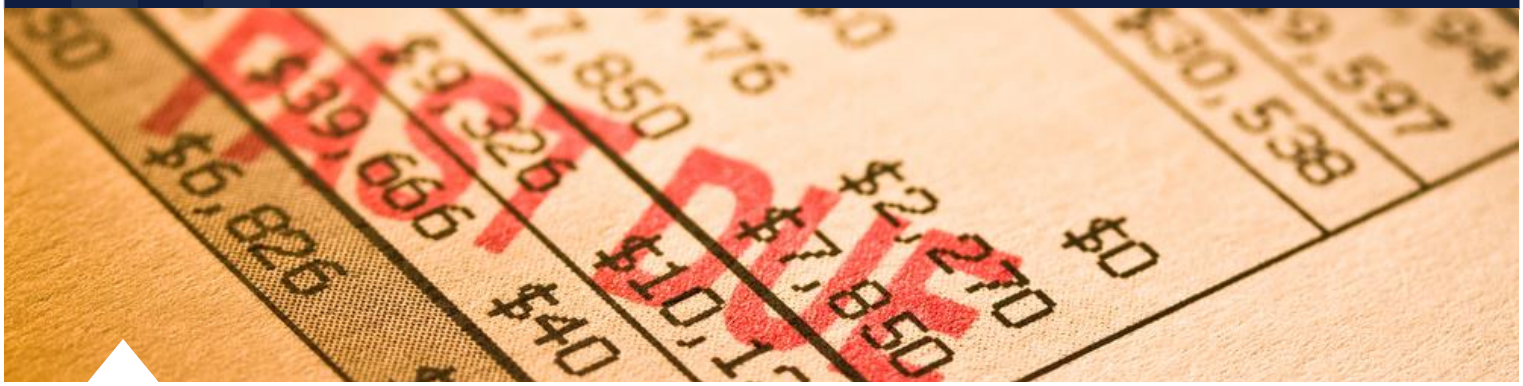

SECURITY OF PAYMENT AMENDMENTS TO COMMENCE ON 1 JULY 2018 WHAT IT MEANS FOR THE INDUSTRY

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In late 2017 the Queensland parliament passed the *Building Industry Fairness (Security of Payments) Act 2017* (Qld) ("**BIFA**") which substantially alters Queensland's security of payment regime. In addition to the introduction of project bank accounts ("**PBAs**")[i] the Act:

1. Repeals *Building and Construction Industry Payments Act 2004* (Qld) ("**BCIPA**") and incorporates it within BIFA, but also significantly changes the payment claim procedure; and

2. Repeals the *Subcontractors' Charges Act 1974* (Qld) ("**Charges Act**") and incorporates it within BIFA.

The Queensland Building and Construction Commission recently announced that these amendments will commence on 1 July 2018. The changes will have a significant impact upon construction industry participants, no matter where they sit within the contractual chain. Close attention to the changes and diligent contract administration will be necessary to avoid the consequences of non-compliance.

SUBCONTRACTORS' CHARGES

Subcontractors' charges enable subcontractors ("**Subcontractors**") to leapfrog up the contractual chain and charge money owed to their employing contractor ("**Contractor**") by the developer/principal or the Contractor's employing contractor ("**Principal**").
In brief, they operate as follows:

1. To create a charge, the Subcontractor must have performed work that is covered by the Charges Act (not all work is covered) and serve a compliant notice of claim of charge on its Contractor and the Principal;

2. Within 14 days after the notice of claim of charge is received by the Contractor, it is required to serve a ("**Contractor's Notice**") upon the Subcontractor claiming the charge and on the Principal, in which it either accepts full liability, disputes the claim entirely or accepts part liability;

3. If the claim is accepted, the Principal is to pay the claimed amount to the Subcontractor (but only if and to the extent that the Principal holds monies which would have otherwise been payable to the Contractor). If the claim is not accepted, the Principal must not pay the monies said to be charged to either the Contractor or the Subcontractor. If it does, the Principal may be liable to pay that amount again to the Subcontractor;

4. If the Contractor denies liability for the claim (in whole or in part) the Subcontractor must commence proceedings against the Contractor if

it wishes to preserve the charge. If it fails to commence proceedings within the requisite timeframe (being 1 month or 4 months depending on the circumstances), the charge will lapse (unless the relevant Subcontractor can rely upon proceedings commenced by another);

5. Once proceedings are commenced, the Principal must either retain the charged amount until the court decides whether the charge is valid or pay the monies into court;

6. If the total value of the charges served are more than the monies the Principal holds (and would have otherwise had to pay to the Contractor) those monies must be shared pro rata by the Subcontractors who serve valid charges; and

7. Persons seeking payment within the construction industry cannot serve a subcontractors' charge and use the adjudication provisions of BCIPA/BIFA at the same time. If a charge has been served and a Claimant later applies for adjudication of a payment claim, the charge is deemed to lapse.

WHAT HAS CHANGED?

The Charges Act will be repealed as of 1 July 2018. For the most part, the provisions of the Charges Act will be inserted into BIFA. The operation of the regime will essentially remain the same, save for:

1. The definition of *"work",* for which a charge can be claimed has been expanded;

   Previously the work the subject of a charge was required to have some connection with the land. The definition provided that work included *"labour, whether skilled or unskilled, done or commenced upon the land where the contract or subcontract is being performed in connection with …"* (my emphasis).

   The amended definition removes the requirement for the work to be connected with the land and provides that work includes *"labour, whether skilled or unskilled, carried out by a person in connection with …"* (my emphasis).

2. It will now be an offence for a Contractor not to serve a Contractor's Notice in response to a Subcontractor's notice of claim of charge or to fail to respond to a Subcontractor's request for information regarding the Contractor's contract with its Principal (each with maximum penalty of $2,523);

3. Charges will not attach to monies held in project bank accounts; and

4. The provision which allowed inaccuracies within notices of claims of charge to be forgiven has, regrettably, not been replicated in the subcontractors' charges provisions in BIFA. Section 5 of the Charges Act provided that:

   > *"a notice of claim of charge may be in the approved form, but the validity of the notice is not affected by any inaccuracy or want of form if the money sought to be charged and the amount of the claim can be ascertained with reasonable certainty from the notice".*

BCIPA/BIFA

BCIPA is designed to ensure that persons ("**Claimants**") who perform construction work or supply related goods or services pursuant to a contract or other arrangement to claim a progress payment from the contractor who employs them or, if they are the head contractor for the project, from the principal or developer ("**Respondent**"). It is intended to recognise that "cash is king" in the construction industry and that Respondents can be reluctant to allow money to flow down the contractual chain to subcontractors. If the flow of money down the chain is restricted, subcontractors often experience financial difficulties which can lead to financial collapse.

BCIPA was introduced in 2004 and created a statutory right for Claimants to claim and obtain progress payments by serving a payment claim. The legislation sets out a number of procedural requirements to be met in order to serve a valid payment claim, one of which is a requirement to endorse the payment claim to state that it is made pursuant to BCIPA. Once a valid payment claim is served (which is not, usually, overly difficult), the Respondent is required to respond by serving a payment schedule, being a document which sets out the sum the Respondent proposes to pay to the Claimant. If the Respondent proposes to pay nothing to the Claimant, or a sum less than that claimed by the Claimant, the Respondent must set out its reasons for doing so in the payment schedule.

If there is a dispute between the Claimant and Respondent as to how much the Claimant is entitled to be paid in respect of any progress payment, the Claimant can apply for adjudication. An adjudicator is then to decide how much the Claimant is entitled to be paid by the Respondent (if any) and the Claimant can enforce the adjudicator's decision as a judgment.

When first introduced in 2004, compliance with BCIPA by Respondents was encouraged by mechanisms which would allow the Claimant to apply for judgment or adjudication if the Respondent failed to serve a payment schedule or failed to pay a Claimant in accordance with a payment schedule. In either circumstance, the Respondent was not (save for any argument that the

payment claim was invalid), entitled to raise a defence to the Claimant's application for judgment or adjudication.

2014 AMENDMENTS

In 2013 a review was undertaken of the effectiveness and operation of BCIPA. Various amendments were made by the Newman Government, which relevantly included:

1. The introduction of two different categories of payment claim, being standard (claims of $750,000 or less) and complex payment claims (claims of more than $750,000), with the response period for complex claims being longer than for standard claims. Additionally, Respondents to complex claims are entitled to rely upon new reasons not included within its payment schedule should the Claimant's payment claim be referred to adjudication (which was not previously possible);

2. The introduction of what has come to be known as a "Second Chance Notice". Where Respondents fail to serve a payment schedule, before Claimants can apply for judgment or adjudication, they are required to give Respondents a further opportunity to serve a payment schedule by serving a "Second Chance Notice". Only after Respondents fail to respond to a "Second Chance Notice" can Claimants apply for judgment or adjudication. This amendment was designed to avoid Claimants holding Respondents to ransom where a payment claim is overlooked for one reason or another.

2017 AMENDMENTS

By passing of BIFA, the Palaszczuk Government will (as of 1 July 2018) reverse many of the Newman era amendments and make other substantial changes to the regime, including:

1. The requirement that Claimants serve a "Second Chance Notice" in the event that no payment schedule is been received has been removed (while Claimants will be required to give notice of their intention to apply for judgment or adjudication, Respondents will not entitled to remedy the failure to serve a payment schedule but will be able to elect to pay the claimed amount and avoid an application being made);

2. Respondents to complex claims will no longer be entitled to raise new reasons for non-payment at adjudication were those reasons not contained in the payment schedule;

3. It will now be an offence to fail to serve a payment schedule (unless the Respondent pays the amount claimed in the payment claim in full by the due date for payment) which attracts a maximum penalty of $12,615; and

4. For a payment claim to be valid, it will no longer need to state that it is made pursuant to the legislation. This is a significant change and means that most invoices or claims for payment received from contractors and subcontractors will constitute a payment claim to which the provisions of BIFA will apply (so long as the other requirements for payment claims stipulated in BIFA are met).

The Department of Housing and Public Works have explained the reasons for removing the requirement for the endorsement as follows:

> "*the removal of the need for endorsement of a claim under chapter 3 makes it open for this jurisdiction to apply at an earlier time…. Feedback from consultation revealed it would be useful to have the provisions of the BCIPA apply from the start of the payment process. Currently, a party may submit an invoice, then await payment. When this does not eventuate, in part or in full, the party may then consider submitting a payment claim under the provisions of the BCIPA. Further, the claimant must wait for the time limits under that legislation in order to seek adjudication. In addition, feedback on consultation revealed that claimants are reluctant to include the words regarding the BCIPA claim on their invoices, to make them into payment claims, due to a stigma about using the BCIPA. Some subcontractors expressed a belief that they would be 'blacklisted' by head contractors for stating that their claim is a BCIPA claim, in that they would not be given work in the future.*"

The change follows the removal of the need for the endorsement in New South Wales, but there has been significant criticism of that decision. Those concerned by the removal of the endorsement in Queensland cite the New South Wales experience as telling a cautionary tale (being that removal of the endorsement did not improve matters, but rather caused confusion and unduly complicated the process). These concerns are genuine, especially given that an email can amount to a payment claim despite neither party intending it to be one.

IMPLICATIONS

The combined effect of these amendments will mean headaches for the industry, no matter where you sit in the contractual chain. For example:

1. Principals and developers will face difficulties because they often engage external consultants to fulfill the roles of superintendent or principal's

representative (i.e. "**Contract Administrators**"). While in most instances principals and developers will want progress certificates issued by Contract Administrators to constitute payment schedules under BIFA, there will be circumstances where principals and developers disagree with the assessment made by their Contract Administrator. When this occurs, principals and developers will need to spend time and money preparing their own payment schedules because, if they do not pay the sum nominated by the Contracts Administrator in the progress certificate, the contractor will be at liberty to obtain judgment;

2. Contracts Administrators will struggle because their clients will, on occasion, need to rely upon their progress certificates in adjudications commenced by the contractor. Given that Respondents will no longer be able to rely on new reasons in respect of complex claims, Contracts Administrators will need to ensure all reasons for withholding or refusing payment are included within their progress certificates, in circumstances where Contracts Administrators are not lawyers;

3. Both Claimants and Respondents generally are likely to experience difficulties. Claimants may find themselves in circumstances where they lose the opportunity to make a payment claim or apply for adjudication. A Claimant can only make one payment claim per reference date and may unintentionally serve a payment claim. Additionally, where Respondents receive a document which it did not consider to be a payment claim (but the document in fact meets the legal test for a payment claim), it may overlook serving a payment schedule. This issue was explained in an example given during the public hearing regarding BIFA:

> *"What it means is that a subcontractor, an electrician or a plumber, if they are instructed to do some variation work and they send in a note to the contractor, their superior contracting party, saying that it cost $400 to change some piping, potentially they have just now issued a payment claim, because they have described the work, they have said how much the money was. That falls within those broad parameters. 'Not requiring an endorsement' now means two possible things. Firstly, the person who receives it will now have to provide a payment schedule or they face the consequences of potentially 100 penalty units, which would seem grossly unfair. Secondly, for the claimant, they will have used an available reference date so they will not be able to claim again until the next entire payment cycle goes through, which is probably going to be another month even though they were only claiming for a few hundred dollars' worth of work, but intended to claim for $30,000 at the end of the month."*

CONCLUSION

The amendments to the BCIPA/BIFA procedure will make it imperative for industry participants to exercise increased diligence in administering their contracts. Even then, mistakes will happen. In the case of Respondents, that mistake could mean a judgment against them or the unintentional commission of an offence. In the case of Claimants, it could mean being unable to make a claim for a progress payment at all because of the unintentional service of a payment claim.

Ultimately, will the changes achieve the intended objective of improving the timely flow of money to Claimants? Possibly, but the system is not perfect and will cause a lot of headaches along the way.

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[i] which commenced in respect of certain Queensland government projects on 1 March 2018. For further information on the operation of project bank accounts, you can read my article about them here.