



RELEASE OF A SUBCONTRACTOR'S RETENTION MONIES CANNOT BE DEPENDENT UPON EVENTS UNDER THE HEAD CONTRACT

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The High Court of Australia has confirmed that the release of a subcontractor's retention monies cannot be conditional or dependent upon events or obligations under the head contract.

Such clauses are likely to fall foul of the prohibition of 'pay when paid' provisions included in security of payment regimes across Australia

What are 'pay when paid' provisions

A 'pay when paid' provision in a construction contract is generally a clause that makes the liability of one party to pay the other conditional or dependent upon the first party being paid by a third party.

An example is a clause in a subcontract that says that the head contractor does not have to pay the subcontractor for its works until the head contractor has been paid for those works by the owner.

Such clauses are prohibited across Australia. In Queensland, they are prohibited by section 16 of the *Building and Construction Industry Payments Act 2004 (Qld)*.

What the High Court decided

In *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5, the subcontract provided that the subcontractor's retention would be released as follows:

1. half to be released 90 days after CFO (being, the issuing of the certificate of occupancy and any other required approvals for the building) is achieved; and
2. the remaining half to be released 365 days after CFO.

The High Court held that a requirement that the subcontractor's retention would only be released when the head contractor obtained a certificate of occupancy, and any other required approvals for the building was invalid because it breached the prohibition on 'pay when paid' provisions under section 12 of the *Building and Construction Industry Security of Payment Act 2009 (SA)*.

The High Court held that the clause was void because:

1. it made the due date for payment (i.e. the release of the retention monies) dependent on the head contractor obtaining the certificate of occupancy; and
2. the certificate of occupancy was dependent on the head contractor completing its works under the head contract.

Tips for head contractors

Because of the decision, head contractors should consider whether to:

- require subcontractors to provide security in the form of a bank guarantee or similar security bond, instead of retention monies; and/or
- negotiate longer defect liability periods (i.e. say, 24 months) with subcontractors who complete their works early in the overall build, so that they cover the likely period of the head contractor's defect liability period under the head contract.

For further information or a detailed discussion on how these issues may affect you, please contact Julian Lane.

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