



## WHITE PAPER

October 2020

### Amendments to Queensland Security of Payment Legislation

The security of payment regime in Queensland has undergone significant reform in recent years. Since the introduction of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld), the regime has remained the subject of scrutiny and review, resulting in the recent passage of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (Qld) (“BIFOLA Act”). The BIFOLA Act introduces significant changes such as the replacement of Project Bank Accounts with a new Project Trust Account framework, and new protections for claimants where the respondent has failed to pay an adjudicated amount.

Under the reforms, head contractors will no longer be exempt from the requirement to hold an appropriate building licence and will be required to submit a supporting statement confirming payment of all subcontractors with any payment claim. The number of these reforms have already begun to take effect. With the amendments introducing additional penalties for noncompliance, it is imperative that all industry participants begin to familiarise themselves with the new regime.

To assist in preparing for the impending changes, this *White Paper* discusses the major reforms, the timing for their commencement and the potential practical consequences for your business.

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## INTRODUCTION

On 15 July 2020, the Queensland Government passed the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020 (Qld)* (“BIFOLA Act”), which received assent on 23 July 2020. This legislation is the culmination of several years of review of the security of payment regime in Queensland and will institute significant changes to the *Building Industry Fairness (Security of Payment) Act 2017 (Qld)* (“BIF Act”). These reforms largely reflect the recommendations of the Building Industry Fairness Reforms Implementation and Evaluation Panel (“Panel”)<sup>1</sup> and of the Special Joint Taskforce investigation into subcontractor non-payment in the Queensland building industry (“Taskforce”).<sup>2</sup>

Consistent with the main purpose of the BIF Act of “helping those in the building and construction industry to be paid for the work they do”,<sup>3</sup> the BIFOLA Act introduces the following key reforms:<sup>4</sup>

- Replacing Project Bank Accounts with “Project Trusts” or “Project Trust Accounts” (“PTA” or “PTA Framework”) and undertaking a phased implementation of the revised trust account framework to the private sector;
- Requiring a head contractor to provide a supporting statement to the principal along with any payment claim, which must state that all subcontractors have been paid, or if they have not been paid, the reasons for this;
- Providing more protection to claimants where the respondent has failed to pay an adjudicated amount when due, by enabling a claimant to:
  - Lodge a payment withholding request to the higher party in the contracting chain (i.e., the head contractor or the financier); or
  - Place a charge on land, if the respondent owns the land on which the relevant building work took place;
- Introducing additional offences and increased penalties for failure to comply with the legislation, including in relation to progress payments;
- Bestowing increased audit powers on the Queensland Building and Construction Commissioner (“Commissioner”) to audit compliance with the new PTA Framework, as well as progress payment and adjudication matters; and
- Removing the exemption for head contractors from the requirement to hold a contractor’s licence of the appropriate kind to undertake building work.

On 27 August 2020, a proclamation was issued under each of the BIFOLA Act and the BIF Act setting forth the dates of commencement for the various reforms.<sup>5</sup> On 1 October 2020, provisions of the BIFOLA Act relating to progress payments under the BIF Act commenced, including the requirement for the supporting statement and the new enforcement measures. The new PTA Framework will come into operation from 1 March 2021,<sup>6</sup> applying initially to eligible State Government building contracts with a contract price between \$1 million and \$10 million. The PTA Framework will then extend its coverage through a phased implementation before ultimately applying to all eligible building and construction contracts with a contract price of \$1 million or more from 1 January 2023.<sup>7</sup> The *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2020* (“BIFOLA Regulation”), published on 1 October 2020,<sup>8</sup> provides the supporting detail for the new PTA Framework and will also commence on 1 March 2021.<sup>9</sup>

As these significant reforms begin to take effect, it will be important for both principals and contractors to take steps to prepare for, and adapt to, the new regime. This *White Paper* provides a summary of the amendments and highlights the changes most likely to impact your business.

Each of these major amendments, the timing for commencement and their potential practical consequences are discussed in further detail below.

## THE NEW PROJECT TRUST FRAMEWORK

### Overview

From 1 March 2021, Project Bank Accounts will be replaced with the new PTA Framework, which comprises Project Trusts and Retention Trusts.

These reforms implement the 20 recommendations made by the Panel, which can be summarised in three broad categories of measures designed to:

1. Simplify the framework;
2. Improve the protections and oversight; and
3. Manage the financial transition.<sup>10</sup>

Statutory trusts must be established for particular contracts related to the building and construction industry, with the

intention of ensuring that funds paid to contracted parties (i.e., the party who is required to perform the work under the contract, whether personally or by directly or indirectly causing the work to be carried out)<sup>11</sup> are held in trust to protect the interests of subcontractors.<sup>12</sup>

The amendments are intended to simplify the current project bank account system. Instead of requiring three trust accounts per eligible contract, one PTA is required, and where a head contractor holds cash retentions, only one retention trust account is required per head contractor, rather than one per project.<sup>13</sup> The requirement for a disputed funds account has been removed, with the new offences and enforcement options granted to claimants in respect of unpaid adjudicated amounts to fulfil the role of protecting subcontractors.

The amendments also attempt to reduce operating costs for principals, by shifting the onus of trust account oversight to the QBCC, which will be granted increased regulatory functions, including audit powers over trust accounts.<sup>14</sup>

The operation of Project Trusts and Retention Trusts is explained below.

## PROJECT TRUSTS

From 1 March 2021, PTAs will need to be established for contracts where:

- The contracting party (i.e., the party to the contract for whom the work is to be carried out)<sup>15</sup> is the State where the value of the contract price is \$1 million or more, but no more than \$10 million, and more than 50% of the contract price is for “project trust work”;<sup>16</sup>
- The contracting party is a State authority that has decided a project trust is to be established for the contract, the contract price is \$1 million or more, and more than 50% of the contract price is for project trust work;<sup>17</sup>
- An amendment is made to a contract (which was not previously eligible for a project trust), and the amendment makes the contract eligible for a project trust. However, if the amendment is only an increase in the contract price, a

project trust is required for the contract only if the amendment increases the original contract price by 30% or more;<sup>18</sup> and

- It is a type of contract prescribed by a regulation.<sup>19</sup> This provision is intended to allow for future flexibility. At the time of this publication, there are currently no indications of any particular circumstances to be prescribed.<sup>20</sup>

The “contract price” means the amount the contracted party is entitled to be paid under the contract (excluding GST) or, if the amount cannot be accurately calculated, the reasonable estimate of the amount the contracted party is entitled to be paid under the contract.<sup>21</sup> Where the same parties enter into multiple contracts for carrying out project trust work at the same site or adjacent sites, the separate contracts are taken to be a single contract for the purposes of assessing whether a project trust is required.<sup>22</sup>

“Project trust work” is defined by section 8A of the amended BIF Act, which replaces the previous definition of “building work”. The intent of the amendment is to align with the definition of “building work” in the *Queensland Building and Construction Commission Act 1991* (“QBCC Act”), while also providing clarity and certainty for industry on the work for which a project trust is required.<sup>23</sup> The newly defined “project trust work” includes, for example, work for the erection or construction of a building; the renovation, alteration, extension, improvement or repair of a building; and site work or earthmoving and excavating that is associated with a building. The definition also includes work prescribed by regulation, which, from 1 March 2021, will include the management and removal of scaffolding if the scaffolding is used for carrying out other project trust work.<sup>24</sup> Under the amended BIF Regulation, the construction, maintenance or repair of a busway, road or railway, or a tunnel for any of the foregoing, and authorised activities under the *Mineral and Energy Resources (Common Provisions) Act 2014* are excluded from the definition of “project trust work”.<sup>25</sup>

Under the amended BIF Act, the contracted party, as the party who controls the PTA, is the trustee and will usually be the head contractor.<sup>26</sup> The contracted party is also a beneficiary.<sup>27</sup> Other beneficiaries of the project trust are subcontractors whose subcontract is for “protected work” or related services,

where the subcontract price is at least a minimum contract price to be prescribed by regulation.<sup>28</sup> “Protected work” is broadly defined under s 8B. While it includes a wide range of building work and will likely capture most subcontractors, the amendments provide the important limitation that only first-tier subcontractors<sup>29</sup> are beneficiaries. For a subcontractor beneficiary, the beneficial interest in the trust is an amount the subcontractor is entitled to be paid under its subcontract, and for the contracting party, as beneficiary, it is the remainder of the trust.<sup>30</sup>

The BIFOLA Act carves out specific exemptions for types of contracts for which project trusts will *not* be required, specifically:

- Contracts for professional design, advisory or contract administration work;<sup>31</sup>
- Contracts with less than 90 days until practical completion;<sup>32</sup>
- Contracts for small-scale residential work (i.e., residential construction work for less than three living units);<sup>33</sup> and
- Contracts for maintenance work, where “maintenance work” means testing, taking samples and work required to prevent deterioration, restoring or replacing a component, but does not include improving a building to increase its capabilities or functions, or a refurbishment or replacement of a building that extends the life of a building.<sup>34</sup>

For contracts where a project trust is required, all payments from the contracting party must be deposited into a PTA, including:<sup>35</sup>

- Amounts paid in accordance with the terms of the contract; and
- Amounts under dispute either because of an adjudication of a disputed progress payment or final and binding dispute resolution process relating to the contract.

## RETENTION TRUST

The amendments require a retention trust account to be established if:<sup>36</sup>

- Retention amounts are to be withheld from payment under a contract (i.e., the “withholding contract”);
- The withholding contract is a head contract or a first-tier subcontract for a head contract;
- The contracting party withholds the retention amount in the form of cash; and
- A project trust is required for the head contract.

This amendment has broadened what is considered a retention trust and extends the protections for retentions withheld by removing the link to a “building contract” as defined under the QBCC Act, which excludes electricians, architects, engineers and other professionals.<sup>37</sup>

Retention amounts deposited into the retention trust account are primarily for the benefit of the party who will be entitled to the retention amount.<sup>38</sup> Under the amendments, the beneficiaries of the trust are the contracting party and the contracted party.<sup>39</sup> The contracting party is also the trustee. For the contracted party, the beneficial interest is in all retention amounts that were withheld from payment to the contracted party, and for the contracting party is the amount held in the trust after subtracting the retention amounts.<sup>40</sup>

Retention trust accounts operate in a similar manner to the PTAs and include similar offences for noncompliance with the requirements for establishment and operation (e.g., deposits and withdrawals). The penalties in relation to these offences are discussed below. The amendments will also make it compulsory for the trustee, or whomever the trustee has nominated as responsible for administering the retention trust on its behalf, to undertake retention trust training in a form to be prescribed by regulation.<sup>41</sup>

The amended retention trust requirements commence on 1 March 2021 and will apply to projects based on the eligibility criteria set out for the phased implementation of the new statutory trust scheme

## COMMENCEMENT DATES FOR THE NEW PTA FRAMEWORK

The new PTA Framework is to be implemented in phases, with each phase commencing from the dates shown below:

<b>PHASE 1</b> 1 March 2021	PTA requirements apply to State Government contracts between \$1 million and \$10 million.
<b>PHASE 2A</b> 1 July 2021	PTA requirements will extend to State Government and Hospital and Health Services' contracts where the contract price is \$1 million or more.
<b>PHASE 2B</b> 1 Jan. 2022	PTA requirements will apply to private sector, local government, statutory authorities' and government-owned corporations' contracts where the contract price is \$10 million or more and more than 50% of the contract price is for "project trust work".
<b>PHASE 3</b> 1 July 2022	The \$10 million or more restriction for the private sector and local government will be reduced, and the PTA requirements will apply where the contract price is \$3 million or more.
<b>PHASE 4</b> 1 Jan. 2023	PTA requirements will apply to all building and construction contracts where the contract price is \$1 million or more and where more than 50% of the contract price is for project trust work.

## PENALTIES UNDER THE NEW PTA FRAMEWORK

The amendments retain and expand on the serious offences in relation to the PTA Framework, with the amended provisions based on existing BIF Act offences and those under other trust legislation.<sup>42</sup> These offences provide for significant maximum penalties, including prison time. The penalties under the amended BIF Act are maximums only, and the courts retain their discretion to impose lesser penalties in reflection of the nature of the breach and any mitigating circumstances. However, the severity of the maximum penalties drives home Parliament's intention to strongly deter noncompliance and emphasise to industry and the community the seriousness of the offences under the legislation.<sup>43</sup>

The BIFOLA Act also introduces a new s 58A to the BIF Act which provides for executive liability in respect of certain "executive liability" provisions. "Executive officer" is defined

broadly as a person who is concerned with, or takes part in, the corporation's management, whether or not that person is a director or his or her position is given the name of executive officer.<sup>44</sup> The amended BIF Act provides that an executive officer commits an offence where the corporation commits an offence against an executive liability provision and the officer did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence. The executive liability provisions are those prescribing offences for a failure to open and properly administer a project trust or retention trust account.<sup>45</sup>

Concerns over the scope of the definition of "executive officer" and the meaning of "taking all reasonable steps" were raised in submissions to Parliament's Transport and Public Works Committee in its review of the BIFOLA Bill.<sup>46</sup> The provision was ultimately retained, presumably due to the Department of Housing and Public Works' view, as reported to the Committee,

that the executive liability applies to only a small number of offences, which were chosen based on the seriousness of non-compliance, is consistent with the QBCC Act<sup>47</sup> and is an important anti-avoidance provision.<sup>48</sup>

While the penalty provisions in relation to the new statutory trust regime, including the new provision for executive liability, commence on 1 March 2021,<sup>49</sup> parties will be liable for such penalties only from the time that their project becomes eligible for the project trust framework under the phased implementation depicted in the chart above. For example, parties to a non-government building and construction contract with a contract price of \$1 million will not be subject to these penalties until Phase 4 commences from 1 January 2023. The current obligations and associated penalties under the BIF Act's project bank account regime will continue to apply up until implementation of the new system.

Accordingly, it is of vital importance that businesses in the building and construction industry, and their executive officers, understand the new obligations and the date from which they will apply, including by seeking personalised advice.

[Table 1 of the Schedule](#) to this *White Paper* provides a summary of the key penalties associated with the PTA Framework, including the executive liability provisions, as well as other penalties under the amended BIF Act.

## **OTHER AMENDMENTS TO THE BIF ACT— PROGRESS PAYMENTS**

### **Overview**

The following changes commenced on *1 October 2020*:<sup>50</sup>

- A new requirement for head contractors to provide a supporting statement along with any payment claim;
- Enhanced enforcement avenues for claimants to recover adjudicated amounts, including the ability to submit a payment withholding request to the higher party in the contracting chain (requiring the higher party to retain a sufficient amount to cover payment of the adjudicated amount) or place a charge over the amount retained by the higher party; and
- New offences and increased penalties for noncompliance.

[Table 2 in the Schedule](#) provides a summary of the updated offences and the current value of the penalties associated with the progress payment process which may be imposed under the amended BIF Act. This includes the creation of an offence where a respondent who has been given a payment claim pays less than the amount stated in a payment schedule,<sup>51</sup> which was recommended by the Panel to deter underpayment of agreed amounts.<sup>52</sup>

### **Head Contractor to Provide Supporting Statement**

Significant among the progress payment reforms is the introduction of a requirement for a head contractor to provide a supporting statement with its payment claim.<sup>53</sup> This provision is a direct response to the Taskforce's recommendation to create a legal obligation to this effect for head contractors.<sup>54</sup>

The "supporting statement" is a written document declaring that all subcontractors have been paid all amounts owed to them by the claimant at the date of the payment claim. For any subcontractor who has not been paid the full amount owed to them at that date, the supporting statement must state:<sup>55</sup>

- The subcontractor's name;
- The amount still unpaid;
- The details of the unpaid payment claim for the subcontractor;
- The date the subcontractor carried out the construction work or supplied the related goods and services; and
- The reason the amount was not paid in full.

Failure to provide a supporting statement does not affect the validity of a payment claim.<sup>56</sup> However, failure to include the supporting statement will be an offence under the amended BIF Act, carrying a maximum penalty of 100 penalty units. A penalty of the same magnitude is also imposed on a head contractor or principal for failure to pay the amount proposed in a payment schedule by the due date for the progress payment to which the payment schedule relates.<sup>57</sup>

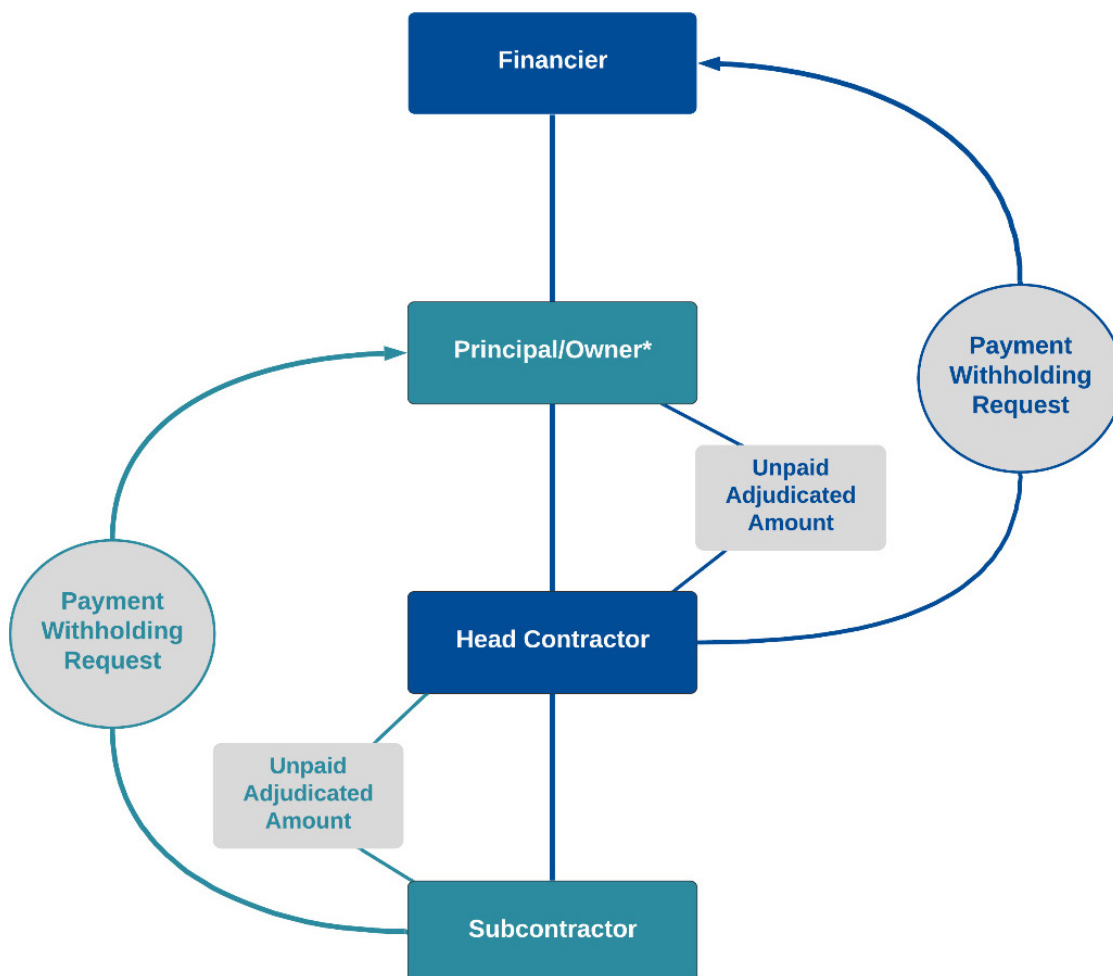
## ENHANCED ENFORCEMENT OPTIONS FOR CLAIMANTS

The BIFOLA Act also makes available to claimants new avenues for ensuring payment of an adjudicated amount, including for claimants to make a payment withholding request<sup>58</sup> and to place a charge over land.<sup>59</sup> These new remedies apply only where a claimant has obtained an adjudication decision requiring the respondent to pay an adjudicated amount and the respondent has not paid that amount.<sup>60</sup>

### Payment Withholding Request

The amendments allow a claimant to submit a “payment withholding request” to the “higher party” in the contractual chain.<sup>61</sup> The higher party is either the financier, where the claimant is the head contractor, or the head contractor/principal/owner where the claimant is a subcontractor.<sup>62</sup> The two scenarios where a payment withholding request may be submitted are depicted in the chart below.

The obligation on the higher party to withhold funds applies only to the extent that an amount is payable to the respondent by the higher party, and the higher party is required only to withhold the lesser of such amount payable to the respondent or the adjudicated amount.<sup>63</sup> For example, if the adjudicated amount is \$55,000 but the amount payable to the respondent by the higher party is only \$40,000, the higher party's obligation is to retain \$40,000. If the adjudicated amount is \$55,000 and the amount payable to the respondent is \$120,000, the higher party's obligation is to retain \$55,000.



\*Note that the claimant may not give a payment withholding request to a higher party that is a resident owner.



The higher party faces a maximum penalty of 50 penalty units for failure to retain the required amount.<sup>64</sup> In addition, the higher party also becomes jointly and severally liable with the respondent for the adjudicated amount, but with the express provision that the higher party may recover from the respondent any amount that the claimant recovers under such joint or several liability.<sup>65</sup> The BIFOLA Act provides some protection to the higher party such that the obligation to retain an amount in compliance with a payment withholding request operates as a defence to an action for recovery of the amount payable by the respondent. Any period during which the higher party retains the amount is also not to be taken into account when working out any period for which that amount has gone unpaid to the respondent.<sup>66</sup>

In addition to the obligation on the higher party to retain the amount, the amount is also subject to a statutory charge in favour of the claimant.<sup>67</sup> The claimant may enforce the charge as if it had been given to the claimant under a written agreement with the higher party and any act done to defeat the charge is ineffective as against the claimant.<sup>68</sup> The charge over the amount expires if: the respondent pays the adjudication amount; the adjudication decision is set aside and the respondent pays into court security for the unpaid portion pending a final decision; or the court dismisses proceedings for enforcement following filing of the adjudication certificate as a judgment for debt.<sup>69</sup>

### Greater Security of Payment—The New Charge Over Property

A second significant means of enforcement is granted to head contractor claimants through the new chapter 3, part 6A. The provisions of this part allow a head contractor, who is a claimant, to register a charge over property for an amount unpaid under an adjudication certificate which the claimant has filed as a judgment debt,<sup>70</sup> providing security to the claimant for of the adjudicated amount.<sup>71</sup> The charge may be registered only where the respondent or a related entity<sup>72</sup> is the registered owner of the property on which the construction work was carried out or to which the related goods and services were supplied.

The charge remains in place for 24 months unless extended by the court.<sup>73</sup> The charge also expires if the underlying adjudication is set aside,<sup>74</sup> if, pending the final decision, the respondent pays the unpaid portion of the adjudicated amount that is the

subject of the charge into court as security;<sup>75</sup> or if the court dismisses any enforcement proceeding.<sup>76</sup> If the charge expires or the adjudicated amount is paid to the claimant, the claimant must, as soon as practicable, lodge a request to release the charge with the Registrar of Titles.<sup>77</sup> The maximum penalty for failure to do so is 100 penalty units. The claimant may apply to the court to enforce the charge by seeking an order that the property be sold. The registered owner of the property may also apply to the court to set aside the charge.<sup>78</sup>

The penalties introduced in relation to the payment withholding request and charge over property are summarised in [Table 3 of the Schedule](#).

## INCREASED REGULATORY OVERSIGHT

In addition to enhanced enforcement and penalty provisions, the BIFOLA Act also seeks to ensure compliance with the BIF Act through increased regulatory oversight. These amendments will remove the principal's viewing rights and step-in ability, as these were considered likely to be ineffective when implemented in the private sector.<sup>79</sup> Instead, the BIFOLA Act vests the Commissioner with the power to approve an audit program under which the QBCC may audit compliance with the BIF Act.<sup>80</sup> Importantly, the audit may relate not only to the PTAs, but to progress payment and adjudication matters as well. These new audit provisions are to be inserted as a new Chapter 5, Part 3 in the BIF Act,<sup>81</sup> which took effect from 1 October 2020.<sup>82</sup>

Under these new provisions, the QBCC may, by written notice, request that a person provide access to documents to assist in such an audit.<sup>83</sup> Failure to comply with the request within the stated period may attract a maximum penalty of 100 penalty units.<sup>84</sup> That compliance with this requirement might tend to incriminate the individual is not a reasonable excuse for noncompliance.<sup>85</sup> The BIFOLA Act does, however, provide that where an individual has given the Commissioner access to, or copies of, such records, evidence of the document is not admissible against the individual in any proceeding to the extent that it tends to incriminate the individual or expose him or her to a penalty in the proceeding.<sup>86</sup> This does not, however, apply to a proceeding about the false or misleading nature of any information in the document.<sup>87</sup>

## AMENDMENT TO QBCC ACT: CHANGE TO LICENCING REQUIREMENTS

Under the BIFOLA Act amendments, head contractors will no longer be exempt from holding a licence to carry out building work where the building work is subcontracted out to a licensed person. The date for commencement of this amendment has not yet been proclaimed.<sup>88</sup>

Unless an exemption applies, it is an offence to carry out, or undertake to carry out (i.e., tender or enter into a contract to carry out) building work without a contractor's licence of the appropriate class.<sup>89</sup> Under the QBCC Act, "carry out" building work means to carry out the work personally, to directly or indirectly cause the work to be carried out or to provide building work services for the work.<sup>90</sup> To "undertake to carry out" building work means to enter into a contract, submit a tender or make an offer to carry out the building work.

Prior to the amendments, the QBCC Act contained an exemption for head contractors to "carry out" certain building work without a contractor's licence.<sup>91</sup> Under the "head contractor's exemption", an unlicensed person (or entity) could do the following without contravening section 42(1):

- Enter into a contract to carry out building work if the building work is not residential construction work or domestic building work, and the work is to be carried out by an appropriately licensed person;<sup>92</sup> or
- Directly or indirectly cause building work to be carried out by an appropriately licensed contractor; or
- Enter into another contract, with an appropriately licensed contractor, to carry out the work.<sup>93</sup>

Under the BIFOLA Act, these exemptions will be removed.

Removal of this exemption was recommended by Parliament's Transport and Public Works Committee. In submissions to that Committee, which were accepted, certain stakeholders<sup>94</sup> expressed the view that head contractors should be appropriately licensed<sup>95</sup> and that the exemption potentially undermines the provisions in relation to payment of subcontractors.<sup>96</sup> The exemption was considered no longer necessary, having originally been introduced to allow for public-private partnerships and prescribed government projects that are now sufficiently provided for by other exemptions.<sup>97</sup>

## What Does the Removal of the Exemption Mean for Head Contractors?

Once these amendments commence, head contractors who enter into contracts or subcontracts for projects that contain building work for which they do not hold the appropriate licence may be in breach of section 42(1) of the QBCC Act.

However, the following exemptions remain under the QBCC Act:

- An unlicensed person who submits a tender, or makes an offer, to carry out building work does not contravene section 42(1) merely because the person submits the tender or makes the offer, if the building work is not residential construction work or domestic building work and is to be carried out by a person who is licensed to carry out building work of the relevant class;<sup>98</sup>
- In respect of a special purpose vehicle that undertakes to carry out building work under a public-private partnership;<sup>99</sup> and
- For an unlicensed person who undertakes to carry out building work for a government project prescribed by regulation.<sup>100</sup>

Further, if the whole scope of the work falls under one of the many exclusions listed in schedule 1 of the *Queensland Building and Construction Commission Regulation 2018*, it will not be characterised as "building work" for licensing purposes under the QBCC Act.<sup>101</sup> This includes, for example:

- Work performed by architects, engineers, licensed surveyors;
- Work performed by the Commonwealth, State, local governments (or their agencies), charities or community organisations;
- Works for water reticulation systems, sewerage systems or storm water drains (except for works connecting a particular building to a main);
- Works on busways, roads and tunnels, public bridges;
- Works for railway tracks, airport runways, dams;
- Work on harbours, wharfs and other maritime structures;
- Construction work in mining;
- Installation of manufacturing equipment;
- Erecting scaffolding; and
- Earthmoving and excavating.

## Impact of Carrying Out Building Works Without a Licence

The unlawful carrying out of building work carries serious penalties: 250 penalty units for a first offence, 300 penalty units for a second offence and 350 penalty units or one year's imprisonment for a third or further offence, or if the building work carried out is tier 1 defective work.<sup>102</sup> In the last case, the person also commits a crime.<sup>103</sup> These penalties are summarised in [Table 4 of the Schedule](#).

Additionally, a person who carries out unlicensed building works is not entitled to be compensated for that work and is limited to claiming reasonable remuneration for carrying out the building work, but only if the amount claimed does not, in substance, benefit the unlicensed person.<sup>104</sup>

That is, unlicensed contractors can claim any amounts paid for supplying materials and labour, but cannot claim:

- An allowance for supply of their own labour;
- Any profit; or
- Any costs that were not reasonably incurred.

Carrying out, or offering to carry out, building work without the appropriate licence may also expose contractors to the risk that any contract entered into for that building work is unlawful and void. This has the further effect of disentitling the contractor from seeking the benefits of the progress payment regime under the BIF Act.<sup>105</sup>

Civil contractors tendering for projects which involve carrying out building works for which a licence is required under the QBCC Act should attempt to obtain the appropriate licence before entering into the contract or entering into any subcontracts to carry out any of the works, or obtain advice as to whether a licence is required before proceeding.

## CONCLUSION

Entry into force of the reforms set forth in the BIFOLA Act will mark a new chapter in the security of payment regime in Queensland. Whether looking to make use of the new provisions or defend against them, all businesses in the construction sector will need to ready themselves for these new requirements, the first of which are now already in force.

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## SCHEDULE: PENALTIES

As detailed in the *White Paper*, the BIFOLA Act amendments provide for a number of significant penalties. The following tables provide a summary of the key offence provisions and related maximum penalties under the BIF Act and the QBCC Act in relation to:

- **Table 1:** the statutory trust framework;
- **Table 2:** the progress payment regime;
- **Table 3:** the new payment withholding request and charge over land; and
- **Table 4:** licensing requirements.

The provisions in Table 1 which are in bold text and bear an asterisk are those for which executive liability may apply under s 58A of the amended BIF Act.

<b>Table 1. Penalties in Relation to the Statutory Trust Framework</b>			
<b>Section<sup>106</sup></b>	<b>Description of Offence</b>	<b>Maximum Penalty<sup>107</sup></b>	<b>Dollar Amount</b>
	<b>In Relation to Project Trusts</b>		
	<b>For the Contracting Party</b>		
19(1)–19(2)*	The contracting party fails to deposit into the PTA an amount paid: <sup>108</sup> <ul style="list-style-type: none"> <li>• in accordance with the terms of the contract;</li> <li>• because the contracting party is liable under section 77 to pay the amount to the contracted party in connection with the contract;</li> <li>• under chapter 3, part 4 because of an adjudication of a disputed progress payment relating to the contract;</li> <li>• because of a final and binding dispute resolution process relating to the contract;</li> <li>• because of a court order relating to the contract;</li> <li>• for any other reason that reduces the unpaid amount of the contract price for the contract.</li> </ul>	200	\$26,690.00
24	The contracting party fails to inform the Commissioner within five days after the contracting party first becomes, or ought reasonably to have become, aware that a subcontractor beneficiary is a related entity for the contracted party. <sup>109</sup>	50	\$6,672.50
24A	The contracting party fails to report to the Commissioner that a PTA has not been opened as required, where it knows or ought reasonably to know.	100	\$13,345.00
	<b>For the Contracted Party</b>		
18(1)*	The contracted party fails to open an account at a financial institution for the project trust in accordance with the following requirements: <ul style="list-style-type: none"> <li>• the PTA must be opened within 20 business days after: <ul style="list-style-type: none"> <li>– entering into the first subcontract for the contract; or</li> <li>– after an amendment to the contract that results in the contract requiring a project trust;</li> </ul> </li> <li>• the PTA must not be a virtual account or subordinate to any other account at a financial institution;</li> <li>• there must not be more than one PTA for the project trust;</li> <li>• a provision of a contract provides that the PTA must be opened less than 20 business days after the contract is entered into is of no effect.</li> </ul>	500	\$66,725.00
19(4)	The contracted party fails to deposit into the PTA any amount paid to it or its agent in contravention of the deposit obligation as soon as practicable after receipt.	200 or two years' imprisonment	\$26,690.00

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**Table 1. Penalties in Relation to the Statutory Trust Framework**

Section <sup>106</sup>	Description of Offence	Maximum Penalty <sup>107</sup>	Dollar Amount
20	The contracted party fails to pay an amount it is liable to pay to a subcontractor beneficiary from the PTA and to the account nominated by the beneficiary.	200 or one year's imprisonment	\$26,690.00
20C(3)	The contracted party fails to inform the Commissioner of a payment made pursuant to s 20C(2) as soon as practicable after making it. <i>Note: Where certain conditions are satisfied, s 20C permits the reduction of payments to be made to subcontractor beneficiaries in proportion to the amounts liable to be paid where the contracted party is liable to pay two or more subcontractor beneficiaries and there is an insufficient amount in the PTA.</i>	100	\$13,345.00
20C(4)	The contracted party makes a payment to a subcontractor beneficiary other than in accordance with s 20C(2) where there continues to be an insufficient amount held in the PTA.	100 or one year's imprisonment	\$13,345.00
23	The contracted party fails to give each subcontractor a notice of project trust: <ul style="list-style-type: none"> <li>• in writing;</li> <li>• which includes a statement that a project trust will be used for making payments to the subcontractor and other information prescribed by regulation;</li> <li>• within 10 days of the establishment of the trust, or before entry into the subcontract if the project trust is already established.</li> </ul>	200 or one year's imprisonment	\$26,690.00
<b>For the Trustee</b>			
18A	The trustee fails to ensure that: <ul style="list-style-type: none"> <li>• the PTA is held at an approved financial institution;</li> <li>• the PTA is held under a name that includes the trustee's name and the word "trust";</li> <li>• deposits of amounts to, and withdrawals from, the PTA are made using only methods that create an electronic record of the transfer.</li> </ul>	For each:  200	\$26,690.00
18B	The trustee fails to give to the contracting party and the Commissioner a notice within five business days of taking one of the following actions: <ul style="list-style-type: none"> <li>• opening the PTA;</li> <li>• changing the name of the PTA;</li> <li>• closing the PTA;</li> <li>• transferring the PTA.</li> </ul>	200	\$26,690.00
18C	The trustee transfers the PTA to an alternative financial institution where: <ul style="list-style-type: none"> <li>• the alternative institution is not an approved financial institution;</li> <li>• not all of the amounts held in the PTA are transferred to the alternative financial institution; or</li> <li>• the trustee fails to inform the contracting party, the Commissioner and the subcontractor beneficiaries.</li> </ul>	200	\$26,690.00

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**Table 1. Penalties in Relation to the Statutory Trust Framework**

Section <sup>106</sup>	Description of Offence	Maximum Penalty <sup>107</sup>	Dollar Amount
19A	The trustee causes an amount to be deposited into the PTA for a purpose other than: <ul style="list-style-type: none"> <li>• paying the trustee, as the contracted party, an amount the contracting party must deposit into the account under section 19(2); or</li> <li>• paying a subcontractor beneficiary an amount the contracted party is liable to pay the beneficiary in connection with its subcontract; or</li> <li>• repaying an amount withdrawn from the account in error; or</li> <li>• making another payment prescribed by regulation.</li> </ul>	200 or one year's imprisonment	\$26,690.00
20A(1)*	The trustee withdraws an amount from the PTA for a purpose other than: <ul style="list-style-type: none"> <li>• paying a subcontractor beneficiary an amount the contracted party is liable to pay the beneficiary; or</li> <li>• paying the trustee, as the contracted party, an amount the contracting party is liable to pay the contracted party but only to the extent the contracted party is not also liable to pay a subcontractor beneficiary for the same work; or</li> <li>• returning an amount paid in error by the contracting party; or</li> <li>• depositing a retention amount into a retention trust account; or</li> <li>• making payment relating to the contract in accordance with an adjudication; or</li> <li>• making payment relating to the contract as ordered by a court; or</li> <li>• making another payment prescribed by regulation.</li> </ul>	300 or two years' imprisonment	\$40,035.00
20A(2)*	The trustee fails to repay all amounts it withdraws in contravention of s 20A(1) as soon as practicable after becoming aware that the withdrawal was in contravention.	300 or two years' imprisonment	\$40,035.00
20B*	A trustee withdraws an amount from the PTA to pay itself, or to make another payment prescribed by regulation, where there would not be a sufficient amount available in the PTA after the withdrawal to pay all amounts the contracted party is liable to pay the subcontractor beneficiary at the time of withdrawal.	300 or two years' imprisonment	\$40,035.00
23A	The trustee fails, without reasonable excuse, to inform a subcontractor beneficiary within five business days of a withdrawal to make a payment to the subcontractor or to deposit an amount withheld from payment to the subcontractor beneficiary in a retention trust account for the benefit of the subcontractor beneficiary.	100	\$13,345.00
23B	The trustee fails, without reasonable excuse and where the information is not already available to the subcontractor beneficiary and has changed since any previous provision, to give to a subcontractor beneficiary a statement of balance and copies of the transactions, trust records and the supporting statements given to the contracting party with the payment claims made by the trustee as the contracted party.	100	\$13,345.00
	<b>General</b>		
21A	A person purports to dissolve a project trust when there are no longer any subcontractor beneficiaries or the only remaining work to be carried out under the contract is maintenance work.	500 or one year's imprisonment	\$66,725.00

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**Table 1. Penalties in Relation to the Statutory Trust Framework**

Section <sup>106</sup>	Description of Offence	Maximum Penalty <sup>107</sup>	Dollar Amount
	<b>In Relation to Retention Trusts</b>		
	<b>For the Contracting Party</b>		
34(2)*	The contracting party fails to open an account for the retention trust before withholding the retention amount from payment.  Note that a contracting party need only establish one retention trust account for all retention amounts withheld by the party under any number of contracts.	500	\$66,725.00
35(2)	The contracting party fails to ensure that retention amount is held in a retention trust account for the party.	200 or two years' imprisonment	\$26,690.00
35(3)	The contracting party fails to deposit an amount in a retention trust account within five business days after a retention trust is required, where the contracting party had withheld the retention amount before the retention trust was required.	200	\$26,690.00
40	The contracting party fails to give the contracting party a notice about the use of a retention trust, which: <ul style="list-style-type: none"> <li>• is in writing;</li> <li>• includes a statement that the trust will be used for withholding retention amounts under the contract and other information prescribed by regulation.</li> </ul>	200 or one year's imprisonment	\$26,690.00
	<b>For the Trustee</b>		
34A(1)–(3)	The trustee fails to ensure that the retention trust: <ul style="list-style-type: none"> <li>• is held at an approved financial institution;</li> <li>• is held under a name that includes the trustee's name and the word "trust";</li> <li>• deposits of amounts to, and withdrawals from, the retention trust are made using only methods that create an electronic record of the transfer.</li> </ul>	200 500 500	\$26,690.00 \$66,725.00 \$66,725.00
34A(4)	The trustee closes the retention account without all retention amounts having been released to the parties entitled under the relevant contracts or without transferring the account to another financial institution.	200	\$26,690.00
34B	The trustee fails to give the Commissioner notice within five business days after having taken one of the following actions: <ul style="list-style-type: none"> <li>• opens the account;</li> <li>• changes the name of the account;</li> <li>• closes the account;</li> <li>• transfers the account.</li> </ul>	200	\$26,690.00
34C	The trustee transfers the retention trust to an alternative financial institution where: <ul style="list-style-type: none"> <li>• the alternative financial institution is not an approved financial institution; and</li> <li>• not all amounts held in the account are transferred with the account to the alternative financial institution; and</li> <li>• the trustee has not informed all contracted parties, from whom retention amounts held in the account have been withheld, about the transfer as prescribed by regulation.</li> </ul>	200	\$26,690.00

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**Table 1. Penalties in Relation to the Statutory Trust Framework**

<b>Section<sup>106</sup></b>	<b>Description of Offence</b>	<b>Maximum Penalty<sup>107</sup></b>	<b>Dollar Amount</b>
35A	The trustee causes an amount to be deposited into the retention trust account for a purpose other than: <ul style="list-style-type: none"> <li>withholding a retention amount from payment under a contract for which the trustee is the contracting party; or</li> <li>repaying an amount withdrawn in error.</li> </ul>	200 or one year's imprisonment	\$26,690.00
<b>36(1)*</b>	The trustee withdraws an amount from the retention trust account for a purpose other than: <ul style="list-style-type: none"> <li>paying a beneficiary who is a contracted party from whom a retention amount was withheld from payment; or</li> <li>paying the trustee, as contracting party, for the purpose of correcting defects or omissions in contracted work, or otherwise to secure, wholly or partly, the performance of a contract; or</li> <li>paying another person for the purpose of correcting defects or omissions in contracted work.</li> </ul>	300 or two years' imprisonment	\$40,035.00
36(2)	The trustee withdraws an amount from the retention trust to pay the trustee, as contracting party, for the purpose of correcting defects or omissions in contracted work, or to secure the performance of a contract, before the end of the defects liability period.	300 or two years' imprisonment	\$40,035.00
<b>36(3)*</b>	The trustee fails to repay all amounts it withdrew in contravention of s 36(1) as soon as practicable after withdrawing the amount.	300 or two years' imprisonment	\$40,035.00
37A	The trustee purports to dissolve the retention trust before it is dissolved under s 37(1) (where all of the amount has been released to the parties entitled to it under the contract).	500 or one year's imprisonment	\$66,725.00
40A	The trustee fails, without reasonable excuse, to give the contracted party from whom a retention amount was withheld notice of a deposit or withdrawal made by the trustee within five business days.	100	\$13,345.00
40B	The trustee fails, without reasonable excuse and where the information is not already available to the beneficiary and has changed since any previous provision, to give to a beneficiary a statement of balance and copies of the transactions and trust records requested by the beneficiary.	100	\$13,345.00
41	The trustee fails to complete retention trust training or to ensure that a person nominated to administer the retention trust account on behalf of the trustee has completed the retention trust training prescribed by regulation.	Each: 100	\$13,345.00
<b>Penalties Common to Project Trusts and Retention Trusts</b>			
51	The trustee fails to immediately deposit an amount equal to a shortfall in the trust account where there is an insufficient amount available in a trust account to pay an amount due to a beneficiary.	100 or one year's imprisonment	\$13,345.00
51B	The trustee invests the funds held in the trust in any form of investment.	200 or one year's imprisonment	\$26,690.00
52	The trustee fails to keep records for the trusts as required by this section.	300 or one year's imprisonment	\$40,035.00
52A	The trustee fails to complete a bank reconciliation for the trust account within 15 business days after the end of each month.	50	\$6,672.50

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**Table 1. Penalties in Relation to the Statutory Trust Framework**

Section <sup>106</sup>	Description of Offence	Maximum Penalty <sup>107</sup>	Dollar Amount
53B	The trustee fails to comply with a direction from the Commissioner not to withdraw an amount without written approval or to give the Commissioner an account review report.	100	\$13,345.00
57	The trustee fails to engage an auditor to carry out a review of the trust account as required by s 57.	200 or one year's imprisonment	\$26,690.00
57B	The trustee fails to provide the auditor with all trust records requested by the auditor as soon as practicable after the request.	200	\$26,690.00
53A(4)	A person fails to comply with a requirement of the Commission to give stated information or documents relating to the trust account.	100	\$13,345.00
53E	A person, without reasonable excuse, obstructs a special investigator appointed by the Commissioner.	100	\$13,345.00

**Table 2. Penalties in Relation to the Progress Payment Process**

Section	Description of Offence	Maximum Penalty	Dollar Amount
	<b>For Claimants</b>		
75(5B)	Head contractor claimant fails to ensure that a payment claim is accompanied with a supporting statement.	100	\$13,345.00
97(3)	Claimant fails to inform the registrar of withdrawal of its adjudication application as soon as practical after the withdrawal and whether it was withdrawn because discontinued by the claimant or because the amount was paid by the respondent.	20	\$2,669.00
	<b>For Respondents</b>		
76(1)	Respondent fails to respond to a payment claim with a payment schedule within the period under the relevant construction contract or 15 business days after the claim is given to the respondent.	100	\$13,345.00
76(3)	Respondent fails to pay the scheduled amount by the due date for the progress payment.	100	\$13,345.00
90(2)	Respondent fails to pay an adjudicated amount by the due date.	200	\$26,690.00
90(3)	Respondent fails to advise the registrar and provide evidence of making payment of the adjudicated amount within five days after making payment.	20	\$2,669.00

**Table 3. Penalties in Relation to Payment Withholding Request and Charge Over Property**

Section	Description of Offence	Maximum Penalty	Dollar Amount
	<b>For Claimants</b>		
97B(4)	Claimant fails to give a copy of a payment withholding request to the respondent at the same time it gives it to the higher party.	50	\$6,672.50
100D(2)	Claimant fails to lodge a request to release a charge over property where the charge expires or the adjudicated amount the subject of the charge is paid to the claimant.	100	\$13,345.00
	<b>For Respondents</b>		
97F(2)	Respondent fails to comply with the requirement to give the claimant information about the higher party within five business days.	20	\$2,669.00

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**Table 3. Penalties in Relation to Payment Withholding Request and Charge Over Property**

Section	Description of Offence	Maximum Penalty	Dollar Amount
97F(3)	Respondent gives claimant information in purported compliance with the requirement to provide information about a higher party that the respondent knows is false or misleading in a material particular.	100	\$13,345.00
	<b>For the Higher Party</b>		
97B(5)	A person who is not the higher party for an adjudicated amount fails to advise the claimant that it is not the higher party within five business days after receiving the payment holding request.	50	\$6,672.50
97C(2)	A higher party fails to retain the lesser of the adjudicated amount or the related amount payable to the respondent.	50	\$6,672.50

**Table 4. Penalties in Relation to the QBCC Act Licensing Requirements**

Section <sup>110</sup>	Description of Offence	Maximum Penalty	Dollar Amount
42(1)(a)	A person carries out, or undertakes to carry out, building work without the appropriate licence—first offence.	250	\$33,362.50
42(1)(b)	A person carries out, or undertakes to carry out, building work without the appropriate licence—second offence.	300	\$40,035.00
42(1)(c)	A person carries out, or undertakes to carry out, building work without the appropriate licence—third or later offence, or the building work carried out is tier 1 defective work.	350 or one year's imprisonment	\$46,707.50
42(2)	A person who contravenes s 42(1) and is liable to a maximum penalty of 350 penalty units or one year's imprisonment commits a crime.	350 or one year's imprisonment	\$46,707.50

## ENDNOTES

- 1 Building Industry Fairness Reforms Implementation and Evaluation Panel, *Building Fairness An Evaluation of Queensland's Building Industry Fairness Reforms* (Report, March 2019) ("BIF Panel Report"). Section 200A of the BIF Act required the Minister to ensure a review of the operation and effectiveness of the 2017 suite of building and construction reforms under which the BIF Act replaced the *Building and Construction Industry Payment Act 2004*.
- 2 Special Joint Task Force, *Investigating subcontractor non-payment in the Queensland building industry* (Report, June 2019) ("Taskforce Report").
- 3 BIF Act, s 3(1).
- 4 See Department of Housing and Public Works, *Building Industry Fairness (Security of Payment) and Other Legislation Act 2020* (Web Page).
- 5 Proclamation No. 158 of 2020 made under the BIFOLA Act ("BIFOLA Act Proclamation") and Proclamation No. 159 of 2020 made under the BIF Act ("BIF Act Proclamation").
- 6 BIFOLA Act Proclamation.
- 7 BIF Act Proclamation.
- 8 The BIFOLA Regulation makes amendments to the *Building Industry Fairness (Security of Payment) Regulation 2018* ("BIF Regulation"), and separately the *Queensland Building and Construction Commission Act 1991* as a result of recommendations made by the Taskforce.
- 9 See Department of Housing and Public Works, Building Legislation and Policy, "Building and Plumbing Newsflash 578: Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2020", October 2020, for further explanation of the BIFOLA Regulation.
- 10 See Explanatory Notes, Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 (Old) 5.
- 11 BIF Act, s 8 (as amended by BIFOLA Act, s 63).
- 12 BIF Act, s 7 (as amended by BIFOLA Act, s 63).
- 13 Queensland, *Parliamentary Debates*, Queensland Parliament, 14 July 2020, 1574 (Michael de Brenni, Minister for Housing and Public Works; Minister for Digital Technology; Minister for Sport). See also BIF Act, s 34(3) (as amended by BIFOLA Act, s 63).
- 14 See BIF Act, Chapter 2, Div 4, Oversight powers (as amended by BIFOLA Act, s 63), and as explained by the Minister: Queensland, *Parliamentary Debates*, Queensland Parliament, 14 July 2020, 1574 (Michael de Brenni, Minister for Housing and Public Works; Minister for Digital Technology; Minister for Sport).
- 15 BIF Act, s 8 (as amended by BIFOLA Act, s 63).
- 16 BIF Act, s 14(1) (as amended by BIFOLA Act, s 63).
- 17 BIF Act, s 14(2) (as amended by BIFOLA Act, s 63).
- 18 BIF Act, s 14A(3) (as amended by BIFOLA Act, s 63).
- 19 BIF Act, s 14D (as amended by BIFOLA Act, s 63).
- 20 See Explanatory Notes, BIFOLA Act 17, 39 (at 17: "[t]his provision was recommended by the Panel to allow Government to monitor industry practice and address potential contracting practices that seek to undermine the intent of the framework").
- 21 BIF Act, s 9 (as amended by BIFOLA Act, s 63).
- 22 BIF Act, s 14B (as amended by BIFOLA Act, s 63).
- 23 BIF Panel Report 28-30: Recommendation 2(a) that "the BIF Act be amended to provide that 'building work' is as defined in the QBCC Act". As noted in the Explanatory Notes, BIFOLA Act 19, following consensus amongst stakeholders that the definition of "building work" must give certainty and clarity for industry, the definition of "building work" was renamed "project trust work" to reflect its specific use in determining if a project trust is required.
- 24 BIF Regulation, s 4 (as amended by BIFOLA Regulation, s 15) project trust work also includes the construction, installation, alteration or repair of a swimming pool (whether associated with a building or not).
- 25 BIF Regulation, s 5 (as amended by BIFOLA Regulation, s 15).
- 26 BIF Act, s 11A(2) (as amended by BIFOLA Act, s 63); Explanatory Notes, BIFOLA Act 37.
- 27 BIF Act, s 11A(2) (as amended by BIFOLA Act, s 63).
- 28 BIF Act, s 11A(4) (as amended by BIFOLA Act, s 63). See also Explanatory Notes, BIFOLA Act 38.
- 29 The definition under the BIF Act conforms to the natural meaning of that term; see BIF Act, s 6.
- 30 BIF Act, s 11B (as amended by BIFOLA Act, s 63).
- 31 BIF Act, s 15E (as amended by BIFOLA Act, s 63).
- 32 BIF Act, s 15F (as amended by BIFOLA Act, s 63).
- 33 BIF Act, s 15C (as amended by BIFOLA Act, s 63).
- 34 BIF Act, s 15D (as amended by BIFOLA Act, s 63).
- 35 BIF Act, s 19 (as amended by BIFOLA Act, s 63).
- 36 BIF Act, s 32 (as amended by BIFOLA Act, s 63).
- 37 Explanatory Notes, BIFOLA Act 11.
- 38 BIF Act, s 31 (as amended by BIFOLA Act, s 63).
- 39 BIF Act, s 31A (as amended by BIFOLA Act, s 63).
- 40 BIF Act, s 31B (as amended by BIFOLA Act, s 63).
- 41 BIF Act, s 41 (as amended by BIFOLA Act, s 63). At the date of this publication, no regulations prescribing the form of the training have been issued.
- 42 This includes the *Legal Profession Act 2007* and *Agents Financial Administration Act 2014*. See Explanatory Notes, BIFOLA Act 12.
- 43 See Explanatory Notes, BIFOLA Act 12.
- 44 BIF Act, s 58A(5) (as amended by BIFOLA Act, s 63).
- 45 See BIF Act, ss 18(1), 19(2), 20A(1), 20A(2), 20B, 34(2), 36(1) and 36(3) (as amended by BIFOLA Act, s 63).
- 46 See Transport and Public Works Committee, Queensland Parliament, Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 (Report No. 36 of 2020, March 2020) 38-39.
- 47 See QBCC Act, s 111B and sch 2, definition of "executive officer".
- 48 Department of Housing and Public Works, correspondence dated 4 March 2020, Attachment 1, p 9: see Transport and Public Works Committee, Queensland Parliament, Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 (Report No. 36 of 2020, March 2020) 39. See cee report at p 39.
- 49 BIFOLA Act Proclamation, Schedule, s 4.
- 50 BIFOLA Act, ss 64-72, 77, 78 and 79.
- 51 BIF Act, s 76(3) (as amended by BIFOLA Act, s 66).
- 52 Explanatory Notes, BIFOLA Act 12; BIF Panel Report, 32: Recommendation 4 and see 31-33 for further discussion of the reasoning behind this recommendation and that for the payment withholding charge, as well as examples in other jurisdictions.
- 53 BIFOLA Act, s 65; BIF Act, s 75(5A).
- 54 Taskforce Report 32-33: Recommendation 10.
- 55 BIF Act, s 75(6)(i) (as amended by BIFOLA Act, s 64).
- 56 BIF Act, s 75(5C) (as amended by BIFOLA Act, s 64).
- 57 See BIF Act, s 76 (as amended by BIFOLA Act, s 66).
- 58 See BIF Act, Chapter 3, Part 4A (inserted by BIFOLA Act, s 73).
- 59 See BIF Act, Chapter 3, Part 6A (inserted by BIFOLA Act, s 75).
- 60 See BIF Act, s 97B(1) for the payment holding request and s 100B(1) for the charge over land (the latter also has additional requirements discussed below).
- 61 See BIF Act, s 97B.
- 62 See definitions in BIF Act, s 97A. Note, however, that the claimant may not give a payment withholding request to a higher party that is a resident owner.
- 63 BIF Act, 97C (inserted by BIFOLA Act, s 73).

- 64 BIF Act, 97C (inserted by BIFOLA Act, s 73).
- 65 BIF Act, 97D (inserted by BIFOLA Act, s 73).
- 66 BIF Act, 97E (inserted by BIFOLA Act, s 73).
- 67 BIF Act, 97G(2) (inserted by BIFOLA Act, s 73). By s 97G(6), the charge is declared to be a statutory interest to which the *Personal Property Securities Act 2009* (Cth), section 73(2) applies.
- 68 BIF Act, 97G(4)-(5) (inserted by BIFOLA Act, s 73).
- 69 BIF Act, 97G(3) (inserted by BIFOLA Act, s 73).
- 70 See BIF Act, 100B (inserted by BIFOLA Act, s 75).
- 71 *Ibid.*
- 72 As defined under BIF Act, s 100A (inserted by BIFOLA Act, s 75).
- 73 BIF Act, 100C(1)-(2) (inserted by BIFOLA Act, s 75).
- 74 BIF Act, 100C(5)(a) (inserted by BIFOLA Act, s 75).
- 75 BIF Act, 100C(5)(b) (inserted by BIFOLA Act, s 75).
- 76 BIF Act, 100C(5)(c) (inserted by BIFOLA Act, s 75).
- 77 BIF Act, 100D (inserted by BIFOLA Act, s 75).
- 78 BIF Act, 100E (inserted by BIFOLA Act, s 75).
- 79 Explanatory Notes, BIFOLA Act 5.
- 80 BIF Act, s 189 (as amended by BIFOLA Act, s 78).
- 81 See BIFOLA Act, s 78.
- 82 BIFOLA Act Proclamation, Schedule, s 1.
- 83 BIF Act, s 189A(2) (as amended by BIFOLA Act, s 78).
- 84 BIF Act, s 189A(3) (as amended by BIFOLA Act, s 78).
- 85 BIF Act, s 189A(4) (as amended by BIFOLA Act, s 78).
- 86 BIF Act, s 189B(1)-(2) (as amended by BIFOLA Act, s 78).
- 87 BIF Act, s 189B(3) (as amended by BIFOLA Act, s 78).
- 88 The relevant Proclamation provides that the date for commencement of s 125A has not yet commenced because it is excluded from part 6, division 2: BIFOLA Act Proclamation, Schedule, Item 2.
- 89 QBCC Act, s 42(1).
- 90 QBCC Act, sch 2.
- 91 QBCC Act, schedule 1 A, s 8.
- 92 QBCC Act, sch 1A, s 8(1).
- 93 QBCC Act, sch 1A, s 8(2).
- 94 Including Master Builders Queensland, Queensland Plumbers Union and National Fire Industry Association of Australia.
- 95 See Explanatory Notes, BIFOLA (Amendments to be moved during consideration in detail by the Honourable Mick de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport) 4.
- 96 See Transport and Public Works Committee, Queensland Parliament, Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 (Report No. 36 of 2020, March 2020) 80-83.
- 97 *Ibid.*
- 98 QBCC Act, Schedule 1A, s9
- 99 QBCC Act, Schedule 1A, s 10
- 100 QBCC Act, sch 1A, s 11
- 101 *Queensland Building and Construction Commission Regulation 2018*, r 5(2).
- 102 QBCC Act, s 42(1)(a)-(c). "Tier 1 defective work" means grossly defective building work that falls below the standard reasonably expected for a licensed contractor for the type of building work and adversely affects the structural performance of a building to the extent that the building cannot reasonably be used for its purpose, or is likely to cause death or grievous bodily harm: see QBCC Act, s 67AB. Note also the definition of "carry out tier 1 defective work" included in this section, which includes, "provide advisory, administrative, management or supervisory services for carrying out tier 1 defective work".
- 103 QBCC Act, s 23(2).
- 104 QBCC Act, s 42(3).
- 105 See *St Hilliers Property Pty Ltd v Pronto Solar Innovations Pty Ltd* [2019] 2 Qd R 29, 39 [26], citing *Cant Contracting Pty Ltd v Casella* [2007] 2 Qd R 13, 23 [30] (Williams JA).
- 106 Of the BIF Act.
- 107 Maximum penalties expressed as a number are references to the maximum penalty units. A penalty unit is currently \$133.45: see *Queensland Government Gazette No. 62, 27 March 2020* stating 0% increase for penalty unit per s 5A *Penalties and Sentences Act 1992* and *Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2019*, s 4.
- 108 Note, however, that under s 19(2) the contracting party is not required to deposit the amount into the PTA where: the amount was due to be paid before the trust was established; is paid into court; is to be withheld because of a payment withholding request; is paid directly to a person under ch 4 in connection with a subcontractor's charge; or whether the contracting party has a reasonable excuse for failing to deposit the amount into the account.
- 109 See s 10A for definition of "related entity".
- 110 Of the QBCC Act.

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