

Key proposed changes to the Building Industry Fairness (Security of Payment) Act by BIF Amendment Bill 2020

Changes proposed in BIF Amendment Bill	Merlehan Group Comments
<p>Streamlining of PBA regime</p> <p>The BIF Amendment Bill will simplify the current PBA regime to now require:</p> <ul style="list-style-type: none">• a Project Trust account per eligible building contract between Principal and Head Contractor; and• a general Retention Trust account to hold all retention monies across all eligible projects (rather than one retention trust account per project). <p>The current concept of a third project bank account, the 'Disputed Monies Account' will be abolished.</p> <p>Eventually, every contractor, subcontractor or principal that wishes to retain retention monies as a form of performance security under their building contracts will be required to open and hold a single retention monies trust account to hold the retentions it receives across all eligible contracts on trust for the respective beneficiaries.</p>	<p>The simplification of the project bank account regime to remove the requirement of opening three bank accounts per eligible contract is a sensible development, removing what would have been material administrative burden, where some larger contractors would otherwise have been required to open hundreds of bank accounts once the scheme was rolled out to the private sector.</p> <p>The remaining requirement to open a separate Project Trust Account per eligible project will still require material administrative burden.</p> <p>The concept of mandating all retention monies to be held in a retention monies trust account will likely see a movement away from retention monies being used as security for performance of building contracts in Queensland. We expect many principals and large contractors will insist on bank guarantee security in lieu of retentions to avoid the administrative burden or running retention monies trust accounts. The retention monies trust account amendment will therefore benefit financiers who provide bank guarantee products and likely disadvantage smaller contractors who have more limited bank guarantee facility limits.</p>
<p>Roll out of Project Bank Accounts (PBAs) to private sector projects confirmed</p> <p>The BIF Amendment Bill will simplify the current PBA regime to now require:</p> <ul style="list-style-type: none">• a Project Trust account per eligible building contract between Principal and Head Contractor; and• a general Retention Trust account to hold all retention monies across all eligible projects (rather than one retention trust account per project). <p>The concept of a third project bank account, the 'Disputed Monies Account' will be abolished.</p> <p>This simplified 'Project Trust' regime will be progressively rolled out to 'eligible' government and private sector building and construction projects as follows:</p> <ol style="list-style-type: none">1. government eligible building contracts above \$1 million, including Health and Hospital Services projects from: 1 July 20202. expanded to include private sector, local government and State authority eligible building contracts above \$10 million from: 1 July 20213. expanded to include private sector, local government and State authority eligible building contracts above \$3 million from: 1 January 20224. all eligible building contracts (including private sector) above \$1 million from: 1 July 2022.	<p>This is a significant development, given the long-running industry debate and uncertainty as to whether project bank accounts would be persisted with following the Panel Review.</p> <p>Provided the Queensland State Government is returned at this year's election, it is almost certain that project bank accounts (in the form of project trusts) will become a requirement for private sector construction in Queensland. Industry participants will need to develop strategies to manage the changes that will arise from being required to hold (substantial) project funds in trust. New financial control mechanisms will need to be put in place between financial and operational divisions of construction businesses to manage the nuances of payment to and from Project Trust and Retention Trust accounts and to ensure no offences are committed.</p> <p>The impact of this reform on the available capital and cost of finance available to construction contractors in the private sector is yet to be seen. We expect financiers will reevaluate the practical degree of collateral available under floating charges/circulating security interests used to secure finance facilities with construction contractors, given the often substantial cash balances held in contractor bank accounts at any one time as 'turnover' for 'work in progress' will now be held in separate protected Project Trust accounts, with only the gross profit from each project (if any) remitted out of the Project Trust Account into the Contractor's possession after subcontractors are paid, reducing the cash-at-bank collateral for lenders.</p> <p>We expect the amendment will result in a decreased appetite for lending to construction companies, and an increase in the cost of finance to construction companies given the resultant higher risk to lenders.</p>

New offence for paying less than the amount stated in a payment schedule

The BIF Amendment Bill proposes to amend the BIF Act to make it an offence for a person to pay less than the amount stated in a payment schedule it issues in response to a payment claim. A maximum penalty of 100 penalty units will apply. It is already currently an offence under section 76 of the BIF Act to not issue a payment schedule in response to a payment claim.

The BIF Act previously brought with it a substantial number of new offences – including making it an offence to fail to give a payment schedule in response to a payment claim. Adding another offence for failing to pay any amount provided in a payment schedule for any party in the contracting chain (principals, head contractors etc) means now, more than ever, it is important that construction stakeholders review their administrative processes and procedures to ensure that compliance with the BIF Act is assured.

New payment withholding request and charge over monies one tier higher in contractual chain

The BIF Amendment Bill proposes to give a claimant who has not been paid an amount adjudicated to be paid to it under the BIF Act, the ability to serve a payment withholding request on the person who is one tier higher in the contractual chain to the respondent (which in the case of a dispute between a head contractor and principal, may be the principal's project financier).

The payment withholding request will require that higher party to withhold an amount equal to the unpaid adjudicated amount from any money that is or to become payable to the respondent by that higher party, creating a charge over any such monies.

A failure of the higher party to withhold the monies from the respondent will see the higher party jointly and severally liable to the claimant for the failure to do so.

This change will incentivise timely payment of adjudicated amounts payable under the BIF Act and somewhat lessens the 'all or nothing' decision making required by subcontractors considering whether to lodge a Subcontractors' Charge or pursue adjudication under the BIF Act.

Given:

1. the ability to now issue a payment withholding request one tier above the respondent if the subcontractor is successful yet unpaid post adjudication; and
2. the absence of any need to commence the costly court proceedings Subcontractors' Charges usually require to be filed in order to enforce them;

some subcontractors may see the BIF Act adjudication process with the fall back of a payment withholding request if non-payment occurs after succeeding at adjudication as the best of both options. However, having the option of pursuing the 'payment withholding request option' as a fallback position may adversely cloud decision making of subcontractor industry participants, to their detriment.

For example, if subcontractors are enticed because of the above rationale into using the adjudication process under the BIF Act more often instead of issuing a Subcontractors' Charge, they may miss the opportunity to secure monies up-stream early (including by a leap-frogging Subcontractors' charge up the contractual chain). In a counter-party insolvency situation, there may be no funds owed to the insolvent contractor which a payment withholding request may usefully apply to once an adjudication process has run its course. The subcontractor would be left substantially disadvantaged for not issuing a Subcontractor's Charge when it first encountered payment issues with its counterparty. Legal advice and commercial considerations to weigh and decide which option to pursue may become more nuanced, and important.

Charge over Site by Head Contractor, if Site owned by Principal or related entity

The BIF Amendment Bill proposes to allow a claimant, who is a head contractor, to request a charge be registered over the land of the building site (provided it is owned by the respondent or are related entity of the respondent) where an adjudication decision has not been paid by the Principal and the adjudication certificate has been filed as a judgment debt.

This amendment poses a material legal risk to project owners.

Given:

1. the rapid pace of any adjudication of payment disputes under the BIF Act;

The head contractor will then be entitled to lodge a request for a charge to be registered in its favour over the Site and a charge may then be registered on title until the Contractor is paid the adjudicated amount and consents to its removal. The Contractor may also apply for an order from a court that the land/Site be sold, free other encumbrances, with the proceeds to be paid in the following order of priority:

- (1) sale costs (such as agent fees);
- (2) claimant's costs of obtaining the order for sale of the property;
- (3) all registered encumbrances in the order in which they were registered against title (the claimant does not get priority over earlier registered interests).

2. the limited basis upon which adjudicators' decisions can be challenged or set aside (for example, even if the decision is viewed as wrong, it cannot be overturned unless a jurisdictional error is shown);
3. the reality that all claimants have a strategic advantage of more preparation time than respondents under the rapid BIF Act adjudication process; and
4. the new charging of the Site land by the Contractor under the BIF Act may constitute an event of default under most project finance loan covenants, risking viability of the project and potential personal guarantee liability under any personal guarantee to any financier for any shortfall,

this amendment will intensify the need for project owners to fully and adequately respond to payment disputes that arise with contractors under the BIF Act. It will likely see more extensive engagement of legal advisors in Queensland throughout BIF Act payment disputes, as project owners comprehend the risk that an adverse adjudication outcome could present to their project, and their livelihoods, with the legal cost of preparing properly to defend a BIF adjudication viewed as outweighed by the risks associated with any poor adjudication outcome.

Mandatory trust account training precondition to withholding retention monies

The BIF Amendment Bill proposes to require all parties in the contractual chain who withhold retention monies as a form of security under a building contract to open a retention monies trust account. This requirement will be rolled out as follows:

- **1 July 2020:** Principal and Head Contractor of eligible Government and Hospital and Health Services' building and construction contracts valued at \$1m or more (ex GST) must open and properly operate a Retention Trust if withholding retention monies;
- **1 July 2021:** Principal and Head Contractor of eligible private sector and local government building and construction contracts valued at \$10m or greater (ex GST) must open and properly operate a Retention Trust if withholding retention monies.
- **1 January 2022:** Principal and Head Contractor of eligible private sector and local government building and construction contracts valued at \$3m or greater (ex GST) must open and properly operate a Retention Trust if withholding retention monies.
- **1 July 2022:** requirement for all parties in the contractual chain (including subcontractors) of all eligible building and construction contracts (including private sector) valued at \$1m or greater (ex GST) to open and properly operate a Retention Trust account will apply.

The party operating a Retention Monies Trust Account must nominate an individual who will operate the trust account and ensure that person undergoes compulsory training and assessment by an approved training organisation on the management of a retention trust accounts by a specified time. Penalties apply for not completing the training or not nominating a person to complete the training within the required timeframe: **100 penalty units each.**

This amendment will produce a need for training throughout the industry of individuals who may operate the new retention monies trust accounts.

Principals and contractors will need to identify early the persons in their business who may be nominated to operate the retention monies trust account and ensure they are appropriate trained, to ensure they do not commit an offence under the new legislation exposing the business to penalty.

Large project owners and contractors who offshore or split their accounting functions from operations will need to grapple with adeptly managing the unique compliance challenges posed by the new laws in a corporate environment that is currently standardised and difficult to effect bespoke change within.

This amendment will also benefit training organisations who will be presented with a new business opportunity.

We expect it will also serve to further perpetuate a shift away from use of retention monies security to more bank guarantee security in the industry, ultimately benefiting financial institutions and disadvantaging smaller contractors who have more limited bank guarantee facility limits.

We also expect that if this occurs, the cost of supplying bank guarantees throughout the contractual chain instead of using retention monies will be borne by project owners in the form of increased preliminaries bid throughout and passed up the contractual chain in tenders.