

## Article Information

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Service: Projects & Construction

Sector: Infrastructure

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## Project Bank Accounts: Do They Cheque Out?

**The Queensland Government appears set to introduce project bank accounts (PBAs) on Queensland construction projects, initially on a pilot basis for government projects of a value between \$1 million and \$10 million but excluding “engineering projects” and residential construction.**

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While it is difficult to argue the ambition of setting “[Queensland’s construction industry up for long-term growth](#)” and “[making sure people get paid in-full, on-time and every time](#)”, the industry is yet to be provided with clear detail as to how these ambitions might be achieved.

**Ted Williams, Partner**, and **Marya Atmeh, Lawyer**, discuss the PBA concept, identify key concerns and suggest practical steps which may be taken to prepare for the possibility of their introduction.

### Background

- Retention and project trust accounts were considered in the [Wallace Report](#) (May 2013) and the Deloitte ‘[analysis of security of payment reform for the building and construction industry](#)’ report prepared for the Queensland Department of Housing and Public Works (November 2016);
- Comment on project bank accounts was sought in the QBCC ‘[Better Payment Outcomes Discussion Paper](#)’ (October 2014), Queensland Department of Housing and Public Works ‘[Security of Payment Discussion Paper](#)’ (December 2015), and Queensland Department of Housing and Public Works ‘[Queensland Building Plan Discussion Paper](#)’ (November 2016);
- The Queensland Government’s report following consultation under the ‘Queensland Building Plan Discussion Paper’ is due mid-2017;
- Minister for Housing and Public Works, Mick de Brenni, noted the project bank account reforms are “[still on track](#)” in February 2017; and
- Public consultation on reform concluded in March 2017.

### Proposal

Over time, the proposal for project bank accounts has evolved from a question of whether they should be introduced at all, to the scope of their application. For example, the recent ‘*Queensland Building Plan Discussion Paper*’ sought feedback about the implementation of PBAs in the private sector and whether PBAs should be applied to residential construction projects.

At this stage the details of the proposal to introduce PBAs involves:

- From **1 January 2018, PBAs to apply to all government projects** (other than engineering projects) valued between \$1 million and \$10 million, although the government has not yet defined the scope of “engineering projects” which would be excluded;
- Subject to the success of the PBA roll-out on government projects, PBAs would be **expanded to private sector and government projects** over \$1 million from January 2019;
- **PBA would be a trust account** set up by the head contractor, with the head contractor and “first-layer” of subcontractors as beneficiaries;
- **One PBA would be set up for a project** with linked sub-accounts only for subcontractors that contract directly

with the head contractor;

- Operation of PBA to **apply only to the “first layer” of subcontractors** (i.e. subcontractors contracting directly with the head contractor);
- The principal will pay the scheduled amount of the head contractor’s progress claim into the PBA; and
- The head contractor will instruct the bank on how to disburse payments to the beneficiaries, and the bank then simultaneously pays the contractor and “first layer” of subcontractors.

### **What are Project Bank Accounts?**

A PBA is an account established by the head contractor into which a principal will pay certified payments which are then distributed between the head contractor and first-level subcontractors (which is as far down the chain as the PBAs are intended to apply in Queensland).

The government’s plan to pilot a roll-out of PBAs on government projects is a likely reflection of the fact that minimal or no legislation is required where such arrangements are mandated under the terms of a government contract. However, legislation will be required in order to effect implementation on non-government contracts.

Regardless of whether it is done by contract or legislative amendment, the implementation of PBAs will require parties to navigate further administrative structures, in particular, a trust deed under which monies paid into the PBA will be held on trust for the contractor and subcontractor. Strict duties will also be imposed on the head contractor as to accountability for trust monies.

Under common law, property held in trust by a company for another is exempt from the liquidator’s control and ownership. Therefore, it is important to note that such property would not be available for distribution to creditors.

### **Forecast benefits and costs**

A planned benefit is that the trust structure insulates monies from insolvency occurring up the contracting chain.

However, given the intention that the scheme will only apply as far down as the first-level of subcontractors, those further down the supply chain will not have the direct “benefit” of such protection when/if a subcontractor above them fails.

The [reform analysis paper](#) by Deloitte (commissioned by the government) predicts a 2.5% reduction in project costs by reason of a reduction in subcontractors’ risk premiums on account of greater security of payment. This forecast is based on a survey that indicated equivalent savings achieved on highway projects in the UK (where some agencies have enforced the use of PBAs).

Deloitte also forecasts very modest additional administrative activities of 8 hours per project month for contractors, and half an hour for subcontractors at a rate of \$52/hour.

### **Limitations**

Whilst the rationale for limited implementation of the scheme has not been made clear, the planned introduction of PBAs will have the following exclusions/limitations:

- “Engineering projects” are excluded;
- Residential projects are excluded;
- The scheme is (initially) limited to projects of a value between \$1 million and \$10 million;
- The scheme will (initially) be limited to projects where the Queensland Government is the principal; and
- PBAs will only cover the head contractor and the first-level of subcontractors.

Assuming the projected benefits of the scheme, what is proposed is hardly a solution for the entire industry as it will apply to a limited subset of it.

In excluding application to “engineering projects” and residential projects, the scheme overlooks the large volume of turnover arising out of the housing sector and an as yet unknown portion of “engineering projects”. Targeting only the top tiers of the supply chain also overlooks the significant incidents of subcontractor insolvency impacting subcontractors downstream. Further, the consequent administrative and cash-flow implications are imposed at the lower end of the industry where competition is high, margins are low, and contract administration capabilities are often limited.

### **Impact on existing legislation**

Implementation of any PBA scheme, regardless of its breadth will require consideration of existing legislation affecting the industry including the *Subcontractors’ Charges Act 1974* (Qld), the *Building and Construction Industry Payments Act 2004* (Qld) and the *Queensland Building and Construction Commission Act 1991* (Qld). In considering the impacts of PBAs

on the operation of these laws, a number of complexities arise. These include:

- How will the trust arrangement affect the ability of subcontractors to place a charge on monies upstream, particularly when they are not parties to the trust deed and/or not named beneficiaries?
- How are competing trust and statutory priorities reconciled?
- How will monies secured by a PBA be distributed for the benefit of all creditors?

### **Wholesale reform is promised**

As part of its reforms, the Government has proposed amendments to each of the Acts described above. As far as we can ascertain, such reforms are intended to address:

- Streamlining the steps required to bring a BCIPA claim, [including](#):
  - Removing the need for claims to be endorsed by reference to the Act;
  - Extended times for lodging an adjudication application;
  - Allowing claims where contracts are terminated “for convenience”;
  - Clarity as to costs and interest orders.
- Creating a single Act to cover the operation of the *Subcontractors’ Charges Act 1974* (Qld), the *Building and Construction Industry Payments Act 2004* (Qld) and the *Queensland Building and Construction Commission Act 1991* (Qld), in the interests of creating a “one-stop-shop”.

In making these proposals, the Government has set itself no small task and intends to provide further clarity on its reforms by mid-2017.

### **How to prepare?**

#### Subcontractors

Based on current proposals, it is not expected that the introduction of PBAs will require significant changes for subcontractors. Nevertheless, as the benefit of a PBA to subcontractors will depend on substantiating their right to payment, subcontractors should ensure they have adequate contract management and documentation processes in place.

#### Contractors

It is expected that head contractors will be required to create and administer the PBAs, and will bear the brunt of the administrative burden following their introduction.

Contractors should therefore remain vigilant as to the introduction of new government policy and legislation addressing PBAs.

Contractors can begin to prepare themselves by considering:

- The impact of a likely shortened payment cycle;
- Internal processes (including in construction joint ventures) for the creation and maintenance of project specific PBAs; and
- Who should be the authorised signatories for the creation of new bank accounts and execution of agreements related to the PBA (e.g. trust deed).

#### Principals

As with subcontractors, there is expected to be minimal impact on a principal’s processes arising from the introduction of PBAs. We consider that it is too soon for private sector principals to consider steps to take in preparation for the introduction of project bank accounts, given no legislation has been tabled and because private sector roll-out is not expected until 2019.

### **Conclusion**

Whilst at face value the concept of project bank accounts may offer an attractive tool for better security of payment, implementation of such a scheme is likely to impose a significant administrative burden, as well as requiring broad legislative change in circumstances where reforms are likely to impact only a portion of the industry.

These reforms do not seem intended to address issues arising out of inappropriate pricing, scope and risk allocation often

experienced on construction projects in a particularly competitive construction market. Despite mooted reforms, under-priced/scoped projects and inappropriate “risk transfer” will continue to have severe payment impacts at all levels of the supply chain.

Further, regardless of reform, the lack of contract management processes and documentation substantiating (or otherwise) an entitlement to payment will remain an imperative for principals and contractors of all tiers.