

Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020

Explanatory Notes

for

Amendments to be moved during consideration in detail by the Honourable Mick de Brenni MP, Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport

Short title

The short title of the Bill is the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020.

Policy objectives of the Amendments and the reasons for them

On 20 March 2020, the Transport and Public Works Committee (the Committee) released Report No. 36 (the Report) following its consideration of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020* (the Bill).

The Report recommends:

1. the Bill be passed.
2. the Minister for Housing and Public Works review all definitions identified by stakeholders as having ambiguities and amend the legislation as appropriate.
3. the Bill be amended to include measures to prevent the use of multiple contracts on the same or adjacent land in relation to contracts for small scale residential construction work.
4. the Bill be amended to make it clear which parties are intended to be excluded by the exemption allowed in proposed new section 15E.
5. the terms used in proposed new section 15F be reviewed to ensure the intent is clearly articulated and amended as considered appropriate.

6. clause 63 of the Bill (proposed new section 20) be amended to ensure that the account nominated by the subcontractor must be under the control of the subcontractor.
7. the Bill be amended to ensure that all relevant contractors are protected by the trust regime.
8. both the need for and location of proposed new section 55B(6) of the Bill be reconsidered and that the Bill be amended accordingly.
9. section 42 and Schedule 1A(8) of the *Queensland Building and Construction Commission Act 1991* be amended to omit the exemption allowing an unlicensed person who enters into a contract to carry out building work, and does not contravene section 42(1) merely because the person entered into the contract, if the building work is to be carried out by a person (an appropriately licensed contractor) who is licensed to carry out building work of the relevant class.
10. the *Queensland Building and Construction Commission Act 1991* be amended to include 'passive fire work' in the definition of 'fire protection' during consideration of the Bill.
11. the Minister for Housing and Public Works considers undertaking a review of the role of property developers in the building and construction industry including consideration of the impact of their financial and operational capacity, ethical behaviour, and work practices.
12. the review detailed in Recommendation 11 be conducted in consultation with industry stakeholders, and the Minister for Housing and Public Works should report the findings of the review by 1 July 2021.

Ongoing consultation with industry stakeholders and the Queensland Building and Construction Commission (QBCC) has also identified opportunities to improve the effectiveness of the legislation. These are contained in the proposed amendments.

Additionally, the impacts of the COVID-19 pandemic and the recovery period require flexibility for new legislative proposals. The amendments therefore enable the provisions in the Bill to commence when industry is prepared and can fully benefit from the enhancements in the Bill.

Further amendments are also proposed, and the objectives of these amendments are outlined below.

Amendment of the *Building Industry Fairness (Security of Payment) Act 2017*

The Bill amends the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act) to implement the new trust framework through a phased implementation, and introduces reforms to further enhance the effectiveness of the payment process.

Consultation with industry, including through the Committee process, has identified provisions within the Bill which require amendment to ensure the intent of the legislation is successfully achieved. This includes amendments to certain definitions and provisions which will ensure:

- the trust framework applies to the correct parties and contracts;
- the trust protections commence at the appropriate time and apply broadly;
- avoidance practices and third-party payments are prevented; and
- notification requirements are streamlined but remain effective.

The Committee also recommended amendments to correct drafting inconsistencies and that a review be undertaken of the role of property developers in the building and construction industry.

Amendment of the *Queensland Building and Construction Commission Act 1991*

The *Queensland Building and Construction Commission Act 1991* (QBCC Act) regulates the building industry to ensure proper standards are maintained. This includes ensuring persons are appropriately licensed for the work they perform.

Minor amendments to the Bill are required to address the Committee's recommendations for greater clarity around fire protection licensing and other licensing issues.

As recommended by the Committee, the definition of 'fire protection system' needs to be amended to ensure it captures a broader range of passive fire protection elements. This definition also requires amendments to remove redundant elements, clarify that a licence is required to install one or more elements, and exclude the installation of battery-operated, interconnected smoke alarms in class 1a or 2 buildings.

Amendments to the Bill are also needed to the definition of 'fire protection work' to omit redundant references and allow for a schedule to exclude certain work from this definition. These types of exclusions are necessary to prevent duplication in licensing and address low risk or minor work. For example, licensed electricians and registered fire engineers currently perform elements of work that are also captured under the QBCC Act. It should not be necessary to hold an additional QBCC licence to perform the same work. It will also exclude the installation, repair and maintenance of domestic, battery-operated smoke alarms from the definition of fire protection work.

Another minor licensing clarification is required as a consequence of regulation amendments that took effect in Queensland last year. On 13 December 2019, the Queensland Building and Construction Commission and Other Legislation Amendment Regulation 2019 (Amendment Regulation) clarified the scope of work for particular QBCC contractor licences includes the installation of fire collars that are incidental to work being performed by the licensee.

To ensure that these changes operate retrospectively, an amendment to the QBCC Act is required to clarify that plumbers and other relevant trades who have performed incidental fire collar installations before the commencement of the Amendment Regulation are protected from prosecution for unlicensed work.

Finally, an amendment to the Bill is required to address the Committee's recommendation about the omission of a current exemption under section 8 of schedule

1A of the QBCC Act that allows an unlicensed head contractor to lawfully enter into a contract for building work in certain circumstances. The Committee agreed with the view expressed by stakeholders that head contractors should be appropriately licensed.

Achievement of policy objectives

Amendment of the Bill

It is proposed to amend the commencement provisions of the Bill to state that most provisions commence by proclamation. This will provide flexibility for government to monitor the impacts of the COVID-19 pandemic on the building and construction industry, and commence the reforms at a time when industry is prepared and can fully benefit from the enhancements contained in the Bill.

Amendment of the *Building Industry Fairness (Security of Payment) Act 2017*

The proposed amendments achieve the policy objectives by ensuring:

- flexibility in the commencement to monitor and respond to the impacts of COVID-19;
- the trust framework applies to the correct parties and contracts;
- the trust protections commence at the appropriate time and apply broadly;
- avoidance practices and third-party payments are prevented;
- notification obligations are streamlined but remain effective;
- transitional provisions deal with all possible trust account scenarios.

Amendment of the *Queensland Building and Construction Commission Act 1991*

The policy objectives of the Committee's recommendations and other amendments proposed will be achieved by amending the Bill as described below. These amendments will improve clarity of licensing requirements in Queensland.

Additionally, providing for a statutory review of legislation as it relates to property developers in the building and construction industry, will respond to recommendations of the Committee.

Alternative ways of achieving policy objectives

Amendment of the *Building Industry Fairness (Security of Payment) Act 2017* Amendment of the *Queensland Building and Construction Commission Act 1991*

There is no alternative way to achieve the objectives.

Estimated cost for government implementation

Amendment of the *Building Industry Fairness (Security of Payment) Act 2017* Amendment of the *Queensland Building and Construction Commission Act 1991*

It is anticipated that the review of property developers in the building and construction industry will involve a cost to government. Any costs to undertake the review, including the establishment and operation of an independent panel, will be borne by government. There are no other anticipated financial costs for the government arising from the amendments to be moved during consideration in detail.

Consistency with fundamental legislative principles

Amendment of the *Building Industry Fairness (Security of Payment) Act 2017* Amendment of the *Queensland Building and Construction Commission Act 1991*

The amendments are consistent with fundamental legislative principles, except for transitional provisions for mechanical services licensing that have retrospective effect.

Amendment 51 inserts provisions that ensure a person is exempted from the unlicensed work offences under the QBCC Act, from 1 July 2020 until commencement, where they have applied for a new class of licence before this date and the QBCC has not yet made a decision. The provisions also ensure that persons are not stopped from being entitled to monetary or other consideration for carrying out relevant work from 1 July 2020 to commencement.

It is considered the provision's retrospective effect is justified as it will not adversely affect rights and liberties of individuals or impose obligations retrospectively. Rather it will benefit individuals.

Consultation

Amendment of the *Building Industry Fairness (Security of Payment) Act 2017*

The amendments have been informed by industry stakeholder feedback on the Bill, including through submissions to the Committee and at the public hearings of the Committee.

The amendments have also been informed by industry stakeholder feedback through the Ministerial Construction Council (the MCC). The MCC was consulted on the proposed amendments, including the proposal to commence provisions in the Bill by proclamation.

There was broad industry support for the proposed amendments.

Amendment of the *Queensland Building and Construction Commission Act 1991*

The proposed amendments to the Bill are in response to the recommendations of the Committee which were informed by consultation with stakeholders. Additional amendments were also identified through consultation with industry bodies and the QBCC.

Consistency with legislation of other jurisdictions

Amendment of the *Building Industry Fairness (Security of Payment) Act 2017* Amendment of the *Queensland Building and Construction Commission Act 1991*

The amendments are specific to the State of Queensland as they are amendments to the Bill.

Notes on provisions

Part 1 – Preliminary

Amendment 1 - Clause 2 (Commencement)

Clause 2 sets the schedule of commencement dates for provisions within the Bill. Amendment 1 amends clause 2 of the Bill to declare that most provisions of the Bill will commence by proclamation. This will provide additional flexibility to allow the provisions to commence at an appropriate time, depending on economic conditions as a result of COVID-19.

The only provisions to commence on assent are those relating to:

- urgent licensing amendments, including amendments that validate previous conduct by persons
- amendments for the *Retirement Villages Act 1999*.

Part 4 – Amendment of Building Industry Fairness (Security of Payment) Act 2017

Amendment 2 – Clause 61 (Amendment of s 2 (Commencement))

Clause 61 amends section 2 of the BIF Act which specifies the commencement dates for the provisions of the Act. Specifically, Clause 61 amends section 2 to state that Chapter

9, part 1, divisions 2 to 4 (which specify the later phases of the trust framework) commence on a day to be prescribed by regulation.

To align with the majority of the BIFOLA Bill provisions now commencing by proclamation, it is now intended to have the Chapter 9, part 1, divisions of the BIF Act also commence by proclamation. Amendment 2 amends clause 61 to achieve this objective.

Amendment 3 – Clause 61 (Amendment of s 2 (Commencement))

Clause 61 of the Bill amends the commencement provision of the BIF Act to state that Chapter 9, part 1, divisions 2 to 4 commence on a day to be prescribed by regulation.

Amendment 3 amends subsection (2) to reference divisions 1 to 4. This ensures the new division 1, which inserts new Phase 2A for the trust framework, is referenced.

Amendment 4 – Clause 62 (Amendment of s 3 (The main purpose of Act))

Section 3 of the BIF Act specifies the main purpose of the Act. Subsection (2)(a) states that the main purpose of the Act is to be achieved primarily by – requiring the use of project bank accounts for particular building contracts. The Bill amends this section to replace the reference to ‘project bank accounts’ with ‘statutory trusts’.

As the new trust framework will apply to contracts other than ‘building contracts’, Amendment 3 amends the purpose provision (clause 62 of the Bill) to suitably capture all contracts under the new trust framework.

Clause 63 – Replacement of ch 2 (Project bank accounts)

Amendment 5 - Section 8 (Definitions for chapter)

Section 8 of the Bill provides for the definitions to be used in the chapter.

Amendment 5 continues the present definition of “building” that is currently in the BIF Act, section 8. This will ensure that only work relating to a building that is a “fixed structure that is wholly or partly enclosed by walls or is roofed” will be captured. The definition will therefore not capture other work such as civil work that is not related to “building” in the traditional sense.

Amendment 6 - Section 8 (Definitions for chapter)

Section 8 provides for the definitions to be used in the chapter.

Amendment 6 amends the definition of “contract administration” to be clear that it relates to work designed, wholly or partly, by a person. The Bill presently states it applies to ‘work designed by a person’ so it is not clear whether contract administration can only occur where all of the work was designed by the person, or just a part of it. This supports

Amendment 11 which amends clause 63, section 15E which relates to contracts for professional design, advisory or contract administration work.

Amendment 7 - Section 8 (Definitions for chapter)

Section 8 of the Bill provides for the definitions to be used in the chapter.

Amendment 7 amends the definition of “contracted party” in section 8 to clarify what work is captured under a contract. The Bill presently refers to the party required to ‘carry out’ work under the contract but this term is not defined. The amendment adopts the approach of the *Queensland Building and Construction Commission Act 1991* (QBCC Act) which presently defines the term ‘carry out’. The amendment states that the contracted party is the party performing work under the contract whether this is undertaken personally, or indirectly, for example, by subcontracting the work.

Amendment 8 - Section 8 (Definitions for chapter)

Section 8 provides for the definitions to be used in the chapter.

Amendment 8 inserts into section 8 a new definition of “mechanical services work.” It is necessary to include this definition in the BIF Act to clarify that the definition has the same meaning as the QBCC Act.

Amendment 9 - Section 8A (Meaning of project trust work)

Section 8A defines project trust work. The definition of ‘project trust work’ is used to determine which contracts will trigger the need for a project trust account.

Amendment 9 clarifies the definition of ‘project trust work’ in the Bill so that it is clear that this work must relate to a building.

Amendment 10 - Section 8B (Meaning of protected work)

Under section 8B of the Bill, “protected work” is used to define who are the beneficiaries receiving the protection of trust accounts. The term is broader than “project trust work” to ensure that protections are provided to a wider cohort.

Amendment 10 puts beyond doubt that “project trust work” is “protected work” and makes it clear in a note that “project trust work” has a narrower scope than the broader “protected work”.

Amendment 11 – Section 11 (What is a project trust)

Section 11 of the Bill states what is a project trust.

Amendment 11 amends section 11 of the Bill to broaden what is considered a project trust. Presently the section only applies to payments from the contracting party to the contracted party. The section is being broadened to also apply to amounts the

contracted party as trustee must deposit into the account. For example, this may include a shortfall payment under section 51.

Amendment 12 – Section 14 (Particular contracts for project trust work)

Section 14 of the Bill defines the particular contracts that are eligible for a project trust.

To provide flexibility to monitor, and respond to, the impacts of COVID-19 on the industry and community, section 14 has been amended to apply the new trust framework to the cohort captured by the present Project Bank Account (PBA) framework i.e. eligible State government contracts between \$1 million and \$10 million.

The amendment also provides added flexibility and ensures State authorities can opt-in to the new framework earlier than the default criteria provides.

Applying the new project trust account framework to the existing PBA cohort will simplify this framework, making it more cost-effective and easier to administer. It is intended to defer commencement of the proposed phase (State Government and Hospital and Health Service contracts valued at \$1 million or more) which is presently provided for in the Bill under section 14. This phase and subsequent phases will commence on proclamation. The provisions relating to this are now in clause 83 in the Bill, which replaces chapter 9, part 1, divisions 2 and 3 of the BIF Act and establishes the phased introduction of the new trust framework.

Amendment 13 - Section 14B (Multiple contracts at same site or adjacent sites)

Section 14B of the Bill aims to treat multiple contracts at the same site or adjacent sites as a single contract when determining if the contract meets the applicable thresholds. This section was inserted as an anti-avoidance provision to ensure split contracts are still captured by the project trust regime in appropriate cases.

Amendment 13 further clarifies section 14B by stating that the exemptions under subdivision 3 apply only to the larger contract and not to the separate contracts. This ensures an exemption from the trust requirements will not apply where, for example, there are multiple contracts on the same or adjacent land for small scale residential construction work and the applicable eligibility thresholds are met.

Amendment 14 - Section 15E (Contracts for professional design work)

Section 15E of the Bill excludes contracts solely for carrying out 'building work services' from having to establish a project trust account.

Amendment 14 further clarifies the types of contracts that are excluded from the project trust requirements to ensure the policy intent is being met and that it is clear for industry. The section now specifically states the professions and types of work that are excluded.

Amendment 15 - Section 15F (Contracts with less than 90 days until practical completion)

Section 15F excludes contracts from having to establish a project trust account where there is less than 90 days between the day a project trust account would be required to be established for that contract and the day of practical completion. The day of practical completion is the day set under the contract or the day the contracted work would reasonably be estimated to be completed.

Amendment 15 further clarifies the section to state that the 90 day assessment is based on the first day a project trust would, apart from the section, have been required, and the expected date for practical completion at the time of assessment. It also makes clear that an ongoing obligation exists to reassess the exemption each time a contract amendment occurs.

Additionally, the amendment also clarifies how section 15F applies in the case of a contract variation that occurs close to the 90 day mark. The section makes clear that a project trust will only be required where there are at least 90 days between the first contract amendment and the expected day for practical completion.

Amendment 16 – Section 17 (Establishment of project trust)

Clause 63 inserts new section 17 which states that a trust is established by the contracting party paying the contracted party, for the first time after the trust is required, an amount under the contract.

It is likely that there would be the circumstance, in the early stages of a project, where the trustee may not have received their first progress payment from the principal but is liable to pay subcontractors for work performed. New section 51 of the BIF Act requires the trustee to immediately deposit an amount into the trust account if there is an insufficient amount available to pay an amount due to a beneficiary of the trust. In this situation, the first payment into the trust would be a payment made by the trustee, rather than the contracting party. The current drafting may not establish a trust in this situation.

Amendment 16 amends section 17 to clarify that the project trust is established at the point a payment that is or becomes payable to a beneficiary is deposited into the trust account.

Amendment 17 - Section 20 (All payments to subcontractor beneficiaries to be paid from project trust account)

Section 20 of the Bill requires the trustee to make all payments to beneficiaries from the project trust account and for the deposit to be made into the account nominated by the beneficiary.

Amendment 17 further clarifies that the account nominated must be one which the beneficiary has control over and a third-party account cannot be nominated.

Amendment 18 – Section 30 (Definitions for part)

Sections 18A and 34A of the Bill require a trustee to open a trust account at an ‘approved financial institution’. The Bill refers to ‘financial institutions’ and ‘approved financial institutions’ depending on whether the section relates to only an approved financial institution or generally to a financial institution. Inconsistencies in the use of the terms have been identified.

Amendments 18, 24 and 26 amend sections 30, 53A and 57A respectively to omit the word ‘approved’ as only the term ‘financial institution’ is required.

Amendment 19 – Section 31 (What is a *retention trust*)

Clause 63 inserts new section 31 which explains what a retention trust is.

Amendment 19 complements the amendment to clause 63, section 11 for project trusts and applies this same methodology for retention trusts. The amendment broadens what is considered a retention trust. Presently the section does not account for all circumstances, such as shortfall payments under section 51. The amendment addresses this matter.

Amendment 19 is also consistent with amendments 20 and 45. The amendment, removes the link to retentions withheld under a ‘building contract’ as defined under the QBCC Act. This broadens the protections for retentions withheld to include all contracted parties who have cash retentions withheld, under a project trust account project. This ensures the policy intent is achieved by including parties such as, electricians, architects, engineers and other professions currently excluded from the definition of ‘building work’ under the QBCC Act.

Amendments 20 - Section 32 (When retention trust required)

Sections 31, 32 and 218 of the Bill specify what a retention trust is and when a retention trust is required. The intent of these sections is for the retention trust framework to apply to all contracted parties under the trust framework who have cash retentions withheld. This includes, electricians, architects, engineers and other professions currently excluded from the definition of ‘building work’ under the QBCC Act.

Amendments 19, 20 and 45 amend sections 31, 32 and 218 of the Bill to remove the link to retentions withheld under a ‘building contract’ as defined under the QBCC Act. This broadens the protections for retentions withheld to include all contracted parties who have cash retentions withheld, under a project trust account project. This ensures the policy intent is achieved.

Amendment 21 – Section 35 (All retention amounts withheld must be deposited in retention trust account)

Section 35 of the Bill requires all retention amounts withheld to be deposited into a retention trust account.

Amendment 21 corrects a drafting error and replaces a reference to the ‘contracted party’ with a reference to the ‘contracting party’. This ensures the requirement under section 35(3) applies to the correct party.

Amendment 22 – Section 40 (Notice of retention trust before withholding retention amount)

Section 40 of the Bill requires the contracting party to notify the contracted party of the use of a retention trust account prior to withholding the retention amount.

Amendment 22 corrects a drafting error by omitting an instance of the word ‘amount’.

Amendment 23 - Section 51 (Trustee to cover shortfalls)

Section 51 requires a trustee to make a payment to ‘top up’ the project or retention trust account if there is an insufficient amount available to pay an amount due to a beneficiary of the trust. Section 51(3) requires the trustee to notify the commissioner when an amount is paid into the trust account for this reason. The intent of this notice is to act as an early warning indicator to the QBCC of potential financial distress.

However, feedback has suggested the notification requirement under section 51(3) is unnecessary and will result in many notifications that will not necessarily indicate financial distress. Feedback also suggested that the notification under section 20C(3) was a more appropriate indicator of financial distress for the QBCC.

Amendment 23 amends section 51 by omitting section 51(3) to remove the requirement to notify the commissioner of a shortfall payment.

Amendment 24 - Section 53A (Power to require particular information)

Sections 18A and 34A of the Bill require a trustee to open a trust account at an ‘approved financial institution’. The Bill refers to ‘financial institutions’ and ‘approved financial institutions’ depending on whether the section relates to only an approved financial institution or generally to a financial institution. Inconsistencies in the use of the terms have been identified.

Amendments 18, 24 and 26 amend sections 30, 53A and 57A respectively to omit the word ‘approved’ as only the term ‘financial institution’ is required.

Amendment 25 - Section 55B (Reports, records and information)

Section 55B places an obligation on financial institutions to provide reports, records and information. However, subsection (6) places an obligation on a trustee to provide information and records to a special investigator on request.

Amendment 25 omits section 55B(6) which was inadvertently included in this provision.

Amendment 26 - Section 57A (Account review report)

Sections 18A and 34A of the Bill require a trustee to open a trust account at an 'approved financial institution'. The Bill refers to 'financial institutions' and 'approved financial institutions' depending on whether the section relates to only an approved financial institution or generally to a financial institution. Inconsistencies in the use of the terms have been identified.

Amendments 18, 24 and 26 amend sections 30, 53A and 57A respectively to omit the word 'approved' as only the term 'financial institution' is required.

Amendment 27 – Section 57A (Account review report)

Section 57A provides for a trust account to be reviewed and a report prepared to certify that the accounts have been kept in accordance with the requirements of the Act. The section states under subsection (5) that the auditor must give the trustee an 'original signed' account review report within a specified period.

Section 57D then requires the trustee to provide the QBCC with a copy of the account review report, in the approved way, within 10 business days after the trustee receives the original account review report from the auditor.

Amendment 27 responds to feedback that this process should be streamlined. The amendment therefore provides for the auditor to provide an account review report directly to the QBCC, in the approved way. The auditor is to provide a copy of the report to the trustee at the same time. Section 57D is then omitted via another amendment of the Bill.

Amendment 28 – Section 57D (Copy of account review report for commissioner)

Section 57D provides for the trustee to give a copy of the account review report to the QBCC within 10 business days of receiving the report from the auditor.

Amendment 28 complements amendment 8 and omits the requirement for the trustee to provide a copy of the account review report to the QBCC. Amendment 8 now requires the auditor to provide the report directly to the QBCC.

Clause 72 – Amendment of s 97 (Withdrawing from adjudication)

Amendment 29 – Section 97 (Withdrawing from adjudication)

Amendment 29 omits the note included in section 97(3) which is not required.

Clause 73 – Insertion of new ch 3, pt 4A

Amendment 30 – Section 97B (Higher party may be required to retain amount owed to respondent)

New chapter 3, part 4A of the BIF Act introduces a payment withholding request mechanism. Section 97B states that a higher party may be required to retain an amount owed to the respondent, where the higher party receives a payment withholding request.

Amendment 30 makes clear that a payment withholding request may not be issued to a resident owner.

Amendment 31 – Section 97B (Higher party may be required to retain amount owed to respondent)

New chapter 3, part 4A of the BIF Act introduces a payment withholding request mechanism. Section 97B states that a higher party may be required to retain an amount owed to the respondent, where the higher party receives a payment withholding request.

Amendment 31 inserts a new subsection (6) into section 97B to define the term ‘resident owner’. The term is defined in accordance with existing section 61(5) of the BIF Act. The resident owner term is used to identify persons who may not be issued a payment withholding request under section 97B

Clause 75 – Insertion of new ch 3, part 6A (Charge over property)

Amendment 32 – Section 100B (Registering charge over property for unpaid adjudicated amount)

Amendment 32 corrects a drafting error to include ‘the’ before following.

Amendment 33 – Section 100B (Registering charge over property for unpaid adjudicated amount)

Amendment 33 corrects a drafting error where section 100B(2)(c)(iii) was incorrectly referred to as 100B(2)(c)(ii).

Clause 82 – Insertion of new ch 8A (Transitional provisions for Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020)

Amendment 34 section 211B (Project bank account for building contracts entered into before 1 July 2020)

Section 211B is a transitional provision which explains what obligations and trust framework applies for building contracts tendered before, or contracts entered, prior to 1 July 2020.

Amendment 34 amends the heading to omit the reference to 1 July 2020 as the new trust framework is now intended to commence later than this date. A more general heading has been introduced.

Amendment 35 – Section 211B (Project bank account for building contracts entered into before 1 July 2020)

Section 211B is a transitional provision which explains what obligations apply, including whether a PBA or trust account is required, for contracts tendered before, or contracts entered, prior to the commencement of new Chapter 2.

Amendment 35 more clearly explains when former chapter 2 applies to building contracts tendered before, or contracts entered, prior to commencement of new Chapter 2. The amendment makes clear that the requirement to establish a project bank account may not apply immediately, but an amendment of a contract may trigger the application of section 13 and 15, and then require a project bank account.

Amendment 35 complements amendment 37 which further clarifies the section 211C transitional provision.

Amendment 36 – Section 211C (Transferring existing project bank accounts to new scheme)

Section 211C is a transitional provision which allows for the transfer of existing project bank accounts to the new scheme.

Amendment 36 amends the heading of section 211C to apply more broadly. It now refers generally to the transition to the new scheme. This is necessary as section 211C can also apply to project bank accounts that were not in existence at the time of commencement of the new scheme.

Amendment 37 - Section 211C (Transferring existing project bank accounts to new scheme)

Section 211C allows trustees for existing PBAs to transfer to the new trust framework within the first 6 months of the commencement of the new framework. Various requirements apply in this circumstance.

Amendment 37 provides further clarity and flexibility in this transition process. Where the PBA has not yet been opened and commencement of the new framework has occurred, the trust accounts can be opened under the new trust account framework. This removes an ambiguity that may have resulted in a PBA having to be opened then immediately closed in order to meet the obligations associated with transferring to the new trust account framework.

Additionally, in the circumstances above, this provision is no longer restricted to within 6 months of commencement to account for circumstances such as where a contract amendment triggers the project trust requirement beyond the 6-month mark. In this case, the head contractor may still transition to the new framework.

For head contractors who have already established a PBA and want to transition to the new framework, this must occur within 6 months after the commencement of the new framework

Amendment 38 – Section 211C (Transferring existing project bank accounts to new scheme)

Section 211C allows trustees to transfer existing PBAs to the new framework within the first 6 months of the commencement of the new framework. Various requirements apply in this circumstance.

Amendment 38 replaces the reference to ‘old account’ with ‘old retention trust account’. This change better reflects the type of account being referred to in the section.

Amendment 39 – Section 211D (Project trusts and contracts entered into before the commencement of new phases)

Section 211D provides for the treatment of project trusts and contracts entered into before the commencement of new phases. The section presently refers to ‘building contracts’ entered into before the commencement of a new project trust phase. However, unlike the PBA framework, the project trust framework is not restricted to ‘building contracts’. Instead the ‘project trust work’ definition is used to place parameters around the types of contracts that are being regulated.

Amendment 39 therefore omits the reference to ‘building’ in this section.

Amendment 40 – Section 211D (Project trusts and contracts entered into before the commencement of new phases)

Section 211D provides for the treatment of project trusts and contracts entered into before the commencement of new phases.

Amendment 40 amends the section to provide further clarity on the operation of the section. The amendment makes clear that contracts should remain within the

parameters of the phase applying at the point of tender or entering the contract. This means that, for example, a contract that does not satisfy Phase 3 project trust criteria at the time of entering the contract, but which is amended post commencement of Phase 4, should only be assessed against the Phase 3 criteria, not the Phase 4 criteria.

Amendment 41 – Section 211D (Project trusts and contracts entered into before the commencement of new phases)

Section 211D of the Bill provides for the treatment of project trusts and contracts entered into before the commencement of new phases. The section presently refers to ‘building contracts’ entered into before the commencement of a new project trust phase. However, unlike the PBA framework, the project trust framework is not restricted to ‘building contracts’. Instead the ‘project trust work’ definition is used to place parameters around the types of contracts that are being regulated.

Consistent with amendment 39, amendment 41 omits a second reference to ‘building’ in this section.

Clause 83 – Replacement of ch 9, pt 1, divs 2 and 3

Amendment 42 – Division 1 (Extended application of project trusts and retention trusts)

Clause 83 of the Bill implements the phased introduction of the new trust framework via three divisions.

Amendment 42 complements amendment 12 which inserts new Phase 1B into the Bill. Amendment 42 takes the circumstances presently stated in clause 63, section 14 of the Bill (i.e. Phase 2A) and inserts it as a new Chapter 9, Part 1, Division 1 prior to the existing Divisions 2 to 4.

Amendment 43 – Division 2 (Extended application of project trusts and retention trusts to local government and private sector)

Clause 83 of the Bill implements the phased introduction of the new trust framework via divisions. Division 2 provides for the extended application of the trust framework and introduces Phase 2B.

Amendment 44 – Division 4 (Extended application of project trusts and retention trusts to most contracts)

Clause 83 of the Bill implements the phased introduction of the new trust framework via divisions. Division 4 provides for the extended application of the trust framework and introduces Phase 4.

Amendment 45 – Section 218 (Amendment of s 32 (When retention trust required))

Sections 31, 32 and 218 specify what a retention trust is and when a retention trust is required. The intent of these sections is for the retention trust framework to apply to all contracted parties under the trust framework who have cash retentions withheld. This includes, electricians, architects, engineers and other professions currently excluded from the definition of ‘building work’ under the QBCC Act.

Amendments 19, 20 and 45 amend sections 31, 32 and 218 of the Bill to remove the link to retentions withheld under a ‘building contract’ as defined under the QBCC Act. This broadens the protections for retentions withheld to include all contracted parties who have cash retentions withheld, under a project trust account project. This ensures the policy intent is achieved.

Clause 84 (Amendment of sch 2 (Dictionary))

Amendment 46 – Schedule 2 (Dictionary)

Clause 84 amends Schedule 2 (Dictionary) of the BIF Act. Schedule 2 provides for key terms used in the Act, including the definition for ‘approved way’.

Amendment 46 amends the definition of ‘approved way’ to omit the reference to section 200C and replace it with section 198A. This addresses a minor drafting error.

Amendment 47 – Schedule 2 (Dictionary)

Clause 84 amends Schedule 2 (Dictionary) of the BIF Act. Schedule 2 provides for key terms used in the Act, including the definition for ‘State authority’.

Amendment 47 inserts a definition for ‘mechanical services’ in Schedule 2.

Amendment 48 – Schedule 2 (Dictionary)

Clause 84 amends Schedule 2 (Dictionary) of the BIF Act. Schedule 2 provides for key terms used in the Act, including the definition for ‘State authority’.

Amendment 48 omits the definition for ‘State authority’ from Schedule 2 as this term is already defined in section 8 for the chapter.

Part 6 – Queensland Building and Construction Commission Act 1991

Clause 108 – Act amended

Amendment 49 – Part 6, division 2, heading (Amendments commencing on assent)

Amendment 49 amends the Part 6, division 2 heading to remove the reference to amendments commencing on assent. Instead a more general heading has been inserted. This is required given the commencement provision of the Bill is being amended to commence the majority of the provisions via proclamation.

New clause 110A Insertion of new s 30CA

Amendment 50 – 30CA Meaning of *fire protection work*

Amendment 50 inserts new clause 110A which defines ‘fire protection work’ under new section 30CA of the QBCC Act. The definition of ‘fire protection work’ is amended to exclude the installation, repair and maintenance of battery-operated smoke alarms in class 1a or 2 buildings and certain work of a type prescribed by regulation. Excluded work that is prescribed by regulation will not require a QBCC fire protection licence. This regulation making power is broadly consistent with other existing regulation-making powers under the Act.

New clauses 115A to 115F

Amendment 51 - Amendment of s 35 (Imposition of conditions etc. on grant of licence) (new clause 115A)

Amendment 50 amends section 35 (Imposition of conditions etc. on grant of licence) to enable the QBCC, during the transitional period after a new licence class is introduced, to issue a conditional licence restricting the scope of work that may be performed under the new licence.

The conditional licence can only be issued in circumstances where an individual cannot demonstrate competence for all the scope of work for the new licence class, thereby enabling individuals who have performed specialised work to continue to perform that work, albeit a narrower scope of work than prescribed for the new licence class. This amendment applies to all licence types (i.e. contractor, nominee supervisor, site supervisor and occupational).

Amendment 51 - Amendment of s 36 (Subsequent imposition of conditions etc.) (new clause 115B)

Amendment 51 – Insertion of new 36A (Vary or revoke conditions) (new clause 115C)

Amendment 49 also makes minor consequential amendments to section 36 (Subsequent imposition of conditions etc.) to move the parts pertinent to varying or revoking condition to new section 36A.

Amendment 51 - Amendment of s 42A (Exemption from s 42 for up to 6 months) (new clause 115D)

Amendment 49 amends section 42A (Exemption from s42 for up to 6 months). This amendment extends the period under which a business is exempt from holding a licence following the introduction of a new licence class from 6 months to 12 months, provided an application is submitted to the QBCC within 6 months of the licence class being introduced. This will provide more time for business owners to understand and demonstrate they meet the new licensing requirements and have their applications assessed.

Amendment 51 - Amendment of s 42C (Unlawful carrying out of fire protection work) (new clause 115E)

Amendment 51 - Amendment of s 42CA (Unlawful carrying out of mechanical services work) (new clause 115F)

Amendment 50 also amends section 42C (Unlawful carrying out of fire protection work) and section 42CA (Unlawful carrying out of mechanical services work). These amendments clarify that particular persons could be exempted from the offence for unlawful carrying out of fire protection work or mechanical services work, if they fall under circumstances prescribed by regulation. This is a consequential amendment consistent with the intent of section of 42A, which exempts particular persons from section 42 (Unlawful carrying out of building work) for a period following the commencement of a new class of licence.

Clause 119 (Insertion of new ss 53BA and 53BB)

Amendment 52 – Insertion of new ss 53BA and 53BB

Amendment 52 omits clause 119 of the Bill. This is due to industry concerns that the effects of the penalties associated with these proposed offences, particularly on smaller licensees, may be too severe. This is particularly relevant at this point in time, when the impacts of the COVID-19 pandemic are being felt across the building and construction industry and the broader economy.

New clause 120A Amendment of s 67AB (Meaning of *tier 1 defective work* and carry out *tier 1 defective work*)

Amendment 53 - Amendment of s 67AB (Meaning of *tier 1 defective work* and carry out *tier 1 defective work*)

Amendment 51 inserts clause 120A which provides minor consequential amendment to section 67AB of the Act to replace ‘fire protection system’ with ‘fire protection equipment’.

New clause 123A Insertion of new s 115D

Amendment 54 – Insertion of new s 115D (Review of role of developers)

Amendment 54 inserts a new clause 123A which inserts a new section 115D into the QBCC Act. This section triggers a statutory review of the role of developers in the building and construction industry. The Minister may appoint a panel of no more than 4 appropriately qualified persons and may give to the panel directions or a terms of reference to guide the review. A report on the outcome of the review must be tabled in the Legislative Assembly by the Minister as soon as practicable after the review is completed.

Clause 125 Amendment of sch 1 (Transitional and validating provisions)

Amendment 55 – Validation of work—installation of fire collars

Amendment 55 amends clause 125 and inserts new section 79A into part 17 of Schedule 1 of the Act (Validation provision for Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020). New section 79A provides that holders of relevant licences are taken to have held a licence of the appropriate class for carrying out installation of fire collars before the commencement of the Queensland Building and Construction Commission and Other Legislation Amendment Regulation 2019. The amendment retrospectively protects those licensees from prosecution for unlicensed work prior to the amendment regulation taking effect.

New clause 125A Amendment of sch 1A (Exemptions from requirement to hold contractor's licence)

Amendment 56 - Amendment of sch 1A (Exemptions from requirement to hold contractor's licence)

Amendment 56 amends Schedule 1A of the Act and omits section 8 as it may undermine the intent of section 42 of the Act regarding unlicensed building work. The amendment is based on a recommendation of the Transport and Public Works Parliamentary Committee and industry submissions. Section 8 is no longer needed as other existing exemptions under Schedule 1A apply to arrangements such as Public Private Partnerships and prescribed government projects.

Clause 126 Amendment of sch 2 (Dictionary)

Amendments 57 – Schedule 2 (Dictionary)

This is a minor amendment to omit the existing definitions of 'fire protection system' and 'fire protection work', as these are to be replaced under amendment 55.

Amendments 58 – Schedule 2 (Dictionary)

Amendment 58 amends clause 126 of the Bill and inserts a new definition for ‘fire protection equipment’. The definition of ‘fire protection system’ is renamed ‘fire protection equipment’ to better reflect the policy intent. This definition is also amended to capture a broader range of passive fire protection elements and clarify that a licence is required to install one or more elements.

Division 3 (Amendments commencing on 1 July 2020)

Amendment 59 – Part 6, division 3, heading (Amendments commencing on 1 July 2020)

Amendment 59 amends the Part 6, division 3 heading to remove the reference to amendments commencing on 1 July 2020. Instead a more general heading has been inserted. This is required given the commencement provision of the Bill is being amended to commence the majority of the provisions via proclamation.

Division 4 (Amendments commencing by proclamation)

Amendment 60 – Part 6, division 4, heading (Amendments commencing by proclamation)

Amendment 60 amends the Part 6, division 4 heading to remove the reference to amendments commencing by proclamation. Instead a more general heading has been inserted. This is required given the commencement provision of the Bill is being amended to commence the majority of the provisions via proclamation. A specific heading about proclamation for provisions under Part 6 is therefore no longer appropriate.

Part 9 – Minor and consequential amendments

Clause 153 – Acts amended

Amendment 61 – Schedule 1 (Acts amended)

Amendment 16 amends the Part 1 – Amendments commencing on assent heading to instead insert a more general heading. This is required given the commencement provision of the Bill is being amended to commence the majority of the provisions via proclamation.

Amendment 62 Schedule 1 (Acts amended)

Schedule 1 is amended to make a minor correction to the heading of section 35H of the *Professional Engineers Act 2002*. The word “heath” is replaced with “health”.

Amendment 63 – Schedule 1 (Acts amended)

Amendment 17 amends the Part 2 – Amendments commencing by proclamation heading to instead insert a more general heading. This is required given the commencement provision of the Bill is being amended to commence the majority of the provisions via proclamation.