

Caught by the Project Trust Account legislation? What now?

Generally the head contractor bears the obligation to establish the project trust account.

A head contractor is required to establish one project trust account and, if it is required, one retention trust account.

Although only one retention trust account is required for all retention monies held across all contracts, a head contractor may choose to establish a separate retention trust account for each contract.

Establishing the Project Trust Account

Generally, within 20 business days of entering into the first subcontract for the project, the head contractor must establish a Project Trust Account.

If a project trust is required, the head contractor must open an account at an approved financial institution.

There must only be one project trust account and the account must be held under a name that includes the trustee's name and the word 'trust'.

The head contractor must ensure that deposits and withdrawals from the account are made only using methods that create an electronic record of the transfer.

Approved Financial Institutions

The Queensland Building and Construction Commission (QBCC) can only approve a financial institution which a PTA may be established under, "if the financial institution has entered into an agreement with the commission about providing financial services for trust accounts".

The QBCC must publish the names of all approved financial institutions on its website.

As at the date of this article, only five banks are listed as being approved financial institutions on QBCC's website, being:

- Commonwealth Bank of Australia;
- HSBC;
- Macquarie Bank;
- National Australia Bank; and
- Westpac.

If your company is not currently banking with an approved financial institution, you will need to establish accounts with an approved financial institution for projects requiring a project trust.

Notice of project trust before entering subcontracts

If a project trust is required for a contract, the head contractor must give each subcontractor a notice about the use of a project trust account.

The notice must be given to the subcontractor, if the project trust is not yet established when the parties are entering into the subcontract, within 10 business days after the trust is established; or, if the project trust is already established, then notice must be given before the parties enter into a subcontract.

The notice must:

1. be in writing; and
2. include a statement that a project trust will be used for making payments to the subcontractor; and
3. include other information prescribed by regulation e.g., name of trust/financial institution etc.

Head contractors should consider giving this notice as part of their tender materials if the relevant information is available at that stage.

Opening, Closing or Changing PTAs

The head contractor must give notice to the principal and QBCC within five business days of:

- opening a project trust account;
- changing the name of the account;
- closing the account; or
- transferring the account.

The head contractor must also provide information to the principal and QBCC, such as the name of the account, BSB and account number as prescribed in Schedule 1AA Part 1 of the Regulation.

The QBCC must maintain a register of project trusts and retention trusts, which is found on its website.

Payments by Principal into Project Trust Accounts

The head contractor will be the trustee of the trust account with both the head contractor and subcontractors as beneficiaries.

A payment claim will be submitted by a subcontractor to the head contractor on and from the reference date in the usual way.

The head contractor will submit their payment claim to the principal, and their claim will naturally incorporate their entitlement to be paid for works carried out by their subcontractors.

But from this point on, things change.

Instead of the principal paying monies directly to the head contractor's account, they will pay their assessment of the claim into the project trust account.

Once a payment is deposited into the project trust account, the deposit is taken to be a payment made by the principal to the head contractor and liability will be discharged to pay that amount to the head contractor.

However, certain payments do not need to be paid into the trust account. These payment exceptions include:

- amounts that were due to be paid before the trust was established;
- amounts paid into court;
- amounts that are to be withheld because of a payment withholding request given to the principal under the Act; or
- amounts paid directly to a subcontractor or in connection with a subcontractor's charge.

If an amount is paid to the head contractor in contravention of the deposit obligation, such as payment directly to the head contractor rather than through the trust, the head contractor must deposit the amount into the project trust as soon as practicable after receiving the amount.

Payments out of PTA by head contractor

The head contractor (as trustee) will hold the PTA monies on trust and may only pay amounts due to the subcontractor beneficiary from the project trust account by depositing the amount from the trust account into the subcontractor's nominated bank account.

If the subcontractor beneficiary is also required to establish a project trust account for its subcontract, their nominated account must be the project trust account for the subcontract.

Head contractor must first pay subcontractors

The head contractor must not pay itself until the scheduled amounts due to subcontractors have been paid in full, unless there would still be a sufficient amount available in the account.

However, the head contractor may withdraw an amount before paying subcontractors if the withdrawal is to make a

Head contractor must cover any shortfall

Section 51 requires the head contractor to cover the shortfall between:

- the amount available in a trust account; and
- the amount to be paid from a trust account.

The shortfall must be paid into the trust account.

The “amount available in a trust account” is self-explanatory. It generally represents the amount paid in by the principal and the shortfall amount transferred to that account by the head contractor as explained above.

The “amount to be paid” is the amount due to be paid to a beneficiary of the trust.

If insufficient amounts available, Head Contractor must pay on proportionate basis

But what if there are insufficient funds in the trust account?

In that case, the Act requires that the head contractor must pay their subcontractors on a proportionate basis.

Therefore, if:

- a project trust is established for a contract; and
- the contracted party is liable to pay two or more subcontractor beneficiaries an amount at the same time; and
- the total amount held in the project trust account is insufficient to satisfy all the amounts liable to be paid,

then the amount to be paid by the head contractor to each subcontractor is to be reduced in proportion to the amounts liable to be paid to each.

The example given is as follows:

If one subcontractor beneficiary is due to be paid \$50,000 and another subcontractor beneficiary is due to be paid \$30,000, but only \$40,000 is available, the beneficiaries are to be paid \$25,000 and \$15,000 respectively.

As you would expect, the interim proportionate payment to subcontractors does not relieve the head contractor of paying each of the subcontractors the full amounts to be paid.

Subcontractor beneficiary to be informed of particular withdrawals

If a withdrawal is made from the PTA to make a payment to a subcontractor beneficiary or an amount withheld from payment is deposited in a retention trust account for the benefit of the subcontractor beneficiary, the trustee must give the subcontractor a notice of the withdrawal within five business days after the transaction.

The notice must include the information prescribed by regulation, such as the amount that was paid and the account number of the financial institution.

A person who is or was a subcontractor beneficiary of a project trust may, in writing, request the trustee give the person information relating to the person such as a statement of balance of the trust account and a copy of the trust records.

The trustee must give the person the requested information in writing within ten business days after being given the request, unless:

- the trustee has a reasonable excuse; or
- the information is already available to the person; or
- the information has not changed since last given to the person.

QBCC's oversight powers

In certain circumstances, the QBCC may, by written notice, give the head contractor the following directions:

- a direction that an amount not be withdrawn from a stated trust account without the commissioner's written approval; or
- a direction that the trustee give the commissioner an account review report for one or more of the trust accounts.

The circumstances include:

- if the contract for a project trust or retention trust is terminated; or
- if the head contractor is an individual – he or she is an insolvent under administration within the meaning of the Corporations Act, section 9 (i.e. undischarged bankrupt);
- if the head contractor is a company –
 - the company has a provisional liquidator, liquidator, administrator or controller appointed; or
 - the company is wound up, or is ordered to be wound up by the Court within the meaning of the Corporations Act, section 9;
- if the commissioner reasonably suspects a trust account is not being used as required under the BIF Act; or

- if the trustee that is a licensee under the Queensland Building and Construction Commission Act 1991 –
 - the trustee’s licence is suspended or cancelled; or
 - the trustee does not satisfy the minimum financial requirements.

The Commissioner may also, by written notice, require parties to give stated information or copies of documents to the commissioner within a stated period.

Retention Trust Accounts (RTA)

A retention trust account is a trust over the following amounts:

- retention amounts withheld in the form of cash under particular contracts; and
- deposits in the retention trust account as required under the Act.

RTAs are primarily for the benefit of the party who will be entitled to the retention amount.

An RTA is not required for a retention amount withheld from payment if:

- the contracting party is the State, Commonwealth, a state authority, or local government or another entity under regulation; or
- the contract price is at least the minimum contract price.

An RTA must be established before taking retention and the contracting party is only required to have one retention trust for any number of beneficiaries.

RTAs generally have the same requirements as PTAs. Requirements will begin on the first day an amount of retention is withheld and continue until all retention amounts withheld have been released to the parties entitled to it. The requirements include:

- RTAs must be with an approved financial institution;
- RTAs must include the trustee’s name and the word ‘trust’;
- deposits/withdrawals must create an electronic record;
- the contracting party must give the QBCC notice of opening an account, changing the name of the account, closing the account and transferring the account within five business days of that action;
- monies may only be paid into the account for the purposes of withholding retention or repaying an amount withdrawn in error.

Record keeping

Head contractors also have extensive record-keeping obligations.

A head contractor for a project or retention trust must keep records prescribed by regulation for 7 years.

The trust records required to be maintained include:

- an individual trust account ledger;
- a copy of each contract for which the trust is required;
- all payment claims and schedules given under the contracts;
- all bank statements; and
- records of deposits and withdrawals etc.

As you can see there are many obligations to comply with under the BIF Act.

Head contractors and other industry participants will need to adapt their processes and procedures so they don’t breach these obligations and become liable for significant penalties under the BIF Act.

Disclaimer

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