



# Changes to Security of Payment laws in Queensland

# Agenda

- Overview of new laws (BIFOLA)
- Security of Payment changes
  - Trust Accounts
  - Supporting statements
  - Adjudication and changes
  - Payment withholding request
  - Charge over property
- QBCC Act
- Building Act

# BIFOLA Overview

**BIFOLA** stands for **B**uilding **I**ndustry **F**airness (Security of Payment) and **O**ther **L**egislation **A**menendment Act 2020.

BIFOLA Act was made on 23 July 2020

Makes changes to:

- *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act)
- *Queensland Building and Construction Commission Act 1991* (QBCC Act)
- *Building Act 1975*

Rolling commencement dates – from 1 October 2020

# BIFOLA Overview

## BIFOLA Objectives

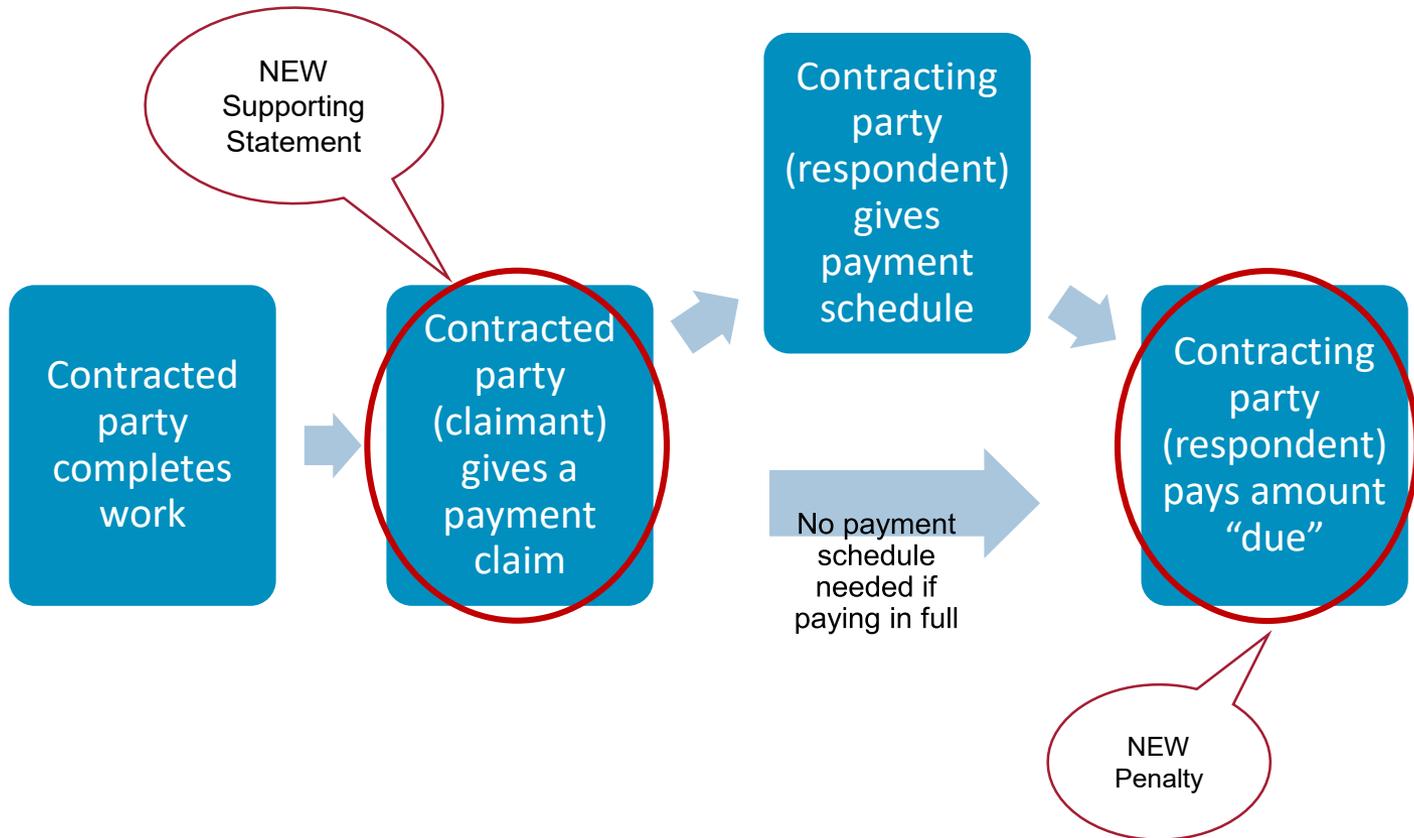
- ✓ **Ensure everyone gets paid** – improves Trust Account framework introduced in 2018 and introduces new payment dispute options.
- ✓ **Industry Confidence and Growth** – improves QBCC's capability in terms of licensing; monitoring and reporting on minimum financial requirements (MFR) and enforcing penalties regarding offences for non-compliance with laws.
- ✓ **Fulfil Government commitments to Industry** – as outlined in Queensland Building Plan.

# Building Industry Fairness (Security of Payment) Act 2017

## **Security of payment**

# Security of Payment

Recall the key steps in the Payment Process



# Supporting Statements

## WHAT?

A Supporting Statement tells the contracting party (the principal or developer) if all subcontractors have been paid or if there are any outstanding payments owed to subcontractors.

## WHO?

If you are a head contractor and have subcontractors, you may need to include a supporting statement with your payment claims.

Some exceptions apply:

- ✘ Does not apply if you are contracted with the resident owner to do domestic building work.
- ✘ Does not apply if you DO NOT have subcontractors.
- ✘ Does not apply to Subcontractors and persons further down the contracting chain.

# Supporting Statements

## WHEN?

A supporting statement must be given **with every payment claim** given in relation to the construction contract.

## HOW?

Give a written document or include a statement on your invoice declaring all subcontractors have been paid amounts owed to them at the time of giving the payment claim.

The image shows a template for an invoice. At the top right, it says "INVOICE" with fields for "DATE" and "INVOICE #". Below this is a table with columns for "Description", "Quantity", "Unit Price", and "Total". At the bottom right of the table, there are fields for "TOTAL", "PMD", and "TOTAL DUE". A red circle highlights a box at the bottom left of the invoice, containing the text "Supporting Statement for claim baraturum xzartum ginaratum dinnanurum".

Use the [example templates](#) available on the QBCC website.

The image shows a form titled "SUPPORTING STATEMENT BY HEAD CONTRACTOR REGARDING PAYMENT TO SUBCONTRACTORS". The form includes a section for "Head Contractor" with fields for "Business name of head contractor", "ABN", "Owner name of subcontractor", "SBN", and "Contract number/identifier". It also has a section for "Subcontractor" with fields for "Name of subcontractor", "ABN", and "Contract number/identifier". The form contains several numbered sections for providing details about the payment claim, including the subject of the claim, the amount, and the date. There are also fields for "Signature" and "Date". At the bottom, there is a "Penalties" section with a warning about the consequences of not providing a supporting statement.

# Supporting Statements

## WHAT IF SUBCONTRACTORS HAVE NOT ALL BEEN PAID?

For each subcontractor who have not been paid the full amount due at the date of the payment claim, the supporting statement must state:

- Name of subcontractor who has not been paid
- Amount that is unpaid
- Reference for the unpaid payment claim e.g. invoice number, claim number
- Date the work was completed or the goods/services were supplied
- Reasons why the amount has not been paid.

# Supporting Statements

WHAT IF A SUPPORTING STATEMENT IS NOT GIVEN?

Penalties may apply

Not including a supporting statement with the payment claim DOES NOT make the payment claim/invoice invalid.

The respondent (e.g. principal) receiving the payment claim should still take all necessary steps to ensure they respond to the claim as required by the BIF Act.

# New non-payment offence

## WHAT?

From 1 October 2020, it will ALSO be an offence not to pay what was proposed in the payment schedule by the due date - a penalty of 100 penalty units may apply.

## WHO?

Applies to all contracts for [construction work](#) or [supplying related goods and services](#).

## HOW?

Everyone should be paid what is owed by the due date – contractors should continue to ensure they pay the amount owed by the due date.

# New non-payment offence

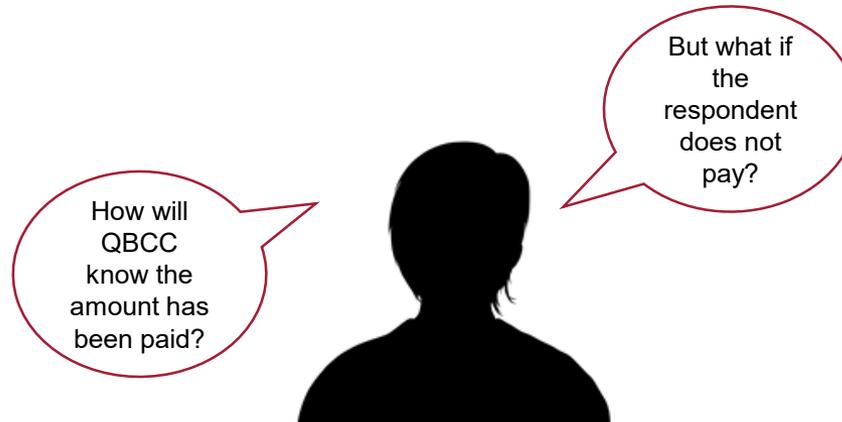
## WHAT TO DO IF YOU ARE NOT PAID?

Notify the QBCC of a failure to pay scheduled amount via the Notification of Offence Form: <https://www.qbcc.qld.gov.au/sites/default/files/Notification%20of%20Offence.pdf>

Remember - Contractors also have a range of dispute options under the BIF Act, including:

- ✓ Making an application for adjudication
- ✓ Give written notice of their intention to Suspend Work
- ✓ Make a Monies Owed Complaint to the QBCC
- ✓ Claim the unpaid amount in their next payment claim/invoice.

# Adjudication changes



# Adjudication changes

## From 1 October 2020:

- ✓ Updated definition of 'complex' payment claim "complex payment claim means a payment claim for an amount more than \$750,000 ..."
- ✓ Claimant must also advise registrar of withdrawal of adjudication application
- ✓ The respondent must advise the registrar (and provide proof) the debt has been paid.

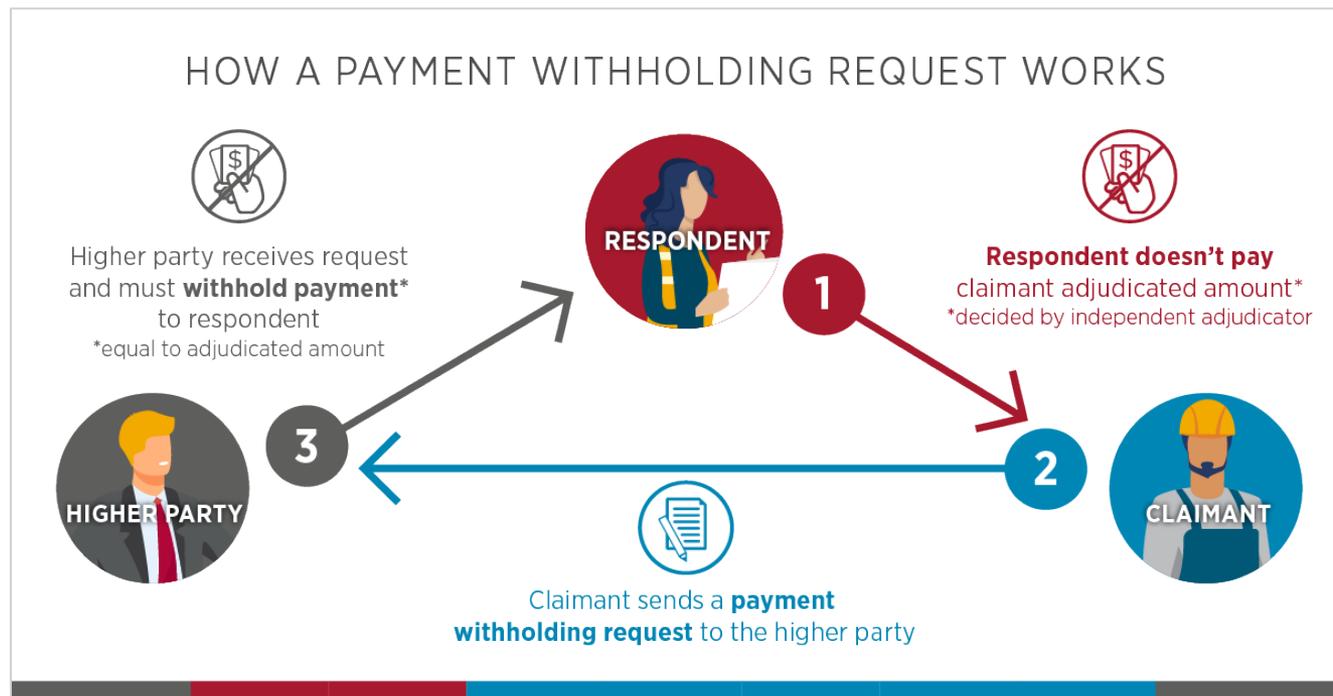
If the respondent has not paid the adjudication amount by the due date, the claimant can CURRENTLY:

- ✓ Give notice of their intention to suspend work
- ✓ Make a monies owed complaint to the QBCC
- ✓ Lodge the adjudication certificate as a judgment debt to recover the unpaid amount through court.

From 1 October 2020 – the claimant has some further enforcement options.

# NEW Payment withholding request

- After adjudication the claimant will be able to give a payment withholding request to the higher party if they are not paid an adjudicated amount by the respondent.
- There are serious consequences for higher parties who fail to comply with payment withholding requests.



# NEW Payment withholding request

## Who is the 'higher party'?

- If the claimant is a subcontractor— the person responsible for paying the respondent for the construction work (or supply of related goods and services) to which the adjudicated amount relates.
- If the claimant is a head contractor— the person who finances the construction work (or supply of related goods and services) to which the adjudicated amount relates.
- ✘ A payment withholding request **cannot be given to a resident owner**.
- ✘ Also as an adjudication application cannot be made in relation to a payment dispute with a resident owner, **a payment withholding request also cannot attach to an amount owed by a resident owners**.
- If the claimant does not know the details of the higher party, they can request this information from the respondent.

# NEW Payment withholding request

## What must the higher party do after receiving this notice?

- The higher party must withhold payment from the respondent up to the amount that the respondent has not paid under the adjudication decision.
- The obligation to withhold this amount remains in force until the claimant is paid the adjudication amount.
- If the person receiving the payment withholding request is not the higher party for the adjudicated amount – they must give notice to the claimant stating they are not, or no longer, the higher party.

# NEW Payment withholding request

## LET'S LOOK AT AN EXAMPLE

*If the amount the higher party owes to the respondent is less than the adjudication amount then they must retain ALL of what they would have paid.*

### Scenario 1.

The adjudication decision requires the respondent to pay \$55,000 to the claimant (which has not been paid).

The higher party only owes \$40,000 to the respondent under the contract.

The higher party must retain all of the \$40,000 and pay nothing to the respondent until they have paid the adjudicated amount to the claimant.

# NEW Payment withholding request

## Scenario 2.

The adjudication decision requires the respondent to pay \$55,000 to the claimant (which has not been paid).

The higher party only owes \$100,000 to the respondent under the contract. This is scheduled to be paid in four further monthly progress payments of \$25,000.

*The higher party may need to withhold more than one payment – i.e. multiple future progress payments.*

The higher party must retain \$55,000 from the respondent until they have paid the adjudicated amount to the claimant – but can then pay the other \$45,000 to the respondent, as follows

Month 1 – retains all of the \$25,000 – pays nothing to the respondent

Month 2 – retains all of the \$25,000 – pays nothing to the respondent

Month 3 – retains \$5,000 – can pay \$20,000 to the respondent

Month 4 – can pay \$25,000 to the respondent

# NEW Charge over property

## WHAT?

- A charge over property registers a charge in favour of the head contractor over the property for the unpaid adjudication amount, safeguarding payment while you pursue recovery action for the outstanding amount.

## WHO?

- ✓ **Only a head contractor** - who is the claimant for an adjudication decision - can use this enforcement option.
- ✓ The respondent, or a related entity for the respondent, **must be the registered owner** of the relevant property.
- ✗ Cannot be placed over the property of a resident owner.

# NEW Charge over property

## WHEN?

- ✓ the adjudicator has decided the respondent is required to pay an adjudication amount.
- ✓ the respondent does not pay the adjudication amount by the due date.
- ✓ the claimant has filed the adjudication certificate as a judgement for a debt with the courts.

## HOW?

The claimant may lodge the following documents with the registrar of titles:

- ✓ A request to record the charge over the lot/property – using a Form 14.
- ✓ The adjudication certificate (or certified copy).
- ✓ A statutory declaration stating the details of the relevant property (lot on plan description), that the adjudicated amount has not been paid, and (if relevant) that the registered owner is a related entity for the respondent.

More Information – See Land Title Practice Manual available on the Lands Titles Registry website.

# NEW Trust Accounts

Trust Accounts ensure project funds are held securely in trust for the subcontractors (the beneficiaries) to help them get paid for their work.

## Continuing roll-out of Trust Accounts for the building and construction industry

### WHAT?

There are two types of trust accounts that may be required (subject to certain criteria and phases):

1. Project Trust Account – one trust account required for each project – holds progress payments received from the principal and that may become payable to subcontractors.
2. Retention Trust Account – one trust account for each contractor – holds cash retention amounts withheld from subcontractors – across multiple eligible project trust contracts.

# NEW Trust Accounts

## WHO?

Project Trust applies to:

- ✓ Head Contractors (who have entered into a contract for an [eligible project](#)); and
- ✓ Some subcontractors, but only if they are a related entity to the Head Contractor who is also required to have a Project Trust.

Retention Trust applies to:

- ✓ Head Contractors who require a Project Trust and who hold cash retentions,
- ✓ Principals (excluding State Government principals) who are withholding cash retentions from a Head Contractor AND who require a Project Trust,
- ✓ (Only from phase 4 – due to commence on 1 January 2023) Subcontractors who are withholding cash retentions AND are working on eligible Project Trust project.

# NEW Trust Accounts

## WHEN?

PTAs phases	Project Trust applies to:
<b>1 March 2021</b>	Principal: State government agencies, excluding Statutory Authorities Contract Price: \$1M and \$10M
<b>1 July 2021</b>	Principal: State Government agencies and Hospital and Health Services (HHS) Contract Price: \$1 million or more.
<b>1 January 2022</b>	Principal: Private sector, local government, statutory authorities' and GoCs Contract Price: \$10 million or more
<b>1 July 2022</b>	Principal: Private sector, local government, statutory authorities' and GoCs Contract Price: \$3 million or more.
<b>1 January 2023</b>	Principal: All private sector and public sector Contract Price: \$1 million or more (full implementation)

# NEW Trust Accounts

## WHAT HAPPENS UNTIL THE NEW LAWS COMMENCE?

The **NEW trust account laws do not apply until 1 March 2021.**

Until then, the current PBA requirements continue for certain State Government building projects valued between \$1M - \$10M.

However, Contractors who open a PBA under the current requirements will be able to transition over to the new streamlined framework when those laws commence.

**COMING SOON** – The QBCC will publish detailed information on its website and provide information to contractors about new trust account framework and the transition process closer to the commencement date.

# Queensland Building and Construction Commission Act 1991 (QBCC Act)

# QBCC Act

## Licensing – excluded persons

- ✓ Strengthen existing '**excluded individual**' provisions by ensuring these persons also cannot obtain a site supervisor licence.
- ✓ A new register for non-licensees on the QBCC website will allow QBCC to publish details of those persons when excluded.
- ✓ Changes to ensure QBCC is informed of a person's **conduct and licence history in other jurisdictions** when considering their eligibility for a licence in Queensland.

## Industry oversight and compliance

- New offence to address situation where a licensee causes another person to give QBCC false or misleading MFR information
- New penalties will apply if a person, without reasonable excuse, delays rectifying building work or obstructs another person from rectifying building work.

# QBCC Act

## Minimum Financial Requirements (MFR)

- QBCC can **exclude accountants** who provide information that doesn't comply with the MFR or knowingly provide false or misleading information about a licensee's MFR to QBCC.
- These persons will be excluded for 3 years, and listed on the QBCC website on a new register.
- Licensees have an obligation to ensure they **do not engage an accountant** who is excluded or not independent of licensee.

# Building Act 1975 (Building Act)

# Building Act 1975 (Building Act)

## Introducing a demerit system

- A demerit point system to be introduced for certifiers, if maximum points are reached, a certifier may have their license suspended for up to three (3) years.

## Changes affecting the work of a certifier

- Building owners will be entitled to request inspection documentation from the certifier for all stages of the work.
- Existing requirements for a private certifier to give a notice of engagement, now also include a requirement the certifier must give the 'owner' notice of their engagement.
- New section allows owners to request additional certifying functions by a building certifier.
- New time limitations for making a complaint about a building certifier's conduct – for example, 7 years where the complaint relates to certification for building development approval, and the certifier's conduct has not caused significant financial loss or other serious harm'.
- How long certifiers must keep copies of inspection documentation has been extended from 5 years to 7 years

# Summary

BIFOLA has made important changes for building and construction industry:

- ✓ Supporting Statements
- ✓ Enhanced payment protections and penalties
- ✓ Improvements to Adjudication process
- ✓ New enforcement options after adjudication
- ✓ Continued roll out of Trust Accounts
- ✓ Changes to QBCC licencing
- ✓ Qualified accountants and excluded accountants
- ✓ Certification process changes

Many of these new requirements apply from [1 October 2020](#)

More information is available under the 'NEW LAWS' tab on the QBCC website and on the DHPW website.

Questions?



# Thank you!

## Need more information?

Visit [qbcc.qld.gov.au](http://qbcc.qld.gov.au)



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