
Construction Contracts Amendment Act 2015

Changes relating to retention money withheld under commercial construction contracts

The Construction Contracts Act 2002 (the Act) regulates payment provisions in construction contracts, provides an adjudication framework for people with disputes under construction contracts and provides remedies for recovering non-payment under construction contracts.

The Construction Contracts Amendment Act 2015 is the result of a comprehensive review of the Construction Contracts Act 2002. The amendments ensure the Act provides:

- a fair, balanced and appropriate payment regime
- access to fast and cost-effective dispute resolution
- cost-effective and timely enforcement of rights and obligations
- better certainty of payment of retention money withheld under commercial construction contracts.

Retention money withheld under commercial construction contracts must be held on trust from 31 March 2017. The Regulatory Systems (Commercial Matters) Amendment Bill will clarify that this requirement will apply only to contracts entered into, or renewed, on or after 31 March 2017.

This new trust requirement provides greater certainty of payment for contractors and sub-contractors owed retention money for work done and ensures the money held in retentions is responsibly managed.

Definition

Retention money is defined in the Act as: “an amount withheld by a party to a construction contract (party A) from an amount payable to another party to the contract (party B) as security for the performance of Party B’s obligation under the contract.”

How will it work?

Where payers withhold retention money under a commercial construction contract, the retention money must be held on trust.

The payer becomes a trustee and the payee becomes the beneficiary.

The obligations of the payee holding retention money on trust end when:

- retention money is paid
- the payee to whom the money is payable agrees to give up their claim
- the money ceases to be payable by law, i.e. the money ceases to be payable under the contract.

What can't you do?

Prohibited contract provisions

You cannot include in a contract any terms designed to delay payment of retention money. Any such terms in a contract will be void.

Similarly you cannot include any conditional payment provisions for retention money in a construction contract (known as pay-when-paid provisions). Conditional payment provisions have been banned since the Act came into force in 2003. The amendments make it clear that this ban also applies to provisions for payment of retention money.

NOTE: Payment of retention money cannot be conditional on anything other than the performance of the payee's obligations under the contract.

Use of retention money

Retention money cannot be used for any purpose other than to remedy a payee's breach of their obligations under the contract, such as fixing defective work.

What *can* you do?

Retention money:

- does not need to be held in a separate trust account,
- may be mixed with other money, i.e.: it can be held in the same bank account as other money,
- may be held in the form of cash or other liquid assets,
- may be invested and interest earned can be kept provided the investment is in accordance with the Trustee Act 1956.

How must retention money be accounted for to meet the trust requirement?

Proper methods of accounting for retention money are now required. Parties holding retention money must keep proper accounts that correctly record all dealings and transactions in relation to the retention money and must make these records readily available to parties owed the money.

The accounting methods must comply with generally accepted accounting principles and be auditable.

Late payments, interest and fees in relation to retention money

- Interest must now be paid on late payments of retentions at the rate agreed under the contract. If a rate has not been agreed, the default rate of interest specified in regulations (yet to be developed) will apply.
- In the event of a payer's insolvency, retention money will be protected. Retention money is not available for the payment of debts of any creditor of a payer and cannot be taken by a court order at the insistence of any creditor of a payer.

When do these new laws apply?

There are three key dates these changes take effect.

- From **1 December 2015** residential and commercial construction contracts are to be treated the same under the Act, with the exception of charging orders. This gives parties to residential contracts full equal access to the Act's dispute resolution and payment regimes. Contractors will not be able to obtain charging orders against residential occupiers.
- From **1 September 2016** design, engineering and quantity surveying work are included under the scope of the Act. This gives parties to construction contracts for these types of design work full access to the Act's dispute resolution and payment regimes. Read more about these changes [here](#).
- From **31 March 2017** retention money withheld under commercial construction contracts must be held on trust. The Regulatory Systems (Commercial Matters) Amendment Bill will clarify that this requirement will apply only to contracts entered into, or renewed, on or after 31 March 2017.

New regulation-making powers

Regulations may, if necessary, prescribe:

- the minimum amount of retentions that the new trust requirements will apply to,
- methods of accounting for retention money in addition to the requirements in the Act,
- the default rate of interest for the late payment of retention money that will apply where a contract does not provide a rate.