



New South Wales

Building and Construction Industry Security of Payment Regulation 2020

under the

Building and Construction Industry Security of Payment Act 1999

[*The following enacting formula will be included if this Regulation is made—*]

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Building and Construction Industry Security of Payment Act 1999*.

Minister for Better Regulation and Innovation

Explanatory note

The object of this Regulation is to repeal and remake, with amendments, the *Building and Construction Industry Security of Payment Regulation 2008*, which would otherwise be repealed on 1 September 2021 by section 10(2) of the *Subordinate Legislation Act 1989*.

This Regulation provides for the following—

- (a) the requirement for head contractors to hold retention money for construction contracts with a value of at least \$10 million,
- (b) the maintenance and disclosure of retention money trust account records,
- (c) the eligibility criteria for adjudicators.

This Regulation is made under the *Building and Construction Industry Security of Payment Act 1999*, including sections 4(1) (definition of *recognised financial institution*), 7(5), 12A, 18(1)(b) and (2)(b), 28(1), 34B(2) and (4), 34D(1)(b)(ii) (definition of *executive liability offence*) and 35 (the general regulation-making power).

public consultation draft

Building and Construction Industry Security of Payment Regulation 2020 [NSW]
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Building and Construction Industry Security of Payment Regulation 2020

under the

Building and Construction Industry Security of Payment Act 1999

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Building and Construction Industry Security of Payment Regulation 2020*.

2 Commencement

This Regulation commences on 1 September 2020 and is required to be published on the NSW legislation website.

Note. This Regulation repeals and replaces the *Building and Construction Industry Security of Payment Regulation 2008*, which would otherwise be repealed on 1 September 2021 by section 10(2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation—

retention money has the same meaning as in section 12A(5) of the Act.

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.

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

Note. The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

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

4 Application of Act

For the purposes of section 7(5) of the Act, owner occupier construction contracts are prescribed as a class of construction contracts to which the Act does not apply.

Part 2 Trust accounts for retention money

Division 1 Preliminary

5 Definitions

In this Part—

approved ADI means an authorised deposit-taking institution approved under section 87 of the *Property and Stock Agents Act 2002* or approved by the Secretary by order in writing.

retention money trust account—see clause 8(1)(b).

6 Application of Part—contracts with value of at least \$10 million

- (1) This Part applies to a head contractor only if—
 - (a) the head contractor's construction contract with the principal (the **main contract**) has a value of at least \$10 million (the **\$10 million threshold**), and
 - (b) the main contract was entered into after 31 December 2020.
- (2) The **value** of a construction contract is—
 - (a) 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
 - (b) if the contract does not provide for that amount—the market value of the work to be carried out or 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 the main contract can increase and reach the \$10 million threshold after the main contract is first entered into.
- (4) If the value of the main contract reaches the \$10 million threshold after the main contract was first entered into, 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 main contract reached the \$10 million threshold.

7 Executive liability offences

Section 34D of the Act applies to an offence against clause 8(1), 8(2), 10, 13, 14 or 16.

Note. Section 34D of the Act provides for the personal liability of directors for certain offences committed by a corporation.

Division 2 Trust account requirements

8 Retention money to be held in trust account

- (1) A head contractor to whom this Part applies must—
 - (a) hold the retention money in trust for the subcontractor entitled to the money, and
 - (b) ensure that the money is paid into and retained in a trust account established with an approved ADI (a **retention money trust account**).

Maximum penalty—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

- (2) A head contractor must ensure that the money is paid into the retention money trust account as soon as possible, but no later than 7 days after the head contractor is required to retain the retention money.
Maximum penalty—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.
- (3) 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 contract of the head contractor, or
 - (c) a separate trust account for all retention money held in connection with 2 or more (or all) construction contracts of the head contractor.

9 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”.
Maximum penalty—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.
- (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.
Maximum penalty—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.
- (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—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

10 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.
- Maximum penalty—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.
- (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—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

11 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—

- (a) the contract between the head contractor and the subcontractor under which the money is held as retention money otherwise provides, or
- (b) the head contractor and subcontractor otherwise agree in writing.

12 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.

13 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—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

14 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—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

15 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.

16 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.

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Part 2 Trust accounts for retention money

Maximum penalty—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

- (2) A head contractor must keep a separate ledger for retention money held in respect of each subcontractor in connection with each construction contract.

Maximum penalty—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

- (3) The ledger must contain the following information—

- (a) the amounts deposited into or withdrawn from the retention money trust account in respect of the subcontractor,
- (b) the date of each transaction,
- (c) the balance after each transaction.

Maximum penalty—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

- (4) A head contractor must provide the subcontractor concerned with a copy of the ledger—

- (a) at least once every 3 months, or
- (b) as often as may be agreed in writing by the head contractor and the subcontractor (but at least once every 12 months).

Maximum penalty—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

- (5) 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—In the case of a corporation, 1,000 penalty units or, in any other case, 200 penalty units.

Part 3 Miscellaneous

17 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(1) of the Act.

18 Supporting statements

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.

19 Adjudicator eligibility

- (1) For the purposes of section 18(1)(b) of the Act, a person is eligible to be an adjudicator in relation to a construction contract if the person has—
 - (a) a degree or diploma in architecture, building surveying, quantity surveying, building and construction, construction management, engineering or law conferred by an Australian or foreign university or tertiary institution and at least 5 years' experience in—
 - (i) the management and administration of construction contracts, or
 - (ii) the resolution of disputes in connection with construction contracts, or
 - (b) at least 10 years' experience in the management of construction contracts or the resolution of disputes in connection with construction contracts.
- (2) For the purposes of section 18(2)(b) of the Act, a person is not eligible to be an adjudicator in relation to a particular construction contract if—
 - (a) the person has not completed the required continuing professional development, or
 - (b) a reasonable person would conclude the person has an actual or perceived conflict or would not adjudicate impartially.
- (3) Subclause (2)(a) does not apply until 1 September 2021.
- (4) In this clause—

required continuing professional development means the continuing professional development required to be completed each year by an adjudicator as specified by the Secretary in guidelines published on the Department's website.

20 Authorisation of nominating authorities

- (1) An authority given by the Minister to an applicant under section 28 of the Act remains in force for a period of 5 years, unless sooner withdrawn by the Minister under the Act.
- (2) An existing authority that was, immediately before 1 September 2020, in force, remains in force for a period of 5 years from 1 September 2020, unless sooner withdrawn by the Minister under the Act.

21 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 an owner occupier construction contract.

22 Repeal and savings

- (1) The *Building and Construction Industry Security of Payment Regulation 2008* is repealed.
- (2) Any act, matter or thing that, immediately before the repeal of the *Building and Construction Industry Security of Payment Regulation 2008*, had effect under that Regulation continues to have effect under this Regulation.
- (3) Part 2 of the *Building and Construction Industry Security of Payment Regulation 2008*, as in force immediately before 1 September 2020, continues to apply to a construction contract that—
 - (a) has a value of at least \$20 million, and
 - (b) is entered into on or after 1 May 2015 and on or before 31 December 2020.
- (4) Despite subclause (2), clause 16 of the *Building and Construction Industry Security of Payment Regulation 2008*, as in force immediately before 1 September 2020, does not apply with respect to the financial year commencing on 1 July 2019.

Schedule 1 Penalty notice offences

Application of Schedule

- (1) For the purposes of section 34B of the Act—
 - (a) each offence created by a provision specified in this Schedule is an offence for which a penalty notice may be issued, and
 - (b) the amount payable for the penalty notice is the amount specified opposite the provision.
- (2) If the provision is qualified by words that restrict its operation to limited kinds of offences or to offences committed in limited circumstances, the penalty notice may be issued only for—
 - (a) that limited kind of offence, or
 - (b) an offence committed in those limited circumstances.

Column 1	Column 2	Column 3
Provision	Penalty for an individual	Penalty for a corporation
Offences under the Act		
Section 13(7)	\$2,200	\$11,000
Section 26A(5)	\$1,100	\$5,500
Section 26B(5)	\$1,100	\$5,500
Section 26D(3)	\$1,100	\$5,500
Section 26E(2)	\$1,100	\$5,500
Offences under this Regulation		
Clause 8(1)	\$2,200	\$11,000
Clause 9(3)	\$2,200	\$11,000
Clause 10(1) or (2)	\$2,200	\$11,000
Clause 14	\$2,200	\$11,000
Clause 16(1) or (5)	\$2,200	\$11,000