

The *Building and Construction Industry (Security of Payment) Act 2021* (Act) retention trust scheme now applies to all new construction contracts entered into with a value of AU\$20,000 or more in Western Australia.

The trigger threshold has been lowered from AU\$1 million, and the scheme will now affect a much larger number of construction contracts.

What Do I Need To Know?

From 1 February 2024, construction contracts valued at AU\$20,000 or more will be subject to the retention trust scheme under the Act (save for minor exceptions). Parties cannot contract out of the scheme.

The scheme applies if money is withheld from payments under a construction contract as performance security or if money is paid by a party to be retained as performance security.

It does not apply if the performance security under the construction contract is not cash retention, e.g. bank guarantee or performance bond.

What Is the Retention Trust Scheme?

Retention money under a construction contract must be held on trust in a retention money trust account by the party retaining the money or the party to whom the money is paid (trustee) on behalf of the other party providing the performance security (beneficiary).

The purpose of the trust scheme is to reduce risks to a party that has paid the retention money in the event of the other party's insolvency by protecting the money from other creditors.

Parties withholding retention money must ensure that the money is paid into a separate trust account with a recognised financial institution. Once the account is in place, parties will have limited recourse to access the funds. The money in a retention money trust account can only be withdrawn in accordance with the specific requirements prescribed by the Act and the regulations.

What Are the Exceptions?

The retention trust scheme does not apply to:

- Head contracts directly with a government party
- Contracts with homeowners for home building works valued at AU\$500,000 or more, unless the homeowner is a corporation, or the contract is for a residential development business or for works on two or more dwellings on different lots of land

- Small-scale residential contracts (e.g. single dwelling, granny flat, shed, patio, carport)

What Do I Need To Do?

A party holding retention money must ensure strict compliance with the Act and regulations.

Some key points to note:

- The party holding retention money must establish a retention money trust account within 10 business days after the parties enter into the construction contract.
- The account must be a deposit or transaction account of a recognised financial institution, and the account must be named as a "trust account".
- A single trust account may be established for multiple projects/beneficiaries.
- Written notice must be given to the beneficiary as soon as the account is established and if there are changes to the account.
- If the money will be separately paid as security under the contract, the trust account must be established before the money is paid as security.
- The trustee can claim interest earned on the account.
- The trustee must keep proper accounting records of the money held under the retention trust scheme, and the beneficiary is entitled to access those records.

Failure to comply with these obligations is an offence under the Act and could result in a significant fine.

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