# PROJECT BANK ACCOUNTS – WHAT DOES IT MEAN AND HOW WILL IT WORK?

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On 26 October 2017 the Queensland Parliament passed the Building Industry Fairness (Security of Payment) Act 2017 (Qld) ("**BIFA**"). It will commence on a date set by proclamation (which has not yet occurred).

In addition to various amendments to Queensland's security of payment legislation, the BIFA introduces project bank accounts ("**PBAs**").

The Queensland Government has indicated that PBAs will be required from 1 January 2018 for projects where the principal is the State of Queensland (or a State authority which elects to opt in), so long as at least 50% of the contract price relates to the performance of building work[1] and the contract price is more than $1 million but less than $10 million. The Government has indicated that PBAs will be rolled out more widely (i.e. for all building contracts with a contract price of more than $1 million) from 1 January 2019.

The introduction of PBAs has been contentious. They are intended to protect down the line subcontractors (inferior contractors) from the insolvency of up the line contractors (superior contractors). What remains to be seen is whether they will achieve that intent.

## THE PBA PROVISIONS

What are PBAs and how do they operate?

In a nutshell:

1. PBAs are trust accounts operated by the superior contractor as trustee. The superior contractor is also a beneficiary of the trust along with all inferior contractors.

2. For applicable contracts, superior contractors are required to open three bank accounts – a general trust account for the deposit of funds by the principal and for payments to inferior contractors ("**GTA**"), a retention account in which retention monies are to be held ("**RTA**") and a disputed funds account in which all disputed funds are to be held ("**DFTA**").

3. All payments made to contractors by the principal to the superior contractor and all payments made by the superior contractor to inferior contractors must be made through the PBAs.

4. No withdrawals can be made from PBAs except to satisfy:

   (a) A liability from the principal to the superior contractor (but only where the funds to be transferred do not relate to a sum the superior contractor is liable to pay to an inferior contractor);

[1] As it is defined in section 8 of the Amendment Act.

(b) A liability from the superior contractor to the principal; or

(c) A liability from the superior contractor to an inferior contractor.

5. A superior contractor is not entitled to withdraw from an RTA unless it is for the purpose of returning retention monies to an inferior contractor or to reimburse itself for the correction of defective work or otherwise secure performance of the subcontract.

6. Should there be a shortfall between the amount held in the PBAs and the amount that a superior contractor is required to pay inferior contractors, the superior contractor must cover the shortfall from its own funds. Conversely, a superior contractor is not allowed to withdraw from the PBAs to pay itself where the withdrawal would cause the balance of the PBAs to fall below the value of its liabilities to inferior contractors (including all retention amounts held).

7. Where a payment dispute arises,[2] the superior contractor must pay the disputed funds into the DFTA.[3]

8. Payments from the DFTA can be made to:

(a) An inferior contractor; or

(b) The superior contractor in accordance with the outcome of a dispute resolution process; or

(c) Another person in the circumstances prescribed by regulation.

9. Principals have various rights to information regarding payments made to and from PBAs. Further, the superior contractor must serve on the principal a copy of all payment instructions it gives to its financial institution in respect of payments made from PBAs.

10. Principals are obliged to inform the Commissioner of the Queensland Building and Construction Commission ("**QBCC**") of any discrepancies it identifies in the payment instructions given to it by a superior contractor. A failure to do so attracts a penalty of up to $12,615.

There are various penalties which apply should principals and superior contractors fail to comply with their obligations in respect of PBAs. The maximum penalties range from periods of imprisonment (1 or 2 years depending on the offence) and fines of $12,615 to $63,075.

## THE PROBLEMS?

While the legislation is relatively detailed, there are some gaps and inconsistencies which are likely to cause problems for the administration of PBAs, including:

1. **What is meant by and when payments are *"due"*?**

The provisions make reference to amounts to which various persons are *"entitled to be paid*", or are *"due to be paid*", and other amounts which a person is *"liable to pay*". These terms are not defined in BIFA and superior contractors and inferior contractors are likely to adopt different interpretations of what they mean.

Superior contractors may well take the view that only scheduled amounts are *"due"* to inferior contractors, whereas inferior contractors are likely to consider claimed amounts to be what is *"due"*. Superior contractors have the better argument, which runs contrary to the intention of the amendments and PBAs generally. The issue is amplified by the fact that differences between the claimed and scheduled amounts are not considered by BIFA to be disputed funds and therefore are not required to be deposited into the DFTA. Consequently, the differences between claimed and scheduled amounts will not be protected in the event of superior contractor insolvencies.

The nature of the provisions may act to encourage aggressive under certification by superior contractors so that superior contractors can ensure that they are able to pay themselves amounts from the GTA which are not considered to be *"due"* to an inferior contractor. Should aggressive under certification occur, we can expect inferior contractors to increasingly rely upon BICPA and contractually prescribed dispute resolution provisions, and in all likelihood, less money flowing down the chain from superior contractors to inferior contractors in circumstances where those funds are not required to be retained in the PBAs.

[2] Being where the contractor proposes to pay an inferior contractor an amount less than the amount certified in a payment schedule or otherwise fails to serve a payment schedule in response to an inferior contractor's payment claim.
[3] The amount to be transferred to the DFTA is the difference between the scheduled amount and the amount proposed to be paid by the contractor, or where there is no payment schedule, the difference between the claimed amount and any amount that the contractor proposes to pay.

Given the ambiguity surrounding "*entitled*", *"due"* and *"liable"*, the QBCC is likely to view under certification as an intentional contravention of the PBA requirements and may take a proactive approach towards enforcement. In enforcement proceedings under the new regime (and they will result) the meaning of "*entitled*", *"due"* and *"liable"* will take center stage. It will also be interesting to see what approach will be taken by the QBCC and the Courts to withdrawals made by superior contractors from PBAs for the purposes of paying themselves in circumstances where they held an honest and reasonable belief that there were no funds *"due"* to an inferior contractor but that belief is later found to be mistaken. Watch this space.

2. **Will PBAs restrict the usefulness of informal dispute resolution?**

While we will see an increase in disputes, it is unclear whether superior contractors and inferior contractors will retain the discretion to resolve disputes on their own without reference to formal dispute resolution processes (such as BCIPA adjudications). If a dispute arises and the funds relevant to the dispute are transferred to the DFTA, withdrawals from the DFTA can only be made as follows:

(a) To an inferior contractor at any time (whether by agreement between the parties or in accordance with the outcome of a dispute resolution process); or

(b) To the superior contractor in accordance with the outcome of a dispute resolution process (my emphasis); or

(c) To another person in the circumstances prescribed by regulation.

A dispute resolution process is said to be *"a process prescribed by regulation"*. No amended regulations have yet been enacted so we do not yet know what a dispute resolution process is. It may be that *"dispute resolution process"* will be defined as formal dispute resolution processes (such as arbitrations and BCIPA adjudications). If that is the case, payments from the DFTA to superior contractors will only be permissible to give effect to the outcome of formal dispute resolution process. This will severely restrict the usefulness of engaging in informal settlement conferences and the like.

3. **Will contractors have unfettered access to retention sums?**

There may also be significant dispute over funds held in RTAs and withdrawals from those accounts. Section 34 of BIFA allows superior contractors to withdraw from an RTA to make payment to itself *"of an amount to correct defects in the building work, or otherwise to secure, wholly or partly, the performance of the subcontract"*. What does *"to secure, wholly or partly, the performance of the subcontract"* mean?

On one interpretation, this entitles the superior contractor to deduct damages of all descriptions from the RTA as ultimately damages act to *"secure.. performance"* of a contract. In contrast, another interpretation of *"securing.. performance"* is that this only relates to what is necessary to secure performance of the contract going forwards, and is not designed to provide superior contractors with an ability to recover damages for purported past non-performance.

There is scope for significant argument as to what withdrawals are permissible, and when they are permissible, from the RTA.

## CONCLUSION

PBAs are intended to promote the flow of funds down the chain and protect inferior contractors against insolvencies up the line.

Will they achieve that end? Quite possibly not. Further, given the vague nature of the legislation, there will certainly be extensive litigation before its true meaning and effect is known.

Lastly, it is possible that the legislation will not survive a change in government if one occurs on 25 November 2017, so this may all become theoretical. However, if it does not, there is one certainty – PBAs will come at significant risk and cost to the industry.

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