

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

Explanatory notes for SL 2018 No. 17

made under the

Building Industry Fairness (Security of Payment) Act 2017

General Outline

Short title

Building Industry Fairness (Security of Payment) (Transitional) Regulation 2018.

Authorising law

Section 211 of the *Building Industry Fairness (Security of Payment) Act 2017* (the Act).

Policy objectives and the reasons for them

The policy objectives of the *Building Industry Fairness (Security of Payment) (Transitional) Regulation 2018* (transitional regulation) are to facilitate the operation of the Act.

The transitional regulation:

- defines payment claim, payment schedule, progress payment and payment dispute by reference to the *Building and Construction Industry Payments Act 2004* (BCIPA) because sections 35 and 36 of the Act (which deal with payment disputes) contain cross-references to sections of the *Building Industry Fairness (Security of Payment) Act 2017* (Act), which will commence at a later date;
- provides that if a principal decides to step in as trustee of a project bank account (PBA) (e.g. if the head contractor is an insolvent or the contract is terminated) they do so by providing a written notice to the head contractor in the approved form. The Act does not currently specify the format of this notice;
- specifies that a reference to “payment instruction” under section 52 means “payment instruction information” in accordance with section 51. Section 52 currently provides for situations where a head contractor has provided a copy of a payment instruction to a principal for checking in under section 51;
- allows additional flexibility for payments being transferred to and from PBA accounts;

- allows a head contractor to transfer an amount to the disputed funds account where the amount transferred is more than the contract price. This is to allow for situations where a head contractor has specifically acknowledged the higher amount, for example because of a variation;
- clarifies the effect of an appeal on the dispute resolution process and the head contractor's responsibilities to make payments from the disputed funds account;
- ensures that amounts held in a disputed funds account are identifiable to the relevant subcontractor;
- clarifies that an adjudicated amount paid by principal to a head contractor under BCIPA must be deposited into a PBA;
- requires a principal to open its own PBA bank accounts as soon as practicable after being appointed as trustee for the PBA;
- requires a financial institution to transfer the vested amounts held in trust under the PBA to the principal's new PBA accounts as soon as practicable after the principal is appointed as trustee for the PBA;
- provides that if a principal is appointed as trustee and the PBA funds have been transferred to the principal's new PBA accounts, the principal's new PBA accounts are taken to be the PBA for the purposes of Chapter 2 of the Act;
- requires a head contractor to give a copy of written records of all transactions kept under section 45(1) of the Act as soon as practicable after the principal is appointed as trustee for the PBA;
- allows the principal to apply to the Supreme Court for directions under section 46 of the Act (currently only the head contractor may do this);
- clarifies the operation to section 37 of the Act to make clear that maintenance work, in relation to a building contract, does not include any work for which a retention amount has been withheld under a subcontract with a subcontract beneficiary;
- provides that no entitlement to a subcontractor's charge exists to the extent it relates to money held in trust under a PBA. This provision replicates existing section 117 of the Act, which refers to a subcontractor's charge under chapter 4 of the Act. Given that chapter 4 will not commence at this time, it is necessary to provide an equivalent provision until chapter 4 commences; and
- makes it clear that the time frames for commencing a prosecution under section 190 align with the time frames under the *Queensland Building and Construction Commission Act 1991*.

Achievement of policy objectives

The policy objectives are achieved by:

- defining payment dispute, payment claim, payment schedule, and progress payment by reference to BCIPA;
- specifying that 'written notice' under section 54 of the Act is to be made in the approved form;
- providing that a reference to a 'payment instruction' under section 52 means payment instruction information under section 51 of the Act;
- allowing additional flexibility for payments being transferred to and from PBA accounts;

- allowing a head contractor to transfer an amount to the disputed funds account where the amount transferred is more than the contract price. This is to allow for situations where a head contractor has specifically acknowledged the higher amount, for example because of a variation;
- clarifying the effect of an appeal on the dispute resolution process and the head contractor's responsibilities to make payments from the disputed funds account;
- ensuring that amounts held in a disputed funds account are identifiable to the relevant subcontractor;
- clarifying that an adjudicated amount paid by a principal to a head contractor under BCIPA must be deposited into a PBA;
- requiring a principal to open its own PBA bank accounts as soon as practicable after being appointed as trustee for the PBA;
- requiring a financial institution to transfer the vested amounts held in trust under the PBA to the principal's new PBA accounts as soon as practicable after the principal is appointed as trustee for the PBA;
- providing that if a principal is appointed as trustee and the PBA funds have been transferred to the principal's new PBA accounts, the principal's new PBA accounts are taken to be the PBA for the purposes of Chapter 2 of the Act;
- requiring a head contractor to give a copy of written records of all transactions kept under section 45(1) of the Act as soon as practicable after the principal is appointed as trustee for the PBA;
- allowing the principal to apply to the Supreme Court for directions under section 46 of the Act (currently only the head contractor may do this);
- clarifying the operation to section 37 of the Act to make clear that maintenance work, in relation to a building contract, does not include any work for which a retention amount has been withheld under a subcontract with a subcontract beneficiary;
- providing that no entitlement to a subcontractor's charge under the *Subcontractors' Charges Act 1974* exists to the extent it relates to money held in trust under a PBA.
- making it clear that the time frames for commencing a prosecution under section 190 of the Act aligns with the time frames under the QBCC Act.

Consistency with policy objectives of authorising law

The transitional regulation is consistent with the main objectives of the Act.

Inconsistency with policy objectives of other legislation

The transitional regulation is consistent with the policy objectives of other legislation.

Alternative ways of achieving policy objectives

The policy objectives can only be achieved by making the transitional regulation.

Benefits and costs of implementation

Implementation of the transitional regulation is not expected to incur additional costs for the State Government.

Consistency with fundamental legislative principles

The transitional regulation is consistent with fundamental legislative principles.

Consultation

The Ministerial Construction Council and the Queensland Productivity Commission was consulted on the development of the regulation.