
SECURITY OF PAYMENT UPDATE: REFORMS IN QLD AND WA

KEN HICKMAN, ANNIE LEEKS, PIP GOLDMAN, DOUGLAS JOHNSON,
BEN HOLLOWAY, EUNICE LIM

Following a series of high profile reviewsⁱ, Australia's patchwork of security of payment laws are undergoing something of a metamorphosis. In particular, Queensland continues to blaze its own trail through the recent introduction of a number of significant reforms aimed at ensuring cash-flow down the contracting chainⁱⁱ. Also, Western Australia is poised to completely re-write its security of payment system; bringing it more or less in line with the East Coast model, while also introducing a number of unique



measures which seek to address a perceived imbalance of bargaining powerⁱⁱⁱ. The reforms are unlikely to represent a total panacea for the ails that plague the industry and which these regimes seek to address. But they do seek to provide sub/contractors with further protections by introducing important changes to the way that payment risks are allocated on construction projects undertaken in these States.

This article briefly explores the key reforms passed in Queensland, and those which are expected to be reintroduced into the Western Australian parliament after the March election, and offers a few thoughts on their expected impact.

QUEENSLAND - PROJECT TRUST ACCOUNTS AND OTHER BIG CHANGES

In July 2020, the Queensland Government passed the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020 (Qld) (Amendment Act)*. The Amendment Act followed a review undertaken into the effectiveness of the State's security of payment regime provided for under the (relatively) newly minted *Building Industry Fairness (Security of Payment) Act 2017 (Qld) (BIF Act)*. It introduced a series of staged reforms aimed at curbing subcontractor non-payment and enhancing cash-flow on construction projects.

i Including the 'Review of Security of Payment Laws' by J Murray AM released in December 2017, the 'Final Report on Security of Payment Reform in the WA Building and Construction Industry' by J Fiocco released in October 2018, and the Queensland Government's Special Joint Task Force Report, 'Investigating subcontractor non-payment in the Queensland building industry', released in June 2019.

ii *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020 (Qld)*.

iii *Building and Construction Industry (Security of Payment) Bill 2020 (WA)*.

The key areas of reform include:

- **Statutory Trust Accounts:** The Amendment Act provides for the phased implementation of a statutory trust regime, replacing the existing system for project bank accounts. This new regime requires that the head contractor under certain ‘eligible contracts’ establish two types of accounts: a project trust account (where amounts payable and amounts in dispute for certain ‘project trust work’ are paid into trust for the benefit of contractors and first tier subcontractors)^{iv} and a retention account (where any cash retentions withheld from amounts due to contractors or first tier subcontractors on eligible projects are held in a separate account). Once established, the principal on the ‘eligible project’ must make payments to the head contractor through the trust, from which payment is then made to the head contractor itself and down the contracting chain. These measures are being rolled out between 1 March 2021 and 1 January 2023; initially applying to certain Government projects before becoming applicable to all ‘eligible contracts’ with a value in excess of \$1 million. A number of penalties and serious offences can apply if a party fails to comply with the statutory trust regime, including the potential for company executives to be held liable.^v
- **Head Contractor Supporting Statements:** Head contractors in Queensland are now also required to provide a supporting statement when submitting their progress claims.^{vi} This is a statement declaring that all subcontractors have been paid all amounts owing to them, and providing reasons for any unpaid amounts (such as disputed claims).^{vii} Failure to provide a supporting statement can carry a hefty penalty.^{viii}
- **Enhanced Protection for Claimants:** The Amendment Act also introduced a suite of further measures aimed at protecting adjudication claimants from insolvency:
 - a) **Payment Withholding Request:** If a respondent fails to pay an amount awarded to a claimant at adjudication, the claimant may submit a ‘payment withholding request’ to the ‘higher party’ in the contracting chain.^x For example, if the claimant is a subcontractor and the respondent is a head contractor, the claimant may submit the request to the principal (the party one step higher than the head contractor). Once a request is served, the higher party is obliged to withhold the amount owing to the claimant from any amounts that the higher party owes to the respondent. For example, if the adjudicated amount is \$55,000, but the amount payable to the respondent by the higher party is \$40,000, the higher party would withhold the \$40,000.^x Amounts retained in this way are the subject of a statutory

iv Amendment Act, s 63.

v BIF Act, s 58A(5) (as inserted by the Amendment Act, s 63).

vi Amendment Act, s 65; BIF Act, s 75(5A).

vii BIF Act, s 75(6)(b)(i) (as inserted by Amendment Act, s 65).

viii See BIF Act, s 76 (as amended by Amendment Act, s 66).

ix See BIF Act, s 97B.

x BIF Act, 97C (inserted by Amendment Act, s 73).

charge in favour of the claimant.^{xi}

- b) **Charge Over Property:** If a principal fails to pay an amount awarded to a head contractor at adjudication, the head contractor can now register a charge over property where the construction work was carried out (where that property is owned by the principal or a related entity).^{xii} This charge remains in place for a period of 24 months unless extended by the Court, and will expire if the adjudication determination is overturned.^{xiii}

These new measures in Queensland can be quite complicated, particularly the provisions relating to the establishment of the new statutory trust scheme. However, it is important for industry participants to become acquainted with them now to avoid falling foul of the enhanced penalties and offences that apply. If you are interested in learning more about the Amendment Act, check out our recent [white paper](#) for an in-depth look.

WESTERN AUSTRALIA – A COMPLETE OVERHAUL ON THE HORIZON

The ‘West Coast’ model for security of payment and adjudication currently applies in Western Australia under the *Construction Contracts Act 2004 (WA) (CCA)*. This model generally enshrines the concept of freedom of contract, by only intervening to impose timeframes for progress claims and responses where the construction contract does not adequately provide for them.^{xiv} It also does not contain a number of the contractor-friendly provisions that apply on the East Coast – for example, an adjudication respondent can raise new reasons for non-payment that were not included in its payment schedule, which is not the case under the East Coast model.^{xv}

The days of the CCA now look to be numbered. In the latter half of 2020, the Government introduced the *Building and Construction Industry (Security of Payment) Bill 2020 (WA) (the Bill)* seeking to completely overhaul the State’s security of payment system. This would involve the introduction of reforms such as:

- **Adoption of the East Coast Model:** If passed, the Bill would introduce an East Coast model of adjudication in Western Australia. Maximum statutory timeframes would apply for the submission of payment claims, and for the provision of responsive payment schedules (a

xi BIF Act, 97G(2) (inserted by Amendment Act, s 73). By s 97G(6), the charge is declared to be a statutory interest to which the Personal Property Securities Act 2009 (Cth), section 73(2) applies.

xii See BIF Act, 100B (inserted by Amendment Act, s 75).

xiii BIF Act, 100C (inserted by Amendment Act, s 75).

xiv See the implied contractual terms provided for in Part 2, Division 2 and Schedule 1 of the Construction Contracts Act 2004 (WA). For example, in accordance with s 16 of the Act, provisions relating to the making of payment claims are only implied into a construction contract where the contract does not have a written provision about how a party is to make a claim to another party for payment.

xv For example, in NSW a respondent cannot include any reasons or withholding payment in its adjudication response unless those reasons have already been included in the payment schedule provided to the claimant. See Building and Construction Industry Security of Payment Act 1999 (NSW), s 20(2B).

departure from the current ‘freedom of contract’ philosophy).^{xvi} A respondent would also be deemed to be liable to pay the full amount of a payment claim if it fails to serve a valid payment schedule in time.^{xvii} This new model would apply to construction contracts entered into on or after a specific date to be proclaimed. However, the CCA would continue to apply to existing contracts, leading to a transition period where familiarity with both systems will be necessary.

- **Relief from ‘Unfair’ Time Bars:** Most construction contracts include notice based ‘time bar’ clauses: provisions requiring that a contractor give the principal notice within a certain period of time after an event has occurred on site, as a pre-condition to a contractor’s entitlement to claim an additional payment or extension of time for that event. These clauses are generally strictly enforced by the Courts in Western Australia even if the results may sometimes be ‘harsh’.^{xviii} The Bill would introduce a right for a claimant to seek a declaration that an ‘unfair’ time bar is void and of no effect in relation to a particular claim.^{xix} To avail itself of this relief, a claimant must establish that it was not reasonably possible, or unreasonably onerous, to comply with the notice-based time bar clause in the circumstances. This is a unique feature not yet seen in any other security of payment jurisdiction in Australia. While it may encourage principals to move away from the more extreme time bars (such as one or two day notice periods), the question of whether a time bar is ‘unfair’ is largely left to the Courts and will involve a detailed factual inquiry in each case. In our view, this is hardly a feature which lends itself to certainty, and may even serve to encourage an increase of claim disputation.
- **Narrower Mining Exclusion:** The CCA’s security of payment regime does not cover certain types of construction works performed in relation to oil and gas and mining projects. Such works are excluded from the definition of ‘construction work’ under the CCA, and therefore cannot be the subject of statutory adjudication. This is known as the ‘mining exclusion’. The Bill retains a mining exclusion, but on significantly narrowed terms. It would no longer exclude work involved in *‘fabricating or assembling items of plant used for extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance’*.^{xx} This change will result in many oil and gas operators and mining companies that were previously excluded from the system now being subject to the security of payment and adjudication regime.

The Bill is yet to be enacted into law. It automatically lapsed in December 2020 when the Government entered caretaker mode ahead of the upcoming State election in March 2021. However, there is no basis to think that the Bill will not be re-introduced after the March state

xvi Building and Construction Industry (Security of Payment) Bill 2020 (WA), Parts 2 and 3.

xvii Ibid, ss 26 and 27.

xviii See for example, *CMA Assets Pty Ltd v John Holland Pty Ltd* [No 6] [2015] WASC 217.

xix Building and Construction Industry (Security of Payment) Bill 2020 (WA), s 16.

xx Compare the definition of ‘construction work’ in s 6(3) Building and Construction Industry (Security of Payment) Bill 2020 (WA) to the definition in s 4(3) Construction Contracts Act 2004 (WA).

election. If the Bill is ultimately reintroduced and passed, it will dramatically change the way that payment claims and adjudications are managed in Western Australia; so watch this space. More details about the new system proposed under the Bill are available in one of our white papers.

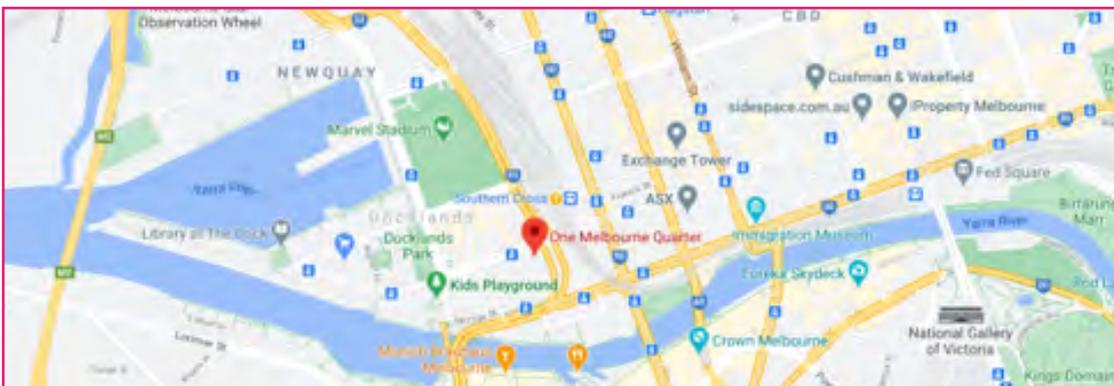
We have also recently published a round-up of the national security of payment laws in Australia; including a comparison of the various timeframes and rules that apply, and a few thoughts on the current trends in the case law in each jurisdiction. If this is something of interest, our publication is available [here](#).

The views and opinions in this article are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of Jones Day.

DGA GROUP Melbourne, has moved!

Our new office can be found at
Level 8 - One Melbourne Quarter
699 Collins Street
Docklands
Melbourne
Australia
Vic 3000
Tel: +61 (0) 3 8375 7620

Office Contact: John Donnelly: john.donnelly@dga-group.com



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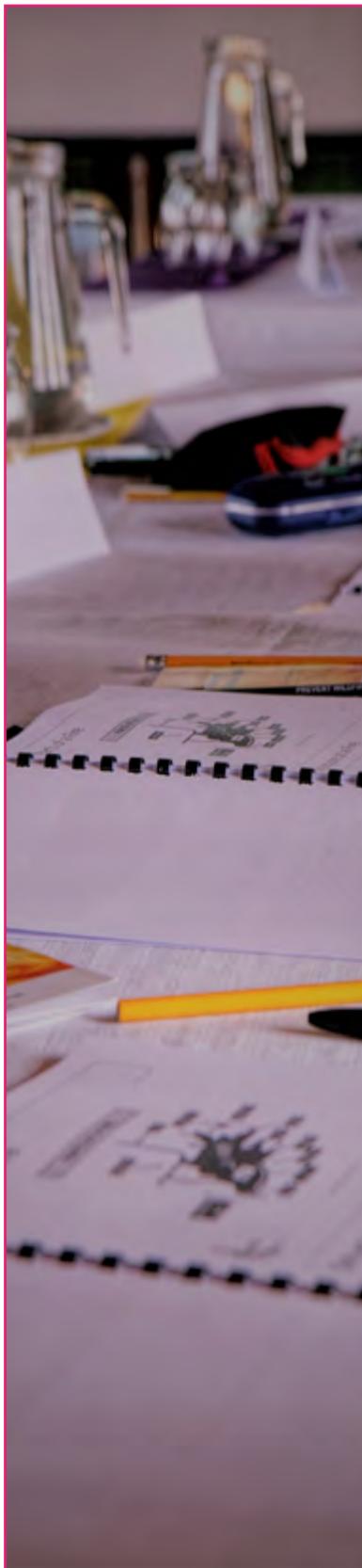
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DGA GROUP HEADQUARTERS

25 Eastcheap
London
EC3M 1DE

Tel: +44 (0)203 961 5340

SINGAPORE

#11-09, Eon Shenton
70 Shenton Way
Singapore
079118

Tel: +65 62916208

HONG KONG

6/F Luk Kwok Centre
72 Gloucester Road
Wan Chai
Hong Kong

Tel: +852 3127 5580

UNITED ARAB EMIRATES

Office 615
Park Lane Tower
Al A'amal Street
Business Bay
United Arab Emirates

Tel: +971 4 437 2470

AUSTRALIA

Level 8
One Melbourne Quarter
699 Collins Street, Docklands
Melbourne
Vic 3000
Australia

+61 (0)3 8375 7620

AUSTRALIA

Level 23
52 Martin Place
Sydney
NSW 2000
Australia

+61 (0)2 9220 5027

CANADA

61 Legacy Landing SE
Calgary
Alberta
Canada
T2X 2EH

Tel: +1(587) 586 5502

AFRICA

Building 2
Country Club Estate
21 Woodmead
Sandton
South Africa
2054

+27 (0)11 258 8703

DGA UNITED KINGDOM

