

## EXPLANATORY MEMORANDUM

### ***BUILDING AND CONSTRUCTION INDUSTRY TRAINING FUND AND LEVY COLLECTION AMENDMENT BILL 2009***

#### **Background and purpose**

- The BCITF levy has been collected on construction projects since 1991. During that time the levy has been calculated as a percentage of the total project value and is currently 0.2%.
- A recent dispute with a project owner which constructed a power station at Kwinana has raised some doubt about the validity of the BCITF regulations which determine how the levy is calculated.
- Previous and current legal advice from the state solicitor's office together with opinions from Wayne Martin QC confirmed the validity of the regulations.
- The state solicitor's office is still of the view that regulation 6 is valid however has recommended amending legislation to remove any doubt at all. The proposed Bill addresses this uncertainty.

#### **Regulation 6 Building and Construction Industry Training Fund and Levy Collection Regulations 1991**

Regulation 6 defines how the value of construction work is valued as follows:

- a) Where the construction work is carried out under a contract the estimated value is the contract price including GST where the price includes value for at least each of the components referred to in paragraph (b).
- b) Where the construction work is carried out other than under a contract or under a contract the contract price including GST for which does not include value for each of the following components; the estimated value of the construction work shall be the sum of the value including GST of all goods (including manufactured goods) forming part of the construction work; labour, services necessary, fees payable, overheads to be met and profit margins.

The words including manufactured goods are interpreted to mean all goods forming part of the construction or installed during the course of the construction project.

The Building and Construction Industry Training Fund and Levy Collection Amendment Bill 2008 proposes to address the uncertainty by

- a) Validating all previous collections.
- b) Placing the provisions currently in Regulation 6 directly into the Act itself.

## **Part 1 of the Bill**

This Part contains the formal provisions of the Bill.

### **Clause 1**

Citation - formal clause.

### **Clause 2**

Commencement – This is the normal clause for the commencement of the provisions of this Bill. Note the provisions of clause 4 of the Bill which inserts new sections 21(4) and (5) which gives Bill retrospective effect.

## **Part 2 of the Bill**

The provisions of this Part amend the *Building and Construction Industry Training Fund and Levy Collection Act 1990*.

### **Clause 3**

Formal clause – this clause cites the *Building and Construction Industry Training Fund and Levy Collection Act 1990* as the act being amended by this Part.

### **Clause 4**

Subclause (1) of this clause amends section 21(1)(a) and (b) to remove the words “as prescribed” which enable regulations to be made for the basis for calculating the value of construction work. The basis for the valuation of “construction work” is now set out in new Schedule 2 now being brought in by this subclause and inserted into the principal Act by clause 5.

The legal advice given in relation to the legal proceedings commenced to recover levy in a recent case is to the effect that these regulations are *ultra vires* because it is argued that the principal Act defines the term “construction work” in terms of the “labour” element in the work and not the items mentioned in regulation 6. Regulation 6 currently includes all the components that go into a construction work eg the items referred to in new Schedule 2. Establishing Schedule 2 in the Act ensures there can be no argument about the regulation being *ultra vires*.

Subclause (2) inserts new subsections (4) and (5) in section 21 of the principal Act. New subsection (4) is declaratory - it declares that regulation (6) of the *Building and Construction Industry Training Fund and Levy Collection*

*Regulations 1991* has always been valid and that doing the things specified in the new subsection has always been valid. This will remove retrospectively any doubt about past payments and collections of the levy.

#### **Clause 5**

This clause replaces Schedule 2 of the principal Act. The original Schedule 2 made consequential amendments to several other Acts such as the *Constitution Acts Amendment Act 1899*. These amendments have been incorporated into those other Acts and the Schedule is now “spent”. The estimation of value is now prescribed by the new Schedule 2 which in its terms reproduces the effect of the matter in regulation 6 which is now repealed by Clause 6.

#### **Part 3 of the Bill**

The purpose of this Part is to repeal regulation 6 of the *Building and Construction Industry Training Fund and Levy Collection Regulations 1991*.

#### **Clause 6**

Citation - this is a formal clause and cites the *Building and Construction Industry Training Fund and Levy Collection Regulations 1991* as the regulations that are being amended by this Part.

#### **Clause 7**

This clause repeals regulation 6 of those regulations. No amendment to the regulations will be necessary because this provision does the necessary consequential amendment.