

ADVISOR DAY 2020

CONSTRUCTION

| WORKSHOPS FROM THE TRENCHES

Presented by

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TOPICS

- A. REGULATION OF THE BUILDING & CONSTRUCTION INDUSTRY IN QUEENSLAND
- B. SECURITY OF PAYMENT – TIPS AND TRAPS
- C. PROJECT BANK ACCOUNTS

Regulation of the Construction Industry

There is nothing new under the sun...

The Code of Hammurabi 1754 BC

228 If a builder build a house for some one and complete it, he shall give him a fee of two shekels in money for each sar of surface.

229 If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death.

230 If it kill the son of the owner the son of that builder shall be put to death.

231 If it kill a slave of the owner, then he shall pay slave for slave to the owner of the house.

232 If it ruin goods, he shall make compensation for all that has been ruined, and inasmuch as he did not construct properly this house which he built and it fell, he shall re-erect the house from his own means.

233 If a builder build a house for some one, even though he has not yet completed it; if then the walls seem toppling, the builder must make the walls solid from his own means.

Regulation of the Construction Industry

Including but not limited to...

1. Queensland Building & Construction Commission Act 1991
 - QBCC Regulation 2018
 - QBCC (Minimum Financial Requirements) Regulation 2018
 - QBCC (Non-conforming Building Products Code of Practice) Notice 2017
2. Building Industry Fairness (Security of Payment) Act 2018
 - Building Industry Fairness (Security of Payment) Regulation 2018
3. Building Act 1975
 - Building Regulation 2006
4. Plumbing & Drainage Act 2018
 - Plumbing & Drainage Regulation 2019
5. Building & Construction Industry (Portable Long Service Leave) Act 1991
 - Building & Construction Industry (Portable Long Service Leave) Regulation 2013
6. National Construction Code
 - BCA Volume 1 & Volume 2
 - PCA
7. Queensland Development Code
8. Local Planning Laws, Plans, Codes & Regulations
9. Labour Hire Licensing Act 2017
10. ...

1. Regulation in Queensland

Queensland Building & Construction Commission

- The industry in Queensland is regulated by various pieces of legislation and is overseen by the Queensland building and construction commission (**QBCC**).
- The QBCC wears a number of hats. It:
 - Manages the licencing regime including enforcing:
 - Minimum qualifications and fit and proper person requirements; and
 - Minimum financial requirements;
 - Provides information and education for both licence holders and homeowners;
 - Provides dispute resolution services for homeowners; and
 - Manages the statutory home warranty insurance scheme.

1. Regulation in Queensland Licensing

1. Not holding a license
 - a. no license = no payment
 - b. no license = fine (or prison for 3rd offence or Tier 1 Defective Work)
2. Not holding the right type of licence
 - a. improper reliance on the 'incidental work of another class' exception
 - b. Nominee vs Company
3. Not having the right structure, or having the wrong entity licensed
 - a. Sole Trader
 - b. Partnership
 - c. Company
 - d. Trustee Company

1. Regulation in Queensland Contracting & Contract Administration

- Different rules for Commercial and Domestic Building Contracts
- Additional consumer protection provisions for Domestic Contracts
- Builders and subcontractors need to be proactive in educating themselves on their obligations

Key issues:

1. contracts need to be in writing
2. contracts need to cover off on at least the minimum requirements set out in the QBCC Act

Example: residential builder with sloppy office process – Level 2 Regulated Contract (Domestic)

Offence	Max Penalty	Demerit Points
Started work on site before contract was signed	100 / \$13,345	10
Failed to give the owner a copy of the signed contract within 5 business days (left in on the back seat that afternoon then forgot to give it to the admin assistant to scan in and she only works 2 days a week so it didn't go until the 8 th business day)	60 / \$8,007	4
Failed to give the owner a commencement notice	40 / \$5,338	2
Waited until all works were complete and paid for before giving copies of the certificates of inspection to the owner	20 / \$2,669	2
Fails to document a variation on time and before work carried out	60 / \$8,007	6
TOTAL POTENTIAL FINE	\$ 37,366.00	24

1. Regulation in Queensland

Defective Work & Defect Rectification

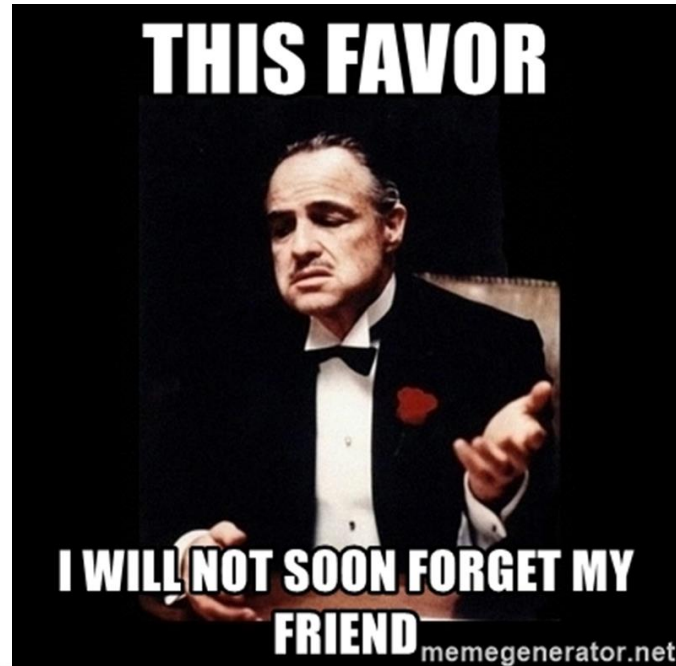
- Defective building work means building work that is faulty or unsatisfactory, and includes, for example, work that:
 - does not comply with the *Building Act 1975*, the BCA or an applicable AS; or
 - a product has been used, constructed or installed in a way that does not comply with the product manufacturer's instructions.
- Defective building work will be classified as either structural or non-structural defective building work.
- The QBCC can issue a Direction to Rectify (DTR)
- A contractor has 28 days from the date they receive the DTR to apply to have the DTR reviewed (internally or externally)
- If they fail to have the DTR reviewed they are stuck with it.
- If they then fail to comply with the DTR it can lead to a fine, demerit points and a successful claim by the consumer under the SHWIS.
- The QBCC can then seek to recover the SHWIS payout from the contractor and the contractor cannot raise any issue with the validity of the DTR.

1. Regulation in Queensland

Statutory Home Warranty Insurance Scheme

- The statutory home warranty insurance scheme is a compulsory insurance whereby the contractor pays a premium on behalf of the consumer to insure against the risks of:
 - Non-completion of the works where the consumer has validly terminated the contract;
 - The contractor failing to rectify defective work; and
 - Subsidence.
- If a claim is approved, and consumer paid out under a policy, the QBCC has the ability to recover the amount paid out from *“the building contractor by whom the relevant residential construction work was, or was to be, carried out or any other person through whose fault the claim arose”*
- Directors, nominees, supervisors, person who did the work, certifier
- Cannot challenge any anterior step taken by QBCC in the debt recovery proceeding

Example – doing a favour



Pay Careful Attention to QBCC Notices and Timeframes

- Any Decision Notices
- Decision to Rectify
- Scope of Works
- Decisions on Reviews

28 days means 28 days!

2. Security of Payment

Chapter 3 of the *Building Industry Fairness Act 2017* (Qld)

If your Client is the Claimant: Key Concepts



Where do Claimants Commonly Go Wrong?

- Failing to correctly identify a reference date
- Issuing multiple claims per reference date
- Accidentally using up a reference date
- Not giving a payment claim in the way required by the contract
- Not giving a payment claim to the correct person
- From 1 October 2020 – there will be a requirement for Head Contractors to give a supporting statement with their payment claims

If your Client is the Respondent: Key Concepts

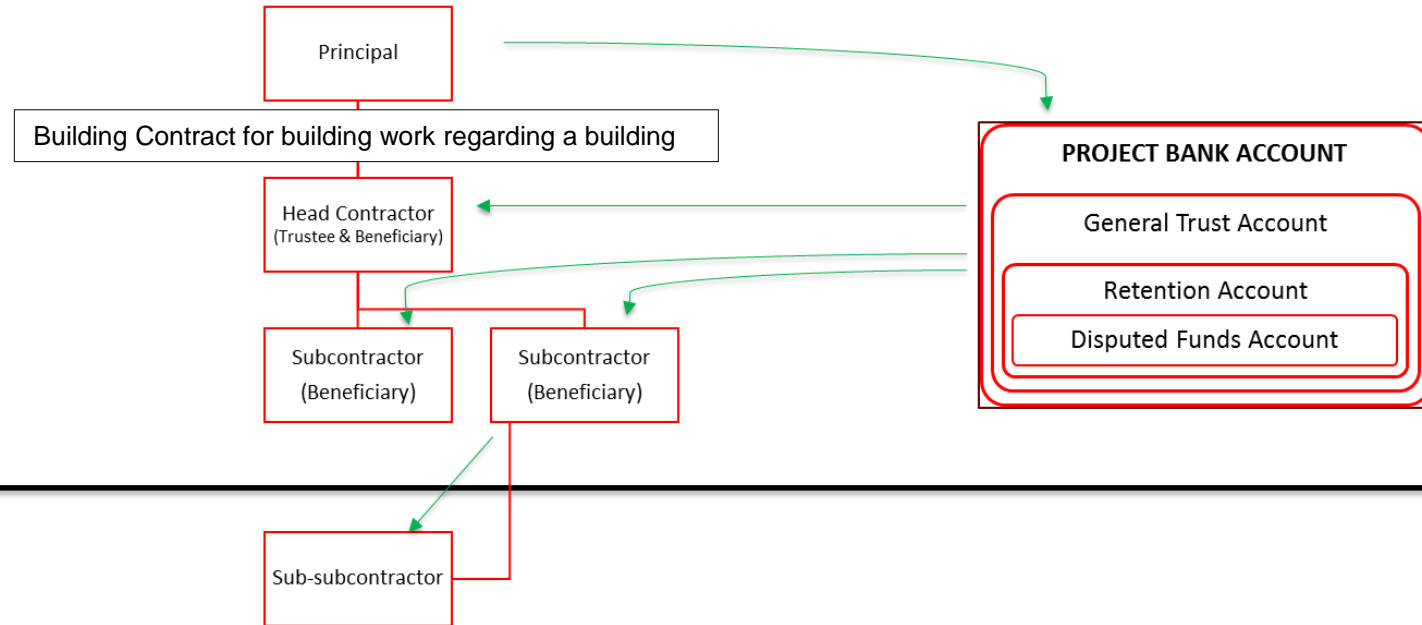


Where do Respondents Commonly go Wrong?

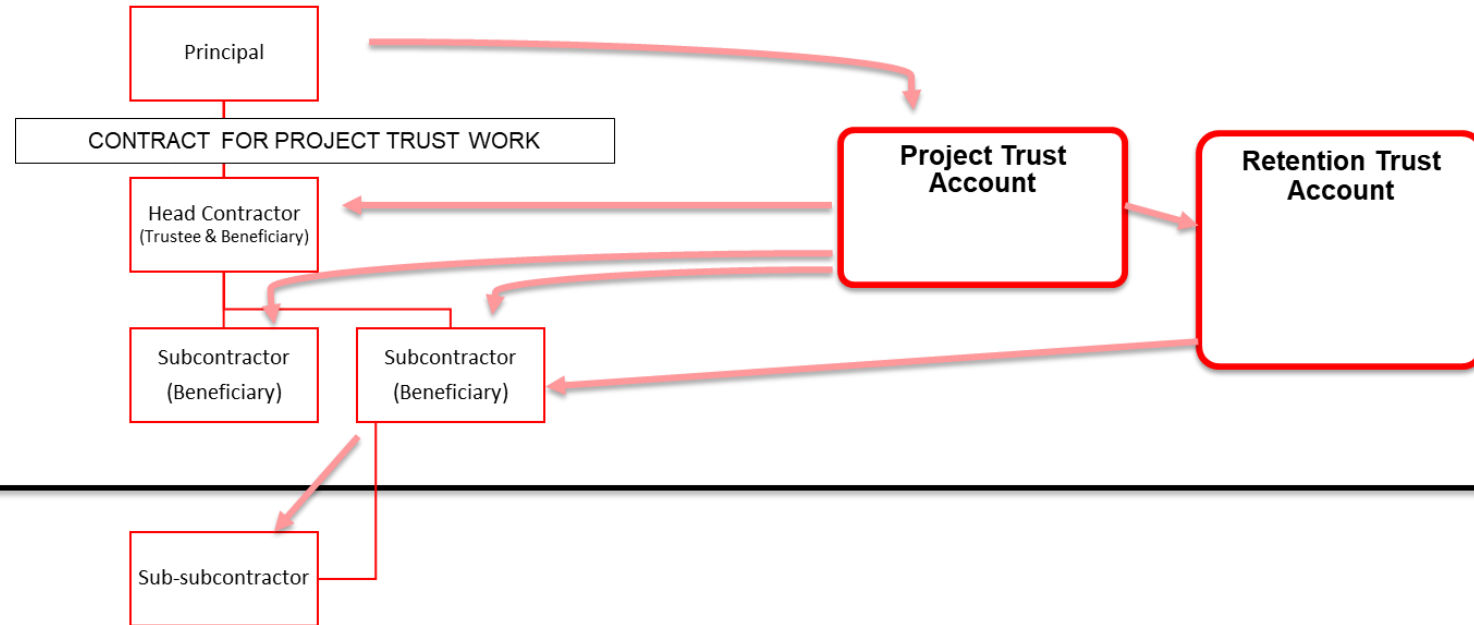
- Not checking their emails or post box
- Failing to identify that a document is a payment claim
- Failing to issue payment schedules on time
- Failing to issue compliant payment schedules
- Failing to include every reason for non-payment in a payment schedule

Project Bank Accounts {to become 'Statutory Trusts'}

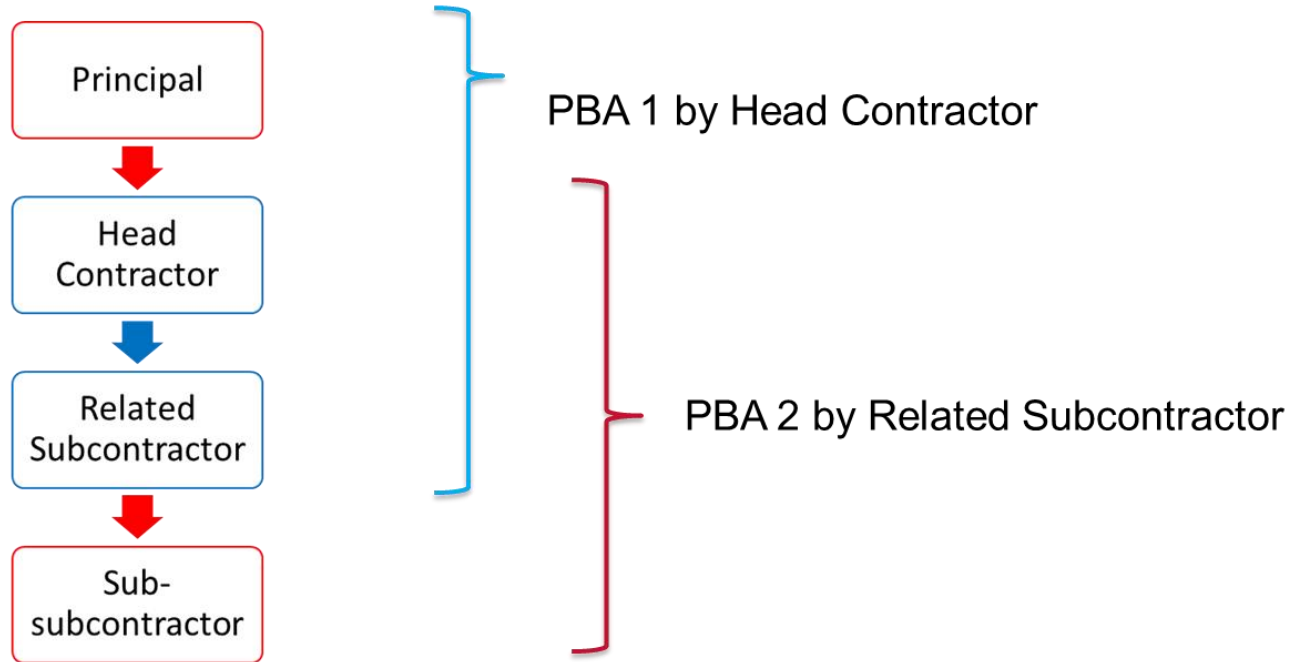
Project Bank Accounts – How do they currently work?



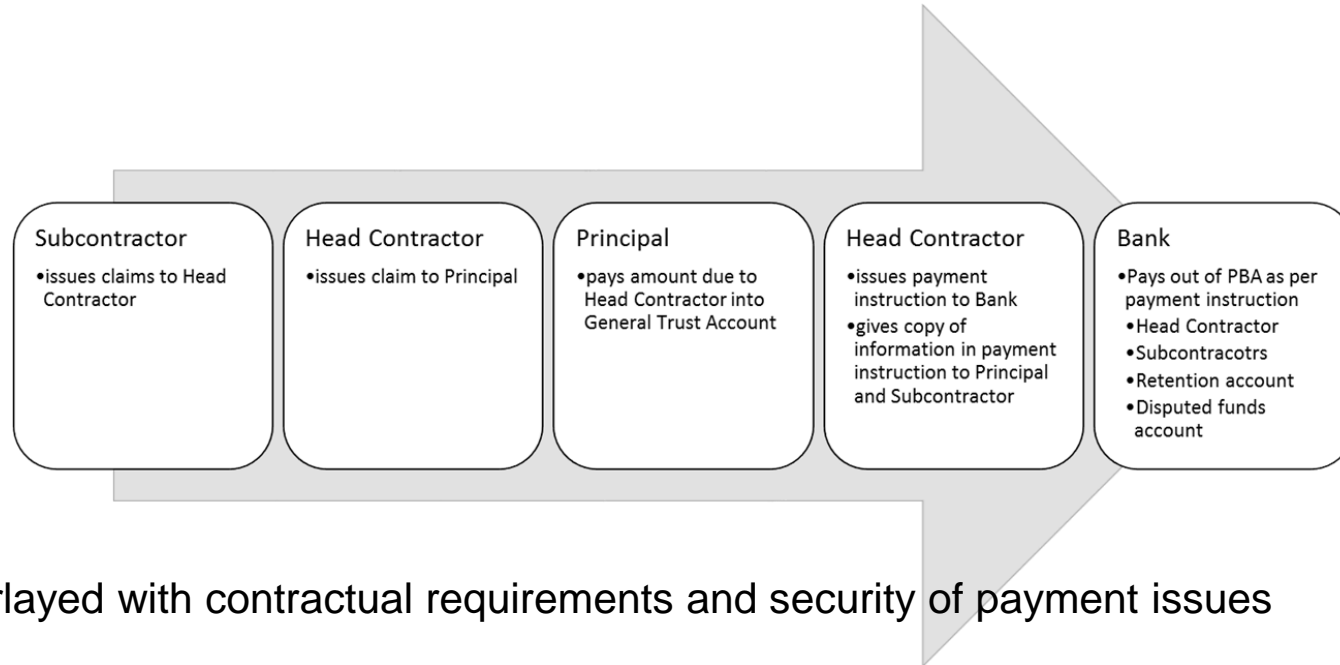
Statutory Trust Accounts – How will they work in the future?



Project Bank Accounts – Related Parties



The Process of Money in and Money Out of PBAs



Overlaid with contractual requirements and security of payment issues

From Opening to Closing - Logistics of PBAs

Set up by Head Contractor

- Before the HC enters Subcontract - notice to subcontractor in approved form that PBA will be used
- Within 5 business days of HC entering Subcontract - notice to principal in approved form
- Within 20 business days (or shorter time if specified in building contract) of HC entering Subcontract - establish PBA (General, Retention & Disputed Funds)
- PBA account name must include the words 'trust account'

Administration by Head Contractor

- HC must keep records of all transactions for not less than 7 years
- HC gets interest on accounts once a year of when accounts close
- HC is the Trustee and a Beneficiary of the account
- HC must ensure that Principal can view deposits, withdrawals and information relevant to payment instruction
- [Principal obliged to inform Commissioner of any discrepancies eg error in account number for subcontractor beneficiary, payment to an entity other than HC or subcontractor, account names not matching]

Ending Account

- HC closes the trust accounts once all funds paid out
- HC must give written notice to the Principal that the PBA has been dissolved

Late Mail: Qualified Accountants

From 1 October 2020 – the QBCC may give an exclusion notice to a person who is an accountant if the person has, within 3 years before the exclusion notice is given:

- a. given information that the accountant knew to be false or misleading to a licensed contractor or to the QBCC in relation to a licensed contractor's satisfaction of the MFRs;
- b. failed to comply with the MFRs in relation to information required to be given to the commission under those requirements; or
- c. failed to fulfil any education requirements that may have been specified by the QBCC in a previous exclusion notice.

If an exclusion notice is given the QBCC can:

- a. publish relevant details of the person on the QBCC website; and
- b. if the conduct is a breach of a professional standard, inform a professional body for accountants of that conduct.

In Conclusion

We've covered a lot of ground:

- Regulation Of The Industry In Queensland
- Security of Payment
- Project Bank Accounts

What to do next?

1. Encourage your building & construction industry clients to get educated.
2. Incurring some modest expense in getting up to speed and implementing some good administration practices will undoubtedly cost less than dealing with a real problem that arises due to 'inadvertent' non-compliance.
3. Timeframes for QBCC and Security of Payment are tight and compliance with those needs to be top of the list for clients.
4. You can help them with this.

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