

Building and Construction Industry Security of Payment Regulation 2008

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New South Wales

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The provisions displayed in this version of the legislation have all commenced.

Authorisation

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Building and Construction Industry Security of Payment Regulation 2008



New South Wales

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Building and Construction Industry Security of Payment Regulation 2008*.

2 Commencement

This Regulation commences on 1 September 2008.

Note—

This Regulation replaces the *Building and Construction Industry Security of Payment Regulation 2001* which is repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Interpretation

(1) In this Regulation:

the Act means the *Building and Construction Industry Security of Payment Act 1999*.

(2) Notes included in this Regulation do not form part of this Regulation.

Part 2 Trust accounts for retention money

Division 1 Preliminary

4 Definitions

In this Part:

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 Secretary by order in writing.

retention money means money retained by a head contractor out of money payable by the head contractor to a subcontractor under a construction contract, as security for the

performance of obligations of the subcontractor under the contract.

Note—

Money is retention money only while it is held as security for the performance of the subcontractor's obligations. If the head contractor becomes entitled to money held as retention money, the money ceases to be retention money and the requirement under this Part that the money be held in trust for the subcontractor in a retention money trust account ceases.

5 Application of Part—projects with a value of at least \$20 million

- (1) This Part applies to retention money held by a head contractor only when the construction project (that is, the head contractor's construction contract with the principal) has a value of at least \$20 million (**the \$20 million threshold**) and only when that construction contract was entered into after the commencement of this Part.
- (2) The **value** of a construction contract is the amount of the consideration that the contract provides is payable for construction work carried out under the contract or for related goods and services supplied under the contract or (if the contract does not provide for that amount) the market value of the work to be carried out and the value of the goods and services to be supplied.
- (3) The value of a construction contract is its value including any variation to the contract after the contract is entered into, with the result that the value of a construction project can increase and reach the \$20 million threshold after the head contractor's construction contract with the principal is first entered into.
- (4) When the value of a construction project reaches the \$20 million threshold after the head contractor's construction contract with the principal was first entered into, retention money held by the head contractor becomes subject to this Part but only for construction contracts between the head contractor and subcontractors entered into after the value of the construction project reached the \$20 million threshold.

Division 2 Trust account requirements

6 Retention money to be held in trust account

- (1) A head contractor who holds retention money is to hold the money in trust for the subcontractor from whom the money has been retained and must ensure that the money is paid into and retained in a trust account (a **retention money trust account**) established with an approved ADI.

Maximum penalty: 200 penalty units.

- (2) A retention money trust account may be established as:
 - (a) a separate trust account for the retention money held in respect of a particular subcontractor, or

- (b) a separate trust account for all retention money held in connection with a particular construction project of the head contractor, or
- (c) a separate trust account for all retention money held in connection with 2 or more (or all) construction projects of the head contractor.

7 Requirements for establishment of trust account

- (1) A head contractor who establishes a retention money trust account must ensure that the name of the account and the description of the account in the records of the head contractor include the name of the head contractor and the words "Trust Account".
- (2) When establishing a retention money trust account with an approved ADI, a head contractor must ensure that the approved ADI is notified in writing that the account is a trust account required to be established for the purposes of this Part.
- (3) A head contractor must, within 14 days after establishing a retention money trust account, notify the Secretary in writing of the following:
 - (a) the name of the approved ADI and the branch or BSB number of the branch of the approved ADI at which the account has been established,
 - (b) the name of the account,
 - (c) the number of the account,
 - (d) the opening balance of the account.

Maximum penalty: 200 penalty units.

8 Withdrawals from trust account

- (1) A head contractor must not withdraw retention money from a retention money trust account except:
 - (a) for the purpose of the payment of the money in accordance with the terms of the construction contract under which the money was retained by the head contractor, or
 - (b) as may be agreed in writing by the head contractor and the subcontractor concerned, or
 - (c) in accordance with an order of a court or tribunal.
- (2) A head contractor must not withdraw retention money from a retention money trust account otherwise than by cheque or electronic funds transfer.

Maximum penalty: 200 penalty units.

9 Interest earned on trust account

Interest earned on retention money held in a retention money trust account is to be held on the same trust as the retention money and dealt with accordingly unless the contract between the head contractor and the subcontractor under which the money is held as retention money otherwise provides or the head contractor and subcontractor otherwise agree in writing.

10 Retention money not available to pay head contractor's debts

- (1) Retention money held by a head contractor is not available for the payment of the debts of the head contractor, or liable to be attached or taken in execution for satisfying a judgment against the head contractor.
- (2) This clause does not take away or affect any just claim that a head contractor may have against or upon retention money.

11 Overdrawn trust account

A head contractor must, within 5 days after becoming aware that a retention money trust account of the head contractor has become overdrawn, notify the Secretary in writing of:

- (a) the name and number of the account, and
- (b) the amount by which the account is overdrawn, and
- (c) the reason for the account becoming overdrawn.

Maximum penalty: 200 penalty units.

12 Closure of trust account

A head contractor must, within 14 days after closing a retention money trust account, notify the Secretary of the closure in writing.

Maximum penalty: 200 penalty units.

13 Financial institutions not subject to certain obligations and liabilities

- (1) An approved ADI with which a retention money trust account is established by a head contractor under this Part:
 - (a) is not under any obligation to control or supervise transactions in relation to the account or to see to the application of money disbursed from the account, and
 - (b) does not have, in relation to any liability of the head contractor to the approved ADI, any recourse or right (whether by way of set-off counterclaim, charge or otherwise) against money in the account.
- (2) Subclause (1) does not relieve an approved ADI from any liability to which it is subject

apart from this Part.

Division 3 Records and information

14 Trust account records

- (1) A head contractor must keep records in relation to a retention money trust account established by the head contractor showing the amounts deposited into or withdrawn from the account.
- (2) A head contractor must retain a record made in relation to a retention money trust account for the purposes of this clause for not less than 3 years after the account is closed.

Maximum penalty: 200 penalty units.

15 Power to require information

- (1) The Secretary may by direction in writing require any of the following persons to provide specified information to the Secretary that is relevant to the enforcement or administration of this Part:
 - (a) a head contractor,
 - (b) a subcontractor,
 - (c) an approved ADI.
- (2) Without limitation, a direction under this clause may require the provision of information in respect of any of the following matters:
 - (a) the value of any construction contract entered into with a principal by the head contractor,
 - (b) retention money retained by the head contractor under a construction contract with a subcontractor,
 - (c) a retention money trust account established by the head contractor for the purposes of this Part.
- (3) A person to whom a direction is given under this clause must comply with the direction by providing the required information in writing to the Secretary within 7 days after the direction is given or within such longer period as may be specified in the direction or as the Secretary may allow by notice in writing to the person.

Maximum penalty: 200 penalty units.

16 Annual report on trust account

- (1) The head contractor who operates a retention money trust account during a financial

year must, within 3 months after the end of the financial year, provide the Secretary with the following:

- (a) an account review report for the account in respect of the financial year,
- (b) a retention account statement for the account in respect of the financial year in the form set out in Schedule 2.

Maximum penalty: 200 penalty units.

- (2) An **account review report** for a retention money trust account is a report given by a registered company auditor (within the meaning of the [Corporations Act 2001](#) of the Commonwealth) certifying that, based on a review of the operation of the account, it is the auditor's opinion that the account operator has complied with all of the requirements of this Part in relation to the account during the financial year for which the report is given.
- (3) A fee of \$1,500 must accompany an account review report and retention account statement provided to the Secretary for the purposes of this clause.
- (4) A head contractor must not provide a retention account statement to the Secretary for the purposes of this clause knowing that the statement is false or misleading in a material particular.

Maximum penalty: 200 penalty units.

- (5) In this clause:

financial year means a period of 12 months commencing on 1 July.

17 Offence of providing false or misleading information

A person who in purported compliance with a requirement imposed by or under this Part provides information to the Secretary knowing the information to be false or misleading in a material particular is guilty of an offence.

Maximum penalty: 200 penalty units.

Part 3 Miscellaneous

18 Recognised financial institutions

Each person or body that is a **body regulated by APRA**, within the meaning of the [Australian Prudential Regulation Authority Act 1998](#) of the Commonwealth, is prescribed for the purposes of the definition of **recognised financial institution** in section 4 of the Act.

19 Supporting statements

- (1) For the purposes of the definition of **supporting statement** in section 13 (9) of the Act, the form contained in Schedule 1 is prescribed.
- (2) A reference to an amount due and payable in a supporting statement does not include a reference to an amount in dispute between the head contractor and a subcontractor. Any subcontractors with whom an amount is in dispute with the head contractor must be separately identified in the attachment to the supporting statement.
- (3) A reference to an amount due and payable in a supporting statement includes a reference to a retention amount due and payable.
- (4) The requirement for a head contractor to provide a supporting statement under section 13 (7) of the Act relates only to those subcontractors or suppliers directly engaged by the head contractor.
- (5) Any payments referred to in a supporting statement that are due and payable and not in dispute must be paid in full before any declaration in the prescribed form is signed.

20 Exemptions

A person is exempt from the operation of Division 2A of Part 3 of the Act in the person's capacity as a principal contractor (within the meaning of that Division) under a construction contract of a kind referred to in section 7 (2) (b) of the Act.

Schedule 1 Form of supporting statement

(Clause 19 (1))

Supporting statement by head contractor regarding payment to subcontractors

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this statement, the terms "principal", "head contractor", "subcontractor", and "construction contract" have the meanings given in section 4 of the [Building and Construction Industry Security of Payment Act 1999](#).

Head contractor: [*business name of head contractor*]

ABN: [*ABN*]

* 1. has entered into a contract with: [*business name of subcontractor*]

ABN: [*ABN*]

Contract number/identifier: [*contract number/identifier*]

OR

* 2. has entered into a contract with the subcontractors listed in the attachment to this statement.

* [*Delete whichever of the above does not apply*]

This statement applies for work between [*start date*] and [*end date*] inclusive (the construction work concerned), subject of the payment claim dated [*date*].

I, [*full name*], being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of

the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature:

Date:

Full name:

Position/Title:

Attachment

Schedule of subcontractors paid all amounts due and payable

| Subcontractor | ABN | Contract number/ identifier | Date of works (period) | Date of payment claim (head contractor claim) |
|---------------|-----|--------------------------------|---------------------------|---|
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Schedule of subcontractors for which an amount is in dispute and has not been paid

| Subcontractor | ABN | Contract number/ identifier | Date of works (period) | Date of payment claim (head contractor claim) |
|---------------|-----|--------------------------------|---------------------------|---|
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Schedule 2 Form of retention account statement

(Clause 16)

Annual retention account statement for retention money trust account

This statement is to be provided along with an account review report for a retention money trust account under clause 16 of the *Building and Construction Industry Security of Payment Regulation 2008*.

Expressions used in this statement have the same meanings as in the *Building and Construction Industry Security of Payment Regulation 2008*.

Head contractor: [*business name of head contractor*]

ABN: [ABN]

Retention money retained by the head contractor from the subcontractor(s) listed in the attachment to this statement has been paid into the trust account to which the accompanying account review report relates.

Date of account review report:

Trust account name:

Name of approved ADI at which trust account established:

Date account opened:

Total retention money paid out of account during audit period:

Total retention money held in account at end of audit period:

I, [full name], being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the information contained in this statement and that to the best of my knowledge and belief the information contained in this statement about retention money held in the trust account to which the accompanying account review report relates is complete and correct.

Signature:

Date:

Full name:

Position/Title:

Attachment

Schedule of retention money retained from subcontractor(s)

| Subcontractor | ABN | Full retention amount retained from subcontractor | Retention amount paid to subcontractor during audit period | Retention amount held at end of audit period |
|----------------------|------------|--|---|---|
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