

ADVISOR DAY 2021

CONSTRUCTION LAW | FORGET WHAT YOU'VE LEARNED

Presenter:

Kylie Howell, Head of Construction

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Construction Law

Learn Why Some Of The Things You Know About Structuring, Asset Protection And Debt Recovery Are Not Useful For Your Construction Industry Clients And Why Other Things That You Do Know Are Especially Relevant And How You Can Help Your Construction Industry Clients Apply Them - And Please Don't Actually Forget Anything You've Learned Today It Has All Been Really Important

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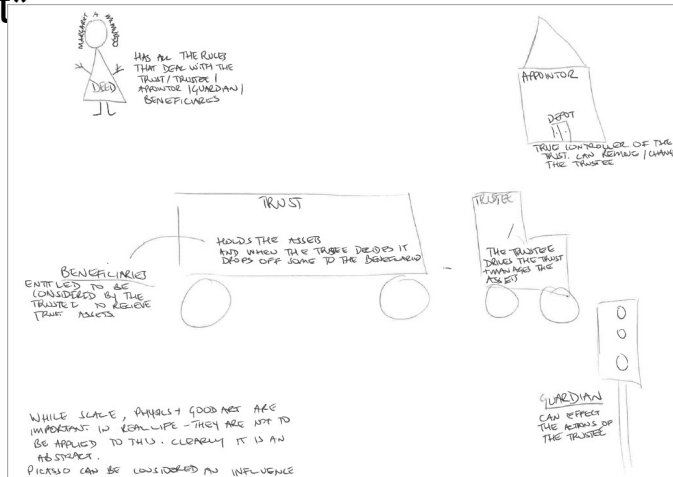
Agenda

- Structuring & Asset Protection
 - Why everyone's* favourite structure makes life really hard if you have a QBCC licence
 - What alternate structures are easier to manage
 - Asset protection and personal liability risks
- Debt Recovery
 - Statements, reminders and final notices – risk vs reward
 - Making better use of Adjudication under the *Building Industry Fairness (Security of Payment) Act 2017*
 - Subcontractors' Charges

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Structuring and Asset Protection – we all love a trust*



*unless you are the QBCC

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Minimum Financial Requirements



Queensland Building and Construction Commission Act 1991

**Queensland Building and
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(Minimum Financial
Requirements) Regulation
2018**

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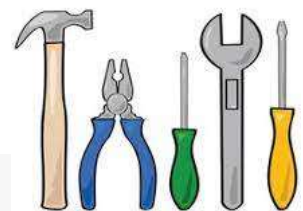
Licence Categories

	Maximum Revenue	Net Tangible Assets	Information Required
SC1	Up to \$200,000	\$12,000	SC1 Declaration
SC2	Up to \$800,000	\$46,000	SC2 Declaration
Category 1	\$800,001 - \$3,000,000	\$46,001 - \$156,000	MFR Report and signed financial statements
Category 2	\$3,000,001 - \$12,000,000	\$156,001 - \$480,000	MFR Report and signed financial statements
Category 3	\$12,000,001 - \$30,000,000	\$480,001 - \$1,200,000	MFR Report and signed financial statements
Category 4	\$30,000,001 - \$60,000,000	\$1,200,001 - \$2,400,000	MFR Report and signed financial statements
Category 5	\$60,000,001 - \$120,000,000	\$2,400,001 - \$4,800,000	MFR Report and signed financial statements
Category 6	\$120,000,001 - \$240,000,000	\$4,800,001 - 14,400,000	MFR Report and signed financial statements
Category 7	>\$240M NTA	>\$14.4M	MFR Report and signed financial statements

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What are Net Tangible Assets?



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Excluded Assets

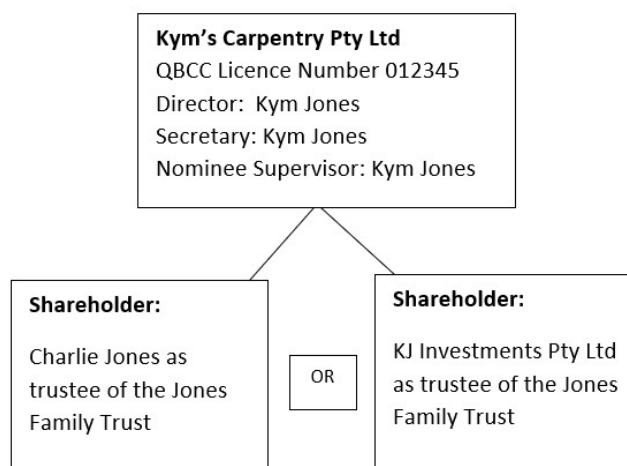
A lot of things including:

- Collectables
- Racehorses
- Recreational vehicles
- Assets held on trust by the licensee for a beneficiary other than the licensee

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What to do about it? - New Structures



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What to do about it? Existing Structures



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Deed of Covenant & Arrangement

- Only if it is absolutely necessary
- Not a preferred option for asset protection
- Ask for it to be released as soon as possible

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Personal Liability of Directors

Executive liability provisions (s111B)

- S42 – licensing
- S42D – fire protection work

Personal liability provisions (s111C)

(1) this section applies if—

- (a) a company is convicted of an offence against a provision of this act; and
- (b) a penalty for the offence is imposed on the company; and
- (c) the amount of the penalty is not paid within the time required for its payment.

(2) this section also applies if—

- (a) a penalty is imposed on a company as the outcome of disciplinary action taken against the company; and
- (b) the disciplinary action takes effect under [section 74G](#); and
- (c) the amount of the penalty is not paid within the time required for its payment.

(3) this section also applies if a company owes the commission an amount because of a payment made by the commission on a claim under the insurance scheme.

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Reminder: Accountants & MFRs

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.

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Debt Recovery – Security of Payment

The security of payment regime in Queensland is legislated in chapter 3 of the *Building Industry Fairness (Security Of Payment) Act 2017* (**the BIF Act**).

It operates independently of any contract between the parties, but some of the provisions (particularly timeframes) are informed by any relevant contract terms that exist. If there is no contract, or if the contract is silent on a particular point then the BIF act sets out a default position.

The focus of the security of payment regime is to provide a framework for facilitating timely payments for construction work or the provision of goods or services related to construction work.

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Debt Recovery – Security of Payment

For a document to be a valid payment claim it must:

- a. be in writing;
- b. identify the construction work or related goods and services that that progress payment relates to;
- c. states the amount claimed;
- d. requests payment (any document bearing the word 'invoice' will satisfy this requirement);
- e. for a claim other than a final claim, be given before the end of the longest of the following periods:
 - i. the time worked out under the contract; or
 - ii. 6 months after the construction work that the claims relates to was last carried out or related goods and services supplied; and
- f. for a final claim, be given before the end of the longest of the following periods:
 - i. the time worked out under the contract;
 - ii. 28 days after the end of the last defects liability period;
 - iii. 6 months after completion of all construction work under the contract or completion of the supply of all related goods and services under the contract

A claimant can only give one payment claim per reference date.

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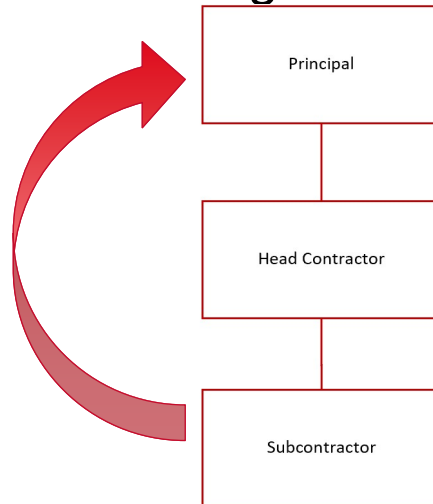
Adjudication

- If the Respondent did not give a valid payment schedule in response – apply within 30 business days after the later of the due date for payment or the last day a payment schedule could have been given
- If the Respondent did give a valid payment schedule and:
 - the Claimant does not agree with the scheduled amount – apply within 30 business days after Claimant is given the schedule
 - The Claimant agrees with the scheduled amount but the respondent fails to pay the amount by the due date – apply within 20 business days of the due date for payment

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Subcontractors Charges



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Conclusion

- **Structuring & Asset Protection**
 - Trusts can make life difficult if you have a QBCC licence
 - A corporate or sole trade structure are much easier to manage
 - There are unique personal liability issues that arise for QBCC licence holders so careful consideration needs to be given to asset protection strategies
- **Debt Recovery**
 - Automated statements can result in clients inadvertently using up reference dates and missing out on the opportunity to use the adjudication process to get paid quickly
 - Subcontractors' Charges
 - Encourage clients to set up their automated systems and any office processes so they automatically comply with the BIF Act

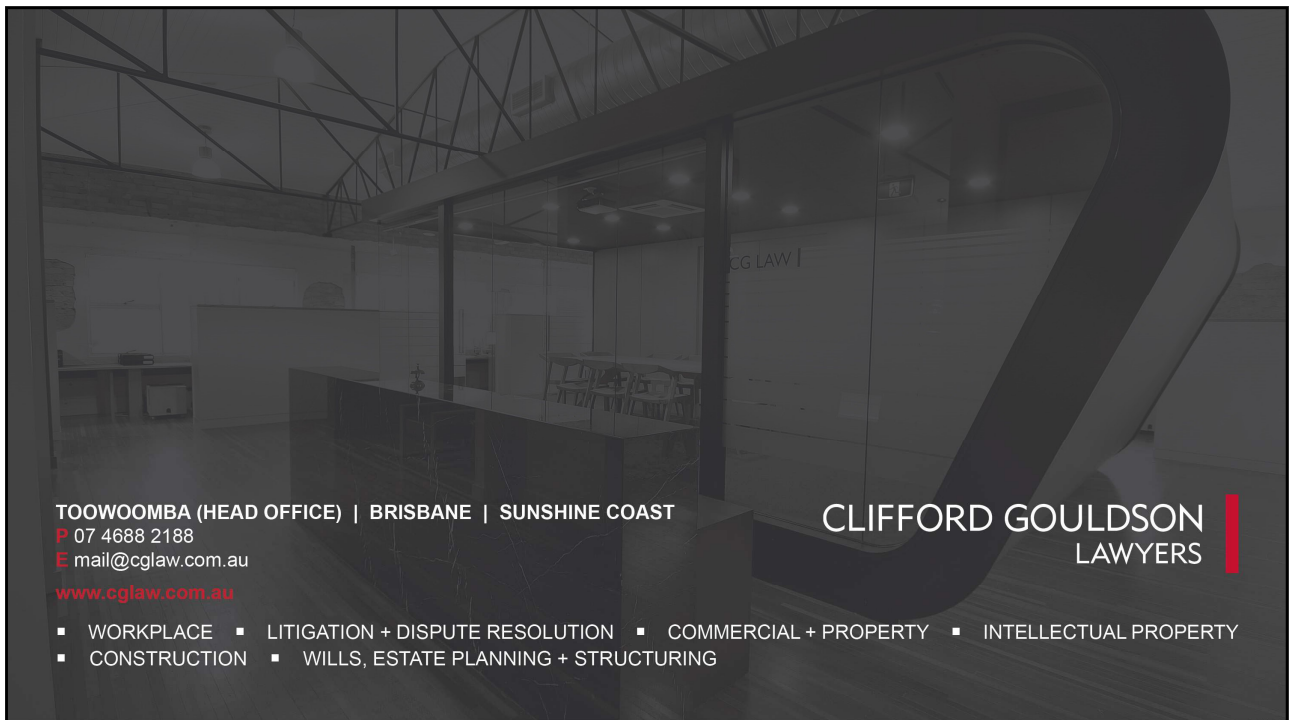
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