



BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT REGULATION AMENDMENT – RETENTION TRUST FUND

On 8 December 2014, the New South Wales Government issued the form of proposed changes to the scheme established under the Building and Construction Industry Security of Payment Act (the Act) by Regulation (the proposed Regulation). The changes have been anticipated since the passage into law in April 2014 of changes to the Act following the New South Wales Government's qualified adoption of some of the recommendations of the inquiry by Bruce Collins QC into Construction Industry Insolvency in New South Wales.

The proposed Regulation is open for public comment until 8 January 2015. It is expected to commence operation on 1 February 2015.

What is it?

The key element of the proposed Regulation is the establishment of retention money trust accounts.

The proposed Regulation is designed to protect subcontractors' interests in their retention moneys and to safeguard against the use of those moneys by head contractors for the purposes of the head contractors' working capital.

Who is affected?

Under the proposed Regulation, head contractors are obliged to deposit subcontractors' retention moneys into accounts with approved authorised deposit-taking institutions (approved ADI), where the retention moneys are received under construction contracts which are:

- With a direct subcontractor.
- Relate to non-residential work.
- Have a value of AUS\$20 million or more.

"Non-residential work" must be understood strictly as the Act under which the Regulation is to operate, and excludes from its application all



construction contracts for the carrying out of residential building work (within the meaning of the Home Building Act 1989) (see section 7(2)(b) of the Building and Construction Industry Security of Payment Act 1999 (NSW)).

The value of a construction contract is the amount of the consideration that the contract provides as payable for the work carried out and any variations to the contract after the contract is entered into. Consequently, if variations increase the value of the construction contract to reach a total of AUS\$20 million or more, then the proposed Regulation applies retroactively to pick up earlier retained retention moneys which must then also be held in a trust account.

How will it work?

Retention money

Retention money is defined in the proposed Regulation as money retained by a head contractor out of money payable by the head contractor to the subcontractor under a construction contract, as security for the performance of obligations of the subcontractor under that contract.

The proposed Regulation provides that retention money:

- Can only be made available for the purposes set out in the relevant contract between the parties.
- Ceases to be retention money subject to the Regulation in the event the head contractor becomes entitled to it under the contract.

Approved ADI

The proposed Regulation requires that the retention money, in the words of the explanatory note, “...be held in a trust for the subcontractor”. Such account must be held with an approved ADI. The relevant



For construction contracts entered into after 1 February 2015, that have a value of more than AUS\$20 million, that do not relate to residential work, and where security from the subcontractor is proposed to be by way of retention moneys rather than by bank guarantee, head contractors need to open and manage suitable trust accounts with an approved ADI for each of the subcontractors engaged for the project.

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administrative requirements are specified in the proposed Regulation and include a reporting procedure to the Chief Executive of the Office of Finance and Services in the event of overdrawn trust accounts and dishonoured cheques drawn on trust accounts.

Head contractor's obligations

Head contractor account holders are to be subject to strict record keeping, account management and reporting obligations. Breaches may be subject to fines of up to AUS\$22,000.

What's next?

For construction contracts entered into after 1 February 2015, that have a value of more than AUS\$20 million, that do not relate to residential work, and where security from the subcontractor is proposed to be by

way of retention moneys rather than by bank guarantee, head contractors need to open and manage suitable trust accounts with an approved ADI for each of the subcontractors engaged for the project.

The requirements set out in the proposed Regulation are not difficult although they will add another layer of financial management and reporting to a head contractor's routine contract administration.

HFW's construction team can assist with resolving any issues arising in relation to the likely operation and regulatory requirements of the proposed Regulation.



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