

# Departmental Disclosure Statement

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Construction Contracts (Retention Money) Amendment Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

13 May 2021

## Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information .....	4
Part Three: Testing of Legislative Content.....	6
Part Four: Significant Legislative Features .....	8

## Part One: General Policy Statement

This Bill amends the retention money regime in the Construction Contracts Act 2002 (the CCA) to strengthen and clarify the regime.

Retention money is an amount withheld 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,” who may be a subcontractor) as security for the performance of party B’s obligations under the contract. Retention money is commonly between 2% and 10% of the contract value. It is often paid out after 12 months, following the expiry of the defects liability period.

Subcontractors are at risk of not receiving retention money held for them by the contractor should the contractor become insolvent if retention money is co-mingled with working capital. The amendments to the CCA are intended to address this risk by better protecting retention money automatically by providing that it is held on trust from the earliest practicable point of time. As trust property, the retention money cannot be used by party A for any other person and is separate from the insolvency estate of the construction company.

The Government and the construction industry are working together to transform the sector through the Construction Sector Accord. As part of the Construction Sector Transformation Plan, the Government and industry have considered retention money as part of business practices they aim to improve. This Bill progresses changes that support the Government’s goal for better business practices by improving the retention money regime.

This Bill makes the following changes to the retention money regime:

- clarifying that retention money held on trust must be kept separate from other money or assets:
- providing that retention money is held by party A on trust for party B as soon as possible:
- requiring retention money to be held in a trust account in a registered bank in New Zealand or in the form of complying instruments (such as an insurance policy or a guarantee):
- requiring party A to give information about the retention money to party B when the money is first retained and then at least every 3 months:
- introducing offences and penalties for the company and its directors for not complying with these requirements:
- if party A becomes insolvent, the receiver or liquidator becomes trustee of the retention money for the purpose of collecting and distributing it. They are entitled to be paid reasonable fees and cost for doing so.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
<i>Retention Money Provisions: An implementation review of the retention money provisions in the Construction Contracts Act 2002, KPMG, 27 August 2019 (accessible at <a href="https://www.building.govt.nz/assets/Uploads/projects-and-consents/retention-money-provisions.pdf">https://www.building.govt.nz/assets/Uploads/projects-and-consents/retention-money-provisions.pdf</a>).</i>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
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### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
<i>Regulatory Impact Statement: Proposed Amendments to the Construction Contracts Act 2002 (Retention Money Regime), Ministry of Business, Innovation and Employment, March 2020, (accessible at <a href="https://www.mbie.govt.nz/dmsdocument/11528-impact-summary-proposed-amendments-to-the-construction-contracts-act-2002-retention-money-regime-proactiverelease-pdf">https://www.mbie.govt.nz/dmsdocument/11528-impact-summary-proposed-amendments-to-the-construction-contracts-act-2002-retention-money-regime-proactiverelease-pdf</a>).</i>	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>NO</b>
<p>The regulatory impact statement was not reviewed by the RIA Team in the Treasury as it did not meet the threshold for their assessment.</p> <p>A Regulatory Impact Summary was prepared in accordance with the necessary requirements, and was submitted at the time that Cabinet approval was sought for initial policy decisions relating to the Bill. The Ministry of Business, Innovation and Employment's Regulatory Impact Analysis Review Panel determined that it met the criteria necessary for Ministers to make informed decisions on the proposals.</p> <p>The Regulatory Quality Team at the Treasury determined that the additional policy decisions were exempt from the requirement to provide a Regulatory Impact Statement on the basis that the substantive issues were addressed by previous impact analysis.</p>	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>
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## Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
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<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>YES</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>YES</b>
<p>The Ministry of Business, Innovation and Employment estimates that under this package, initial private administrative costs (bank fees, book keeping, trust establishment and audit costs) will be approximately \$55 million. However, once trusts are established, private administration costs will be approximately \$16 million per annum spread across nearly 62,000 building and construction businesses.</p> <p>The benefits are expected to be significant (this is based on avoided financing costs and avoided insolvency costs and feedback from stakeholders) and in the order of \$50-\$100 million per annum. Benefits were analysed by small, medium and large organisations, as organisations can be both contractors and subcontractors for projects.</p> <p>Smaller building and construction organisations (with fewer than 20 employees) are expected to be approximately \$718 per annum better off (on average), while those larger organisations (with over 100 employees) are expected to be approximately \$9,000 worse off (noting that this is likely to be a small proportion of their turnover). Medium to large organisations (between 20 to 99 employees) are expected to be \$788 worse off. Overall, 98 per cent of all building and construction businesses will be better off from the proposed package of changes to the retention money regime.</p> <p>Further details on the costs and benefits were included in the regulatory impact statement prepared ahead of policy decisions on the retention money regime.</p>	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>YES</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>YES</b>
<p>The Bill introduces new offences and penalties. The Bill creates a strict liability offence where party A, such as a head contractor, fails to hold retention money on trust in a separate bank account or complying financial instrument. The maximum fine for this offence will be set at \$200,000.</p> <p>A penalty will also be imposed on directors of the payer company for failure by the payer to hold retention money on trust in a separate account or complying financial instrument. The penalty will be a maximum fine of \$50,000.</p> <p>The Bill also creates additional offences where party A provides false information on retention money. The penalty for these offences is a maximum fine of \$50,000.</p>	

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
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The Ministry of Business, Innovation and Employment is unaware of any international obligations. No international obligations were identified or raised through the policy process as being inconsistent with the Bill.

### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
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The proposals are consistent with the principles of the Treaty of Waitangi. Te Puni Kōkiri was consulted during the development of policy proposals.

### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>	<b>YES</b>
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Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>.

### Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
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<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
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<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>NO</b>
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See section 4.4 for discussion on new offences and defences.

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
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MBIE consulted the Ministry of Justice on these provisions, particularly regarding the proposed offences and the level of the penalties. Advice from the Ministry of Justice was incorporated into the development of the Bill.

### Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>NO</b>
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## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
The Ministry of Business, Innovation and Employment released a targeted consultation document in January 2020 to key stakeholder groups, including construction industry organisations most likely to be affected. Feedback from targeted consultation directly informed policy development. A summary of feedback from targeted consultation was included in the regulatory impact statement prepared ahead of policy decisions.	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
MBIE engaged with stakeholders within the construction sector, including adjudicators of construction contract disputes and legal experts, in the development of policy proposals.	
An exposure draft of the Bill underwent targeted consultation in August 2020 to seek feedback on the workability and durability of the changes to the retention money regime. Feedback was received from subcontractors, head contractors, accountancy firms, legal firms, and insolvency practitioners. This feedback was broadly supportive of the changes and has informed the development of the Bill.	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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### Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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### Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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### Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
<p>Clause 4 creates a strict liability offence for party A to fail to keep retention money in a bank account or complying instruments (as outlined in section 18DA(1)(a)). If party A is a body corporate, its directors will also commit the offence (as outlined in section 18DA(1)(b)).</p> <p>Clause 4 includes a defence if the person charged with the offence took all reasonable steps to ensure that the offence did not occur (as outlined in section 18DA(2)).</p> <p>Clause 9 creates offences for providing false information on retention money (as outlined in section 18FC(7) and section 18FD(7)).</p>	

### Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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### Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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### Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>NO</b>
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**Any other unusual provisions or features**

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>
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