

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

Explanatory Notes for Subordinate Legislation 2020 No. 241

Made under the

Building Act 1975

Building Industry Fairness (Security of Payment) Act 2017

Plumbing and Drainage Act 2018

Queensland Building and Construction Commission Act 1991

State Penalties Enforcement Act 1999

General Outline

Short title

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

Authorising law

Sections 13 and 261 of the *Building Act 1975* (Building Act)

Section 201 of the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act)

Section 116 of the *Queensland Building and Construction Commission Act 1991* (QBCC Act)

Section 157 of the *Plumbing and Drainage Act 2018* (PD Act)

Section 165 of the *State Penalties Enforcement Act 1999* (SPE Act)

Policy objectives and the reasons for them

The policy objectives of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2020* (the BIFOLA Regulation) are to support the commencement of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (the BIFOLA Act) and to prescribe penalty infringement notices for certain offences that are created by that Act.

The BIFOLA Act amends a range of building and construction legislation to:

- Implement recommendations from the Building Industry Fairness Reforms Implementation and Evaluation Panel (Panel) and the Special Joint Taskforce (Taskforce)
- Revise the Project Bank Account (PBA) framework with a more streamlined trust account framework
- Gradually implement the new trust framework to the industry more broadly
- Enhance protections for the industry by introducing new payment enforcement mechanisms
- Improve the Queensland Building and Construction Commission's (QBCC) ability to address poor behaviour in the industry
- Strengthen Queensland's building laws to enhance regulatory oversight capabilities, clarify licensing requirements, improve building safety and support industry professionals
- Implement reforms arising from the Queensland Building Plan (QBP) to strengthen the certification and inspection process and improve professional standards and compliance in the certification sector
- Improve the regulatory oversight of registered architects and professional engineers
- Ensure the continuation of external review rights for decisions about transition plans for retirement village schemes.

The BIFOLA Regulation amends six regulations. The policy objectives relating to each regulation are outlined below.

Building Industry Fairness (Security of Payment) Regulation 2018 (BIF Regulation)

The Panel recommended that principal oversight of trust accounts be removed and replaced with other mechanisms to support the integrity of the framework, including the keeping of detailed trust records and mandatory external auditing of trust accounts (recommendations 7 and 13). Recommendations 11, 14 and 19 of the Panel report also made recommendations about information sharing. For example, recommendation 14 was that the head contractor be required to provide the QBCC with certain information about a project trust contract within a specified number of days after entering the contract.

The BIFOLA Regulation amends the BIF Regulation to provide the detail regarding notice requirements, trust records that must be kept and auditing of trust accounts.

The BIFOLA Act also amends the BIF Act to provide various definitions for the new trust framework, including "project trust work" and "residential construction work." The amended BIF Regulation provides additional definitions that support the new trust framework. The amended BIF Regulation also provides additional clarity on the scope of key definitions under the amended BIF Act, including "project trust work".

Building Regulation 2006 (Building Regulation)

The BIFOLA Act amends the Building Act to deliver the first phase of Queensland's building certification reforms, as outlined in the QBP. The BIFOLA Act also implements reforms arising from the Building Confidence Report (BCR), which was commissioned by

the Building Ministers' Forum in 2017. The recommendations of the BCR were aimed at enhancing public trust in the effective implementation of building and construction standards.

The BIFOLA Regulation amends the Building Regulation to support these measures, by strengthening the independence of building certifiers, improving regulatory compliance by certifiers with the introduction of a demerit point system, enhancing the certification process and improving professional standards.

The sustainability of buildings is another area of reform covered by the QBP. Amendments of the Building Regulation will update the Queensland Development Code (QDC) by replacing the current version of a part of the QDC known as MP 4.1 with a new version of the part. The new version contains changes that will improve the year-round performance and comfort of new dwellings in Queensland and assist with minimising household energy costs. A minor consequential amendment to reflect the de-amalgamation of two local governments is also included in the new version.

Amendments to the Building Act included in the BIFOLA Act will allow all aspects of the QDC that are intended to be mandatory to be referenced in a single legislative instrument, being the Building Regulation, streamlining the legislative arrangements for the QDC and making it more accessible and easier to amend.

Other amendments to the Building Regulation will support amendments of the Building Act included in the BIFOLA Act relating to the regulation of the design and siting of residential buildings. The regulation amendments will ensure current provisions of the QDC that regulate the design and siting of residential buildings will continue to apply to those buildings pending possible regulatory changes in the future.

Additionally, amendments to the Building Regulation will support certifiers, consumers and the building and construction industry by making the QDC more accessible through the introduction of a new schedule that references each aspect of the QDC that is intended to be mandatory

Plumbing and Drainage Regulation 2019 (PD Regulation)

Minor amendments will be made to the scopes of work of certain plumbing and drainage licences under the PD Regulation to allow those licensees to install fire collars that are incidental to their work. This will prevent duplication in licensing requirements following the commencement of the new QBCC Act definition of 'fire protection equipment', which includes fire collars, and ensure a separate fire protection occupational licence will not be required for this work.

Queensland Building and Construction Commission Regulation 2018 (QBCC Regulation)

The BIFOLA Act amended the QBCC Act to implement the legislative amendments arising from the recommendations of the Taskforce and to strengthen licensing requirements. The Taskforce made 10 recommendations following their investigation into fraudulent behaviour relating to subcontractor non-payment in Queensland's building industry.

The BIFOLA Act implemented five of the Taskforce recommendations, with remaining recommendations to be delivered through regulatory or administrative means. The BIFOLA Regulation implements three of the remaining Taskforce recommendations.

Further amendments to the QBCC Regulation are consequential amendments of the BIFOLA Act to prescribe certain matters relating to the definitions of 'fire protection work' and 'occupational licence'.

Queensland Building and Construction Commission (Minimum Financial Requirements) Regulation 2018 (MFR Regulation)

The BIFOLA Act also amended various QBCC Act provisions relating to the Minimum Financial Requirements (MFR). Amendments to the MFR Regulation in the BIFOLA Regulation will remove certain provisions relating to excluding accountants that have now been made redundant by the QBCC Act Amendments. Consequential amendments will also alter 'project bank account' references to align with the new trust account framework.

State Penalties Enforcement Regulation 2014 (SPE Regulation)

The BIFOLA Act introduced new penalties to the Building Act, BIF Act, QBCC Act, *Architects Act 2002* (Architects Act) and *Professional Engineers Act 2002* (PE Act). Certain offences have been identified as being suitable for a penalty infringement notice. The BIFOLA Regulation amends the SPE Regulation to prescribe these offences.

Achievement of policy objectives

BIF Regulation

Amendments to the BIF Regulation will support implementation of the new trust account framework which will commence in stages. Proclamations made under the BIFOLA Act specify that the revised trust account framework will commence in the following stages for eligible building and construction contracts, from the dates below:

- 1 March 2021 – the existing PBA cohort, being State government building contracts with a contract price between \$1 million and \$10 million
- 1 July 2021 – expand to State government and Hospital and Health Services' building and construction contracts with a contract price of \$1 million or more
- 1 January 2022 – expand to private sector, local government, statutory authorities' and government-owned corporations' building and construction contracts with a contract price of \$10 million or more
- 1 July 2022 – expand to private sector, local government, statutory authorities' and government-owned corporations' eligible building and construction contracts with a contract price of \$3 million or more
- 1 January 2023 – apply to all building and construction contracts with a contract price of \$1 million or more.

The amendments to the BIF Regulation will commence on 1 March 2021, to support implementation of the new trust account framework. The BIFOLA Regulation amends the BIF Regulation by:

- providing inclusions and exclusions for the definition of 'project trust work' that is contained in the BIF Act
- prescribing the information to be included in notices or directions to be given to trustees, beneficiaries, the QBCC, principals and/or financial institutions under the amended BIF Act
- prescribing the trust records that must be kept and how they must be kept;
- outlining the process for and obligations relating to completing a bank reconciliation of a trust account
- setting out the timing for account review reports under the BIF Act and the information that is to be included in a report.

Building Regulation

The BIFOLA Regulation amends the Building Regulation to support the building certification reforms introduced through the BIFOLA Act. The amendments will:

- ensure all mandatory parts of the Queensland Development Code (QDC) are referenced in a single legislative instrument
- prescribe all aspects of the QDC that are intended to be mandatory
- ensure that current provisions of the QDC that regulate the design and siting of residential buildings will continue to apply to those buildings pending possible regulatory changes in the future
- extend the requirement for a certifier to keep the record of decision about the assessment of a competent person from 5 years to 7 years
- align record keeping requirements for building certifiers with the Building Act
- prescribe the replacement 'Code of Conduct for Building Certifiers' made by the Chief Executive on 9 September 2020 to provide the overriding duty of the certifier to act in the public interest
- prescribe in the Building Regulation all of the accreditation standards bodies that may issue accreditation to individuals proposing to apply to be building certifiers
- prescribe demerit offences and demerit points which apply where a certifier has not complied with their regulatory requirements
- correct an editorial error in the definition of 'assessable building work'.

In addition, the amended Building Regulation facilitates Queensland adopting an approach that is consistent with the national approach in the National Construction Code (NCC) in relation to separate annual heating and cooling load limits for the thermal performance of a new dwelling. The amendments will update the QDC, and in doing so, will improve the year-round performance and comfort of new dwellings in Queensland and assist with minimising household energy costs. This update will also reflect the de-amalgamation of two local governments (Livingstone Shire Council and Noosa Shire Council), which supports the assessment of end-of-trip facilities associated with major developments.

Amendments to the Building Act by the BIFOLA Act will facilitate the possible introduction of new aspects of the QDC that would regulate the design and siting of class 1a buildings

(e.g. houses) and class 10 buildings (e.g. garages) in the future. If introduced, the new aspects of the QDC would replace the current provisions of the QDC that regulate the design and siting of those buildings. Amendments to the Building Regulation are intended to ensure the current provisions of the QDC that regulate the design and siting of residential buildings will continue to apply to those buildings until any future regulatory changes of this type are made.

QBCC Regulation

The BIFOLA Act amends the definition of ‘occupational licence’ in the QBCC Act to clarify the occupational licences that may be granted to a person. The QBCC Regulation now prescribes the Acts under which an occupational licence may be granted. These are the Acts that regulate occupational licences for plumbing, gas-fitting and pest control, in line with the new definition of ‘occupational licence’ under the BIFOLA Act. This will ensure that these occupations are captured for the purposes of the QBCC Act, such as ensuring that building work is adequately supervised by a suitably licensed person.

The BIFOLA Act also amends the definition of ‘fire protection work’ to enable the QBCC Regulation to prescribe certain aspects of the work. The BIFOLA Regulation amends the QBCC Regulation to insert a new schedule which prescribes work that is not fire protection work, such as work performed by a registered professional engineer or electrician. This will reduce duplication in licensing.

Amendments to the QBCC Regulation also bring fire protection and plumbing and drainage occupational licensees in line with other licence holders under the QBCC Act in being able to perform relevant work on their homes up to \$11,000. This will help avoid unintended consequences of the new definition of occupational licence, which would otherwise mean that the occupational licensees could not perform work on their own properties without also holding a contractor’s licence for the work.

Amendments to the QBCC Regulation also implement three of the recommendations of the Taskforce (recommendations 4, 7 and 8) into fraudulent non-payment in the building and construction industry. The amendments will:

- enable sharing of information between the QBCC and relevant investigating and prosecuting authorities throughout Australia, for example, interstate law enforcement agencies, and the Australian Securities and Investments Commission
- require applicants for a licence to provide information about any previous name they have been known by and certified photographic proof of identity
- require the licensee register to include, where applicable, the licensee’s Australian Business Number or Australian Company Number.

MFR Regulation

The MFR Regulation includes requirements for accountants providing financial information to the QBCC to meet a licensee’s financial reporting obligations. The BIFOLA Act amended the QBCC Act to include a more detailed process for the QBCC to be able to exclude certain accountants from providing financial information for the purposes of the MFR Regulation. Consequentially, existing provisions in the MFR Regulation are now unnecessary and are omitted. The MFR Regulation includes references to PBAs and consequential amendments are necessary to address the transition to the new trust account framework.

PD Regulation

The scopes of work of certain plumbing and drainage licences under the PD Regulation are being amended to allow those licensees to install fire collars that are incidental to their work. This will prevent duplication in licensing requirements following the commencement of the new QBCC Act definition of 'fire protection equipment', which includes fire collars, and ensure a separate fire protection occupational licence will not be required for this work.

SPE Regulation

The BIFOLA Act introduced new penalties into the Building Act, BIF Act, QBCC Act, Architects Act and PE Act. The BIFOLA Regulation amends the SPE Regulation to prescribe penalty infringement notice (PIN) offences for these Acts.

Consistency with policy objectives of authorising law

The BIFOLA Regulation is consistent with the policy objectives of the Architects Act, BIF Act, BIFOLA Act, Building Act, PD Act, PE Act, QBCC Act and SPE Act.

Inconsistency with policy objectives of other legislation

The BIFOLA Regulation is not inconsistent with the policy objectives of other legislation.

Benefits and costs of implementation

BIF Regulation

The new trust account provisions that are contained in the BIF Act and the BIF Regulation will benefit the industry as a whole, as the reforms are designed to simplify and enhance the existing PBA process. Staged implementation of the reforms will enable industry adequate time to prepare for the changes and so adjust their business practices accordingly.

The detail in the regulation to support introduction of the new trust account framework was developed in close consultation with key stakeholders in order to align as closely as possible with existing industry practice. In addition, provisions of the BIF Regulation to provide clarity in relation to definitions in the BIF Act, will make the BIF Act provisions easier to use.

Implementation of the reforms will result in improved payment down the contractual chain in the building and construction industry.

Building Regulation

Amendments to the Building Regulation will clarify the operation of the QDC and make certain provisions consistent with the Building Act. They will also clarify some provisions

relating to building certifiers. The amendments relating to demerit points for building certifiers will enhance regulatory compliance by building certifiers.

The introduction of separate heating and cooling load limits can improve thermal comfort and help reduce a dwelling's ongoing energy costs.

QBCC Regulation

Amendments to the QBCC Regulation that implement three of the recommendations of the Taskforce, will enhance accountability and integrity in the building and construction industry.

Other amendments to the Regulation will streamline licensing and avoid duplication in requirements, thus providing a financial benefit to industry.

Any government costs arising from implementation of the regulation will be met from existing resources.

Consistency with fundamental legislative principles

The BIFOLA Regulation has been assessed for consistency with fundamental legislative principles as defined in section 4 of the *Legislative Standards Act 1992*.

New sections 8 and 10B of the BIF Regulation require the trustee to provide information to the QBCC about the opening, closing and transferring of a project trust account or retention trust account. The information required to be provided includes such matters as the name of the trust account, name of the financial institution at which the trust account is kept and the date the trust account was opened, closed or transferred (whichever circumstance applies). The BIFOLA Act contains provisions which require the trust account to be named in a certain way, be opened at an approved financial institution and sets the timeframes in which the trust account must be opened and closed. Failing to comply with these provisions is an offence and it may be considered that including information in a notice to the QBCC that is inconsistent with the requirements under the Act could be self-incriminating.

These information requirements are justified on the basis that failing to manage the trust accounts in the way specified may undermine the intended benefits of the new trust framework. The trust framework is intended to alter the culture of the building and construction industry to one that makes payment on time and in full, and which is transparent between parties. Providing subcontractors with information about the name of the trust account and financial institution, and when the account was opened or closed, aids in this transparency. Ensuring the QBCC, as the regulator, also has this information will further encourage this transparency, consistency and accountability.

The BIFOLA Regulation contains provisions that may limit individuals' right to privacy. In particular, section 29 amends the QBCC Regulation to enable the QBCC to enter an information-sharing arrangement with prescribed agencies. Section 29 gives effect to recommendation 7 of the Taskforce, which observed that fraudulent behaviour relating to subcontractor non-payment often involves conduct the significance of which could better

be appreciated through acquiring information held by other agencies. The Taskforce considered QBCC's supervision of the industry would be enhanced by greater opportunities to collaborate with relevant investigating and prosecuting authorities throughout Australia.

The amendments are considered justifiable, as the collection of information and evidence is necessary to ensure that QBCC can identify and address offending fraudulent behaviour and effectively perform its role as regulator. The QBCC Act provides safeguards to lessen potential privacy impact, in that an information-sharing arrangement may relate only to information that helps the QBCC or the other agency to perform its functions, or information the disclosure of which is reasonably necessary for protecting the health or safety of a person or property.

Consultation

The government consulted on the BIFOLA Regulation with industry stakeholders, including a subcommittee of the Ministerial Construction Council. The stakeholders were:

- Master Builders Queensland
- Master Electricians Australia
- National Fire Industry Association
- Australian Institute of Building Surveyors
- Australian Institute of Quantity Surveyors
- CPA Australia
- Master Plumbers Association of Queensland
- Local Government Association of Queensland
- Cornerstone Building Certification
- Housing Industry Association
- Chartered Accountants
- The Association of Wall & Ceiling Industries
- Consult Australia
- Subcontractors' Alliance.

The proposed amendments were supported.

The Queensland Productivity Commission was consulted as part of the development of the BIFOLA Regulation.