

Avoiding Insolvency in the Queensland Building and Construction Industry

A guide for:

ACCOUNTANTS
LAWYERS
SUBCONTRACTORS
BUILDERS
DEVELOPERS

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Avoiding Insolvency in the Queensland Building and Construction Industry

1. PROBLEMS IN THE CONSTRUCTION INDUSTRY IN QUEENSLAND

A downturn in the construction industry, particularly in high-rise apartment projects, has put extra strain on the building industry this year (2017). It seems that you can't pick up a local newspaper these days without reading about another company in the building industry in Queensland going bust. This has resulted in hundreds of millions of dollars of debts being written off as a result of building company failures this year alone. Because of these problems anyone involved in the building industry needs to be more focussed than ever on their business.

We have had plenty of experience with financially distressed subcontractors, builders and developers and prefer to see positive outcomes for everyone, rather than another company going into liquidation. That's why we've put together this publication to provide an overview of what happens in a building company insolvency and more importantly, how you can avoid it happening in your business.

If you would like to discuss any issues regarding the information contained in this publication, or your business in general, please don't hesitate to contact us for an initial free consultation.





2. WHAT HAPPENS IN A BUILDING COMPANY INSOLVENCY

Trying to deal with the insolvency of a company involved in the building industry is never easy. The fallout hits other people and businesses, with effects ranging from mere inconvenience, to business interruption and potentially even further insolvencies.

The more you know about the insolvency process, the better you can navigate it. The following is what commonly happens if a Liquidator or Administrator is appointed to a company involved in the building industry:

- The Liquidator or Administrator takes control of the company.
- If the company has a Queensland Building and Construction Commission ("QBCC") licence, the licence is nearly always cancelled immediately.
- Most, if not all, of the company's employees will be immediately terminated.
- The insolvency appointment is often an event of default under contracts, such as a contract between a builder and a developer.
- Secured creditors will often repossess assets which they have financed such as equipment and motor vehicles.
- A secured creditor with security over the company's assets, may appoint a Receiver. The Receiver will then most likely take control of the company or particular assets.

What are the typical problems for a Liquidator or Voluntary Administrator?

It is often difficult for a Liquidator or Administrator to recover funds for the benefit of ordinary unsecured creditors, including suppliers and subcontractors, as:

- There are often no funds left after paying debts to secured creditors and employee entitlements.
- A company with a building licence will generally not be able to complete projects which it is carrying out, primarily because:
 - Its QBCC licence will be cancelled and it must cease carrying out building works immediately.
 - It is in breach of contract due to the insolvency appointment which will commonly result in principals or developers terminating contracts with the company. Principals or developers will then hire third parties to finish incomplete projects, which will generally be costly.
- Principals or developers are entitled to set-off claims for completing outstanding work, over and above remaining amounts payable under contracts with the company, against debts which they owe. They are also entitled to set-off claims for rectifying defects. This often results in the amounts of debts owed to the company being significantly reduced, or not being recoverable at all.
- Principals or developers will also more than likely be able to claim liquidated damages if projects are not finished on time. They can also set-off any such claim against debts which are owed to the company, thus reducing any amount recoverable by a Liquidator or Administrator.
- Subcontractors often claim subcontractors' charges, which give them a "security" over debts owed by principals or developers to a builder in liquidation or voluntary administration. If these subcontractors' charge claims are valid, then subcontractors get paid directly from any debts owed to the builder in liquidation or voluntary administration. This means that the builder will not receive these funds.
- If a Liquidator or Administrator is appointed to a developer then commonly a Receiver will be appointed by a bank with security.
- It is difficult for an insolvency practitioner to realise a developer's assets (most commonly properties which have or are being developed) for the price which may have been achievable by the developer, generally because properties will be incomplete and/or will often be required to be sold quickly.
- If there are funds recovered by a Liquidator or Administrator, then their costs are payable in priority to any amounts owed to unsecured creditors. An insolvency practitioner's costs can be significant in these types of matters, given the issues which are commonly encountered.
- If there are any funds available after paying an insolvency practitioner's costs, then unpaid employee entitlements are paid from these funds in priority to amounts owed to ordinary unsecured creditors. There can often be significant amounts owed to employees especially if they are owed pay in lieu of notice, redundancy pay and long service leave.

Unfortunately for ordinary unsecured creditors, this means that if a company involved in the building industry goes into liquidation or voluntary administration, they can often expect a limited return at best.

What are the risks for directors?

When a company involved in the building industry collapses, the directors often become insolvent and are often made bankrupt. There are five main reasons for this:

- The directors have often personally guaranteed the company's bank debts and any finance agreements. It is very common for banks and financiers to suffer shortfalls on debts owed by the company and then to try to recover shortfalls from the directors.
- The directors commonly have signed personal guarantees for a number of trade creditors, meaning the directors are personally liable for these debts if they are not paid.
- Guarantees signed for creditors often contain charging clauses. This means the creditor can lodge a form of security over any real property directors own. As a result, the creditor will be paid in priority from any such property's sale, after prior ranking secured debts are paid.
- A Liquidator may pursue certain claims against the directors. For example, they might pursue claims against the directors for insolvent trading or breaches of their duties.
- The director may be liable for certain amounts as a result of QBCC licencing issues, such as claims as a result of a QBCC Deed of Covenant and Assurance or the QBCC's home owner warranty scheme, as further explained in Section 6.

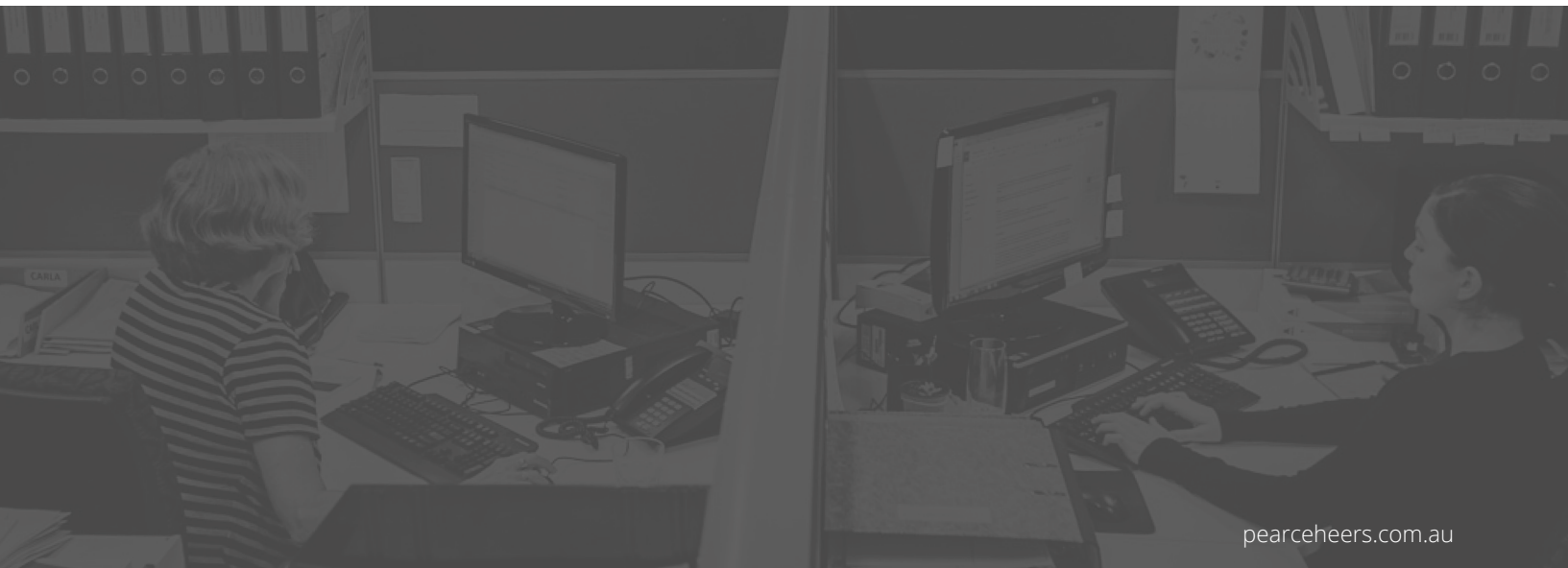
3. ADVICE FOR SUBCONTRACTORS

If a building company goes into liquidation or voluntary administration it is likely that subcontractors who are owed money by the company will not be paid, or if they are paid they will only receive a small return. As a result of this many of these subcontractors will themselves face financial difficulties from which they may not recover.

There are some things subcontractors can do to avoid or minimise the financial impact of a builder going broke.

Before starting work

- **TRADE ON YOUR OWN TERMS.** This might include seeking an up-front payment, cash on delivery or a mix of a deposit and payments on delivery, partial progress and on completion.
- **HAVE A SOLICITOR REVIEW CONTRACTS,** especially if they involve significant amounts of money.
- **DO A QBCC LICENCE SEARCH ON A BUILDER.** The QBCC's licence history for a builder can include details of whether the builder has ever had their licence suspended, been directed to rectify work or received any demerit points for judgments obtained and not paid.
- **DO A TRADE CREDIT CHECK ON A BUILDER.** Credit reporting agencies can provide the credit history of a company and its directors that includes details of past related corporate failures and any currently known credit defaults or judgments entered.
- **MAKE SURE YOU HAVE PROFESSIONALLY PREPARED TRADE CREDIT AGREEMENTS** that include:
 - personal guarantees, which contain a charging clause making the subcontractor a secured creditor of the guarantor.
 - retention of title clauses for any materials supplied. A security interest should also be registered on the Personal Property Securities Register.
- **TALK TO OTHER SUBCONTRACTORS.** If you have any concerns about a potential client, talk to or try to get credit references from other subcontractors who have also done work for that client.
- **CONSIDER THE RISKS OF TAKING ON BIG PROJECTS.** The larger the project, the larger the risk to your cash flow if payment isn't received.
- **OBTAIN TRADE CREDIT INSURANCE FOR LARGER CLIENTS.** While there's obviously a premium to pay for trade credit insurance, it may be worth the cost if it means a claim can be made to recover some amount from a bad debt.



Once the work is underway

- **GET WRITTEN CONFIRMATION OF VARIATIONS.** Building companies in financial difficulty often stop paying poorly documented variation claims to improve their cash flow. You should have a formal variation approval system that includes getting appropriate documentation signed off by the client before you start work on any variations.
- **CONSIDER STOPPING WORK** (or refusing to carry out further work) if payment isn't made. You should also think twice about agreeing to take on new work for a client when they have outstanding overdue invoices payable. Contractual obligations should always be considered before stopping work, as it may constitute a breach of contract.

When the work is complete

- **INVOICE FOR WORK AS SOON AS IT HAS BEEN COMPLETED.** This includes invoicing promptly for any progress claims that may be payable under a contract.
- **ENSURE CLAIMS AND PAYMENTS ARE PROPERLY MADE** under the Building and Construction Industry Payments Act 2004 (BCIPA). Issuing a claim or invoice as a BCIPA payment claim allows you to access the BCIPA process if any disputes arise.

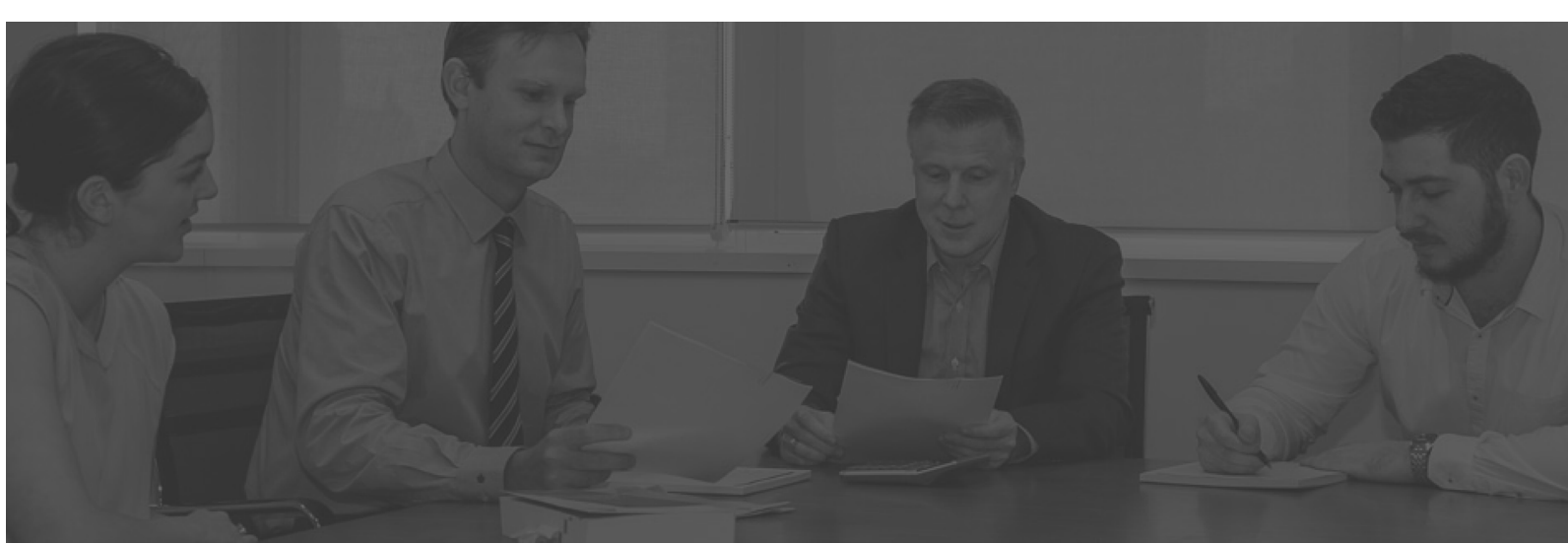
If payment isn't made

- **FOLLOW UP PAYMENT ON THE DUE DATE.**
- **SEEK ADJUDICATION UNDER THE BCIPA PROCESS.** An adjudicator confirming a debt is owed is similar to obtaining a judgment against the debtor. It may be prudent to obtain legal advice on this process, as certain timeframes and statutory steps need to be observed.
- **NOTIFY THE QBCC OF UNPAID DEBTS.** If the QBCC receives a complaint from a subcontractor that they haven't been paid, the QBCC will request a builder to show cause for the non-payment. This may well result in you being paid. However, it could also lead to the builder's licence being suspended, forcing them to cease all work and possibly enter liquidation.
- **ISSUE A SUBCONTRACTORS' CHARGE.** A subcontractors' charge secures your debt over any money owed by the principal/developer to the builder. This gives you a means of getting paid directly without having to rely on, or wait for, payment from the builder. You should engage a specialist building and construction solicitor to prepare a subcontractors' charge and take any necessary recovery action as these charges have various requirements and timeframes.
- **ISSUE A STATUTORY DEMAND.** If there's no genuine dispute about a debt, you can instruct solicitors to issue a Statutory Demand rather than filing court proceedings to seek a judgment. This gives a builder 21 days to pay the debt, after which you can make an application to Court to place the builder in liquidation.

- **START LEGAL PROCEEDINGS** to obtain a judgment. If a debt is disputed (or if solicitors suggest it) you can start legal proceedings to obtain a judgment, which may result in the debt owed being paid.
- **DON'T DO FURTHER WORK ON THE PROMISE OF BEING PAID** for earlier work. You need to be careful if you're asked to perform more work when invoices for earlier work still haven't been paid. If a builder wants you back on site to carry out further work, they should pay for the work that has already been completed.

If the builder enters liquidation or administration

- **EXERCISE ALL RIGHTS UNDER CREDIT TERMS.** This may involve collecting materials supplied under retention of title terms, pursuing personal guarantees and lodging caveats over any guarantors' properties.
- **ISSUE A SUBCONTRACTORS' CHARGE.** Subcontractors' charges can still be claimed if a builder has entered administration or liquidation.
- **BE CAREFUL ABOUT LODGING A PROOF OF DEBT** if claiming a subcontractors' charge. Claiming a subcontractors charge may make you a "secured creditor" and if you lodge a Proof of Debt and/or vote at a meeting of creditors you could surrender your security and become an "unsecured creditor". Subcontractors claiming a subcontractors' charge should obtain legal advice on this issue.
- **SEEK PAYMENT FROM THE PRINCIPAL OR DEVELOPER.** It may be possible for you to have your outstanding debt paid by the principal or developer. For example, they may pay some of your historical costs for you to come back on site to complete work that has already been started and/or provide release certificates or certifications of work performed.
- **PURSUE CLAIMS FOR INSOLVENT TRADING.** If the Liquidator doesn't pursue a claim for insolvent trading against the director, a subcontractor (or perhaps a number of them) can pursue the claim themselves. The subcontractor(s) need to obtain the consent of the Liquidator in writing or leave of the Court before starting recovery action.
- **BE AWARE OF UNFAIR PREFERENCE CLAIMS** from a Liquidator. If a company makes a payment to a creditor in the six months before the relation back day for a liquidation, this payment may be an unfair preference and recoverable by a Liquidator. A possible defence to an unfair preference claim is that the recipient of the payment did not have reasonable grounds to suspect the payer was insolvent when the payment was made. However, the following actions taken by a subcontractor may result in the subcontractor being unable to rely on this defence:
 - corresponding with the debtor about their failure (or inability) to pay.
 - entering into a payment arrangement, especially if multiple payment arrangements are entered into or payment arrangements have been breached.
 - stopping work and walking off the site.
 - issuing a statutory demand or commencing legal proceedings.



4. ADVICE FOR BUILDERS

Builders have the most stakeholders to deal with on any given project including managing the principal and their bank, as well as all of the subcontractors and suppliers. There's no doubt that dealing with these parties and managing all other aspects of a building project are incredibly difficult and there can be genuine reasons for a builder to go into liquidation or administration.

While we acknowledge the challenges that builders face, some builders can be their own worst enemies. We have seen some builders ignore the warning signs and take desperate steps that only worsen the position for these stakeholders.

This is precisely the type of situation we aim to help builders avoid.

Avoiding builder insolvency: What to do?

Even when things are going well there are some fundamental business practices builders should ensure they have in place to improve their chances, so that if times get tough, they are better prepared. The most important practices every builder should have are:

- **KEEP RECORDS UP-TO-DATE AND MANAGE CASH FLOW** with three to six month rolling forecasts. Funding gaps can then be anticipated early to avoid problems.
- **FIND SPECIALIST ACCOUNTANTS AND SOLICITORS THAT KNOW THE BUILDING GAME.** These advisors will have clients at all levels in the industry and can offer extra insight and perspectives you might not otherwise have.
- **UNDERSTAND THE QBCC'S MINIMUM FINANCIAL REQUIREMENTS (MFR)** ahead of time and monitor your company's net tangible assets balance.
- **ENSURE THE CORRECT CLASS OF QBCC LICENCE IS HELD** and turnover is within the QBCC's allowable turnover limit. Falling foul of these conditions may prevent you from using BCIPA to make a claim and can disallow an entitlement to any profit.
- **ENSURE JOB COSTINGS ARE PROPERLY INFORMED,** leaving minimal margin for error. Developers are negotiating

contract specifications harder up-front to protect themselves from builders who try to make their profit in a wave of variations at completion.

- **ENSURE THAT THE MARGIN IN QUOTES IS SUFFICIENT.** A race to the bottom will benefit no one and you may end up paying, rather than being paid, to go to work.
- **DON'T GROW AT THE EXPENSE OF PROFITABILITY.** Although, in theory, smaller margins on a higher turnover is better, it also leads to larger problems if disputes arise, projects run into problems or principals can't pay.
- **ENSURE THERE ARE CAPABILITIES AND SYSTEMS IN PLACE TO MATCH THE PROJECTS BEING TAKEN ON.** Larger projects have more complex contracts, negotiations and responsibilities. Larger developers may take advantage of smaller builders who aren't as adept at managing big projects. If problems arise, complete chaos can ensue and the project can become a massive headache and loss-maker.
- **DECIDE HOW MUCH TO COMMIT TO A SINGLE PROJECT.** If disputes or problems arise leading to non-payment, that one big project which was going to make you a healthy profit, could sink your business.
- **HAVE ANY VARIATIONS OR EXTENSION OF TIME (EOT) FACTORS CONFIRMED IN WRITING** at the relevant times. Failing to do so can mean not getting paid for variations or being hit with liquidated damages claims if practical completion is not reached on time.
- **ENSURE CLAIMS ARE ISSUED AS BCIPA CLAIMS** and take advantage of the process to fast-track recovery of debts where money is owed to you. Where a principal isn't assessing, or is unreasonably not approving EOTs, and those matters result in costs for you, you should consider running matters to BCIPA adjudication to have the EOT question determined. This will (hopefully) help avoid liquidated damages down the line.
- **CONSIDER SURETY BONDS** as an alternative to cash bonds or bank guarantees. Although, like bank guarantees they have a cost, the benefit to a business of having that final 5% of cash in hand can make a huge difference to cashflow and help with MFR requirements.
- **HAVE A CONSTRUCTION LAWYER LOOK OVER PROJECT CONTRACTS** to make sure specific clauses are understood and where possible protection can be afforded for work you are carrying out.

- **DO DUE DILIGENCE ON DEVELOPERS AND ALSO SUBCONTRACTORS BEFORE COMMENCING A PROJECT.** Consider whether they've been exposed to another builder insolvency, whether their debts are insured and gather evidence that proves they have sufficient finance to pay during the project, as well as at completion.
- **ENSURE SUBCONTRACTORS COMPLETE WORK BEFORE LEAVING SITE AND/OR BEING PAID.**
- **KEEP A CLOSE EYE ON YOUR PROJECT MANAGERS.** Often building company directors focus on winning work and lose sight of snowballing problems on existing projects which aren't escalated to management.
- If cashflow permits, **CONSIDER BRINGING FORWARD PAYMENT TIMEFRAMES FOR SUBCONTRACTORS** to ensure your projects get priority and they stay on site to complete their work.

If there is trouble meeting payments

There are cases where even businesses that have set up all the safeguards against insolvency have trouble making the necessary payments. If this arises, consider the following:

- **CUT COSTS EARLY WHERE POSSIBLE.** Make decisions quickly to maximise the prospect of a business surviving.
- **ENGAGE A PROFESSIONAL ADVISER:** a lawyer, accountant and/or insolvency or turnaround professional can help consider and decide on the right approach to deal with financial difficulties.
- **START PUTTING A PLAN IN PLACE** as soon as you encounter issues with paying suppliers within usual terms. Options include:
 - In the early stages you may be able to negotiate payment plans with the ATO and suppliers.
 - Talk to stakeholders, although it's tough to admit problems, banks, principals and subcontractors will generally support a plan with good prospects of better outcomes for them.
 - If things are more serious, structured workouts can be achieved and there are a number of recent examples including the use of project bank accounts.
- In the event of a crisis, further finance may be unavailable and the best course may be for the orderly handover of one or more projects for developers to complete or by novating your contracts to other builders. Minimising developers' liquidated damages and set-off claims, and other creditors' claims, will allow better prospects of avoiding builder insolvency and/or personal bankruptcy, potentially saving your QBCC licence.
- **START TALKING TO THE QBCC EARLY.** The QBCC may be willing to work with proactive builders to try to achieve better outcomes for stakeholders. This should be done in conjunction with qualified advisors who have been engaged.

What NOT to do

These are the steps builders should not take when financial problems arise:

- **SIGNING STATUTORY DECLARATIONS FALSELY** stating that subcontractors and suppliers have been paid to secure further payments.
- **OVER-CLAIMING ON PAYMENT CLAIMS** because of a desperation for cash.
- **CONTINUING TO TRADE WHILST INSOLVENT**, just hoping to get through; insolvent trading is an offence and it can result in a fine or other penalties being levied against a director and/or the director being personally liable for debts incurred.
- **UNDERCUTTING AND SQUEEZING MARGINS TO WIN WORK.**
- **PUSHING OUT SUBCONTRACTOR OR ATO PAYMENTS**, effectively using them to finance a business.
- **PROMISING PAYMENTS TO SUBCONTRACTORS IN ORDER TO GET THEM TO DO MORE WORK** which they may not be paid for. Incurring further debts with little or no ability to pay them is the wrong thing to do.
- **CONSIDERING AN ILLEGAL PHOENIX ARRANGEMENT** to trade through another entity at the expense of the company which is insolvent and will go into liquidation in the future.

" We often see these activities when a builder is really struggling. If you have found yourself doing any of the above, they are immediate "red flags" indicating that you should be seeking urgent professional advice.

5. ADVICE FOR DEVELOPERS

With the current problems facing the building industry in Queensland developers face various project management issues such as:

- a builder or head contractor staying solvent until a project's completion;
- significant decreases in the value of properties being sold (particularly apartments) at practical completion;
- whether buyers can settle and the problems caused by contracts falling over; and
- the developer's bank's willingness to continue to support a project.

So what can developers do to avoid or minimise risks?

The preliminary stages of a project

- **PERFORM DUE DILIGENCE**, feasibility and viability studies properly. Cutting corners prior to commencing a project can have massive effects down the track.
- **GET FINANCES LOCKED IN EARLY FOR THE WHOLE PROJECT**. If you're struggling to secure finance down the track to complete a project, you may have to turn to financiers that charge higher interest rates. This will not only increase your overall costs, but could also lead to a cost blowout if you're unexpectedly delayed.
- **BE DILIGENT WITH RECORDKEEPING**. For developers who are always looking at 'the big picture', recordkeeping is often just an afterthought. But having a bookkeeper or accountant managing your numbers will:
 - help you make informed decisions;
 - allow for more accurate cash flow forecasting; and
 - help you monitor the ongoing viability of your project.
- **DON'T LET A LACK OF CASH FLOW SINK THE PROJECT**. Ensure you have a realistic cash flow forecast that helps you identify cash shortages early.
- **HAVE BACKUP FINANCIAL RESOURCES AVAILABLE** if possible. This may help if problems are encountered with a financier or if there are unforeseen costs or delays with a project.

If you are worried about cash flow

- **KEEP YOUR ATO AND OTHER STATUTORY PAPERWORK UP TO DATE** so you can claim your GST credits and satisfy any ATO queries.
- **LOOK AT SELLING YOUR SURPLUS LAND BANK AHEAD OF TIME** so you have funds available for existing projects if needed.
- **IF YOU'RE STRUGGLING TO PAY YOUR BUILDER** enter into a payment arrangement so they can be paid as "stock" is sold.

- **TALK TO YOUR BANK ABOUT RELEASING FUNDS FROM PROPERTY SALES** rather than the bank taking all net proceeds. This might involve providing the bank with a summary of outstanding costs on a project along with details of projected future property settlements / sales.

If you're worried about your builder

- **DO DUE DILIGENCE ON YOUR BUILDER**. There have been instances of builders underbidding to win work, often to drive rapid growth. The lower contract price may then be recouped from the developer through a "death by variations". The best decision might not be getting the builder with the cheapest tender price, but getting the builder for the cheapest price who can do the job for that price.
- **GET YOUR CONTRACT RIGHT FROM THE OUTSET**, in particular ensuring it addresses:
 - Payment pre-conditions and payment suspension rights (though these won't work against BCIPA claims);
 - Rights to take over the works if progress is delayed or to directly pay subcontractors (and set-off those payments against any money owed to the builder);
 - What security you're taking for performance of the works (cash retentions, surety bonds or bank guarantees);
 - Making sure your rights of set-off are broad and allow estimated costs to be set-off (not just costs which have been incurred); and
 - With reference to the PPSA, your right to use and hold a subcontractor's equipment and/or materials after an insolvency event (particularly if that piece of equipment is key to completing the works).
- **ASK YOUR BUILDER FOR FORTNIGHTLY OR MONTHLY FINANCIAL REPORTING** including management accounts, aged receivables, aged payables and bank balances (and include this in the contract if needs be).
- **MONITOR YOUR PROJECT FOR "RED FLAGS"** including slowdown in progress of the works, requests for upfront payments and plant and personnel not attending site (or leaving unexpectedly).
- **TALK TO SUBCONTRACTORS** to see if there are any payment issues with the builder.
- **IF YOU HAVE ANY CONCERNS ABOUT YOUR BUILDER'S SOLVENCY**, raise these with the builder and consider whether you can support them through their difficulties (ideally with the assistance of a turnaround or insolvency professional) or alternatively if subcontractors need to be engaged directly
- **IF YOU FEAR THE WORST**, start talking to potential replacement builders early to minimise the impact of the builder's insolvency on your project.
- **ENSURE CLAIM CERTIFIERS CAREFULLY INSPECT ALL COMPLETED WORKS** and notify you of any issues in the quality of the work being performed.

If things go bad with your builder

You need to be proactive if things go bad and here are some suggestions of what to do if this happens:

- **IF YOUR BUILDER HAS BREACHED YOUR CONTRACT** obtain legal advice as to what your best and most appropriate course of action is. Ensuring your ability to deduct the costs of having others complete the works can be critical to minimising your exposure to a failing builder.
- **BE WAR OF THE BUILDER LODGING CAVEATS** over the remaining properties in your development regarding progress claims, a right that stems from equitable charging clauses in building contracts.
- **BE PREPARED FOR SUBCONTRACTORS' CHARGES** which will be issued by unpaid subcontractors.
- **BE READY FOR POTENTIAL BODY CORPORATE CLAIMS TO BE MADE** against you and the builder if subsequent defects arise. Check with your insurance broker that your policies cover the various issues which may arise from a builder going under.

If you have problems with your bank or financier

Since the end of the GFC, banks have become more willing to work with all types of borrowers, but they are particularly prepared to work with property developers in the right circumstances. One of the major reasons for this is the losses which were suffered by banks resulting from making a number of receivership appointments to developers, with the Receivers then having difficulty completing projects and/or selling remaining property "stock". So what can and should you do:

- **TALK TO YOUR BANK AND KEEP THEM INFORMED OF DEVELOPMENTS.** Banks hate being kept in the dark and they hate surprises. They are however more likely to work with you to come up with a solution to financial problems if you are up front and honest with them.
- **ENGAGE A PROFESSIONAL ADVISER:** a lawyer, accountant and/or insolvency or turnaround professional will be best placed to help you communicate with and if required negotiate with a bank.
- **COME UP WITH A PROPOSAL THAT WILL BENEFIT THE BANK.** Even if the bank is not going to be paid in full a proposal can still be put to them which will see them receive more than if they arrange a formal insolvency appointment. Such a proposal may include an orderly sale of the company's assets with the directors undertaking to achieve the best possible sale prices, but consulting with the bank regarding contracts being entered into as needs be.
- **TRY TO SETTLE ANY PERSONAL LIABILITY WHICH MAY FLOW TO THE DIRECTORS.** Banks are open to acting commercially to settle claims against guarantors for any shortfalls which may be suffered on loans owed by property developers. Settlements can even be entered into prior to all properties which a developer owns being sold. A lawyer or an insolvency professional is the best placed person to negotiate a settlement with a bank on your behalf.

6. QBCC LICENSING ISSUES

QBCC licensing and other regulations have a major effect on a company involved in the building industry which is in financial difficulty.

Things like non-payment of subcontractors, a judgment being obtained against a company or the failure to meet net tangible asset requirements will result in licensing issues including possible suspension or loss of a company's QBCC licence. Additionally, the liquidation or voluntary administration of a company will almost always result in the company's QBCC licence being cancelled. As most involved in the building industry would know, the loss or suspension of a company's QBCC licence generally prevents any further trading including even carrying out minor works like rectifying defects.

In addition to licensing issues there are further potential pitfalls for companies involved in the building industry and their directors. So what are some of these specific issues and problems which may arise for an insolvent building company.

Companies with a QBCC licence

A company will almost always lose its QBCC licence when a Liquidator or Administrator is appointed. Additionally, the company's directors and any influential persons in respect of the company will become excluded individuals. A person who is an excluded individual will lose their building licences for three years (for a first event of insolvency) and they won't be able to act as a director, shareholder or take a role at senior management level in a private building company during this period.

A person who is involved in two unrelated insolvency events will become an excluded individual for life.

There used to be a right of appeal if the QBCC determined a person was an excluded individual, however, this right of appeal no longer exists other than if the QBCC exclude someone on the basis that they are an influential person.

The QBCC can also exclude an influential person from being involved in the building industry. The QBCC defines an influential person to be an individual, other than a director or secretary of the company, who is in a position to control or substantially influence the conduct of the company's affairs, including, for example, a shareholder with a significant shareholding, a financier or a senior employee.

The definition of influential person includes senior employees and shareholders of companies and people with the ability to control or influence the company's affairs (commonly shadow or defacto directors of companies). However, who the QBCC deems to be an influential person is really up to it and we have seen the QBCC assert that directors of corporate shareholders are influential persons and subsequently exclude those persons from being substantially involved with a private building company.

If the QBCC deems that someone is an influential person, the QBCC will give notice of their decision and the decision can be appealed within required timeframes to the Queensland Civil and Administrative Tribunal (QCAT) within 28 days of the decision being made. An appeal may also be made to the QBCC directly, however, if such an appeal is made and is unsuccessful then the timeframe to appeal to QCAT may have already expired. As such anyone considering an appeal of such a decision by the QBCC should obtain proper legal advice about their options.

Companies carrying out residential building work

If a builder is a principal contractor, and carrying out residential building work then the builder will also likely be covered by the QBCC homeowners warranty scheme. Residential building work includes construction of new dwellings to three stories and certain renovations. If the builder is covered by the homeowners warranty scheme then subject to various conditions, the QBCC provides insurance for homeowners for six and a half years after building work has been completed.

If a builder fails to complete residential building work being carried out or rectify any defects after being asked to do so by the property owner the QBCC will pay the costs of doing this (up to certain limits) and it can recover these costs from the builder which did the work.

If the builder which did the work was a company then the QBCC can recover its costs from both the company and the company's directors. This extends to directors of the company at the time it did the work and also at the time when the QBCC commences recovery procedures.

A significant risk for directors under this "scheme" is that if a company is in liquidation or has been deregistered then it is likely that its directors will not receive any notification to rectify defects or complete incomplete works and the QBCC will then just cover the costs of doing this and then pursue the directors personally for these costs.

QBCC Deeds of Covenant and Assurance

A licenced building company which doesn't have sufficient net tangible assets to meet the level of maximum revenue (which the QBCC determines for a licence each year) may rely on a Deed of Covenant and Assurance ("Deed"). A Deed is commonly signed and provided by a company's directors, but it can also be provided by associated companies in the building industry.

Under the terms of a Deed the directors provide a guarantee to the company, which the company can rely upon to meet the net tangible asset requirements of the QBCC licensing provisions.

The amount of the guarantee provided under a Deed is dependent on a company's financial position and available net tangible assets. The amount of the guarantee may change each financial year and it is determined by the information recorded in an Independent Review Report or

Audit Report prepared for the company, most commonly by the company's accountant.

If the company's directors fail to execute a Deed, when requested by the QBCC, the QBCC will refuse to license the company.

The risk for a company's directors who have executed a Deed is that if a company is placed in liquidation, the directors are required to pay the amount of any guarantee which they have given under the Deed to the company, upon a demand being made for payment of this amount by the company's Liquidator. The QBCC will provide copies of all Deeds which have been executed and any associated documentation, to the company's Liquidator within a short period of the commencement of the liquidation without the Liquidator having to request these documents.

The property of a director who has executed a Deed is charged to secure payment of the guarantee which has been given under the Deed. The result of this security is that (among other matters), a Liquidator of a company may be entitled to lodge a caveat over real property owned by the director and if the amount payable under the Deed is not paid apply to Court for an Order that the property subject to the caveat be sold.

Importantly for company directors, a Deed can only be revoked in writing by the QBCC. Accordingly, company directors, and their advisors, should be diligent to ensure that the QBCC properly revokes any Deed, in circumstances where the Deed is no longer required to be relied upon.

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