

Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020 (Qld): Explained

October 2022

Background

The *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020 (Qld)* ('BIFOLA Act') received assent on 23 July 2020. The BIFOLA Act adopts the recommendations from the Building Industry Fairness Implementation and Evaluation Panel ('Panel') who were "appointed to undertake an evaluation of the implementation of the *Building Industry Fairness (Security of Payment) Act 2017*" ('BIFA').¹ The Panel's primary task was to determine "the effectiveness of the legislative framework in meeting the policy intent and identifying opportunities for improvement of security of payment outcomes".² Relevantly, the BIFOLA Act "implements the Panel's recommendations for a revised trust account.

This Newsletter

In this newsletter we provide insights into the trust account regime under the BIFOLA Act. We also look at its aims and whether they are addressed by the legislation.

Retention Trust Account and Project Trust Account

Under the BIFA there are two types of trust accounts:

- retention trust account; and
- project trust account.

The former is "an account where eligible cash retentions withheld from contractors are held until due to be paid".³ Comparatively, a project trust account is "an account through which project funds are received and paid".⁴

¹ *Building Fairness: An Evaluation of Queensland's Building Industry Fairness Reforms* (Report, March 2019) 1.

² *Building Fairness: An Evaluation of Queensland's Building Industry Fairness Reforms* (Report, March 2019) 1.

³ 'Types of Trust Accounts', QBCC (Web Page, 10 September 2021) <<https://www.qbcc.qld.gov.au/running-business/trust-accounts/types-trust-accounts>>.

⁴ *Ibid.*

Despite this distinction, under the BIFA, retention trust accounts are required “where the related head contract requires a project trust account and where cash retentions are being withheld from a contracted party by a relevant contracting party”.⁵

Entitlement to receive payment

Retention Trust Account

Section 36 of the BIFOLA provides that the entitlement to receive the retention amount is “governed by the contract under which the retention amount was withheld”. Importantly, sub-section (2), states that withdrawal of the amount must not happen “until after the defects liability period”.

Second Reading Speech

In introducing the Bill the Minister for Housing and Public Works, Digital Technology and Sport stated that:

“[F]or decades security of payment has remained a black spot, a drain on our economy and a stain on our social fabric. Delivering security of payment to the Queenslanders who work in our construction industry is a reform so critical but for too long elusive”.⁶

The Minister explained that the BIFOLA Act “will deliver a simplified trust account process, improve subcontractor protections and manage the transition to the full implementation of trust accounts. The number of accounts will be reduced. Instead of three trust accounts, one project trust account will be needed for each eligible contract. If a head contract holds cash retentions then one retention trust account needs to be held per contractor”.⁷

The BIFOLA Act’s design enables a ‘phased introduction’, which the Minister claimed, ‘served a number of purposes.’ It not only allows the Government “to perfect the system over time; it allows licensees to develop their skills and knowledge around the framework; and it allows for the finance sector, particularly the banks, to establish their software products and their trust account instruments to support the implementation of the framework. Importantly, as well, it allows for the impact of COVID-19, and its impact on the construction industry in particular, to be taken into consideration when we turn on each of these phases”.⁸

⁵ ‘Trust Account Rollout’, QBCC (Web Page, 16 May 2022) <<https://www.qbcc.qld.gov.au/running-business/trust-accounts/trust-account-rollout>>.

⁶ Queensland, *Hansard*, Legislative Assembly, 14 July 2020.

⁷ Queensland, *Hansard*, Legislative Assembly, 14 July 2020.

⁸ Queensland, *Hansard*, Legislative Assembly, 15 July 2020.

Please refer to the table in the Schedule of this newsletter which clearly outlines the different phases of contracts, the dates they come into effect and the relevant provision under the *BIFA*.

Further explanation

In a recent article exploring payment trusts in the construction industry, the authors noted that an effective statutory payment trust “must protect, or secure, subcontractors’ payment funds while they are in the hands of a principal contractor, otherwise the legislative objective is completely undermined”.⁹ In light of this concern, it has been stated that the BIFOLA Act is “more likely to result in head contractors not using money owed to subcontractors as working capital”.¹⁰ This conclusion has been reached as under the BIFOLA Act:¹¹

- detailed trust accounting records must be kept for project bank accounts;
- offences are committed when money that is liable to be paid to a subcontractor is wrongly moved from the project bank account; and
- the inappropriate movement of money from the project bank account is more likely to be detected due to the requirement for separate bank accounts, record-keeping obligations, auditing requirements and oversight powers of the Commissioner.

Criticisms of the BIFOLA Act

Despite the BIFOLA Act’s premise and its strengths which were noted in the previous section, there have nevertheless been some criticisms of the Act.

Administrative Costs

For each project covered, the BIFOLA Act requires that:

- agreements and trust deeds are prepared;
- trust accounts are set up and administered; and
- there is compliance with auditing and reporting requirements.

In light of these requirements, the BIFOLA Act has been criticised for being both costly and time consuming.¹² In acknowledgement of the potential burden of the scheme the Panel explained that “rigorous administrative requirements” were “necessary to produce clarity and transparency over the movement of money via the project bank account”.¹³ Despite this criticism, it “may be expected” that administration costs will “decrease somewhat under

⁹Bianca Wei Joo Teng and Jeremy Coggins, ‘In Which Payment Trust Should the Australian Construction Industry Place Its Trust?’ (2020) 29 *Insolv LJ* 113, 122.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Bianca Wei Joo Teng (n 11) 121.

¹³ *Ibid.*; *Building Fairness: An Evaluation of Queensland’s Building Industry Fairness Reforms* (Report, March 2019) 45.

Phase 2” due “to the streamlining of required bank accounts from three per project to just one, and the establishment of trust deeds no longer being required”.¹⁴

Retention Trust Accounts

Though the retention trust account regime has been commended, as it makes the subcontractor a secured creditor in the event of bankruptcy or insolvency, analysis on retention trust funds have questioned the potential benefit of this regime.¹⁵ Deloitte modelling on ‘security of payment reform’ in 2016 found that “the benefits to society in implementing a [retention trust fund] scheme are less than the costs of implementing the scheme”.¹⁶ Whilst Deloitte’s modelling did not “capture the benefit to subcontractors of receiving retentions owed” in or outside of an insolvency situation, these findings are nevertheless concerning.¹⁷

¹⁴ Ibid s 20B; Bianca Wei Joo Tend (n 11) 121.

¹⁵ ‘Trust Account Framework’, *Queensland Government* (Web Page, 28 March 2022) <<https://www.epw.qld.gov.au/news-publications/legislation/building/trust-account-framework>>.

¹⁶ Deloitte, *Analysis of Security of Payment Reform for the Building and Construction Industry* (Report, 8 November 2016) <https://www.hpw.qld.gov.au/__data/assets/pdf_file/0021/4935/securityofpaymentdeloitteoriginal.pdf>.

¹⁷ Ibid.

Schedule

Item	Date Update takes Effect	Relevant Section under the <i>BIFA Act</i>	Parties required to set up a Project Trust Bank Account and Retention Trust Account
	1 March 2021	Pursuant to section 14(1) <ul style="list-style-type: none"> Proclamation for commencement of phase made on 27 August 2020 	Project Trust Account: <ul style="list-style-type: none"> Applies to state government contracts valued between \$1 million and \$10 million excluding GST, which were tendered from 1 March 2021.
	1 July 2021	Pursuant to section 14(1) <ul style="list-style-type: none"> Proclamation for commencement of phase made on 27 August 2020 	Project Trust Account: <ul style="list-style-type: none"> Applies to state government contracts valued at \$1 million or more excluding GST, which were tendered from 1 July 2021. Applies to Hospital and Health Services contracts valued at \$1 million or more excluding GST, which were tendered from 1 July 2021.
	1 January 2022	Pursuant to section 14(1) <ul style="list-style-type: none"> Proclamation for commencement of phase made on 27 August 2020 	Project Trust Account: <ul style="list-style-type: none"> Applies to private entities contracts valued at \$10 million or more excluding GST and executed on or after 1 January 2022. Applies to local government contracts valued at \$10 million or more excluding GST and executed on or after 1 January 2022. Applies to state authorities' (including government-owned corporations) contracts valued at \$10 million or more excluding GST and executed on or after 1 January 2022. Retention Trust Accounts: <ul style="list-style-type: none"> Head contractors and private sector principals where a project trust account is required for the head contract Commonwealth, Queensland government, state authority and local government contracting parties are exempt
	1 April 2023	Pursuant to section 216 <ul style="list-style-type: none"> Proclamation for commencement of phase made on 24 March 2022 	Project Trust Account: <ul style="list-style-type: none"> Applies to private entities contracts valued at \$3 million or more excluding GST and executed on or after 1 July 2022. Applies to local government contracts valued at \$3 million or more excluding GST and executed on or after 1 July 2022. Applies to state authorities' (including government-owned corporations) contracts valued at \$3 million or more excluding GST and executed on or after 1 July 2022. Retention Trust Account: <ul style="list-style-type: none"> Head contractors and private sector principals for the head contract

			Commonwealth, Queensland government, state and local government contracting parties are exempt
Item	Date Update takes Effect		Parties required to set up a Project Trust Account and also a Retention Trust Account
	1 October 2023	<p>Pursuant to section 217</p> <ul style="list-style-type: none"> Proclamation for commencement of phase made on 24 March 2022 	<p>Project Trust Account:</p> <ul style="list-style-type: none"> All building and construction contracts valued at \$1 million or more excluding GST and executed on or after 1 January 2023; and Subcontractors working on project trust account projects that hold cash retentions. <p>Retention Trust Account:</p> <ul style="list-style-type: none"> Any contracting party (including principals, head contractors and any subcontractors down the contractual chain) where a project trust account is required for the head contract Commonwealth, Queensland government, state authority and local government contracting parties are exempt

Please refer to below as a key for the different phases of contracts:

Type of Contract	Definition
'Private Entity'	Under section 14(3) of the <i>BIFA</i> defined as a "company or other entity that is owned by any entity other than the State; but does not include a State authority".
'State Authority'	Under section 8 of the <i>BIFA</i> as an "agency, authority, commission, corporation, instrumentality, office, or other entity, established under an Act or by authority of the State for a public or State purpose" or "a corporation that is" either "owned or controlled by the State" or "prescribed by regulation to be State authority".
'Hospital and health service'	Section 8 of the <i>BIFA</i> states that the phrase is defined as a "hospital and health service established under the <i>Hospital and Health Boards Act 2011</i> , section 17". Accordingly, section 17 outlines that a regulation may declare either of the following to be a health service area:

	<ul style="list-style-type: none"> (i) A part of the State; (ii) A public sector hospital; (iii) A public sector health service facility; (iv) A public sector health service.
'Local Government'	<p>The legislation has not defined 'local government' this poses difficulty in identifying the definition of local government contracts.</p> <p>However, Crisp Law suggest that 'local government contracts' likely means an agreement undertaken with a local government authority e.g. local government councils.</p>