



Retention Trust Scheme under the *Building and Construction Industry (Security of Payment) Act 2021*

What is the Retention Trust Scheme?

The *Building and Construction Industry (Security of Payment) Act 2021* (the Act) establishes a retention trust scheme to better protect retention money such as cash security in the event of financial difficulty or dispute on a construction project.



Where a construction contract has a value above a certain financial threshold, retention money withheld under that contract is taken to be held on trust for the benefit of the party who provided the money.

Parties cannot contract out of the scheme and any attempt to do so will be unenforceable.



The Act does not require parties to a construction contract to withhold retention money from progress payments. Instead, the scheme applies only where retention money is taken under the contract, and does not affect other common forms of security used in the industry such as performance bonds (for example bank guarantees).

What is the meaning of retention money?

The Act defines retention money broadly to include:



Money (including GST) withheld from payments made under a construction contract as performance security (for example money withheld from progress payments).

or



Money paid upfront by or on behalf of one party to the other party to the contract to be retained as performance security (for example cash provided up-front at the start of the contract as performance security).



Retention money is still retention money for the purposes of the scheme if it is called by another name, for example, a 'hold back'. Parties cannot 'contract out' of the application of the scheme by calling retention money by a different name.

When does the scheme apply?

The scheme applies whenever retention money is withheld under a construction contract. The scheme will commence operation in two phases:



Phase 1: from 1 February 2023 to 31 January 2024, the scheme applies to all new construction contracts entered into for construction work or the supply of related goods and services in Western Australia where the value of the contract is \$1 million or more (including GST).

Phase 2: from 1 February 2024 onwards, the scheme applies to all new contracts entered into with a value of \$20,000 or more (including GST).

The Phase 1 and Phase 2 thresholds are not retrospective. This means the scheme will not apply to construction contracts that are entered into **before** the commencement of either Phase and subsequently exceed the relevant threshold after the commencement of the phases.

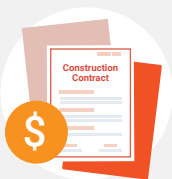
Example: Contract entered into before the commencement of a relevant Phase.



- The value of a construction contract is \$950,000 (including GST) at the time it is entered into on 1 December 2022.
- The contract will not be covered by the retention trust scheme when the Phase 1 comes into operation on 1 February 2023.
- If a variation to the contract means that the total value exceeds \$1 million (including GST) in July 2023 for instance, the scheme will still not apply, because the contract itself was entered into prior to the commencement of Phase 1.

However, where the value of the contract (at the time it is entered into) is less than the amounts stated above, the scheme will start applying only once the value increases above the threshold.

Example: Variation to the contract.



- The value of a construction contract is \$950,000 (including GST) at the time it is entered into on 2 February 2023 (i.e. after Phase 1 commences operation).
- Subsequently, a variation to the contract means the total value exceeds \$1 million (including GST) on 1 May 2023.
- The scheme will apply from the date the variation is approved and the value of the contract meets the threshold.
- Retention money withheld thereafter will be subject to the scheme.



It is important to be aware that the 'value' of a construction contract for the purposes of the retention trust scheme means the current value at any relevant time, including GST.

Some minor exceptions do apply to the application of the scheme. These are:

- Head contracts directly with State Government or Commonwealth principals, including departments and agencies (for example, you are a builder or contractor directly contracted by a State or Commonwealth department, agency or instrumentality to carry out construction works where it is agreed that retention money is to be withheld).

- Contracts directly with individual homeowners for home building works valued at \$500,000 (including GST) or more, unless 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 irrespective of the value of the contract, as defined below.



What is a 'small scale' residential contract?

A construction contract for home building work will be a small-scale residential contract where it is:

- a contract between a head contractor and a subcontractor (or between two subcontractors) for works on a single dwelling (for example a house); or
- a construction contract (between any parties – for example a client and builder, or builder and a subcontractor, or between two subcontractors) for an associated structure connected to or on the same lot as an existing or proposed single dwelling. This includes a granny flat, shed, patio, deck, pergola, carport, driveway, swimming pool or similar kind of structure; or
- a construction contract for an associated structure on common property if the client (principal) is an individual or a strata company or community corporation.

How the retention trust scheme works



Where a party to a construction contract withholds retention money as performance security (the trustee), they are taken to hold the money on trust for the benefit of the party carrying out the work or supplying the goods and services (the beneficiary).

As a trustee of the retention money, the party withholding the money is required to comply with various obligations under the Act, including to place the retention money in a separate retention money trust account with a bank or other financial institution.

Do I need to apply for a special type of banking product?

No.

Whilst many banks offer special statutory trust accounts for other industries, such as legal practitioners and real estate agents, the requirements of the retention trust scheme are compatible with the use of a general transaction or deposit accounts offered by Australian banks. You must however label the account as a Trust Account. If unsure, speak to your bank or other financial institution about setting up the account.

The retention money must be held in the retention money trust account for the duration of the construction project until it is due to be paid or otherwise applied under the terms of the contract. Failure to place the money in a retention money trust account does not affect the other party's rights in the event of an insolvency to that money.

The trustee should not at any time keep the retention money in their normal banking account or use the money to pay other debts, or otherwise fund their business.

Within
10
business days

The account must be established by the trustee within 10 business days after the parties entered into the construction contract or within 20 business days after the current value of the contract exceeds the relevant Phase 1 or Phase 2 threshold. The account must comply with certain minimum requirements, including that the beneficiary is notified of the establishment of the account. If the trustee already has a retention money trust account at the time of entering into the contract, that account may be used.



Requirements relating to a retention money trust account

The retention money trust account -

- must be a deposit or transaction account of a recognised financial institution; and
- must include the words "trust account" in the name and description of the account.

As soon as practicable after the account is established, the party who established the account must give a written notice of the account to the beneficiary. The notice must contain the following particulars:

- the name of the recognised financial institution with which the account has been established;
- the name of the account; and
- the BSB number and account number for the account.

If any of those particulars should change during the life of the contract then the party who established the account is obligated to give the other party a written notice of the change.

Each trustee only requires one retention money trust account. This single account may hold retention amounts across a number of different projects. If the trustee prefers, they may have multiple retention trust accounts for each beneficiary.

It is an offence under the scheme for a trustee to omit to pay retention trust money to which the scheme applies into a retention money trust account. A maximum fine of \$50,000 for individuals or \$250,000 for corporations can apply if convicted.

More information about how to establish a retention money trust account can be found in the Retention Money Trust Accounting Guidelines available on the Building and Energy website.

When can money be withdrawn from trust?

The trustee may only withdraw the retention money from the trust account where:



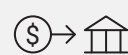
They are entitled to do so under the terms of the contract or as agreed by both parties.

or



In accordance with a decision by a court, arbitrator, expert determiner, adjudicator or review adjudicator.

or



It is for the purpose of transferring money to another retention money trust account, returning money taken in error, or to withdraw interest earned on the money in the account.

Any interest earned on the retention money in the trust account can only be withdrawn once every six months.



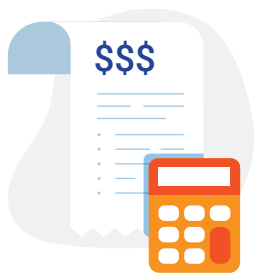
Many industry standard form construction contracts allow recourse to be had to retention money to remedy defective work. When entering into a contract, make sure the precise circumstances are clearly defined and agreed to by all parties in relation to when recourse may be had to retention money.

Under no circumstances can the money be withdrawn to cover the business costs of the trustee or be invested.



It is important to note that retention trust money can only be withdrawn (in the circumstances allowed under the scheme) via cheque or electronic fund transfers. Cash withdrawal is not permitted.

How does the trustee operate a retention trust account?



The trustee must keep proper accounting records on the retention money held under the scheme.

The records must show all transactions relating to the trust money and also show a correct position in relation to the outcome of those transactions. The other party, the beneficiary, is entitled (without charge) to inspect these trust records and take copies upon the giving of reasonable notice. It is an offence under the scheme for a trustee to deny a beneficiary this entitlement. A maximum fine of \$50,000 for individuals or \$250,000 for corporations can apply if convicted.

The trustee is allowed to employ an agent to assist in managing the account. The trustee is also entitled to any interest earned on the account and may withdraw that interest once every six months.

Can trust records be redacted?

Yes, but only in limited circumstances.

If a trustee holds all retention monies in one account, then if a beneficiary wishes to inspect and take copies of trust records, the names and associated information of other beneficiaries may be redacted by the trustee. The values of money in respect of which the beneficiary has a beneficial interest, however, may not be redacted.

For details on best practice in operating and keeping proper records in respect of a retention trust account, refer to the Retention Money Trust Accounting Guidelines on the Building and Energy website.

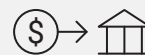
When can a retention money trust account be closed?

Once established, a retention money trust account may only ever be closed:



After retention money is no longer retained under the construction contract (for example it has all been paid out to the beneficiaries or withdrawn in the circumstances permitted by the retention trust scheme).

or



After any money in the account has been transferred to another retention money trust account (for example if a single account was originally established but is to be amalgamated with another retention money trust account).

If a retention money trust account is closed, the party who established the account must, as soon as practicable, give written notice of the closure to the other party to the contract.

What if there is a dispute about retention money in the trust account?

Where a beneficiary is concerned that a trustee has not fulfilled their obligations under the scheme, they have a right under the Act to suspend on-going construction work or the supply of related goods and services in certain circumstances.

A beneficiary may also have access to existing remedies under the general law to seek court orders. This includes the recovery of funds that have been improperly taken from the beneficiary in breach of trust.

Disputes about the payment of money into or out of a retention money trust account can also be made by adjudicators, courts, arbitrators, and expert determiners appointed by the parties under their construction contract.








For further information about the retention trust scheme refer to the information available on the Building and Energy website.



If the beneficiary considers the trustee may have breached their obligations under the Act, they must take action as soon as possible. Such as by suspending on-going construction work in accordance with the requirements of the Act or seeking court orders.

The Building Commissioner or Building and Energy CANNOT assist parties with claims for breach or potential breach of trust. If you are unsure of your rights, seek independent professional advice.

Tips in relation to the retention trust scheme

-  Strict timelines apply for the establishment of a retention trust account. The account must be established by the trustee within 10 business days after the parties entered into the construction contract.
-  A retention money trust account must comply with certain minimum requirements, including that the beneficiary is notified of the account and it is labelled as a trust account.
-  A party who established and operates a retention money trust account (the trustee) must at all times keep proper accounting records relating to the account, and allow the beneficiary to inspect the trust records and take copies upon the giving of reasonable notice.
-  The trustee may only withdraw the retention money from the trust account to the extent they have a contractual entitlement to do so.
-  The Building Commissioner has published the Retention Money Trust Accounting Guidelines for more information on the requirements of establishing and operating a retention money trust account.

Glossary

Important terminology

Adjudicator	is an individual registered under the Act as an Adjudicator.
Bank or other financial institution	refers an authorised deposit-taking institution as defined in the <i>Banking Act 1959 (Commonwealth)</i> section 5(1).
Beneficiary	is the party to a construction contract who has retention money withheld from them under the construction contract by the trustee.
Common Property	is common property as defined under the <i>Community Titles Act 2018</i> or the <i>Strata Titles Act 1985</i> .
Trustee	is the party that withholds retention money under a construction contract from the beneficiary.

Disclaimer – The information contained in this fact sheet is provided as general information and a guide only. It should not be relied upon as legal advice or as an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations, you should obtain independent legal advice.

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