Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

26 February 2020

Our ref: HS – C&I

Committee Secretary
Transport and Public Works Committee
Parliament House
George Street
Brisbane QLS 4000

By email: [redacted]

Dear Committee Secretary

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

Thank you for the opportunity to provide comments on the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020 (**the bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Construction and Infrastructure Law Committee whose members have substantial expertise in this area. However, as volunteers who conduct their own private practices they have found it difficult to consider this voluminous bill in the detail needed in the very short time period available.

Three weeks of consultation is not adequate for a bill of this size and nature, particularly where QLS was not involved in any consultation at the draft bill stage (QLS had been consulted regarding the revised minimum financial requirements regime in 2018 as mentioned in the explanatory notes).

Within the time available, QLS has endeavoured to identify key issues of concern. However, QLS's silence on any other particular provisions or issues should not be taken as endorsement of those provisions.

With respect to the bill we raise the following:

- QLS has had insufficient time to consider all of the drafting in detail but has identified several provisions that are not sufficiently clear.

- QLS is generally supportive of the bill in its efforts to improve the security of payment regime but questions whether the aims of the bill will be achieved by introducing penalties for non-compliances that do not invalidate payment claims.

Inserting section 143B into the *Building Act 1975*

Clause 44 of the bill inserts a new section 143B into the *Building Act 1975* (**Building Act**). The proposed amendment applies where a building certifier is engaged to perform certifying functions for a building and the owner of the building is not the client. The client is usually the builder who is constructing the building.

The proposed section goes on to allow the owner, by notice, to direct the client of the building certifier (ie the builder), to ask the building certifier to perform a certifying function.

The builder is then required to give an additional certification notice to the building certifier and the building certifier is obliged to perform the certifying function stated in the additional certification notice on or before the agreed day, unless the certifier has a reasonable excuse.

In QLS's view there is a lack of detail in the new section 143B insofar as:

1. It does not expressly require that the additional certifying function must relate to the "building" the subject of the current engagement.

2. It does not take account of the information currently before the building certifier, or give any guidance as to what might be a reasonable excuse for the building certifier.

3. The "agreed day" calculation does not put any bounds on when a nominated date might be. It seems it can be any date which is nominated within 15 business days after the relevant day.

4. It does not address that the owner is directing further certification functions, the cost of which contractually rests with the builder. While subsection (7) makes the owner liable for the reasonable cost of performance of the certifying function by the building certifier under an additional certification notice:

   (a) the building certifier has no contract with the owner if the builder defaults in making payment; and

   (b) the provision does not expressly give the builder a right to payment for organising the performance of the certifying function under the contract of engagement.

QLS submits that section 143B requires these deficiencies to be addressed to make the subsection workable.

New section 24A of the *Building Industry Fairness (Security of Payment) Act 2017*

Clause 63 provides for the replacement of the project bank accounts chapter of the *Building Industry Fairness (Security of Payment) Act 2017* (**BIF Act**).

New section 24A imposes a positive obligation on the principal to inform the commissioner if the principal knows, or ought reasonably to know, that a project trust is required for the contract but has not been opened.

The section as drafted does not impose a time limitation for informing the commissioner and accordingly, QLS considers that, despite the operation of subsection 38(4) of the *Acts Interpretation Act 1954*, it is difficult to envisage the fine actually being imposed. QLS recommends that a specific time frame be included in the provision, such as x number of days from when the contracting party becomes aware or has reasonable grounds for suspicion that the project trust has not been established.

New section 36 of the BIF Act

This section forms part of the new provisions regarding the retention trust account and, in particular, deals with the withdrawal of amounts from that retention trust account.

Subsection 36(1)(b) allows the payment of the trustee as the contracting party for the purpose of correcting defects or omissions in the contracted work or otherwise to secure wholly or partly the performance of the contract. Subsection 36(2) goes on to say a trustee must not withdraw an amount from the retention trust account for a payment mentioned in subsection 36(1)(b) until after the defects liability period applying to the amount has expired

This limitation would prevent the trustee addressing defects and issues during the defects liability period, even where the contracted party refuses to perform rectification works or ought to comply with the terms of the contract. It also ignores a situation where the contract itself is terminated and the entitlement to have the benefit of those moneys crystallises, perhaps prior to the end of the defects liability period.

Information Sharing

The bill introduces a number of information sharing provisions to the BIF Act that are extensive and potentially burdensome, including new sections 18B, 23A and 40A.

QLS queries whether, given many retentions are held on a monthly basis during lengthy contracts, giving notice upon every deposit to that trust account in respect of all subcontractors is too administratively burdensome and not proportionate to the mischief the provisions aim to prevent.

New section 41 of the BIF Act

This is a new section that requires compulsory training for a person administering a retention trust account.

Subsections 41(5) and (6) imposes penalties for not completing the compulsory training or not nominating a person to complete the training within the required timeframe. These penalties are said to be consistent with the penalties provided by section 72 of the *Work Health and Safety Act 2011* for failing to comply with an obligation to train health and safety representatives.

However, unlike section 72 of the *Work Health and Safety Act 2011,* new section 41 of BIF Act does not address the cost of the training.

Failure to provide a supporting statement

QLS is concerned that the amendments to section 75 of the BIF Act will not achieve the intended purpose because failure to provide a supporting statement with a payment claim, while an offence punishable by a fine, does not invalidate the payment claim itself, which remains enforceable under the BIF Act. It is conceivable that a party that has not paid its subcontractors would intentionally not provide a supporting statement, knowing that the potential payment to be obtained from the respondent could outweigh the penalty which may be imposed for not providing the statement.

Clause 65 of the bill amends section 75 of the BIF Act to introduce a requirement that the claimant ensure that a payment claim is accompanied by a supporting statement. The amended section 75 would provide that it is an offence, with a maximum penalty of 100 penalty units, to fail to ensure that the payment claim is accompanied by a supporting statement but that non-compliance will not affect the validity of a payment claim. The supporting statement is similar to the common contractual requirement to provide a statutory declaration that subcontractors have been paid. In *BRB Modular Pty Ltd v AWX Constructions Pty Ltd* [2015] QSC 218, His Honour Justice Applegarth found that the requirement for a statutory declaration before making a valid progress claim was void.

The consequence of this amendment for respondents is that a claimant may fail to provide a supporting statement in contravention of this proposed provision and still be successful in an adjudication application. In *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126, Hutchinson sought to challenge an adjudication decision on the basis that one of the statutory declarations provided by Glavcom was knowingly false and therefore argued that the adjudication decision was obtained by fraud and voidable. The Court resolved that the claimant's fraudulent failure to comply with the contract was irrelevant to the adjudicator's decision because the relevant clause of the contract offended the no contracting out requirement in the *Building and Construction Industry Security of Payment Act 1999* (NSW).

The proposed section 200D, inserted by clause 80 of the bill, provides that if a person gives a supporting statement with a payment claim under section 75 which the person knows to include information which is false or misleading in a material particular then that person will commit an offence.

The consequences of failure to declare that subcontractors have been paid or of making a false declaration in the supporting statement required by the proposed amendment to section 75, will only be able to be actioned by the QBCC and will have no apparent impact on the legal rights of the parties to the payment dispute. This will mean that a claimant that has not paid its subcontractors will still be able to utilise the procedures under the Act to itself recover payment.

The explanatory notes also indicate that 'the penalty is consistent with the existing offence under section 76 of the BIF Act for failing to give a payment schedule'. Whilst this is technically correct, it is noted that a respondent who fails to provide a payment schedule is also liable to pay the amount of the claim in full pursuant to subsection 77(2). It is submitted that applying a penalty for failing to provide a supporting statement but not invalidating the claim is not comparable with applying both a penalty and allowing judgement for the full amount of the payment claim when a respondent fails to provide a payment schedule.

In QLS's view, the failure to provide a true and correct supporting statement should invalidate the payment claim for the purposes of the BIF Act (but not under the contract) so that a claimant cannot take the benefit of the procedures under the BIF Act to recover payment where a supporting statement is not provided. This could be achieved by removing proposed subsection 75(5C) and including the requirement to provide a supporting statement as a requirement of a valid payment claim in section 68. The question of whether an offence should be introduced is discussed further below.

Offence provisions generally

The BIF Act enables an alternative pathway for a claimant to claim a progress payment, rather than using the mechanisms under a contract. The legislative mechanism provides for a money claim and its abatement by a respondent. With this in mind, QLS urges caution regarding the introduction of offence provisions for non-compliance with procedures. For example, clause 65 (amendment of section 75 making a claim, as discussed above) introduces the requirement for a claimant/head-contractor to accompany its payment claim with a supporting statement. The better deterrent, as set out above, would be the absence of the supporting statement rendering the payment claim ineffective. By way of further examples, the new subsection 97B(4) (clause 73) creates a penalty against a claimant for not serving a withholding statement on all relevant parties (i.e., there is a penalty for not acting in its own interests) and in subsection 97B(5) there is a penalty against a non-involved higher party for missing an administrative procedure of providing notice.

Part 4A Requiring higher party to withhold payment

QLS notes that these provisions appear to be drawn from the subcontractor's charges procedures, with the aim of having a claimant paid by a higher party from monies still to flow down the line to the respondent for the particular work in question. New subsection 97B(2) makes this procedure optional, which QLS notes will be useful if the respondent is in insolvency administration because the amendments allow a claimant to create a charge over the "related amount payable to the respondent", which can often be a claimant's only hope of being paid if the respondent is insolvent. However, if a claimant goes down this path against a solvent respondent, the dispute could widen and deepen by pulling in a higher party, which in turn could defeat the original cash flow objective of the BIF Act.

By way of illustrating the potential unintended consequences: clause 97B requires a "higher party" which is defined to include a financier, to retain out of the related amount payable to an unsuccessful adjudication respondent either the adjudicated amount or the related amount payable to the respondent, whichever is less. Depending on the terms of the financial accommodation and any builder's tie-in deed, there is unlikely to be any amount "payable" to the respondent in any case.

Such a notice may, despite its own limited utility, be an event of default under any financial accommodation and could therefore result in finance being withdrawn for the whole project. The result is that any other funds payable do not flow through to other subcontractors which are not secured. While the adjudication may be for $100,000.00, a default under the financial accommodation may result in no further claims being paid by the financier for amounts which are to become due under the contract to unsecured subcontractors.

Endorsement

QLS notes that the BIF Act security of payment procedures introduce a high degree of regulatory prescription into what are essentially civil disputes. While noting that this is intended to respond to the unsatisfactory level of subcontractor non-payment, QLS's committee members consider that it would be efficient and effective to re-introduce endorsement of payment claims so that claimants opt-in to the BIF Act, and the regulation it brings, or remain under the contract.

Applying the BIF Act to all claims introduces significant uncertainty into contract administration for claimants and respondents. It potentially increases the cost of administration by requiring detailed payment schedules to be issued even where there may in fact be no dispute or even no intention by the claimant to submit a payment claim. Given:

- the very broad definition of payment claim
- the common practice in the construction industry of engaging in informal written communications regarding payments and submitting claims and related invoices separately, and
- the consequences of not submitting a payment schedule in response to a payment claim (liability to pay both the claim and potentially a fine)

prudent respondents are left with little option but to respond with a detailed payment schedule to all such communications.

The lack of a requirement to endorse can also have inadvertent consequences for claimants who may be unaware of the consequences of their actions under the legislation. For example, a claimant could unintentionally utilise available reference or miss key timeframes under the BIF Act of which they are unaware, resulting in a loss of rights under the BIF Act.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Luke Murphy
President