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AMENDMENT TO BUILDING INDUSTRY FAIRNESS  
(SECURITY OF PAYMENT) ACT- PROJECT TRUST  
ACCOUNTS

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- Amendments to Security of Payment Provisions and QBCC Act, s42E, Excluded no site supervisors licence, complex claims

# OVERVIEW AND HISTORY

- Original Act - Dec 2017 - PBA provisions applied to State or State Authority (excluded – Local Governments) contracts from 1 March 2018 between \$1 Million and \$10 Million with more than 50% building works, not being residential except if more than 3 or more living units, and not being maintenance
- Evaluation provided to government - March 2019
- Government responded November 2019 and released Bill for consultation - 5 Feb 2020
- Submissions closed 26 Feb and Committee stages reported to Parliament - 20 March
- Expected to pass last week in April to commence phase 2 of reforms by 1 July 2020

# PHASES OF INTRODUCTION

- Phase 2A from 1 July 2020 - extends to include State Government Department and Hospital and Health Service (HHS) exceeding \$10 Million excluding GST or over (excludes Local Government and State Government Authorities)
- Phase 2B from 1 July 2021 – extends to private projects, State Authority and Local Government, exceeding \$10 Million excluding GST or over
- Phase 3 from 1 January 2022 - extends to private projects, Local Government and State Authority in the range of \$3 million - \$10 Million excluding GST
- Phase 4 from 1 July 2022 - extends to private projects, Local Government and State Authority in the range of \$1 million - \$3 million excluding GST

## **Transitional**

- Phase 2A – won't apply if tender commenced before 1 July 2020 – current phases will apply – but can transition to new trust account regime within 6 months
- Balance of phases depends when the contract is entered into

# WHO DO TRUSTS APPLY TO?

- Does not apply to drilling, extraction of oil and natural gas, constructing underground works for the purposes of mining and work prescribed by regulation
- There will be a minimum contract price prescribed by the regs to apply (\$20,000 - \$50,000)
- Must be 50% of contract price project trust work = supposed to align closely with Building Work definition QBCC Act and fixed structure – not necessarily building with 4 walls **BUT** actually broader – closer to “construction work” – SOP provision
- Committee wants review to ensure broader coverage of contracts

## WHO DO TRUSTS APPLY TO? CONTINUED....

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- Related entities and “Super Subcontractor”
- Multiple contracts at same or adjacent sites
- Principle no longer has viewing rights and step in ability



## WHICH CONTRACTS ARE EXEMPT?

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- Does not apply to small scale residential construction work – for less than three living units
- Does not apply to maintenance work
- Others as prescribed
- Does not apply to administrative, supervisory and advisory (building work services)
- Contracts less than 90 days, between when would have needed trust to practical completion

# WHEN IS THE AMOUNT LIABLE TO BE PAID TO THE SUBCONTRACTOR?

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- Due under contract, or certified or assessed
- Payment schedule received for
- Default in delivery of payment schedule
- Payment required by adjudication
- Amount determined by final and binding dispute resolution process
- Amount payable by court order

# STATUTORY TRUSTS – ADMINISTRATION - DEPOSITS, PAYMENTS, DISSOLUTION, SHORTFALL, NOTICES

- S18 head contractor must open Trust Account within 20 business days after it enters first subcontract - **500 penalty units**
- Account must not be a virtual account, with own BSB account number and be with an approved financial institution (approved by QBCC Commissioner)
- Must be an electronic record of transactions - **500 penalty units**
- Within 5 business days of opening , changing name, closing or transferring the account , have to notify Commissioner, - 200 penalty units

# STATUTORY TRUSTS – ADMINISTRATION - DEPOSITS, PAYMENTS, DISSOLUTION, SHORTFALL, NOTICES

- Beneficiaries advised of any changes
- Any Payment by principal reducing the unpaid portion of contract price has to be made to trust account (some exceptions - payment into court, amount subject to a withholding request, amount subject to a subbies charge)
- If contractor receives funds must deposit to trust account as soon as practical - **max penalty imprisonment 2 years**
- No other monies are to be paid into trust max penalty **1 year imprisonment**

# STATUTORY TRUSTS – ADMINISTRATION - DEPOSITS, PAYMENTS, DISSOLUTION, SHORTFALL CONTINUED...

- All payments to subcontractor beneficiary is to be done through trust - **1 years imprisonment**
- No payments other than to subcontractor in priority, then trustee, retention amounts to retention trust, or payments in accordance with court order or adjudication, **returning funds in error paid in by principal – 300 penalty units, 2yrs and a further 300 penalty units and 2years if not repaid as soon as practicable**
- S51, if insufficient funds to pay amount due?— requires deficiency to be made up by Trustee and notify Commissioner
- S20C - If no shortfall makeup - subcontractors are to paid proportionately – Commissioner notified

# STATUTORY TRUSTS – ADMINISTRATION - DEPOSITS, PAYMENTS, DISSOLUTION, SHORTFALL CONTINUED...

## **Ending Trust**

- S21 - can only dissolve trust if no more beneficiaries and paid all amounts liable to pay, or only maintenance work left
- Notify Commissioner

## **Notices**

- S23 - Beneficiaries must be notified that project trust to be used
- Within 10 business days after establishment or if already established before subcontract entered into
- 23A - Must notify beneficiaries of withdrawals amounting to payments to any subcontractor beneficiary, and deposits to retention trust as it relates to beneficiary - within 5 business days
- S24 if contracting party ought reasonably to know that beneficiary is related entity to contracted party - notify commissioner. Liability also on contracted party - s25
- Contracting party must report non opening project trust

# STATUTORY TRUSTS – ADMINISTRATION - DEPOSITS, PAYMENTS, DISSOLUTION, SHORTFALL CONTINUED...

## Information Request

- S23B - Beneficiary can request information that relates to its entries to include statement of balance, copy transactions, and any trust records, a copy of “supporting statements” given to contracting party
- Must be given within 10 business days unless information already available or has not changed since previously given

## RETENTION TRUST ACCOUNT, ADMIN, CHARGES

- Establishment on withholding retention amount from payment
- Funds in trust subject to a charge in favour of subcontractor
- If requirement for payment under contract charge released to extent required
- Also declared to be statutory interest under PPSA
- Only one retention trust account required for all subcontractors – but penalty of **500 units** if fail to open before withhold funds

# RETENTION TRUST ACCOUNT, ADMIN, CHARGES CONTINUED...

- 34A - must name a/c with at least trustees name and “trust”
- Similar requirements and penalties as to Project Trusts (Financial Institutions, notices, deposits)
- S36 - Limited nature of withdrawals - only money to trustee if for defects rectification, paying for omissions, or otherwise to secure performance and only after end of DLP **(300 penalty units or 2 years.)**
- Information is to pass up and down line as to whether a trust account for retention is required, deposits and withdrawals
- S40B - Requests can be made for information by beneficiaries, seeking statement of balance, copies of trust records and copies of transactions effecting balances of trust accounts



# TRAINING

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- Must nominate person responsible for administering
  - Notify if ceased
  - Notify of new appointment
- Must undergo retention trust training
  - Reg's may exempt
  - Extend time to complete
- Trustee to pay costs of training

# POWERS OBLIGATIONS AND RESTRICTIONS ON TRUSTEES

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- Trust amount unavailable to trustee for payment of other debts or execution of process
- Cannot invest
- Can't charge a fee for administration/can't recover fees
- Entitled to interest once every 12 months

# POWERS OBLIGATIONS AND RESTRICTIONS ON TRUSTEES

- **S51E** – Trustee liable for default of Agent or Nominees
- **S51E** – Trustee power to delegate but bound by actions of delegates unless actual notice no authorisation
- **S56B** – Principles of equity will apply unless inconsistent
  - Strict liability usually if breach of trust
  - Must restore trust as if breach not committed
  - Applies even if breach is a result of dishonesty or breach by a third party
  - As long as casual connection between breach of trust and loss.

# QBCC POWERS

- Requires monthly bank reconciliation to be completed 15 business days after month end
- Can require information in as little as 5 days from anybody who may have information – **100 penalty units**
- Can freeze accounts - if MFR breaches, suspension, suspects trust not being used as intended, a contract is terminated, there is insolvency
- Can direct trustee to provide an account review report
  - Auditors opinion within 20 business days
  - Whether complied with Act
- Can apply for directions concerning funds held in trust
- Can appoint a Special Investigator – funded by trustee if contravened Act
- Can discipline accountants appointed to review trust accounts and deliver review reports - can exclude for up to 3 years

## QBCC POWERS CONTINUED...

### **S57 - Requires review reports by auditors**

- For period prescribed
- **200 penalty units** for 1 year imprisonment - if don't engage

### **S56 – Security under PPSA**

- Both trusts statutory interests s73(2) PPSA
- Priority over all other security interests

### **S58A - PERSONAL LIABILITY OF EXECUTIVES**

- Applies to persons “concerned with or takes part in, the corporations management”
- Applies if did not take all reasonable steps to ensure corporation did not engage in conduct constituting offence. Penalty is that which would be maximum for an individual.

# PERSONAL LIABILITY OF EXECUTIVES

Only applies to offences to do with:-

- Failure to open a trust account.....500 penalty units
- Failure to pay by contracting party.....200 penalty units
- Withdrawal – unauthorised.....2 years imprisonment
- Repayment of withdrawal late.....2 years imprisonment
- Withdrawal without having paid subbie.....2 years imprisonment
- Failure to open retention trust account.....500 penalty units
- Unauthorised withdrawal from retention fund.....2 years imprisonment
- Withdrawal before defects liability period expired.....2 years imprisonment

# PERSONAL LIABILITY OF EXECUTIVES CONTINUED...

As to whether or not all reasonable steps taken court will consider:

- Whether knew or should have known the corporations conduct constituting the offence
- Whether officer in a position to influence the corporations conduct

## **S. 53BA, BB QBCC Act**

- New liability – for Executive Officer (wide definition) and partner who are unlicensed to exercise due diligence to ensure compliance by Licensee of MFR provision
  - 1<sup>st</sup> offence 250PU
  - 2<sup>nd</sup> offence 300 PU
  - 3<sup>rd</sup> offence 1 year imprisonment

“Due Diligence” includes reasonable steps:-

- keep up to date knowledge obligations and requirements
- understand nature of Licencees – Activities and Financial Management
- ensure appropriate resources – to ensure MFR met
- to verify the provision use of resources and processes

## AMENDMENT TO S75

- Applies only to claim made by head contractor as against principle
- Requires supporting statement
  - Declaration all subbies paid or
  - Detail of each subbie not paid in full, name, what owed, details of payment claim, date works carried out, reasons why not paid in full and that all other subbies paid in full.
- If not accompanying – does not effect validity of payment claim
- If false or misleading offence – **100 penalty units**



# WITHHOLDING PAYMENT – S97A - H

- Applies if beneficiary of an adjudicated decision, and not been paid
- Can apply between head contractor, principle and financier
- Can on notice require a party higher in contractual chain to retain enough funds to cover adjudicated amount, so long as out of a “related amount payable to the respondent”
- The monies otherwise payable to the respondent from which funds are to be withheld must be for work or goods and services to which the adjudicated amount relates.
- Must retain adjudicated amount or the related amount payable to respondent whichever is lesser amount

## WITHHOLDING PAYMENTS CONTINUED...

- Must withhold until claimant paid adjudicated amount
  - S97E – “Defence” to any claim by contracted party
- Higher party jointly and severally liable to the extent adjudicated amount not paid
- HP can recover from respondent as a debt any amount claimant recovers from HP
- While obligation to provide information as to identity of higher party —always a problem
- Amount held by HP is subject to a charge in favour of claimant

## CHARGE OVER PROPERTY – S100A - H

- Applies if head contractor is holder of a judgement after adjudication and not paid, and the respondent or related entity is registered owner of property where works carried out.
- Can request a charge be registered over land to the value of outstanding judgement – which lasts 24 months and can be extended by court order for only a further 24 months.
- Can apply to court to sell property to satisfy charge and costs of sale and seeking orders

# CHARGE OVER PROPERTY CONTINUED...

- Funds paid firstly for costs of sale and application, encumbrances in order of priority including charge, balance to owner

## **SECTION 10A**

- “Related Entity” – family member, goes as far as grandchildren, grandparents , spouses of, and everything in between
  - Company - and individual – individual or a member of family is a majority shareholder, director or sect of the corporation or a related body corporate of the corporation or has an interest of 50% or more in the corporation
  - Individual and trustee - individual or related entity under another provision of section is a beneficiary of the trust
  - Goes on to extensively cover related bodies corporate as per Corporations Act, corporations and trustees, two or more trusts

# AMENDMENTS TO SECURITY OF PAYMENT PROVISIONS AND QBCC ACT

- S42E - up until amendments a party to a building contract ... “must not, without reasonable excuse, cause another party to the building contract to suffer a significant financial loss because the person deliberately avoids complying with, or fails to comply with the contract”
- Now proposed – “must not without reasonable excuse, cause another party to the building contract to suffer a significant financial loss because of the persons deliberate noncompliance with the contract.”
- (Note included clarifies onus on defendant to prove reasonable excuse on balance of probabilities)
  - QBCC argues easier to prosecute
- Prosecution time limit generally extended to 3 years from 2 years

# AMENDMENTS TO SECURITY OF PAYMENT PROVISIONS AND QBCC ACT CONTINUED...

## **Excluded individual supervisors licence**

- If excluded individual won't be able to hold a site supervisors licence any longer
- When operative — said to apply from proclamation
- Need to be clear whether any site supervisors are excluded – search QBCC – can be **1000 penalty units** if not supervised by appropriately licensed individual
- Other amendments – make a factor in determining whether applicant for a nominee's licence, contractors licence or site supervisors licence are fit and proper
  - Whether a suspended or cancelled licence interstate or in New Zealand
- Harder to search and need to know history

# THANK YOU



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