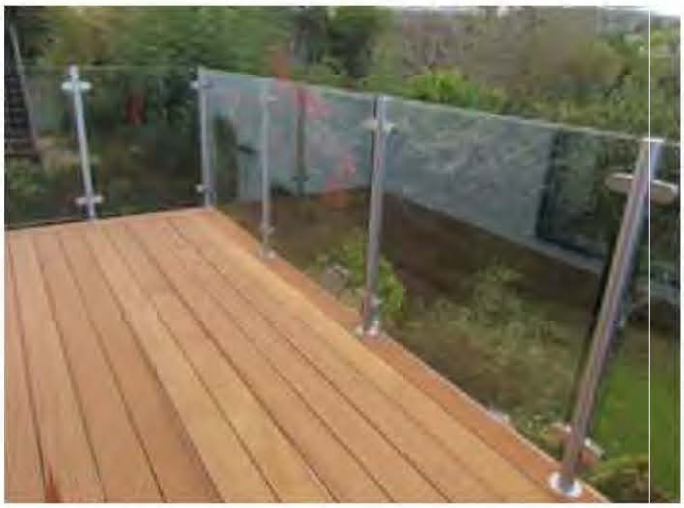
BuildLaw: In Brief

Builder prosecuted for falsely claiming to be a licensed building practitioner



An unlicensed builder has been convicted of two charges of falsely claiming to be a licensed building practitioner.

Albany-based builder Blair Cole has been fined $5,000 and ordered to pay court costs and $1,296 in reparation to an Orewa homeowner.

The case against Cole was brought to the North Shore District Court by the Ministry of Business, Innovation and Employment (**MBIE**) Occupational Licensing Team.

"Mr Cole, who trades as Akoranga Construction Limited, ran numerous advertisements in local papers falsely claiming to be a licensed practitioner and displayed the Licensed Building Practitioner (**LBP**) logo on his business card, despite never holding an LBP license," says Investigations Team Leader Simon Thomas.

"Furthermore, an Orewa homeowner responded to one of these print advertisements, engaging Mr Cole to replace a number of piles under the deck of her house. Mr Cole undertook this work, continuing the guise of a licensed builder. The homeowner paid Mr Cole for the job, which remains unfinished."

It is an offence under the Building Act 2004 for a person to claim to be licensed to carry out or supervise restricted building work, while not being licensed.

Mr Cole pleaded guilty to both charges, was fined $5,000, and ordered to pay court fees and $1,296 in reparation to the homeowner for the unfinished work on her Orewa home.

"This prosecution sends a clear message to the building industry that claiming to be a licensed building practitioner without actually holding such a license is illegal. Where MBIE has evidence of this occurring, offenders can expect to be prosecuted accordingly," Mr Thomas says.

Builder's illegal gas cooker job earns $6,000 fine

February prosecution by the Plumbers, Gasfitters and Drainlayers Board, backs the important messages to homeowners that are in their new public awareness campaign 'Sort the pros from the cons – your family's health and safety, your property and insurance are at risk.'

Auckland builder and Director of L&B Construction Limited, Byungsung Lim pleaded guilty to two charges: doing unauthorised gasfitting and doing unauthorised sanitary plumbing. He was fined $6,000 on the gasfitting charge, and fined $650 on the plumbing charged. He was also ordered to pay $113 solicitor's costs.

The complainant in the case engaged Mr Lim to undertake kitchen and bathroom renovations.

Sanitary plumbing and gasfitting conducted by anyone who does not hold a current NZ Practising Licence from the Board is illegal activity.

Mr Lim has never been registered or licenced as a gasfitter or plumber. He illegally installed

a toilet and a gas hob/cooker during the renovation project – and his work was defective.

Approximately one month after the installation a strong smell of gas, sooty flames and carbon build up on one of the gas nozzles was noticed.

Prolonged low-level exposure, to carbon monoxide can cause illness, loss of normal cognitive function and drowsiness. At high levels of exposure, it can be fatal, which is why the fines associated with illegal work of this type are high.

"Dealing with gas is dangerous. Never install a gas appliance yourself. The law requires you to use a licensed tradesperson and our new campaign 'sort the pros from the cons', shows consumers how to choose the right people", said Martin Sawyers, Chief Executive for the Board.

"It highlights the importance of qualified tradespeople, and the need to eliminate any risk by asking to sight a New Zealand Practising Licence before any work begins."

"A qualified tradesperson will make sure gas appliances are connected correctly, flued and vented properly, working properly and most importantly, that it is safe to use," he continued.

The Board and The NZ Insurance Council NZ warn mistakes are costly, and you could void your insurance. Consumers can find out what's legal and what's not at www.pgdb.co.nz.

Where there is any concern that work may have been done by someone who is not authorised, or there is concern about the competency of a tradesperson, consumers should notify the Board.

To make a complaint phone 0800 743 262, or use the R.A.C app (report-a-cowboy). It is available free and is a direct link to the Board's investigations team. Go to www.pgdb.co.nz.

Commission confirms charges filed against Bunnings for misleading advertising

The Commerce Commission has filed 45 charges in Auckland District Court against Bunnings (NZ) Limited alleging it misled consumers by advertising the prices of its goods as being the lowest in the market.

Bunnings is a duly incorporated company with its registered head office in Auckland. Its ultimate parent company is the Australian company Wesfarmers Limited, which also owns Coles, Target, K-Mart and Officeworks.

Bunnings is one of New Zealand's largest retailers, selling home improvement, outdoor living and general merchandise products. It has 46 retail stores nationwide, all of which it owns and operates. It employs 3,700 staff and stores stock on average 46,000 product lines.

The Commission alleges that Bunnings' advertising at its stores nationwide along with advertising campaigns on television, radio, online, and in newspapers and catalogues gave an overall impression that it offered the lowest prices for its products, when this was not true.

The Commission's investigation focused on the period 1 July 2014 to 28 February 2016.

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New retention scheme came into effect on 31 March 2017

The details are set out in the Construction Contracts Amendment Act 2015. The retention money provisions are designed to ensure payment of retention money to subcontractors, even in the event of insolvency.

Further clarification of the retentions trust regime was provided for in the Regulatory Systems (Commercial Matters) Amendment Bill (the Bill) introduced into Parliament in 12 October last year. The Bill is an omnibus bill and one of a package of three omnibus bills that contain amendments to legislation administered by the Ministry of Business, Innovation, and Employment.

The primary purpose was to clarify that the new retentions trust regime will apply only to contracts entered into or renewed on or after 31 March 2017, however the Bill also introduced a new and significant alternative to the retentions trust regime in the form of a 'complying instrument'.

On 23 March 2017, the Bill passed its third and final reading. Sections 139 to 147 of the bill amend provisions in the Construction Contracts Amendment Act 2015 relating to retentions and came into force immediately after section 18 of the Construction Contracts Amendment Act 2015 came into force on 31 March 2017.

In summary, from 31 March 2017:

- existing contracts, and their retentions, are not caught unless the contract is renewed for a further term after 31 March 2017 or the parties agree that the retentions provisions will apply;
- the retentions regime will apply to all retentions withheld under all construction contracts entered into or renewed after 31 March 2017, no matter how small, unless the contract is residential construction contract, vis. a contract for a person who is occupying or intends to occupy the premises that are the subject of the construction contract wholly or mainly as a dwellinghouse;
- the default position is that all retentions withheld by a payer in respect of commercial construction contracts entered into on or after 31 March 2017 must be 'held on trust';
- retention money may be held as cash or other liquid assets that are readily converted into cash;
- payers may invest the retention money and may retain any interest earned but are liable to make good any losses on the investment;
- retention funds can be comingled with other money but cannot be used as working capital;
- retentions funds cannot be used for anything other than remedying defects in the payee's work;
- retention funds are not available for the payment of debts of any other creditors, even if they are secured or preferential creditors;
- disbursement of retention money cannot be made conditional on anything other than performance of the payee's obligations under the contract;
- the date of payment of retentions fixed in the contract cannot be later than the date on which the payee's obligations under the contract have been completed;
- interest on retention money is payable from the due date for payment; and
- as an alternative, the payer may elect to put in place a 'complying instrument' to protect payment to the payee if the payer fails to pay – in practical terms that would mean an insurance policy, a bond, or a guarantee, provided that certain conditions are met, namely:

- the instrument must be issued by a licensed insurer, registered bank, or any other person who is not an associate of the payer prescribed by regulations;

- it must be issued in favour of the payee;

- it must be paid for fully by the payer and all conditions must have been satisfied so that the instrument is, and remains in effect;

- the retention money must be paid out if the payer fails to make payment on the date on which it is payable under the construction contract;

- payees can enforce the promise to pay against the issuer of the instrument; and

- importantly, records of financial instruments must be made available for inspection by payees at all reasonable times and without charge.

With both the default trust arrangement and the complying instrument option, there are onerous accounting and recording keeping obligations on the payer. The payee is entitled to inspect those records at all reasonable times and without charge.

Uncertainty remains as to the efficacy of the complying instrument option as the market has not yet responded with fit for purpose complying instruments, the cost of obtaining such instruments is unknown, what might constitute minimum or prohibited terms is unclear, and just what a payee might be required to do to secure the release of retention monies from the instrument provider is unknown. Furthermore, in the event of any breach of its terms, the payer (and its directors) will immediately be subject to, and in breach of, the default retentions trust regime.

No regulations are currently proposed to set a minimum amount of retention money, alternative methods of accounting, or the default interest rate to apply for late payment of retention money. MBIE advises that the retention money provisions will apply regardless of the amount of money involved to ensure payment for small subcontractors is protected.

What is clear is that contractors pricing new projects will need to understand the basis on which retentions are to be held and agree whether the monies will be held in cash or as liquid assets, whether the monies will be held in a separate account or comingled with other retention money in a common project account, where those accounts will be held, and the interest rate that will apply in the event of late payment.

NEW REQUIREMENTS FROM 31 MARCH 2017

Do not let any employer withhold retentions from you unless they are held in trust in a unique BuildSafe Retention Trust Fund Account.

BuildSafe
SECURITY OF PAYMENT SCHEME
TE KAUPAPA MO TE WHAKARURU PAREMATA
RETENTION TRUST FUND