

New Retentions Regime

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The new and tighter rules under this amendment apply to retentions held under commercial construction contracts entered into from 5 October 2023 onwards.

What do the new rules do?
The new rules are designed to strengthen the protection available to contractors and subcontractors from whom funds otherwise due and payable for works completed under a contract, are withheld as security for their continued performance under the contract.

Summary of the new retention rules

The following is a general summary of the new rules;

- Retentions withheld from payments under a contract which are in cash will have to be held in a separate bank account, and cannot be intermingled with other trading funds of the party withholding the money. Where an account hold retentions under a number of contracts, specific ledgers must be maintained in respect of each contract are held under.
- The bank account in which retention funds are held must be a trust account.
- If retentions are not held in cash, then a 'complying instrument' (for example, a bond) may be put in place for the value of the retentions.
- Retention money can only be used by the party holding it for the purpose of rectifying non-performance (such as, if there has been a failure to rectify defects in the contract works).
- The party holding retentions must provide a quarterly report to the contractor or subcontractor whose funds are held, and must provide a written report promptly after each retention money transaction under a contract (i.e. as soon as any money payable under the contract becomes retention money). The details which must be included in such reports are further set out in the Amendment Act.
- The contractor or subcontractor whose funds are held can request accounting details of the retention funds at any time, free of charge
- If the retention money is not paid out when due, then the party to whom it is owed must be paid interest.
- The Amendment Act ensures that in the event of the receivership or liquidation of the party holding the retention funds, the funds remain protected for the benefit of the contractor/subcontractor
- The chief executive of MBIE may enforce the obligations of a party retaining funds.
- Certain provisions in contracts are prohibited, for example, a party withholding funds cannot contract out of compliance with the new rules
- Strict liability offences have been introduced for failing to hold retention money as required, including penalties of up to $50,000 for a director and up to $200,000 for a company.
- There are detailed record-keeping obligations on parties holding retentions set out in the Amendment Act.

It is important that parties who are subject to these obligations (and in particular their

directors), and parties from whom retentions are withheld become familiar with the new rules. Cooney Lees Morgan has a team of lawyers experienced in commercial construction contracts who would be happy to assist.