland Treasurer issued the Terms of Reference as the first inquiry of the newly established Commission. The QPC submitted its Final Report to the Treasurer on 23 October 2025, with the report carrying an official date of October 2025. The Final Report was publicly released on 21 January 2026 together with the Queensland Government’s response.

The Crisafulli Government characterised its response as a “construction industry reset” and agreed, or agreed in principle, to 51 of the QPC’s 64 recommendations. The stated objective was to reverse the reported 9% productivity decline since 2018, with substantial emphasis upon reducing planning and regulatory constraints and accelerating housing and infrastructure delivery.

The Crisafulli Government immediately abolished the BPIC framework from State procurement policy. The QPC found that the BPIC restricted market competition, failed to demonstrate material safety improvements, and was on track to cost taxpayers $20.6 billion over five years.

To address housing-supply constraints, the Government took steps to reduce regulatory barriers by overhauling planning schemes and streamlining development approvals. This included measures directed toward restrictive local density caps and accelerated State intervention in planning and zoning decisions.

The significance of the Queensland data becomes clearer when viewed through the framework developed by Sir Michael Latham in *Constructing the Team*.

If housing policy is assessed principally by the volume of approved supply entering the pipeline, the blue line presents an apparently positive result. Between 2024 and 2026 approvals rise steeply, reaching approximately 47,700 dwellings.

When Queensland’s construction policy is assessed through the lens of Latham’s *Constructing the Team*, however, the recent surge in dwelling approvals cannot, without more, be treated as evidence of improved construction productivity.

Latham approached productivity as a whole-of-industry problem in which economic conditions, procurement, training, contractual relationships, teamwork and, critically, cashflow and security of payment are interconnected. He regarded it as “absolutely fundamental” that construction participants be paid for work undertaken.

A system that expands the pipeline of approved work while the capacity of the contractual chain to obtain payment for performing that work is deteriorating is therefore not demonstrating improved productivity. It is increasing the productive demand imposed upon an increasingly financially fragile delivery system.

That is not a problem identified with the benefit of hindsight.

The construction industry is the productive system upon which the Government relies to deliver its million-home program to 2044, State capital works and the infrastructure required for the Brisbane 2032 Olympic and Paralympic Games.

In February 2025, the Minister for Housing and Public Works, Sam O’Connor, stated:

> We want Queensland to be the building capital of the nation but at the moment our construction sites are the least productive in Australia.

In a discussion paper presented personally to the Minister for Housing and Public Works and submitted as a submission to the Queensland Productivity Commission on 5 September 2025, I identified the anterior problem:

Minister, if "*money makes the mare go*", then the mare in Queensland is not only starving but also has "HEADED FOR GLUE FACTORY" written all over it in the same way the carthorse "Boxer" in Orwell's dystopian novel "Animal Farm" when he was no longer useful to the pigs.

The current state of statutory affairs, as presented and discussed in this briefing paper, symbolises the betrayal and exploitation of the contracted party (working class) as adopted by Labor's Palaszczuk Government (Minister de Brenni) in the *Building Industry Fairness (Security of Payment) Act 2017*.

Nothing has changed since I raised these concerns directly with the Minister on 5 September 2025. The evidence now available indicates that the position has materially deteriorated.

Security of payment – the legislative mechanism intended to secure cashflow through Queensland's construction industry – is structurally failing in both procedural and substantive operation. More significantly for present purposes, that failure is occurring at the same time as Government policy seeks to accelerate the volume of construction entering the pipeline.

The QPC was expressly warned of this problem before completing its Final Report.

The Ministerial Briefing Paper presented to the Minister for Housing and Public Works on 5 September 2025 was subsequently accepted as a submission to the QPC inquiry.

That paper did not raise security of payment as some peripheral construction-law concern. It expressly warned that **"Without cash flow, there will be no productivity"**, explained the cascading economic consequences of interruption to cashflow throughout the contractual chain, and placed before the inquiry contemporary adjudication data demonstrating an extraordinarily low recovery rate for construction participants seeking payment.

The QPC therefore knew of the issue.

Indeed, its Final Report acknowledged that the industry is highly leveraged, incurs substantial upfront costs, operates through hierarchical contracting chains upon which cashflow depends, and experiences correspondingly high insolvency rates.

Yet having identified those characteristics, the QPC diagnosed the causes of poor construction productivity principally as "growing regulatory burdens" and "sub-optimal procurement practices.

That was not an absence of evidence. It was a failure to follow the evidence through the contractual chain.

To ignore this causal link is a failure of logic so fundamental that, if comparable reasoning appeared in an administrative decision subject to judicial review — as my

adjudication decisions are — it would immediately raise the question whether the decision-maker had failed to engage with a material and critical issue required to be considered.

The QPC accurately identified the structural disease: a highly leveraged, hierarchically dependent and vertically striated contracting chain prone to catastrophic insolvency. Yet it prescribed medicine directed principally toward different symptoms.

By failing to connect its own factual findings on cashflow to the broader crisis of industry productivity, the QPC did not merely overlook a submission. Instead, it committed a profound failure to follow its own evidence to its necessary conclusion.

The QPC did eventually address non-payment in a non-responsive way:

Stakeholders told the Commission that, despite financial regulations being in place, **non-payment of contractors remains a significant issue.**

The QPC then acknowledges divergent views and proceeds principally to consider minimum financial requirements and project trust accounts. Recommendation 43 concludes that there is little evidence that project trust accounts have been effective in reducing non-payment and recommends a further review of the trust-account framework, including consideration of "alternative options".

Having been provided with evidence that security of payment and cashflow were asserted to be fundamental determinants of productive capacity, the QPC acknowledged that **"non-payment of contractors remains a significant issue"** but relegated the problem to its discussion of "financial regulation". Its substantive recommendation was not reform of the security-of-payment architecture, but a further review of the trust account framework and consideration of alternative options.

The distinction is critical. The QPC did not fail to see non-payment. Instead, the QPC investigators saw it, acknowledged it, and then failed to integrate it into its diagnosis of productivity.

Recommendation 43 also exposes a deeper conceptual problem addressed elsewhere in this submission. The QPC recommends that Queensland investigate whether its trust-account framework should be retained and that "alternative options" for addressing non-payment be explored. Yet the problem is not merely whether a trust account, viewed in isolation, works. The anterior question is whether the Commission understands the legal machinery within which construction trusts historically operate.

That distinction is important to the Californian comparison already developed in this submission. The construction trust is not properly understood as a stand-alone payment device. It forms part of a broader architecture in which the protection of construction funds operates alongside the mechanics' lien — the proprietary security mechanism by which those improving land obtain security against the improved property.

The significance of that integrated architecture, including its relationship with the Californian machinery within which SB 35 ultimately operates, has already been examined.

More importantly, **this alternative was not unavailable to the QPC**. Ten years earlier, in evidence before the Senate Economics References Committee, I expressly proposed an integrated **lien, construction escrow and adjudication mechanism** and cautioned against examining the American construction-trust model "in a piecemeal fashion" divorced from the mechanics lien. That same essential solution was again placed before the Minister and the QPC in the September 2025 submission.

In my testimony before the Senate in August 2015, I was not merely advocating a trust. I criticised the Final Report of Bruce Collins QC for making precisely the analytical error that Recommendation 43 now risks repeating, that is, engaging in an examination of the United States model helter-skelter and piecemeal rather than as an integrated payment-security architecture to understand how the system operates and the problems that may arise when seeking to install the legislative machinery in Australia.

The Collins Final Report examined the construction trust but did not examine why or how that trust developed alongside the mechanics' lien. Maryland enacted its construction trust statute in 1987[32] – 96 years after enactment of its mechanics' lien legislation in 1791.[33]

Recommendation 43 therefore presents an extraordinary circularity. Here **the QPC recommends further investigation of the very problem for which an integrated alternative had already been placed before the inquiry.** The significance of that failure becomes clearer when Recommendation 43 is read against the mechanics' lien, construction trust and Californian administrative architecture already examined in this submission.

This is a form of catastrophic "procedural blindness" within an administrative investigation instructed to make recommendations to government. The concern I have (which also relates to how the QBCC operates) is that the bureaucratic system sees only what it chooses to see and count.

Here, the relevant fact was visible; the evidence was available; the problem was acknowledged; yet the QPC did not alter the analytical frame through which productivity was being diagnosed. The paper containing that evidence and those submissions is in the public domain.

The Queensland data from 2024 to 2026 shows precisely this dynamic. Approvals have accelerated sharply, rising to 47,700 dwellings, yet the financial conditions

[32] The Maryland Construction Trust Statute was enacted in 1987 under the title "Trust Relationships in the Construction Industry" and was specifically created to protect project funds and to compliment the mechanics' lien framework.

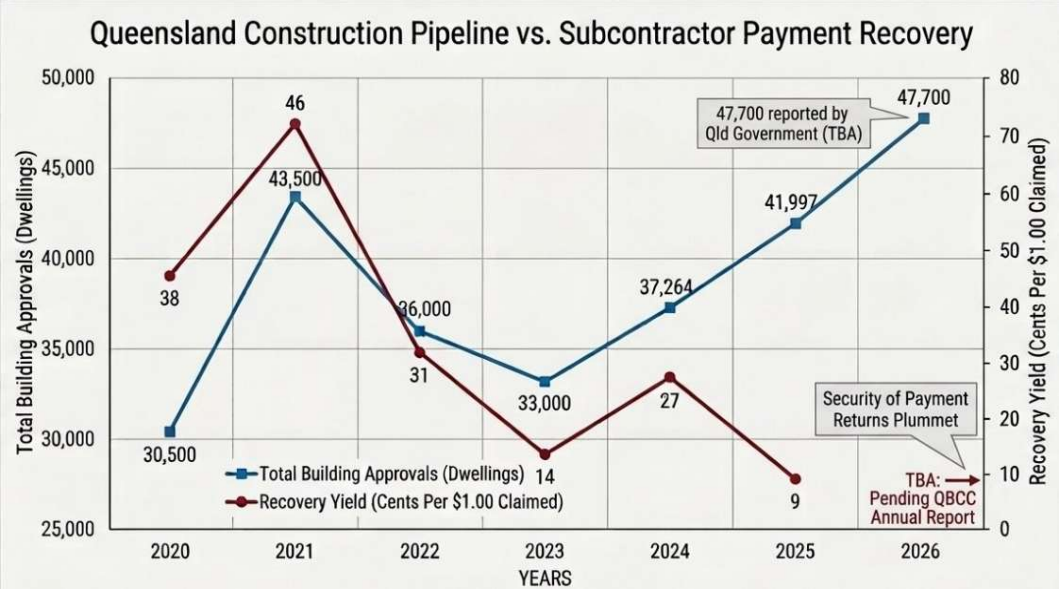
[33] The Maryland Mechanics' Lien Law was enacted in 1791 by the Maryland General Assembly, and this legislative event marked the first mechanics' lien law in the United States to facilitate and encourage construction in the newly planned capital of Washington DC.

required to convert approvals into completed homes have materially deteriorated. Under Latham's framework, this widening gap is not a benign administrative mismatch; it is the signature of a sector where **the cashflow lifeblood has been drained from subcontractors**, leaving the delivery chain structurally incapable of meeting the policy ambition.

This is why the second graph — the QBCC recovery-yield collapse — is not merely relevant but critically important and must be considered by the Productivity Commission. The image demonstrates that, while Government policy is increasing the volume of work entering the pipeline following the QPC recommendations, the measured recovery performance of the underlying adjudication system has collapsed.

In Latham's terms, you cannot construct the team when the team is insolvent. No amount of planning reform, zoning acceleration, or procurement restructuring can compensate for a payment environment where subcontractors are recovering less than 10 cents on the dollar.

A system that approves more work than it can pay for is not productive. **Instead, it is unstable**.



The QPC has recommended accelerating the conveyor belt without first determining whether the productive machinery at the end of that conveyor remains financially capable of processing the tsunami of approvals projected by the Crisafulli Government.

The QPC inquiry — Opportunities to improve productivity of the construction industry — is now complete. The QPC describes the inquiry as having "*examined how policies and regulation affect construction industry productivity and considered opportunities for reform*".

On 28 May 2026, the Federal Treasurer requested that the Productivity Commission "*undertake an inquiry into the rules and regulations that impact housing supply*". The Productivity Commission describes its task in the following terms:

"*The PC has been asked to examine how regulations across all levels of government can be improved to speed up delivery of new housing and boost construction. The inquiry will identify and prioritise reforms to reduce unnecessary regulatory barriers to housing, support the National Housing Accord, and help Australia build more well-located homes*".

The Senate Select Committee on Productivity in Australia approaches the problem more broadly, treating housing as relevant to national productivity, labour mobility and economic growth. Its Interim Report also considers regulatory burden, macroprudential regulation, banking structures and access to finance as constraints affecting housing availability. While acknowledging that excessive regulatory red tape stymies supply, the Senate Committee explicitly states that housing availability is equally restricted by macroprudential regulation, banking structures, and restricted access to finance.

The three inquiries resemble the parable of the blind men and the elephant. Each touches a different part of the same structural problem and, because each approaches the system through a different analytical frame, none necessarily sees the complete animal.

The QPC touches the side of the elephant. It examines Queensland construction-industry mechanics, procurement, regulation and planning. The QPC then recommends acceleration at the approval end of the conveyor belt without adequately determining whether downstream market capacity possesses the cashflow — the lifeblood — necessary to absorb and sustain that increased load.

The PC touches the trunk. It has been instructed to examine Federal, State and local regulatory frameworks affecting housing supply and to identify reforms capable of speeding delivery and supporting the National Housing Accord.

The Senate Select Committee touches the tusk. Its inquiry operates at the broader macroeconomic level, examining productivity, finance, population distribution and structural economic settings, with its housing work extending into macroprudential regulation and access to finance.

Each observation may be correct as far as it goes. The problem is that none, standing alone, describes the elephant.

The missing analytical step can be expressed through the Theory of Constraints, or bottleneck analysis. The goal of such an exercise is to identify the point within the system that actually limits throughput before attempting to accelerate the system around it.

The concern developed in this submission is that the decisive constraint may not lie principally at the front end of the pipeline. It may lie at the point of conversion — the point at which approved work must be transformed into physical construction by the delivery chain.

Construction is not manufacturing

The analytical models employed by the inquiries risk treating construction as though throughput responds predictably to increased administrative input. Construction does not operate like a conventional repetitive manufacturing process. It does not ordinarily possess:

- stable inputs,
- predictable processes,
- repeatable outputs.

Construction is not manufacturing and each construction job is unique. A construction project is a volatile, non-repetitive, multi-actor hierarchy in which cashflow is a critical determinant of survival.

The bottleneck identified by this submission — applying the Theory of Constraints to the construction delivery system — is the financial capacity of the contracted party to continue performing. When the 2024–25 adjudication data shows an adjudicated amount equivalent to approximately nine cents on the dollar; when payment claims cannot be collateralised; when insolvency risk is cascading down the chain; planning, zoning and broader credit policy cannot, by themselves, remove that constraint.

The constraint is the inability of the delivery chain to absorb the load being pushed down onto it.

Accelerating approvals into an insolvent system does not increase productivity. Rather, it accelerates the collapse.

I note parenthetically that, except perhaps in the middle of a battlefield, nowhere must people coordinate the movement of labour and materials amid such chaos and with such limited certainty about present facts and future occurrences as on a construction project. Even the most painstaking planning frequently turns out to be conjectural. Accommodation to changed circumstances on site must necessarily be rough, quick and ad hoc — a state of performance under a construction contract not unlike the constantly changing commands of a battlefield.

The difficulty with concentrating upon how the bank finances the development while giving insufficient attention to how the construction “battlefield” itself is financed and managed is that the inquiry can overlook the participants actually absorbing the operational risk. The Bathla collapse provides a contemporary illustration of what occurs when financial failure at one level propagates throughout that delivery structure.

The prevalence of disputes and litigation within construction appears disproportionate when compared with many other forms of commercial enterprise.

This greater tendency to litigate problems has many causes.

First, many contractors operate with limited capital relative to the scale of their contractual obligations. When adverse events occur, that financial structure can make it difficult or impossible to continue performing. The costs and cashflow demands of a construction project can be enormous relative to the capital and prospective profit of the contractor or subcontractor undertaking it.

Second, the construction business is, by its very nature, nonrepetitive. In contrast to manufacturing, for example, each construction job is unique. Routine operations and stable relationships characterise manufacturing. Manufacturers operate for long periods in the same location, with the same personnel producing the same product under the same laws. The construction industry contractor, by contrast, moves from one jobsite to another. Each site has different physical characteristics, different local codes and laws with which to comply, and different inspectors, engineers, union teams, and personnel. The principal (owner) is usually a stranger. Subcontractors come and go. The architect, lending institution, materials and material suppliers, and union agents change from job to job. The cumulative effect is that every new project reconstructs a network of commercial and professional relationships, each of which presents another potential point of disagreement or failure.

A dispute arising from a construction project tends to involve many parties, among whom may be the owner, the architect, the engineer, the head contractor, the superintendent, the sub- or trade- contractor, the material supplier, the construction lender, the titles office, and the regulator. Because the typical construction dispute is multiparty, it is inherently more difficult to manage and resolve, making Sir Michael Latham’s *Constructing the Team* as relevant today as it was in 1994.

Yet despite the accumulated evidence — including major contractor collapses, the Senate Committee’s own findings and decades of analysis demonstrating construction’s volatility, fragmentation, multiparty interdependence and extreme cashflow sensitivity — these characteristics do not occupy a corresponding position within the analytical framing of the recent productivity inquiries.

The resulting analyses risk treating construction as though it were a comparatively stable and repeatable production system rather than a volatile, multi-actor contractual hierarchy in which payment insecurity and upstream financial failure can trigger cascading downstream insolvency.

Undercapitalised contractors, constantly changing project relationships, non-repetitive work, multiparty disputes, lender influence, regulatory blind spots and the possibility that one upstream failure can destroy numerous downstream businesses are not peripheral characteristics. They form part of the productive environment being assessed.

An inquiry into construction productivity that does not integrate those characteristics risks assessing productivity without adequately understanding the productive system itself.

The Queensland Productivity Commission, the Federal Productivity Commission and the Senate Select Committee have either examined or are currently examining the housing and productivity problems discussed in this submission. The next question is therefore what these bodies have actually been tasked to investigate and whether their Terms of Reference encompass the structural matters identified above.

The starting point is the precise scope of the institutional mandates. The QPC, Federal Productivity Commission and Senate Select Committee approach the same broad housing and productivity problem through different Terms of Reference and different institutional functions. The question is whether those differences confine the present analysis or – if properly understood – provide the authority with the ability to conduct the full-system examination developed in this submission.

The Terms of Reference issued to both the Productivity Commission and the Senate Select Committee are not narrow constraints. They are expansive mandates that, properly interpreted, permit and, in important respects, require a full-system analysis of the construction delivery chain — including the financial, administrative and regulatory machinery at the end of the conveyor belt.

The Commission's own reliance on California's Senate Bill 35 (SB 35) as an exemplar of "international best practice" makes this unavoidable. Once California is invoked as a benchmark, the Commission cannot cherry-pick the fast-track approval mechanism while ignoring the structural architecture that makes SB 35 function.

SB 35 is not a stand-alone planning reform. As demonstrated earlier in this submission, it operates within an administrative, legislative, regulatory and financial architecture developed over decades and substantially associated with Governor Jerry Brown's four terms in office.

This is the central analytical failure of the QPC, the PC, and the Senate. Each inquiry accelerates the front end of the construction conveyor belt while ignoring the bottleneck at the delivery end. The Terms of Reference require the Commission to evaluate "established best practice", identify "barriers to more productive methods of construction", and examine "processes and frameworks to deliver new and utilise existing housing infrastructure".

These mandates cannot be satisfied by focusing solely on planning, zoning, or regulatory intake. They require examination of the machinery that converts approvals into completed dwellings — the financial capacity, cashflow integrity, and insolvency resilience of the contracted parties who physically deliver construction.

The California comparison developed earlier demonstrates why “established best practice” cannot sensibly be confined to the final approval mechanism. SB 35 operates within the enabling environment already examined – administrative legality, capital formation, infrastructure financing, human capability and security of performance and payment. The Mello-Roos infrastructure-financing mechanism provides one example of the machinery by which increased development activity can be matched with the infrastructure necessary to support it.

SB 35 therefore operates within a system already possessing mechanisms capable of absorbing accelerated approvals.

Australia does not possess an equivalent institutional architecture operating in the same form. Its infrastructure-financing mechanisms differ materially from California's Mello-Roos model, and infrastructure delivery frequently lags the development activity it is required to support. The relevant comparison is therefore not whether Australia has infrastructure-financing mechanisms at all, but whether its existing machinery can match accelerated regulatory intake with timely physical and financial delivery.

This is why the Terms of Reference cannot be interpreted narrowly. The Commission is required to evaluate “*barriers to productive methods of construction*”. The barrier identified by this submission lies downstream of planning approval: cashflow friction and the financial capacity of the contracted party to continue performing.

Productivity requires capital investment, industrialisation, and adoption of advanced construction methods. These cannot occur in an environment where subcontractors recover nine cents on the dollar, where payment claims cannot be collateralised, and where insolvency risk is concentrated at the bottom of the contractual hierarchy.

The High Court authorities examined earlier reinforce the structural contradiction identified in this submission. *Pafburn* illustrates the concentration of statutory responsibility higher within the contractual hierarchy, while *Probuild* confirms the legislative importance attached to maintaining interim cashflow through that hierarchy. Yet the empirical Queensland data demonstrates cashflow failure concentrated at the productive end of the chain.

This structural contradiction is the true bottleneck. Accelerating approvals into an insolvent delivery chain does not increase productivity; it accelerates collapse.

The Terms of Reference also require the Commission to evaluate systems “against established best practice”.

Best practice cannot be measured merely by the volume or speed of approvals if the delivery system remains incapable of reliably converting those approvals into completed construction. The Bathla Group collapse provides the contemporary warning. SB 35 is not best practice merely because it accelerates approvals. Its relevance lies in the broader institutional environment within which that acceleration occurs.

The Senate's Terms of Reference reinforce this obligation. The Senate is required to examine "structural barriers to sustainable growth," "opportunities for the states and territories to drive growth," and "Australia's competitiveness and benchmarking against similar nations."

These mandates cannot be satisfied without examining the structural realities of the construction industry: undercapitalisation, non-repetitive work cycles, multiparty interdependence, regulatory blind spots, lender influence, and extreme cashflow sensitivity.

The Senate's own Interim Report recognises macroprudential regulation and access to finance as matters affecting housing availability. The unresolved question is why that financing analysis stops before reaching the contracted party whose continuing liquidity determines whether approved work is physically delivered.

The Terms of Reference therefore require a full-system analysis. They require the Commission and the Senate to examine the bottleneck at the end of the conveyor belt — the financial capacity of the contracted party to perform. They require examination of the payment system, the insolvency chain, the failure of security of payment, and the collapse of ready money. They require examination of the delivery machinery that California built and Australia lacks. They require recognition that construction productivity cannot be reduced to a planning problem. Cashflow and the financial capacity of the delivery chain are themselves productivity problems.

The present policy emphasis has the sequence backwards. Accelerating the front end of the conveyor belt cannot substitute for repairing the productive machinery at the delivery end — the financially fragile contractual chain required to absorb that increased velocity.

Until that bottleneck is addressed, planning reform, zoning acceleration and regulatory streamlining cannot, by themselves, produce the intended increase in completed output.

Trojan Horse

The Terms of Reference, properly interpreted, compel the Commission and the Senate to confront this reality.

SB 35 is the Trojan Horse. By placing California on a pedestal, the Commission has opened the door to the entire Californian architecture. It cannot now retreat behind narrow bureaucratic limits. It must examine the delivery chain. It must examine the payment system. It must examine the bottleneck. And it must recognise that productivity cannot be achieved merely by accelerating approvals into a system that lacks the financial capacity to perform the work required to deliver them.

The Invisible Buffer

The structural flaw identified throughout this submission is not confined to construction. It was independently and strikingly illustrated on 23 September 2026, when Georgie Dent, CEO of The Parenthood, addressed the National Press Club on "*The mother and father of all problems: Australia can't afford for raising a family to be unaffordable*".

Dent identified a simple but revealing mismatch. Australian children have approximately 12 weeks of school holidays each year while a full-time employee ordinarily receives four weeks of annual leave. Even in a two-parent household where both parents are employed full-time and take all of their annual leave separately — thereby sacrificing any shared family holiday — a substantial care deficit remains. The wider work-and-care mismatch has been estimated at least 814 hours each year.

Dent described the hidden assumption beneath that system. Somewhere within the household there is a "spare adult" capable of absorbing the difference. The system appears complete on paper only because an essential productive input — unpaid or flexible parental labour, grandparents, purchased care or foregone employment — is assumed to exist outside the model.

That is precisely the analytical defect identified in this submission with respect to housing construction.

The housing model contains its own invisible buffer. Government accelerates planning approvals, releases land, funds infrastructure and establishes numerical housing targets. The model then assumes that, somewhere beyond the approval process, there exists a solvent, sufficiently capitalised and financially resilient construction delivery chain capable of absorbing whatever volume is placed upon it.

The contracted party is construction's "spare adult".

It is simply assumed to be there. It is assumed to possess the labour. It is assumed to possess the working capital. It is assumed to finance performance while awaiting payment. It is assumed to absorb retentions, set-offs, payment delay and contractual risk. And when one participant fails, the participants below it are assumed somehow to absorb the resulting financial deficit and continue performing.

The similarity between the two policy failures is structural. Each system is designed end-to-end on paper while leaving a critical external variable outside the model. Family policy assumes somebody exists to absorb the care deficit. Housing policy assumes somebody exists to absorb the construction-financing and performance deficit.

In both cases, the invisible buffer has finite capacity. Increasing the load does not increase that capacity. Once the buffer is exhausted, the apparent efficiency of the system disappears with it.

This is why accelerating the front end of the construction conveyor belt cannot, by itself, constitute a productivity policy. Government can increase the velocity of approvals and improve the infrastructure in the middle of the belt, but neither measure establishes that the small builders, subcontractors and trade contractors at the delivery end possess the financial capacity to convert that increased load into completed dwellings.

The missing variable is the productive resilience of the person upon whom the entire model silently depends.

Until that variable is brought inside the analytical model, the Government is not measuring the productive capacity of the system. It is assuming it.

Inquiry Component	QPC Inquiry (Queensland Level)	Federal PC Inquiry (Housing Supply)	Senate Select Committee (Productivity in Australia)
Primary Focus	**Productivity bottlenecks** specifically within the Queensland construction sector (residential, commercial, and civil).	**Regulatory burdens** and rules that directly restrict or slow down housing supply and approvals nationally.	**Macroeconomic growth** drivers, long-term national strategy, and broad structural barriers across the entire Australian economy.
Housing & Infrastructure	Explicitly links construction productivity to state housing targets (e.g., the Crisafulli Government's 1 million homes goal) and major public infrastructure like the Brisbane 2032 Olympics.	A core objective. Focuses heavily on land release, development approvals, and funding frameworks to build more homes quickly.	Addresses housing indirectly via a long-term "**national settlement strategy**" to balance population between cities and regions.
Regulation & Procurement	Scrutinises state/local regulations, industrial relations, and government procurement policies (specifically **Best Practice Industry Conditions**)	Focuses heavily on planning and environmental laws. **Excludes the National Construction Code** (handled separately).	Evaluates the impact of **broad regulatory tax burdens** and federal competition law on the wider economy.
Labour & Supply Chain	Details specific local challenges: material supply constraints, labour/skills availability, and rising builder insolvencies.	Examines how approval frameworks act as barriers to adopting more productive, modern methods of construction.	Looks broadly at **overall labour and multifactor productivity history** rather than sector-specific supply chains.
Geographic Lens	Focuses on Queensland construction conditions and State-specific regulatory and industry settings.	Compares planning systems across all Australian states and territories to identify national “best practice”.	Focuses on **national vs. international benchmarking** and city-to-regional population distribution.
Innovation & Technology	Identifies specific barriers to entry, investment, and innovation within the building sector.	Looks at how regulations hinder the rollout of **new, faster home-building techniques**.	Investigates the high-level impact and economic opportunities of **technology across all market sectors**.

What the three inquiries are actually trying to achieve (the plain English version)

QPC – Speed up the front end

The Queensland Productivity Commission (QPC) wants to speed up the front end. In broad terms, the QPC identifies a construction environment burdened by slow and costly processes, inconsistent and ad hoc planning, and substantial building and labour regulation.

The QPC believes the desired situation must be focused on creating:

- Faster approvals;
- Cheaper compliance;
- More predictable planning rules;
- Higher construction productivity.

The QPC concludes that the conveyor belt is moving way too slowly at the start. The solution, according to the QPC, is completely obvious – spin the conveyor belt faster.

PC – Remove regulatory friction in the middle

The Productivity Commission (Commonwealth) says that for the conveyor belt to move faster, we need to remove the regulatory friction in the middle.

The Productivity Commission locates substantial friction within planning complexity, zoning rigidity and regulatory inconsistency across the States and Territories:

- Looser zoning;
- Fewer overlays;
- Streamlined development assessment;
- Nationally consistent building rules.

The Productivity Commission concludes that the conveyor belt is jammed in the middle. The solution, according to the PC, is completely obvious – lubricate the gears of the conveyor belt.

Senate Select Committee on Productivity – Fix macro setting so the system can run faster

The Senate Select Committee says that the problem for the conveyor belt sits within the macro-level constraints, that is:

- Finance availability;
- Labour shortages;
- Supply chain bottlenecks;
- National productivity stagnation.

The Senate Select Committee believes the desired situation must be focused on:

- More labour mobility;
- Better training;
- More competition;
- Better financing conditions.

The Senate Select Committee on Productivity concludes that the conveyor belt needs a bigger engine and more workers feeding the conveyor belt at the beginning.

Thus, the QPC wants “speed up at the front of the conveyor belt”. The PC wants to “lubricate the middle of the conveyor belt”. The Senate, however, says “the conveyor belt needs a bigger engine”.

Unifying Flaw

The unifying flaw is that all three inquiries locate the principal constraints at the front or within the middle of the conveyor belt. The model developed in this submission identifies a different constraint. There is a serious and menacing constraint upon the productive and financial capacity of the contracted party within the hierarchical striation.

The CIE Report, Costs of Housing Regulation in Queensland, is an independent economic study commissioned by the Queensland Productivity Commission to identify and quantify the impact of regulation on residential housing.

The CIE Report is intensely focused upon the costs associated with delivering a dwelling.

The report provides concrete empirical data and reveals that regulation makes up the second- or third- largest component of building a home and this regulatory burden accounts for 11.75 to 19.9% of a dwellings final sales price (pages 7 to 8).

The report breaks down the exact areas where regulation adds financial friction, identifying the “zoning premium” (the cost of land supply constraints) as a far greater burden than building or labour rules (pages 7 and 24).

More importantly for this submission, the CIE Report identifies an economic pressure capable of propagating through the contractual chain. The report quantifies the financial consequences of “unreasonable delays” in approvals and infrastructure connections, including the additional holding costs imposed upon a project while the owner or developer wait (pages 24 and 36).

What the CIE Report does not then follow is how that financial pressure may travel through the contractual hierarchy and ultimately affect payment to the participants actually performing the work. That is the dimension examined below.

The CIE Report identifies three things that are relevant to the lifeblood of the construction industry and payment focus. The CIE Report shows—

1. how delay and uncertainty increase holding costs;
2. developers demand higher margins because of risk and uncertainty; and
3. the system is structurally fragile.

While an owner (developer) waits for approval, that owner must continue to pay interest and other holding costs.

This is the first conveyor-belt choke point.

When the owner incurs increased holding costs, the resulting commercial pressure does not necessarily remain at the top of the contractual hierarchy. Depending upon the contractual structure and conduct of the parties, pressure to contain or recover those costs can move downward through the chain:

- first to the head contractor,
- then to subcontractors,
- then to suppliers.

This downward transfer of pressure is rarely orderly. In practice, when the contracting party elects to push "holding-cost" pressure down the chain, the shift is abruptly sharp. It often arrives without notice, without warning, and without any commercial justification. The contracted party's progress claim can be washed out overnight and replaced with a sudden assertion that the contracted party now "owes money" to the party above it for whatever reason sounds good at the time.[34]

The downstream transmission of commercial pressure is illustrated by *Woonona-Bulli RSL Memorial Club Ltd v Warrane-Design Construct Fit-Out Pty Ltd* [2025] NSWSC 271.[35] This case is an example of what I see all the time as an adjudicator:

1. The owner rushes commencement.
2. The site was not properly investigated.
3. Latent conditions emerged (asbestos).
4. Delay costs exploded.
5. The owner refused to pay.
6. The head contractor was instructed to "go hard" on the subcontractor.
7. The subcontractor was first confronted with delay and then nonpayment, the consequences of which forced the assertion of rights under statutory adjudication.
8. The subcontractor's adjudicated delay costs then became "costs of works" under the head contract.

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[34] This pattern is well-documented in statutory adjudication disputes. In *Harlech Enterprises v Beno Excavations* [2022] ACTCA 42, the Court of Appeal noted that SOPA exists precisely because the contracted party is exposed to sudden reversals of payment position, where cashflow disruption can be "critical to survival". The Court observed that the statutory regime protects against abrupt non-payment by providing "interim payments… erected to protect a class of enterprises for which cash flow is often critical to survival." Special leave was refused, confirming the finality of this position.

[35] This NSW Supreme Court (Equity – Technology and Construction List) decision relates to the determination I made in ABCDRS NSW 666 dated 20 January 2025.

This is the conveyor belt breaking at the point of payment. The CIE Report assists in explaining the economic pressure. The adjudication determination and subsequent litigation demonstrate how commercial pressure originating higher within the contractual hierarchy can be transmitted downward through its vertical striations.

The decision of Rees J then demonstrates what occurs when the resulting payment dispute reaches the Court and the contractual allocation of those costs must finally be confronted.

Conceptualisation of "Productivity" by Productivity Commission

The Productivity Commission approaches productivity through broad economic and structural measures. Construction disputes, by contrast, expose productivity at the micro level by showing what actually happens to labour, plant, materials, time and cost while physical construction is being performed. My work as an adjudicator provides a direct window into that project-level dimension.

The Productivity Commission frames construction productivity through four core modifiers:

- Construction Productivity & Alternative Methods
- Commercial Feasibility & Zoned Capacity
- Agglomeration & Urban Productivity
- Regulatory Efficiency

Adjudication requires a sharp distinction between two legally and forensically distinct concepts:

1. Standard Delay.
2. Lost Productivity (Disruption).

Delay concerns the consequences of time lost because work cannot proceed as planned. Disruption concerns the loss of productive efficiency while work continues — for example, where owner- or principal-attributable conduct, severe weather or deficient coordination causes labour and plant to perform less efficiently than contemplated.

In adjudication submissions supported by expert evidence, the "measured mile" approach is a recognised method of comparing an unimpacted period of performance with a disrupted period in order to quantify lost efficiency.

Productive disruption is not confined to physical site conditions. The conduct and relationships between project participants can themselves affect performance. Hostile, oppressive or aggressive conduct can undermine coordination, cooperation and site efficiency.

Sir Michael Latham's landmark UK report, *Constructing the Team* (1994) – the precursor to security of payment regimes in Australia – established that conduct and

site culture dictate performance. Applied to the present analysis, Latham's findings can be reduced to three related propositions:

- Adversarialism kills efficiency;
- Teamwork is the core determinant;
- Adjudication becomes a critical circuit breaker.

Adversarial contractual behaviour can therefore become a direct impediment to productive performance. Efficient construction depends upon coordination between participants whose respective performances are interdependent. When those relationships deteriorate, delay, disruption and additional cost can follow.

The CIE Report assists in identifying one source of that pressure: delay and uncertainty can create substantial financial consequences before the subcontractor or trade contractor even arrives on site. The question is what happens when that pressure is subsequently transmitted through the contractual hierarchy.

Latham's recommendations for rapid adjudication were directed toward preventing payment disputes from paralysing continuing performance and maintaining cashflow while final rights remained unresolved.

My experience as a practitioner and adjudicator identifies that intervention must occur considerably earlier — at the point when a performance dispute begins to threaten continuing cashflow, rather than after the commercial relationship has already deteriorated.

While adjudication can provide temporary stability during performance, my experience as an adjudicator shows that payment friction frequently resurfaces, almost like clockwork, as the contract approaches completion.

Latham’s Chapter 10 recommendations did not treat rapid adjudication as a stand-alone solution. His payment recommendations formed part of a broader architecture directed toward maintaining cashflow and preventing payment disputes from destabilising continuing performance. Practical application, as demonstrated in decisions such as Woonona, Warrane and A-Civil, shows that statutory trust mechanisms alone, without an accompanying statutory lien mechanism, do not fully protect trade contractors and subcontractors from insolvency risk.

Woonona-Bulli RSL Memorial Club Ltd v Warrane-Design Construct Fit-Out Pty Ltd [2025] NSWSC 271 illustrates the classic structural failure points that occur when an owner attempts to force schedule and cost risks downstream under delay conditions.

In ABCDRS NSW 666, I found that the owner pressed for commencement without completing full geotechnical investigations in order to meet an ambitious deadline associated with ANZAC Day 2024. Against the resulting uncertainty, the builder negotiated a cost-plus head contract. The contractual structure therefore left the owner bearing the commercial consequences of latent site conditions, including the asbestos encountered on day one.

When the builder raised its concerns and sought further geotechnical investigation, the owner declined the additional expenditure. The contractual allocation of the resulting subsurface and delay risk nevertheless remained with the owner under clauses 10(a)(iv) and 12 of the contract.

When the subcontractor (All-Civil) encountered asbestos and claimed delay costs, the owner instructed the builder to “go hard” on the claims to suppress costs and push them downstream.

The subcontractor pursued its statutory rights under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* and obtained an adjudication determination against the builder for delay costs associated with Variation 31. Because the head contract operated on a cost-plus basis, those adjudicated downstream costs became an actual “cost of the works” claimed upstream by Warrane in Progress Claim 13 as Variation 40.

The owner then resisted that upstream claim, relying upon alleged failures to comply with delay-notification procedures and contending that the subcontractor adjudication determination was not binding under the head contract.

I determined that, under the cost-plus head contract, the downstream delay costs awarded to the subcontractor by another adjudicator constituted actual costs of the works capable of being claimed upstream against the owner. That conclusion arose from the contractual structure operating together with the statutory security-of-payment machinery.

Rees J dismissed the owner's challenge to my determination. The subsequent payment arrangements, including money paid into Court and the operation of certificates under the *Contractors Debts Act 1997 (NSW)*, further demonstrate the complexity of maintaining the payment stream through the contractual hierarchy.

This matter demonstrates how an owner’s attempt to compress time and refuse preliminary risk-mitigation costs ultimately backfires under a cost-plus structure. The adjudication framework, operating through the cost-plus contractual structure, resulted in the downstream delay costs being claimed back upstream against the party contractually bearing that risk.

The litigation surrounding ABCDRS NSW 666, and subsequently ABCDRS NSW 732, also exposes the limitation of relying upon a construction trust without corresponding lien security. Even an adjudication determination registered as a judgment does not itself provide the contracted party with proprietary security over the property whose value has been improved by its performance.

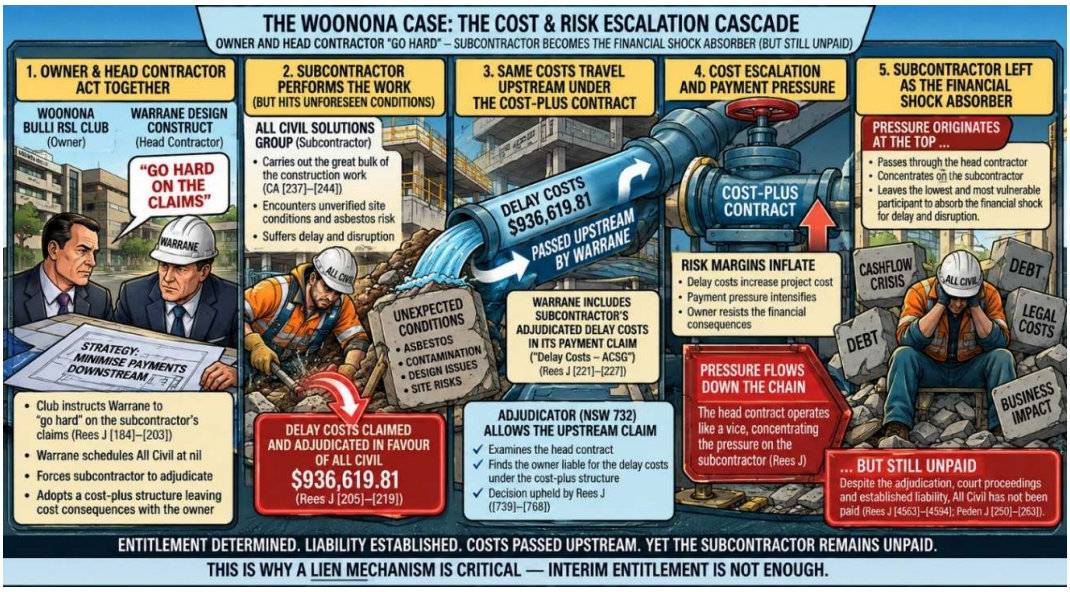
The *Woonona–Warrane* dispute is not an isolated incident. Rather, it provides a textbook demonstration of how upstream delay pressure can transform into downstream payment pressure. The CIE Report identifies the economic proposition that risk and uncertainty cause developers to demand higher margins; Woonona demonstrates what can occur within the contractual hierarchy when the financial consequences of that risk subsequently materialise.

In *Woonona*, when the consequences of delay materialised, the owner did not simply absorb them. Pressure was applied downward through the contractual chain in an attempt to suppress the resulting costs:

- The owner refused further geotechnical investigation.
- The owner insisted on commencement despite unknown subsurface conditions.
- The builder, recognising the risk, insisted on a cost-plus contract.
- The owner later refused to pay for the consequences of its own decision.
- The owner instructed the builder to “go hard” on the subcontractor to suppress costs.
- The subcontractor was forced into adjudication to survive.
- The adjudicated delay costs became a “cost of works” under the head contract.
- The owner then attempted to avoid those costs by arguing procedural technicalities.

This is the conveyor belt under stress. Risk at the top becomes margin padding in the middle, which becomes non-payment at the bottom. The CIE Report identifies the economic mechanism by which risk and uncertainty increase development margins. *Woonona* supplies the project-level illustration of what can happen when the risk for which the contractual structure was designed actually materialises. The Club accepted a cost-plus structure reflecting the uncertainty but subsequently resisted payment of costs when that uncertainty became real.

The adjudication determination examined the contractual mechanism and found that the owner was liable for the relevant delay costs under the cost-plus structure. The decision of Rees J subsequently upheld my determination against the owner's challenge. This example shows the second choke point in the conveyor belt model:



The head contract in Woonona operated like a vice. Faced with subsurface uncertainty — including unverified site conditions and asbestos risk — the parties

adopted a cost-plus structure that left the resulting cost consequences with the owner. When those risks subsequently materialised, the owner resisted the financial consequences and applied pressure downward through the contractual hierarchy.

The case illustrates how pressure originating at the highest contractual level can pass through the head contractor and concentrate upon the subcontractor, leaving the lowest and most vulnerable participant functioning as the project's financial shock absorber for delay and disruption.

When delay costs escalated and were unacceptable to the owner, the owner instructed the builder to “go hard” on the subcontractor to suppress liability. However, this strategy breaks down at the second choke point. Forced into adjudication to survive, the subcontractor secured a determination (for example, the $936k award excluding GST).

The adjudication then changed the economic alignment within the hierarchy. Once the subcontractor's adjudicated delay costs became a legitimate “cost of the works” under the cost-plus head contract, the economic interests of the subcontractor and head contractor aligned upstream. The cost pressure the owner had attempted to push downward returned through the contractual structure to the party bearing the relevant risk.

How Amdahl’s Law Applies

Background

Gene Amdahl was a pioneering computer architect and entrepreneur who helped shape the early growth of California’s high-technology industry by founding Amdahl Corporation to challenge IBM’s dominance of the mainframe market.

Born in South Dakota in 1922, Amdahl earned a PhD in theoretical physics. He joined IBM in 1952 and served as the chief architect for the groundbreaking IBM 704 and later the legendary IBM System/360 family of mainframes.

In the late 1960s, IBM placed Amdahl in charge of its Advanced Computing Systems Laboratory in Menlo Park, California. After IBM rejected his proposals for advanced computer designs, Amdahl left the company in 1970 and founded Amdahl Corporation in Sunnyvale, with critical backing from the Japanese electronics company Fujitsu. In 1975, the company released the Amdahl 470V/6, a faster, cheaper and substantially smaller mainframe capable of running IBM software through plug-compatible hardware.

By setting up shop in Sunnyvale during the 1970s, Amdahl contributed to the diversification of the South Bay technology economy beyond components and semiconductors into high-end computing systems. Amdahl Corporation demonstrated that a California-based entrant could compete directly with a dominant East Coast corporation through plug-compatible computer architecture. Its partnership with Fujitsu also provides an early example of the cross-Pacific capital and commercial relationships that became important within Silicon Valley.

California's longstanding prohibition upon employee non-compete restraints — now reflected in section 16600 of the Business and Professions Code — forms an important part of the legal environment within which Amdahl was able to leave IBM and establish a competing enterprise in California.[36]

The comparison developed below is that an equivalent departure in jurisdictions more willing to enforce post-employment restraints could have encountered materially greater legal impediments.

In the 1960s and 1970s, the computing world was divided geographically and legally:

- The East Coast Route 128 Model
- The California Model

Jurisdictions such as Massachusetts and New York historically permitted materially greater enforcement of post-employment non-compete restraints. For engineers and executives seeking to leave established firms and establish competing enterprises, those restraints could create significant litigation risk and inhibit employee mobility.

The California model took a materially different approach, with origins extending back to 1872. California law has long treated contracts restraining lawful professions, trades and businesses as void, subject to statutory exceptions.

When IBM established its Advanced Computing Systems Laboratory in Menlo Park, it placed Amdahl within a materially different legal environment governing employee mobility — effectively a legal safe haven from the restraints enforceable elsewhere.

California's restraint-of-trade law materially limited the ability of an employer to prevent a departing employee such as Amdahl from competing merely through enforcement of a conventional non-compete restraint. Had an enforceable non-compete prevented that immediate competition, two obvious consequences could have followed:

1. litigation could have consumed startup capital before the new enterprise produced a machine; and

2. Amdahl could have been restrained, for a period, from working within his principal field of expertise.

Amdahl's move is one of the classic case studies used by economic historians (such as AnnaLee Saxenian in her seminal book Regional Advantage) to explain why Silicon Valley impressively defeated Boston's tech sector.

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[36] Business and Professions Code, Division 7. General Business regulations [16000 – 18107], Part 2. Preservation and Regulation of Competition [16600 – 17365] expressly and currently provides as follows: CHAPTER 1. Contracts in Restraint of Trade [16600 – 16608], 16600. *(a) Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void. (b) (1) This section shall be read broadly, in accordance with Edwards v. Arthur Andersen LLP (2008) 44 Cal.4th 937, to void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored, that does not satisfy an exception in this chapter. (2) This subdivision does not constitute a change in, but is declaratory of, existing law. (c) This section shall not be limited to contracts where the person being restrained for engaging in a lawful profession, trade, or business is a party to the contract. (Amended by Stats. 2023, Ch. 828, Sec. 1. (AB 1076) Effective January 1, 2024.).*

Because California legally permitted **employee mobility and "knowledge spillovers",** Amdahl was able to take his unparalleled understanding of mainframe architecture and immediately commercialise it through a faster, cheaper alternative. His success set a precedent that encouraged other tech pioneers to break away from corporate giants, secure in the knowledge that California law protected their right to compete.

One of California's "secret" legal weapons was what became Business and Professions Code section 16600. Its longstanding hostility to non-compete restraints formed an important component of the wider enabling environment. Skilled employees could leave established companies, establish competing enterprises and carry knowledge through the regional economy rather than remaining contractually locked within incumbent firms.

This law allowed brilliant engineers[37] to leave established companies and freely launch rival startups, sparking continuous innovation.

California's Legislative Innovation

California's legislative innovation during the late nineteenth century arose substantially from its response to intense economic, political and social disruption rather than from detached, forward-looking idealism. The reforms associated with the Constitution of 1879 were frequently aggressive and experimental responses to immediate structural problems.

Historians attribute this intense burst of legislative innovation to a few primary catalysts:

1. Striking Back Against "The Octopus"
2. Rising to Contain Massive Industrial and Social Chaos
3. Pressure from Radical Grassroots Movements

By the 1870s, the Southern Pacific Railroad (often called "The Octopus") had grown so large that it effectively controlled the state's economy, ports, and many of its politicians. Lawmakers and citizens realized standard legislation could not curb corporate monopolies. To bypass a corrupted legislature, reformers used the 1879 *Constitutional Convention* to establish the nation's first powerful, independent Railroad Commission. This aggressive framework directly laid the groundwork for the Progressive Era's radical reforms a few decades later.

[37] Another important example of the power of this provision is the journey of legendary Alan Shugart, the founder of Seagate Technology. Shugart's story, like Amdahl's perfectly illustrates the exact economic and legal phenomenon created by California's unique ban on non-compete agreements. Alan Shugart spent 18 years as an engineer at IBM, where he help pioneer the very first computer disk drive industry in San Jose. He later moved to Memorex. Because California's Business and Professions Code Section 16600 protected Shugart from being locked down by a non-compete clause, Shugart was able to legally leave and launch his own competitor, Shugart Associates, in 1973. That company made floppy disks an industry standard before he was personally forced out following an acquisition by Xerox. Unhindered by any post-employment restrictions, Shugart and his co-founders immediately turned around and founded Shugart Technology in 1979, which was promptly renamed Seagate Technology to avoid a Xerox lawsuit. Seagate went on to build the first 5.25-inch hard disk drive for personal computers, completely shifting data storage from corporate mainframes to consumer desktops. Because California allowed engineers like Shugart to repeatedly spin out of tech giants and launch rival startups without fear of being sued into oblivion by their former employers, the Golden State's hard drive industry flourished, and this paved the way for the broader Silicon Valley BOOM.

The rapid population boom from the Gold Rush overstretched early state services, leading to rampant vigilantism and a volatile economy. Recognising that the state was on the brink of structural collapse, late-19th-century lawmakers deliberately wrote a sprawling, hyper-detailed constitution to act as a regulatory shield. These lawmakers pioneered entirely new legal frameworks for water rights and navigated the hostile clash between massive industrial mining and agricultural interests and for local governance by creating flexible decentralised power structures to allow rapidly growing cities and counties to manage themselves.

The convention also operated amid substantial pressure from populist and labour movements, including the Workingmen's Party of California and agrarian interests. One critical milestone was the elevation into the 1879 Constitution of mechanics' lien protection that had already existed in statutory form since the State's earliest years.

California's early leaders openly declared it their business to “set the world an example” and show other states how to emerge from corruption. While their motives were often a mix of radical populism, economic self-preservation, and systemic racism, their willingness to aggressively expand state regulations, pioneer consumer protections, and challenge monopolistic corporations gave late-19th-century California law its highly experimental, “visionary” reputation that has been responsible for laying the critical constitutional, administrative, legislative, and regulatory foundation responsible for creating the world’s 4th largest economy.

California is one of the very few states in the country to elevate the mechanics' lien into a state constitutional right that focused heavily on shielding every individual worker down the supply chain.[38] Embedded during that same tumultuous 1879 Constitutional Convention, this addition perfectly exemplifies the era's aggressive, populist-driven legislative style.

The lawmakers in California were stunningly visionary. This discussion highlights a critical legal intersection in the late 1800s showing how California’ 1872 non-compete ban laid the groundwork for unmatched economic growth when not having a complete set of tools like Australia (namely, sovereign capabilities), while the Golden State’s robust Mechanics Lien laws safely capitalised that growth into the physical housing market.

[38] With that said, however, Texas does share this rare distinction with California. Written during the exact same era of post-Civil War agrarian and labour populism, the Texas Constitution of 1876 includes Article XVI, Section 37. This section explicitly guarantees lien rights to “mechanics, artisans and material men, of every class”. However, while California and Texas both elevated this protection to a constitutional right, Texas applied it very differently in practice. The distinction is particularly important in relation to the Texas homestead. The Texas Constitution simultaneously provides unusually strong constitutional protection of the homestead, with the result that mechanics’ lien rights against homestead property are subject to constitutional and statutory requirements that materially constrain their operation. California’s constitutional mechanics’ lien architecture does not operate subject to an equivalent homestead limitation. Accordingly, the fact that both States constitutionalised mechanics’ lien rights does not mean that those rights possess the same practical reach or economic effect. The two States also diverge in relation to privity, the classes of persons protected, notice and perfection requirements, and the extent to which lien rights operate directly for participants further down the contractual chain. The constitutional text must therefore be examined together with the machinery through which the lien actually attaches and can be enforced.

Historical Milestone	Date	Event
The Treaty	1848	The Treaty of Guadalupe Hidalgo ended the Mexican-American War and ceded California to the United States.
Statehood	1850	California officially achieved statehood.
Mechanics Lien (Statutory enactment)	1850	The initial Mechanics Lien statute was passed in 1850 during the first legislative session of this new state in the union.
Mechanics Lien (Aggressive expansion)	1868	The California legislature aggressively expanded its Mechanics' Lien statute to strengthen protections for working labourers, mechanics, and material suppliers who frequently faced non-payment during the rapid post-Civil War and post-Gold Rush economic and building boom.
Non-Compete Ban	1872	The ban on non-compete agreements was enacted in 1872 as part of the original California Civil Code (former Section 1673)
Mechanics Lien (Constitutional protection)	1879	In 1879, California became the first state in the union to enshrine mechanics lien rights directly into its State Constitution.

The Economic Pistons: Visionary Actions Legislative Action Driving Housing & Tech

The Catalyst (Non-Competes & Technology Growth)

By declaring non-compete agreements void in 1872, early lawmakers accidentally created the perfect ecosystem for the Gold Rush region that became Silicon Valley a century later. Because talent could freely leave a company to start a competitor or join a startup, innovation accelerated exponentially through "knowledge spillover" that became critically and materially catalysed by the implementation of Governor Pat Brown's vision for higher education called the California Master Plan for Higher Education of 1960.

The Infrastructure (The Mechanics Lien & Capital Security)

As the technology economy boomed because of the actions taken by Governor Jerry Brown (son of Governor Pat Brown), this explosion of economic growth triggered an unprecedented, continuous demand for housing and infrastructure.

Because construction is a high-risk, credit-reliant industry, workers and material suppliers needed protection. By enshrining the Mechanics Lien legislation into the State Constitution in 1879, California ensured that those who build the physical environment have a secured stake in the property itself. This security allowed banks to lend more confidently and laborers to work with guaranteed payment protections, directly facilitating the rapid scaling of housing infrastructure.

These two visionary mechanisms effectively formed a closed-loop economic engine: one legal piston generated the immense wealth and population influx, while the other secured the capital necessary to build the physical world those people lived in

Why Amdahl and Shugart Would Be Blocked in Australia

Gene Amdahl (IBM) and Al Shugart (Memorex, Shugart Associates, Seagate Technology) could not have built their revolutionary spin-offs if they had been based in Australia rather than California.

As top-tier, highly compensated executives, their salaries would sit far above Australia's proposed **$190,100 high-income threshold**. Under the draft reforms, employers remain permitted to impose non-compete clauses on anyone earning above this cap, provided they claim to protect a “legitimate interest” like confidential information.

By allowing incumbent firms to legally lock down elite talent, Australia's proposed laws fail to address the root cause of the country's severe market concentration. True tech dynamism requires a complete, California-style ban on non-compete clauses alongside robust anti-monopoly frameworks.

The interplay between banning non-compete clauses and maintain aggressive anti-trust (Competition Laws in Australia) is widely recognised by economists as the supercharged dual engine that drives California’s unprecedented and unparalleled innovation ecosystem.

California has some of the most potent antitrust protections in the United States, anchored by the ***Cartwright Act***. While federal U.S. antitrust laws (like the Sherman Act) have been weakened by decades of conservative judicial interpretation, California's state laws remain highly aggressive, explicitly targeting anti-competitive behavior, monopolisation, and restraints on trade.

When the pairing of the *Cartwright Act* with California’s absolute ban on non-competes (Business and Professions Code Section 16600), the legislative combination creates a unique legal environment that allows the marketplace to function effectively, efficiently, and productively. The non-compete ban allows talent to immediately flow to its most productive use, while antitrust laws prevent incumbent giants from swallowing up or crushing those new competitors.

In contrast, Australia’s combination of comparatively weak anti-merger controls and the proposed high-income exemption for non-competes risks creating a protective shield around dominant incumbents.

Under the proposed laws, employers are explicitly permitted to keep using non-competes for anyone earning above this cap, provided the employer can argue it protects a “legitimate business interest” (such as confidential information).

This exemption potentially allows dominant incumbents to continue restraining the very high-value talent capable of launching disruptive competitors.

The concern is that the proposed reform preserves part of the very mechanism capable of reinforcing Australia's highly concentrated market structure. Breaking that concentration requires a coordinated two-pronged approach: (1) the eradication of employment non-competes and (2) aggressive antitrust enforcement. Australia has repeatedly struggled to achieve that combination within the institutional dynamics of its own "Washminister" system.[39]

California boasts the most effective anti-trust laws in the United States via the Cartwright Act, which works hand-in-hand with its strict ban on non-compete clauses. This dual-framework ensures that talent can freely spin off into new enterprises, and that state law actively prevents incumbent monopolies from crushing or buying out those rising competitors.

The contrast with California returns the discussion to the "Enabling Environment". If employee mobility is constrained while competition policy permits excessive market concentration, the marketplace is deprived of two prerequisites necessary for the dynamism the Productivity Commission seeks to promote. This is precisely why government must "regulate the hell out of the prerequisites". The object is not regulation for its own sake. It is regulation directed toward creating the conditions within which the marketplace can operate effectively, efficiently and productively.

The concern is not confined to competition policy. My experience with security of payment provides another example of government intervention replacing an existing marketplace structure without adequately confronting the competitive consequences of doing so.

We have seen this exact blind spot play out before in Security of Payment (SOP) frameworks. As I testified before the **Senate Economics References Committee in August 2015**, the Newman Government unlawfully dismantled the decentralised marketplace of Authorised Nominating Authorities (ANAs) in Queensland, replacing a competitive market with a state-run registry monopoly.

This state-sanctioned takeover openly bypassed the **National Competition Agreements** and regulatory impact assessments.

Such an intervention would have collided directly with the kind of competition and administrative architecture developed in California. The adverse effects of this illegal takeover are still being felt in a materially negative way in Queensland eleven years later.

When I raised this destruction of the competitive ANA marketplace before the Senate Economics References Committee, the response from then-Acting Chair Senator Canavan illustrated the institutional problem. The sentiment conveyed was

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[39] Australian political scientist Professor Elaine Thompson is credited with coining the term "*Washminister*" in 1980. She used the portmanteau to describe Australia's unique hybrid structure, which combines elements of two distinct systems of governance: (1) "*Wash*" (Washington, DC) which is taken from the **United States** model, borrowing a written constitution, a federal system of independent states, and a powerful, elected upper house (the Senate) acting as a states' house; (2) "minister" (Westminster) which is taken from the **United Kingdom** model, borrowing a constitutional monarchy and the core principle of **responsible government**, meaning the executive power (the Prime Minister and Cabinet) is drawn directly from, and must answer to, the elected parliament. Thompson's work dismantled the traditional political orthodoxy that Australia was purely a "Westminster system" proving that the country had mutated the two styles into something entirely its own. Another prominent Australian political scientist, **Dean Jaensch**, later popularised and endorsed the concept in the early 1990s.

effectively to “get over it”, with the conduct dismissed on the basis that “both sides of politics do this”.

That response is significant to the present discussion because it treats compliance with competitive institutional architecture as secondary to political practice. If competition rules become optional when politically inconvenient, the marketplace prerequisites discussed above cease to perform their intended function.

Just as the Bruce Collins QC recommendation concerning the Maryland construction trust examined the trust without the property-backed mechanics' lien architecture within which it developed, the Productivity Commission's current celebration of California's SB 35 housing streamlining risks the same analytical error by isolating the approval mechanism from the constitutional, administrative, legislative, regulatory and municipal frameworks within which it operates.

A partial non-compete prohibition retaining a high-income exemption, if divorced from the wider competition architecture, risks repeating the same mistake. Australia cannot achieve genuine market dynamism by importing isolated components of foreign regulatory systems while ignoring the institutional architecture that makes those components function.

Conclusion

Originally a computer-science formula, Amdahl’s Law provides that the overall improvement achievable within a system is ultimately constrained by the component that cannot be correspondingly accelerated, regardless of how intensely the other components are optimised.

Component Being Optimised (The Front End)

The three inquiries devote substantial attention to accelerating planning approvals, reducing zoning constraints and streamlining development processes. In Amdahl's terms, government is devoting considerable effort to accelerating one component of the overall housing-delivery system.

These government bodies are trying to make this single component run infinitely fast.

Serial Bottleneck (The End of the Belt)

The bottleneck identified throughout this submission lies at the delivery end of the conveyor belt: the financial capacity of the contracted party required to convert approved work into physical construction. That participant confronts payment delay, limited collateral options, vertical contractual pressure and, according to the Queensland adjudication data examined earlier, an adjudicated amount equivalent to less than ten cents for every dollar claimed.

The Amdahl Factor

If the physical delivery of housing ultimately depends upon the financial capacity of the contracted party, then reducing planning approval time toward zero cannot overcome a delivery chain that lacks the liquidity necessary to perform. The faster

component eventually ceases to determine overall system performance because the unresolved bottleneck controls the achievable output.

You cannot optimise the system by tweaking a component that is not the dominant constraint.

THE REFORM IMPERATIVE

The preceding discussion is not a series of isolated failures but is in administrative fact a single, integrated systems collapse.

The Queensland Productivity Commission, the Commonwealth Productivity Commission, and the Senate Select Committee on Productivity each believe the bottleneck sits at the front of the middle of the conveyor belt and consists of planning delays, zoning rigidity, labour shortages, and regulatory friction to boot.

However, the evidence presented in this submission shows that the conveyor belt is not failing at the front or in the middle. It is failing at the end — at the point of payment, where construction industry participants are required to physically convert the approvals the Government envisages into the completed dwellings it expects ultimately to emerge from the process.

The argument presented throughout this submission can be shown as the following process:

Front:	Approvals enter the system.
Middle:	Regulation, planning, finance, labour, procurement and construction processes move them along.
End:	The contracted party must physically convert all of that into completed construction — **and must be paid for doing so**

The three inquiries concentrate on making the front and middle operate faster. The discussion and real-world battles in the construction industry I determined as an adjudicator presented in this submission show the decisive failure completely ignored by the inquiries (and each of them) occurs at the delivery end, where performance has already moved up the contractual hierarchy, but money fails to move back down and the object of the security of payment regime has been completely thwarted by a respondent who is engaging in a more sophisticated form of menacing conduct to achieve unconscientious, unbargained-for windfalls.

The “end” is the part of the process where Government presumes – much as it does in the childcare example – the existence of a magical, invisible buffer. The contracted party is construction's “spare adult”. Unless, however, that contracted party has somehow acquired Aladdin's lamp,[40] there is no genie capable of producing the endless supply of labour, working capital and financial resilience the model silently assumes exists.

This discussion assists in understanding the diagnosis made in this submission and how it becomes a prescription:

[40] In the original traditional folk tale (The Book of One Thousand and Nights (commonly known as Arabian Nights)), there is no limit of three (the “Three” Rule created by pop culture versions). The genie grants unlimited wishes as long as the subcontractor owns the lamp. The activation process therefore takes place as in the original folk tale – Aladdin’s mother accidentally summons the genie by vigorously rubbing the lamp with a cloth to clean off dirt so the lamp could be sold. Rather than selling the lamp, the subcontractor, by vigorously (and even madly at times) rubbing the lamp, now establishes the endless source of cash flow the inquiries seem to think this spare adult has. This is the absurdity of the Government’s implicit assumption – the subcontractor can supposedly keep rubbing the lamp whenever cashflow disappears and summon another supply of “ready money”.

Conveyor belt	Identifies where the system fails
Spare adult / invisible buffer	Identifies what the Government model assumes to exist
Aladdin's lamp	Exposes the absurdity of assuming that buffer has unlimited financial capacity

That is why the later Amdahl analysis identifies the bottleneck as the financial capacity of the contracted party required to convert approved work into physical construction

Every structural weakness identified in the CIE Report — holding costs, risk premiums, margin inflation, delay-driven cost escalation — ultimately expresses itself as **nonpayment**.

In an injurious and harmful way, the menacing conduct of nonpayment and other unconscientious behaviour conducted by the contracting party (the contractual position of power in the vertical, striated hierarchy without regulation) expresses itself as **insolvency**. Insolvency expresses itself as **productivity collapse**. Productivity collapse expresses itself as **industry fragility**. And industry fragility expresses itself as **systemic economic drag**.

This is the unifying flaw in all three inquiries, that is, **each inquiry is focused on diagnosing a different variation of the symptoms, and all inquiries are not focused on the causes giving rise to the symptoms.**

The construction industry conveyor belt does not break because planning is slow. The construction industry conveyor belt breaks because payment is slow and the menacing conduct resulting in nonpayment is capturing unconscientious, unbargained-for windfalls at the complete expense of the contracted party – the party who performs the work needed to take the approval to a constructed unit.

The conveyor belt does not break because zoning is rigid. The conveyor belt breaks because cashflow is rigid and freezes up the lifeblood needed to keep the conveyor belt working.

The conveyor belt does not break because labour is scarce. The conveyor belt breaks because liquidity is scarce and the contracted party is unable to engage, let alone keep a workforce in place.

The Underlying Structural Contraction – The Silent Exit

The insolvency statistics relied upon throughout this submission do not capture the full contraction in construction capacity. There is another form of attrition occurring outside formal external administration: businesses cease trading, surrender or allow licences to lapse, retire, or otherwise leave the construction marketplace without appearing as corporate insolvencies. I describe this as the "silent exit".

ABS business-demography data records construction-business exits on a scale substantially greater than formal construction insolvencies recorded by ASIC. The two datasets do not measure the same event and should not be treated as directly

interchangeable. Their divergence nevertheless identifies an important analytical problem – formal insolvency statistics cannot be used as a complete measure of productive capacity leaving the construction industry.

That distinction matters to the productivity inquiry. A contractor does not need to enter liquidation before productive capacity disappears. When a builder retires early, surrenders a licence, ceases trading, refuses to assume another fixed-price project, or a subcontractor simply walks away from the industry, productive capacity has disappeared just as certainly as when a company enters external administration. It simply disappears without the corresponding insolvency event.

Queensland's demographic profile compounds the concern. The licensing data examined for this submission indicates an ageing contractor population accompanied by comparatively weak replacement at the younger end of the market. The resulting risk is therefore not merely insolvency. It is attrition: experienced productive capacity leaving the marketplace without being replaced at an equivalent rate.

The QPC recognised elements of this problem through its consideration of an ageing workforce, retention, apprenticeship completion, training, occupational licensing and labour mobility.

Recommendations 59–64 of the QPC's Final Report October 2025 accordingly address mechanisms intended to improve labour-market participation and replacement. That analysis, however, still leaves unanswered the anterior question raised throughout this submission: **Why would an experienced contractor remain in, or a new entrant commit capital to, a marketplace in which the contracted party must finance performance while carrying the payment and insolvency risks described above?**

This is the silent constraint hidden inside the headline description of a "labour shortage". The industry does not merely lack people. It is losing productive participants. Increasing apprenticeship intake addresses entry. It does not, without more, address the conditions causing experienced productive capacity to exit.

A productivity policy that counts workers entering the industry without measuring businesses and experienced contractors leaving it therefore risks mistaking replacement activity for capacity growth.

The conveyor belt does not break because regulation is complex. The conveyor belt breaks because the statutory machinery designed to guarantee payment has been dismantled, politicised, centralised, and rendered procedurally illegitimate.
The *Woonona–Warrane–All-Civil* dispute is not an anecdote. Rather, this diametrically opposed and completely polarised bad blood payment dispute involving the Principal, Head Contractor, and Subcontractor represents the example, not the exception, of how participants act within the construction industry marketplace and becomes the forensic demonstration of the structural failure that pervades, like a stage 4 cancer, the security of payment process.

The adjudication determination (ABCDRS NSW 666) and the subsequent litigation (Rees J, Stevenson J, the NSW Court of Appeal, Peden J[41]) show precisely how upstream risk becomes downstream insolvency, how delay becomes nonpayment, how nonpayment becomes collapse, and how collapse becomes productivity stagnation.

Queensland's system — stripped of ANAs, stripped of decentralised nomination, stripped of competitive procedural oversight, stripped of statutory neutrality — cannot protect the contracted party.

Security of payment in Queensland cannot protect cashflow. It cannot protect productivity. It cannot protect the construction industry in Queensland.

This is why the Recommendations now become the critical hinge in the submission. They are not an optional policy menu. They are the structural interventions required to prevent the conveyor belt from breaking.

The paradox of Queensland is best described as being the state with visionary transparency to the opaque pariah.

This failure is all the more tragic because Queensland was once a pioneer. When Queensland originally adopted security of payment through the "*Building and Construction Industry Payments Act 2004*" (BCIPA), The Honourable Robert Schwaten Minister for Public Works, Housing and Racing[42] was driven by a visionary premise: that the construction industry – and the free flow of cash within it – is deeply "clothed with the public interest".

A healthy, functioning construction sector is not merely a collection of private commercial contracts; it is a vital pillar of macroeconomic stability and public infrastructure.

For that reason, transparency was rightly treated as a non-negotiable statutory safeguard, anchored by the mandatory publication of adjudication determinations and performance metrics. Transparency was intended to expose predatory conduct, ensure public accountability, and benchmark whether the statutory machinery was fulfilling its core purpose. Today, Queensland has degenerated into a statutory pariah.

In place of transparent, real-time access to adjudication outcomes, the current system actively suppresses and delays critical performance data. Industry participants and policymakers no longer have access to timely, operational statistics; instead, data is buried within delayed annual reports of the regulator (the QBCC), months after systemic failures have already claimed their victims downstream.

Worse still, even when statistics are disclosed, they are fundamentally misleading.

[41] Justice Peden presided over the litigation component of statutory proceeding ABCDRS NSW 732.

[42] Premier Peter Beattie's Labor Government in 2004.

The reported figures obscure the single metric that matters most to industry survival, that is, the actual recovery rate. By failing to track and publish the real net percentage of claimed funds successfully recovered and retained by the performing party relative to the true amount owed, the state masks the true extent of statutory failure.

The public and the legislature are left blind to how much unbargained-for windfall is extracted upstream through delay and unconscientious non-payment.

The Case for Commonwealth Institutional Reform

The institutional solution proposed by this submission is not the restoration of the former Australian Building and Construction Commission.

The ABCC ultimately became identified principally with industrial relations and the regulation of union conduct. That was substantially narrower than the institutional architecture contemplated by Commissioner Cole, whose Royal Commission envisaged a federal construction regulator capable of addressing misconduct extending across industrial, civil and criminal law.[43]

The distinction is fundamental. The systemic problems identified in this submission do not belong exclusively to industrial relations. They involve payment integrity, insolvency, licensing, contractual power, consumer protection, regulatory administration, competition, professional standards and the movement of money through a national construction industry.

Workplace relations can remain within the Fair Work architecture. What is missing is a Commonwealth institution concerned with the construction marketplace itself.

I therefore propose a reconstituted Commonwealth Building and Construction Commission (CBCC) whose function is fundamentally different from the former ABCC instituted by the Howard Government. Its purpose would be to provide the national institutional architecture necessary to harmonise construction regulation, protect consumers and construction participants, preserve payment integrity and establish minimum national standards across domestic and commercial construction.

Beneath that Commission would sit an Office of Administrative Construction Law (OACL). The distinction is deliberate:

The CBCC regulates the construction industry. The OACL regulates the administrative machinery through which that regulation is created and applied.

[43] The primary recommendation of the Cole Royal Commission (Final Report, February 2003 – Summary of Findings and Recommendations Volume One) proposing the creation of a specialised, independent industry regulator was Recommendation 1 Item 10: “There needs to be an independent body free from pressures of the participants in the industry, which will ensure that participants comply with industrial, civil and criminal laws applicable to Australians, and thus operating on building and construction sites, as well as industry specific laws applicable to this industry only”. Therefore, Recommendation 1 established the creation of a federal regulatory body to monitor and enforce compliance.

This adopts the institutional lesson developed earlier from California. Effective markets do not require government to pick the winners. They require government to regulate the hell out of the prerequisites so that the marketplace can function effectively, efficiently and productively.

The OACL would therefore perform the administrative-law function examined earlier in this submission, namely scrutinising subordinate rules, policies, procedures and regulatory practices to ensure that administrative machinery remains within legislative authority, statutory purpose and nationally prescribed standards. The object is not additional bureaucracy. It is to prevent the underground rulemaking in the construction industry that occurs at an alarming rate in Australia (no matter what jurisdiction is concerned), procedural blindness, administrative accretion and jurisdictional fragmentation demonstrated throughout this submission.

The preceding pages in this submission have supplied the diagnosis. What remains is the prescription.

The evidence developed throughout this submission leads back to the same structural proposition I placed before the Senate Economics References Committee in 2015, that is, **speed without security does not constitute security of payment**.

The intervening decade has strengthened rather than displaced that conclusion. The Queensland recovery data demonstrates the deterioration of adjudication outcomes. The Silent Exit demonstrates that productive capacity can disappear without ever appearing in insolvency statistics. The *Woonona–Warrane–All-Civil* litigation demonstrates something more fundamental still.

A contracted party can:

- perform the work;
- establish its statutory entitlement;
- obtain an adjudication determination;
- register the adjudication in a court of competent jurisdiction as judgment;
- engage debt-recovery machinery permitted as a matter of law; and
- **nevertheless, remain unpaid**.

That is the missing distinction between entitlement to payment and security for payment.

The comparative analysis developed throughout this submission demonstrates why the distinction matters. Adjudication supplies speed. Construction trusts protect identified project funds. A statutory lien secures the underlying value created by the contracted party against the property improved by that performance. None performs the complete function of the others.

The required architecture must therefore combine speed, protected funds and proprietary security, while intervening sufficiently early to prevent a performance dispute from metastasising into non-payment and insolvency.

The recommendations that follow are consequently not 23 disconnected proposals. They operate beneath four interdependent structural reforms.

The Four-Point Plan

My submission to the Senate Economics Reference Committee made it known to the Senate Committee that there was (and still is) a four-point plan to resolving construction industry disputes and construction industry insolvencies.

I believed that statutory lien protection is simply not enough and there needs to be, as in California, a state-based constitutional mandate for liens: "*I believe that at the state level a constitutional mandate should be made that permits builders not just subcontractors. Any person in the construction industry who has performed work in improvement on land should have a right to place a lien on that land*".

A mechanics-lien style right becomes the first pillar for any construction industry participant who improves land in Australia.

I also believed that a federal model of construction industry law was needed: "*Second, there should now be a federal model of construction-industry law that assists that lien*".

Therefore, a national legislative framework to support and harmonise lien rights is the second pillar.

I believed further that a construction escrow was needed: "*Third, there should be a construction escrow*".

Therefore, a trust-style escrow mechanism to hold project funds securely and prevent upstream asset stripping is the third pillar.

I believed further that statutory adjudication needed to be expanded to include performance dispute: "*Fourth, adjudication should be expanded to performance disputes in addition to payment disputes because, in my experience, all payment disputes arise out of a performance dispute*".

I have within the last few years revised the concept from adjudication to conciliation. Nevertheless, the underlying concept I presented in August 2015 remains unchanged. Statutory intervention must begin at the moment performance hostilities arise and well before the conclusion of that performance friction – payment withheld. This is the fourth and last pillar.

Prior to the questions presented by Senator Xenophon, Acting Chair Canavan understood my proposal precisely in the following terms: "You are effectively recommending, now, that we should have a national model". I responded by stating: "Yes, in no uncertain terms".

Senator Xenophon confirmed that my diagnosis that Queensland's system is broken:

Senator XENOPHON: Mr Sive, thank you for your evidence. You are basically saying that the current system in Queensland is basically broken. Is that a fair summary of your evidence?

Mr Sive: Absolutely

Senator XENOPHON: And you say that the best way to do this a federal model?

Mr Sive: Yes. If you look at the statistics coming out since December last year, when I raised my concerns, claimants in the dispute process under the adjudication process, when you look at the average, were getting 48 to 49 per cent of what they were claiming. This is little less than 50 per cent. That statistic now stands less than 22 per cent.

Senator XENOPHON: So it has got worse.

Mr Sive: You are better off as a subcontractor to go down over here to Jupiters, put your money on one colour – you will get a better pay out.

Senator XENOPHON: I do not support gambling so I cannot help with that one. Let's not let Jupiters use it as a publicity thing.

Mr Sive: No. It is just that it is around the corner. I withdraw that.

Russian Roulette

A profound and under-recognised parallel exists between the predatory nature of the gambling industry and the systemic failure of current centralised Security of Payment (SOP) framework overseen by the Queensland Building and Construction Commission (QBCC).

Gambling causes immense, well-documented psychological and financial distress because it exploits vulnerable individuals who enter a system with a false promise of fairness, only to suffer devastating losses.

In the construction industry – particularly for subcontractors and other contracted parties under a construction contract as discussed in this submission – the systemic culture of non-payment inflicts the exact same brand of destruction. Subcontractors do not enter contracts to gamble; they perform legitimate work with a statutory expectation of being paid in full and on time. Yet, under the current administrative regime, seeking entitlements under the *Building Industry Fairness (Security of Payment) Act 2017* (the BIF Act) has effectively been reduced to a game of chance.

Examining the Odd

This systemic failure is starkly illustrated by a comparison of statistical probabilities. During an exchange with Senator Nick Xenophon in August 2015 – a lawmaker

widely recognized for his staunch opposition to the predatory mechanics of gambling – the baseline odds of achieving a payout were compared using the mechanics of traditional Roulette.

However, a hard-look review of recent QBCC performance data reveals a far more lethal statistical reality.

Claimant initiates Part 4 statutory adjudication by making an application to the adjudication registrar under s.79	NO JURISDICTION 1006 Decisions 74%		JURISDICTION 350 Decisions 26% s.88(1)(a)-(c)
	s.79	s.84(2)(a)(i)	
	339 Applications Rejected by QBCC "No Jurisdiction"	667 Applications Rejected by Adjudicator "No Jurisdiction"	
	ESTIMATED TOTAL NUMBER OF APPLICATIONS: 1356		

If insolvency represents the absolute worst-case scenario for a contracted party, the statutory adjudication path is fast approaching structural parity.

QBCC data I presented to the Minister for Housing and Public Works in a briefing paper dated **20 February 2025** shows that out of an estimated 1,356 adjudication applications made under the BIF Act, a staggering 1,006 applications (74%) failed to ever reach a substantive decision on the merits under section 88(1) of the BIF Act 2017.

This state of statutory affairs leaves claimants with a mere **26% chance** of obtaining an enforceable adjudication decision. To contextualise how severely the centralised system disadvantages the weaker party, consider the mathematical probability of survival in a lethal game of chance:

- **Survival Rate in Russian Roulette**. A standard six-chambered revolver containing a single round yields an **83.3% probability** of survival on the first trigger pull.
- **Success Rate under the BIF Act**. A claimant navigating the QBCC's centralised registry faces a **74% probability of structural rejection** (either through immediate registrar rejection or subsequent "No Jurisdiction" findings by an adjudicator), leaving just a **26% chance** of securing a decision.

Statistically, an applicant looking to recover cashflow under Queensland's current security of payment framework faces worse odds of a successful outcome than a player face-to-face with a loaded cylinder in a game of Russian Roulette.

Structural Harms & Demise of Subcontractor Sovereignty

The distress caused by this legislative roulette established by the Newman-Mander Government when amending the Building and Construction Industry Payments Act 2004 and then blindly and wholeheartedly when the Palaszczuk-de Brenni Government repealed BCIPA and replaced it with the Building Industry Fairness (Security of Payment) Act 2017 is not merely financial. Rather, it disrupts the entire contractual chain in a materially injurious and harmful way. Cashflow is the lifeblood of the construction marketplace. When the regulatory framework fails to secure

either payment “for performance completed and tendered” or a lifeline to “ready money” to keep the work crew working brilliantly as they may have been, the burden of risk is unlawfully shifted onto the weaker party as previously discussed in this submission.

Just as problem gamblers are left vulnerable by inadequate regulatory protections, subcontractors are being systematically destroyed by a menacing culture of non-payment that the BIF Act was expressly enacted to prevent but otherwise fosters through the old-Soviet style of prior restraint.

The current centralised system overseen by the QBCC has warped and completely distorted the marketplace never envisioned by the Honourable R E Schwarten (Rockhampton—ALP) (Minister for Public Works and Minister for Housing) when he brought security of payment to Queensland in 2004,[44] ensuring that the stronger party achieves unbargained-for windfalls while the weaker party faces complete financial demise.

If only 26% of applications in this dataset ever reach a substantive adjudication decision on the merits, the statutory gateway to the very mechanism designed to help people working in the industry get paid itself becomes the prior restraint administered through the old-Soviet style of centralised administration now being overseen by the QBCC within the Adjudication Registry.

That outcome raises a more fundamental question**. What was the “fraud” from which the 2014 reforms were supposedly protecting the construction marketplace?**

Security of payment legislation is intentionally asymmetric. Its purpose, as noted by Minister Schwarten during his Second Reading of the Building and Construction Industry Payments Bill, is to move money rapidly down the contractual chain to the party who has already moved performance up that chain.

That was not an accidental advantage conferred upon claimants. It was the legislative design. The respondent remained protected because adjudication was interim. As noted by the High Court in Probuild and subsequently applied by the ACT Court of Appeal in Harlech, the underlying contractual rights survive, including the right ultimately to recover money to which the claimant was not entitled.

For more than a decade I have searched for the systemic claimant fraud said to justify dismantling that architecture. I have not found it.[45] The demonstrated danger has travelled in the opposite direction. The recurring construction-industry catastrophe is money being withheld, diverted or removed upstream while the

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[44] In his Second Reading of the Building and Construction Industry Payments Bills on Wednesday, 26 November 2003, the Minister states the importance of security of payment: “*Improving payment outcomes for all parties operating in the building and construction industry is a key priority for this government. Security of payment has been an issue for many decades, particularly in relation to subcontractors. While bad debts are not unique to the building and construction industry, the industry is particularly vulnerable to payment problems because it generally operates under a hierarchical chain of contracts. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow and, in some cases, insolvency*”.

[45] Out of the nearly 300 decisions I have made as an adjudicator, I distinctly remember one matter that I was not confident in what the claimant was saying and may have been in the penumbra of fraud. If there is any fraud, the fraud I repeatedly see is top down, not bottom up.

contracted party that supplied the labour, materials and performance is left unsecured downstream.

Walton Construction provides the obvious historical warning. The problem exposed by its collapse was not subcontractors fraudulently extracting money through adjudication. It was subcontractors and suppliers being left with enormous unpaid debts while transactions involving company assets and payments occurring before collapse subsequently attracted regulatory, liquidator and public scrutiny. The legislative question should therefore have been how to stop the diversion of construction money away from those whose performance created the value – not how to make it more difficult for those participants to obtain interim payment.

If government genuinely wished to “stop the fraud”, it was looking in the wrong direction. California's architecture recognises the direction in which the danger actually travels. Construction money received for an improvement is not simply an unrestricted source of upstream liquidity capable of being diverted while those whose labour and materials created the improvement remain unpaid. It is, as discussed above, a Criminal offence in California to divert funds.

The historical irony lies in how the Newman-Mander Government removed the decentralised marketplace of Authorised Nominating Authorities and replaced it with the old-Soviet style of prior restraint administered through the centralised QBCC system.

The 2014 reforms were promoted on concerns about fairness, perceived claimant advantage, adjudicator bias and so-called “ANA shopping”. The statutory architecture deliberately designed to move money rapidly down the contractual chain was treated as though the danger lay in allowing the contracted party to be paid that money.

I repeatedly made known this concern and asked, “**Where was the evidence of systemic claimant fraud that justified dismantling that architecture?**”

The asymmetry was intentional. Security of payment was designed to place the performing party in a favourable interim position because performance had already moved up the contractual chain and money needed to move rapidly back down it. The respondent was not deprived of its substantive contractual rights. Adjudication was interim and the respondent retained its ultimate rights, including restitution where an interim payment was subsequently shown not to have been due.

The contemporary history surrounding the collapse of Walton Construction presents the problem from the opposite direction. In 2012–13, as Walton approached its October 2013 collapse, Altum Property Trust — an entity linked to the LNP — received $431,082 from Walton. Australian Electoral Commission records disclosed more than $1.4 million received from Walton between 2009–10 and 2012–13. The LNP maintained that those payments were rent rather than donations. Subsequent AEC compliance reviews nevertheless identified substantial deficiencies in Altum's disclosure returns, including the under-disclosure of the Walton receipt itself.

None of that, standing alone, establishes that Walton purchased legislative influence or that those payments caused the 2014 amendments. It does, however, expose the extraordinary inversion in the regulatory diagnosis. At precisely the historical moment when subcontractors were suffering catastrophic losses through major contractor insolvency, legislative attention was directed toward restraining the statutory machinery deliberately designed to move money down the contractual chain.

If there was a diversion-of-funds problem requiring legislative intervention, the question should have been whether construction money and construction value were being diverted upstream while the participants whose labour and materials created that value remained unpaid. California addresses that danger directly. It does not begin from the assumption that the subcontractor receiving interim payment is the systemic threat.

Senator Xenophon accepted the substance of the **Four-Point Plan**. After questioning me about the deterioration in claimant recovery under the Queensland system, he expressly stated:

"***I do not want to restate your four points, which made a lot of sense to me, in terms of reform…***"

That observation is significant. The Four-Point Plan now advanced in this submission is not a reform architecture constructed retrospectively for the present inquiries. It was placed before the Senate Economics References Committee under oath in August 2015 and was expressly recognised during the hearing as making "a lot of sense" in terms of reform.

Operational Framework

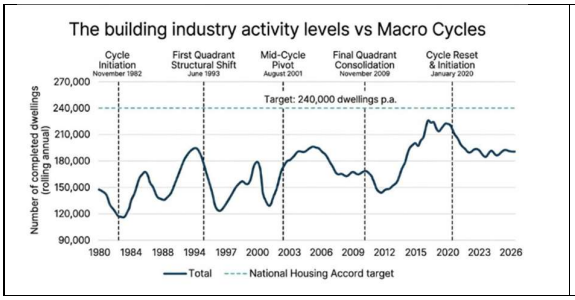
The Four-Point Plan establishes the structural foundation. The eleven years since I gave that evidence have not caused me to retreat from any of those four propositions. To the contrary, my experience as an adjudicator, the deterioration demonstrated by the Queensland statistical evidence, the construction insolvencies examined throughout this submission and, most recently, the *Woonona–Warrane–All-Civil* litigation have demonstrated why each pillar is necessary.

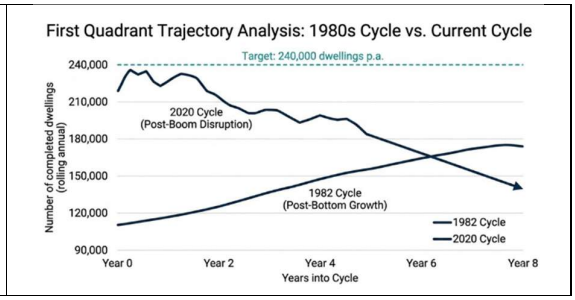
What has changed is the level of detail. Eleven further years of experience have exposed the administrative, professional, financial and regulatory machinery necessary to make those four structural reforms work in practice.

The recommendations that follow should therefore not be understood as 23 disconnected reforms or another policy wish-list. They are the implementation machinery sitting beneath the Four-Point Plan presented to the Senate in 2015.

The Four-Point Plan provides the architecture. The recommendations below make that architecture operational.

IMPLEMENTATION MEASURES





The provided diagrams establish that Australia is entering a structurally different macro-cycle from any experienced in the last 40 years. **The historic peak of 21.4% under the Fraser government occurred in April 1982**. The previous "1982 cycle", which began in November 1982, started in a high-interest-rate environment (yields ranging between 11.5% and 15.0% before climbing to a macroeconomic peak of 17.50% in January 1990). The current cycle initiated under polar opposite financial conditions.

This current macro-cycle officially commenced in 2020. Leading into this reset, the number of completed dwellings in Australia hit its historic peak in 2018, registering 215,103 completions. Following this record-setting boom – which was largely driven by a high-rise apartment construction surge in Sydney and Melbourne – the market entered a brief structural retreat. The tail-end of the 1982 macro-cycle registered a relative low point shortly after 2018, when rolling annual completions dropped by more than 44,000 to 170,358 dwellings.

This contraction bottomed out just prior to the onset of the pandemic in 2020, marking the structural boundary and initiation point of the new cycle. The year 2020 served as the ultimate floor for the historical multi-decade interest rate decline; the Reserve Bank of Australia lowered the official cash rate to an unprecedented all-time low of **0.10% in November 2020** to support the economy through the COVID-19 pandemic. Consequently, where the 1982 cycle faced the friction of restrictive monetary policy and high capital costs from its inception, the 2020 cycle launched from an absolute baseline of zero-bound interest rates, completely altering the macroeconomic incentives driving post-disruption construction activity.

The Bathla Group collapse[46] now unfolding in New South Wales confirms that the existing framework cannot detect distress, cannot prevent contagion and cannot protect the most vulnerable participants in the contractual hierarchy. The Four-Point Plan therefore cannot be treated as an optional reform package.

It is the minimum architecture required to stabilise the industry, protect cashflow, and prevent Boxer being sent to the glue factory as governments pursue accelerated

[46] Australia's largest corporate collapse remains the 2001 failure of insurance giant HIH, which involved estimated losses and debts upward of $5.3 billion. Nevertheless, the Bathla Group collapse is shaping up to be one of the largest – and potentially the largest – residential construction and housing developer collapses in the country's history.

approvals without the institutional machinery needed to sustain delivery. The following Implementation Measures set out the structural reforms required to rebuild that machinery.

National Institutional Architecture

The Four-Point Plan cannot operate nationally without an institution capable of administering and protecting the architecture. The CBCC/OACL structure proposed above provides that institutional machinery. Its purpose is not to recreate the former ABCC, but to establish national oversight of construction regulation, payment integrity, licensing, financial warning systems and administrative legality.

Federal Construction Enforcement

This submission recommends the establishment of the Commonwealth Building and Construction Commission (CBCC) as the national construction regulator, which must be supported by the Office of Administrative Construction Law (OACL).

The CBCC should provide national enforcement and regulatory oversight across domestic and commercial construction, while the OACL scrutinises the administrative machinery through which construction regulation is created and applied. Workplace relations remain within the Fair Work architecture.

National Licensing Reform

This submission recommends the establishment of nationally consistent minimum licensing standards for builders, contractors and relevant construction occupations, with mutual recognition operating beneath the national baseline.

Licensing should cease functioning as a collection of substantially separate State regulatory silos in an industry whose participants, projects, finance and supply chains routinely operate across State borders.

National Insolvency Early-Warning System

This submission recommends the establishment of a national construction-industry early-warning system integrating licensing, payment, adjudication, financial and insolvency indicators.

The object is to identify financial distress before formal insolvency occurs rather than waiting until the contracted parties below the distressed participant have already suffered the loss.

The system should identify patterns including repeated non-payment, deteriorating financial capacity, abnormal adjudication activity, licensing instability and other indicators demonstrating that the participant may no longer possess the financial capacity required to undertake its contractual obligations.

Random Financial Spot-Checks

This submission recommends the empowerment of the national regulator, working with State licensing authorities where appropriate and given the transition to a federal model, to undertake risk-based and random financial spot-checks of licensed contractors.

Minimum financial requirements are of limited protective value if compliance is tested principally at predictable reporting points rather than when financial deterioration is actually occurring.

Anti-Phoenix Reform

This submission recommends the integration of construction-specific anti-phoenix monitoring and enforcement with Commonwealth corporate and insolvency regulation.

Licensing history, related entities, director involvement, asset transfers and the movement of projects between associated entities should be capable of being identified across jurisdictional boundaries before the same participants re-enter the construction marketplace through another corporate vehicle.

Reform Regulatory Governance

This submission recommends the immediate reform of how the QBCC governs and that such reform must be within the national framework by separating its regulatory, licensing and adjudication functions where institutional concentration creates conflicts, opacity or administrative prior restraint.

Queensland regulation should operate beneath the same national standards of transparency, administrative legality and accountability applying elsewhere.

Security for the Money and the Performance

The first and third pillars provide the critical answer to the defect exposed most starkly by the *Woonona* litigation, that is, **establishing an entitlement to payment under the object of the security of payment regime is not the same thing as securing the payment the object expects to occur under security of payment regime**.

The performing party requires protection both for the money flowing through the project and for the value its performance creates in the improved property.

Statutory Liens

This submission proposes the creation of nationally consistent statutory lien rights for any construction participant whose labour, materials or services improve land.

The lien must provide proprietary security against the value created by that performance rather than leaving the contracted party dependent solely upon a personal debt claim against the party immediately above it in the contractual hierarchy.

Construction Trust Funds

This submission proposes a legislative requirement that project funds received for construction be held and applied for the purpose for which they were received through nationally consistent construction-trust or escrow arrangements.

The trust must operate together with, rather than as a substitute for, statutory lien protection.

The lien protects the value of the construction work or related goods and services supplied under a construction contract by securing that value against the property improved by that performance. It grants every construction participant a proprietary interest in the improved land (whether commercial or domestic) proportionate to the value they have conferred, ensuring that the performing party is not left with only a personal debt claim against the party immediately above it in the contractual hierarchy.

The trust protects the progress payment to be received in relation to the carrying out of that work and the supplying of those goods and services.

Simply put, the lien protects the value, and the trust protects the money (the lifeblood of the construction industry).

Performance Insurance / Bonds

This submission proposes that there be a requirement for appropriate performance and payment security for projects according to their value and risk profile.

This requirement should include bonds or insurance capable of protecting the contractual chain against failure of a participant whose performance or payment obligation is critical to continuing delivery.

Construction Debt Conciliation

This category is distinct and separate from performance conciliation.

Section 13 of the *Building and Construction Industry Security of Payment Act 1999 (NSW)*, for the purpose of this discussion, relevantly states: "*(4) A payment claim may be served only within-- … (b)* ***the period of 12 months*** *after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied) …*".

This submission proposes the establishment of a specialist Construction Debt Conciliation process (as opposed to court litigation) for accrued construction debts that fall outside, or remain unresolved after, the rapid statutory payment process.

The object should be early recovery and restructuring of construction debt before ordinary commercial debt becomes an insolvency event.

This submission envisages this proposal incorporating section 32(3) of the *Building and Construction Industry Security of Payment Act 1999 (NSW)*, which relevantly provides: "(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal— "*… (b) may make such orders as it considers appropriate for* ***the restitution of any amount so paid****, and such other orders as it considers appropriate, having regard to its decision in those proceedings*" [emphasis added].

The distinction therefore becomes:

- Statutory performance conciliation is the part of the process that seeks to resolve a performance dispute before it becomes a non-payment matter.
- Statutory adjudication is the statutory determination of a payment dispute on an interim basis.
- Statutory debt conciliation is the statutory conciliation of an accrued debt that threatens insolvency.

Rebuild Statutory Adjudication

The fourth pillar requires more than faster adjudication. It requires the restoration of a statutory system capable of achieving its object. Outside Queensland, no jurisdiction publishes the adjudication statistics necessary to determine whether the legislation is functioning as intended. Inside Queensland, the repeal of BCIPA and its replacement with BIF has not produced the promised improvements in cashflow, transparency or recovery. The absence of mandatory reporting, the absence of recovery-rate data, and the absence of institutional accountability mean that no Parliament in Australia can presently determine whether the statutory machinery is protecting the contracted party or merely determining entitlement without securing payment.

A statutory regime cannot achieve its object if it lacks the legislative bite, institutional independence and transparency required to enforce it. Adjudication must therefore be rebuilt as part of an integrated architecture to include the following component parts:

- early intervention,
- decentralised administration,
- mandatory publication of outcomes, and
- national oversight capable of ensuring that the system protects the most vulnerable participants in the vertical striation hierarchy.

Without this machinery, adjudication becomes a procedural step rather than a protective mechanism, and the statutory object becomes aspirational rather than operational.

Operational Concerns

The operational concerns arise because the statutory machinery presently lacks the structural conditions required for adjudication to function as a protective mechanism. A system designed to secure payment cannot operate effectively when its component parts are fragmented, opaque, or incapable of producing the information necessary to regulate it. The absence of early intervention, decentralised administration, mandatory reporting and national oversight has created a statutory environment in which neither Parliament nor industry can determine whether the legislation is achieving its object.

The graphs at the beginning of this section show a clear and accelerating downward trajectory — a structural failure pattern in which the bottom is visibly falling out of Queensland's construction capacity. In this environment, accelerating the approval process is not merely ineffective; it is counter-productive. The statistical data now emerging in Queensland, particularly since the Crisafulli government accepted or agreed in-principle to 51 of the 64 recommendations, illustrates a textbook case of administrative doublespeak: **reduced oversight is being presented as increased protection, and a deepening structural collapse is being marketed as improved regulatory efficiency**.

In practice, this means the contracted party is exposed to the same risks whether adjudication exists or not. Entitlement may be determined, but recovery remains uncertain. Payment claims may be served, but systemic patterns of non-payment remain invisible. Adjudicators may decide disputes, but the institutional machinery cannot identify whether those decisions are producing the protective outcomes the legislation was enacted to achieve.

These operational concerns are not peripheral. They go to the core of whether the statutory regime is capable of functioning as a system. Without transparency, without accountability, and without institutional independence, adjudication becomes procedurally active but substantively ineffective. It generates determinations without generating protection. It resolves disputes without resolving risk. It produces outcomes without producing recovery.

It is within this context that the first operational requirement must be addressed.

Transparency and Accountability

The actual recovery rate is the missing metric needed to establish whether the object or main purpose of the security of payment legislation is being achieved. Moreover, delayed reporting blinds industry and Parliament as to what is occurring and why it is occurring and who is responsible.

A statutory system cannot be regulated intelligently if neither Parliament, industry nor the public can determine whether it is achieving its statutory purpose. Transparency must therefore become part of the machinery of payment protection rather than an incidental administrative function.

There must be mandatory adjudication statistics and mandatory publication of adjudication outcomes for each state and territory.

Contractual and Professional Capacity

A statutory system cannot protect the contracted party if the participants operating within it lack the contractual capability, professional competence and commercial literacy required to navigate its machinery. Payment protection, financial resilience and regulatory integrity depend not only on institutional architecture but on the capacity of those who must operate within it. The current environment demonstrates that contractual imbalance, inadequate business education and inconsistent professional standards continue to expose the most vulnerable participants to avoidable risk. Strengthening contractual and professional capacity is therefore an essential component of the protective architecture.

Focused attention is required on:

- the regulation of adhesion (stick it to the contracted party) contracts;
- mandatory business education;

- mandatory CPD for builders and trades;
- mandatory CPD for advisers.

Integrated Reform Architecture

This final consideration addresses the productive participant itself. Regulation cannot protect the contracted party merely after failure occurs. The system must improve contractual capability, professional competence and understanding of the financial and statutory machinery before the participant assumes the risk.

None of these measures should be considered in isolation. That is precisely the error this submission has identified repeatedly in Australian regulatory reform. A construction trust without the lien architecture within which that protection developed is incomplete. Adjudication without effective security for recovery establishes entitlement without necessarily producing payment. Accelerated approvals without a financially resilient delivery chain increase load without increasing productive capacity. Training new entrants without addressing the Silent Exit risks replacing numbers while continuing to lose experience.

The Four-Point Plan and its implementation measures therefore operate as a system. Liens secure the value created. Trusts protect the money intended to pay for that value. Conciliation intervenes when performance friction first arises. Adjudication provides rapid determination when payment nevertheless becomes disputed. ANAs restore decentralised administration. Reporting exposes whether the machinery works. Financial monitoring identifies instability before insolvency. Education and professional standards strengthen the capacity of those operating within the system. The CBCC provides national institutional oversight, while the OACL ensures that the administrative machinery remains within legislative authority and purpose.

This is the distinction between regulating an outcome and creating an enabling environment. Government cannot command productivity into existence. It can establish the legal, administrative, financial and institutional prerequisites within which productive participants are able to perform.

California's lesson is therefore not SB 35. Latham's lesson is not adjudication. Maryland's lesson is not the construction trust. Each is merely a component of an architecture. The lesson is that the architecture matters.

Australia must stop importing the component while ignoring the system that makes it work.

Workhorse at the End of the Conveyor Belt

The economic trajectory shown at the commencement of these Implementation Measures brings the discussion back to the construction industry participant standing at the end of the conveyor belt.

The contracted party is the workhorse of the construction industry. Approvals do not purchase materials. Approvals do not employ labour. Approvals do not finance performance. Approvals do not construct dwellings.

The contracted party does those things and, as this submission has repeatedly demonstrated, frequently does so using its own working capital before payment moves back down the contractual chain.

Last year I described that participant to the Queensland Minister for Housing and Public Works in deliberately simple terms: **if "money makes the mare go", the mare in Queensland is starving and has "HEADED FOR GLUE FACTORY" written all over it.**

The reference was to Boxer, the carthorse in George Orwell's *Animal Farm*: the productive workhorse who continues to perform until the system has extracted everything useful from him and then disposes of him.

That metaphor now assumes greater significance. The first-quadrant trajectory shown above indicates that Australia has commenced this cycle travelling in the opposite direction from the corresponding phase of the previous long construction cycle. At the same time, government proposes to accelerate the number of approvals entering the conveyor belt. Bathla provides the contemporary warning of what happens when enormous, approved pipelines confront financial failure before those approvals become completed dwellings.

Putting more unfinished houses onto the conveyor belt does not increase productive capacity if the workhorse standing at the end of that conveyor belt is already starving. It merely increases the load he is expected to carry.

This is why payment security is not peripheral to housing productivity. It is one of the institutional conditions necessary to convert an approval into a completed dwelling. If the contracted party cannot obtain and retain the money necessary to finance continuing performance, the conveyor belt does not merely slow down. Eventually, the productive participant disappears, and the unfinished houses fall off the end.



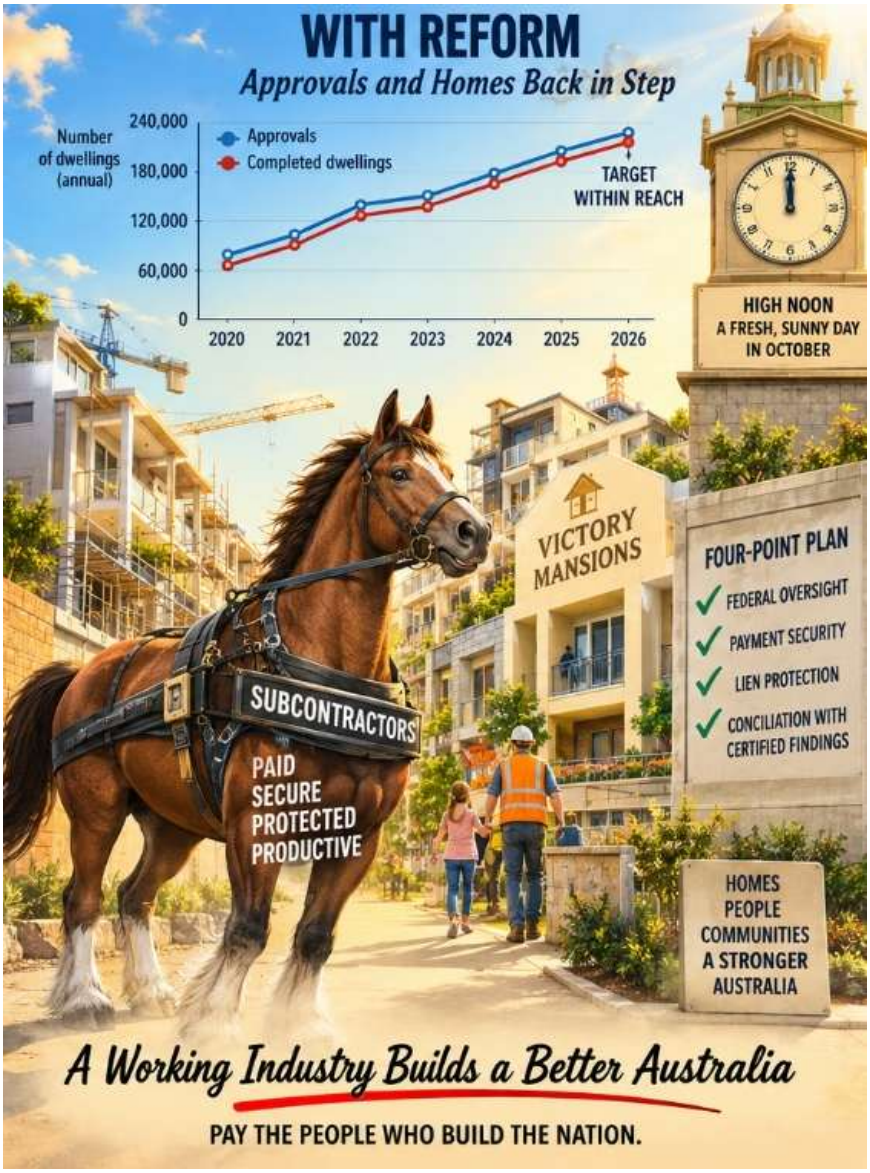
This is the dark outcome I have been concerned about and attempted to bring to the attention of both the Minister and the Queensland Productivity Commission, but to no avail. The image shows the approvals being demanded by government and the completions being delivered by Boxer visibly diverging in a materially negative way. Unfinished houses are simply pouring off the conveyor belt. Boxer is making every effort not only to carry but also support the accelerating load. The glue factory is quite visible. Boxer has not collapsed yet, but he is exhausted.

In George Orwell's *Animal Farm*, Boxer represents the loyal, hard-working working class exploited by the revolutionary regime that ultimately replaces one form of oppression with another. In this submission, Boxer represents the loyal, hard-working contracted-party class of construction industry participants within the vertically stratified contractual hierarchy.

However, that trajectory is not inevitable.

The purpose of the Four-Point Plan and the Implementation Measures proposed in this submission is not to manufacture productivity by administrative command. It is to protect and strengthen the productive participant so that performance can continue, money can move, businesses can remain solvent and approved dwellings can actually be completed.

A properly functioning system changes the trajectory. The gap between approvals and completions begins to close because the productive capacity necessary to convert one into the other is protected rather than consumed.



In the winter preceding Boxer's collapse, Orwell writes that food was short and "*once again all rations were reduced, except of those of the pigs and the dogs*". Crucially, Squealer forbids the word "reduction", insisting on calling it a "readjustment". The animals are starving, but the official narrative insists they are prospering.

This mirrors precisely how cashflow is "readjusted" in the construction industry when a project enters financial distress. As the CIE report explains, head contractors and principals — often themselves trading in doubtfully solvent waters — preserve their own administrative overheads and executive margins for as long as possible. The subcontractors, however, endure the actual *reduction*:

- delayed progress claims,
- aggressive backcharges,
- withheld payments, and
- manufactured variations.

The *Woonona v Warrane* litigation demonstrates that this state of contractual affairs ends not only abruptly but bitterly, with a no-holds-barred effort to prevent money from moving downstream.

The same pattern appears in the regulatory reporting itself. The other States do not publish adjudication statistics at all. Queensland does — but even Queensland is now shifting its reporting position through underground regulatory changes. The cumulative effect is that industry, Parliament and the public cannot determine whether the statutory machinery is achieving its object.

The lifeblood of the construction industry — cashflow — cannot be monitored when the system refuses to disclose whether the arteries are blocked.

Orwell's description of Squealer reading out endless figures "*proving in detail that they had more oats, more hay, more turnips than they had had in Jones's day*" captures this perfectly. The animals are starving, but the data says they are thriving.

The QBCC's own letter to me dated 12 December 2025 illustrates this phenomenon with precision. The CEO and Commissioner acknowledges that:

> While the above statistics suggest that 44.7% (978) of the 2,186 valid applications lodged in the period resulted in an adjudication decision pursuant to section 88 of the Act, this does not necessarily demonstrate the Act is not achieving its objectives in the remaining 54.3% of cases, given that 34.2% (748) of valid applications were withdrawn by claimants. While the QBCC does not track the reasoning for these withdrawals in all circumstances, it can be assumed that some discontinuances were occasioned by the claimant receiving payment of the claimed amount and parties reaching a resolution to their dispute.

Straight from the Horse's Mouth – Adjudication is Thriving in Queensland

The significance of the statement above from the QBCC Commissioner is not merely the statistic. It is the reasoning used to transform an unknown outcome into evidence of statutory success.

The QBCC acknowledges that only 978 of 2,186 valid applications — **44.7%** — resulted in an adjudication decision under section 88 of the BIF Act 2017. It then acknowledges that **748 applications were withdrawn** and, critically, that the QBCC **"does not track the reasoning for these withdrawals in all circumstances"**. Yet, notwithstanding that admitted absence of information, the regulator proceeds to assume that some withdrawals resulted from payment or settlement.

The letter then goes further. It states that the Act provided an outcome in **70% of cases (978 of 1,407)** and **"up to 79% of cases (1,726 of 2,186)"** if withdrawn applications are included. The 1,726 figure is simply the 978 adjudication decisions plus all 748 withdrawals.

This is precisely the statistical problem Squealer illustrates. **An absence of information has been converted into a favourable regulatory statistic.**

A withdrawal may follow payment or settlement. However, it may equally follow insolvency, exhaustion of resources, commercial compromise, abandonment, jurisdictional difficulty, inability to fund the adjudication, or any number of other circumstances.

The QBCC's letter provides no data by which those possibilities can be distinguished. The regulator expressly says that it does not track the reason. The proper conclusion from an unmeasured withdrawal is therefore not success or failure. **It is that the outcome is unknown.**

Yet the unknown has been incorporated into a figure of "up to 79%" and presented in answer to a concern about whether the Act is achieving its statutory purpose.

The same problem becomes more serious when the question changes from "*How many applications produced some form of outcome?*" to the question the Act actually exists to address: "**How much of the money claimed by contracted parties is being adjudicated as payable?"**

The QBCC Annual Report supplies the aggregate dollar value claimed, and the aggregate dollar value awarded. What it does not prominently disclose is the relationship between those figures.

		Adjudication Decisions Released			
		Total value of claims - decisions released	Total value of adjudicated amount - decisions released		
	2019-2020	$ 169,941,533.00	$ 64,030,857.00	37.68%	$ 0.38
	2020-2021	$ 82,254,751.00	$ 37,503,111.00	45.59%	$ 0.46
	2021-2022	$ 51,816,750.76	$ 15,854,533.66	30.60%	$ 0.31
	2022-2023	$ 152,408,699.17	$ 21,858,656.22	14.34%	$ 0.14
	2023-2024	$ 225,306,008.71	$ 61,524,294.00	27.31%	$ 0.27
	2024-2025	$ 956,966,293.88	$ 81,873,482.13	8.56%	$ 0.09
Cumulative Total		$ 1,638,694,036.52	$ 282,644,934.01	17.25%	$ 0.17
Cumulative Total from 2019 to 2023		$ 456,421,733.93	$ 139,247,157.88	30.51%	$ 0.31

A regulator cannot manage what it does not measure, and Parliament cannot supervise what the regulator does not disclose.

If security of payment is part of the institutional infrastructure necessary for housing productivity, reporting the number of applications lodged and decisions released is not enough.

The reporting system must disclose what happens to the claims as they pass through the statutory machinery:

- what was claimed,
- what was scheduled,
- what was adjudicated,
- what was paid,
- why applications were withdrawn and, ultimately,
- whether the contracted party received the cashflow which the legislation exists to protect.

