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Legislation Update

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Company compliance compressed and retentions revisited



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The **Regulatory Systems (Commercial Matters) Amendment Act** is one of a three part package of omnibus bills recently rolled out to "*maintain the effectiveness and efficiency of the regulatory systems established by the Acts they would amend, and so reduce the chance of regulatory failure*".

The changes come into force at the end of May 2017 (*except for those to the retention regime under the Construction Contracts Act which apply from 1 April 2017*).

A number of the tweaks to the Companies Act and the Construction Contracts Act will provide welcome relief to business.

In this note we touch on a relaxation of audit requirements and removal requirements for overseas companies, annual report and annual meeting changes and a new way to hold retention monies in trust under commercial construction contracts.

Audit requirements

If an overseas company is considered "large" and has a branch in New Zealand, the New Zealand Companies Act demands the filing of audited group financial statements to comply with 'GAAP' (Generally Accepted Accounting Practice).

Going forward, this audit requirement will be removed if the overseas company is not subject to an audit requirement in its home country (but the obligation to prepare financial statements remains). Keeping to the theme of efficiency, the aim is to avoid unnecessary compliance costs.

The select committee report on the Amendment Act notes the extreme example of a Japanese company which was subjected to audit costs of up to \$375,000 – a grossly excessive charge for a company with a small presence in New Zealand.

Annual meetings and reports

For most New Zealand companies, the Companies Act no longer requires anything to be done at annual shareholder meetings.

Traditionally annual meetings would consider the annual report, financial statements and auditors report (although the Companies Act does not require shareholders to approve or adopt these reports/financials), elect directors and appoint and fix the remuneration of auditors. But neither financial statements, nor an audit, are required unless the company is "large", a public entity, has more than 10 shareholders (and not opted out) or shareholders have "opted in".

The Amendment Act clarifies that an annual meeting does not have to be called or held (nor therefore a resolution passed) if there is nothing to be done at the meeting, the constitution doesn't specifically require the meeting and the board resolves that, *'It is in the interests of the company to rely on [the section allowing a meeting not to be held] having regard to whether there is any particular issue that the*

shareholders should be given an opportunity to discuss, comment on, or ask questions about.'

Following on from that change, where no annual meeting is to be held, the company need only send an annual report, or a notice providing electronic access to an annual report, to shareholders (generally only required if financial statements are required) within 20 working days after it is prepared. The requirement to state in the notice whether a concise annual report was prepared has also been removed.

Registrar may remove overseas company from register

Currently, overseas companies can only be removed from the NZ Register for ceasing to carry on business in New Zealand on an application by the company itself after 3 months' public notice, or by a liquidator.

The Amendment Act allows the Registrar to act of his own motion if no objection to the removal is received 20 working days after public notice and notice to the company (matching the timeframe for NZ companies).

No notice is required if the Registrar is satisfied that the overseas company has been dissolved or otherwise ceased to exist as a company under the laws of another country.

Commercial construction contracts - retention money can be held on trust as bond, guarantee or insurance

The new retentions regime introduced by the **Construction Contracts Amendment Act 2015** commenced at the beginning of April 2017 and applies to all commercial construction

contracts entered into or renewed after **31 March 2017**.

Under this new regime, all retention money withheld under a commercial construction contract must be held on trust for the other party, with fiduciary obligations to be imposed on the trustee. This keeps retentions separate from the general pool of assets, and as the Commerce Select Committee has noted, ensures payers (such as developers and head contractors) protect retention money for the benefit of payees (such as sub-contractors) rather than using it as working capital.

Click **here** to read our earlier article with more detail on the retention changes: *Changes to the Construction Contracts Regime – Are you ready?*

However, concern had been expressed around the regime's requirement that retention money be held in the form of cash or liquid assets readily converted into cash. This is going to be expensive and difficult for some payers who may need to obtain additional capital to hold retention money in such form.

The Amendment Act tries to address this issue by allowing, as an alternative option, for retention money to be protected by a third party through a "*complying instrument*" (such as insurance, a bond or a guarantee) issued by an insurer or registered bank directly in favour of the payee subcontractor.

Recent developments

In a new development since the Amendment Act came into force, MBIE has advised that no regulations are now proposed in relation to the retentions regime. Detail was expected on a de minimis threshold amount of retentions which will trigger the new rules, a default interest rate for late payment of retention money and specific accounting requirements and requirements for "*complying instruments*".

But now the retention rules will apply regardless of the amount of money involved, the applicable interest rate must be agreed under the construction contract and there will not be any further detailed requirements for accounting or complying instruments.

MBIE "*expects industry participants to develop reporting methods that best suit the accounting systems they have in place*".

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