

7 September 2021

Our ref: [IG: C&I]

Confidential

Strategic Policy (QBCC) team
Building Division
Department of Energy and Public Works
Level 15, 53 Albert Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Strategic Policy (QBCC) team

Interaction between project trust obligations under the *Building Industry Fairness (Security of Payment) Act 2017* and trust account obligations under other State or Territory legislation

We refer to our previous correspondence dated 31 May 2021 regarding the interaction between project trust obligations under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) ('**BIF Act**') and the Commonwealth Government requirements to establish project 'trust accounts'. Thank you for your response dated 8 July 2021, indicating that you are in the process of investigating any potential inconsistency (copies **enclosed**).

Our Construction & Infrastructure Law Committee have identified a further concern for your consideration. We highlight that circumstances may arise where a contractor is licensed in and based in Southeast Queensland, however, frequently performs work in Northern New South Wales. For that work, one or more of the contractor's subcontractors may perform work in Queensland (for example, prefabricating materials, which are then supplied to site and installed on the site by the subcontractor).

New South Wales regulation requires retention money to be held in trust accounts for certain construction contracts with a value of at least \$20 million (see *Building and Construction Industry Security of Payment Regulation 2020* (NSW) s 6 and part 2). We query how the Queensland statutory trust legislation would affect circumstances where the retention money withheld under the subcontract is required to be withheld in a New South Wales retention trust account.

We note that chapter 3 of BIF Act indicates that that chapter does not apply to a construction contract dealing with construction work carried out outside of Queensland or related goods and services supplied for construction work carried out outside of Queensland (see section 61(4)). However, we consider that a similar restriction is required such that chapter 2 of BIF Act only applies to project trust work carried out in Queensland for a head contract where the site is located in Queensland.

Interaction between project trust obligations under the *Building Industry Fairness (Security of Payment) Act 2017* and trust account obligations under other State or Territory legislation

Our committee members have suggested the solution may lie in providing in regulation 5 of the BIF Regulation that such work is not project trust work. Alternatively, a general provision similar to section 61(4) could be included that exempts head contracts that are for construction work carried out outside of Queensland.

We understand that this issue hasn't arisen to date, largely because the projects subject to the new Queensland requirements have been Queensland government, local government, state authority or hospital projects. However, we anticipate that the interaction of the legislation between these two jurisdictions may become an issue when the statutory trust system is rolled out to apply to the private sector from 1 January 2022.

We would be happy to meet with the Department to discuss these issues further, should that be of interest to the Department.

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


Elizabeth Shearer
President

31 May 2021

Our ref: [IG-C&I]

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Megan Johns
Director - BIFOLA
Queensland Building and Construction Commission
GPO Box 5099
Brisbane QLD 4001

By email: QLDBuildingPlan@qbcc.qld.gov.au
CC: Megan.Johns@qbcc.qld.gov.au; Omar.Ameer@qbcc.qld.gov.au;
Kate.Raymond@qbcc.qld.gov.au

Dear Ms Johns

Interaction between project trust obligations pursuant to the *Building Industry Fairness (Security of Payment) Act 2017 (Qld)* and Commonwealth Government Requirements to establish project 'trust accounts'

We refer to the BIFOLA Stakeholder Consultation meeting held on Friday, 21 May 2021.

During the meeting, concerns were raised in relation to the interaction between BIFOLA and its trust bank account system and the provisions contained in the Commonwealth Government construction contracts, which require trust accounts.

The Chair of the meeting requested QLS provide a brief note raising the issue for further consideration.

Many standard form contracts utilised by the Commonwealth Government require contractors to establish 'trust accounts' as a mechanism to ensure payments made by the Commonwealth to head contractors are properly distributed to subcontractors and suppliers.

While the requirement to establish a trust account under some Commonwealth Government contracts is general in nature (see for example Department of Defence Head Contract HC-1 2021, clause 24(e)(vii)), some requirements are more prescribed.

Specifically, the Department of Defence Managing Contractor Contract (MCC-1 2003) requires the contractor to execute a separate 'trust deed' and establish and administer a 'trust account' in accordance with the terms of that deed (see clauses 12.22 and 12.23).

As part of the BIFOLA consultation process and the Government's role-out of the legislation to industry, QLS believes that it would be prudent for the BIFOLA Committee to consider the interaction between the:

- contractual requirement for contractors to establish and administer a trust account pursuant to standard form Commonwealth Government contracts; and
- the statutory requirements for contractors to establish and administer a project trust pursuant to Chapter 2 of the *Building Industry Fairness Security of Payment Act 2017* (Qld),

and make recommendations for reconciliation of the provisions which may be implemented by Government.

The Society believes that it is important for both mechanisms to be aligned, such that a contractor carrying out works in Queensland pursuant to a Commonwealth Government contract is not subject to two (potentially inconsistent) regimes.

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



Elizabeth Shearer
President

Our Ref: MN04136-2021
Your Ref: IG-C&I



Queensland
Government

Department of
Energy and Public Works

05 JUL 2021

Ms Elizabeth Shearer
President
Queensland Law Society
179 Ann Street
BRISBANE QLD 4000

By email: president@qls.com.au

Dear Ms Shearer

Thank you for your letter of 31 May 2021 to the Queensland Building and Construction Commission (QBCC) regarding the interaction between project trust obligations pursuant to the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act) and the requirements under the Commonwealth Government construction contracts to establish trust accounts. The QBCC has forwarded your letter to me for direct response.

We appreciate you raising your concerns and providing examples of the Commonwealth contract clauses that may be inconsistent with the BIF Act. We are currently investigating any potential inconsistency and will let you know of the outcome in due course.

I trust this addresses your enquiry. If you need any more information or help with this matter, Ms Catherine McCahon, Director, Building Policy, Building Division can be contacted on (07) 3008 2559 or email catherine.mccahon@epw.qld.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'R Cassidy'.

Richard Cassidy
Assistant Director-General
Building Policy