The Building Industry Fairness (Security of Payment) Act 2017 (Qld)

Get ready for BIF
Key security of payment changes
Fusion – the new norm?

Progress claim and payment claim

Progress certificate and payment schedule

Dispute?  Adjudication?
When does BIF Act take over?
When does BIF Act take over?

■ Chapter 3 of BIF Act commences on proclamation (this chapter has not commenced)

■ BIF Act applies to all construction contracts entered into before or after its commencement

■ An exception – ‘unfinished matters’ under BCIPA (for payment claims served prior to commencement of BIF Act), such as:
  □ service of payment schedule
  □ consequences of failing to pay a claim
  □ making adjudication applications
  □ giving adjudication responses
  □ the adjudication process and enforcement
  □ suspensions of work

■ To date, no regulations released for Chapter 3
What is a payment claim?
Say goodbye to the magic words

This is a payment claim under the Building and Construction Industry Payments Act 2004 (Qld)
The old (BCIPA, s 17)

A payment claim must:
• identify the construction work or related goods and services
• state the claimed amount, and
• state that it is made under the Act

The new (BIF Act, s 68)

A payment claim is a written document that:
• identifies the construction work or related goods and services
• states the claimed amount
• requests payment of the claimed amount (any document bearing the word ‘invoice’ will satisfy this requirement), and
• includes the other information prescribed by regulation (as yet unknown)

What are the implications?
Payment schedules
What is the ‘response period’?

- Payment schedule must be provided before the end of the ‘response period’, regardless of whether standard or complex claim.

- The shorter of the following:
  - If the contract includes a period for responding to a payment claim or paying the full claimed amount – that period, or
  - 25 business days after the payment claim is given to the respondent.

- Don’t need to serve a payment schedule if claim paid in full before the end of the response period.

- But what if payment terms are longer?
Failing to respond or pay under BIF Act: no more second chances

- The claimant may enforce the claim in court or apply for adjudication.

- Warning notice must be given before going to court, but not a second chance to serve a payment schedule.

- If the claim:
  - is enforced in court, respondent cannot raise any defence or counterclaim.
  - proceeds to adjudication, respondent cannot serve an adjudication response.

- Failure to provide a payment schedule is an offence (100 penalty units), and can also trigger QBCC disciplinary action.

- If you do not intend to pay, always provide a payment schedule with all reasons for withholding payment.
Payment schedules – requirements under BIF Act

■ A payment schedule must:
  □ identify the payment claim to which it responds
  □ state the amount of the payment, if any, that the respondent proposes to make
  □ if that amount is less than the amount claimed, state why that is so and include reasons for withholding payment, and
  □ include the other information prescribed by regulation (as yet unknown).

■ Include all reasons and explain them – only opportunity to do so because no new reasons can be raised in adjudication

■ Write for an external audience (where will the document end up?)

■ ‘Rejected’ is not a reason

■ Role of the Superintendent – risks and benefits?
Timeframes
Timeframes under the basic BIF Act process

1 Reference date (as per contract)

2 Payment claim (from each reference date)

3 Payment schedule (within ‘response period’)

4 Adjudication application (30 business days after payment schedule received*)

5 Adjudication response (10 to 15 business days after adjudication application received**)

6 Adjudicator’s decision (10 to 15 business days after receiving adjudication response**)

Adjudicated amount payable (5 business days after adjudicator’s decision)

* Generally speaking, but depends on circumstances
** Depends on whether payment claim is standard or complex
Project Bank Accounts (PBAs)
PBAs - Overview

Nature

☑ trust accounts set up by head contractor (trustee)
☑ general trust account; retention account and dispute funds account
☑ beneficiaries – head contractor and first tier subcontractor (assuming not a related entity) (includes ‘suppliers’ of specified items)

Timing

☑ implemented in two phases:
  — phase 1 (trial) – commenced on 1 March 2018
  — phase 2 – possibly from 1 January 2019
☑ value of contract price for phase 1 ($1-10m including GST)
☑ value of contract price for phase 2 ($1m+ including GST)
  — cannot artificially split contracts (unless separate tender processes conducted)
PBAs - Overview

Projects to which it applies

- Phase 1
  - State
  - ‘State authority’ which have opted-in (presumably by contract)
  - Local governments can opt in

- Phase 2
  - State and State authority
  - Private sector

The building contract:

- must be for ‘building work’ – ‘building’ defined as ‘fixed structure that is wholly or partly enclosed by walls or is roofed’
- must have more than 50% of contract for ‘building work’
PBAs - Overview

- Regulations relevant to PBAs (both commence 1 March 2018):
  - Building Industry Fairness (Security of Payment) *(Transitional)* Regulation 2018 (expires 1 March 2019)
  - Building Industry Fairness (Security of Payment) Regulation 2018 *(BIF Regulation)*

- BIF Regulation - expands definition of building work to include:
  - Erection, management and removal of scaffolding for building work
  - Building certifying function work (as per meaning in Building Act 1975 s10)
  - Assessment of the energy efficiency of a building under Building Code of Australia and Queensland Development Code
  - Work carried out by architects, registered professional engineers and surveyors for building work

- BIF Regulation – prescribes what is **not** building work:
  - Construction, maintenance or repair of a busway, road or railway
  - Construction, maintenance or repair of a tunnel for a busway, road or railway
  - An authorised activity for a resource authority (see Mineral and Energy Resources *(Common Provisions)* Act 2014, schedule 2)
QBCC Act implications
Reforms to QBCC Act – Penalties

- Failure to respond to a payment claim
  - up to 100 penalty units may apply
  - ground for disciplinary action under the QBCC Act

- Failure to pay adjudicated amount
  - up to 200 penalty units may apply
  - ground for disciplinary action under QBCC Act

- Unlicensed building work
  - first strike – up to 250 penalty units may apply
  - second strike – up to 300 penalty units may apply
  - third strike or ‘tier 1 defective work’ – 350 penalty units may apply or imprisonment
Reforms to QBCC Act – Who enforces the penalties?

- How will the Commissioner know that you have breached the BIF Act?

- You may be audited and required to show copies of the claims received from subcontractors, suppliers and consultants, and evidence of when they were paid and/or a payment schedule was issued by you in reply.

- Under s 190 of the BIF Act, a prosecution ‘may only be started by a person authorised in writing by the Commissioner, either generally or in a particular case, to start the prosecution.’

- Infringement notices can be issued by an investigator appointed under the QBCC Act, pursuant to the State Penalties Enforcement Regulation 2014 (Qld).

- All penalties recovered shall be paid to the Commission.
The BIF Act introduces:

- a new offence for not including “mandatory contract conditions” in a building contract; and

- a new offence for including “prohibited contract conditions” in a building contract.

These mandatory and prohibited conditions are yet to be defined.

**s 67GA, QBCC Act:** A building contractor must not enter into a building contract that does not include conditions (mandatory conditions) prescribed by regulation for inclusion in that type of building contract.

- Maximum penalty is 80 penalty units.

**s 67GB, QBCC Act:** A building contractor must not enter into a building contract that includes a prohibited condition (prohibited conditions) prescribed by regulation.

- Maximum penalty is 80 penalty units.
Q&A