

Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 – Regulatory oversight reforms

Changes proposed in BIF Amendment Bill	Merlehan Group Comments
<p>Amendments to the <i>Architects Act 2002</i> and <i>Professional Engineers Act 2002</i> to give greater supervisory powers over the professions</p> <p>The BIF Amendment Bill introduces substantial powers to the respective overarching professional bodies that regulate both Architects and Engineers in Queensland – including significant investigatory and compliance audit powers, powers of entry to a place by consent or warrant by investigators, as well as more significant condition/enforcement powers in the event of issues with practitioners’ conduct and ‘fitness to practice’.</p> <p>The Bill also introduces new penalties (from 50 to 100 penalty units, depending on the offence) for registered engineers or architects who fail to provide certain information (such as information relating to ‘fitness to practice’) to the Boards regarding their professional conduct, or in the event that they fail to comply with requests for production of documents with the newly introduced investigative powers of the respective boards.</p>	<p>This is a significant development of powers available to the respective professional Boards.</p> <p>Given the importance of the services undertaken by architects and engineers in the context of major construction projects, as well as increased public scrutiny of quality issues with widely publicised construction projects suffering quality issues (for example, Mascot Towers in New South Wales and Lacrosse Towers in Victoria) it is appropriate that misconduct or lapses in professional engineering and architectural conduct can be appropriately and categorically investigated, and if required, appropriate penalties be levied.</p> <p>However, it will be important to monitor the introduction of these powers to ensure that these professional bodies appropriately exercise these new significant powers, particularly to ensure that natural justice and procedural fairness is afforded to any person being investigated or subject to the powers.</p>
<p>Causing Financial Loss and reversing the onus of proof</p> <p>The BIF Amendment Bill revises the existing section 42E of the QBCC Act, which makes it an offence for a person, without reasonable excuse, to cause another party financial loss because of the person’s deliberate noncompliance with the contract. ¹</p> <p>The BIF Amendment Bill will clarify that the onus of proof is on a defendant to prove the existence of a reasonable excuse for non-compliance when charged with an offence (referring to the operation of section 76 of the <i>Justices Act 1886</i>). ²</p>	<p>As the Committee identified in its report, the update to this provision to clarify the reversal of the onus of proof places the onus on to the defendant to ‘disprove’ any charge or action under this provision.</p> <p>The Explanatory Notes for BIF Amendment Bill notes: <i>The reversal of the onus of proof is justified because the existence of a reasonable excuse is peculiarly within the defendant’s knowledge. Because of this, without the reversal of the onus of proof, it would be difficult for the prosecution to prove the offence and the legislation could not otherwise be practically administered.</i> ⁴</p>

¹ See clause 135 of the BIF Amendment Bill.

² Ibid.

⁴ Ibid, 98.

This amendment is aimed to address conduct such as poor payment practices and deliberate avoidance of contractual obligations. The Queensland Government agreed that the reversal of the onus of proof was justified as the reasonable excuse for non-compliance would be within the particular knowledge of the defendant. The Committee in its review of the Bill noted: *“The committee is satisfied that sufficient regard has been given to an individual’s rights and liberties”*.³

Offence for providing false or misleading information

The BIF Amendment Bill will introduce a new offence against persons providing to the QBCC false or misleading information about a licensee’s financial circumstances.⁶

This will allow for the QBCC to prosecute false and misleading offences (currently only done by the Queensland Police under the Criminal Code).

This is intended to be an extension of the Minimum Financial Requirement framework and better equip the QBCC to detect and mitigate the impact of possible insolvencies and corporate collapses.

This amendment is plainly made to “enhance the QBCC’s chances of a successful prosecution”.⁵ Given the enhanced provisions and powers afforded to the QBCC under this Bill, and taking into account the turbulent state of the construction industry given present circumstances, industry stakeholders should expect the QBCC to give increased attention to its broad powers under this provision, which will allow it (if desired) strongly police the actions of industry participants.

This provision supports the introduction of the requirement for a supporting statement with either:

1. a payment claim under section 75 of the BIF Amendment Bill, in which when a person commits an offence if they knowingly include financial information which is false or misleading in the ‘supporting statement’ required to be submitted with every payment claim; or
2. a notice of deposit or withdrawal given under section 23A or 40A of the BIF Act (as amended).

Although well intentioned, it appears that with the requirement of the supporting statement with a payment claim, if there is a failure to by a head contractor to provide a supporting statement with a payment claim, the failure will not affect the validity of a payment claim. A key issue with this is that a claimant under the BIF Act may in fact not be properly paying its subcontractors, but still be able to proceed with a claim for payment (and adjudication) under the BIF Act.⁷ This appears to be contrary to the express intentions of the BIF Act as a whole.

While this issue was acknowledged by the Committee, there was no recommendations provided to rectify this issue.

Another potential issue that arises, is that the timing of certain subcontractor payments may mean that some subcontractors engaged by a head contractor

³ Queensland Government Transport and Public Works Committee, Queensland Government, *Report No. 36, 56th Parliament Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020* (2020), 96

⁵ Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020, Explanatory Notes, page 79.

⁶ See: clause 80 of the BIF Amendment Bill

⁷ See: Submission from the Queensland Law Society to Committee to Secretary Transport and Public Works Committee dated 26 February 2020.

will not be paid before the head contractor's payment claim (and statement) is prepared and submitted – meaning that a head contractor will need to disclose this 'timing issue' in any supporting statement, potentially causing the principal, or the QBCC, to make further inquiries and potentially interrupting payment processes. It may be sensible for contractors to flag in the supporting statement that this 'non-payment' of a subcontractor arises from an ordinary contractual payment cycle mismatch with the subcontractor to obviate this issue.

Increased limitation periods for commencing prosecution

The BIF Amendment Bill will increase the limitation period for the QBCC to commence prosecution to the latter of either: ⁸

- 3 years after the alleged date of commission of the offence; or
- 2 years after the offence comes to the knowledge of the QBCC.

This will bring Queensland's legislation in line with other states and territories, as well as enhancing the QBCC's ability to investigate and prosecute complex matters.

These updates reflect the significant policy emphasis placed on reducing subcontractor non-payment – notwithstanding some industry feedback that the penalties introduced under the BIF Act, and now the BIF Amendment Bill, are significant. ⁹

As we note above, taking into account the turbulent state of the construction industry given present circumstances, industry stakeholders should expect the QBCC to give increased attention to its broad powers provided, in part, by the BIF Amendment Bill, which will allow it (if desired) strongly police the actions of industry participants.

For further information, please contact:

Adam Merlehan	Managing Director	P: +61 401 219 769	E: adam.merlehan@merlehangroup.com
Nathan Chalmers	Senior Consultant	P: +61 401 641 315	E: nathan.chalmers@merlehangroup.com

⁸ See clause 147 of the BIF Amendment Bill.

⁹ Queensland Government Transport and Public Works Committee, Queensland Government, *Report No. 36, 56th Parliament Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 (2020)*, 61.