Queensland Law Society

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Office of the President

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Our ref: [SS:C&I]
[redacted]

Committee Secretary
Housing, Big Build and Manufacturing Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Committee Secretary

Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2024

Thank you for the opportunity to provide feedback on the Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2024 (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 & Infrastructure Committee (the **Committee**), whose members have substantial expertise in this area. This response focuses on the proposed amendments to the *Building Industry Fairness (Security of Payment) Act 2017* (the **BIF Act**) and an amendment to the *Queensland Building and Construction Commission Act 1991* (the **QBCC Act**).

General comments

QLS supports measures to clarify and simplify the BIF Act. Previously, we have raised a number of concerns with ambiguities in the BIF Act and our members have reported difficulties in applying provisions of the legislation in practice. In our committee members' view, these issues can lead to uncertainty within Queensland's building and construction industry, which can affect head contractor cash flow and subcontractors receiving timely payment. However, we are concerned that some of the proposed amendments may lead to further confusion.

We are also concerned that the regulations and guidelines proposed by the Bill have not yet been developed and are not available for consultation in tandem with the Bill. As the regulations

and guidelines may significantly affect the interpretation and application of the BIF Act, it is essential that the current public consultation comprises the entire reform package, including the proposed regulations and guidelines. However, without having the opportunity to review the entire reform package, our comments on the Bill are limited at this stage. We would therefore welcome further consultation after the regulations and guidelines have been drafted.

Our comments on specific amendments proposed under the Bill are detailed in the following sections of this letter.

Clause 19: Insertion of new s 9A

Proposed section 9A contains new definitions, including a definition of 'contractor or trade work'. In our view, caution should be taken when introducing further definitions into the BIF Act that are intended to apply only to certain industry segments, trades or types of work. As the BIF Act already contains several definitions relating to works, an additional definition may unnecessarily create further confusion within the building and construction industry.

We note that proposed section 9A includes a regulation-making power to prescribe additional subcontracted work services and types of subcontracts that are excluded from being a project trust subcontract. However, the details of the proposed regulation have not been released for consultation at this stage.

When making the regulation, we recommend including a provision that provides for the exclusion of subcontracts that are less than the minimum contract price prescribed by the regulation. This will ensure that smaller subcontracts are able to be excluded by regulation from the project trust account scheme as they were previously excluded by section 11A(4)(c) of the BIF Act.

We also note that a regulation-making power has been included at section 9A(5)(b) in the proposed definition of 'contractor or trade work' to capture additional types of work. We understand the intention may be to add off-site work to the regulation as some in the industry are of the view that off-site work is not 'building work' that requires a QBCC licence. However, there are a number of classes of licence in Schedule 2 of the *Queensland Building and Construction Commission Regulation 2018* (the **QBCC Regulation**) that expressly include off-site work and, as such, that work would already be captured as 'contractor or trade work' under proposed subsection 9A(5)(a)(iv).

If work is included by way of regulation pursuant to section 9A(5)(b) that is already captured pursuant to section 9A(5)(a)(iv), confusion in the industry will result in relation to what work requires a licence under the QBCC Act. That will not assist the industry as there is already some confusion regarding licence classes due to the outdated terminology used in Schedule 2 of the QBCC Regulation.

Similarly, section 9A(1)(b)(iv) includes a regulation-making power that allows for the addition of other work to be captured by the proposed definition of 'project trust subcontract'. For the same reasons as that discussed above in relation to section 9A(5)(b), it is important that work is not added by way of regulation that is already captured as a project trust subcontract pursuant to section 9A(5)(a) as a subcontract for carrying out 'contractor or trade work'.

To avoid confusion, it is critical that the *Building Industry Fairness (Security of Payment) Regulation 2018* is not amended to include types of off-site work that are already captured under proposed subsection 9A(5)(a).

Clause 23: Replacement of s 11A (Who are the trustee and beneficiaries of a project trust)

QLS does not support proposed subsection 11A(4)(b)(ii) of the BIF Act.

Currently, a subcontractor beneficiary ceases to be a beneficiary of a project trust when it has been paid all amounts it is entitled to be paid under its subcontract. However, it is proposed that a subcontractor will remain a beneficiary of the project trust until:

- the subcontractor has been paid all amounts it is entitled to be paid in connection with the project trust subcontracts; and
- the project trust is lawfully dissolved.

As a project trust may continue to exist after the subcontractor's contract comes to an end and/or the subcontractor has been paid all amounts that it is entitled to be paid, it is not appropriate that the subcontractor remains a beneficiary until the project trust is dissolved. Its beneficial interest ceases once it has been paid all amounts that it is entitled to be paid under its subcontract.

Clause 24: Amendment of s 11B (What are the beneficial interests in a project trust)

QLS does not support the proposed amendments to subsection 11B(1)(a) of the BIF Act.

It is not clear whether the intention is to expand a subcontractor's beneficial interest to 'all' amounts the subcontractor is entitled to be paid in connection with project trust subcontracts rather than 'an' amount that it is entitled to be paid. However, changing the wording of clause 11B(1)(a) to 'all' rather than 'an' may introduce unintended consequences. Arguably, with the proposed amendment, the beneficial interest may extend to the full subcontract price being 'all amounts' that the subcontractor is entitled to be paid in connection with the subcontract. However, the policy has previously been for the beneficial interest to be in an amount that the subcontractor is entitled to be paid at a particular point in time during the project.

There are a number of ways in which that amount can be calculated as a progress payment. However, in our view, while a subcontractor has a beneficial interest in an amount it is entitled to be paid, a beneficial interest should not arise until the subcontractor becomes entitled to be paid that amount. It is not entitled to be paid the full subcontract price until it has completed all works under the subcontract.

Further, the head contractor's beneficial interest pursuant to section 11B(1)(b) is limited to the 'remainder' after all subcontractors' beneficial interests have been deducted from "the amount still held in trust". However, there will not be an amount in the project trust account at any time that will cover all amounts that all subcontractors are entitled to be paid, at some point in time, in relation to all subcontracts. This is because the principal is not required to deposit all amounts that the head contractor is entitled to be paid in connection with the head contract, i.e. the full contract price.

To avoid further confusion and arguments in the industry, it is important that the beneficial interest does not arise for a subcontractor until it is entitled to be paid an amount under its subcontract. Further, it is important that a head contractor's cash flow on a project is not

hindered to the extent that it is required to provision for amounts that have not yet become due to subcontractors when it has not yet received those amounts from the principal. That situation would represent a significant policy change.

Clause 26: Replacement of s 14A (Amendments of contracts requiring project trusts)

QLS welcomes amendments to section 14A of the BIF Act to clarify when a contract will become eligible for a project trust after a contract has been amended. Our Committee members have reported that ambiguities in the drafting of sections 14A and 211D of the BIF Act have caused confusion as to when contract amendments trigger the requirement to establish a project trust.

Clause 32 - Amendment of s 20A (Limited purposes for which money may be withdrawn from project trust account)

QLS does not support the proposed amendments to subsection 20A(1)(b).

We note the proposed change in language from a contracted party being 'liable to pay' a subcontractor beneficiary to a subcontractor beneficiary being 'entitled to be paid'. While this may appear to be a minor amendment, it introduces significant uncertainty in the legislation.

Section 10B of the BIF Act specifies when an amount is 'liable to be paid' to a subcontractor. Therefore, a trustee can refer to section 10B when determining whether subsection 20A(1)(b) applies. As many of the circumstances set out in section 10B refer to amounts and dates that are determined under legislation, this section provides some certainty for the parties.

However, there is no definition of 'entitled to be paid' in the legislation to assist the parties to determine whether proposed subsection 20(1)(a) will apply. Therefore, without the assistance of section 10B, there may be less certainty for the parties.

Further, in our committee members' view, this uncertainty cannot be eliminated simply by including a definition of 'entitled to be paid' in the BIF Act. This is because determining whether an entitlement to be paid has arisen is a legal question that requires reviewing a variety of contractual issues relating directly to that particular subcontractor as well as other subcontractors.

The policy intent in adding section 10B to the BIF Act in a previous amendment to the legislation was to provide a means of determining when an amount is liable to be paid to a subcontractor beneficiary to clarify what amounts a head contractor is permitted to withdraw from a project trust account and what amounts must remain in the account. The proposed change removes the clarity that comes from the inclusion of section 10B into the BIF Act.

Clause 33: Amendment of s 20C (Insufficient amounts available for payments)

QLS does not support the proposed amendment to section 20C of the BIF Act for the reasons outlined in relation to section 20A above.

Clause 36: Amendment of s 31 (What is a *retention trust*)

The proposed amendment appears to mandate the retention of GST on retention monies without regard to whether GST has or will become payable on those retention sums. GST is not a tax on the head contractor; it only becomes payable if and when the subcontract terms provide for it.

In our view, GST should not be held in the retention trust account unless the GST has become payable pursuant to the subcontract.

Australian Taxation Office Ruling PAR2017/2 notes that GST is payable on a cash retention amount when it is invoiced (i.e., when contract allows the subcontractor to claim for the release of the retention at the end of the defects liability period) or it is paid. This ruling applies to GST accounting on an accrual basis. If accounting on a cash basis, GST would not be payable until payment is received i.e., the retention amount is released.

On that basis, the subcontractor should not charge GST until it is entitled to payment for the retention release. The existing provisions of the BIF Act should be sufficient to capture the GST amount at that time.

To require a head contractor to transfer an additional 10% of a payment claim to the retention trust account requires the head contractor to effectively pay the GST component at that time even though the subcontractor has no legal basis for collecting it at that time. This is likely to create confusion.

Further, as the GST component cannot be claimed by the head contractor until it is payable, the head contractor is effectively required to hold an additional amount in the retention trust account without being able to account for it as a GST credit in its Business Activity Statement. This may create a cash flow shortfall for the head contractor.

Construction management software packages often operate on a GST-exclusive basis as the GST component is simply a tax that the subcontractor is required to collect on behalf of the government and is separate to a subcontractor entitlement under the contract. Therefore, when payments to subcontractors are processed through these packages, GST is typically not accounted for. A requirement to process GST through the retention trust account will result in a misalignment between construction management financial reporting and business financial reporting, which is likely to lead to confusion.

A further issue arises if GST is to be held in the retention trust account and a head contractor becomes entitled to use that money to pay another subcontractor beneficiary to fix defective work carried out by the original subcontractor. In that situation, the head contractor may not be required to pay GST on the new subcontractor's payment claim if the new subcontractor is not registered for GST or if the head contractor rectifies the defective works itself or otherwise becomes entitled to have recourse to the original subcontractor's retention, it would not be permitted to claim GST on those amounts. In those situations, the GST component would never be paid to the original subcontractor.

In our view, it is unnecessary to single out GST. It is sufficient to refer to money that the parties have contractually agreed to retain. The parties' current rights to freely contract in relation to GST on the retention amounts should be retained.

Clause 37: Amendment of s 31A (Who are the trustee and beneficiaries of a retention trust)

QLS does not support the amendment to subsection 31A(5)(b).

We note this amendment is similar to the amendment to section 11A proposed under clause 23 of the Bill. This amendment is not appropriate because a retention trust account may continue to exist after a particular beneficiary has been paid all retention amounts it has a beneficial

interest in. It is not appropriate for that beneficiary to remain a beneficiary from that point in time until the trust is lawfully dissolved.

Clause 39: Amendment of s 33A (Charge over retention amounts held in retention trust)

For the reasons we detailed in relation to clause 36 of the Bill, our view is that a charge over retention amounts held in a retention trust account should not include GST.

Clause 41: Amendment of s 35 (All retention amounts withheld must be deposited in retention trust account)

Similarly, for the reasons we detailed in relation to clause 36 of the Bill, our view is that retention amounts deposited in a retention trust account should not include GST.

Clause 48: Insertion of new ch 2, pt 5

In our view, the proposal under clause 48 of the Bill to give the chief executive power to issue guidelines to facilitate compliance with Chapter 2 lacks transparency. While we support the intent of subsection 59(2) to facilitate consultation on proposed guidelines, any consultation will be at the chief executive's discretion, including the extent and process for consultation. There is no assurance that the guidelines and any subsequent amendments will only be made following extensive consultation.

Given the significant impact of these guidelines, it is essential to ensure the guidelines and any amendments are not made without full transparency and consultation with relevant stakeholders.

Clause 72: Amendment of s 86C (Internal review decision)

We note it is proposed to extend the timeframe for making an internal review decision from 28 days to 28 business days. According to the QBCC Annual Report 2022 – 2023, the average processing time for Internal Review decisions was 28.4 days. This includes applications where the applicant agreed on additional time. Given the deemed decision provisions, and the existing entitlement for the applicant to agree on a longer period than the current 28 days in accordance with section 86C(2)(b), it is unclear how extending the timeframe to the extent proposed is beneficial or necessary. On the contrary, the extension is likely to delay resolution of internal review matters and any subsequent applications to QCAT for an external review of the decision.

Further consequential amendments required

In addition to the amendments proposed by the Bill, we recommend the following consequential amendments to the BIF Act.

Section 12(4)

Due to the proposed amendment to the definition of 'amendment' in section 8 of the BIF Act, an amendment is required to section 12(4) to reflect the following:

> *"(4) The requirement continues until the project trust is dissolved under section 21, regardless of any amendment of the contract.*

This is because the proposed definition of 'amendment' captures the matters addressed by the existing subparagraphs (a), (b) and (c) in section 12(4).

Section 32(3)

Due to the proposed amendment to the definition of 'amendment' in section 8 of the BIF Act, an amendment is required to section 32(3) to reflect the following:

> *"(3) The requirement continues until all of the retention amount has been released to the parties entitled to it under the withholding contract, regardless of any amendment of the contract.*

This is because the proposed definition of 'amendment' captures the matters addressed by the existing subparagraphs (a) and (b) in section 32(3).

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

[redacted]

Genevieve Dee
Deputy President