

NEW ZEALAND

Legislative changes around contractual retentions take effect on 31 March 2017. Are You Ready?

The Construction Contracts Amendment Act 2015 made some major amendments to the Construction Contracts Act 2002 (the CCA). The changes were to be introduced in three stages.

The first stage, effective from 1 December 2015, extended adjudication powers under the CCA beyond payment disputes to include 'rights and obligations' disputes. It also permits payees to suspend works if payments due to them are not made or if an adjudicator's decision is not complied with.

The second stage, effective from 1 September 2016, extended the reach of the CCA to include services provided by designers, engineers, consultants, etc., if their work will lead to construction. The Amendment Act contained what it calls 'savings provisions' to make it clear that these first two amendments did not apply to contracts let before their effective dates.

The third and final amendment to the CCA becomes effective on 31 March 2017 and concerns contractual retentions. From 31 March 2017, retention money on construction contracts must be held 'in trust' by the payer. This is not the same as it being held in a 'trust account' but auditable accounting procedures do need to be in place that make all retention moneys clearly identifiable as such.

The retention moneys will be protected from other creditor claims and cannot be spent by the payer, other than to repair defects in the construction contract works to which they relate and in accordance with the contract. The retentions must be released when the contract says so and not whenever the payer wishes. There was no 'savings provision' to this particular amendment, implying that it would apply to **all retentions held** as at 31 March 2017.

Government recognised that such an overnight change to accounting procedures applicable to all retentions could harm an industry accustomed to using retentions as working capital. They therefore included a savings provision in the "Regulatory Systems (Commercial Matters) Amendment Bill" to provide that the retention provisions of the CCA would not apply to contracts entered into before 31 March 2017.

The Bill has so far only reached the select committee stage but the latest advice from the Society of Construction Law is that the Bill is likely to be enacted by the end of March with the relevant clause intact. So it is to be hoped that the retention amendments will only apply to retention moneys held on contracts let after 31 March 2017. Payers on construction contracts should therefore plan to comply with the CCA's retention amendments from 31 March 2017 onwards in respect of all new contracts and keep an eye out for the passage of the Bill.

The regulations expected to give guidance on how to comply with the Act have unfortunately not materialised. Hence the question, are you ready with accounting and banking arrangements which you believe will satisfy the retention requirements of the amended CCA from 31 March onwards?