

AON

Construction Solutions

Retention Instrument



The Construction Contracts Act 2002 (CCA) has been amended with the passing of the Construction Contracts (Retention Money) Amendment Act 2023 (Amendment Act) on 5 April 2023.

The Amendment Act clarifies and strengthens the CCA’s retention regime, including how retention money must be handled. The Amendment Act applies to all commercial construction contracts signed and or updated after 5 October 2023 and states that:

Retention money must either be protected by:

- Being held in the form of cash in a compliant bank account used solely for these purposes; or
- A complying instrument.

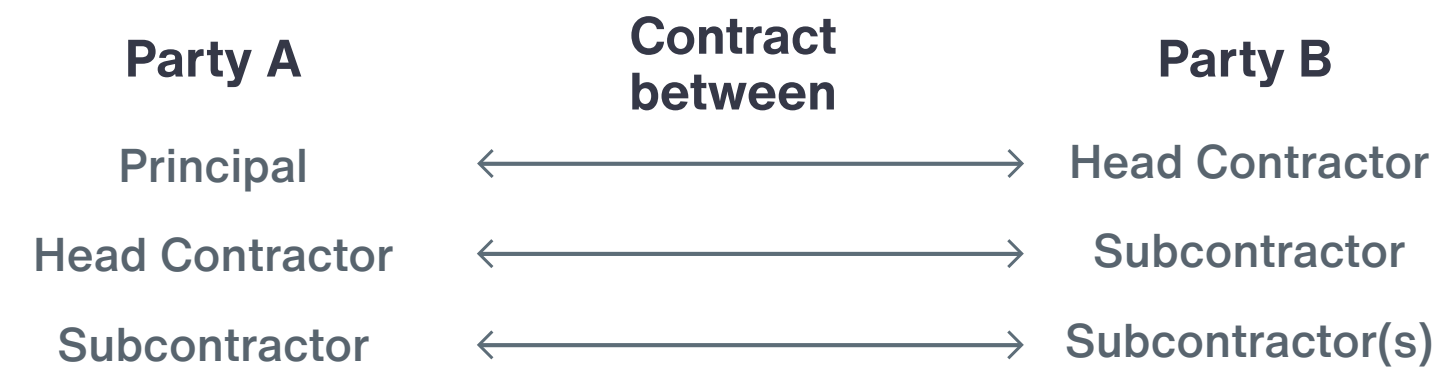
Who must comply?

The CCA must be complied with if:

- There is a commercial construction contract in place.*
- Retention money is withheld.

Party A must comply with the requirements. It is party A that will be liable for non-compliance. Party B has the retention money withheld from them.

Examples of party A and party B include:



Why comply?

Non-compliance can result in a fine of:

- Entities | Up to \$200,000 per breach
- Directors | Up to \$50,000 per breach

The Ministry of Business, Innovation and Employment (MBIE) has significant power to enforce retention money provisions including:

- Monitoring compliance and taking enforcement action;
- Requiring information;
- Bringing proceedings for non-compliance and/or hindering an investigation and seek a fine;
- Entering premises to obtain documentation.

*A commercial construction contract is a contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract.

Retention Instrument

The retention instrument is a complying instrument under the CCA.

It is provided to party A and is issued in favour of party B.

What is a complying instrument?

If party A has a complying instrument, then party A is not required to deposit retention money into a compliant bank account for those retentions.

The CCA specifies what the requirements are for a complying instrument. In short, it is a financial guarantee from an independent third party from which protected retentions will be available when they are due if party A is unable to return the retention to party B.

Advantages of a Retention Instrument

- 1 **Frees up cash.** Cash does not have to be held separately for retentions protected with a Retention Instrument.
- 2 **It is not an “on demand” instrument.** There is a process for the payment of the retention to party B.
- 3 **Party A does not have to disclose other retentions** that they hold on other party Bs or other commercially sensitive information.
- 4 **Party A has been financially vetted** by the insurer and has met the financial criteria meaning the insurer is prepared to put its capital behind party A.
- 5 **It Complies with the CCA.**
- 6 **Reduces risk for a breach** of the CCA and a resulting fine.

How does it work?

Party A can apply for a retention instrument. The key requirements are:

- 1** Party A has a strong balance sheet.
- 2** Aon undertaking AML verification of party A.
The New Zealand Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and associated regulations apply to Retention Instruments.

If the application is successful and accepted by party A:

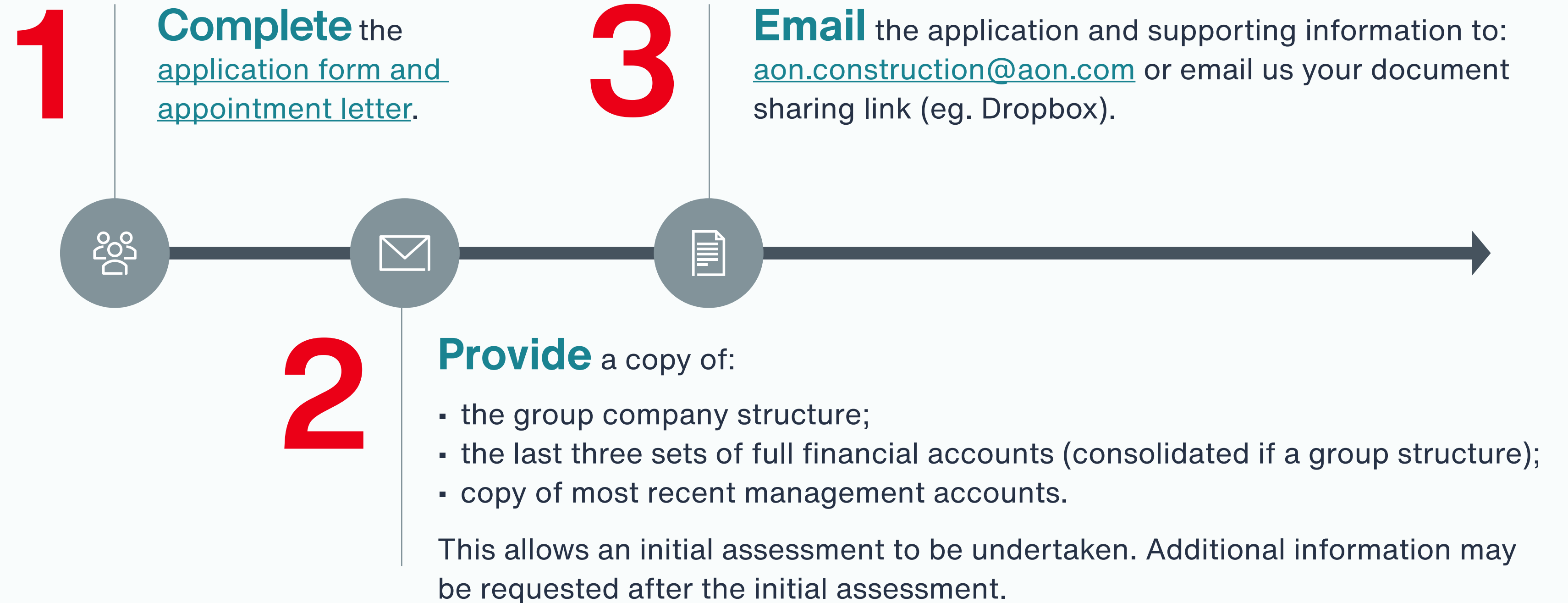
- 1** The insurer provides a limit of the maximum value of retentions that they will secure. This can be across multiple projects and party Bs. The retentions protected by the insurer is as advised by party A to the insurer.
- 2** If the limit provided by the insurer is less than the total of all retentions held by party A, party A is required to hold the balance of retentions in a compliant bank account.
- 3** Party A is required to provide the insurer with a monthly retentions report*. This report becomes the “policy schedule” of retentions protected by the Retention Instrument at that time (to be no more than the maximum limit offered by the insurer).
- 4** Once a retention is protected by the Retention Instrument, it remains protected until it is paid back to party B or removed from the most recent retention report provided to the insurer.
- 5** Like an insurance policy:
 - the Retention Instrument is annually renewable.
 - a premium is payable by party A before the Retention Instrument is issued.
- 6** Once the Retention Instrument is issued to party A, party A can utilise the retention cash it is currently holding (up to the value of the retentions protected by the Retention Instrument).

*The retention report provides the insurer specific details to ensure compliance with the Amendment Act. It includes details of party B, project, construction contract, total amount of retention money held, date of the retention and the amount protected by the Retention Instrument.

How to apply.

The Retention Instrument is based around the financial position of party A. As such, party A provide full financial disclosure of their financial position when applying for the Retention Instrument. We are aware that party A may have separate companies that hold plant and property assets. These will need to be included

in the information provided so that the insurer issuing the Retention Instrument is aware of the group financial position. We appreciate that the information requested is commercially sensitive. You can be sure that your information will be treated with the utmost confidentiality.



Aon is in the Business of Better Decisions.

About Aon

Aon is a leading provider of risk management and associated services in Aotearoa, and around the globe. We exist to help shape decisions for the better, providing our clients with advice, understanding, and solutions that give them clarity and confidence in their decision making.

Say **hello** to an Aon specialist today and find out how we can support **you**.

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