

Some construction contracts expressly provide for the deposit of retention money into a more secure trust account than that provided by the Regulation. For example, cl 5.9 of AS2124-1992 provides that a party holding retention money or cash security must deposit the money in a joint trust account in the joint names of the principal and the contractor. Money cannot be withdrawn by one party from that trust account except with the approval of the other party. That protection was omitted in the Regulation. It seems that where the Regulation applies, then so far as concerns the subcontractors' retention money, cl 5.9 will be superseded by the Regulation. The head contractor will have to deposit the subcontractors' retention money into the less secure trust account prescribed by the Regulation. Cash security would still have to be deposited into the more secure trust account prescribed by cl 5.9 of AS2124-1992.

The diminished rights of subcontractors under the SOP Act

When the Regulation requires the head contractor to pay retention money into the retention money trust account, the entitlement of the subcontractor under the SOP Act is reduced. Section 13(3)(b) of the SOP Act provides that a payment claim can include any amount that is held under the construction contract that the claimant claims is due for release. If the head contractor holds retention money as holdback, a subcontractor can make a payment claim under the SOP Act for the amount held by the head contractor as retention. But a subcontractor cannot use the SOP Act to recover money in the statutory trust account. An adjudicator cannot order the release of money in the statutory trust account.

Assume that a subcontractor submits a claim under the SOP Act to adjudication and the subcontract is one under which the head contractor is obliged to pay retention money into a statutory trust account. Assume that the subcontract provides for 10% retention money. If the adjudicator finds that the head contractor is liable to make a progress payment of \$100,000 to the subcontractor, the head contractor would have to pay \$10,000 into the statutory trust account and only \$90,000 to the subcontractor. However, having paid that amount into the statutory trust account the head contractor can then withdraw it from the account 'for the purpose of the payment [to the head contractor] in accordance with the terms of the construction contract'. The subcontractor could not make another adjudication application to recover the amount withdrawn. To recover an amount in the statutory trust account or an amount that the head contractor has withdrawn from the account without lawful authority, the subcontractor must sue in a court.

Conclusion

The New South Wales Government has elected to ignore the recommendation in the Collins Report for the enactment of legislation for a *Construction Trust*. Instead, the Government has enacted legislation for a *Retention Money Trust Account*. When next there is a spate of insolvencies in the construction industry, it will be found that subcontractors are left exposed. The *Retention Money Trust Accounts* will prove to be worthless. Only the enactment of the *Construction Trust* as recommended in the Collins Report will provide subcontractors with protection.

