



AUSTRALIAN
CONSTRUCTORS
ASSOCIATION

**AUSTRALIAN CONSTRUCTORS ASSOCIATION
SUBMISSION**

**BUILDING & CONSTRUCTION INDUSTRY SECURITY OF
PAYMENT AMENDMENT (RETENTION MONEY TRUST
ACCOUNT) REGULATION 2014**

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AUSTRALIAN CONSTRUCTORS ASSOCIATION – SUBMISSION ON PUBLIC CONSULTATION DRAFT BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT (RETENTION MONEY TRUST ACCOUNT) REGULATION 2014

1. INTRODUCTION

1.1 The Australian Constructors Association (ACA) welcomes the opportunity to respond to the Public Consultation Draft *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2014*.

1.2 The ACA regards security of payment and the prevention of insolvencies across the supply chain as being crucial to the ongoing sustainability of the industry.

1.3 The ACA and its members are committed to working with Australian governments and industry stakeholders to ensure that the sustainability of the industry is safeguarded for future generations of Australia.

2. AUSTRALIAN CONSTRUCTORS ASSOCIATION

2.1 The ACA represents the nation's leading construction contracting organisations. A list of ACA members is attached (Annexure 1). The ACA is dedicated to promoting a sustainable construction industry for Australia.

2.2 ACA member companies operate in a number of market sectors including:

- Engineering construction incorporating public and private sector infrastructure
- Commercial and residential building
- Contract mining
- Oil and gas operations
- Process engineering
- Telecommunications services
- Environmental services
- Maintenance and related services

2.3 Association members operate globally, with member companies operating in Australasia, Europe, Asia, North and South America, Africa and the Middle East. Collectively ACA member companies have a combined annual revenue in excess of \$50 billion and employ over 100,000 people in their Australian and international operations.

2.4 The ACA has four (4) key objectives:

1. To require the highest standards of skill, integrity and responsibility of member companies.
2. To represent the interests of major contractors to government and other decision makers.
3. To enhance and promote the status of construction contractors and the industry which they serve.

4. To facilitate the exchange of technical information and encourage further research.

3. APPROACH TO THE SUBMISSION

3.1 The purpose of this submission is to respond in broad terms to the Draft *Building & Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2014* (Draft Regulation) with some specific comments on certain aspects of The Regulation.

4. THE AUSTRALIAN CONSTRUCTION INDUSTRY

4.1 The Australian construction industry employs 1 million members of the Australian workforce and is Australia's third largest employer after health services and retail trade.¹ The majority of those working in the industry operate in small to medium enterprises (SMEs) as trade subcontractors.

4.2 The ACA made a submission to the NSW Government consultation paper: *A Statutory Retention Trust Fund for the Building and Construction Industry* in January 2014 in which we highlighted the structure of the industry and the need to consider the comments of Mr B Collins QC in his report arising from the Inquiry into NSW Construction Industry Insolvencies.

4.3 As indicated in the ACA submission on the NSW Government consultation paper referred to above, during discussions with industry representatives as part of his Inquiry, Mr Collins indicated that the problem relating to the management and protection of retention moneys did not appear to be applicable where the projects were large in nature but was an issue more related to residential construction and smaller developers/builders although there had been a limited number of mid-range construction companies that had entered into administration or receivership whilst owing money to subcontractors.

4.4 We note that this Draft Regulation applies to non-residential building projects worth \$20 million or more, and so does not target the area of industry which Mr Collins identified as at greatest risk of insolvency and in need of further government regulation regarding security of payment.

4.5 In reading the outcomes of the Collins Inquiry, the ACA submits that this Draft Regulation does not address the identified concerns, and will have the effect of increasing red tape by placing administrative and financial burdens on the part of industry least in need of regulation.

4.6 On the basis that the Government has determined to proceed with the Draft Regulation, the ACA submits that the Government should make it clear to the industry that it intends to extend the proposal to the wider industry and the timeframe for implementation of that extension.

¹ Australian Bureau of Statistics, *Labour Force, Australia, Detailed, Quarterly- Table 04. Employed Persons by Industry- Trend, Seasonally Adjusted, Original*. 6291.0.55.003, November 2013.

5. SPECIFIC CONCERNS WITH THE REGULATION

5.1 As well as believing that this Draft Regulation targets the wrong area of the construction industry in order to effectively address security of payment and insolvency issues, the ACA has concerns regarding specific components of the Draft Regulation.

Definitions

5.2 The Draft Regulation contains a definition of an approved ADI as meaning an authorised deposit-taking institution approved under s.87 of the Property, Stock and Business Agents Act 2002 or otherwise approved in writing. The ACA is concerned that there may be situations where head contractors operate through financial institutions that are not ADIs in the context of the current draft definition and would thus be required to alter their banking arrangements to meet the requirements of the Draft Regulation.

5.3 The ACA submits that if a head contractor is required to change its banking institution on the basis that the institution does not meet the requirements of the definition, or that institution does not offer a trust account facility, there could be significant costs and expenses involved for the contractor and this situation could even impact on the contractors business operations if required to change financial institutions to meet the requirements of the definition. The ACA submits that the Government should examine other definitional options to address this possibility.

Application of Part – Projects of a value of at least \$20 million

5.4 The ACA considers that the Draft Regulation does not adequately address those situations that arise where a contract, as entered into, does not exceed \$20m but later could exceed \$20m as a result of variations to contract. It is envisaged that there will be circumstances where arguments between head contractors and subcontractors about the quantum of variations may place a head contractor in a difficult position in the context of the responsibility to open and manage trust accounts in specific instances. The ACA submits that more drafting work is required to ensure that the likely issues are addressed in a way that does not place a head contractor in breach of its obligations under the Draft Regulation where a variation of contract arises and is the subject of a dispute between the head contractor and relevant subcontractor.

5.5 An additional issue requiring further analysis relates to the process for assessing the market value of construction work in the absence of a specific value being included in the contract. The ACA submits that the Draft Regulation should provide for a process of establishing market value so that the calculation process avoids potential arguments about the quantum of the contract being above or below the \$20m threshold. It can be seen that arguments between parties over the quantum of a variation or for actual work could have unintended consequences for a head contractor using their best endeavours to determine whether a contract exceeds the threshold for the purpose of the responsibility to place retention moneys in a trust account

Existing Arrangements

5.6 ACA members operate in a variety of market sectors, some of which already include a requirement to maintain a retention trust fund. Clause 7 of The Regulation is drafted in a manner which assumes retention trust funds do not exist.

5.7 The ACA would like the Government to confirm that those companies operating existing retention trust funds which conform with the requirements outlined in the Draft Regulation are able to use their pre-existing retention trust fund arrangements and do not have to set up a new fund. If existing accounts conform to the Draft Regulation, we see no reason why a new account needs to be established as the purpose of the Draft Regulation is already being fulfilled.

Interest Earned on Trust Accounts

5.8 The ACA submits that leaving the question of entitlement to interest earned on a trust account to issues such as the contractual arrangements between a head contractor and subcontractor is problematic.

5.9 There will be administrative and other costs for head contractors associated with implementing the scheme and the costs will vary depending upon the nature of the contractual arrangements between the parties and the number of transactions relating to each contract, yet the head contractor will always be responsible for all costs attributable to the management of the scheme as and when they fall due which means that the head contractor may have to meet administrative costs well before being able to obtain access to interest earned. These costs will include the cost to the head contractor of having the trust account audited and a report being made to the Government.

5.10 The ACA submits that the Draft Regulation should simply make it clear that all interest earned shall be retained by the head contractor. This will avoid unnecessary argument between a head contractor and its various subcontractors and place the cost issue beyond doubt.

Overdrawn Trust Account

5.11 As the Draft Regulation contemplates that a trust account may relate to 2 or more projects, it is considered that further specification may be necessary to cover the situation of overdrawn trust accounts e.g. it is envisaged that some industry participants may need further assistance to understand what is meant by a trust account being overdrawn such as the account itself being overdrawn or a specific ledger in the account being less than it should be.

5.12 It may be useful in a wider context for the government to issue a general administrative document covering the operation of trust accounts to provide further assistance to industry in managing its responsibilities.

Annual Report and Account Review Requirements

5.13 A further concern with the Draft Regulation surrounds annual report and audit requirements. Under Clause 15 of The Regulation, an account review report must be completed within one month of the conclusion of the financial year. The ACA believes that

the one month requirement is an unreasonable length of time to complete such a report, particularly given that a retention trust fund may involve comingled funds from numerous projects and involve thousands of transactions to numerous subcontractors.

5.14 The administrative burden in compiling a report involving monies of this nature is extensive, and such obligations cannot reasonably be met by the industry within a one month timeframe. The ACA submits that three months is a reasonable timeframe for the production of such a report, especially when a head contractor must notify of an overdraw.

5.15 The ACA notes that neither the Regulatory Impact Statement nor the Draft Regulation contain any detail as to the likely fees involved in an account review process. The ACA submits that no fee should apply to the account review process for the following reasons:

- If the Government receives no complaints from subcontractors about their payments why is there a need to have the account review report separately examined.
- There are adequate responsibilities placed on head contractors to report irregularities and very heavy penalties for non-compliance so there is no need to undertake separate audit processes.
- In the corporate sector, the report of a registered company auditor is accepted. There should not be any need to separately assess a head contractor but if such action is necessary then the cost should be borne by the contractor and not by all head contractors.
- If a fee is to apply, the ACA proposes that the fee is subject to further consultation with industry to ensure that it is acceptable by industry participants

5.16 The ACA notes that a maximum of 200 penalty units apply to breaches of the provisions of The Regulation. The ACA submits that a phase-in period should be put in place to allow industry time to establish procedures and gain experience in operating with a retention trust fund before these penalties become applicable. The ACA believes that a three month phase-in period will be a suitable length of time to allow industry to become proficient in these processes.

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MEMBERS OF AUSTRALIAN CONSTRUCTORS ASSOCIATION

BGC Contracting Pty Ltd

Brookfield Multiplex Australasia Pty Ltd

Clough Limited

Downer EDI Limited

Fulton Hogan Construction Pty Ltd

Georgiou Group Pty Ltd

John Holland Group Pty Limited

Laing O'Rourke Australia Construction Pty Ltd

Leighton Contractors Pty Ltd

Lend Lease Building Pty Ltd

Lend Lease Construction and Infrastructure Pty Ltd

McConnell Dowell Corporation Limited

UGL Limited

Watpac Limited