

Key Takeaways: Queensland's new Building Industry Fairness - Security of Payment Reforms

The below summarises some key aspects of the new Security of Payment legislation reform in Queensland and penalties which commenced on 17 December 2018.

1) Responding to progress claims from 17 December 2018 onwards:

Assume every progress claim you receive under a construction contract or any written request for payment of a progress amount (regardless of the form it is presented in), may be a payment claim made under the *Building Industry Fairness (Security of Payment) Act 2017* (or, the **BIF Act**).

Practically, this means:

- a) quickly form a view (within 24 hours of receipt) of whether you are likely to contest the claimed amount. If you are likely to contest the amount, then ensure you complete the steps listed in this section.
- b) diarise an alert the day before the Payment Schedule is due so that you remember to issue it on time. A failure to issue a payment schedule in response to a payment claim under the BIF Act on time is an offence that can result in a fine of up to **100 penalty units (currently, \$13,055 for an individual, \$65,275 for a company)** and you becoming instantly liable to pay the full amount of the claim without ability to object.
- c) immediately commence legal due diligence to identify any legal arguments to oppose the validity of the payment claim (by alerting your in-house legal team and, if appropriate, external legal support). Include any of these in your payment schedule.
- d) simultaneously, have your project/contracts administration/site-based team and, if appropriate, independent expert(s), investigate and collate all merits/factual reasons for not paying the full amount to include in your payment schedule, and begin collating evidence to support those contentions (this may be needed in an adjudication that follows).

For example:

- i. not all the work was done? (take some photos/capture evidence of the incomplete aspects and assess the value of the work that was actually done);
 - ii. some of the work is defective? (collate evidence to show how it is defective and how it fails to meet the contractual requirements);
 - iii. you have a right of set-off to exercise? (collate evidence of why you have that right, how much the set-off is for and prepare to take the steps necessary under the Contract to exercise that set-off).
- e) include in your payment schedule all reasons (legal and factual) for not paying the full claimed amount (you will not be able to add or rely on any reasons other than those set out in your payment schedule for withholding payment in any adjudication process that may follow).
 - f) ensure that your payment schedule is given to the claimant by the time required, in the way your contract permits (or requires) for the service of payment schedules/contract notices.

2) New offences to be aware of and not commit

Be aware of the following new offences under the BIF Act and *Queensland Building and Construction Commission Act 1991 (QBCC Act)* and review and build into your internal processes some checks and balances to ensure that you do not commit any of them:

- a) Failing to give a payment schedule in response to payment claim: **100 penalty units (currently, \$13,055 if an individual, \$65,275 if a company)** - s76 BIF Act.
- b) Failing to pay an adjudicated amount on time: **200 penalty units (currently, \$26,110 if an individual, \$130,550 if a company)** - s90 BIF Act.
- c) A contracting party to a building contract¹ (i.e. the party for whom the building work is to be carried out under the contract) must, unless the party has a reasonable excuse or the retention amount is the subject of a dispute or is paid into court to satisfy a notice of claim under the BIF Act, release the retention amount to the contracted party in accordance with the building contract (e.g. on time): **200 penalty units (currently, \$26,110 individual; \$130,550 company) or 1 year's imprisonment** - s67NB QBCC Act.

Note: if the building contract does not specify a period at the end of which the security or retention is released, it will be subject to a condition that it must be released at the end of a period of 12 months following practical completion – s69NA QBCC Act.

- d) If a retention amount or security is held under a building contract², the party for whom the building work is to be carried out under the contract must provide notice to the contracted party in the **approved form** published on the QBCC website of the date the defects liability period ends and the date and amount to be paid to the contracted party (if any). *Note: this obligation does not apply to Principals.*

The notice must be given within 10 Business Days before the end of the defects liability period unless the defects liability period is linked to the defects liability period under another building contract and equivalent notice has not been received under that other contract in time to enable the contracting party to comply with the 10 Business Day timeframe, in which case the notice must be given within 5 business days of receiving that notice under the other building contract: **100 penalty units (currently, \$13,055 if an individual, \$65,275 if a company)** - s67NC - QBCC Act.

3) Amend standard construction contracts

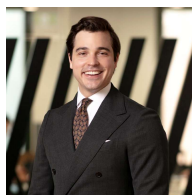
Amend your standard form construction contracts to ensure alignment with the new Act including:

- a) changed terminology and legislation section referencing that may already exist in your contracts so that the contract operates as intended; and
- b) to ensure you avail yourself of the longest time period permitted under the new laws to respond to payment claims.

For further information or assistance



Adam Merlehan
Managing Director
P: +61 401 219 769
E: adam.merlehan@merlehangroup.com



Nathan Chalmers
Senior Consultant – Capital & Infrastructure Projects
P: +61 401 641 315
E: nathan.chalmers@merlehangroup.com

¹ Seek advice if unsure whether your contract is a 'building contract' that the QBCC Act applies to.

² As above.