



Farewell BCIPA: Being ready for BIF

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Project Bank Accounts (PBAs)



PBAs - Overview

■ Nature

- trust accounts set up by head contractor (trustee)
- general trust account; retention account and dispute funds account
- beneficiaries – head contractor and first tier subcontractor (assuming not a related entity) (includes ‘suppliers’ of specified items)

■ Timing

- implemented in two phases:
 - phase 1 (trial) – commenced on 1 March 2018
 - phase 2 – possibly from 1 January 2019
- value of contract price for phase 1 (\$1-10m including GST)
- value of contract price for phase 2 (\$1m+ including GST)
 - cannot artificially split contracts (unless separate tender processes conducted)



PBAs - Overview

■ Projects to which it applies

— Phase 1

- State
- 'State authority' which have opted-in (presumably by contract)
- Local governments can opt in

— Phase 2

- State and State authority
- Private sector

■ The building contract:

- must be for 'building work' – 'building' defined as 'fixed structure that is wholly or partly enclosed by walls or is roofed'
- must have more than 50% of contract for 'building work'



PBAs - Overview

- Regulations relevant to PBAs (both commence 1 March 2018):
 - *Building Industry Fairness (Security of Payment) **(Transitional)** Regulation 2018* (expires 1 March 2019)
 - *Building Industry Fairness (Security of Payment) Regulation 2018 (BIF Regulation)*
- BIF Regulation - expands definition of building work to include:
 - erection, management and removal of scaffolding for building work
 - building certifying function work (as per meaning in *Building Act 1975* s10)
 - assessment of the energy efficiency of a building under Building Code of Australia and Queensland Development Code
 - work carried out by architects, registered professional engineers and surveyors for building work
- BIF Regulation – prescribes what is **not** building work:
 - construction, maintenance or repair of a busway, road or railway
 - construction, maintenance or repair of a tunnel for a busway, road or railway
 - an authorised activity for a resource authority (see *Mineral and Energy Resources (Common Provisions) Act 2014*, schedule 2)



PBAs - Overview

■ What contracts are not covered

- contracts entered into before BIF Act commenced that were not a PBA contract but the contract was amended after BIF Act commenced and it become a PBA contract
 - amendment includes change in contract price
 - if amendment is a change in contract price, it must increase the contract price by 30%+ (this is aggregate with prior amendments)
- government contracts tendered before commencement of BIF Act
 - tender had to be issued or advertised before commencement
 - no PBA will apply regardless of amendment to contract



PBAs - Overview

■ What contracts are not covered

- contracts **only** for ‘residential construction work’
 - exception doesn’t apply to HPW work for 3 or more living units
 - exception doesn’t apply when phase 2 commences (unless there are less than 3 living units)
- contracts **only** for ‘maintenance work’
- government contracts tendered before commencement of BIF Act
 - tender had to be issued or advertised before commencement
 - no PBA will apply regardless of amendment to contract
- contracts where ‘practical completion’ is expected to occur within 90 days after the day when a PBA was required to be entered into



PBAs – Types of accounts

- Head contractor will be required to open 3 trust accounts
 - timing (**500 penalty units**):
 - no later than 20 business days after first subcontract is entered into; **OR**
 - date specified in PBA contract provided it is:
 - no earlier than 20 business days after building contract is entered into
 - no later than 20 business days after first subcontract is entered
 - if subcontract already entered into before PBA is required – have 20 business days from the ‘start date’ (being the date the PBA was required)
 - must include ‘trust account’ in name (**200 penalty units**)
 - Head contractor has a series of notifications it must give to the Principal and the first tier subcontractors (**200 penalty units or 1 year’s jail**)



PBAs – Types of accounts

- General trust account
 - principal pays in all amounts owing to head contractor
- Retention account
 - head contractor pays retention amounts for a first tier subcontract
- Disputed funds account
 - head contractor pays in the amount of a ‘payment dispute’
- Trust accounts to be set up such that:
 - only electronic transfers for deposits and withdrawals (**500 penalty units**)
 - only ‘payment instructions’ to finance institution for withdrawals and transfers (**500 penalty units**)
 - principal can view these matters and the account payment reports (**200 penalty units**)



PBAs – Payment process

Subcontractor submits progress claim to the head contractor



Head contractor submits progress claim to the principal



Superintendent submits progress schedule to the head contractor and principal



Head contractor submits payment instruction to the bank for payment to first tier subcontractors and head contractor



Principal deposits the payment into the PBA's general account



Bank pays the first tier subcontractors and the head contractor, and pays retention money into the retention account



PBAs – Payment in

- Principal must pay all amounts in to general trust account unless:
 - reasonable excuse
 - amount paid under subcontractors' charges (Part 4)
 - paid into Court
 - paid before PBA established
- If head contractor receives directly – must pay in to trust account (**200 penalty units or 2 years jail**)
- Head contractor must not cause amount to be paid into trust accounts other than for the prescribed purposes (including those in the BIF Regulation) (**200 penalty units or 1 year jail**)



PBAs – Payments in

- Head contractor must pay retention money in to retention account (**200 penalty units or 2 years jail**)
- ‘Payment dispute’ amounts to be transferred by head contractor from general trust account (**200 penalty units or 1 year jail**) – defined as:
 - head contractor issues payment schedule for \$100 but issues payment instruction to bank for \$80 – payment dispute is \$20
 - head contractor fails to issue payment schedule – payment dispute is amount of payment claim



PBAs – Payment in (Transitional Regulation)

■ Transitional Regulation:

- confirms adjudicated amounts payable by principals to head contractors under BCIPA must be deposited into PBA
- provides a payment dispute will arise where:
 - a payment instruction is for less than the amount scheduled for payment in a payment schedule issued in response to BCIPA payment claim
 - a head contractor fails to issue a payment schedule in time in response to BCIPA payment claim
- provides for circumstance where an amount must transferred by the head contractor to the disputed funds account but that amount is not held in the general trust account or retention trust account
- sets out how to calculate the amount that a head contractor must transfer to disputed funds account prior to Chapter 3 ('Progress payments') commencing
- head contractor must ensure amount held in disputed funds account is identifiable as being held for subcontractor beneficiary (**maximum 100 penalty units**)



PBAs – Payment out

- Head contractor can only pay subcontractor out of trust account (**200 penalty units or 1 year jail**)
 - must pay subcontractors before it pays itself (**300 penalty units or 2 years jail**)
- Head contractor can withdraw for limited purposes (**300 penalty units or 2 years jail**)
 - paying subcontractor liable to pay under the subcontract
 - paying head contractor (subject to priority) to the extent no other liability to pay subcontractor for the same work
 - returning amounts paid by principal in error
 - as required by Court or adjudication (including adjudication under BCIPA)
 - to transfer as required by BIF Act (e.g. payment dispute amounts)



PBAs – Payment out

- Head contractor covers shortfalls
 - if amount is due to be paid from trust account and insufficient amount available in trust account to pay subcontractor (**100 penalty units or 1 year jail**)
 - shortfall is paid into trust account ‘as soon as head contractor becomes aware’
- Proportionate adjustment of amounts paid out if insufficient
 - 2 or more subcontractors due to be paid by trust account cannot cover all amounts
 - head contractor to pro rata and pay accordingly (**100 penalty units or 1 year jail**)
 - head contractor still liable for full amounts
- Retention amounts can be withdrawn (**300 penalty units or 2 years jail**)
 - return amount to subcontractor
 - paying head contractor an amount to correct defects or to secure (wholly or partly) the performance of the subcontract



PBAs – Payment out

- Payment dispute amounts can be paid out (**300 penalty units or 2 years jail**)
 - to subcontractor
 - to head contractor pursuant to outcome of ‘dispute resolution process’ (prescribed by regulation)
 - as prescribed by regulation
- Head contractor must notify subcontractor of transfer (**50 penalty units**)
 - must be transferred back to general trust account if 60 days have elapsed since notice unless ongoing dispute process (which are prescribed to include a proceeding in a court or tribunal, or an adjudication under BCIPA) (**50 penalty units**)
- Interest earned on account can be paid out to head contractor every 12 months or when PBA closed



PBAs – Payment out

- Copy of all payment instructions to be given to principal and subcontractors as soon as practicable (**100 penalty units**) (prescribed information for payment instructions contained in s10 of BIF Regulation)
- Principal must inform the commissioner of any discrepancies in a payment instruction as soon as practicable after becoming aware of the discrepancies or after it ought to reasonably have known of the discrepancies (**100 penalty units**)
 - Discrepancies, for a payment instruction, means:
 - an error in the account number for a subcontractor
 - payment to an entity, other than the head contractor, that is not a subcontractor
 - payment to a subcontractor if the name of the subcontractor and account name do not match



PBAs – Close out

- Head contractor can close PBA when (**500 penalty units or 1 year jail**):
 - all subcontractors have been paid (i.e. no more subcontractor beneficiaries);
OR
 - only maintenance work remaining
 - **Transitional Regulation** – maintenance work **does not** include any work for which a retention amount has been withheld under a subcontract with a subcontractor beneficiary
- Closing any of the trust accounts constitutes closing
- Must maintain copy of records of all transactions for 7 years (**300 penalty units or 1 year jail**)



PBAs – Termination or insolvency

- Principal ‘may’ step in as trustee if:
 - head contract terminated for default of head contractor
 - head contractor has an administrator, liquidator etc. appointed
 - other prescribed circumstances, namely if head contract is terminated for any reason
- Transitional Regulation (sections 14 and 15) prescribes:
 - if a principal is appointed as trustee for PBA under s54 of BIF Act, the principal **must**, as soon as practicable after appointment, open a principal’s general trust account, retention account and disputed funds account
 - if a principal is appointed trustee and has opened the required accounts, the financial institution **must** transfer all amounts held in the head contractor’s PBA to those opened by the principal
- Principal, as trustee, as a right to apply to the Supreme Court for directions about the amounts held in PBA, administration of PBA and the exercise of powers by principal (Transitional Regulation, s18) (application to be served on all subcontractor beneficiaries)



PBAs – Termination or insolvency

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- Principal has broad powers to request information from parties (e.g. head contractor, third parties)
 - Transitional Regulation (s17) – head contractor must, as soon as practicable, give the principal appointed as trustee copies of the records that the head contractor was required to keep under s45(1) of BIF Act
- Head contractor not relieved of obligation to top up shortfalls or any prior liability as trustee
- Principal does not incur civil liability if conducting itself in good faith and without negligence
- PBA is declared to be a priority ‘statutory interest’ for PPSA purposes
 - in priority to other security interests over money held in account
- Transitional Regulation (s19) – no entitlement to subcontractor’s charge exists to the extent it relates to money held in trust under a PBA



PBAs – Practical Issues

- How do State Authority's opt-in?
- Will State funding be conditioned on opting-in?
- How many accounts?
 - 1 trust account with sub-accounts or 3 separate accounts?
 - Which banks are supporting?
- How are amounts in PBAs treated (by Head Contractor) in an accounting sense?
- GST payment timing?
- Timing of money out of PBAs
- Financiers' concerns?
- What happens if Principal does not step in as trustee?
- Contract changes?
- Transitional Regulation (s20) prescribes that prosecution for an offence under BIF Act may be started within 1 year after offence comes to the knowledge of the commission, but no later than 2 years after the offence is committed
- *Building Industry Fairness Reforms: Project Bank Accounts Principal Guidelines (March 2018)* released by Department of Housing and Public Works



Things to consider - PBAs

■ PBA

- The BIF Act provides a high level approach to the administration of a PBA regime and does not consider the daily operation of a PBA
- If operating in the PBA regime, consider whether additional contractual obligations for the Contractor to operate and manage a PBA are required, for example:
 - provision of a statutory declaration to ensure all subcontractors engaged have been notified and no 'discrepancies' to payment instructions
 - Contractor to seek consent from the Principal before the Contractor employs or engages an agent or delegates a power in relation to a PBA
 - allow the Principal to have full and transparent access to records
 - any breach of the administration of the PBA is a substantial breach under the contract
 - cost recovery by Principal if it steps in as trustee



Q&A



Key security of payment changes



Traditional view

Contract

Progress
claim

Progress
certificate

Dispute?

Security of payment

Payment
claim

Payment
schedule

Adjudication?



Fusion – the new norm?

Progress claim
and
payment claim

Progress certificate
and
payment schedule

Dispute?

Adjudication?



Agenda

- When does the new security of payment regime take over?
- What is a payment claim?
- Payment schedules and associated risks
- Timeframes



When does the new security of payment regime take over?

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- Commencement of chapter 3 of BIF Act on 1 July 2018 announced, however this has not been proclaimed
- BIF Act applies to all construction contracts entered into **before or after** its commencement
- An exception – ‘unfinished matters’ under BCIPA (for payment claims served prior to commencement of BIF Act), such as:
 - service of payment schedule
 - consequences of failing to pay a claim
 - making adjudication applications
 - giving adjudication responses
 - the adjudication process and enforcement
 - suspensions of work





Reference dates under BIF Act

- Definition is largely the same
- Governed by the contract, or arise by default
- Termination reference dates
- Preconditions to reference dates
- tension – section 200 (anti-avoidance)
- sections 67GA and 67GB of the QBCC Act (mandatory and prohibited conditions, prescribed by regulation?)



What is a payment claim?



Say goodbye to the **magic words**

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- This is a payment claim under the *Building and Construction Industry Payments Act 2004 (Qld)*



Payment claims: BCIPA versus BIF Act

The old (BCIPA, s 17)

A payment claim must:

- identify the construction work or related goods and services
- state the claimed amount, and
- state that it is made under the Act

The new (BIF Act, s 68)

A payment claim is a written document that:

- identifies the construction work or related goods and services
- states the claimed amount
- requests payment of the claimed amount (any document bearing the word 'invoice' will satisfy this requirement), and
- includes the other information prescribed by regulation (as yet unknown)

■ What are the implications?



Standard versus complex claims

Claim	Amount	Key implications under BCIPA	What about BIF Act?
Standard	≤\$750,000 excluding GST	<ul style="list-style-type: none"> • Payment schedule due in 10 business days • All reasons must be stated in payment schedule 	<ul style="list-style-type: none"> • Must provide payment schedule within the 'response period' • All reasons must be stated in payment schedule • Generally, adjudication response due 10 business days after adjudication application received
Complex	>\$750,000 excluding GST	<ul style="list-style-type: none"> • Payment schedule due in 15 or 30 business days (depends on reference date) • Adjudication response can include new reasons (claimant's reply follows) 	<ul style="list-style-type: none"> • Must provide payment schedule within the 'response period' • All reasons must be stated in payment schedule • Generally, adjudication response due 15 business days after adjudication application received (and respondent can seek an extension)

■ Adjudication timeframes are also potentially longer for complex claims



Payment schedules



What is the 'response period'?

- Payment schedule must be provided before the end of the 'response period', regardless of whether standard or complex claim
- The **shorter** of the following:
 - if the contract includes a period for responding to a payment claim or paying the full claimed amount – that period, or
 - 25 business days after the payment claim is given to the respondent.
- Don't need to serve a payment schedule if claim paid in full before the end of the response period
- But what if payment terms are longer?



Failing to respond or pay under BIF Act: no more second chances

- The claimant may enforce the claim in court or apply for adjudication
- Warning notice must be given before going to court, but not a second chance to serve a payment schedule
- If the claim:
 - is enforced in court, respondent cannot raise any defence or counterclaim
 - proceeds to adjudication, respondent cannot serve an adjudication response
- Failure to provide a payment schedule is an offence (100 penalty units), and can also trigger QBCC disciplinary action
- **If you do not intend to pay, always provide a payment schedule with all reasons for withholding payment**





Payment schedules – requirements under BIF Act

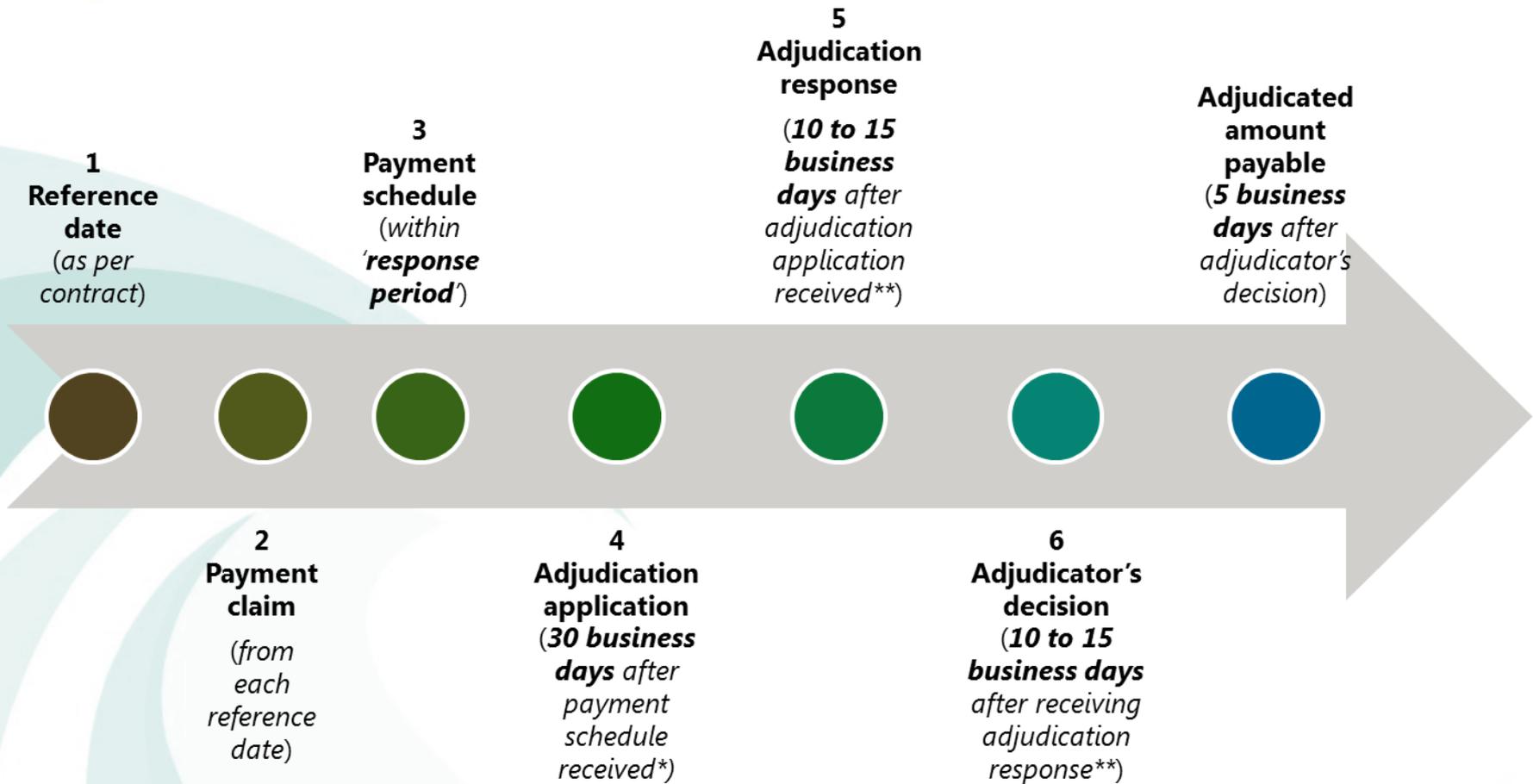
- A payment schedule must:
 - identify the payment claim to which it responds
 - state the amount of the payment, if any, that the respondent proposes to make
 - if that amount is less than the amount claimed, state why that is so and include reasons for withholding payment, and
 - include the other information prescribed by regulation (as yet unknown).
- **Include all reasons and explain them** – only opportunity to do so because no new reasons can be raised in adjudication
- Write for an external audience (where will the document end up?)
- ‘Rejected’ is not a reason
- Role of the Superintendent – risks and benefits?



Timeframes



Timeframes under the basic BIF Act process



* Generally speaking, but depends on circumstances

** Depends on whether payment claim is standard or complex



Things to consider – Security of payment

■ Progress payments

- Administrative amendments such as removing reference to BCIPA and *Subcontractors' Charges Act*, update terminology and timeframes
- Consider whether the response period ends before the due date for payment arises under the BIF Act and aligning the timing for provision of payment schedules and payment by the Principal
- 'Claims Preconditions'
- 'Valuation' of claims

■ Termination reference date

- Consider including a new clause which provides for the following in the event the contract is terminated:
 - recognition of a termination reference date
 - Claim Preconditions for termination reference date
 - the payment regime where the contract has been terminated



Q&A



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