

18 September 2016

Security of Payment: Consultation Paper  
Department of Finance, Services and Innovation  
Regulatory Policy Branch  
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**Re: Multiplex Constructions Pty Ltd - Submission  
Proposal for deemed statutory trusts Consultation Paper (Paper)**

Multiplex Constructions Pty Ltd (**Multiplex**) supports initiatives to improve the New South Wales construction industry and appreciates the opportunity to provide submissions on the Paper. Multiplex provides its submissions to address each of the questions raised in the Paper below.

Multiplex would like to highlight 4 main questions that were raised the Paper, and Multiplex will also provide a response to the remainder of the proposed amendments below.

**Question 1.**

**(a) Do you support the proposal to establish deemed statutory trust in the Act.**

Although acknowledging there are issues with financial strength of entities within the construction industry, we would recommend other options are also available to government to try and assist with ensuring security of payment and financial stability of entities within the industry. These could be implemented before or in conjunction with the proposed deemed trust arrangements.

We think the deemed trusts should be trialled in an agreed process rather than being legislated immediately for all projects.

**(b) What alternative reform(s) could be implemented**

Multiplex would support a licencing system which requires submission of audited financial statements which in turn dictates the allowable revenue an entity is able to undertake and the size of projects an entity is allowed to undertake.

Multiplex would also support the Department of Fair Trading enforcing existing maximum payment term legislation which is being ignored by some within the industry.

**Question 7. Should deemed trust account records be subject to external audit.**

**(a) Do you support the proposal to not require auditing of trust records.**

No, if no audit certificate were required to confirm compliance with the Act, many entities would simply ignore the requirements. The fact some entities openly fail to comply with

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maximum payment terms set out in the current Act with no apparent consequence is an indication of how some within the industry may choose to apply the deemed trust requirements.

**(b) Do you consider that the compliance and enforcement powers proposed in the exposure draft bill are sufficient to support the operation of 'deemed' statutory trusts.**

Multiplex is of the opinion that excluding the requirement for an annual audit confirming compliance with retention trust requirements and the deemed trust would be encouraging non-compliance.

**(c) What type of compliance and enforcement powers or framework would be preferred.**

Multiplex is of the opinion that an annual audit confirming compliance with trust requirements would be fundamental.

As stated in 1(b) Multiplex would prefer a system which has a licensing element based on audited financial compliance with an agreed scheme. This would enable a Contractor to be granted a licence to undertake work of an agreed value, based on its financial capability and its annual allowable turnover.

The fact that some entities find it difficult to justify a \$3,000 – \$10,000 audit of their trust accounts is a good indication that some entities do not have the financial capacity to actually operate within the industry. The suggestion entities can undertake contracts in excess of \$1m and potentially have revenue in excess of \$1m p.a. but would be unable to pay for an external audit costing a few thousand dollars is precisely why some entities do not have the financial strength and financial systems to enable them to operate within the industry.

## **Question 8. When is a trustee entitled to payment.**

**(a) Do you support the proposal to allow the trustee to withdraw funds from the account before a subcontractor has been paid.**

Multiplex would support the proposal allowing payment of profit and overheads either prior to or at the same time subcontractors are also paid. Some subcontractors are paid on 14 day terms so it would be reasonable to allow the head contractor to also recover its overheads and profit on or before the payment of most of the subcontractors.

Multiplex also queries how if a head contractor is not paid by the client, do the funds in the account apply to other monies, and is the head contractor still required to pay the subcontractors if deemed trust arrangements are in place. Do the monies link to particular claimed amounts, or to any amount within the deemed trust account. In some scenarios, a head contractor could be liable to a subcontractor in circumstances where it will not recover money if the client has become insolvent.

**(b) When should a trustee be permitted to withdraw funds**

As per (a).

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## **Question 12. Can a beneficiary inspect the books of a deemed statutory trust account.**

### **(a) Do you support the proposal to allow the beneficiaries to inspect the records of the deemed trust accounts**

If a deemed trust system were to be imposed on the industry, Multiplex **strongly disagrees** that beneficiaries should be able to inspect the records, this would involve showing confidential information to a specific beneficiary.

Example: If Multiplex currently holds in excess of \$20m of retention trust monies, to show 1 subcontractor that their retention monies are held within the trust account, Multiplex would need to show the full bank balance of \$20m, then show the full breakdown of projects within that amount and then a list of all the subcontractors that add to the account and then show the individual subcontractor its portion. This information is confidential should not be available in detail to client or subcontractors.

### **(b) Is there an alternative approach that would provide beneficiaries with a similar degree of awareness.**

Multiplex supports a qualified third party audit being conducted and "compliance certificate" being issued which could be sent to or made available to all beneficiaries. or a statutory declaration signed by a Director or officer of the entity.

Multiplex also provides its submissions in response to each of the other questions raised in the Paper.

## **Question 2. How far deemed statutory trusts extend along the contractual chain.**

### **(a) Do you support the proposal to apply a cascading deemed statutory trust model.**

If deemed trusts were to be introduced, then they would need to cascade down the supply chain to subcontractors. Most insolvency occurs in the lower and smaller end of the industry.

### **(b) What would be an appropriate point in the contractual chain to limit the requirement for deemed statutory trusts**

Given that most insolvency occur within the residential sector and involve small contractors, if deemed trust accounts were to be introduced, they would need to include head contractors at the lowest level. The suggested \$1M contract value would still miss a substantial amount of construction contracts where many of the insolvencies occur.

Higher value projects suffer from insolvencies infrequently, but when they occur, generally they have a large financial impact and generally involve a subcontractor rather than a head contractor. In Multiplex's view, if deemed trust accounts were to be introduced they would need to include subcontractors within the supply chain.

Insolvencies also occur in the rail and road sectors not just property sector, so if deemed trusts are to be legislated they should cover property, rail, road, engineering and infrastructure projects. Many subcontractors work across all sectors. Multiplex understands that there are



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subcontractors who are paid in excess 60 days on some major construction and infrastructure projects in NSW.

We would also recommend a trial period and comprehensive education process and phased introduction.

## **Question 3. What particular projects or contracts would require deemed statutory trusts**

### **(a) Do you support the proposal to apply the requirement for deemed trusts to construction projects valued at \$1m or more**

ASIC data shows that most insolvency occurs with entities with less than 5 employees, therefore a \$1m threshold would be unlikely to improve the ASIC statistics.

### **(b) What would be an appropriate alternative monetary threshold**

Based on the ASIC statistics, the trusts obligations would need to capture all the smallest subcontractors in the industry.

One issue the industry will face is many operations at the smaller/lower end of the industry may not be sophisticated enough to understand and comply with deemed trusts, and a substantial education process will need to be undertaken.

### **(c) Do you support the proposal to limit the application of the requirement to parties based on the value of their individual contracts**

Yes, that would make a clear delineation between contracts that do or do not require a deemed trust account.

One issue to consider and clarify is what happens if a contract value starts below the threshold and at some point during construction variations cause the value to increase to a value that exceeds the threshold.

### **(d) What would be an appropriate contract value**

\$1m would be a clear line of operation.

## **Question 4. When would the obligation to establish deemed statutory trusts arise in the project lifecycle.**

### **(a) Do you support the proposal that the requirement for a deemed trust should arise immediately when contract monies are received by the trustee**

If a deemed trust system were to be imposed on the industry, then we would agree that the deemed trust would start immediately upon receipt of the contract monies.

### **(b) What would be an appropriate point in the contract lifecycle for the deemed statutory trust to be established**

As per 4(a)

## **Question 5. Who would be responsible for managing the deemed statutory trust.**

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**(a) Do you support the proposal that responsibility for managing 'deemed' trust monies is placed on the trustee**

We agree that the entity would be responsible, we do not believe government would have the required resources to act as trustee for construction receipts and payments.

**Question 6. A separate bank account required for deemed trust funds.**

**(a) Do you support the proposal to allow trust monies on multiple construction projects to be held in a consolidated deemed trust account.**

If a deemed trust system were to be imposed on the industry, Multiplex would prefer 1 consolidated account to minimise the administration costs.

Having a separate project specific account for each project would add significant administration costs. But entities should be able to choose whether they prefer 1 combined deemed trust account or whether they chose to set up trust accounts for each project.

**(b) Should there be any further obligations applied to trustees and/or beneficiaries to support the efficient flow of monies in/out of accounts (for example a requirement for transaction certificates of some form).**

If a deemed trust system were to be imposed on the industry, Multiplex would suggest that annual audits (or more regular, bi-annual) by a qualified accounting firm would be a fundamental requirement. If no audits were required then some entities may simply ignore the legislation and not comply.

**Question 9. What happens when there are insufficient funds in the deemed statutory trust account.**

**(a) Do you support the proposal to allow funds to be distributed on a pro rata basis as a proportion of their payment claims.**

If a deemed trust system were to be imposed on the industry, Multiplex would agree that distribution on a pro rata basis as a proportion of certified progress claims. It is essential that the claims have been certified on a cost to complete basics first. Guidelines and process would need to be clear and an education process conducted to ensure the industry understands.

**Question 10. What happens when there is a dispute about monies held in a deemed statutory trust account.**

**(a) Do you support the proposal relying on the existing dispute resolution mechanisms in the Act.**

If a deemed trust system were to be imposed on the industry, Multiplex would agree with the proposed dispute mechanisms.

Alternatively the dispute mechanisms agreed commercially by the parties in the subcontract or supply agreement should apply.

**Question 11. Can deemed statutory trust monies be invested.**

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**(a) Do you support the proposal to allow investment of deemed statutory monies.**

Clarity would need to be provided on what is an accepted investment.

**Question 13. Should directors be liable for a breach of trust by a corporation.**

**(a) Do you support the proposal to apply executive liability to directors and other relevant persons for breaches.**

If funds have been deliberately and fraudulently been misappropriated by a director, then yes. In the circumstances where this occurs by someone else in the business, then no. That person should be prosecuted and not the Director or officer unless they have actual knowledge. In addition, in circumstances of accidental non-compliance issues or an event that directors did not have actual knowledge of, then no. Multiplex is concerned that the proposed provisions are too broad and could inadvertently expose directors and executives to personal liability for minor non-compliances or for matters that they were not reasonably aware of or for fraudulent criminal behaviour by employees, which has its own remedies at law.

**Question 14. Separate bank accounts can improve financial detection of non-compliant or inappropriate activity**

**(a) Do you consider these are the likely benefits associated with the proposal.**

Identifying losses earlier

Large and medium size entities should have some form of computerised accounting system that forecasts the projects revenue and costs a trust account will make no difference in identifying losses earlier than the forecasting systems they use.

For small entities that run the business on a cash basis a trust account may help highlight losses earlier but they are excluded from the proposed trust provisions by way of contracts only being included over \$1m.

Mandating trusts would require participants to be better capitalised

The introduction of trust accounts may make some entities increase capital within the entity. A licencing system would be a far better way of increasing capital within entities and ensure capital matches the size of projects undertaken and annual revenue an entities balance sheet would allow.

**Question 15. Statutory trusts can create efficiencies**

**(a) Do you consider these are the likely benefits**

Multiplex does not believe there would be any efficiencies or a reduction in disputes. We do not believe there is an incentive to resolve contracts simply to get a distribution from the trust account.

**Question 16. Deemed statutory trusts can reduce the ability of business to manage cashflow**

**(a) Do you consider these are the likely costs associated with the proposal**



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Deemed statutory trusts can reduce the ability of businesses to manage cashflow

As the Murray review identified, this would be an intended consequence of limiting cash taken out of the trust accounts.

Statutory trusts may not be effective at achieving their objective

If projects are in a loss making position, at some point in time there will be insufficient funds to pay the supply chain and recoup profit and overheads that may have been correctly taken out of the trust account in prior periods. If entities have insufficient capital and financial strength, the trust will still leave the supply chain unpaid.

This supports Multiplex continued support for a licencing system based on financial strength.

Statutory trusts may impose administrative and regulatory burdens

Imposing a deemed trust adds to the administration costs.

The introduction of the retention trust in NSW clearly added additional time in operating separate bank accounts and the associated administration requirements. Introducing a trust for all receipts and payments would no doubt add additional time and cost.

**Question 17. Statutory trusts may make it difficult for business to obtain finance**

**(a) Do you consider these are the likely costs associated with proposal**

There will be costs associated with the proposal.

If you have any questions and would like to discuss the comments raised, please do not hesitate to contact me on [REDACTED]

Yours faithfully,  
**Multiplex Constructions Pty Ltd**

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