

Building Industry Fairness (BIF) Reforms Implementation and Evaluation Panel

Discussion paper



Queensland
Government

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Introduction

About this paper

The purpose of this discussion paper is to obtain feedback from building and construction industry stakeholders on the Building Industry Fairness reforms introduced by the Queensland Government in 2017.¹

The Building Industry Fairness Reforms Implementation and Evaluation Panel (the 'Panel') will use the feedback as part of its evaluation of the reforms.

About the evaluation

The *Building Industry Fairness (Security of Payment) Act 2017* (the 'BIF Act') requires that a review of the operation and effectiveness of the 2017 suite of new Building Industry Fairness reforms be carried out by the Panel. The Panel will report on the outcomes of its review and that report will be tabled in Parliament by the Minister for Housing and Public Works, Minister for Digital Technology and Minister for Sport.

The Panel has been appointed by the Minister under the BIF Act.

The Panel

In June 2018 the Queensland Government appointed the Panel to support the review of the operation and effectiveness of the new Building Industry Fairness reforms.

The Panel has four members:

- Bronwyn Weir (Chair)
- Jennifer Robertson (Deputy Chair)
- Troy Lewis
- Fiona Reid.

What are the Panel's terms of reference?

The Panel has been asked to determine:

1. the effectiveness of the government's implementation of the suite of building industry reforms
2. the effectiveness of the legislative framework in achieving policy intent
3. opportunities to realise improved security of payment outcomes for industry prior to the commencement of project bank accounts in the private sector
4. the indicative economic impacts and outcomes of the building industry reforms.

We will refer to these as terms of reference or 'TOR'1-4 throughout the discussion paper.

Which reforms will the Panel consider?

In broad terms the Panel will consider:

1. the introduction of project bank accounts (PBAs)
2. the changes to the procedures for progress payments and dispute resolution using the adjudication process
3. the modernisation of the subcontractor's charges laws
4. new laws about fair terms in contracts
5. changes to the minimum financial requirements for licensees under the BIF Act.

It should be noted that many of these reforms are in the early period of operation or have not yet commenced. As a result, impacts will vary as the transition occurs and stakeholders become more familiar with the new requirements. The suite of reforms is intended to operate as a package and therefore the effectiveness of the reforms is expected to improve over time as each component becomes operational.

¹ *Building and Construction Legislation (Non-confirming Building Products-Chain of Responsibility and Other Matters) Amendment Act 2017* and the *Building Industry*

Fairness (Security of Payment) Act 2017 and related regulations.

Which reforms are discussed in this paper?

This discussion paper sets out information about the reforms relating to:

- PART 1—project bank accounts
- PART 2—changes to progress payments and dispute resolution using the adjudication process
- PART 3—new requirements which will apply to all building contracts which provide for retentions or security for performance
- PART 4—timing for commencement of the suite of reforms.

Your feedback

Your comments and suggestions will help the Panel evaluate and provide its report to the Queensland Government.

The Panel is seeking feedback on the:

- government's implementation
- practical operation
- effectiveness in achieving the policy intent of government.

Who should give feedback?

All members of the building and construction industry are invited to provide feedback including building contractors, subcontractors, consultants and industry organisations. The Panel would also welcome feedback from banking institutions, advisors to the construction industry (such as lawyers, accountants and financial advisors), and members of the community with an interest in the reforms.

Please note that if you are currently involved in a project bank account contract you may respond to this discussion paper but you may also be contacted separately if you are a:

- banking institution
- head contractor or
- first tier subcontractor.

Privacy and confidentiality

All personal information collected will be treated in accordance with the *Information Privacy Act 2009*.

Submissions will be published on the BIF Panel website after the closing date unless you

request that your submission not be published. If you wish your submission or a part of it to be treated as confidential, that should be made clear at the time it is lodged.

If you make a submission, the department or Panel may contact you to discuss your submission further.

Disclaimer

This discussion paper has been released to seek feedback on the Building Industry Fairness reforms and does not represent legal advice.

The State of Queensland, the Panel and the members of the Panel individually make no statement, representation, or warranty about the accuracy or completeness of any information contained in this discussion paper.

The State of Queensland, the Panel and the members of the Panel individually disclaim all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages and costs any person might incur as a result of the information being inaccurate or incomplete in any way for any reason.

How can you give your feedback?

You can give your feedback in **one or more** of the following ways by:

- completing our questionnaire on project bank accounts
- providing a written submission on any of the reforms discussed in this paper
- sending an email with comments on any of the reforms discussed in this paper and/or
- attending an industry forum.

Completing our questionnaire about project bank accounts

The project bank accounts questionnaire should take you about 20 minutes to complete and can be completed in the following ways:

- **Online:** You can complete the questionnaire online.
- **Email:** You can complete the questionnaire at the end of this document or [download it](#) and email it to us at:

BIFPanel@hpw.qld.gov.au

- **Post:** You can complete the questionnaire at the end of this document or [download it](#) from and post it to us at:

BIF Panel Secretariat
PO Box 2457
Brisbane QLD 4001

Completed questionnaires close 5pm on 15 February 2019

Making a written submission about any of the reforms discussed in this paper

You can provide written submissions on any of the reforms discussed in this paper by sending them to:

- **Email:** BIFPanel@hpw.qld.gov.au
- **Post:**
BIF Panel Secretariat
PO Box 2457
Brisbane QLD 4001

At the end of each Part we set out questions you may wish to respond to when making a submission.

Written submissions close 5pm on 15 February 2019

Send us an email

You can send us an email with comments on any of the reforms discussed in this paper to:

Email: BIFPanel@hpw.qld.gov.au

Email submissions close 5pm on 15 February 2019

Attend an Industry Forum

The Panel will be holding forums which industry stakeholders may register to attend.

For more information about the Forums please visit the Panel's [webpage](#).

All submissions close 5pm on 15 February 2019

How is the Panel going to consider the new Building Industry Fairness reforms?

There are multiple ways in which the Panel is going to support the review of the new Building Industry Fairness reforms. These include considering:

- the responses to this discussion paper
- feedback from the industry forums
- feedback from the Industry Reference Group
- case studies and consultation directly with parties to current project bank account contracts
- relevant reviews and reports that have already been conducted by State and Federal Governments
- reports commissioned by the Panel.

The Panel's [Evaluation Plan](#) is published on its webpage.

What is the IRG?

The Industry Reference Group (IRG) is a group made up of representatives from different industry organisations and groups. The IRG has been established in consultation with the Minister in accordance with the Panel's terms of reference. The Panel will consult with the IRG as part of their review.

What will the IRG do?

The IRG will carry out activities such as:

- providing the Panel with submissions or input
- development of the content of discussion papers, surveys and/or other tools that may be used
- identifying relevant stakeholders
- identifying a range of methods to engage with stakeholders
- attending industry forums held by the Panel
- facilitating feedback from industry through the various bodies that IRG members represent.

Membership of the IRG

The IRG is made up of the following representatives:

Name	Industry organisation
Graham MacKrill	Air Conditioning and Mechanical Contractors Association
Dianne Tate	Australian Banking Association
Stacy Kennedy	Australian Institute of Building Surveyors
Jillian Carney	Consult Australia
Chris Lynch	Electrical Trades Union
Stacey Rawlings	Engineers Australia
Michael Roberts	Housing Industry Association
Grant Galvin	Master Builders Queensland
Malcolm Richards	Master Electricians Australia
Penny Cornah	Master Plumbers Association of Queensland
Wayne Smith	National Fire Industry Association
Gary O'Halloran	Plumbers Union
Juanita Gibson	Subcontractors Alliance

Background

Why were the reforms made?

The building and construction industry is one of the pillars of the Queensland economy. The industry:

- contributes \$46 billion to the State economy each year
- is the third largest employer in Queensland, employing around 230,000 Queenslanders.

However, commentators have identified a number of issues in the industry relating to financial practices which affect security of payment for subcontractors including:

- drawn-out and sometimes unjustified delays in paying for work done
- the bottom up allocation of risk in the contractual chain, leaving those who can least afford it, funding the construction project
- retention money being used as cash flow by contractors and head contractors, often with subcontractors rarely or never receiving retention amounts owed.

Reports have also concluded that as a result of the above issues businesses in the construction industry are at a higher risk of insolvency². The risk of insolvency has a direct impact on the industry, communities and confidence in the Queensland economy.

There are a number of suggested reasons for there being more insolvencies in the construction industry, including the imbalance of bargaining power in the contractual chain and practices such as:³

- concertina of back to back contracts, which effectively shed risk down the contractual chain
- cascading payment regimes, which result in projects being funded from the bottom up.

This often results in subcontractors and sub subcontractors being hardest hit when payment disputes arise or an insolvency occurs.⁴ In many instances they are also not the party best-placed to manage at least some of the risks they bear.

Throughout 2015 and 2016 the Queensland Government consulted with industry on a range of options to improve the security of payment for subcontractors in the building and construction industry. This resulted in the introduction of a series of reforms to improve security of payment for subcontractors through the *Building Industry Fairness (Security of Payment) Act 2017* (the BIF Act), which was passed by Parliament on 26 October 2017.

² The [Senate Committee report](#) into insolvency in the Australian building and construction industry dated December 2015 also argues that businesses in the industry face “an unacceptably higher risk” of insolvency than other industries, noting that the industry’s rate of insolvencies is out of proportion to its share of national output.

³ Murray, J. (2017), *Review of Security of Payment Laws: Building Trust and Harmony*, December 2017, page executive summary page xiv

⁴ The [Senate Committee report](#) into insolvency in the Australian building and construction industry dated December 2015 argued that the building and construction market is distorted because market power is “concentrated at the top of the contracting chain, inequitably reallocating risk from the large contracting companies to those who are least able to bear it, namely subcontractors, suppliers and employees”.

What was the objective of the reforms?

The BIF Act tackles the issue of security of payment from several angles including:

- **Queensland Building and Construction Commission's (QBCC) powers strengthened**

This includes greater penalties for unlicensed building work and clarifying influential person provisions to combat illegal phoenixing. Commenced in November 2017.

- **Project Bank Accounts (PBAs)**

Requiring trust accounts to be set up by the head contractor for each project through which money from the principal/developer must flow to subcontractors and preventing funds from being used for purposes other than the project. Initially PBAs will apply only to government building projects with a contract value between \$1 million and \$10 million (including GST) (Phase 1). Following this initial implementation period it is intended that PBAs would apply to all public and private sector building contracts over \$1 million. Phase 1 commenced on 1 March 2018.

- **Security of Payment changes**

Modifications to the current protections and processes for payment claims and payment schedules, streamlined adjudication and modernized and simplified subcontractors' charges provisions. Due to commence on 17 December 2018.

- **Retentions and security for performance**

New provisions will apply to all building contracts which provide for retentions or security for performance. These provisions give greater certainty about the time period for the withholding of retentions or security for performance. They also create a process for the return of retention monies. Due to commence on 17 December 2018.

- **Minimum Financial Requirements (MFR) strengthened**

This provides for QBCC to have greater oversight of the financial position of contractors; and the transfer of the MFR into a regulation to make the MFR provisions more transparent and rigorous. Anticipated to commence in January 2019.

- **Improving the fairness of contracts**

There is a new requirement for building contracts to include 'mandatory conditions' prescribed by regulations. The content of these new regulations is under development.

These reforms are not standalone solutions but rather a holistic package of strategies, which together aim to:

- drive cultural change in the industry
- improve security of payment
- support economic growth in the building and construction industry
- reduce insolvencies in the industry over the long term.

As noted above, this paper discusses the following suite of reforms:

- Part 1—project bank account reforms
- Part 2—changes to progress payments and dispute resolution using the adjudication process
- Part 3—new requirements which will apply to all building contracts which provide for retentions or security for performance
- Part 4—timing for commencement of the suite of reforms.

The reforms relating to MFR and improving the fairness of contract terms will not be considered in this paper as at the time of preparing this paper, the regulations relating to these reforms had not been released.

PART 1—Project Bank Accounts

What is the purpose of PBAs?

The purpose of PBAs is to help people working in the building and construction industry be paid for the work they do⁵ by providing for effective, efficient and fair processes for securing payment.⁶

PBAs are intended to:

- increase business confidence, provide greater fairness in the industry and reduce the levels of anguish and financial difficulties for subcontractors (and the social impacts of this anguish) faced with still having to meet their payment obligations
- lead to faster progress payments
- protect subcontractor payments
- make systemic changes designed to effect cultural change in the industry
- provide greater security in events such as insolvency, where money within the account is effectively quarantined for subcontractors who are beneficiaries to the trust.

When will PBAs commence?

The government has divided the implementation of PBAs into three phases:

Phase 1

On 1 March 2018 PBAs commenced on government building and construction projects (excluding engineering projects) valued between \$1 million and \$10 million (including GST).

Phase 2

Phase 2 will extend the operation of PBAs to all building and construction projects (public and private) valued over \$1 million, except for those contracts outside of the scope of “building work” including:

- projects where the principal is the state government, a local government or private sector
- building contracts where 50% or more of the contract price is for ‘building work’, the contract price is \$1 million or more, and the building contract is not a subcontract (i.e. it is only required to be established by head contractors)
- private sector residential construction work (for three or more living units in the same contract)
- multiple contracts at same or adjacent sites entered between the same principal and head contractor
- contracts entered into after the commencement of Phase 2 provisions.

The date for commencement of Phase 2 has not been announced by the government but it has said that Phase 2 will commence no sooner than 1 March 2019.

Phase 3+

Phases 1 and 2 will apply to first tier subcontractors, that is, subcontractors who contract directly with the head contractor. The Act also enables application of PBAs to lower tier contractors and suppliers at a later date which has been referred to by government as Phase 3 of PBAs.

How do PBAs work?

A PBA is a trust account set up for a particular project into which the developer/owner pays progress payments. The head contractor and the first tier subcontractors are beneficiaries of the trust account.

Money paid into the PBA is held in trust for the beneficiaries.

Because each project is required to have a separate PBA, this enables increased transparency over where and when the payments from the principal are being distributed on a project by project basis.

⁵ section 3(1), *Building Industry Fairness (Security of Payment) Act 2017*

⁶ Explanatory notes to *Building Industry Fairness (Security of Payment) Act 2017*

Main features of the PBAs

The main features of PBAs are:

- the head contractor is the trustee of the PBA
- the head contractor and first tier sub-contractors are beneficiaries of the PBA
- the head contractor must set up three trust accounts for each project, being:
 - General Trust Account
 - Retention Trust Account
 - Disputed Funds Trust Account
- all payments from the principal must be made into the General Trust Account
- all retention money must be held in the Retention Trust Account
- all funds subject of a 'payment dispute' must held in the Disputed Funds Trust Account
- the head contractor must provide specified information to principals and subcontractors
- all payments from the PBAs due to subcontractors take priority over payments to the head contractor
- where there are insufficient funds to pay subcontractors, the head contractor must deposit funds to cover the shortfall
- The principal has information about the PBA and:
 - must be provided with the ability to view transactions
 - must be given written notice for all payments and withdrawals to and from the PBA
- in the event of insolvency of the head contractor, or termination of the head contract, the principal can take over the administration of the trust funds and the head contractor must provide the principal with enough information to undertake ongoing administration.

Failure to comply with these provisions will be an offence by the head contractor.

The principal also has a mandatory obligation to report certain payment discrepancies to the QBCC.

New concepts and terms

Below we have summarised some of the new concepts and phrases included in the PBA processes.

Building Work

For the purposes of the PBA contract, building work includes building, construction and renovation activities, site works, planning and design, contract administration and certain inspections associated with the construction of a building.

PBAs are not required for:

- civil, engineering, public transport infrastructure projects
- residential construction work of less than three living units.

General Trust Account

The principal pays all progress payments for the project into this trust account. All withdrawals and transfers from this trust account must be made by way of payment instruction to the financial institution.

Retention Trust Account

The head contractor must pay all retention amounts withheld under a subcontract into this trust account.

The head contractor can only withdraw funds from this trust account if it is paying:

- the subcontractor an amount withheld under its subcontract
- itself to correct defects in the subcontracted work, or to secure the performance of the subcontract. The payment must be made at the end of the defects liability period for the related subcontract or
- a payment ordered by a court or
- a payment to another subcontractor beneficiary, engaged by the head contractor to correct defects or omissions in subcontracted work.

Disputed Funds Trust Account

If a payment dispute occurs the head contractor must pay into this trust account the difference between the payment instruction and:

- the amount the head contractor proposed to pay in its payment schedule, if the head contractor provided a payment schedule or
- the claimed amount, if the head contractor did not provide a payment schedule.

However, the head contractor is under no obligation to make the above payment if the amount of the payment dispute is more than the contract price for the subcontract.

The head contractor can only withdraw funds from the disputed funds trust account if it is paying:

- the subcontractor who is a party to the payment dispute
- itself in accordance with the outcome of a dispute resolution process
- another person prescribed by regulation or
- the funds back to the general trust account after:
 - the outcome of the dispute resolution process, if the dispute cannot be appealed
 - the appeal process has been completed or the time period to lodge an appeal if no appeal is made or
 - 60 days after the subcontractor is notified that the money has been transferred into the disputed funds trust account, if a dispute is not referred to a dispute resolution process.

Payment dispute

A payment dispute for PBAs is when the head contractor provides a payment instruction, which is less than:

- the amount the head contractor agreed to pay in its payment schedule, if the head contractor provided a payment schedule or
- the claimed amount in the payment claim, when the head contractor did not provide a payment schedule.

Payment instruction

A payment instruction is the instruction to the financial institution for the payment of an amount from one of the trust accounts.

How can you give your feedback to the Panel on the project bank account reforms?

The Panel has prepared a questionnaire that you can complete as a way of giving your feedback on the project bank account reforms.

Completion of the questionnaire is optional.

You can also make a submission, send an email or attend one of our industry forums.

See Page 5 of this document for further details on how to complete the questionnaire or make a submission to the Panel.

If you wish to make a submission or send an email to the Panel setting out your views on the project bank account reforms, the following questions could guide your submission:

- 1. Have you been provided with sufficient information about the project bank account reforms to help you understand how they will apply? What further information would you like from government?**
- 2. Will the PBA reforms improved payments to subcontractors? Why?**
- 3. Will the PBA reforms improved the receipt of retentions by subcontractors? Why?**
- 4. Do you believe that the project bank account reforms could be improved? If so, how?**
- 5. What impact (positive or negative) will the PBA reforms had on your business? Why?**

PART 2—Progress Payments and Adjudication

Background

Currently the *Building and Construction Industry Payments Act 2004* (BCIPA) sets out a process that helps enforce claims for payment in the building and construction industry. The protections of BCIPA are triggered by the claimant sending a valid payment claim.

BCIPA primarily:

- provides a method of separating disputes from debts due
- provides adjudication to resolve disputes and debts due quickly
- provides special enforcement protections in court for debts due under BCIPA
- allows claimants to suspend work for non-payment
- prohibits “pay when paid clauses”.

On 17 December 2018 BCIPA will be replaced by chapter 3 (progress payments and the adjudication process) and 5 (appointment of adjudicators) of the BIF Act.

What is the purpose of these changes ?

The purpose of these changes is to:

- reduce the legal hurdles to security of payment legislation
- reduce opportunities for head contractors to delay payment and allow subcontractors to take action to resolve payment issues faster
- enhance the independence and operation of the Adjudication Registry within the QBCC, and streamline the adjudication process for greater ease of use
- make systemic changes designed to effect cultural change in the industry, protect subcontractor payments and increase

business confidence and fairness in the industry.⁷

What types of work do the progress payment and adjudication provisions apply to?

The progress payment and adjudication provisions apply to all contracts for ‘construction work’ and/or related goods and services. The definitions of construction work⁸ and related goods and services⁹ are very broad and have not changed from those definitions in BCIPA.

A much broader range of building projects are covered by the progress payment provisions than the PBA requirements therefore these reforms affect more participants in the building and construction industry.

Concepts and terms

The following terms are used on the progress payment provisions.

Adjudication

An adjudication is a legal process for dispute resolution. Under the adjudication process, adjudicators are appointed by the Adjudication Registry.

The adjudication process is intended to be a fast track, dispute resolution process to enable timely and fair payment on an interim basis.

Mandatory timeframes are set down for the adjudication process. Parties in dispute are bound by the decision of the adjudicator and must make any payments ordered promptly. However, they can commence proceedings for breach of contract later if they wish to re-litigate issues determined in an adjudication.

Claimants and Respondents

A claimant is a person who makes a claim for payment. A respondent is the person who receives a claim and is liable to pay (the ‘payer’). Claimants and respondents can be

⁷ Explanatory notes to *Building Industry Fairness (Security of Payment) Act 2017*

⁸ section 65, *Building Industry Fairness (Security of Payment) Act 2017*

⁹ section 66, *Building Industry Fairness (Security of Payment) Act 2017*

head contractors, subcontractors, sub subcontractors or suppliers.

Payment Claim

A payment claim is a claim for payment by a claimant. It may be a one-off payment or a progress payment. A valid payment claim must:

- identify the construction work and/ or related goods and services that the progress claim relates
- state the claimed amount
- request payment of the claimed amount
- contain any information required by regulation.

Payment Schedule

A payment schedule is issued by a respondent (payer) in response to a payment claim. The payment schedule sets out what the payer is willing to pay the claimant and, if they don't want to pay the full amount claimed, the reasons why.

Reference Date

The reference date is the date on or after which a claimant is entitled to make a payment claim under their contract. If there no time set out in the contract, the reference date is the last day of the month.

What are the changes to the progress payment provisions?

The key changes from the BCIPA are:

It is an offence for a payer not to issue a payment schedule unless they have paid the payment claim in full.

Under BCIPA, a time for issuing a payment schedule varied depending on the value of the claim. There was also no mandatory obligation on a payer to issue a payment claim.¹⁰

Under the BIF Act, unless a payer pays the payment claim in full by the due date, it must issue a payment schedule within the earlier of

the time stated in the Contract or 15 business days of the date of receipt of the payment claim. The failure to do so is an offence with a maximum penalty of approximately \$13,000 (100 penalty units).

The due date for payment is the date provided for in the Contract, OR, if no date is provided or the payment provision is void, 10 business days after the payment claim is issued.

Payment claims will not need to be endorsed to trigger the protections of security of payment.

Under BCIPA if a claimant wanted to rely on the protections of BCIPA, a valid payment claim stating that it was made under BCIPA (the endorsement) would need to be made. The endorsement notified the respondent ('payer') that the protections under BCIPA had been triggered. It has been reported that as a result, subcontractors did not use the endorsement on their claims (and therefore not trigger the protections of BCIPA) as they feared this may affect their relationship with the builder and could impact on their prospects of being engaged for future work.

Under the BIF Act an endorsement is no longer required and instead payment claims are required to include a request for payment. A written document bearing the word invoice is taken to satisfy this requirement.

Claimants do not need to give a second chance notice, which allowed the payer (respondent) a second chance to provide a payment schedule and raise a dispute.

Under BCIPA if a claimant sent a payment claim and did not receive a payment schedule or payment by the due date, the claimant had to send a second chance notice within 20 business days from the due date. If that notice was not sent, the claimant lost its ability to use BCIPA to resolve the dispute.¹¹ The second chance notice¹² gave the payer a second opportunity to raise a dispute.

¹⁰ Unless the contract provides for a shorter period

¹¹ Except for suspension of work

¹² Or section 20A notice

Under the BIF Act a second chance notice is no longer required for adjudication, but a warning notice is required if the claimant intends to enforce the claim in court.

Claimants will have 30 days to lodge an adjudication application.

Under BCIPA there are strict timeframes for lodging an adjudication application, the shortest period being 10 business days from receiving the payment schedule if the payment schedule was less than the claimed amount.

Under the BIF Act, an adjudication will need to be commenced within:

- 30 business days of the due date for payment, if there is no payment schedule and the full amount of the payment claim has not been made
- 30 business days of receiving the payment schedule, if there is a payment schedule that provides for payment of less than the full amount claimed
- 20 business days of the due date for payment, if there is a payment schedule and the amount provided for is not paid in full.

To enforce an unpaid payment claim in court claimants must, within 20 business days of the due date for payment, give the payer a warning notice of the claimant's intention to start proceedings.

Under the BIF Act, if a claimant wishes to enforce a debt due in court, the claimant must give the payer a warning notice within 20 business days of the due date for payment. If the claimant does not give the payer the warning notice within the 20 business days, it loses its opportunity in court to rely on the special enforcement protections for debts due, being:

- the payer being unable to bring a counterclaim or
- raise a defence.

The process for adjudication of 'complex claims' has varied in that reasons that were not stated in the payment schedule can no longer be introduced by the payer during the adjudication process.

Under BCIPA the processes varied depending on the value of the claim. A "complex payment claim" was a claim for more than \$750,000. Timeframes in the payment claim process and adjudication process varied for complex claims. Also, a payer was able to include new reasons for non-payment not set out in its payment schedule during an adjudication of a complex payment claim. This meant that the payer could withhold reasons until the adjudication process commenced. This could lengthen the adjudication process.

Under the BIF Act complex payment claims are still claims for more than \$750,000. However, the payment claim process does not vary for complex payment claims. The timeframes in the adjudication process for complex payment claims remain the same. However, a payer can no longer raise new reasons in its adjudication response that were not included in its payment schedule.

Adjudicators

Chapter 5 of the BIF Act deals with adjudicators. The key changes introduced by the BIF Act are:

Adjudicators will need to hold qualifications to be registered by the Adjudication Registry.

There will be a code of conduct applying to adjudicators and they will be required to undertake compulsory professional development.

Registered adjudicators may have their registration suspended or cancelled if they contravene the code of conduct or are no longer suitable for registration.

These changes are intended to ensure that adjudicators appointed to run adjudications are competent and have integrity.

How can you give your feedback to the Panel on the payment process and adjudication reforms?

If you would like to provide the Panel with feedback on the progress payment reforms you can make a submission, send an email or attend one of our industry forums.

See Page 5 of this document for further details on how to make a submission or send an email to the Panel.

In making your submission you may like to respond to the following questions about the progress payment and adjudication reforms:

- 1. Have you had been provided with sufficient information about the payment process and adjudication reforms to help you understand how they will apply? What further information would you like from government?**
- 2. In your experience will the payment process and adjudication reforms improve the ability for claimants to use the payment processes in the Act to resolve disputes? Why?**
- 3. In your experience, will the payment process and adjudication reforms improve the quality of decision making of adjudicators? Why?**
- 4. Do you believe that the payment process and adjudication reforms could be improved? If so, how?**
- 5. What impact (positive or negative) do you believe the payment process and adjudication reforms will have on your business? Why?**

PART 3—Retentions and security for performance

The BIF Act amends the QBCC Act¹³ so that for building contracts that require that retentions are held or a security is given:

- the payer (the contracting party) must comply with certain actions
- if the contract does not identify when retentions amounts are to be released, a default time period will apply.

Previously, some payers (contracting parties) had avoided paying retentions and releasing securities by:

- not stating when the retentions or securities were to be released
- making the defects liability period dependent on the end of a defects liability period of another contract, which the claimant (the contracted party) was not a party too and usually was unaware of the terms of the other contract or
- simply ignoring claims for retention amounts.

The purpose of the amendments is to make sure claimants are paid their retentions by:

- making sure claimants know when the retention amounts are due to be paid or when their security is due to be released
- make sure if retentions are not paid to claimants, there is a legitimate reason for the non-payment
- encouraging payers to notify the claimants of the end of the defects liability period and to pay retentions by creating offences where there is non-compliance
- increase business confidence in the building and construction industry
- bring more fairness to the industry.

These amendments are intended to strengthen the existing requirements in the QBCC Act relating to retention amounts and securities. The existing requirements are summarised as follows:

- retention amounts or security must not be greater than 5% of the contract price¹⁴
- retention amounts can only be withheld up to the value of 10% of any payment claim
- only 2.5% of retention amounts or security can be held after the date of practical completion during the defects liability period¹⁵.

Which contracts do the new retention provisions apply to?

The new provisions about retentions and security for performance apply to all building contracts, which provide for retention amounts or security to be withheld after practical completion to correct defects.

What do the new provisions require?

The new provisions provide:

- a default time period if the contract does not state when the retention or security is to be released
- that retention amounts are to be released on or before the date due
- the payer is to give a notice 10 business days before to the end of the defects liability period to the claimant.

Each of these is explained further below.

¹³ To include new sections 67NA, 67NB and 67NC.

¹⁴ Section 67K and 67L of the QBCC Act provides for exemptions from this requirement in limited circumstances

¹⁵ Section 67N of the QBCC Act does not prevent more than 2.5% of any retention amount or security being applied to correct defects before the date for practical completion.

What is the length of the defects liability period?

Under these new provisions, retentions and the security must be released to the claimant at the end of 12 months starting on the day of practical completion for the contract (the statutory defects liability period), if the building contract:

- provides for retention amounts or security to be withheld
- does not identify when the retentions or security are to be released.

Where the statutory defects liability period applies, this means that the retention amount or security must be released to the person entitled to it at the end of 12 months from the date of practical completion even if this is not stated in the contract.

Mandatory obligation to release retention amounts

Failure to release a retention amount on or before the date it is due¹⁶ will be an offence with a maximum penalty of approximately \$26,000 (200 penalty units) or one year's imprisonment unless:

- The payer has a reasonable excuse
- The retentions have been paid into court to satisfy a subcontractor's charge or
- The retentions are the subject of a dispute between the parties to the building contract.¹⁷

Retention amounts will still be able to be used legitimately to correct defects or as provided for under the contract. If there is a dispute about retention amounts, the retentions can be withheld until the dispute is resolved.

Mandatory obligation on payers to provide a notice

The party holding the retention or security (the payer) will be required to give the person entitled to the retention amounts a notice within 10 business days before the end of the defects liability period.

The notice must set out the:

- date the defects liability period ends
- retention amount
- amount to be paid at the end of the defects liability period
- date that amount will be paid.

Failure to issue the notice will be an offence with a maximum penalty of approximately \$13,000 (100 penalty units).

The amendments allow for instances where:

- the defects liability period under a subcontract is reliant on the defects liability period under another contract (contract A)
- the payer under the subcontract does not receive the notice of the date for the end of the defects liability period under contract A¹⁸ before it is time to give notice to its subcontractor (i.e. 10 business days' before the end of the defects liability period).

In those instances, the Act provides that the payer must give its subcontractor a notice of the end of the defects liability period for the subcontract within five business days of the payer receiving the notice itself under contract A.¹⁹

Principals are not required to comply with the notice requirements.

¹⁶ under the contract or under the statutory defects liability period (whichever applies),

¹⁷ Unless as an outcome of the dispute, the retentions amount is to be paid to the claimant. Section 67NB

¹⁸ If the notice given to the payer is given later than 10 business days of the defects liability period.

¹⁹ If the notice given to the payer is given later than 10 business days of the defects liability period.

How can you give your feedback to the Panel on the retentions and security of performance reforms?

If you would like to provide the Panel with feedback on the retentions and security of payment reforms you can make a submission, send an email or attend one of our industry forums.

See Page 5 of this document for further details on how to make a submission or send an email to the Panel.

In making your submission you may like to respond to the following questions about the progress payment and adjudication reforms:

- 1. Have you been provided with sufficient information about the retention and security of performance reforms to help you understand how they will apply? What further information would you like from government?**
- 2. In your experience, will the retention and security for performance reforms result in retentions being returned to the contracting party they have been withheld from more often? Why?**
- 3. Do you believe that the retention and security for performance reforms could be improved? If so, how?**
- 4. What impact (positive or negative) do you believe the retention and security for performance reforms will have on your business? Why?**

PART 4—Timing for commencement of the suite of reforms

In making the Building Industry Fairness reforms the Queensland Government is trying to improve the financial practices of the building and construction industry and to create a fairer industry.

The reforms will require many building contractors to review their cash flow management and financing practices.

An intended consequence of these reforms is to prevent contractors using monies properly owed to subcontractors or withheld as retentions from being used to fund the business practices of the contractor. This is expected to shift risk up the contracting chain and lead to positive impacts on subcontractors' cash flow and financing costs.

The Queensland Government has recognised that the adjustments some contractors will have to make to their business practices have the potential to have financial impacts including changes to administration costs and/or financing costs.

To manage potential impacts, the Queensland Government has staged the timing for commencement of various parts of the reforms to provide the industry with an opportunity to transition.

The commencement of the suite of reforms has been staged as follows:

1. Phase 1 of the project bank account reforms applying to government projects valued between \$1 million and \$10 million commenced on 1 March 2018.
2. The payment process and adjudication reforms commence on 17 December 2018.

3. The new provisions relating to retentions and security for performance are due to commence on 17 December 2018.
4. MFR reforms are anticipated to commence on 1 January 2019.
5. Phase 2 for project bank account reforms for all government and private sector projects valued \$1 million is due to commence sometime after 1 March 2019.

As part of its work the Panel is asked to consider the effectiveness of the government's implementation of the suite of reforms.

How can you give your feedback to the Panel on the timing for commencement of the suite of reforms?

If you would like to provide the Panel with feedback on the timing for the commencement of the suite reforms you can make a submission, send an email or attend one of our industry forums.

See Page 5 of this document for further details on how to make a submission or send an email to the Panel.

In making your submission you may like to respond to the following questions about the timing for commencement of the suite of reforms:

To assist the Panel with this work, the following questions could be addressed in your submission to the Panel:

1. **Will the staged commencement of the suite of reforms assist your business to adjust to the changes? Why or why not?**
2. **What changes would you suggest the government makes to the timeframes for commencement of the suite of reforms and why?**