

Article Information

Authors: Ted Williams, Gemma Twemlow

Service: Projects & Construction

Sector: Infrastructure

A costly Christmas present - ramifications of the commencement of the new Building Industry Fairness (Security of Payments) Act 2017

On 17 December 2018 the new Building Industry Fairness (Security of Payment) Act 2017 (Qld) (BIF Act) will come into force which includes amendments to the payment regime provisions contained in the Building and Construction Industry Payments Act 2004 (Qld) (BCIPA). The commencement of the BIF Act during the Christmas period will create a number of challenges for claimants and respondents in relation to the service of documents required under BCIPA and the BIF Act. Ted Williams, Partner and Gemma Twemlow, Senior Associate, discuss those challenges and impacts.

On 17 December 2018 the new *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**BIF Act**) will come into force which includes amendments to the payment regime provisions contained in the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**). The commencement of the BIF Act during the Christmas period will create a number of challenges for claimants and respondents in relation to the service of documents required under BCIPA and the BIF Act.

Background

On 17 December 2018 the BIF Act will come into effect. Our previous articles have discussed the key changes ([Security of Payment in Queensland – The changes are on your doorstep...](#)). One of the important changes the BIF Act brings is that, regardless of the date of the relevant construction contract, from 17 December 2018:

1. the submission of a payment schedule is mandatory unless the respondent pays the claimed amount during the 'response period'. Failure to do so may result in disciplinary action and a fine.
2. the time for submitting a payment schedule (**response period**) has changed and will be the earlier of:
 1. the period stated in the contract for responding to a payment claim or paying the claimed amount; and
 2. 15 business days after the payment claim is given to the respondent, whichever is the earlier;
3. the time for submitting adjudication application has been extended.

A costly Christmas present?

Whilst the timeframes for the provision of a payment schedule and an adjudication application have changed as a result of the BIF Act, one thing that remains the same is the basis upon which timeframes are calculated under both of the Acts.

The impending Christmas period inevitably effects the timeframes within which parties have to apply the provisions of either the BCIPA or the BIF Act. Both of the Acts refer to "business days" in the calculation of periods to provide a payment schedule or adjudication application. For the purposes of both Acts, a business day does not include a weekend, a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done, or any day occurring within any of the following periods:

1. 22 to 24 December
2. 27 to 31 December
3. 2 to 10 January

Therefore, for example, if a payment claim is issued **before** the 17 December 2018 (and before the BIF Act is in force), the respondent has either 10, 15 or 30 business days after service of the payment claim to serve its payment schedule, depending upon whether the payment claim is a “complex payment claim” or not.^[1]

Conversely, if a payment claim is issued **on** or **after** 17 December 2018, the respondent has the earlier of either the period stated in the contract for responding to a payment claim or paying the claimed amount, or 15 business days after the payment claim is given to the respondent, to provide a payment schedule. Given the time of year, that timeframe would necessarily involve the consideration of the following dates:

- 22 and 23 December – weekend
- 24 December – non business day under BCIPA
- 25 and 26 December – public holiday
- 27 and 28 December – non business day under BCIPA
- 29 and 30 December – weekend
- 31 December – non business day under BCIPA
- 1 January – public holiday
- 2, 3 and 4 January – non business day under BCIPA
- 5 and 6 January – weekend
- 7, 8, 9 and 10 January – non business day under BCIPA

The following calendar will assist claimants and respondents alike:

December 2018															January 2019						
MOTUWETHFRSASU															MOTUWETHFRSASU						
															1	2					
3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	1	2	3	4	5	6	
17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	7	8	9	10	11	12	13
24	25	26	27	28	29	30	31								14	15	16	17	18	19	20
31															21	22	23	24	25	26	27
															28	29	30	31			

The same shutdown periods apply to all actions required under the BCIPA and the BIF Act including the service of documents, lodging of applications, responses and decisions.

Failure to calculate the time periods correctly may render a party unable to issue a payment schedule or an adjudication application. A further consequence of failing to issue a payment schedule in relation to each payment claim is that it can result in a fine of \$13,055^[2] and may also be grounds for disciplinary action under the *Queensland Building and Construction Commission Act 1991* (Qld).

The BIF Act comes into force on 17 December 2018 – be cautious:

- payment claims are no longer required to be endorsed as a payment claim made under the BCIPA. Respondents must therefore be vigilant when receiving ‘invoices’ from contractors and subcontractors and ensure that they respond to each and every payment claim if the amount is in dispute.
- ensure that you apply the provisions of the correct Act and the timeframes that apply, failing which it could have severe consequences such as rendering a party out of time to issue a payment schedule or adjudication application, liable to pay a fine or subject to disciplinary action.

Be sure to include all reasons for withholding payment in each payment schedule, whether it is a complex payment claim or not.

^[1] Section 18 *Building and Construction Industry Payments Act 2004* (Qld)

^[2] Section 4 *Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2018* (Qld) which amended the *Penalties and Sentences Regulation 2015*, section 76(1) *Building Industry Fairness (Security of Payment) Act 2017* (Qld).