

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

Explanatory notes for Subordinate Legislation 2024 No. 85

made under the

Building Industry Fairness (Security of Payment) Act 2017
Queensland Building and Construction Commission Act 1991

General Outline

Short title

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

Authorising law

Section 201 of the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act), and section 116 of the *Queensland Building and Construction Commission Act 1991* (QBCC Act).

Policy objectives and the reasons for them

The policy objectives of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2024* (BIFOLA Regulation 2024) are to:

- clarify what type of work is and is not captured under the meaning of a 'project trust subcontract' which determines which subcontractors are beneficiaries of the trust.
- remove the requirement for mandatory retention trust training to be completed by all trustees and account administrators.
- remove the requirement for account review reports (external audits) to be completed for each retention trust account annually.
- clarify and simplify trust account record keeping requirements, including:
 - what records and reports must be kept for each trust.
 - what information must be recorded in trust account records and reports.
 - how beneficial interest is recognised in each of the trust ledger accounts.
- provide clarity to industry on how amounts held under the trust account framework are to be dealt with for the purposes of calculating assets and liabilities for minimum financial requirements purposes.

Security of payment protections for the Queensland building and construction industry are established by the framework enshrined in the BIF Act and its supporting regulation, the Building Industry Fairness (Security of Payment) Regulation 2018 (BIF Regulation).

The trust account framework (the framework) is designed to protect progress payments and cash retention amounts for industry contractors and subcontractors and minimise the social and economic impacts of late payment, non-payment and insolvency in the industry.

The framework is being implemented in phases and currently applies to eligible Queensland Government contracts of \$1 million or more and private sector, local government, statutory authority, and government-owned corporations' contracts of \$10 million or more.

The two remaining framework phases are scheduled to commence in March 2025 (Phase 3 – eligible private sector, local government, statutory authority and government-owned corporations' contracts of \$3 million or more) and October 2025 (Phase 4 and full implementation – all eligible contracts of \$1 million or more; and extending retention trusts throughout the contractual chain).

The Department of Housing, Local Government, Planning, and Public Works (DHLGPPW) continues to monitor the framework's implementation and throughout 2023 undertook a review of the BIF Act and BIF Regulation to identify opportunities to simplify and clarify the framework to ensure its continued effectiveness.

Clarifying and simplifying amendments were progressed in the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2024* (BIFOLA Act 2024), which received Royal assent on 26 April 2024. The amendments help industry by reducing administrative complexity and supporting development of a range of software solutions that will facilitate industry compliance.

The BIFOLA Regulation 2024 prescribes further detail relating to a number of amendments in the BIFOLA Act 2024.

Achievement of policy objectives

The policy objectives will be achieved by amending the BIF Regulation and the Queensland Building and Construction Commission (Minimum Financial Requirements) Regulation 2018 (MFR Regulation). The proposed amendments to these regulations are consequential to the BIFOLA Act 2024 amendments which, as a package of reforms, seek to reduce administrative complexity for industry and facilitate the development of software solutions to further assist industry compliance.

Amendments to the BIF Regulation

Work that is captured under 'project trust subcontract'

Section 19 of the BIFOLA Act 2024 inserts new section 9A 'Meaning of project trust subcontract' into the BIF Act and section 23 replaces section 11A (Who are the trustee and beneficiaries of a project trust) to clarify that a beneficiary of a project trust is a subcontractor for a 'project trust subcontract'. The amendments clarify the original policy intent about the types of subcontractors that are protected under the framework.

New section 9A(1) prescribes a project trust subcontract to be a first-tier subcontract, under which the work is either architectural services, contractor or trade work, professional engineering services or other services or work prescribed by regulation, and the subcontract is not excluded by regulation.

The BIFOLA Regulation 2024 prescribes additional services or work that is included within the meaning of subcontracted work and prescribes certain subcontracts for services or work as being excluded and not a project trust subcontract. This is to ensure the policy intent of the legislation to protect certain subcontractors is achieved and to provide clarity to industry for the administration of trust account payments and protections.

Removing mandatory retention trust training and account review report requirements

The amendments to the BIF Regulation seek to balance the benefits of the trust account protections whilst minimising unnecessary compliance cost and burden for trustees required to administer the trusts.

To reduce administrative burden and cost to industry, the amendments will (in effect):

- remove the requirement for mandatory retention trust training to be completed by all trustees and account administrators.
- remove the requirement for account review reports (external audits) to be completed for each retention trust account annually.

Although the amendments omit the prescribed requirements in the BIF Regulation, the head of power in the BIF Act to prescribe mandatory training and/or account review report requirements is retained. This will enable these requirements to be reintroduced in future if needed and after industry has successfully transitioned their business systems to the other requirements.

Additionally, the Queensland Building and Construction Commission (QBCC) has a regulatory function to monitor compliance with the trust account requirements and may undertake proactive trust account audit programs at any time.

Clarifying and simplifying record keeping requirements

Section 43 of the BIFOLA Act 2024 replaces the former section 52 of the BIF Act, which prescribes what records must be kept by the trustee in relation to a project or retention trust. The revised section 52 of the BIF Act is simplified and provides a head of power for a regulation to prescribe what records must be kept by a trustee of a project or retention trust.

Additionally, section 44 of the BIFOLA Act 2024 omits former section 52A of the BIF Act which requires the trustee of a project or retention trust account to complete a bank reconciliation for the trust account as required by regulation.

Consequently, the BIFOLA Regulation 2024 replaces sections 10F and 10G of the BIF Regulation with revised and simplified record keeping and reporting requirements.

The intent of these amendments is to reduce prescriptiveness by simplifying the trust account record keeping requirements and clarifying the ledger and other account keeping

requirements. This is intended to also assist in fast tracking fit for purpose accounting software solutions that will aid industry compliance.

Transitional provisions

Section 49 of the BIFOLA Regulation 2024 inserts a transitional provision to clarify how parties should proceed given the omission of the account review report requirements.

Specifically, for trust account reviews that have been completed or are required to be completed, the relevant provisions applying before commencement continue to apply. For all parties following commencement, a requirement does not exist to engage an auditor and complete a new or subsequent review.

Amendments to the MFR Regulation

The MFR Regulation prescribes financial requirements for contractor licences issued by QBCC. To ensure QBCC licensees have a financially sustainable business and appropriate level of working capital, they are required to meet minimum financial requirements and to submit financial information to QBCC.

The amendments to the MFR Regulation provide clarity to industry on the interaction of the framework and the MFR Regulation requirements, specifically how amounts held in trust under the framework are to be dealt with for the purposes of calculating assets and liabilities.

As currently drafted, a number of sections in the MFR Regulation direct the treatment of amounts held in a building trust and/or beneficial interest in a building trust for working out actual revenue, assets and liabilities.

Due to the nature of project and retention trusts, trust amounts, and beneficial interests are not assets or liabilities of the building contractor and can therefore duplicate the assets and liabilities already recognised in a building contractor's business accounts. The potential for double accounting may misrepresent the actual financial position of the building contractor and has also led to confusion for industry and accountants preparing financial reports.

Accordingly, the amendments omit these subsections to ensure licensees only reflect asset and liability amounts under their business accounts for MFR purposes.

Consistency with policy objectives of authorising law

The BIFOLA Regulation 2024 is consistent with the main objects of the BIF Act and QBCC Act, that is to help people working in the building and construction industry in being paid for the work they do, and to regulate the building industry.

Inconsistency with policy objectives of other legislation

No inconsistencies with the policy objectives of other legislation have been identified.

Alternative ways of achieving policy objectives

The policy objectives can only be achieved by amending the BIF Regulation and MFR Regulation. These issues cannot be addressed administratively or by other policy means.

Benefits and costs of implementation

The BIFOLA Regulation 2024 support the amendments incorporated in the BIFOLA Act 2024 which serve to simplify and clarify the framework's application. Implementation of the regulation is not expected to incur additional costs for industry.

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

Consistency with fundamental legislative principles

The BIFOLA Regulation 2024 is consistent with fundamental legislative principles.

Consultation

Broad stakeholder consultation has continued throughout the development of the BIFOLA Act and BIFOLA Regulation amendments. This includes consultation with the Ministerial Construction Council, which consists of key industry stakeholders., and the Trust Account Framework Implementation Steering Committee. Dedicated consultation has also occurred with accounting professional bodies and software providers.

In accordance with the Queensland Government Better Regulation Policy, an Impact Analysis Statement (IAS) has been prepared and approved by the Director-General, DHLGPPW and Minister for Housing, Local Government and Planning and Minister for Public Works. The IAS found, in summary, that the proposed amendments are minor and machinery in nature. The amendments contained in the BIFOLA Regulation 2024 do not add additional burden and continue to support industry by clarifying and simplifying matters under the framework. Therefore, no further regulatory impact assessment is required.