

## Article Information

Service: Projects & Construction

Sector: Infrastructure

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# A New “Fairer” Way In Queensland - Building Industry Fairness (Security Of Payment) Act

**On 10 November 2017, the new Building Industry Fairness (Security of Payment) Bill 2017 (Qld) was assented to by the Parliament. This will see the introduction of Project Bank Accounts[i], and the repealing and replacement of the Building and Construction Industry Payments Act 2004 (Qld) ('BCIP Act') and Subcontractors' Charges Act 1974 (Qld).**

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## Background

The Queensland Parliament has assented to the introduction of the BIF Act, which in principle seeks to improve security of payment in the Queensland building and construction industry.[\[1\]](#)

## Key changes

### 1. Payment claims

#### *Content of payment claim*

Although payment claims will still need to identify “construction work or related goods and services”, and state the amount claimed, they will no longer need to be endorsed as a payment claim made under the Act. Therefore, respondents will need to be vigilant when receiving ‘invoices’ from contractors and subcontractors, and ensure that they respond to each and every payment claim if the amount is in dispute.

The new BIF Act will include additional content requirements, namely that claims request payment and state any other information by regulations. A document which bears the word ‘invoice’ will be sufficient to comply with the first requirement.

#### *Reference date*

Pursuant to the new BIF Act, an additional reference date will arise on the termination date of a contract if the contract does not contain a post-termination reference date, or purports to prevent a reference date from arising after termination. This amendment is seeking to rectify some disadvantages faced by claimants who enter into brief contracts with limited reference date provisions (usually subcontractors).

### 2. Payment Schedules

#### *Content requirements*

Whilst the current content requirements for a payment schedule (i.e. to identify the payment claim, state the amount proposed to be paid and if that amount is less than the claimed amount, state its reasons) will continue to apply, new requirements may now also be imposed by regulation.

#### *Mandatory submission of payment schedules*

Under the new BIF Act, it will be mandatory for respondents to submit a payment schedule *unless* the respondent pays the claimed amount before the end of the ‘**response period**’ (defined below). Failure to provide a payment schedule within the

response period may result in disciplinary action being taken by the QBCC and a fine of up to \$12,615.

#### *Time for submitting payment schedules*

The time for submitting a payment schedule (the '**response period**') has been amended such that payment schedules must be served within the earlier of:

- the period stated in the contract for responding to a payment claim or paying the claimed amount;
- the period stated in the contract to pay the amount claimed; or
- 25 business days after the payment claim is given to the respondent, whichever is the earlier.

#### *No second chance notices*

If a respondent fails to serve a payment schedule, claimants will no longer be required to provide a 'second chance' notice before proceeding to adjudication. Therefore, it is essential that respondents are proactive in reassessing their mechanisms for dealing with payment claims and invoices prior to the BIF Act taking effect.

A notice (now called a 'warning notice') will still need to be given to the respondent if the claimant intends to seek summary judgment to recover the unpaid claimed amount.

### **3. Adjudication Applications**

#### *Time for submitting adjudication application*

Claimants will be provided with greater time to submit adjudication applications. The new timeframes are as follows:

<b>Adjudication applications relating to:</b>	<b>Timeframe for submitting application</b>
Respondent failing to give a payment schedule and pay the full claimed amount	<b>30 business days</b> after the later of: <ul style="list-style-type: none"><li>• due date for the progress payment; or</li><li>• last day respondent could serve payment schedule (i.e. last day of 'response period').</li></ul>
Respondent failing to pay the full scheduled amount	<b>20 business days</b> after the due date for the progress payment
Payment schedule being less than the claimed amount	<b>30 business days</b> after the claimant receives the payment schedule

### **4. Adjudication Responses**

#### *Content of adjudication response*

Under the new BIF Act, respondent's will no longer be able to raise new reasons for withholding payment that were not first included in their payment schedules, regardless of whether the payment claim is a standard or complex payment claim (which is the current position under the BCIP Act). This makes it essential for respondent's to provide detailed reasons for withholding payments in every payment schedule.

### **5. Adjudicator's Decision**

Adjudicator's will now have the discretion to disregard adjudication applications or responses or accompanying documents if they contravene the limitations imposed by the new regulations. These limitations have not yet been released, but it is expected that there may be a page limitation.

#### **Commencement Of The BIF Act**

Chapter 3 of the BIF Act will apply to contracts whether entered into before or after the commencement of the BIF Act. Therefore, payment claims submitted after the commencement of the BIF Act will be governed by the piece of legislation.

The Queensland Government has not yet indicated when the BIF Act will come into effect, however given that the State election has been called for November 2017, it is likely that it will commence after the New Year.

#### **Preparation, Preparation...**

We suggest that industry participants familiarise themselves with the changes now, which will apply as soon as the BIF Act comes into effect, particularly the new timeframes for submitting documents.

### 1. Claimants

Claimants should (if they do not already) ensure that all payment claims bear the word 'invoice'.

As the timeframes for providing payment schedules has been significantly extended, claimants should consider this when entering into new contracts, and specify a reasonable period within which a payment schedule must be issued in order to avoid having to wait a lengthy period to proceed to adjudication to recover the claimed amount.

### 2. Respondents

Respondents will need to pay careful attention to the requirements of the BIF Act. They should look to implement or review current contract administration processes to ensure that a valid payment schedule is issued in response to a disputed payment claim and that each payment schedule contains all reasons for withholding payment.

### Conclusion

Given the significant extensions to a number of timeframes within Chapter 3 of the new BIF Act, the extent to which the regime is a "fast process" for recovering money has come into question.

However, with a national report into security of payments expected in late December 2017, it is unclear how long these amendments will be in effect.

For further information on these changes, please see the [link](#) to our earlier articles on this topic.

[1] Explanatory Note, Building Industry (Security of Payment) Bill 2017 (Qld) 1.

[1] See our article '[Project Bank Accounts: Do They Cheque Out?](#)' for further details.