

PROJECT BANK ACCOUNTS

BUILDING INDUSTRY FAIRNESS

In late 2017 the Queensland Government passed the *Building Industry Fairness (Security of Payment) Act 2017* (the **Act**).

The Act introduces significant changes to the construction industry in Queensland. Principals and head contractors in particular need to be aware of, and comply with, these changes - or risk being in breach of the new Act. The changes include (but are not limited to):

- 1 the introduction of Project Bank Accounts for certain construction projects;
- 2 the amendment and consolidation of the *Building and Construction Industry Payments Industry Act 2004* (**BCIPA**) and *Subcontractors' Charges Act 1974*;
- 3 amendments to the *Queensland Building and Construction Commission Act 1991* (**QBCC Act**); and
- 4 the introduction of a number of penalty provisions to enforce compliance with the Act.

There are a number of provisions which will require industry participants to review how their contracts are drafted and administered, in order to ensure that they do not fall foul of the provisions of the Act.

Of particular interest to principals and head contractors will be the introduction of Project Bank Accounts, changes to the mechanisms concerning payment disputes and amendments made to the QBCC Act. Changes to a limited number of contracts commenced in March 2018 – but will apply across much of the industry from, we expect, 1 March 2019. We discuss these three issues in further detail in the [links] below.

KEY TAKEAWAYS:

- 1 PBAs will not apply to all building projects. Residential construction, maintenance work, subcontracts, construction, maintenance or repair of busways, roads or railways (or tunnels for that infrastructure) and authorised activities for resource activities are excluded from the PBA provisions. .
- 2 Implemented in two phases. The first phase, which commenced on 1 March 2018, and only applies to certain construction contracts where the contract price is between \$1 million and \$10 million, and the principal is the State or a State authority. The second phase, which we expect to commence in March 2019, will expand the scope of PBAs, so that they will be required for building contracts over \$1 million, even where the principal is a private party.
- 3 Risks to head contractors include ensuring compliance (with failure to do so to be met with significant penalties and, potentially imprisonment), costs of administration, and a reduction in liquidity in the head contractor's business.

The Building Industry Fairness (Security of Payment) Act 2017 (the **Act**) establishes the Project Bank Account (**PBA**) regime, which is designed to:

- 1 protect the funds payable to subcontractors from head contractors who might otherwise use those funds for other purposes; and
- 2 shift the risk of late or non-payment from subcontractors to head contractors (or principals in the absence of a head contractor),

through the creation of trust accounts which will ring-fence the funds owing to subcontractors. As the Explanatory Memorandum for the Act states, the introduction of PBAs will "provide greater security in events such as insolvency, where money within the account is effectively quarantined for subcontractors who are beneficiaries to the trust".¹

The Queensland Government had been considering the introduction of PBAs for some time, following a period of consultation with the community after the release of the Security of Payment discussion paper (in December 2015), as well as the Queensland Building Plan Discussion paper (in November 2016). PBAs have been trialled (and in some states, are in limited use) in other Australian jurisdictions such as NSW, WA and the NT, however the Queensland Act extends the PBA model so that it will apply to contracts between private parties in addition to contracts involving State government bodies.

The Act provides for the implementation of PBAs in two phases:

- 1 Phase 1 – from 1 March 2018, which applies to certain building contracts between \$1 million and \$10 million, in which the principal for the contract is the State or a State authority which has decided a PBA is to be established for a contract; and
- 2 Phase 2 – expected to commence in March 2019, which will expand the application of PBAs to include certain contracts over \$1 million where the principal for the contract is a private party.

1. Explanatory Memorandum, page 3.

1 RISKS TO HEAD CONTRACTORS

Risks and costs to head contractors posed by the introduction of PBAs include:

- (a) **Compliance** with the requirements concerning the administration of PBAs. This is particularly so in light of the fact that in order to enforce the provisions relating to PBAs, the Act provides for a number of penalties (and in some cases, imprisonment) to be imposed in the event of non-compliance.
- (b) **The costs of administration** including potentially hiring an additional employee or otherwise engaging, an agent to act on the head contractor's behalf with respect to the PBA. Under the provisions of the Act, head contractors will not be permitted to recover from either the PBA or a subcontractor beneficiary, any of the costs incurred relating to the administration of the PBA, or the fees payable for the PBA. Costs incurred by the head contractor to appoint an agent to act on its behalf in relation to the PBA will similarly be unable to be recovered from the PBA or any beneficiaries to the PBA. Furthermore, funds held in trust in the PBA must not be invested. Although head contractors will be entitled to receive any interest earned on amounts held in a PBA this is unlikely to be sufficient to cover the costs incurred by a head contractor in administering the PBA.
- (c) The requirement to cover any shortfalls in the PBA as well as the obligation to make a payment from the PBA regardless of whether or not the amount to be paid is held in the account at the time when the payment is due, will require head contractors to have sufficient funds set aside in order to comply with the Act, thereby **reducing liquidity** in the head contractor's business.

There is some evidence to suggest that the introduction of PBAs in other jurisdictions such as in the United Kingdom, led to a slight reduction in building and construction procurement costs as subcontractors reduced fees that had been inflated to cover the risk of non-payment. Whether, however, that will occur in Queensland following the introduction of PBAs, with the administration and penalties structure put in place by the Act, remains to be seen.

2. Deloitte Report: "Analysis of security of payment reform for the building and construction industry" Deloitte report at p15 – 16. Available at: <http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDeloitteReport.pdf>.

2 PBAs - A SUMMARY

Extracted below are some of the key provisions and concepts relating to PBAs contained in the Act.

What is a PBA?

PBAs are trust accounts in which progress payments, retention funds and “disputed funds” for certain construction contracts will be held in trust for first tier subcontractors, who are the beneficiaries of the trust. Head contractors are both trustee and a beneficiary, and are required to attend to the administration of the PBA.

For the purpose of operating a PBA, head contractors must open three trust accounts with a financial institution within Queensland:

- (a) a general trust account;
- (b) a retention account; and
- (c) a disputed funds account,

within the mandated timeframes. Within time limits identified by the Act, building contracts between the principal and head contractor may provide for the date by which the PBA must be established. The latest date for establishing a PBA is 20 business days after the head contractor enters into the first subcontract for the building contract.

Penalty: failure by the head contractor to establish a PBA within the mandated timeframes can incur a maximum penalty of 500 penalty units for an individual (which, as at today’s date is equivalent to a fine of \$65,275) or five times that amount for body corporate (\$326,375).

In what circumstances will a PBA be required?

A PBA is required for the building contract if the contract is a “PBA Contract” and the head contractor enters into a subcontract for all or part of the contracted work.

PBAs apply to “building contracts” which are for “building work”, including:

- (a) the erection or construction of a building;
- (b) the renovation, alteration, extension, improvement or repair of a building;
- (c) the provision of lighting, heating, ventilation, air-conditioning, water supply, sewerage or drainage in connection with a building;
- (d) any site work (including the construction of retaining structures) related to work of a kind referred to above;
- (e) the preparation of plans or specifications for the performance of building work;
- (f) contract administration carried out by a person in relation to the construction of a building designed by the person;
- (g) fire protection work;
- (h) carrying out a completed building inspection;
- (i) the inspection or investigation of a building, and the provision of advice or a report, for termite management systems for the building or for termite infestation in the building; or
- (j) for other work prescribed by regulation.

PBAs are not be required for:

- (a) building contracts only for residential construction work (unless the Department is the principal and the work is for three or more living units);
- (b) maintenance work;
- (c) subcontracts;
- (d) the construction, maintenance or repair of a busways, roads or railways (or tunnels for that infrastructure); or
- (e) an authorised activity for a resource activity.

Phase 1: commencing 1 March 2018

During phase 1, a building contract will be a PBA Contract requiring the establishment of a PBA where:

- (a) the principal for the building contract is either the State or a State authority that has decided a PBA is to be established for the contract;
- (b) more than 50% of the contract price is for building work;
- (c) the contract price for the building contract is between **\$1 million to \$10 million**; and
- (d) the building contract is not a subcontract for another building contract.

A building contract may be declared a PBA Contract by regulation if the principal for the contract is the State or a State Authority. It may also become a PBA Contract if, following amendment, the contract meets the four requirements mentioned above. If, however, the only amendment to the building contract is an increase in the contract price, the contract will become a PBA Contract only if the amendment to the contract (together with any earlier amendments of the contract) increases the contract price by 30% or more.

A review of phase 1 is required under the Act, and will commence no later than September 2018. The report on the outcome of the review must be tabled in parliament by the Minister as soon as practicable after the review is completed.

Phase 2: commencing March 2019 (expected)

In phase 2, the operation of PBAs will be expanded to apply to the private sector as well as government contracts and will be required for building contracts where:

- (a) more than 50% of the contract price is for building work;
- (b) the contract price for the building contract is **\$1 million or more**;
- (c) the head contractor enters into a subcontract for all or part of the contracted building work; and
- (d) the building contract is not a subcontract for another building contract.

For both Phase 1 and Phase 2, PBAs will only be required for payments to the first tier of subcontractors with whom a head contractor contracts. PBAs will not be required for contracts between first tier and second tier subcontractors and so on. The Act does, however, include a mechanism which provides that in the future, PBAs could be required for payments to lower tier subcontractors and suppliers.

Limitations on deposits

Deposits generally

If the principal pays either an amount owing to the head contractor under the building contract or otherwise reduces the unpaid amount of the contract price for a building contract, the principal must deposit that amount into the general trust account.

Only limited exceptions apply to this requirement, namely, that the amount was due to be paid before the PBA was established, the amount has been paid into court, the amount has been paid directly to a subcontractor as a result of a subcontractor's charge, or if the principal has a reasonable excuse for not making the payment into the general trust account.

Any payment made to the general trust account is taken to be payment by the principal to the head contractor and discharges the principal's liability to pay that amount to the head contractor under the building contract.

The head contractor must not cause an amount to be deposited for any purpose other than:

- (a) paying the head contractor an amount the head contractor is entitled to be paid under the building contract;
- (f) paying a subcontractor beneficiary an amount that the beneficiary is entitled to be paid under a subcontract for the building contract;
- (g) paying an amount held as a retention amount;
- (h) paying an amount the subject of a payment dispute; or
- (i) making another payment prescribed by regulation (currently, the only prescribed payments are payment for claims under BCIPA made by a head contractor for a building contract for which a PBA is required or a payment claim made by a subcontractor, other than a supplier, for a first tier subcontract for a head contract).

Penalty: failure to comply with the limited purposes for deposits into the PBA could result in a maximum penalty of 200 penalty units (equivalent to a fine of \$26,110) or 1 year's imprisonment for individuals, and a maximum fine of \$130,550 for a body corporate.

Notably, the Act provides that a subcontractor's charge cannot attach to money held in trust under a PBA.

Shortfalls in the general trust account

As soon as the head contractor becomes aware that there will be an insufficient amount available in the general trust account to pay an amount that is due to be paid to a subcontractor beneficiary, the head contractor must deposit into the trust account an amount equal to the shortfall.

Penalty: failure by a head contractor to cover the shortfall as soon as the head contractor becomes aware of it could result in a maximum penalty of 100 penalty units (equivalent to a fine of \$13,055) or 1 year's imprisonment for an individual, or a maximum fine of \$65,275 for a body corporate.

Limitations on withdrawals

Withdrawals generally

All payments that a subcontractor is entitled to be paid under its subcontract must be made from the PBA. The obligation to make a payment from the PBA applies regardless of whether or not the amount to be paid is held in the trust account at the time when the amount is due.

Amounts that may be withdrawn by the head contractor from the PBA are limited to:

- (a) paying a subcontractor an amount that a subcontractor is entitled to be paid under a subcontract; or
- (b) paying the head contractor an amount payable by the principal under the head contract (but only to the extent that the head contractor is not also liable to pay a subcontractor beneficiary for the same work); or
- (c) returning an amount paid in error by the principal; or
- (d) transferring an amount to another trust account as required by the provisions governing PBAs in the Act; or
- (e) making another payment prescribed by regulation (currently, the only prescribed payments are payment for claims under BCIPA made by a head contractor for a building contract for which a PBA is required or a payment claim made by a subcontractor, other than a supplier, for a first tier subcontract for a head contract).

Penalty: failure to comply could result in a maximum penalty of 300 penalty units (equivalent to a fine of \$39,165) or 2 years imprisonment for an individual, or a maximum fine of \$195,825 for a body corporate.

Order of priority of payment

In the event that there are insufficient funds in the PBA (and noting the head contractor's obligation to pay any shortfalls into the PBA), the order of priority for payment operates to benefit subcontractors as follows:

- (a) **Conflict between a head contractor and subcontractor:** the head contractor must not withdraw an amount from the general trust account to pay itself or make any other payment prescribed by regulation, unless:
 - (i) there would still be a sufficient amount available in the trust account to pay all amounts due to be paid to subcontractor beneficiaries at the time of the withdrawal; and
 - (ii) the withdrawal will not reduce the retention amount, for a subcontract, held in the retention account before that amount may be released in accordance with the subcontract.

Penalty: failure to comply could result in a maximum penalty of 300 penalty units (equivalent to a fine of \$39,165) or 2 years imprisonment for an individual, or a maximum fine of \$195,825 for a body corporate.

- (b) **Conflict between 2 subcontractors due to be paid at the same time:** the amounts to be paid to each subcontractor beneficiary are to be reduced in proportion to the amounts due to be paid to each. While there continues to be insufficient amounts held in the trust account, the head contractor must not pay a claimant unless the amount is being paid to the subcontractors to whom money is owed.

Penalty: failure to comply could result in a maximum penalty of 100 penalty units (equivalent to a fine of \$13,055) or 1 year's imprisonment for an individual or a maximum fine of \$65,275 for a body corporate.

Retention account

The second trust account required under the PBA structure is a retention account. The creation of the retention account addresses the fact that previously there was no requirement for a party holding retention funds to quarantine those funds (meaning that in the event of insolvency, those funds could be allocated to creditors, rather than to the subcontractor to which contractually the amount should have been paid).

The head contractor must ensure that any retention amount for a subcontract is held in this account.

Penalty: failure to comply could result in a maximum penalty of 200 penalty units (equivalent to a fine of \$26,110) or 2 years imprisonment for individuals, and a maximum fine of \$130,550 for a body corporate.

The head contractor must not withdraw any part of the amount held in the retention account unless the withdrawal is to make any of the following payments:

- (a) payment to a subcontractor beneficiary of an amount withheld under the subcontract;
- (b) payment to the head contractor of an amount to correct defects in the building work, or otherwise to secure, wholly or partly, the performance of a subcontract; or
- (c) payment ordered by a court; or
- (d) payment to a subcontractor beneficiary engaged by the head contractor to correct defects or omissions in the subcontracted work.

Penalty: failure to comply could result in a maximum penalty of 300 penalty units (equivalent to a fine of \$39,165) or 2 years imprisonment for an individual or a maximum fine of \$195,825 for a body corporate.

The head contractor must ensure that an amount held in the retention account is identifiable as being held for the subcontractor beneficiary that is entitled to be paid that amount.

Penalty: failure to comply could result in a maximum penalty of 100 penalty units (equivalent to a fine of \$13,055) for an individual or a maximum fine of \$65,275 for a body corporate.

Payment disputes

The third and final trust account to be set up as part of a PBA is the disputed funds account.

This account is to be used in the event of a "payment dispute" which will arise in circumstances where:

- (a) the subcontractor has given the head contractor a payment claim for a progress payment;
- (b) the head contractor has given a payment schedule to the subcontractor beneficiary in relation to the progress payment; and
- (c) the head contractor does not prepare a payment instruction to pay the full amount proposed to be paid under the payment schedule.

A payment dispute will also occur where the head contractor fails to give the subcontractor a payment schedule in response to the subcontractor's payment claim. The head contractor becomes liable under the Act to pay the subcontractor the amount claimed and the head contractor does not prepare a payment instruction to pay the full amount claimed in the payment claim.

Depending on the type of payment dispute, the head contractor must transfer into the disputed funds account either:

- (a) the difference between the amount the head contractor proposed to pay the subcontractor under the payment schedule and the amount stated in the payment instruction; or
- (b) where the head contractor failed to give a payment schedule, the amount in the payment claim which the head contractor is liable to pay the subcontractor under the Act.

Penalty: failure to comply could result in a maximum penalty of 200 penalty units (equivalent to a fine of \$26,110) or 1 year's imprisonment for individuals, and a maximum fine of \$130,550 for a body corporate.

The head contractor must immediately inform the subcontractor, in writing, of when an amount was transferred into the disputed funds account.

Penalty: failure to comply could result in a maximum penalty of 50 penalty units (equivalent to a fine of \$6,527.50) and a maximum fine of \$32,637.50 for a body corporate.

The head contractor must ensure that an amount held in the disputed funds account is identifiable as being held for the subcontractor beneficiary that is entitled to be paid that amount.

Penalty: failure to comply could result in a maximum penalty of 100 penalty units (equivalent to a fine of \$13,055) for an individual or a maximum fine of \$65,275 for a body corporate.

The head contractor must ensure that the amount transferred to the disputed funds account is not paid to any person other than the subcontractor beneficiary, or the head contractor (in accordance with the outcome of a dispute resolution process) or to another person in circumstances prescribed by regulation. 'Dispute resolution process' is currently defined in the regulations as a proceeding in a court or tribunal, or an adjudication of a payment claim under BCIPA.

Penalty: failure to comply with this requirement can result in a maximum penalty of 300 penalty units (equivalent to a fine of \$39,165) or 2 years imprisonment for individuals, or a maximum fine of \$195,825 for a body corporate.

The head contractor must remove the amount from the disputed funds account as soon as practicable after:

- (a) if there has been a dispute resolution process – after that process has concluded;
- (b) if the dispute resolution process may be appealed – after the appeal may no longer be commenced or the appeal has been decided; or
- (c) otherwise – 60 days after the funds have been transferred into the disputed funds account.

If the amount was drawn from the general trust account or the retention trust account and placed in the disputed funds account, the amount must be returned to the account from which the amount was initially drawn. Otherwise, head contractor may pay themselves the funds.

Penalty: failure to comply could result in a maximum penalty of 50 penalty units (equivalent to a fine of \$6,527.50) and a maximum fine of \$32,637.50 for a body corporate.

Dissolving a PBA

A head contractor may only dissolve the PBA once:

- (a) there are no longer any subcontractor beneficiaries for the PBA (i.e. once each subcontractor has been paid all amounts, including any retention amounts, it is entitled to be paid under its subcontract); or
- (b) when the only remaining building work to be carried out under the building contract is maintenance work.

The head contractor dissolves the PBA by closing the trust accounts and giving the principal written notice of the fact that the PBA has been dissolved.

A head contractor must not dissolve the PBA while it is still required for a building contract. A head contractor will be taken to have dissolved the PBA if it closes any of the trust accounts while the PBA is still required for the building contract.

Penalty: premature dissolution of a PBA could result in a maximum penalty of 500 penalty units (equivalent to a fine of \$65,275) or 1 year's imprisonment for individuals or a fine maximum of \$326,375 for a body corporate.

Head Contractor insolvency or liquidation or termination by Principal of contract for default

In a number of circumstances, including head contractor insolvency, or where a contract is terminated by the principal for a default, the principal may give a notice to the head contractor advising that the principal will replace the head contractor as trustee of the PBA. Once that occurs, the principal as trustee, may only make payments which are in accordance with the provisions concerning PBAs, thereby preserving the funds for the beneficiaries of the trust. The principal may apply to the Supreme Court of Queensland for directions about the administration of the PBA.

REPEAL AND REPLACEMENT OF THE BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS ACT 2004 (BCIPA)

BUILDING INDUSTRY FAIRNESS



KEY TAKEAWAYS:

- 1 These changes will commence on 17 December 2018.
- 2 A payment claim will no longer be required to state that it is made under legislation.
- 3 Crucial that respondents to payment claims issue payment schedules:
 - (a) on time;
 - (b) which outline all reasons for withholding payment.
- 4 If a respondent does not provide a payment schedule in response to a payment claim, the respondent will not be allowed to give an adjudication response in the event an adjudication is commenced.
- 5 In the event the dispute proceeds to adjudication, respondents who provided a payment schedule will not be allowed to include new reasons for withholding payment in the adjudication response that are additional to what was included in the payment schedule.
- 6 The Regulations to the Act prescribe limitations on submissions and accompanying documents for adjudication applications and adjudication responses.
- 7 Claimants will have more time to make an adjudication application.
- 8 Definition of 'Reference Date' amended.

The *Building Industry Fairness (Security of Payment) Act 2017* (the **Act**) provides for the repeal of BCIPA, with the provisions of BCIPA to be replicated, subject to amendment, in the Act. The provisions of BCIPA provide for the management of payment disputes, and the amendments provided for in the Act are favourable to subcontractors considering bringing a claim in relation to payment.

1 KEY AMENDMENTS

Two of the key changes to the BCIPA provisions relate to how payment claims are to be made, and the extension of timeframes for claimants to apply for adjudication.

1.1 PAYMENT CLAIMS

The government has sought to ease the way for payment claims to be made by subcontractors by:

(a) Amending the definition of "payment claim"

- (i) The requirement to endorse a payment claim as being made under BCIPA has been removed. The definition of "payment claim" has been amended to refer to a written document that:
 - (A) identifies the construction work to which it relates;
 - (B) states the claimed amount of progress payment;
 - (C) requests payment of the claimed amount (the Act specifies that a written document bearing the word 'invoice' will satisfy this requirement); and
 - (D) includes any other information prescribed by regulation.
- (ii) Amending the definition in this manner means that an invoice issued by a claimant which identifies a due date for payment, as well as meeting the other criteria set out above, could operate as a "payment claim" for the purpose of the Act.

(b) Tightening the requirements on respondents

- (i) The obligation to provide a payment schedule on time; and
- (ii) Removing the opportunity for respondents to issue a second chance payment schedule.

Payment claims and schedules

A respondent must respond to a payment claim giving the claimant a payment schedule before the earlier of:

- (i) the expiry of the response period under the contract (if any); or
- (ii) 15 business days after the payment claim is given to the respondent.

A respondent to a payment claim is not required to give a payment schedule, if it pays the full amount claimed on or before the due date for the progress payment to which the payment claim relates.

If, however, the respondent does not agree, in full or in part, with the amount claimed by a subcontractor, it will be imperative that the respondent issue a payment schedule in response to payment claim on time, which outlines any and all of the reasons for withholding payment. The Regulations may mandate other information to be provided in a payment schedule. However, the Regulations do not currently do so.

Failure to provide the payment schedule on time will also render the respondent liable to a penalty of 100 penalty units (\$13,055 for individuals and \$65,275 for a body corporate), and is a ground for disciplinary action to be taken against the respondent under the *Queensland Building and Construction Commission Act 1991*.

If payment is not made, the claimant may either recover the unpaid portion of the amount owed from the respondent, as a debt owing to the claimant in court, or commence an adjudication of the payment claim.

A payment schedule, if provided, will need to be a 'complete' response, setting out all reasons a respondent may have for withholding payment. Respondents will not be allowed to include any new reasons in an adjudication response for withholding payment that were not included in the original payment schedule given to the claimant even for "complex payment claims" for over \$750,000 (excluding GST) (or if a greater amount is prescribed by regulation, for the amount prescribed).

Response submissions for adjudication

The second chance provisions under BCIPA for a respondent to issue a payment schedule have been removed from the Act, and if adjudication of the payment claim is commenced and a respondent did not provide a payment schedule in response to a payment claim, the respondent will be precluded from giving an adjudication response.

The Regulations prescribe limitations on submissions and accompanying documents for payment claims of \$25,000 or less. Submissions must not exceed 10 pages, use font that is at least size 10 and have margins of at least 2.54cm. Submissions may only be accompanied by the following documents:

- the payment claim to which it relates;
- the construction contract to which it relates;
- the payment schedule given in response to the payment claim;
- any document that had been given by one party to the other that supported either the payment claim or payment schedule;
- a document given by one party to the other that is related to the construction contract;
- an expert report related to the payment claim; and
- a statutory declaration related to the payment claim.

In the event that any prescribed limitations are exceeded, adjudicators may disregard the adjudication application or adjudication response, to the extent that the submissions or accompanying documents contravene any limitations identified in the Regulations.

1.2 TIMEFRAMES TO APPLY FOR ADJUDICATION OF DISPUTES

The Act also extends the timeframes within which an adjudication application may be made by a claimant, however, the existing timeframes for a respondent to submit an adjudication response have remained the same.

Comparison of timeframes for making adjudication application

Type of application	Timeframe under BCIPA	Timeframe under Act
Application relating to failure to give payment schedule and pay the full amount stated in payment claim	10 business days after the date the respondent to serve the payment schedule	30 business days after the later of the following: a) the day of the due date for the progress payment to which the claim relates; or b) the last day the respondent could have given the payment schedule.
Application relating to a failure to pay the full amount stated in the payment schedule	20 business days after the due date for payment	20 business days after the due date for the progress payment to which the claim relates
Application relating to amount stated in the payment schedule being less than the amount stated in the payment claim	10 business days after the claimant receives the payment schedule	30 business days after the claimant receives the payment schedule

As a result, the period within which respondents must factor the uncertainty of whether an adjudication application will be made, into their business decisions, has been extended.

1.3 OTHER AMENDMENTS TO WATCH OUT FOR

Some other key amendments that have the potential to impact upon contract and dispute administration include:

- (a) A useful clarification to the definition of “reference date” so that in the event of termination of a contract which does not provide for (or purports to prevent) the reference dates surviving termination, the final reference date for the contract will be the date of termination.
- (b) That a progress payment for a construction contract which either does not provide a date for payment or otherwise contains a void payment provision (such as a pay when paid provision) will become payable at the end of 10 business days after a progress claim is made in accordance with the provisions of the Act.
- (c) In deciding the fees payable by the claimant and respondent to an adjudication, the adjudicator must consider the conduct of both parties to the adjudication, and may consider a number of other factors, including the reasons given by the respondent for not making the progress payment the subject of the adjudication application.

AMENDMENTS TO QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION ACT 1991

BUILDING INDUSTRY FAIRNESS



KEY TAKEAWAYS:

- 1 New provisions directed towards preventing corporate phoenixing so that persons of influence who were in a position to control or influence a construction company that failed, will be excluded from obtaining a QBCC licence.
- 2 Providing the regulator with greater oversight of the financial affairs of construction companies.
- 3 Introduction of new penalties for non-compliance with the QBCC Act.

1 KEY AMENDMENTS

1.1 CORPORATE PHOENIXING

As part of the amendments to address corporate phoenixing, the *Building Industry Fairness (Security of Payment) Act 2017* (the **Act**) amended the *Queensland Building and Construction Commission Act 1991* (**QBCC Act**) by:

- (a) Expanding the definition of an “influential person” to include individuals in positions to control or substantially influence the company’s conduct. The Act identifies the following persons as potentially being influential persons:
- (i) a chief executive officer, or general manager, or equivalent, or someone acting in those positions, in the company; or
 - (ii) a person who directly owns, holds or controls 50% or more of the shares in the company, or 50% or more of the class of shares in the company; or
 - (iii) someone who gives instructions to an officer of the company and the officer generally acts on those instructions; or
 - (iv) someone who makes, or participates in making, decisions that affect the whole or a substantial part of the company’s business or financial standing; or
 - (v) someone who engages in conduct or makes representations that would cause someone else to reasonably believe the person controls or substantially influences, the company’s business.

The expanded definition of “influential person” increases the scope of provisions which prevent influential persons from holding QBCC licences and/or holding positions of influence in the business of another QBCC licensee.

- (b) Extending from one year to two years the period for which an individual is an “excluded individual” (and unable to be granted a contractor’s licence) if he/she was a director, secretary or influential person for a construction company which:
- (i) had a provisional liquidator, liquidator, administrator or controller appointed; or
 - (ii) was wound up or ordered to be wound up.

The individual will be an excluded individual unless he/she can satisfy the Commissioner that at the time he/she ceased to be an influential person, director or secretary for the construction company, the company was solvent.

1.2 GREATER FINANCIAL OVERSIGHT

As part of the amendments to give the QBCC greater financial oversight of construction companies, the QBCC Act now requires holders of, and applicants for, QBCC licences to satisfy ‘minimum financial requirements’. This is a change in language to the QBCC Act which previously only required licensees to meet the ‘financial requirements’ stated in the board’s policies. Although what the Regulations identifying what the minimum financial requirements will be are yet to be released, it is anticipated that they will be tougher than the current financial requirements licensees must meet.

This amendment is carried through the QBCC Act, so that if, for example, a licensee is audited by the QBCC, it may be required to give to the QBCC financial records evidencing that the licensee meets the minimum financial requirements.

1.3 OTHER AMENDMENTS TO WATCH OUT FOR

Some of the other amendments to the QBCC Act include:

- (a) The introduction of escalating maximum penalties for unlawful carrying out of building work without a contractor's licence. It is expected that the higher penalties will act as a deterrent against unlicensed builders entering the market, which will assist in ensuring compliance with standards and in protecting other members of the construction industry and consumers from loss.¹
- (b) The introduction of a statutory defects liability period, to apply in circumstances in which a retention or security amount may be withheld after practical completion but the building contract does not provide for the release of those amounts at the end of an identifiable period. In these circumstances, the building contract will now be subject to a condition that the retention amount or security must be released to the person entitled to it at the end of 12 months starting on the day of practical completion for the contract.
- (c) The introduction of mandatory conditions prescribed by regulation for inclusion into building contracts as well as the requirement that a building contractor must not enter into a building contract that includes certain prohibited conditions, also prescribed by regulation. The Regulations identifying these conditions have not, as yet, been released, however the Explanatory Notes indicate that the purpose of mandating certain conditions is to ensure greater consistency across the industry, while the prohibition of certain conditions is to address unconscionable or unfair contract provisions in building contracts and improve fairness in the building and construction industry.²
- (d) The requirement that a person must not, without reasonable excuse, delay rectifying building work that is defective or incomplete, or remedying consequential damage, as required by a direction given under section 72A of the QBCC Act. Similarly, a person must not, without reasonable excuse, obstruct another person from rectifying or remedying work, as required by a direction given under that section. It is expected that the Regulations will provide that a person who fails to comply with either of these requirements will receive 4 demerit points.
- (e) The introduction of new penalty provisions including that:
 - (i) A person who is a party to a building contract must not, without reasonable excuse, cause another party to the building contract to suffer a significant financial loss because the person deliberately avoids complying with, or fails to comply with, the contract.
Maximum penalty: 350 penalty units for an individual (equivalent to a fine of \$45,692.50) or 1750 for a body corporate (equivalent to a fine of \$228,462.50).
 - (ii) A licensee who publishes or causes to be published any advertisement in connection with the licensee's business must ensure that the advertisement:
 - (A) does not include any false or misleading information; and
 - (B) does not omit any information, if the omission of the information causes the advertisement to be misleading.
Maximum penalty: 35 penalty units for an individual (equivalent to a fine of \$4,569.25) or 175 penalty units for a body corporate (equivalent to a fine of \$22,846.25).

With respect to the second of these penalty provisions, any advertisement that includes false or misleading information, or omits information resulting in the advertisement being misleading, could also fall foul of, among other things, the provisions of the *Australian Consumer Law*.³

This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.

1. Explanatory Notes, *Building Industry Fairness (Security of Payment) Bill 2017*(Qld), 56
2. Explanatory Notes, *Building Industry Fairness (Security of Payment) Bill 2017*(Qld), 61
3. *Competition and Consumer Act 2010*(Cth), Schedule 2