

ALERT

10 JUNE 2015

2015 amendments to NSW Security of Payment requirements: projects over \$20m

In a [previous Alert](#), we advised of the changes to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) rolled out from 21 April 2014.

Those major changes were:

- maximum payment terms of 15 business days (head contracts) and 30 business days (subcontracts) after the relevant payment claim;
- supporting statement required for head contractors' payment claims; and
- no requirement that a payment claim must include an endorsement that it is a payment claim under the Act.

Changes from 1 May 2015

In more recent developments, the *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015* (NSW) (**Regulation**) has enlivened the retention money trust account provisions legislated for in 2014 and sets out the detailed requirements. The Regulation will apply to all head contracts entered into for non-residential construction

work in New South Wales after 1 May 2015 for works with a contract sum exceeding \$20 million.

Retention money trust scheme

The retention money trust scheme requires head contractors to hold retention money from subcontractors in a trust account with an approved 'authorised deposit-taking institution,' on trust for that subcontractor.

\$20 million threshold

The threshold of \$20 million includes any increases to the contract sum by virtue of variations.¹ If a head contract does not initially meet the threshold, but subsequently reaches the threshold of \$20 million during the course of the project, then the head contractor must comply with the retention money trust scheme in respect of subcontracts entered into *after the time* when the adjusted contract sum exceeds the threshold.²

¹ *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015* (NSW) Schedule 1, Part 2, s5(3)

² Regulation Schedule 1, Part 2, s5(4)



Trust account management

Trust accounts must be opened with an approved account with an authorised approved deposit-taking institution (ADI), such as a bank, building society or credit union (if approved).³ Head contractors may open separate trust accounts for each subcontractor or each project, or operate one trust account for all retention money held on trust under the retention money trust scheme (provided that each individual subcontractor's retention monies are identifiable and retention monies are separated in book keeping records). The account name must include the name of the head contractor and the words "trust account".

Trust Account records

Head contractors are required to keep records of money paid in and out of the trust account, and must keep them for at least three years after account closure. Head contractors must provide annual review reports and annual retention account statements to the Chief Executive of the Office of Finance and Services. The Chief Executive can also request information from the head contractor, subcontractor or ADI.

Trust Account withdrawals

Under the Regulation, head contractors can withdraw money

³ *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015* (NSW) Schedule 1, Part 2, s4 states: "approved ADI means an authorised deposit-taking institution approved under section 87 of the *Property, Stock and Business Agents Act 2002* or approved by the Chief Executive by order in writing."

from the retention money trust account:

- for the purpose of payment pursuant to the terms of the construction contract under which the retention money is held;
- as agreed in writing between the head contractor and the subcontractor concerned;
- in accordance with the order of a court or tribunal.

Interest on Trust Account monies

Unless there is an alternative agreement in writing, interest earned on retention monies held in trust are also to be held in trust.

Implications

Head contractors should be conscious that where a head contract meets the \$20 million threshold, the scheme will require them to open retention money trust accounts and to comply with the detailed requirements including as to records and reporting. Penalties of up to \$22,000 may apply for breaches of the Regulation.

In light of the Regulation, head contractors that have typically used cash retentions in their downstream construction contracts may consider insisting on other forms of security, such as bank guarantees, to avoid the application of these new trust account requirements.

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