QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION

PROJECT AND RETENTION TRUSTS

REGULATORY GUIDE

VERSION 5 – JANUARY 2024

BACKGROUND AND PURPOSE OF THIS REGULATORY GUIDE

On 1 March 2021, a new trust account framework commenced under the *Building Industry Fairness (Security of Payment) Act 2017* (the Act). The framework creates statutory trusts over money paid and payable under eligible contracts with the primary aim of protecting the payment rights of subcontractors in the Queensland building and construction industry.

The trust account framework is rolling out in phases to eligible contracts. The framework is already in place for eligible contracts with State government or Hospital and Health Service principals[1], where the contract price is $1 million or more. From 1 January 2022, the framework rolls out to eligible commercial contracts in the private sector, as well as to contracts where statutory bodies, local governments and other (non-State) entities are the principal.

The QBCC has the responsibility for overseeing compliance with the trust account framework. This regulatory guide has been produced to inform parties that have obligations under the framework about the QBCC's decision-making process in relation to compliance and enforcement activities for project and retention trusts.

This document contains general statements based on typical circumstances. Where circumstances warrant a different approach, the QBCC may depart from its usual process.

1 Statutory bodies may also opt in to the framework.

SCOPE

This regulatory guide applies to parties to eligible contracts[2], that have obligations under the trust account framework, including:

- parties to State Government or Hospital and Health Service contracts valued at $1M or more; and
- parties to other contracts valued at $10M or more from 1 January 2022, $3M or more from 1 March 2025, and $1M or more from 1 October 2025; and
- parties that withhold cash retention amounts under an eligible contract under a project trust project.

Snapshot of project trust obligations

Money payable to head contractors[3] and subcontractors for work done by them for eligible contracts must be held in trust by the head contractor for the primary benefit of the subcontractors. The head contractor must open a project trust account with an approved financial institution. The principal has an obligation to ensure they deposit all contract payments into that trust account (a 'deposit obligation'). The head contractor must ensure that the trust account is operated in accordance with the Act, including ensuring that subcontractors are paid only from the trust account. The head contractor must also maintain proper records of the trust account (i.e. 'trust records').

Snapshot of retention trust obligations

Cash retention amounts withheld from contractual payments must be held in trust if the overarching (i.e. head) contract is an eligible contract. This includes:

- retention amounts withheld from contractor payments by a *private sector principal*;
- retention amounts withheld from subcontractor payments by a *head contractor*; and
- from 1 October 2025 (when the retention trust obligations cascade to all contract and subcontract tiers under an eligible contract) retention amounts withheld from sub-subcontractor payments by the *subcontractor* that engaged them.

The party withholding the retention amounts must open a retention trust account with an approved financial institution. They only need to have one retention trust account for all retentions they withhold. They must ensure that the retention trust account is operated in accordance with the Act, including that all retention amounts are paid into the trust account and that retentions are released/paid from the trust account. They must also maintain proper trust records.

Existing project bank accounts

The project bank account scheme previously established under the *Building Industry Fairness (Security of Payment) Act 2017* will continue to apply to some contracts. These contracts will have resulted from a tender process that began before 1 March 2021 (unless the head contractor has opted-in to the new trust account framework).

For the purposes of its approach to non-compliance, QBCC will treat project bank accounts in the same way as trust accounts.

Regulatory approach

The QBCC's regulatory approach to trust account compliance considers the likelihood and consequence of a range of contraventions. The likelihood of particular breaches occurring may guide the detection strategy, as will the overall risk, whereas the consequence of a breach is a consideration when determining the enforcement response.

The QBCC considers that parties to State Government and Hospital and Health Service contracts (the 2021 cohort) are now broadly familiar with the obligations to manage payments to and retentions withheld from subcontractors through trust accounts. Contractors tendering for these projects must meet the requirements of the prequalification system for building contractors, including in relation to on-time payment of subcontractors, and the awarded contracts generally reinforce the trust account requirements. The QBCC has also delivered trust account information sessions and is confident that head contractors in the 2021 cohort are fully aware of their obligations to open and operate trust accounts. For these reasons, the QBCC expects a low likelihood of eligible public sector contracts failing to open trust accounts as required.

Private sector contracts, which enter the trust account framework from 2022, are considered more at risk of failing to open trust accounts when required due to lower familiarity with the requirements and a possible incentive of avoiding the cost of complying with the trust account requirements. The QBCC anticipates an increased risk of non-compliance including intentional non-compliance in this cohort.

There is no indication that the cohorts will significantly differ in their awareness, ability or willingness to comply with the requirements for administering trust accounts, once they have been opened. However, given the larger number of private sector contracts expected to be captured under the framework (in comparison to public sector contracts), contraventions arising in this sector can have potentially wider-reaching consequences across industry.

The QBCC's regulatory approach will reflect these considerations, as described below.

2 'Eligible contract' refers to a contract that requires a project trust (I.e. a 'project trust contract'). Obligations under the trust account framework apply to parties to the head contract and/or its subcontracts. This document does not detail the full criteria for a project trust contract. Visit qbcc.qld.gov.au for full details.

3 Any reference to a 'head contractor' also refers to a subcontractor who is a related entity to a head contractor for an eligible contract.

Detecting non-compliance

There are three main ways in which non-compliance with trust account obligations is likely to come to the attention of the QBCC. The first is through complaints being made to the QBCC in relation to a contract that requires a trust account. On receipt, QBCC will assess the complaint for possible further investigation and action in line with its usual processes. Other relevant notifications of non-compliance to the QBCC (such as moneys-owed complaints or unpaid adjudication amounts) may also trigger an investigation.

The second way is through the conducting of a proactive audit under an approved audit program. QBCC is developing an approved audit program to check compliance with trust obligations. The program details, including purpose and timeframes, will be published on the QBCC website once finalised.

The QBCC also has the power to appoint a special investigator to investigate a person's compliance with their statutory requirements in relation to trust accounts, and may detect non-compliance as a result of such an investigation.

The third way non-compliance is likely to be identified is in reviewing account review reports. Account review reports are required to be submitted annually to QBCC for retention trust accounts, and may also be required by the QBCC for project trust accounts. An independent auditor will prepare the account review report and is required to report any non-compliance they identify in auditing the trust account.

Because there is a possibility that failure to open a trust account is more likely in the private sector, the QBCC may direct focused attention to that sector in attempting to detect those contraventions.

Responding to non-compliance

The QBCC's responses to non-compliance range in severity from education and warnings through to penalties, licence conditions/suspension/cancellation and prosecution in court. Some of the factors that the QBCC will take into account when deciding on an appropriate and proportionate response include:

1. **State of mind:** Is there evidence of an intention to avoid complying with the requirements? This includes evidence of hiding information from the QBCC or being uncooperative with an audit.
2. **Seriousness:** Has the non-compliance caused loss to subcontractors, and if so, how much?
3. **Scale:** How many breaches have occurred, or how long has the offender been in breach without remedying?
4. **Systems:** Has the contractor/principal failed to put in place adequate business and accounting systems and processes (having regard to the size and operations of the offender) to ensure compliance with its obligations? Did they have access to (or the choice of) adequate systems and processes that would have allowed them to achieve compliance?
5. **Any other relevant matters:** Each situation is unique and the QBCC will consider all relevant factors in determining its regulatory response.

In instances where non-compliance is inadvertent and the obligated party has acted in good faith to achieve the intent of the framework to their best ability, the QBCC may consider taking an educative approach to responding to the non-compliance.

An example of an educative approach could be taking action to ensure that the offending party is aware of and understands its obligations, and conducting a follow up audit at a later date to check that no further non-compliance occurs.

Notwithstanding the above, ignorance does not provide a legal excuse from compliance with a party's obligations. The QBCC therefore expects that parties will make every effort to understand the new laws and comply with their obligations.

If the non-compliance appears to be more serious than an inadvertent breach, the QBCC will take stronger compliance and enforcement action. It may also do this if a contractor fails to comply even after the QBCC has taken an educative approach.

Failure to open a trust account where required will generally be considered a serious breach and is unlikely to be addressed with an educative approach. Likewise, misuse or misdirection of funds that are required to be held in trust, including by a principal with a deposit obligation, will generally be considered a serious breach.

Software platforms for keeping trust records

The QBCC is aware of challenges with computerised accounting platforms being unable to keep trust records to the requirements of the legislation. With this in mind, the QBCC will exercise discretion when responding to breaches of trust record keeping requirements that occur because of software inadequacies. In these cases, the QBCC may choose to take no action or an educative approach where the obligated party has demonstrably taken all the steps they could have taken to keep accurate, auditable trust records that allow effective administration of the account.

Possible responses

If the QBCC determines that compliance action is warranted, it will take a proportionate response that it expects is likely to bring the non-compliant party into compliance and serve as a deterrent against future breaches. The table below sets out some common responses to non-compliance and the circumstances when they would be used.

It should be noted that the circumstances detailed for each regulatory response are included for guidance only and are not intended to be applied inflexibly. Not all the factors listed in the 'Circumstances' column are required to be present to indicate that the corresponding response is appropriate. Regulatory responses are determined on a case-by-case basis.

RESPONSE	CIRCUMSTANCES
Education/informal warning	1. Unintentional conduct 2. Minor breach; no loss to others 3. First offence; breach already remedied or easily remedied 4. Systems adequate or implemented to best ability having regard to offender's circumstances
Reprimand (for QBCC licensees only)	1. Careless/negligent conduct 2. Minor to moderate breach; limited impact on others 3. Previous warnings; breach already remedied or easily remedied 4. Systems adequate or implemented to best ability having regard to offender's circumstances
Penalty infringement notice	1. Careless/negligent/willful conduct 2. Minor to moderate breach; minor impact on others 3. Previous warning/s 4. Systems may be deficient
Imposing a penalty (for QBCC licensees only)	1. Willful or negligent conduct 2. Moderate breach; loss to affected parties 3. Repeated non-compliance 4. Systems deficient
Imposed condition (for QBCC licensees only)	1. Willful or negligent conduct 2. Moderate breach; loss to affected parties 3. Repeated non-compliance; breaches likely to be remedied with QBCC oversight 4. Systems deficient
Licence suspension (for QBCC licensees only)	1. Willful or negligent conduct 2. Significant non-compliance causing loss to subcontractors 3. Further non-compliance and ongoing loss to subcontractors likely 4. Systems deficient
Licence cancellation (for QBCC licensees only)	1. Willful or negligent conduct 2. Significant non-compliance causing loss to subcontractors 3. Failure to rectify breach/es following suspension; further non-compliance and ongoing loss to subcontractors likely 4. Systems deficient or absent
Prosecution	1. Willful conduct 2. Significant non-compliance causing substantial loss to subcontractors 3. Previous breaches 4. Systems deficient or absent

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