

Hon Poto Williams

MP for Christchurch East

Minister for Building and Construction

Minister of Police

Associate Minister for Children

Associate Minister of Housing (Public Housing)



Legislative Statement: Construction Contracts (Retention Money) Amendment Bill First Reading

Overview

The Construction Contracts (Retention Money) Amendment Bill (the Bill) amends the Construction Contracts Act 2002 (the Act) to strengthen and clarify the retention money regime.

Retention money is an amount held back by a party to a construction contract (party A, a “payer”, for example, a contractor) from an amount payable to another party to the contract (party B, a “payee,” for example, a subcontractor), as security for performance of party B’s obligations under the contract. Retention money is commonly between 2 and 10 per cent of the contract and is often paid after 12 months, following the expiry of the defects liability period.

The holding of retention money is voluntary and forms part of the security to ensure that a subcontractor fixes any defects with their work. However, there have been instances where head contractors have used retention money as working capital (i.e. as part of the money used for everyday business). The use of retention money as working capital can add additional financial risk for businesses. For example, if a head contractor becomes insolvent before paying out retention money, there can be substantive financial loss for subcontractors.

The Bill complements a range of other work underway to lift construction sector performance, such as work being driven through the Construction Sector Accord’s Construction Sector Transformation Plan launched in 2020.

The following briefly describes the substantive changes in the Bill.

Clarification of the existing trust requirement and improvement of transparency of retention money

The Bill clarifies the existing trust requirement by removing the ability to co-mingle retention money with other money and assets held by the head contractor, and the use of liquid assets as a way to hold retention money. Retention money held as cash must also be held aside separately in a bank account with prescribed ledger accounts. This clarification will ensure greater protection for subcontractors’ retention money in the event of insolvency, as the money will be clearly identifiable and separate from other assets held by the head contractor.

The Bill also improves transparency of retention money by introducing reporting requirements for head contractors to notify subcontractors of retention money held head contractors. Head contractors will be required to provide information to subcontractors when the retention money is withheld, as well as updated information at least once every three months.

Introduction of offences, penalties, and defences to improve compliance

The Bill introduces offences, penalties, and defences for companies (for example, head contractors) and their directors for failure to comply with the requirements in the Act. Failure by head contractors to hold retention money aside can create uncertainty and undermine business confidence within the building and construction sector. The intention of the offences is to improve compliance with the retention money requirements.

The Bill introduces personal liability for directors where a head contractor fails to meet the requirements for holding retention money or complying instruments. This covers instances where a breach is discovered at the point of company insolvency.

An offence has also been introduced that applies to head contractors providing false information on retention money or complying instruments.

Clarification of the administration of retention money in the event of insolvency

In the event that the head contractor becomes insolvent, the Bill appoints the receiver or liquidator to administer the retention money and charge reasonable fees and costs. This allows subcontractors access to retention money without a court order, which would add further costs, time, and complexity.