

## Chapter 10

### A Statutory Construction Trust

10.1 Many submissions and witnesses, particularly from small and medium sized businesses, indicated support for the creation of a mandatory trust model for the construction industry. This arrangement was explicitly recommended by the Collins Inquiry<sup>1</sup> and the Law Reform Commission of Western Australia<sup>2</sup> and mentioned positively by the Cole Royal Commission.<sup>3</sup> A form of a mandatory trust scheme exists in Western Australia,<sup>4</sup> has recently been introduced in NSW<sup>5</sup> and is the subject of a discussion paper in Queensland<sup>6</sup> and the Australian Capital Territory.<sup>7</sup>

10.2 Mandatory trusts are a feature of the construction industry in comparative jurisdictions. A number of states in the United States<sup>8</sup> and provinces of Canada<sup>9</sup> have established trust schemes; a Bill before the New Zealand Parliament proposes to do the same;<sup>10</sup> and the United Kingdom requires a trust relationship for all government contracts.<sup>11</sup>

10.3 This marks a clear change across the industry in only little more than a decade. The final report of the 2003 Cole Royal Commission found that a trust fund had considerable merit in ensuring subcontractors get paid monies to which they are entitled. However, the report found that opposition to the trust model 'is so entrenched' that 'it would very likely be vigorously opposed'. While not making a recommendation

1 *Final Report of the Independent Inquiry into Construction Industry Insolvency in NSW* (2012), p. 355, Recommendation 6 (for all building projects worth more than \$1 million).

2 Law Reform Commission of Western Australia, *Financial Protection in the Building and Construction Industry*, Project No. 82, p. 105, Recommendation 2.

3 *Final Report of the Royal Commission into the Building and Construction Industry: Volume 3 National Perspectives Part 1* (2003), p. 60.

4 *Construction Contracts Act 2004* (WA), schedule 1, division 9, s 11; *Construction Contracts (Security of Payments) Act* (NT), schedule 1, division 9, s 10.

5 Building and Construction Industry Security of Payment Amendment (Retention of Money Trust Account) Regulation 2015 (NSW) (for all building projects worth more than \$20 million).

6 Queensland Building and Construction Commission, *Better Payment Outcomes* (Discussion Paper, 2014).

7 Environment and Planning Directorate, *Improving the ACT Building Regulatory System: Discussion Paper* (November 2015), pp. 26–27.

8 See for example, Maryland: Md Code Ann Real Property §9–201 and Texas: Tex Code Ann Property Code §10–162.

9 Alberta: *Builders' Lien Act* R.S.A. 2000, c. B-7, s. 22; British Columbia: *Builders' Lien Act* S.B.C. 1997, c. 45, ss. 10–14; Manitoba: *The Builders' Liens Act* R.S.M. 1987, c. B91, ss 4–9; New Brunswick: *Mechanics' Lien Act* R.S.N.B. 1973, c. M-6, s 3; Nova Scotia: *Builders' Lien Act* R.S.N.S. 1989, c. 277, ss 44A–44G; Ontario: *Construction Lien Act* R.S.O. 1999, c. C.30, ss 7–13; Saskatchewan: *Builders' Lien Act* S.S. 1984-85-86, c. B-7, ss 6–21.

10 Construction Contracts Amendment Bill 2013 (NZ).

11 Cabinet Office, *A Guide to the Implementation of Project Bank Accounts (PBAs) in Construction for Government Clients* (July, 2012).

to establish a trust model, Commissioner Cole pointedly remarked that he 'should not be taken to be recommending against that model'.<sup>12</sup> Evidence before the committee at this inquiry suggests that entrenched opposition has dissipated.

10.4 Problematically, despite broad support for the establishment of a statutory construction trust, there was some confusion as to whether the trust should apply to all monies owed or merely retention monies. At times, it was not clear whether a witness advocated a retention trust account, as now exists in New South Wales for certain projects, or a broader trust account over the entire contract, as was recommended by the Law Reform Commission of Western Australia and operates in relation to government contracts in the United Kingdom. As will be elaborated below, a retention money trust account would operate in a more limited manner than a trust over the entire project.

### **Exploring a statutory construction trust model for security of payments**

10.5 It is important to set out the basics of a statutory construction trust. This section briefly sets out the fundamentals of a trust scheme before examining the advantages and disadvantages of a trust for the construction industry.

#### ***What is a trust?***

10.6 A trust is a structure that separates legal ownership from beneficial ownership. It is a relationship whereby one party holds title to property subject to an obligation to keep or use the property for the benefit of another party. The person who holds the property for another's benefit is called a trustee. The person who is benefited by the trust is called the beneficiary. The property that comprises the trust is the trust property.

10.7 The trustee of a trust holds a fiduciary position and must protect the interest of the beneficiaries of the trust. A trustee must not put themselves in a position in which their duty conflicts, or has the capacity to conflict, with these interests unless the beneficiaries agree to the conflict. The use of trust funds is controlled either by legislation or membership rules of professional associations.

10.8 The use of trust schemes is common within the legal, accounting and stockbroking professions and the real estate industry as there is a fiduciary relationship based on generally discrete and distinct financial transactions between principals and agents where funds are held on trust for some time. The use of retention money and progress payments in the construction industry mirrors the arrangement in these professions and industries, suggesting that a trust relationship may be an appropriate arrangement.

#### ***What is retention money?***

10.9 Retention money is payment for a service or product that is withheld pending the completion of a specified condition. In the construction industry, ordinarily the contract will entitle the head contractor to withhold between 5 per cent and 10 per cent

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12 *Final Report of the Royal Commission into the Building and Construction Industry: Volume 8 Reform—National Issues Part 2* (2003), p. 250.

of each progress claim until the maximum value of retention is reached. Retention of monies is a feature of contracts at each stage in the chain.

10.10 Once the subcontracted works are complete and a certificate of practical completion is issued, the contract will usually provide that half of the retention money is released to the subcontractor. The remaining half of the retention money is not released to the subcontractor until the end of the defects liability period—ordinarily between 6 and 12 months. The security that is retained throughout the defects liability period is for the purpose of rectifying any faulty and defective work of the subcontractor.

***Difference between a retention trust and a trust over the entire project***

10.11 A retention trust would operate over only the small amount of money held back at each progress payment and the money held until the end of the defects liability period. A trust applying to the entire contract would include the entirety of each progress payment within its ambit.

**In favour of the trust**

10.12 Many submissions and witnesses indicated strong support for the adoption of a statutory construction trust at a national level, or across all states and territories. The CFMEU was particularly vocal, urging that the establishment of a statutory trust should be a 'central part of a suite of measures'.<sup>13</sup> The union considered that a trust arrangement 'offers a simple, cost efficient and fair means of dealing with the insolvency problem and the peculiar circumstances of the industry'.<sup>14</sup> The Masonry Contractors Association of NSW & ACT agreed with the CFMEU, explaining that they 'fully support' this approach.<sup>15</sup>

10.13 Mr Christopher Rankin, AMCA, considered that a scheme—whether a trust arrangement, project bank account, or something else—to ensure retention amounts are paid back quickly at the end of a project, 'would be of great benefit to the nation'. However, Mr Rankin was clear that any system 'needs to be federal'.<sup>16</sup>

10.14 Cbus Super and ARITA both drew the committee's attention to the findings of the Collins Inquiry, and in particular, the recommendation that a 'retention money trust account regime' be established.<sup>17</sup> Indeed, the Collins Inquiry was unequivocal in its recommendation.

There is no question that the statutory construction trust is fully effective in protecting subcontractors against the loss of progress claims paid by the

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13 CFMEU, *Submission 15*, p. 4.

14 CFMEU, *Submission 15*, p. 31.

15 Masonry Contractors Association of NSW & ACT, *Submission 16*, p. 1.

16 *Official Committee Hansard*, 21 September 2015, p. 15.

17 ARITA, *Submission 8*, p. 1 and Cbus Super, *Submission 13*, p. 3.

owner to the head contractor and lost in the event of the head contractor's insolvency.<sup>18</sup>

10.15 Cbus Super supported the Collins Inquiry recommendation. However, Cbus Super went a step further, explicitly advocating for a broader construction trust over the entire contract. It advocated:

...the merits in trusts being established through which payments are set aside to ensure that those payments reach the sub-contractors or suppliers that they are intended for and are not used up in cash purchases for other related or non-related matters.<sup>19</sup>

10.16 Mr Robert Couper and Mr Leonard Willis, two Queensland-based subcontractors, also supported a broader trust arrangement.<sup>20</sup> As did Mr Patrick McCurry, Director of Mawson Group, who considered it 'an outstanding suggestion'.<sup>21</sup>

10.17 Associate Professor Michelle Welsh preferred not to make a comment on the effectiveness of a trust—either on the entire contract or merely retention payments—until she had completed her study. However, Associate Professor Welsh did note that any scheme that ensured people lower down the contractual chain are getting paid would result in less insolvencies among companies relying on that payment.<sup>22</sup>

10.18 Adjunct Professor Philip Evans, Notre Dame Law School, also considered that a trust would 'greatly assist' in doing away with 'some of the problems that are being experienced at the lower end of the contracting chain'.<sup>23</sup> Mr Andrew Wallace, who conducted a review of the Queensland SOP Act, considered the introduction of a retention trust account run by the state regulator 'a no-brainer'.<sup>24</sup>

10.19 Some submissions suggested that a statutory trust arrangement has the potential to curb illegal phoenix activity. The Subcontractors Alliance identified the provision of meaningful security of payment legislation—that is, a mandatory retention trust account—as a solution. It stated:

Had this legislation been in place, Walton and others would not have been able to embark on his course of action. Phoenix trading of this kind would disappear. This is now occurring with monotonous regularity and will keep on doing so and the answer is clear and the answers have all been identified.<sup>25</sup>

10.20 Mr Noonan, CFMEU, explained that the establishment of a statutory trust fund has wider positive consequences. According to Mr Noonan, such action would be

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18 *Final Report of the Independent Inquiry into Construction Industry Insolvency in NSW* (2012), p. 133.

19 Cbus Super, *Submission 13*, pp. 11, 13.

20 *Official Committee Hansard*, 31 August 2015, p. 28.

21 *Official Committee Hansard*, 29 September 2015, p. 41.

22 *Official Committee Hansard*, 29 September 2015, p. 7.

23 *Proof Committee Hansard*, 26 October 2015, pp. 3, 4.

24 *Proof Committee Hansard*, 4 November 2015, p. 39.

25 Subcontractors Alliance, *Submission 18*, p. 8.

beneficial across the entire industry and would not merely assist in curbing illegal phoenix activity:

Trust funds would assist with phoenixing, but they would also assist just in circumstances where a head contractor puts money into other projects or other companies or uses it for development or uses it to pay debts off his last [project].<sup>26</sup>

10.21 The committee heard that a mandatory retention trust would also avoid the problem of false statutory declarations. Mr Coyte explained:

If I have a trust account, I do not have to go through the paperwork of submitting statutory declarations to the client each month to prove that I have paid everyone, because I am not paying everybody. It is coming out of the trust account and going directly [to each subcontractor].<sup>27</sup>

10.22 The question of a statutory trust for the construction industry has been considered before. The Law Reform Commission of Western Australia considered the option of establishing a statutory trust in its 1998 Report on *Financial Protection in the Building and Construction Industry*. That report considered that the advantages of a trust scheme are that it:

- provides a means of ensuring that a head contractor and subcontractors are paid for their services and for materials supplied while keeping contract moneys within the control of the parties to the project;
- imposes ethical standards on the payment of participants in the industry for work done or materials supplied in an industry which has failed to use self-regulation to control the use of various unfair or unscrupulous practices;
- reinforces good practice in the distribution of funds for a project to the participants in the project and is consistent with the concept of cooperative contracting, which is seen as way of improving the efficiency of the industry;
- means that because the moneys are held in trust, they cannot be seized or frozen by a receiver or liquidator of the trustee or the trustee of the estate of a bankrupt trustee. Thus, the position of a person further down the chain can be secured and the payment of funds downward can still take place because the project funds held in trust will not form part of property distributed in the bankruptcy or winding up of the trustee;
- makes available a wider range of remedies is available for a breach or possible breach of trust than for a breach of contract;
- may result in a speedier resolution of disputes between, for example, a head contractor and a subcontractor, because generally the head contractor cannot withdraw money from the trust fund until all the claims of the fund's beneficiaries have been met. It removes the incentive for those holding funds

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26 *Official Committee Hansard*, 12 June 2015, p. 17.

27 *Official Committee Hansard*, 12 June 2015, p. 49.

to create artificial disputes and to resolve them through purely commercial pressure; and

- may result in speedier payment of subcontractors.<sup>28</sup>

### Opposition to the trust

10.23 Despite the apparent benefits of a statutory trust, some submissions did note their opposition to its introduction. Concerns ranged from the added administrative costs involved in managing a trust, to questioning whether it would really solve the problem of insolvency in the industry.

10.24 The HIA declared its strong opposition to the introduction of a trust scheme in the residential building industry. In HIA's view, trusts are 'an unreasonable legislative interference in commercial transactions, adding costs and uncertainty to the industry'.<sup>29</sup> Both the Collins Inquiry and the Law Reform Commission of Western Australia considered this concern in their reports. In their view, the introduction of a statutory construction trust would not impose substantial additional administrative costs. The Law Reform Commission noted in particular:

Doing this will not necessarily require any more stringent book keeping than is now required for the proper running of a business or to comply with taxation laws. Even if there were increased costs they are likely to be offset by the interest received on the trust moneys while they are held in trust. Further, any additional accounting costs are unlikely to increase the cost of building because those costs are likely to be more than offset by a more secure payment system which will do away with or reduce the need to build into the contract price a sum to cover defaults or delays in payment.<sup>30</sup>

10.25 The HIA raised a second concern—flexibility. According to the HIA, a trust scheme would reduce the scope of contractors to divert money received from one project to meet payments due on another project. They explained:

Trust funds would further restrict the ability of a builder to use money received from progress payments in a flexible manner, further depriving them of working capital and forcing them to incur additional financing costs.<sup>31</sup>

10.26 Many witnesses were unconvinced with this argument. Mr Michael Ravbar, Secretary CFMEU Qld, contended that 'flexibility' is 'usually a code for avoiding everything'.<sup>32</sup> Adjunct Professor Evans agreed, noting that his personal view is that one should not use 'other people's money to enhance your business interest', and

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28 Law Reform Commission of Western Australia, *Financial Protection in the Building and Construction Industry*, Project No. 82, pp. 52–53.

29 HIA, *Submission 7*, p. 11.

30 Law Reform Commission of Western Australia, *Financial Protection in the Building and Construction Industry*, Project No. 82, p. 53.

31 HIA, *Submission 7*, p. 11.

32 *Official Committee Hansard*, 31 August 2015, p. 8.

considered the suggestion 'unconscionable'.<sup>33</sup> Mr Robert Gaussen, Adjudicate Today, went further, explaining that in his view 'moving funds from one job to another job is conversion, and that is illegal'.<sup>34</sup>

10.27 A third concern was discussed by the Law Reform Commission of Western Australia. In its report, it noted that a construction trust scheme is only effective if there is trust property to meet the claim of beneficiaries. A difficulty arises where a deficit in trust funds arises in the absence of a breach of trust along the chain. This could occur where there is a right of set-off because of an incomplete or deficient job or deliberate under-bidding. In both cases, it may be that a trust beneficiary will not be paid in full even though there has been no breach of trust anywhere in the chain. So long as the trustee pays all trust money it receives, it discharges its obligations even though the beneficiary is not paid in full.

10.28 The Commission accepted that a trust is only effective if there is sufficient property to meet the claims of beneficiaries. However, it explained that a trust scheme may be able to deter net of tax tendering for two reasons:

First, it would be a breach of trust for trust funds from one project to be used to meet financial obligations on another project. It would therefore no longer be desirable to underbid on one project to obtain a cash flow to meet payments on another project. Secondly, if there were insufficient funds available in the trust to pay all beneficiaries, the funds would have to be distributed on a pro rata basis to the beneficiaries. The head contractor would not be entitled to any of the trust fund. It therefore would not be in the head contractor's interest to underbid or underquote for a project.<sup>35</sup>

10.29 The NSW Chapter of the Master Builders of Australia (MBA NSW) also indicated their opposition to any trust arrangement. According to the MBA NSW, the problem of insolvency is 'more about management practices and the application of appropriate financial management skills'.<sup>36</sup>

10.30 Elaborating this point further yields a fourth potential issue concerning a trust scheme—trust relationships impose fiduciary duties and therefore require trustees undertake their responsibilities seriously. A question arises as to whether participants in the industry have sufficient financial acumen to manage a trust scheme, and whether licensing requirements need to be strengthened alongside the introduction of a trust arrangement? Adjunct Professor Evans considered this premise 'offensive and demeaning'.<sup>37</sup>

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33 *Proof Committee Hansard*, 26 October 2015, p. 4.

34 *Official Committee Hansard*, 21 September 2015, p. 59.

35 Law Reform Commission of Western Australia, *Financial Protection in the Building and Construction Industry*, Project No. 82, p. 54.

36 MBA NSW, *Submission to the Inquiry into Construction Industry Insolvency in NSW* (received 16 July 2014), p. 4.

37 *Proof Committee Hansard*, 26 October 2015, p. 4.

***Committee's views***

10.31 The committee accepts the view of the NSW Chapter of the Master Builders of Australia that poor management practices and lack of financial acumen are contributing factors to the high rate of insolvency in the industry. However, as discussed in chapter 2, these factors are but two among many causes of insolvencies and do not explain in any way the poor payment practices that are endemic in the industry. It is clear that the pyramidal structure of the industry places significant pressures on those on the bottom of the contractual pyramid.

10.32 The committee notes that the overwhelming majority of submissions that considered the issue argued in favour of the establishment of retention trust accounts. This position is consistent with the Collins Inquiry and the Law Reform Commission of Western Australia's Report. The committee believes that a trust model for the construction industry has considerable merit and offers the prospect of ensuring subcontractors are paid, potentially reducing insolvencies down the contractual chain.

**How would the trust operate?**

10.33 As noted above, statutory trusts for the construction industry exist in some states within the United States and Canada, operate in relation to government contracts in the United Kingdom and are being actively explored by New Zealand, Queensland and the ACT. In Australia, Western Australia and the Northern Territory and New South Wales already provide for two different forms of trust schemes. This section examines the two approaches in Australia, as well as a third model used in the United Kingdom and currently trialled in Western Australia and New South Wales—the Project Bank Account.

10.34 The basic approach of a statutory trust for the construction industry was explained by the HIA. They noted that in general, a trust scheme operates as follows:

Under a deemed trust arrangement, a contractor receives progress payment upon trust to pay workers, subcontractors and suppliers. Only after these parties have been paid does the balance go to the builder.<sup>38</sup>

10.35 This basic approach has been followed, with slight differences in the relevant Australian jurisdictions.

***Approach in Western Australia and the Northern Territory***

10.36 In Western Australia and the Northern Territory, many standard-form subcontracts provide for the principal to deduct from payments due to the contractor a specified amount, as security for proper performance of the contract. The effect of such a provision is to oblige the principal to set aside these retention monies in a trust fund for the contractor, subject to the principal's entitlement to access these funds in the event of any non-performance of the contractors' obligations.

10.37 Where a contract does not have a written provision concerning the status of money retained by the principal for the performance by the contractor of his or her

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38 HIA, *Submission 7*, p. 11.

obligations, the *Construction Contracts Act* prescribes that the principal is to hold the money on trust for the contractor until the following occurs:

- the money is paid to the contractor;
- the contractor, in writing, agrees to give up any claim to the money;
- the money ceases to be payable to the contractor by virtue of the operation of this contract; or
- an adjudicator, arbitrator, or other person, or a court, tribunal or other body, determines that the money ceases to be payable to the contractor.<sup>39</sup>

### ***Approach in New South Wales***

10.38 In 2014, the NSW Government introduced regulations to further ensure the effectiveness of their security of payments regime. The *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2014* partially implemented recommendations of the Collins Inquiry. Applying to contracts between head contractors (or principals) and subcontractors for non-residential building projects worth over \$20 million,<sup>40</sup> the changes:

- require head contractors to deposit subcontractors' retention money into approved accounts with authorised deposit-taking institutions. These retention monies will not be available to head contractors for their general use;
- require head contractors to undergo an annual audit for each account in operation;
- ensure that retention monies will only be available for the purposes specified in the contract between the parties;
- set a maximum penalty for breach of the Regulations at 200 penalty units—currently \$22,000;
- require account holders lodge an annual audit report for each account that they hold; and
- increase investigative powers for compliance officers so that they can better review and seek information on individual accounts.

10.39 While the Western Australia and Northern Territory model creates a trust where parties do not provide otherwise in their contract, the New South Wales model applies to all contracts over \$20 million.

10.40 The most important factor in the development of each model is the absence of a statutory construction trustee. That is, neither model has a central regulator which

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39 *Construction Contracts Act 2004* (WA), schedule 1, division 9, s 11; *Construction Contracts (Security of Payments) Act* (NT), schedule 1, division 9, s 10.

40 The Collins Inquiry recommended the establishment of a construction trust for all building projects valued at \$1 million or more: *Final Report of the Independent Inquiry into Construction Industry Insolvency in NSW* (2012), p. 355, Recommendation 6.

operates and administers the trust fund; rather the contractors themselves must administer it.

### ***Project bank accounts (PBAs)***

10.41 Project bank accounts (PBAs) are a project-based bank account with trust status that facilitates the direct payment of monies owed by a project principal to both the head contractor and subcontractors participating in the PBA. Instead of contracted payments being made by the principal into the head contractor's usual bank account, payments are deposited into a dedicated project trust account. The account is established by the head contractor and operated not by the head contractor, but by the bank with whom the account is held.

10.42 Payments to subcontractors are made by the bank from the PBA in accordance with payment instructions issued by the head contractor based on its contractual obligations. The PBA can also hold any retention monies required to be held in accordance with the head contractor's contracts with its subcontractors. PBAs provide security and certainty of payment while at the same time reduce unnecessary costs associated with short-term financing, debt-chasing and administration.

10.43 In September 2009, the UK Government Construction Board decided that Central Government Departments, their agencies and Non-Departmental Public Bodies would be required to adopt PBAs for government funding construction work unless there was a compelling case not to do so.<sup>41</sup>

10.44 On 26 June 2013, the Western Australian Government announced it would trial PBAs on construction projects managed by the Department of Finance's Building Management and Works.<sup>42</sup> The PBA model being trialled has been developed in consultation with the construction industry, and feedback during the trial is being used by Building Management and Works to refine the model. The trial is expected to end in February 2016 when a report outlining the findings of a review into the trial is provided to the WA Minister for Finance. This review will seek feedback from PBA project participants and will help inform any decision regarding the future use of PBAs in Western Australia.

10.45 In New South Wales, a trial of PBAs on selected government projects commenced in 2014 and will run for two years until the end of 2016.<sup>43</sup> The trial is along very similar lines to that being undertaken in Western Australia.

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41 Cabinet Office, *A Guide to the Implementation of Project Bank Accounts (PBAs) in Construction for Government Clients* (July, 2012).

42 Western Australia Department of Finance, 'Project Bank Accounts' <[https://www.finance.wa.gov.au/cms/Building\\_Management\\_and\\_Works/New\\_Buildings/Project\\_bank\\_accounts.aspx](https://www.finance.wa.gov.au/cms/Building_Management_and_Works/New_Buildings/Project_bank_accounts.aspx)> (accessed 1 December 2015).

43 New South Wales ProcurePoint, 'Construction Procurement: Direction C2013-02' <<https://www.procurepoint.nsw.gov.au/construction-procurement-direction-c2013-02>> (accessed 1 December 2015).

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## Conclusion

10.46 The committee has already noted its support in chapter 9 for Commonwealth security of payments legislation to be enacted for the construction industry.

10.47 In the view of the committee, there is one principle and one principle only that should be observed in relation to security of payment in the construction industry. It is a fundamental right of anyone who performs work in accordance with a contract to be paid without delay for the work they have done.

10.48 The overwhelming majority of submissions and evidence to this inquiry support the establishment of a retention trust or similar mechanism to facilitate the prompt payment of contract payments to subcontractors. Such a mechanism would be in addition to security of payment legislation that provides for rapid adjudication processes in relation to payment disputes.

10.49 As noted above, the final report of the Cole Royal Commission considered a trust fund model and found that it had considerable merit in meeting the objective of ensuring subcontractors get paid monies to which they are entitled, thus preventing insolvencies and their associated hardships and suffering. However, the report found opposition in the industry to the establishment of a trust model to be so entrenched, that any recommendation would very likely be vigorously opposed. While not making a recommendation to establish a trust model, Commissioner Cole pointedly remarked that he should not be taken to be recommending against that model.

10.50 That was in 2003. In the view of the committee, the evidence and submissions to this inquiry indicate that industry opposition to a trust model have softened markedly in the intervening years. Witness after witness, submission after submission—from subcontractors, the legal profession, liquidators, employee organisations, regulators, Treasury and ASIC—all told the committee that a trust model would act to reduce substantially the number of insolvencies in the industry, improve business cash flows and promote innovation and other productivity improvements in the industry.

10.51 The committee agrees with the evidence and submissions of the many witnesses and submitters who have supported the concept of a trust account model for securing payments to subcontractors and reducing the incidence of insolvency in the industry. The committee believes that PBAs, as employed in the United Kingdom and currently being trialled in Western Australia and New South Wales, have the very strong potential to resolve the payment problems that have beset the industry. The committee believes further that PBAs can help minimise the great harm that the high level of insolvencies in the industry is inflicting on thousands of businesses and the people who run them and work in them every year.

10.52 PBAs can complement harmonised national security of payments legislation. Any disputes in relation to payments or the head contractor's payment instructions to the bank can be resolved through access to the security of payment and rapid adjudication legislation the committee recommends in chapter 9.

10.53 The committee believes that further consultation is required in examining the preferred scope of any statutory construction trust/PBA as a means by which security

of payment can be achieved through Commonwealth legislation, including in particular to what scale of projects it should apply to and whether it should apply only to retention payments or to the entire contract.

10.54 The committee recognises that the Commonwealth is a major funder of construction in Australia. The Commonwealth has a responsibility, as in all fields, to be a model industry participant. In the view of the committee, the Commonwealth has a responsibility to be a model participant in the construction industry by promoting the adoption of best practice payment systems. The best way to do so would be to require construction projects that receive Commonwealth funding to adopt a best practice model.

#### **Recommendation 29**

**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**

**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**

**10.57 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.**