



## JHK LEGAL

# *Project Bank Accounts to roll out across the country? WATCH THIS SPACE....*

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The prevalence of unethical behaviour and poor payment practices within the building and construction industry saw the Queensland Government recently announce new legislation, which among other reforms, included the introduction of Project Bank Accounts (“PBAs”). In October 2017, the PBA system was set up under the *Building Industry Fairness (Security of Payment) Act 2017* (“**the BIF Act**”) for State Government building and construction projects between \$1 million and \$10 million.



A PBA is a set of three bank accounts, which is created by a Head Contractor and operates as a trust account. It aims to provide security to subcontractors by ensuring they are paid on time and reliably. Furthermore, PBAs protect subcontractors’ retention and disputed monies.

### What does a PBA consist of?

There are four parties involved in a PBA, which are as follows:

1. The Principal being the party to a building contract for whose benefit building work is to be carried out under the contract.<sup>1</sup>

<sup>1</sup> Part 1, Section 8 of the *Building Industry Fairness (Security of Payment) Act 2017*.  
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2. Head Contractor being the party to a building contract who is required to carry out building work under the contract.<sup>2</sup> This can include principal consultants, building inspectors and architects.<sup>3</sup>
3. Subcontractor being the first-tier subcontractors who are subcontracted by the Head Contractor to carry out the work under the contract.<sup>4</sup>
4. Queensland Building and Construction Commission being the body which monitors whether the PBA is being complied with, and also acts as an investigative body whether discrepancies and payment concerns between a Principal or Subcontractor arise.

A PBA includes the following three accounts:

1. General Trust Account – this is for the management of progress payments. The Principal makes payments into this account that are owing to the Head Contractor, and the Head Contractor will then pay the Subcontractor from this account.
2. Retention Trust Account – this account holds the Subcontractor’s retention money. The retention money is held until the retentions are required to be returned to the Subcontractor, or used by the Head Contractor pursuant to the subcontract.
3. Disputed Funds Trust Account – this account is for any amounts that are in dispute, which are held on behalf of the Subcontractor. The account will hold any amount that is subject to particular disputes, until the point at which these disputes are resolved. The amount in this account is the difference between the amount that has been scheduled by the Head Contractor to be paid to a Subcontractor and the amount instructed to be paid to the Subcontractor by the payment instruction (i.e. invoice).

### **When and how to enter into a PBA**

Firstly, it is the Head Contractor’s role to decide whether or not a PBA is required under the building contract. The following link provides examples of when a PBA is required: <https://www.business.qld.gov.au/industries/building-property-development/building-construction/project-bank-accounts/when-pba-needed>.

In most circumstances, if there is a building contract in place, a Head Contractor will be required to set up a PBA where the contract involves “building work”. Building work is defined in the BIF Act and includes but is not limited to “*the erection or construction of a building*” and “*the renovation, alteration, extension, improvement or repair of a building*”.<sup>5</sup>

Before a subcontract is entered into between the Head Contractor and the Subcontractor, it is up to the Head Contractor to provide notice to the Subcontractor that a PBA will be used.

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<sup>2</sup> Ibid.

<sup>3</sup> Queensland Government, *Project Bank Accounts* <<https://www.business.qld.gov.au/industries/building-property-development/building-construction/project-bank-accounts/what-is-pba>>

<sup>5</sup> Part 1, Section 8 of the *Building Industry Fairness (Security of Payment) Act 2017*.  
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The Head Contractor must then provide the Principal with information such as the name of the Subcontractor (i.e. registered business name and/or trading name), the Subcontractor's financial institution and their bank account details. This information must be provided by the Head Contractor (in approved form) within 5 days of entering into the subcontract.

### **How do PBAs affect contractual rights?**

The answer is: they don't. PBAs will not alter any existing contractual rights and responsibilities of the contractors. This means that the contractual agreement between a Head Contractor and Subcontractor will not be affected. In addition to this, a PBA will not prevent a party from commencing legal proceedings if a dispute arises, and will not constrain parties from seeking or applying for adjudication.

### **Benefits of a PBA**

Considering that the main purpose of PBAs is to protect the interests of subcontractors, it goes without saying that it is the subcontractors who experience the greatest benefits from this type of payment mechanism.

If a Head Contractor is facing financial difficulties, a PBA will ensure that the Subcontractor is protected, particularly in the event of insolvency of the Head Contractor. This is because monies in a trust account can't be legally distributed to creditors in the event of insolvency.

A PBA will also ensure a faster payment process for all parties involved, and will ensure Principals and Head Contractors and being transparent and held accountable throughout the entirety of the payment process.

### **Watch this space...**

In NSW, the *Building and Construction Industry Security of Payment Act 1999* ("the **SOPA**") aims to reduce insolvency and unethical behaviour within the industry. Recently, the NSW Government has been looking at ways to amend the SOPA to mirror reforms recently made by the QLD Government.

In August 2018, the NSW Department of Finance, Services & Innovation published a consultation paper which looked into a proposal for "deemed" statutory trust. Despite a few minor differences, the "deemed" statutory trust is similar to that of a PBA whereby when a progress payment is made by a Principal to a Head Contractor, the Head Contractor is then required to hold the part-payment in the trust account until payment is made to the Subcontractor.<sup>6</sup> The proposal aims to ensure that when the time comes for a progress payment to be made, the monies within the trust remain protected.

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<sup>6</sup> NSW DFSI, *Securing payments in the building and construction industry – a proposal for 'deemed' statutory trusts*, August 2018  
<[https://www.fairtrading.nsw.gov.au/data/assets/pdf\\_file/0009/396522/Deemed-Statutory-Trust-Proposal-Consultation-Paper-August-2018.pdf](https://www.fairtrading.nsw.gov.au/data/assets/pdf_file/0009/396522/Deemed-Statutory-Trust-Proposal-Consultation-Paper-August-2018.pdf)>  
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In the Australian Government's report on the national Review of Security of Payment Laws, the report concluded the following:

*"...the most effective way that payments can be secured from misuse and the risk of head contractor insolvency is by implementing a cascading statutory trust. Only such a statutory trust would secure the payments of all subcontractors, including the most vulnerable at the base of the contractual chain."*<sup>7</sup>

As of August 2018, 20% of national insolvencies were within the building and construction industry, and due to the current hierarchical system within the industry, there is clearly a need for further reforms to current legislation to ensure the rights of those at the bottom of the chain are protected.<sup>8</sup> It is still too early to tell the full impact of PBA's, however if all goes well in QLD, the test pilot is likely to roll out across NSW and the entire country.

Watch this space...

### **How JHK can assist**

Whether you are a Head Contractor who requires advice on the applicability and operation of a PBA, or a Subcontractor who would like to know how PBAs may affect you, JHK has extensive knowledge in this area and can assist in all aspects of building and construction disputes, as well as general enquiries you might have. Please don't hesitate to call our Brisbane office on [\(07\) 3859 4500](tel:0738594500) for further information in relation to PBAs or our Sydney office on (02) 8239 9600 for any building and construction disputes within NSW.

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<sup>7</sup> Murray, J. (2017), Review of Security of Payment Laws: Building Trust and Harmony, Department of Jobs and Small Business, Canberra, Australia, December 2017, p. xv.

<sup>8</sup> Ibid.