

HEAD CONTRACTORS BEWARE: NEW RETENTION MONEY REQUIREMENTS IN NEW SOUTH WALES

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Australia Construction Alert

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The Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015 (Retention Money Regulation) commenced on 1 May 2015 and brought into effect important requirements for head contractors to comply with in respect of subcontractors retention moneys.

WHAT PROJECTS DOES THE RETENTION MONEY REGULATION APPLY TO?

- The Retention Money Regulation applies to head contractors on a construction project (to which the *Building and Construction Industry Security of Payment Act 1999* applies), if that project has a value of at least AUD20 million and was entered into after 1 May 2015.
- The AUD20 million project value threshold relates to the value of the overall project (i.e. the value of the head contractor's construction contract with the principal), rather than the value of the subcontract.
- The AUD20 million project value threshold will include any variations to the contract after the contract was entered into, but the Retention Money Regulation will only apply to subcontracts entered after the value of the project reaches the AUD20 million threshold.

WHAT MUST A HEAD CONTRACTOR DO TO COMPLY WITH THE RETENTION MONEY REGULATION?

- A head contractor must pay any retention money from a subcontractor into a trust account established with an approved authorised deposit-taking institution (ADI).
- Within 14 days of establishing a retention money trust account, the head contractor must notify the Chief Executive of the Office of Finance and Services (Chief Executive) and provide details of the account.
- Interest earned on retention money must also be held in the same trust account as the retention money, unless the subcontract provides otherwise (for example, the subcontract provides that the head contractor is entitled to the interest on retention moneys) or the head contractor and subcontractor otherwise agree in writing.
- The Retention Money Regulation also places specific obligations on the head contractor in respect of an overdrawn trust account and the closure of the trust account.

WHEN CAN RETENTION MONEY BE WITHDRAWN FROM A TRUST ACCOUNT?

- Retention money can only be withdrawn from a retention money trust account for any of the following reasons:
 - to pay money in accordance with the terms of the subcontract (for example, if the subcontract allows the head contractor to call on the security for subcontractor default)
 - as agreed in writing by the head contractor and the subcontractor
 - in accordance with the order of a court or tribunal.

WHAT RECORD KEEPING OBLIGATIONS DOES THE HEAD CONTRACTOR HAVE?

- A head contractor must keep records in relation to a retention money trust account, showing the amounts deposited into or withdrawn from the account. The records must be kept for at least three years after the account is closed.
- Within three months after the end of each financial year, the head contractor must provide to the Chief Executive:
 - an account review report for the account for the financial year (which must be given by a registered company auditor)
 - a retention account statement (in the form set out in Schedule 2 of the Retention Money Regulation)
 - a fee of AUD1,500.

WHAT HAPPENS IF A HEAD CONTRACTOR DOES NOT COMPLY WITH THE RETENTION MONEY REGULATION?

It is an offence to contravene certain provisions of the Retention Money Regulation, for which the penalty is AUD22,000.

FURTHER INFORMATION

If you are a head contractor to which the Retention Money Regulation might apply, you should:

- review all of your subcontracts to ensure that they adequately deal with recourse to retention moneys and interest on retention moneys
- ensure that you have the required record keeping in place and fully understand the implications of the Retention Money Regulation.

The K&L Gates Construction team can provide you with more information on the Retention Money Regulation and/or assist you to comply with the Retention Money Regulation.

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