

23 July 2021

NZCIC Submission: Construction Contracts (Retention Money) Amendment Bill

Introduction

The New Zealand Construction Industry Council (NZCIC) is a not-for-profit peak industry association representing around 35 member organisations involved in the delivery of our built environment. Members include designers and specifiers (architects, engineers etc.), contractors and suppliers (manufacturers, distributors, builders etc.) and a range of other building professionals (compliance, research, surveyors, developers etc.).

General

NZCIC supports this Construction Contracts (Retention Money) Amendment Bill (The Bill) and believe it will improve the resilience and reputation of the construction industry by ensuring retentions retained by a payer are held in trust and are not available for use as working capital by the payer.

Compulsory reporting required by the payer will improve the relationship between payer and payee and lead to more trusting relationships between parties. Penalties for non-compliance will act as a deterrent for non-compliance.


Specific comments

1. The Bill mandates that retention money held on trust must be kept in a separate trust account in a registered bank in New Zealand or in the form of other complying instruments such as an insurance policy or guarantee.

We believe the bill will reduce the risk of developers and main contractors using retention money for working capital, and if Party A goes into liquidation, then retentions held from Party B will be protected and able to be distributed by the receiver or liquidator, less their fee.

2. When party A makes a payment to party B and withholds an amount as security, the amount withheld is retention money, which automatically becomes trust property in respect of which party A must comply with all legal obligations of a trustee.

This is an important section of the Bill and will need to be understood by anyone holding retentions. An education programme may be needed to educate payers and payees of their obligations and rights.

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3. The Bill requires party A to give information about the retention money to party B when the money is first retained and then at least every three months.

This requirement is a vital piece of the Bill. Without this requirement it has been proven that some developers or contractors will not keep retention money separate when their liquidity is squeezed.

We believe Clause 18FC (6) may be ambiguous and should be amended as follows:

Party A must make the accounting and other records and financial statements required in 18FC (3) and 18FC (4) available for inspection by party B at all reasonable times and without charge.

4. The Bill introduces offences and penalties for the company (\$200,000) and its directors (\$50,000) for not complying with the specified requirements.

This is an important aspect of the Bill, but it does not include a mechanism for enforcing compliance, this is a weakness and needs to be addressed. The regulator (MBIE) is the obvious agency to take on this role, or other options could be considered including providing jurisdiction to referees under the Disputes Tribunal Act. It is vital that the jurisdiction appointed to enforce the legislation must act in a timely and cost-effective way and be readily accessible to businesses without the need for legal counsel.

5. The Bill states that if party A becomes insolvent, the receiver or liquidator becomes trustee of the retention money for the purpose of collecting it and distributing it. They are entitled to be paid reasonable fees and cost for doing so.

This provision will save significant cost and lead to creditors receiving a greater proportion of the retentions owed. It also means the costs will be deducted from the retention fund rather than the general assets of the failed business, which is a fair allocation of cost.

6. There will be some costs in administering the separate account and reporting functions, however most of these functions are already needed to administer the retention monies. There will be minimal additional costs from the status quo.

Summary

NZCIC supports the Construction Contracts (Retention Money) Amendment Bill with the proviso that clause 18FC (6) is amended to remove possible ambiguity; and a mechanism introduced for reporting non-compliance and enforcing penalties.

NZCIC would also like to make a verbal submission to the select committee.

Contact NZCIC

For any questions regarding this submission, please email info@nzcic.co.nz or phone Graham Burke 021 249 3459

