



# Construction | Workshops from the Trenches: Advisor nightmares

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## Table of Contents

1. Queensland Building Industry .....	3
2. The Regulatory Regime .....	3
2.1 Licensing in Queensland.....	4
2.2 Contracting in Queensland .....	5
2.3 Defective Work & Statutory Insurance .....	8
2.4 Conclusion.....	11
3. Security of Payment.....	11
3.1 Introduction.....	11
3.2 History .....	12
3.3 When Your Client is the Claimant .....	12
3.4 Where Your Client is the Respondent.....	13
3.5 Adjudication .....	14
4. Project Bank Accounts (to become Statutory Trusts) .....	14
4.1 Introduction.....	14
4.2 When is a PBA required?.....	14
4.3 The Flow of Claims .....	15
4.4 The Rules .....	15
4.5 Changes to PBAs .....	17
5. Further Changes on the Horizon.....	18

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## 1. Queensland Building Industry

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- 1.1 The Queensland Building Industry is a significant contributor to the economy. It employs 230,000 people and contributes \$46 billion to the economy<sup>1</sup>.
- 1.2 The industry in Queensland is regulated by various pieces of legislation and is overseen by the Queensland Building and Construction Commission (**QBCC**).
- 1.3 The QBCC wears a number of hats. It:
  - (a) manages the licencing regime including enforcing:
    - (i) minimum qualifications and fit and proper person requirements; and
    - (ii) minimum financial requirements;
  - (b) provides information and education for both licence holders and homeowners;
  - (c) provides dispute resolution services for homeowners; and
  - (d) manages the statutory home warranty insurance scheme.
- 1.4 As advisors to individuals and businesses within the Queensland Building and Construction Industry it is essential that we:
  - (a) understand the regulatory regime our clients operate within;
  - (b) understand and be able to pre-empt the issues that our client's may face; and
  - (c) are in a position to respond to the often very tight timeframes our client's will be faced with should an issue arise.
- 1.5 This paper contains a snapshot of some of the key provisions that building contractors need to be aware of. It is not the complete picture and it is essential that our clients are educated on the issues they may face and be able to identify when it is they need to reach out for our help.

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## 2. The Regulatory Regime

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The *Queensland Building and Construction Commission Act 1991* (**QBCC Act**) is the main piece of legislation that regulates the industry.

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<sup>1</sup> Auditor-General Queensland: *Licensing builders and building trades (Report 16:2019-20)*

The stated objects of the QBCC Act are:

- (a) *to regulate the building industry—*
  - (i) *to ensure the maintenance of proper standards in the industry; and*
  - (ii) *to achieve a reasonable balance between the interests of building contractors and consumers; and*
- (b) *to provide remedies for defective building work; and*
- (c) *to provide support, education and advice for those who undertake building work and consumers; and*
- (d) *to regulate domestic building contracts to achieve a reasonable balance between the interests of building contractors and building owners; and*
- (e) *to regulate building products to ensure—*
  - (i) *the safety of consumers and the public generally; and*
  - (ii) *persons involved in the production, supply or installation of building products are held responsible for the safety of the products and their use; and*
- (f) *to provide for the proper, efficient and effective management of the commission in the performance of its functions.*

The QBCC Act employs a range of strategies to assist the QBCC achieve these objects including licencing obligations, minimum financial requirements, exclusion mechanisms, offence provisions, conferring audit and investigative powers on the QBCC and many others.

Since about 2016 in particular, the QBCC has progressively been given more enforcement powers and additional offences have been created in the QBCC Act which the QBCC can prosecute.

Over that time we have had clients seek our assistance in relation to audits, complaints, investigations, decisions and prosecutions that were unexpected and for which they were unprepared. In some cases clients left it too late to seek help and time limits had already passed, leaving them with no option but to comply with a QBCC direction that they could otherwise have challenged.

## 2.1 Licencing in Queensland

- (a) Unless exempt under the QBCC Act, individuals and companies must hold a QBCC licence to carry out, or undertake to carry out<sup>2</sup>:
  - (i) any building work valued over \$3,300 (inclusive of material, labour and GST);
  - (ii) any building work involving Hydraulic Services Design valued over \$1,100;
  - (iii) any building work (of any value) involving:
    - gas fitting;
    - plumbing and/or drainage;
    - chemical termite management;
    - fire protection;
    - completed residential building inspections;
    - building design (low, medium, open); and
    - site classification.
- (b) Some exemptions to the requirement include:

<sup>2</sup> s42 QBCC Act

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- (i) an employee of an appropriately licensed licensee (but can't do occupational building work or site supervision);
  - (ii) sub-trade contractor for an appropriately licensed trade contractor;
  - (iii) owner builders;
  - (iv) asbestos and demolition works (requirements are under Workplace Health & Safety); and
  - (v) electricians carrying out electrical work (requirements are under Electrical Safety Office).
- (c) In order to hold a licence a person or company must, amongst other things<sup>3</sup>:
- (i) be a 'fit and proper person';
  - (ii) hold the necessary qualifications for the particular licence; and
  - (iii) meet the minimum financial requirements for a particular licence class.
- (d) A person will hold a licence of a particular class. They must not carry out work that is not covered by their license class unless it is 'incidental work of another class'. Incidental work must be valued at no more than \$3,300 and must not include occupational work.
- (e) If a person carries out, or undertakes to carry out building work that they are not licenced to do they could face a number of consequences which may include:
- (i) prosecution by the QBCC and fines up to<sup>4</sup>:
    - 250 penalty units for a first offence (currently \$33,362.50); or
    - 300 penalty units for a second offence (currently \$40,035.00); or
    - 350 penalty units (currently \$46,707.50) or 1 years imprisonment and a criminal record for a third or later offence, or if the building work carried out is tier 1 defective work; and
  - (ii) a prohibition on being paid for the work carried out.

## 2.2 Contracting in Queensland

There is a distinction drawn in Queensland between Commercial Building Work and Domestic Building Work. There are additional consumer protection provisions legislated in relation to Domestic Building Work.

### (a) Contracts for Commercial Building Work

- (i) Commercial building contracts must be in writing. If the reasonable cost of the building work is more than \$10,000 the contract must be in writing before the carrying out of the building work is started. If the reasonable cost of the building work is \$10,000 or less, then the contract must be in writing before the carrying out of the building work is finished<sup>5</sup>.
- (ii) If the contract is varied during the course of the work so that the reasonable cost goes from \$10,000 or less to more than \$10,000 no further work can be carried out until the contract is reduced to writing<sup>6</sup>.
- (iii) Commercial building contracts must also comply with the formal requirements set out in the QBCC Act. At a minimum, a building contract must state the following<sup>7</sup>:

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<sup>3</sup> s31 QBCC Act

<sup>4</sup> s42 QBCC Act

<sup>5</sup> s67G(1) QBCC Act

<sup>6</sup> s67G(2) QBCC Act

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- the scope of the building work the subject of the contract;
  - when the building work is to be completed;
  - the amount to be paid for carrying out the building work or, if appropriate, how the amount to be paid for carrying out the building work is to be worked out;
  - the parties' agreement about retention amounts and securities to be held;
  - the name of the building contractor who is the contracted party for the building contract;
  - the licence number of the building contractor mentioned in paragraph (e), as it appears on the building contractor's licence card;
  - the address of the land where the building work is to be carried out.
- (b) There are penalty provisions that attach to a failure to comply with each of these provisions - up to 80 penalty units for each separate offence.
- (c) These requirements apply to any contract that is not for domestic building work. This means that the provisions apply to:
- (i) commercial construction projects;
  - (ii) sub-contract arrangements (regardless of whether the work is being carried out on a commercial or domestic property);
  - (iii) a contract for the construction of 2 or more detached dwellings;
  - (iv) a contract with the holder of an owner-builder permit; and
  - (v) a contract where the building owner is the State or a local government.
- (d) Contracts for Domestic Building Work**
- Domestic Building Work includes<sup>8</sup>:
- (i) the erection or construction of a detached dwelling (and any associated work);
  - (ii) the renovation, alteration, extension, improvement or repair of a home (and any associated work);
  - (iii) removal or resiting work for a detached dwelling (subject to some exclusions);
  - (iv) the installation of a kit home at a building site; and
- (e) All contracts for domestic building work valued at more than \$3,300 must be in writing, dated and signed by or on behalf of each of the parties to it. If it does not comply with this requirement the contract does not have "effect"<sup>9</sup>.
- (f) What a domestic building contract must cover varies slightly between level 1 and level 2 contracts. Level 1 contracts are for work where the contract price is more than \$3,300 but less than \$20,000 and level 2 is \$20,000 and above.

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<sup>7</sup> s67G(4) QBCC Act

<sup>8</sup> Schedule 1B, s4, QBCC Act

<sup>9</sup> Schedule 1B, s13(5) & s14(10) QBCC Act

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**(g) A Level 1 Contract must contain at least the following<sup>10</sup>:**

- (i) the names of the parties to it, including the name of the building contractor as it appears on the contractor's licence;
- (ii) the building contractor's licence number as it appears on the building contractor's licence;
- (iii) a description of the subject work;
- (iv) any plans and specifications for the subject work;
- (v) the contract price or the method for calculating it, including the building contractor's reasonable estimate;
- (vi) a provision that states the date for practical completion or how the date is to be determined;
- (vii) a conspicuous notice advising the building owner of the right the owner may have to withdraw from the contract under schedule section 35 of the QBCC Act.

**(h) A Level 2 contract must contain at least the following<sup>11</sup>:**

- (i) the names of the parties to it, including the name of the building contractor as it appears on the contractor's licence;
- (ii) the building contractor's licence number as it appears on the building contractor's licence;
- (iii) a description of the subject work;
- (iv) any plans and specifications for the subject work, including all plans and specifications required for carrying out the work in compliance with any development approvals or similar authorisations that are required by law for carrying out the work;
- (v) the contract price or the method for calculating it, including the building contractor's reasonable estimate;
- (vi) a provision that states the date for the start of the subject work at the building site, or how the date is to be determined;
- (vii) a provision that states the date for practical completion or how the date is to be determined;
- (viii) a statement of each of the statutory warranties that apply to the subject work;
- (ix) a conspicuous notice advising the building owner of the right the owner may have to withdraw from the contract under schedule section 35 of the QBCC Act.

**(i) In addition, a Level 2 contract must also comply with the following:**

- (i) If the contract price is fixed, it must be stated in a prominent position on the first page of the contract schedule.
- (ii) If the contract price is not fixed, the method for calculating it, including any allowances, must be stated in the contract schedule.
- (iii) If the contract price may be changed under a provision of the contract, the contract must also contain—
  - a warning to that effect; and

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<sup>10</sup> Schedule 1B, s13, QBCC Act

<sup>11</sup> Schedule 1B, s14, QBCC Act

- a brief explanation of the effect of the provision allowing change to the contract price.
- (iv) The warning and explanation mentioned in subsection (6) must be in a prominent position on the first page of the contract schedule.
- (v) The contract must not state the name of any person—
  - as the building contractor; or
  - so it may reasonably be mistaken to be the building contractor; unless the person is the building contractor under the contract.
- (vi) the building contractor must give the owner a copy of the Consumer Building Guide before the owner signs the contract.
- (vii) the building contractor must give the owner a commencement notice within 10 business days of commencing work on site
- (j) The building contractor must give the owner a legible signed copy of the contract, including any plans and specifications for the subject work, within 5 business days after entering into a regulated contract<sup>12</sup>.
- (k) The building contract (if responsible for engaging the building certifier) must give the owner a copy of each certificate of inspection as soon as practicable after receiving the certificate<sup>13</sup>.

**(l) Variations and Extensions of Time**

- (i) For Domestic Building Work the QBCC Act sets out the mechanism for varying the work under a contract<sup>14</sup> and obtaining an extension of time<sup>15</sup> to the date for practical completion. It is imperative that contractor follow these procedures in order to validly vary the works or extend time. A failure to do so can result in the contractor not getting paid for work they have done, or being liable for liquidated damages if the date for practical completion is not validly extended. It will also leave the contractor exposed to prosecution by the QBCC and the application of fines and demerit points.
- (ii) The QBCC Act is not so prescriptive for commercial works, but a good construction contract will set out a mechanism (usually similar to the domestic work requirements) for varying commercial works and extending time. Whilst the fines and demerit points don't apply, the contractor could still find themselves significantly out of pocket as a result of the unrecoverable cost of variations or the payment of liquidated damages if they have failed to follow the contractually agreed mechanisms for varying the works and extending the time for completion.

### 2.3 Defective Work & Statutory Insurance

- (a) The Statutory Home Warranty Insurance Scheme (**SHWIS**) is a compulsory insurance whereby the contractor pays a premium on behalf of the consumer to insure against the risks of:
  - (i) non-completion of the works where the homeowner has validly terminated the contract;
  - (ii) the contractor failing to rectify defective work; and
  - (iii) subsidence.

<sup>12</sup> Schedule 1B, s15 QBCC Act

<sup>13</sup> Schedule 1B, s16 QBCC Act

<sup>14</sup> Schedule 1B, s40 & s41 QBCC Act

<sup>15</sup> Schedule 1B, s42 QBCC Act



- (b) The QBCC Act and Regulation is very prescriptive and specific in what types of works will be covered by the scheme, who is entitled to claim on a policy and timeframes within which a claim must be brought.
- (c) From a contractor's perspective they need to be across:
- (i) what works must be insured;
  - (ii) when the premium needs to be paid;
  - (iii) consequences if a successful claim is brought under a policy by a consumer.

**(d) What works must be insured**

Most residential work valued over \$3,300 will attract a requirement to pay the insurance premium<sup>16</sup>. This includes:

- (i) works to construct a new home, related roofed building (eg a garage), townhouse or multiple unit dwelling (no more than 3 storeys);
- (ii) works to extend, add to, alter, repair or renovate any of the above;
- (iii) works to replace or refit fixtures or fittings (eg in a kitchen or bathroom);
- (iv) work on a deck or veranda, attached to a residence;
- (v) any building work that affects the structural integrity of the building;
- (vi) work on or in the home or related roofed building (such as painting);
- (vii) work on a deck or veranda attached to a home or a related roofed building;
- (viii) any works to anything attached to the home or related roofed building which require a building or plumbing approval;
- (ix) works to any structure attached to the external part of a home or related roofed building which has no other supporting structure (such as a handrail or awning);
- (x) works to any stairs or ramp which provide access, and are permanently attached to the home or related roofed building; and
- (xi) swimming pools.

**(e) When a premium must be paid<sup>17</sup>**

For residential construction work, a contractor must collect from the consumer<sup>18</sup>, and pay to the commission, the appropriate insurance premium before the first of the following occurs:

- (i) 10 business days elapse from the day the contract was entered into; or
  - (ii) the residential construction work starts.
- (f) If a contractor is carrying out speculative residential construction work they must pay the premium before they start work.
- (g) The maximum penalty for a failure to pay a premium is 100 PU (\$13,345) and 4 demerit points.

<sup>16</sup> s67WC QBCC Act

<sup>17</sup> s68B QBCC Act

<sup>18</sup> "Consumer" generally, means a person for whom building work is carried out, but does not include a building contractor for whom building work is carried out by a subcontractor but for the Statutory Insurance Scheme on relates to residential construction work: Schedule 2 & s67WA QBCC Act

**(h) Consequences if Consumer Successfully Claims**

- (i) The standard SHWIS policy will give coverage up to \$200,000.00. Consumers can pay top up premiums to increase this up to \$300,000.00.
- (ii) If a claim is approved, and a consumer is paid out under a policy, the QBCC has the ability to recover the amount paid out from “the building contractor by whom the relevant residential construction work was, or was to be, carried out or any other person through whose fault the claim arose”<sup>19</sup>.
- (iii) For a corporate licence holder this could mean recovery from the corporation, a director of the corporation, a site supervisor or nominee, the person who physically did the work or even the certifier if relevant to the particular issue.

*“The QBCC may recover an amount from any “person through whose fault the claim arose”, even if that person did not actually carry out, or was not to carry out, any building work: Queensland Building and Construction Commission v Marshall [2016] QSC 200. In that case, the QBCC sought to recover under s 71 from a certifier who certified defective building work. The certifier brought an application for summary judgment in its favour on the grounds that it was not a person through whose fault the claim arose. The basis of the certifier’s argument was that the reference to a person through whose fault the claim arose in s 71(1) only referred to a person who carried out, or was to carry out, the relevant residential construction work, and building certification work is excluded from the ambit of building work by virtue of Item 34 in Sch 1AA of the QBCC Regulation. Jackson J rejected the certifier’s argument, and held that the QBCC’s right to recover from a person through whose fault the claim arose was not restricted to a person who had carried out, or was to carry out, the relevant residential construction work referred to in s 71(1), or any building work at all”<sup>20</sup>.*

- (iv) It is also important to note that a building contractor defending a claim by the QBCC seeking payment under s71 is unable to defend the claim by challenging the basis or validity of any anterior step taken by the QBCC (for example a decision to issue a direction to rectify or whether rectification work had been properly completed).
- (v) In *Mahony v Queensland Building Services Authority* the Court of Appeal said:

*It is sufficient for recovery under the section that the authority have made a payment on a claim under the insurance scheme. The statutory right to recover is not conditioned upon the legal quality of a determination by the authority to make the indemnity payment or of any anterior step taken by the authority that had led to the decision to pay.<sup>21</sup>*

- (i) Which brings us to why it is so important for contractors to treat the defect rectification framework seriously.

**(j) Defective Work**

- (i) A consumer can ask the QBCC to give a direction to rectify building work that the consumer considers is defective or incomplete<sup>22</sup>.
- (ii) An owner or occupier of a residential property adjacent to a building site can ask the QBCC to give a direction to remedy consequential damage to that property<sup>23</sup>.

<sup>19</sup> s71(1) QBCC Act

<sup>20</sup> [71 Recovery from licensed contractor etc., Queensland Building Service](#)

<sup>21</sup> *Mahony v Queensland Building Services Authority* (2014) 30 BCL 401; [2013] QCA 323 per Gotterson JA (with whom McMurdo P and Douglas J agreed)

<sup>22</sup> s71J(1) QBCC Act

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- (iii) There are prescribed forms that must be used and a request must be made within the relevant time frame.
  - (iv) The QBCC will usually advise a contractor that a complaint has been made and encourage the contractor to go and sort it out with the consumer before the QBCC attends site to do an inspection.
  - (v) Once an inspection has been completed the QBCC will decide whether the works are defective. The QBCC process is explained in the Rectification of Building Work Regulatory Guide<sup>24</sup> and decisions are made in accordance with the Rectification of Building Work Policy<sup>25</sup>.
  - (vi) If defective, the QBCC can then issue a Direction to Rectify (DTR)<sup>26</sup>.
  - (vii) It is an offence to fail to rectify defective work as required by a DTR - 250 PU (\$33,362.50) and 10 demerit points.
  - (viii) Failure to comply with a DTR can also lead to a successful claim by a consumer under the SHWIS. The QBCC can then seek to recover the amount paid out from any person through whose fault the claim arose. The defendant would not be able to defend that recovery action on the basis that the DTR was improperly issued.
  - (ix) This is why, if a contractor disagrees with a DTR they must apply to have the decision to issue the DTR reviewed. They only have 28 days to do so. If they miss that timeframe they are stuck with the DTR and any consequences should they fail to comply with it.

## 2.4 Conclusion

- (a) The regulatory regime for the construction industry can be daunting and I'm yet to meet a tradesperson who went into their line of work because they enjoyed paperwork.
- (b) As advisors to individuals and businesses within the Queensland Building and Construction Industry we are all well placed to assist our clients educate themselves, pre-empt issues and respond quickly to any issues that may arise.

## 3. Security of Payment

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### 3.1 Introduction

- (a) The Security of Payment regime in Queensland is legislated in Chapter 3 of the *Building Industry Fairness (Security of Payment) Act 2017 (the BIF Act)*.
- (b) It operates independently of any contract between the parties, but some of the provisions (particularly timeframes) are informed by any relevant contract terms that exist. If there is no contract, or if the contract is silent on a particular point then the BIF Act sets out a default position.
- (c) The focus of the Security of Payment regime is to provide a framework for facilitating timely payments for construction work or the provision of goods or services related to construction work.

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<sup>23</sup> s71J(2) QBCC Act

<sup>24</sup> [https://www.qbcc.qld.gov.au/sites/default/files/Rectification\\_of\\_Building\\_Work\\_Regulatory\\_Guide.pdf](https://www.qbcc.qld.gov.au/sites/default/files/Rectification_of_Building_Work_Regulatory_Guide.pdf)

<sup>25</sup> <https://www.qbcc.qld.gov.au/sites/default/files/Rectification%20Of%20Building%20Work%20Policy.pdf>

<sup>26</sup> s72 QBCC Act

### 3.2 History

Prior to the introduction of the BIF Act, the Security of Payment regime was contained in the now repealed *Building and Construction Industry Payments Act 2004*. The transition to the BIF Act included a number of key changes to the Security of Payment regime that have caused some concern within the industry.

### 3.3 When Your Client is the Claimant

- (a) "From each reference date under a construction contract, a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract."<sup>27</sup>
- (b) A reference date is the date stated in or worked out under the contract as that date on which payment claims can be issued. If the contract doesn't supply a date then the BIF Act says it is the last day of the month. The BIF Act also specifies that, if a contract is terminated and the contract doesn't provide for (or purports to prevent) a reference date surviving beyond termination then the final reference date will be the date the contract is terminated.
- (c) Progress payments are claimed by the claimant giving a payment claim to the respondent.<sup>28</sup> A payment claim must<sup>29</sup>:
  - (i) be in writing;
  - (ii) identify the construction work or related goods and services that that progress payment relates to;
  - (iii) states the amount claimed;
  - (iv) requests payment (any document bearing the word 'invoice' will satisfy this requirement);
  - (v) for a claim other than a final claim, be given before the end of the longest of the following periods:
    - the time worked out under the contract; or
    - months after the construction work that the claims relates to was last carried out or related goods and services supplied; and
  - (vi) for a final claim, be given before the end of the longest of the following periods:
    - the time worked out under the contract;
    - 28 days after the end of the last defects liability period;
- (d) months after completion of all construction work under the contract or completion of the supply of all related goods and services under the contract
- (e) From 1 October 2020 there will be an additional requirement for head contractors to also give a supporting statement with their payment claims. This supporting statement must declare that all subcontracts have been paid all amounts owed to them by the claimant at the date of the payment claim and, if payment has not been to some subcontractors, setting out certain details in relation to that non-payment. A failure to give a supporting statement won't affect the validity of the claim itself, but could attract a maximum penalty of 100 penalty units<sup>30</sup>.

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<sup>27</sup> s70 Building Industry Fairness (Security of Payment) Act 2017

<sup>28</sup> s75 Building Industry Fairness (Security of Payment) Act 2017

<sup>29</sup> s68 & s75 Building Industry Fairness (Security of Payment) Act 2017

<sup>30</sup> s65 Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020

- (f) A claimant can only give one payment claim per reference date<sup>31</sup>.
- (g) A payment claim can include an amount that was included in a previous claim.<sup>32</sup>
- (h) If the respondent fails to pay the claimed amount by the due date the claimant can:
  - (i) make an adjudication application - if the respondent has not given a payment schedule the respondent will not be permitted to lodge an adjudication response unless it deals only with a jurisdictional issue; or
  - (ii) recover the unpaid amount from a Court if the respondent has failed to issue a payment schedule (after a warning notice has been given);
  - (iii) suspend carrying out the works.

### 3.4 Where Your Client is the Respondent

*"1. If given a payment claim, a respondent must respond to the payment claim by giving the claimant a payment schedule within whichever of the following periods ends first:*

- a. the period, if any, within which the respondent must give the payment schedule under the relevant construction contract;*
- b. 15 business days after the payment claim is given to the respondent.*

*2. However, the respondent is not required to give the claimant the payment schedule if the amount claimed in the payment claim is paid in full on or before the due date for the progress payment to which the payment claim relates."<sup>1</sup>*

- (a) A Payment Schedule is a written document that<sup>33</sup>:
  - (i) identifies the payment claim to which it responds;
  - (ii) states the amount of the payment (if any) the respondent proposes to make; and
  - (iii) if the amount to be paid is less than the amount stated in the payment claim - states why the amount proposed to be paid is less, including the respondent's reasons for withholding any payment.
- (b) If a respondent fails to respond to a payment claim with a payment schedule then the respondent is deemed liable to pay the amount claimed under the payment claim on the due date.<sup>34</sup>
- (c) If the respondent fails to pay the amount owed to the claimant on or before the due date then the claimant can<sup>35</sup>:
  - (i) recover the unpaid portion as a debt owing in a court;

<sup>31</sup> s75(4) Building Industry Fairness (Security of Payment) Act 2017

<sup>32</sup> s75(5) Building Industry Fairness (Security of Payment) Act 2017

<sup>33</sup> s69 Building Industry Fairness (Security of Payment) Act 2017

<sup>34</sup> s77 Building Industry Fairness (Security of Payment) Act 2017

<sup>35</sup> s78 Building Industry Fairness (Security of Payment) Act 2017

- (ii) apply for adjudication;
- (iii) issue a notice to suspend works.

### 3.5 Adjudication

- (a) There are strict timeframes that apply to lodging an adjudication application and response which vary depending on whether a payment schedule has been issued.
- (b) The annexed flow charts set out some of the key milestones required by the BIF Act.
- (c) Once an adjudication decision is made any payment obligations can be enforced quickly through the Courts if a party fails to pay.

## 4. Project Bank Accounts (to become Statutory Trusts)

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### 4.1 Introduction

- (a) Project bank accounts were first legislated in Queensland in the *Building Industry Fairness (Security of Payment) Act 2017 (the BIF Act)*. Phase 1 of the project bank account scheme commenced on 1 March 2018. Recent legislative amendments will see significant changes to the scheme likely to roll out over the next 3 years.
- (b) The conceptual idea behind project bank accounts (**PBAs**) is for money that is to be paid to subcontractors to be “held in a way that protects the interests of the subcontractors”.
- (c) Traditionally, money flows through a chain of construction contracts - the Principal pays the Head Contractor, the Head Contractor pays the Subcontractor, the Subcontractor pays their Sub-subcontractors and so on.
- (d) PBAs have been designed to prevent a scenario where the Principal pays the Head Contractor but some event occurs whereby the Head Contractor does not pay the Subcontractor, the Head Contractor becomes insolvent and the Subcontractor is left without payment.
- (e) By forcing the parties to certain contracts to utilise PBAs as a payment process the portion of the funds paid to the Head Contractor by the Principal that is on account of work carried out by the Subcontractor is protected (held on trust) and cannot be used for any other purpose.
- (f) Whilst the funds held on trust are protected for a Subcontractor in the event of the liquidation of the Head Contractor (they cannot even be accessed by a secured creditor)<sup>36</sup> the consequential effect for the industry is that those funds are also unavailable to the Head Contractor as part of their usual cash flow.

### 4.2 When is a PBA required?

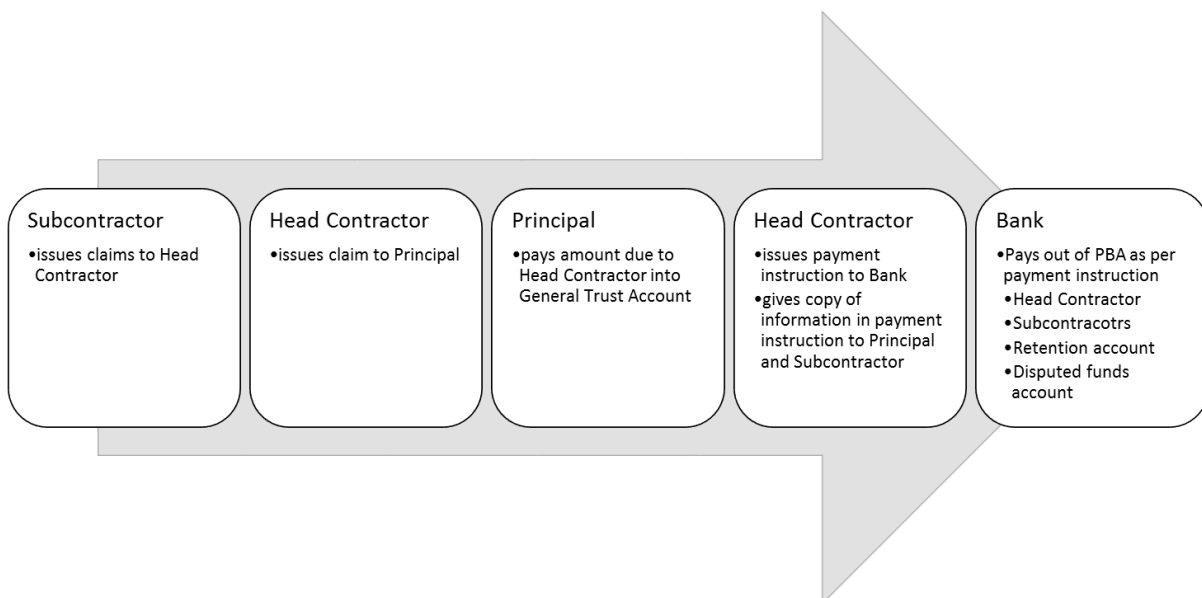
- (a) Currently, PBAs are required for contracts where:
  - (i) the principal is the State or a State Authority that has decided a PBA is to be established;
  - (ii) more than 50% of the contract price is for building work;
  - (iii) the contract price is between \$1 million and \$10 million; and
  - (iv) the Head Contractor enters into a subcontract for all or part of the building work.

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<sup>36</sup> s39(1) Building Industry Fairness (Security of Payment) Act 2017

- (b) The contract must be for “building work”. A “Building” is defined in the BIF Act (for the purpose of project bank accounts only) to mean “a fixed structure that is wholly or partly enclosed by walls or is roofed.”<sup>37</sup>
- (c) However, there are certain exclusions, where a PBA will not be required, including for:
- (i) residential construction work (unless the Principal is the department and the work relates to 3 or more living units)<sup>38</sup>;
  - (ii) maintenance work<sup>39</sup>;
  - (iii) the works will reach Practical Completion in less than 90 days from the date the PBA would otherwise be due to be established<sup>40</sup>.
- (d) If the Head Contractor and the Subcontractor are related entities<sup>41</sup> then two sets of PBAs will be required.

### 4.3 The Flow of Claims



### 4.4 The Rules

#### (a) Set Up<sup>42</sup>

- (i) Before the Head Contractor enters into a Subcontract they must give notice to each Subcontractor in approved form that a PBA will be used for the project.
- (ii) Within 5 business days of the Head Contractor entering into a Subcontract they must give notice to the Principal in the approved form.
- (iii) Within 20 business days (or shorter time if specified in building contract) of the Head Contractor entering into a Subcontract the Head Contractor must establish the PBAs [General, Retention & Disputed Funds].

<sup>37</sup> s8 Building Industry Fairness (Security of Payment) Act 2017

<sup>38</sup> s16 Building Industry Fairness (Security of Payment) Act 2017

<sup>39</sup> s17 Building Industry Fairness (Security of Payment) Act 2017

<sup>40</sup> s23 Building Industry Fairness (Security of Payment) Act 2017

<sup>41</sup> “related entities” is defined in s19 of the BIF Act. It is a very broad definition that includes family relationships, corporate and shareholder relationships and trust relationships.

<sup>42</sup> s23 Building Industry Fairness (Security of Payment) Act 2017

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- (iv) Each PBA account name must include the words 'trust account'.

**(b) Administration<sup>43</sup>**

- (i) Funds can be transferred to and from a PBA by electronic transfer only.
- (ii) Withdrawals and transfers between accounts and beneficiaries can only occur on payment instruction given to the bank
- (iii) The Head Contractor cannot pay a subcontractor other than through the PBA (regardless of the value of the work).
- (iv) If there is a shortfall in the PBA, the Head Contractor is responsible for covering that shortfall.
- (v) The Head Contractor can't pay itself if there wouldn't be enough money left in the PBA to pay subcontractor beneficiaries - even if the Principal has short paid a claim.
- (vi) The funds in the PBA cannot be invested, although any interest earned on account goes to the Head Contractor once a year or when the account is closed.
- (vii) The Head Contractor must keep written records to sufficiently explain the transactions and be accurate, retain for 7 years
- (viii) The Head Contractor can apply to supreme court for directions about the accounts
- (ix) The Head Contractor must ensure Principal can view deposits, withdrawals and information relevant to payment instructions
- (x) The Principal is obliged to inform the QBCC Commissioner of any discrepancies eg error in account number for subcontractor beneficiary, payment to an entity other than the Head Contractor or subcontractor, account names not matching etc.

**(c) Ending Account<sup>44</sup>**

- (i) The Head Contractor can close the trust accounts once all funds paid out and they must give written notice to the Principal that the PBA has been dissolved.
- (ii) Any funds held in the retention account can only be used in accordance with the terms of the subcontract, to rectify defects or as ordered by a Court.

**(d) Payment Disputes<sup>45</sup>**

- (i) Disputed funds must be paid into the disputed funds account. The PBA legislation considers a payment disputes narrowly and as between the Head Contractor and Subcontractor only. For example:
- Subcontractor issues Payment Claim for \$1000
  - Head Contractor issues Payment Schedule that says will pay \$900
  - Head Contractor issues payment instruction to bank to pay \$500 to Subcontractor out of PBA
  - Head contractor must transfer the disputed amount of \$400 into the disputed funds account until dispute resolution process prescribed by regulation is met

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<sup>43</sup> Part 3, Divisions 2 - 5 Building Industry Fairness (Security of Payment) Act 2017

<sup>44</sup> Part 3, Division 7 Building Industry Fairness (Security of Payment) Act 2017

<sup>45</sup> Part 3, Division 6 Building Industry Fairness (Security of Payment) Act 2017



- The original \$100 difference between the Payment Claim and Schedule is not a dispute about payment, it is a dispute about the work or the value of the work which will be a contractual dispute or a security of payment dispute.

#### 4.5 Changes to PBAs

- (a) On 15 July 2020 the Queensland Government passed the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020. The Bill includes amendments to, amongst other legislation, the Building Industry Fairness (Security of Payment Act) 2017, the Building Act 1975 and the Queensland Building and Construction Commission Act 1991.
- (b) Whilst the legislation has been passed, the date for commencement has not yet been set. The Government has indicated that the changes to the PBA scheme will be rolled from March 2021 with a staged process to expand the application of PBAs until January 2023 when they will apply to all eligible building contracts of \$1million or more.
- (c) The legislation changes the way that PBAs will operate in that:
  - (i) Project Bank Accounts will be renamed 'Statutory Trusts'.
  - (ii) Instead of three Project Bank Accounts, there will be two types of Statutory Trusts, one will be a Project Trust Account which will have to be established for each eligible contract. If a Head Contractor holds cash retentions then they will also have to establish a separate Retention Trust Account.
  - (iii) A disputed funds account will no longer be required. Rather, the Head Contractor will have to give a supporting statement with their payment claims stating that all of their Subcontractors have been paid. A penalty of up to \$13,345 can be imposed for making a false or misleading statement.
  - (iv) Project Trust and Retention Trust accounts will have to be audited by an independent auditor.
  - (v) Executive officers of corporations will be able to be held personally liable for an offence by the corporation (certain provisions of the Act only) if that officer did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.
  - (vi) Principals will no longer have any oversight over the Statutory Trust accounts. The QBCC will take over this role with additional audit powers. The QBCC will also be able to 'freeze' a Statutory Trust by giving notice to the financial institution.
  - (vii) Thresholds will now exclude GST.
  - (viii) 'Building work' will be replaced with 'project trust work' so the statutory trust accounts will apply to a broader scope of work including site testing, electrical work, earthmoving, etc. This will mean that a broader range of subcontractors will also be caught by the regime.
- (d) The dates for the expansion of the project bank account regime to non-state government contracts has not yet been set in stone, but in the Second Reading Speech the Minister for Housing & Public Works, Mick de Brenni, outlined the following intended timeframe - but this could change in the future:
  - (i) "From 1 March 2021 eligible Queensland government building and construction contracts valued between \$1 million and \$10 million will require a trust account".
  - (ii) "From 1 July 2021, state government and hospital and health services' building contracts worth \$1 million or more will require a trust account.
  - (iii) From 1 January 2022, project trust accounts will be extended further to all private sector building and construction contracts worth \$10 million or more. This and the next phase

will also include statutory authorities, local government and government owned corporations.

- (iv) From 1 July 2022, trust accounts will apply to all building contracts worth \$3 million or more.
- (v) Finally, from 1 January 2023 trust accounts will apply to all eligible building contracts, be they government or private, of \$1 million or more.”

## 5. Further Changes on the Horizon

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- (a) The Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 also outlined a number of other changes including:
  - (i) An additional safeguard for Head Contractors is also due to be introduced. Head Contractors will be able to lodge a payment withholding request with a financier if the principal fails to pay an adjudication amount and will be able to register a charge over the land that the building work was carried out on if the land is owned by the principal or a related entity of the principal.
  - (ii) There will be increased regulation of certifiers, including the introduction of a demerit point system, the requirement for additional inspections and clarification that a certifier’s primary duty is to act in the public interest (regardless of who engages them or is paying their fees).
  - (iii) The Minimum Financial Requirement framework is set to be moved from the BIF Regulation to the BIF Act and will attract increased penalties for non-compliance.
  - (iv) There will be additional audit and investigative powers that will impact on Architects and Engineers, together with the introduction of new offences if those audits and investigations are complied with.
  - (v) From 1 October 2020 the ability for non-licenced entities to contract with clients to perform non-residential building work so long as they engage a licenced contractor to actually do the work will be removed.
  - (vi) The QBCC Regulation is going to be amended to provide the ACN or ABN of all licensees is to be recorded on the QBCC Licence Register.
- (b) **It has never been more important for businesses in the Building & Construction Industry to have advisors on their side who can navigate the complex regulatory regime they operate in.**



Clifford Gouldson Lawyers

September 2020

**Disclaimer:** No part of this paper can be regarded as legal advice. Although care has been taken in preparing the content of this paper, readers must not alter their position (or that of others) in reliance on this paper. All enquiries should be directed to CG Law (Trading) Pty Ltd trading as Clifford Gouldson Lawyers, otherwise known as CGLaw.



## Security of Payment: Respondent Guide

The Security of Payment regime in Queensland is legislated in Chapter 3 of the *Building Industry Fairness (Security of Payment) Act 2017* (**the BIF Act**).

This is a quick reference guide for respondents who have received a payment claim from a claimant.

### Have you been given a valid payment claim?

1. Does it
  - a. describe the work;
  - b. state the amount claimed; and
  - c. request payment or have the word 'invoice' on it
2. Was it given to the person or entity liable to pay under the contract?
3. Was it given on or after a reference date for work carried out up to that reference date?
4. Was it given before the expiration of the time limit?
  - a. for a claim other than a final claim this is the longer of the time worked out under the contract or 6 months after the work the subject of the claim was last carried out; or
  - b. for a final claim this is the longer of the time worked out under the contract, 28 days after expiry of the defects liability period or 6 months after completion of the works.
5. If more than one payment claim was issued for a reference date, is it the first in time claim?

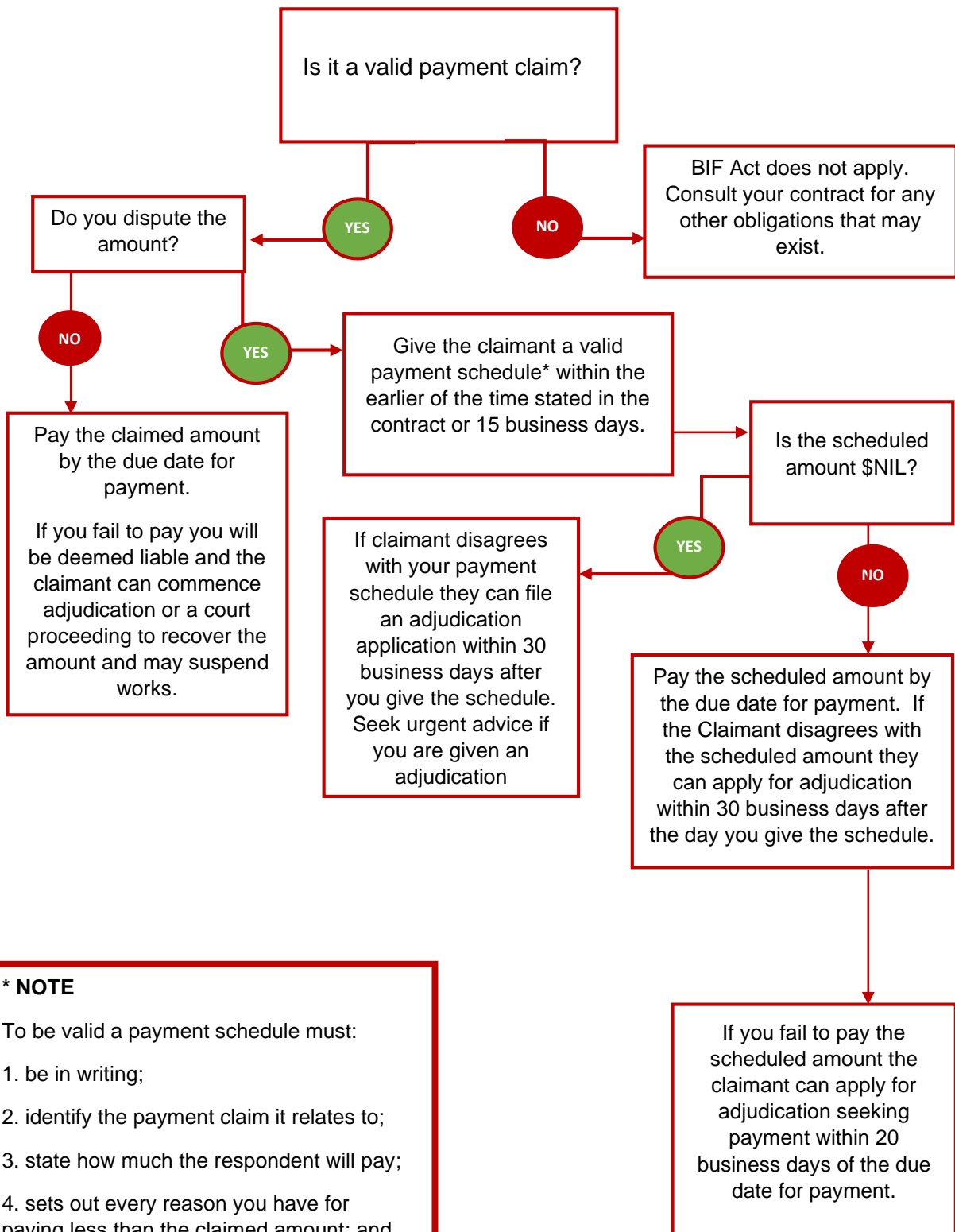
If you answered yes to these questions, then you have been served with a valid payment claim.

If you answered no to any of these questions, then we recommend you seek further advice on how to respond.

**Need more assistance? Contact our team today!**

**mail@cglaw.com.au | cglaw.com.au | +61 7 4688 2188**

## So you've received a valid payment claim - what next?



### \* NOTE

To be valid a payment schedule must:

1. be in writing;
2. identify the payment claim it relates to;
3. state how much the respondent will pay;
4. sets out every reason you have for paying less than the claimed amount; and
5. be given to the claimant within the earlier of the time stated in the contract or 15 business days.



## Security of Payment: Claimant Guide

The Security of Payment regime in Queensland is legislated in Chapter 3 of the *Building Industry Fairness (Security of Payment) Act 2017* (the **BIF Act**).

This is a quick reference guide for claimants wishing to utilise the provisions of the BIF Act to get paid.

Issuing a Payment Claim:

1. Identify the reference date;
2. Give the Respondent a compliant payment claim on or after the reference date for work done up to the reference date;
3. Give the payment claim to the Respondent before the prescribed time limit expires:
  - a. for a claim other than a final claim this is the longer of the time worked out under the contract or 6 months after the work the subject of the claim was last carried out; or
  - b. for a final claim this is the longer of the time worked out under the contract, 28 days after expiry of the defects liability period or 6 months after completion of the works.

Reminders:

1. Only give one payment claim per reference date;
2. To be valid the payment claim must:
  - a. describe the work;
  - b. state how much you are claiming; and
  - c. request payment or have the word 'invoice' on it.
3. Make sure you give a payment claim to the person liable for payment under your contract
4. All notices and adjudication applications must comply with the BIF Act technical requirements.
5. Head Contractors - if you have engaged subcontractors you must also give a supporting statement with a payment claim (from 1 October 2020) declaring that the subcontractors have been paid all money owing to them by the claimant as at the date of the payment claim.

**Need more assistance? Contact our team today!**

**mail@cglaw.com.au | cglaw.com.au | +61 7 4688 2188**

## So you've issued a valid payment claim - what next?

