

In 2013, the Western Australian Small Business Commissioner conducted an investigation into the non-payment of subcontractors on construction projects administered by Building Management and Works between 2008 and 2012. The final report was presented to the Minister for Small Business in March 2013 with advice and recommendations.

Integra Legal played a crucial role in conducting this investigation, and the final report was significant in driving a number of improvements and changes in the construction industry, particularly in relation to the procedure for paying subcontractors.

Some of these changes are coming to fruition. Changes to security of payment legislation to protect subcontractors has been the topic of discussion recently from the Attorney-General and Minister for Commerce, the Honourable John Quigley MLA, and the Minister for Small Business the Honourable Paul Papalia CSC MLA.

The Minister for Commerce has announced that his departmental staff are drafting a cabinet submission to introduce imputed statutory trusts to present to cabinet in September. The Minister for Small Business has introduced a Bill to expand the investigative and reporting functions of the Small Business Development Corporation to ensure the timely payment of subcontractors.

Both changes come in the wake of the Federal Governments Review of Security of Payment Laws conducted by John Murray in 2017 and the Security of Payment Reform in the WA Building and Construction Industry Report conducted by John Fiocco in 2018.

### **The Statutory Trusts Regime**

The regime was a key recommendation in the Murray Report to curtail the high incidence of insolvency and payment default affecting vulnerable subcontractors when payment issues arose, most commonly where a party higher up the contractual chain either misused funds rightfully due to subcontractors or became insolvent. The provision of statutory trusts furthers the State Governments recent trials with Project Bank Accounts (PBA) and the repeated recommendations for implementation from Mr Wayne Martin QC (as he was then when he chaired the WA Law Reform Commission).

A statutory trust operates such that each contractor or subcontractor holds funds down the line on trust for the person or company with whom they are in contract. A PBA on the other hand is a bank account, opened and maintained by the head contractor, into which contractual payments by the principal are deposited and through which payments are made to the head contractor and its subcontractors directly by the participating bank. The major difference between the two is that a statutory trust protects all parties involved in the contractual chain, whereas a PBA only provides protection to tier-one subcontractors who have entered into a contract with the head contractor.

The statutory trust will operate by ensuring subcontractors are paid what is due and owing before the head contractor draws from the fund. The regime will likely require that before the head contractor/trustee makes any payments out of the trust account to a subcontractor it must submit a certificate to the bank certifying the amount is due and payable, providing a safeguard against unauthorised disbursements from the trust account. It is likely that third parties with knowledge of breach of trust will be liable.

Some potential issues with the proposed regime—mainly affecting the interests of head contractors—include an increased administrative burden and restriction on the ability of contractors using progress payment monies as working capital.

The Attorney-General has indicated that the regime will be introduced for contracts over \$20 million in the first 18 months, extending to contracts over \$10 million after 36 months and to contracts over \$1

million after 54 months. The implementation of a statutory trust regime is likely to affect all construction companies in Western Australia as the changes are rolled out.

### **The Small Business Development Corporation Bill**

The Minister for Small Business has proposed changes to the *Small Business Development Corporation Act 1983* (WA) boosting the powers of the Small Business Commissioner. The changes are aimed at improving behaviour and unfair practices in the construction industry.

Once enacted, the Bill will expand the Commissioner's current investigative and reporting functions to cover issues affecting the commercial activity of small businesses on private, local government and state government projects. The changes are a positive move forward for the Western Australian construction industry.

For further information or advice relating to the changes and the impact on your business please call Integra on 9218 8588.