

**SUBMISSION 17.9.2018**  
**DEEMED STATUTORY TRUSTS AND THE BUILDING AND CONSTRUCTION**  
**INDUSTRY SECURITY OF PAYMENTS ACT 1999**

**OVERVIEW**

One of the reasons for the high rate insolvency amongst principle contractors is because the government has protected trade contractors via the Security of Payments Act to ensure they get paid but have afforded absolutely no protection for the principle contractor to ensure payment by clients/consumers.

The principle contractor signs a building contract with a client who can decide to withhold payments for any reason and the principle contractor has to pursue the client through the court system. This is both time consuming (usually take around two years to get a court hearing and achieve a finding) and expensive (legal costs are high and usually each party has to bear their own costs). Then even when the case is upheld the clients still often don't pay, so the principal contractor has to spend more money to actually try and get all the monies from the client to which they are entitled. Governments have made no effort to protect principle contractors from non-payment by consumers/clients. The line goes that in a free-market economy, principle contractors have to take appropriate actions to ensure payment. However, sub-contractors, who are also private commercial entities (ie not employees) are considered a special interest group who are not responsible for their commercial decisions and require specialist legislation to ensure they are protected and paid. Why sub-contractors entitled to special protections and principle contractors are not?

If the Minister for Innovation and Better Regulation is serious about preventing high insolvency rates amongst principle contractors then a form of the Security of Payments legislation must be introduced to enforce payment by consumers/clients to principle contractors for works carried out.

**SUB-CONTRACTORS UNACCOUNTABLE FOR NON-RECTIFICATION OF FAULTY WORKS**

At present, sub-contractors, carrying out works for a principle contractor, and despite being licenced, are not, in reality, accountable for carrying out defective works in the event they leave the industry. If defective works are carried out by the sub-contractors, and the sub-contractor refuses to return to site to carry out repairs then the principle contractor is liable for the works of the sub-contractor. The principle contractor would have to pay for the rectification works and then have to take legal action or use NCAT to try and recover the costs of repair. However, even if the

courts or NCAT find in favour of the principle contractor the sub-contractor often doesn't pay. Once again, the principle contractor has to pursue the sub-contractor. Another issue the legislation does not address is when the sub-contractor carries out incomplete and or sub-standard works on site. They can make a claim under the Security of Payments Act to which the builder has only 10 (ten) working days to respond. In my experiences these cases are always found in favour of the sub-contractor as they are deemed to be the innocent party. As a result, the sub-contractor gets paid for the sub-standard and shoddy work and then the principle contractor has to then pay another sub-contractor to complete or rectify the works. It is not surprising that there are high insolvencies when principle contractors, on occasions, have to pay twice to get works done.

This respondent has found the current adjudicator system is both biased and farcical as the following real example provides. A response to a sub-contractor who had carried out shoddy brick laying works was submitted. The adjudicator determined the photographs had been "doctored" to suit our case (the images were not doctored and no explanation was provided as this conclusion was arrived at). The adjudicator also claimed a trade agreement with the contractor was not genuine because each page of the contract had not been signed. Again, the builder was accused of providing false documents (which was not true). The adjudicator made no reference to the invoices that were put forward as proof of the rectification costs to repair the defective works and also complete the works after the sub-contractor left the site with much of the work incomplete. The adjudicator found in favour of the sub-contractor including payment for work not completed. All the evidence submitted by the sub-contractor was accepted without question. There was no request via the adjudicator for additional information, no phone conversation nothing. The basic principles of natural justice were non-existence. The Security of Payments Act is designed to ensure a quick resolution of disputes and payment of sub-contractors. From my experience, this has been achieved but at the expense of fairness and justice.

The bottom line is that the principal contractor is a "cash cow" for the Security of Payments Act and as a result there is and will continue to be insolvency amongst principle contractors. Legislators seem to think principle contractors have an unlimited ability to pay, but like the golden goose this is not the case.

**COMPLIANCE COSTS WILL BE PASSED ONTO CONSUMERS. NEW HOMES WILL COST MORE TO BUILD**

It is ironic that at time when governments (in particular) are identifying the escalating cost of housing as being a major social issue, legislators continue to add more and more layers of compliance all of which increase operational costs to principle contractors. There is no doubt whatsoever that all the costs associated with principle contractors complying with this proposed legislative change will be passed directly onto consumers. Building costs will increase.

**DEEMED STATUTORY TRUSTS (DST)**

The statement that trusts “can” create efficiencies does not apply in instances of sub-standard and defective workmanship by sub-contractors. The sub-contractors get a fast-tracked payment and the principle contractor has to pay for the same work twice. The establishment of trust accounts adds to an already onerous management/compliance time by principle contractors (this is one of the reasons for increasingly high rates of mental health and suicide issues within the building industry – none of the supporting literature around the proposed legislative changes addresses the human cost to principle contractors). Principle contractors are constantly being targeted to take responsibility and liability for the failure of the performance of sub-contractors.

This is the worst sort of legislation imaginable for principle contractors and will force medium and smaller builders out of the industry resulting in large companies becoming dominant and building prices will continue to raise (a lack of competition tends to do that).

In the event that DST are legislated for then it must be incumbent on the government to set up a similar structure and legislation to protect principal contractors from non-payment by clients.

Yours faithfully,

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