

The Construction Contracts (Retention Money) Amendment Act 2023: what you need to know

The collapse of construction companies such as Mainzeal and Ebert Construction has prompted legislative change to afford more protection for retention monies held under construction contracts. Parties to commercial construction contracts entered into after 5 October 2023 will need to comply with the new retentions regime set out in the Construction Contracts (Retention Money) Amendment Act 2023.

The Amendment Act applies to new, or renewed, construction contracts, and provides for the following key changes.

Retention money is deemed to be held on trust

Retention money is automatically deemed to be held on trust by the party who is entitled to hold retention money, for the benefit of the party from whom retention money is withheld. The party who is entitled to hold the retention money does not need to actively create a trust.

Separate bank account or complying instrument

The party holding retention money must hold that money in a separate bank account. The bank account must be registered in New Zealand, and it must be used solely for the purpose of holding the retention money. The party holding the retention money must advise the bank that

the account is for the purpose of holding retention money. If the account is an interest earning account, the party holding the retention money is entitled to any interest earned.

In the alternative, the party holding the retention money can use a 'complying instrument', such as a bank guarantee / bond or insurance instrument, rather than holding the money in a designated bank account. The instrument must contain the name of the issuer, sufficient information to identify it (i.e. a policy number) and the protected amount.

Reporting obligations

The party holding the retention money must keep accounting records relating to the retention money. The records must:

- identify the bank account in which the retention money is held;
- identify the construction contract under which the money is retained;
- include details of all payments into and out of the account; and
- confirm whether the bank account holds money for any other parties.

Records should be made available to the party from whom retentions are being withheld on a quarterly basis, albeit the records must be available for inspection at reasonable time and without charge.

Use of retention money

The party holding the retention money can only use it for the purposes set out in the construction contract, and must comply with the provisions governing the use of retention money. The party holding the retention money must give a minimum of 10 working days' notice that it intends to use the money for the purpose of remedying defects and give details of the defects to be remedied.

Article title
(Continued)

Penalties

Failure to hold retention money in accordance with the requirements of the legislation is an offence, and a party who holds retention money is liable for a fine of up to \$200,000 per offence. If the party holding the retention is a body corporate, each director also commits an offence and is liable for a fine of \$50,000 per offence.

The party holding the trust money may have a defence if it can demonstrate that either:

- it (or a director) took reasonable steps to comply;
- it acted in good faith and honestly and reasonably believed that the use of the money was permitted.

Where a party uses retention money other than as permitted by the contract, the party using the retention money is liable for a fine of \$20,000, and each director is liable for a fine of \$50,000. Similarly, failure to comply with records and reporting requirements is an offence, with a fine of up to \$50,000. There are no defences available for either incorrect use of retention money or breaches with respect to records and reporting requirements. There is also the prospect of parties that hold retentions facing civil claims against them where retention monies are either improperly held or applied.

How liquidators and receivers should treat retention money

When a liquidator or receiver is appointed, the party holding the retention money ceases to be a trustee of the retention money (the liquidator or receiver steps in and is the "new trustee"). The new trustee must notify the party from whom the retention money is withheld within 10 working days of their appointment. The new trustee can have reasonable costs and fees met from the retention money on trust. The new trustee is not responsible for any unlawful or improper action taken by the party who held the retention money.

Want to know more?

Parties to commercial construction contracts should ensure they understand the requirements of the new retentions regime, particularly those parties who will be holding retention monies. Those parties will need to ensure they have processes in place to comply with the new legislation, particularly in terms of the records and reporting requirements.

If you have any questions about rights and obligations with respect to retentions, please contact our specialist [here](#).