



19 April 2022

Contact  
Tracey Wood  
07 [REDACTED]

**Attention: Committee Secretary**  
Transport and Resources Committee  
Parliament House  
George Street  
Brisbane QLD 4000

**Our reference**  
TW:186

By email: [trc@parliament.qld.gov.au](mailto:trc@parliament.qld.gov.au)

Dear Committee Secretary

### **Building and Other Legislation Amendment Bill 2022**

Thank you for the opportunity to provide feedback on the Building and Other Legislation Amendment Bill 2022 (the Bill).

#### **1. Executive Summary**

- I support the amendment to section 32 to include a head of power to require a retention trust for a subcontract under a head contract that relies on the head contractor exemption provided by section 8 of Schedule 1A of the QBCC Act, but do not support prescribing a project trust for a subcontract as it adds unnecessary administrative burden and cost to a project with no real benefit or increase in security for subcontractors;
- I support the changes to the auditing requirements for retention trusts as the current requirements cannot lawfully be performed by auditors;
- I do not support the reinstatement of the head contractor exemption without limitations as per my previous submission regarding this issue;
- I do not support the parliament's approach to dealing with exceptions to the head contractor exemption being dealt with through regulation as it is not appropriate in the circumstances;
- I recommend that parliament include amendment to section 8 of Schedule 1A of the QBCC Act to address the recent decision of the District Court that is not in accordance with the intent of the QBCC Act and is inconsistent with other demerit offence provisions of the QBCC Act; and
- I recommend that parliament include amendments to sections 14A and 211D of the BIF Act to provide certainty to the industry as to what contracts, entered into on or after 1 March 2021 but prior to the commencement of the current and subsequent phases of the statutory trust rollout, require a project trust notwithstanding that the contracts were entered into prior to the commencement of the applicable phases of the rollout.

## 2. Part 4 - Amendment of *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act)

### 2.1 Clause 25 – Amendment of s 32 (When retention trust required)

I have raised concerns in previous submissions made to the Department of Energy and Public Works (**the Department**) regarding the impact of the head contractor licensing exemption provided by section 8 of Schedule 1A of the *Queensland Building and Construction Commission Act 1991* (**QBCC Act**) on the Statutory Trust Account regime provided by chapter 2 of the BIF Act. I support the inclusion of this amendment of section 32 of the BIF Act that provides a head of power for parliament to prescribe a subcontract below a head contract that relies on the head contractor exemption to have a retention trust account.

I would not support a project trust at a lower level as that will result in needless additional cost to a project and is unlikely to ever be a benefit to subcontractors in having a project trust due to the nature of project trusts. There is a possibility that a retention trust could provide some benefit to subcontractors of a retention trust so I support the inclusion of this amendment that would permit a retention trust at a lower level.

### 2.2 Clauses 27 to 31 – Amendments in relation to auditing of retention trusts

I have raised concerns in previous submissions made to the Department regarding the impact of the audit requirements for chapter 2 of the BIF Act. It is important to ensure that auditors are not required to carry out audits that they cannot lawfully carry out. Auditors are not lawyers and yet the current requirements of chapter 2 of the BIF Act require auditors to:

- interpret construction contracts (head contracts, subcontracts and supply/consultancy contracts);
- review project documentation to determine variation claims, extension of time claims, delay cost claims and liquidated damages claims; and
- payment claims and payment schedules etc.

These matters must be understood by the auditor in order to determine if the head contractor is liable to pay a subcontractor a particular amount on a particular day. Otherwise, the auditor is unable to *certify that, based on a review of the administration of the account, it is the auditor's opinion that the trustee has complied with all the requirements of this Act for the account during the period to which the report relates* as required by section 57A(2) of the BIF Act. Further, section 57A(3)(d)(iii) and (iv) requires the account review report to include *a statement as to whether or not the trust records relating to the trust account have been kept in compliance with this Act and the trustee has complied with all requirements for the relevant trust under this Act*, respectively. Section 57A(3)(e) also requires the audit review report to include *details of any irregularities identified during the review of the trust records relating to the trust account*.

Further, the current requirements are likely to require auditors to review every transaction for the retention trust account rather than a sample of transactions as is typical for audits. This will significantly increase the cost of the audit for head contractors which, in turn, will increase the cost of the project for the consumer.

I support the proposed amendments to restrict the audit to administrative / transactional matters only and not any matters that require a non-lawyer to determine legal rights, entitlements and liabilities under a construction contract. This should, hopefully, encourage auditors to agree to be appointed to conduct these audits as in the past, I have been advised by some auditors that the risks associated with carrying out an audit pursuant to the BIF Act as it is currently drafted, are too high and the costs associated with such a comprehensive audit are too high. If there is a lack of qualified auditors in the industry who are

willing to take on the liability that the BIF Act imposes on the auditor, then this will cause issues for head contractors and will also drive the cost up which, in turn, will further increase the cost of the project for the consumer.

In relation to the obligation on auditors pursuant to section 57C to report *serious breaches* to the QBCC, the proposed amendment to restrict this to *wilful* contraventions of a chapter 2 requirement and only a contravention that has *caused, or is likely to cause, financial loss to a beneficiary of the trust* or for repeated failures to comply with one or more chapter 2 requirements is a welcome amendment. It is important to ensure that head contractor trustees are not unnecessarily or severely penalised for inadvertent 'breaches' of chapter 2 when chapter 2 includes numerous requirements that do nothing to assist a subcontractor getting paid.

- 2.3 Clause 36 – Omission of section 125A BIFOLA: Section 8 of Schedule 1A QBCC Act – Head contracts to carry out building work

#### Reinstatement of section 8 exemption

I have previously made submissions to the Department regarding changes to section 8 of Schedule 1A of the QBCC Act. In my opinion, the inclusion of this exemption to the requirement to hold a contractor's licence is entirely inconsistent with the intent of the licensing regime provided by the QBCC Act and the responsibility for building work provided by the QBCC Act. Whilst I appreciate that some commercial businesses rely entirely on this exemption for their business model, that ought never be a reason to remove the protections that legislation is trying to bring to consumers. If it was, legislation would never be introduced that would deny commercial entities the right to structure their business in whatever format suits the business even where such a structure removes protections for consumers and lower tier contractors.

Whilst parliament is proposing to include a head of power to prescribe certain contractual arrangements to which this exemption will not apply, that power is more appropriately exercised by parliament through the 'normal' legislative process. It is not appropriate to do this by regulation, particularly when it will impact on existing contracts on foot at the time of any proposed regulation change and will cause disruption and confusion across the industry regardless of what contractual arrangements such a change will impact on at any given time.

#### Urgent amendment required to section 8 due to a recent District Court decision

Notwithstanding that parliament wishes to continue with the status quo in relation to the head contractor exemption in section 8 of Schedule 1A of the QBCC Act until it has time to properly consider what specific restrictions it wants to place on this exemption, there is a recent decision of the District Court of Queensland that must be rectified to avoid even more mischief.

In December 2021, Porter QC DCJ handed down the decision in *Panel Concepts Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd* [2021] QDC 322. In that case, the court held that a subcontractor can rely on the exemption provided by section 8 of Schedule 1A of the QBCC Act notwithstanding that the heading to section 8 makes it clear that it was intended to only apply to the head contract between a consumer/principal and the first tier contractor. Headings cannot be used to address an ambiguity in a legislative provision and, in this case, the court held that there was nothing in section 8 itself that limited the application to the first tier contract with the consumer/principal. The court considered the Explanatory Memorandum to come to that decision notwithstanding that there does not appear to be any ambiguity or inconsistency within section 8 itself that should require recourse to the Explanatory Memorandum.

In any event, this decision turned on the fact that the unlicensed subcontractor to the licensed head contractor always **intended** to engage a licensed sub-subcontractor to carry out the building work that the subcontractor was not itself licensed to carry out and that the sub-subcontractor that carried out the building work was appropriately licensed. However, this decision creates serious issues for the industry and consumers generally and, in my opinion and with all due respect to the court, the decision is not consistent with the provisions of the QBCC Act and QBCC Regulation. This can be readily addressed, though, by adding a simple amendment to the current *Building and Other Legislation Amendment Bill 2022* that is currently before parliament. I have set out below the reasons why, in my view, the decision is not consistent with the QBCC Act.

Pursuant to section 2 of Schedule 1A of the QBCC Act, a subcontractor to a licensed trade contractor does not need to hold a licence itself provided the building work that the subcontractor carries out is within the scope of the building work allowed by the class of licence held by the licensed trade contractor. This is the exemption that many in the industry mistakenly believe provides an exemption for sub-subcontractors from the requirement to hold a licence. However, that is not always correct. This exemption is clearly limited to subcontractors to a *licensed trade contractor*. A *licensed trade contractor* is defined in section 2 as follows:

*A licensed trade contractor means a licensed contractor other than the following:*

- (a) *a licensed builder;*
- (b) *a licensed contractor who holds a contractor's licence authorising the licensee to carry out completed building inspections.*

In turn, a *licensed builder* is defined in Schedule 2 of the QBCC Act and section 6 of the *Queensland Building and Construction Commission Regulation 2018 (QBCC Regulation)* to mean a person who holds a *builder contractor's licence*. Section 8 of the QBCC Regulation defines a *building contractor's licence* to mean:

- (a) *a licence of a class mentioned in schedule 2, any of parts 4 to 10; or*
- (b) *a licence of any of the following classes mentioned in section 60 –*
  - (i) *building restricted to alterations and additions;*
  - (ii) *building restricted to external finishes;*
  - (iii) *building restricted to building removal;*
  - (iv) *building restricted to renovations, repairs and maintenance;*
  - (v) *building restricted to repairs and maintenance;*
  - (vi) *building restricted to non-structural renovations.*

Subparagraph (a) above refers to the following licence classes set out in Schedule 2 of the QBCC Regulation:

- *Part 4 Builder – low rise licence;*
- *Part 5 Builder – medium rise licence;*
- *Part 6 Builder – open licence;*
- *Part 7 Builder restricted to kitchen, bathroom and laundry installation licence;*
- *Part 8 Builder restricted to shop fitting licence;*



- *Part 9 Builder restricted to special structures licence; and*
- *Part 10 Builder restricted to structural landscaping licence.*

Accordingly, it is clear that parliament intended for all subcontractors to a licensed builder to hold an appropriate contractor's licence in their own right regardless of where in the contractual chain the builder sat.

Further, section 51B of the QBCC Act provides that it is an offence for a licensed contractor to contract with a person for the person to carry out building work unless the person holds a contractor's licence of the appropriate class under the QBCC Act. This offence carries a range of penalties from 80 penalty units for a first offence, 120 penalty units for a second offence and 160 penalty units for a third or subsequent offence. The offence is also a demerit offence with 8 demerit points. Demerit offences with 8 demerit points are serious offences given that the majority of demerit offences only carry 2 or 4 demerit points (see Schedule 5 of the QBCC Regulation).

If the decision in *Panel Concepts* is correct, it would place the power in a subcontractor's hands to determine whether a licensed builder committed an offence against section 51B because whether or not the builder committed an offence would turn on whether the unlicensed subcontractor **intended** to engage a licensed sub-subcontractor at the time of entering into the subcontract and/or whether, as a matter of fact, a licensed sub-subcontractor **actually carried out** the building work. Neither of those matters are within the control or knowledge of the builder at the time of entering into the subcontract with the subcontractor. Given the seriousness of the offence provision in section 51B, that cannot be the way in which parliament intended section 8 of Schedule 1A to apply.

Further, had parliament intended the exemption in section 8 of Schedule 1A to apply to lower tier subcontractors, it would not have included a heading that clearly indicates that it is intended to only apply to *head contracts*. Whilst a *head contract* is not currently defined in the QBCC Regulation, it has always applied to a contract between a consumer and a builder or first tier contractor. There can be a number of head contracts e.g. with a builder, with a civil contractor, with a consultant etc, as there is no requirement for a consumer to only ever contract with one entity directly for a part of a project. The industry, including government, have often entered into more than one contract directly and that contract has typically been referred to as a *head contract* with the first tier subcontract below the head contract referred to as a *subcontract* and the next tier subcontract, as a *second tier subcontract* or *sub-subcontract* and so on. This is further supported by the definition of *subcontract* in chapter 1 of the BIF Act and the structure of chapter 2 of the BIF Act in that it clearly provides obligations on the contract with the head contractor and the contracting party for that contract *being the State, a state authority, a local government, an individual, a private entity or a hospital and health service*. A contract below that level is a *subcontract* (section 6 of the BIF Act).

Pursuant to section 42(1) of the QBCC Act, it is a serious offence for an unlicensed person to carry out building work as indicated by the maximum penalties that apply to that offence including imprisonment i.e.:

- first offence – 250 penalty units;
- second offence – 300 penalty units;
- third or later offence, or if the building work carried out is tier 1 defective work – 350 penalty units or 1 year's imprisonment.

Further, an unlicensed person is not entitled pursuant to section 42(3) of the QBCC Act to any monetary or other consideration for doing so under the contract. To leave this decision open creates significant uncertainty for all parties including consumers as an offence by a licensed builder under section 51B of the QBCC Act will place the head contract at risk which, in turn, will place subcontracts and subcontractors at risk.

It is critical that parliament clarify this position as a matter of urgency and this can be done relatively easily by adding another subparagraph to the one proposed in section 67 of the *Building and Other Legislation Amendment Bill 2022*:

“(5) Subsection (1) only applies to a head contract that is not also a subcontract of another contract where a *subcontract* has the same meaning as section 6 of the *Building Industry Fairness (Security of Payment) Act 2017*.”

### 3. Urgent clarification required for the application of chapter 2 of the BIF Act to existing contracts

Many in the industry believe that Statutory Trusts do not apply to contracts entered into prior to the commencement of a particular phase of the rollout. However, on close reading of the transitional provisions provided in sections 211A to 211E of the BIF Act), that does not appear to be correct and this uncertainty is causing problems in the industry, particularly the private sector. Given that parliament is currently proposing amendments to the BIF Act through the *Building and Other Legislation Amendment Act 2022*, it is appropriate for clarification to be included as part of these amendments to ensure that problems do not arise in the industry due to this uncertainty, particularly given that serious offences are committed if the contract is a contract to which a Project Trust applies and the contractor is unaware that it is. I have set out below the various provisions for ease of reference for the Committee.

Section 12 of the BIF Act provides that that section only applies to contracts entered into on or after the commencement of section 12 (which was 1 March 2021). Section 12(2) provides that a project trust is only required if:

- (a) the contract is eligible for a project trust under subdivision 2; and
- (b) the contract is not exempted under subdivision 3; and
- (c) the contractor enters into a subcontract for all or part of the contracted work.

Section 14(1) provides that a contract is eligible for a project trust if it meets the requirements set out therein i.e.

- (a) principal is the State, hospital and health service, other state authority, private entity, or local government (depending on the phase);
- (b) more than 50% of the contract price is for project trust work; and
- (c) contract price is above the threshold for the applicable phase.

Section 14A(1) provides that if an amendment is made to a contract and:

- (a) before the amendment is made, the contract was not eligible for a project trust under section 14; and
- (b) after the amendment is made, the contract is eligible for a project trust under section 14; the contract is eligible for a project trust when the amendment takes effect.

Subsection 14A(3) provides, however, that if the amendment is only an increase in the contract price, a project trust is required for the contract only if the amendment, together with any earlier amendments of the contract, increases the original contract price by 30% or more.

The confusion arises because section 14A defines *amendment* to include any variation of the contract or change in the contract price, and section 8 defines *variation* to mean an addition to, or an omission from, the contracted work.

Accordingly, the BIF Act makes a distinction between a change in price only (e.g. a rise and fall clause with no associated change in scope of work) and a variation to the contract (e.g. change in the contract price because of a change to the scope of work, specification etc) which changes the contract price.

#### Private sector contracts entered into prior to 1 March 2021

Notwithstanding the phased rollout of Statutory Trusts, a project trust will not be required if the contract was entered into prior to 1 March 2021 because section 12 of the BIF Act did not apply prior to that date in its current form, and prior to 1 March 2021 under the former chapter 2 (Project Bank Account model), section 12 did not apply to the private sector. This is also confirmed by section 211B of the BIF Act which provides that all contracts entered into prior to the replacement of chapter 2 (which was 1 March 2021), do not require a project trust if the contract did not require a project trust under the PBA model in force at the time of entering into the contract. For private sector, this means that contracts entered into prior to 1 March 2021 will never require a project trust notwithstanding any amendment to the contract.

#### Private sector contracts entered into on or after 1 January 2022

On 1 January 2022, section 14 was amended to include principals that are private entities, local government or other state authorities, and to include contracts of \$10M or more. All contracts entered into on or after 1 January 2022 that meet the requirements of section 12 of the BIF Act, require a project trust i.e. the contract must be eligible for a project trust, is not exempted, and a subcontractor is engaged.

#### Private sector contracts entered into on or after 1 March 2021 but prior to 1 January 2022

The confusion comes with contracts entered into on or after 1 March 2021 and prior to 1 January 2022.

Pursuant to section 211D(2) of the BIF Act, if a project trust was not required before 1 January 2022, it continues to not be required despite the replacement of chapter 2 of the BIF Act. However, section 14A still applies for any amendment to the contract after the commencement of the phase (refer section 211D(3)). As set out above, section 14A provides that if an amendment is made to a contract and:

- (a) before the amendment is made, the contract was not eligible for a project trust under section 14; and
  - (b) after the amendment is made, the contract is eligible for a project trust under section 14;
- the contract is eligible for a project trust when the amendment takes effect.

The time at which section 14 is to be considered for the purposes of an amendment after the commencement of a phase, is the time at which a project trust would otherwise be required (refer section 211D(3A)).

However, it is not clear whether section 14A of the BIF Act requires the amendment to be the reason that the contract is eligible for a project trust after the commencement of the phase (i.e. 1 January 2022 for the current phase) in order for section 14A to apply. It is also not clear whether a contract that was entered into on or after 1 March 2021 but prior to 1 January 2022, that meets the requirements for a project trust except that the principal is a private entity, can become eligible if there is an amendment to the contract even if the amendment to the contract is not the reason the contract becomes eligible for a project trust. This confusion is making it very difficult for the industry to apply the legislation to contracts entered into on or after 1 March 2021 (being the commencement of section 12) and before the commencement of the next phase of the rollout, currently 1 January 2022.

Whilst I have referred to the phase commencing on 1 January 2022, the same confusion arises on commencement of the next phase on 1 April 2023 and the final phase on 1 October 2023.

It is critical that parliament address this confusion in this round of amendments of the BIF Act.

By way of example of the different scenarios discussed above:

Example 1:

Contract with a private sector principal is entered into on 1 October 2021 for \$12M.

On 1 April 2022, an amendment is made to the contract to increase the scope of the work under the contract i.e. it is a *variation* to the contract as defined by section 8. However, the contract price is already more than the threshold for the current phase of the rollout.

The contract does not become *eligible* for a project trust because of the amendment to the contract on 1 April 2022 as the contract would have already met the criteria for eligibility **but for** the fact that the principal was a private entity so the amendment did not cause the contract to become eligible. Is a project trust now required for the contract?

Example 2:

Contract with a private sector principal is entered into on 30 December 2021 for \$8M.

On 1 February 2022, an amendment is made to the contract to increase the scope of the work under the contract i.e. it is a *variation* to the contract as defined by section 8. The variation increases the contract price to \$12M. Therefore, as the amendment has caused the contract price to exceed the threshold for the current phase of the rollout, the amendment has caused the contract to become *eligible*. Is a project trust required on 1 February 2022 (assuming the first subcontract has been entered into by that date)?

Example 3:

Contract with a private sector principal is entered into on 30 December 2021 for \$8M.

On 15 February 2022, an amendment is made to the contract to increase the scope of the work under the contract i.e. it is a *variation* to the contract as defined by section 8. The variation increases the contract price by 25% to \$10M. Is a project trust required at that time for the contract? Or is it only required if the variation together with all previous variations causes a change in contract price by 30% or more as referred to in section 14A(3) of the BIF Act?



The confusion arises in this regard because the BIF Act clearly distinguishes between an *amendment* to the contract that is a *variation* to the contract and an *amendment* to the contract that is a *change in the contract price*. As a *variation* is defined in section 8 as “an addition to, or an omission from, the contracted work”, it is clear that parliament intended the 30% threshold to only apply to a *change in the contract price* after the relevant date that, together with other variations, causes the threshold to be exceeded and not simply to a *variation* to the contract. If it had intended the 30% threshold to apply to a change in the contract price for any reason i.e. for a *change in the contract price* OR a *variation* to the contract, then parliament would not have defined an *amendment* as including both terms.

It is clear that this has a major impact on the industry because the definition of *amendment* is too broad AND section 14A(3) does not technically apply to variations that change the scope of work or specification or duration of the project because all of those variations change more than just the contract price.

In terms of normal contracts, there is almost never (if ever) a contract that goes from commencement to completion that does not involve an amendment to the contract of some form as that term is defined in the BIF Act. Sometimes a contract is amended without a corresponding increase in the contract price and a contract almost never has a price increase only that is not associated with some other change to the contract so the 30% threshold for an *amendment* [that] *is only an increase in the contract price*, and not to any amendment that results in an increase to the contract price of 30% or more, as discussed in section 14A(3), will almost never apply.

Whilst the QBCC may decide to take an educative and/or facilitative approach to the new regime, it is important to understand that a project trust and/or retention trust is created when it is required by section 12 of the BIF Act regardless of whether or not a project trust account and/or retention trust account are, in fact, opened by the head contractor (refer s58B of the BIF Act). This will create serious issues if a head contractor goes into liquidation or bankruptcy because it will create trust arguments and claims where there is no project trust account or retention trust account. This is further exacerbated by section 11(a)(ii) which provides that the trust is over money paid to a subcontractor (which may or may not have been paid from the project trust account) and by section 11B(2) which provides that a subcontractor has a beneficial interest in the amount it is *entitled to be paid* under the subcontract. This could create a situation where one subcontractor is paid an amount from the project trust account on a particular day that is more than it is entitled to under its subcontract which means that the difference is, in fact, trust money that other subcontractors may be able to make a claim against.

The confusion surrounding contracts entered into on or after 1 March 2021 and prior to the commencement of each phase of the rollout can be addressed relatively easily by amendment to section 14A of the BIF Act to confirm that the amendment to which that section refers, must be an amendment that makes the contract eligible for a project trust as a result of the amendment, and also that that section only applies to amendments that cause the contract price to increase by 30% or more regardless of whether the increase is due to an increase in the contract price OR a variation to the contract and that it does not apply to any other types of amendment to the contract e.g. change to the date for practical completion, change to the specifications etc.

It is also important to amend section 211D to make it clear whether a contract with a contract price of \$10M or more entered into on or after 1 March 2021 but prior to 1 January 2022 will never require a project trust (the same applies to \$3M prior to 1 April 2023 and \$1M prior to 1 October 2023) or if any amendment to such a contract, will become eligible for a project trust.

If you have any queries regarding the contents of this letter, please do not hesitate to contact me.

Yours faithfully  
**Wood L&M Solutions**

A handwritten signature in blue ink that reads "T Wood". The signature is written in a cursive, slightly stylized font.

Tracey Wood  
**Principal**