

Supplementary Departmental Disclosure Statement

Construction Contracts (Retention Money) Amendment Bill

A supplementary departmental disclosure statement for a Bill the government is proposing to amend seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill in amended form.

It highlights material changes to previous disclosures relating to:

- 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.

The original disclosure statement for the Construction Contracts (Retention Money) Amendment Bill, dated 13 May 2021, can be found at this link:

<http://disclosure.legislation.govt.nz/bill/government/2021/45>.

This supplementary disclosure statement was prepared by the Ministry of Business, Innovation and Employment (MBIE).

MBIE certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

Finalised on 1 August 2022.

Contents

Contents	2
The Main Areas of Change to the Original Disclosures	3
Part One: General Policy Statement	4
Part Two: Background Material and Policy Information	5
Part Three: Testing of Legislative Content	8
Part Four: Significant Legislative Features	11

The Main Areas of Change to the Original Disclosures

This is a supplementary disclosure statement for the Construction Contracts (Retention Money) Amendment Bill.

A supplementary disclosure statement supplements the original disclosure statement for the Bill by reporting the additions and changes that would need to be made to the original disclosure statement to accurately reflect the Bill with the proposed government amendments incorporated.

Where the Bill now also incorporates changes made by a select committee of the House, the supplementary disclosure statement will note these if relevant but will not explain them further.

The main area of change to the original disclosure statement is a clarification that the Chief Executive of the department responsible for the administration of the Act (currently MBIE) is given the function to investigate and enforce the newly introduced offences in the Bill. There are offences and penalties to support the Chief Executive's monitoring and enforcement functions.

Part One: General Policy Statement

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

The Act regulates construction contracts. This includes the payment terms, dispute resolution process and protection of retention money in construction contracts. This Bill only makes changes to the retention money regime in the Act.

Retention money is an amount held back by a party A to a construction contract (a “payer”, for example a head contractor) from an amount payable to a party B to the contract (a “payee”, for example a subcontractor), as security for performance of the subcontractor’s obligations under the contract.

The holding of retention money is voluntary. If held, retention money is commonly between two and ten per cent of the contract value. It is often paid out after 12 months, following the expiry of the defect repair period.

A reason that parties to a construction contract may want to hold retention money is because there is a 12-month defect repair period for residential building work. If any defects in the building work emerge within 12 months from the date the build was completed, the head contractor has an obligation to fix them.

If the head contractor discovers an issue with the work done by the subcontractor during the 12-month defect repair period (e.g. an incorrectly installed toilet), the retention money will not be released to the subcontractor until the subcontractor fixes the defect. If the subcontractor refuses to fix the defect, the head contractor is able to deduct the costs of fixing it from the retention money before it is released to the subcontractor.

The Act currently requires retention money to be held on trust but does not cover the manner in which it should be held. If retention money is not held separately from working capital, it can become difficult to distinguish the retention money from other moneys. This can lead to situations where retention money is used as working capital, which means that subcontractors are not protected if the head contractor becomes insolvent.

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 this goal.

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:
- requiring 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 separate bank account with prescribed ledger accounts 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 party A and its directors for not complying with these requirements:
- clarifying that if party A becomes insolvent, the receiver or liquidator becomes trustee of the retention money for the purpose of collecting, managing and disbursing it, and that they are entitled to be paid reasonable fees and cost for doing so:
- clarifying that the Chief Executive of the department responsible for the administration of the Act (currently MBIE) is given the function to investigate and enforce the newly introduced offences in the Bill:
- introducing offences to support the Chief Executive in investigating and enforcing the retention money regime.

Part Two: Background Material and Policy Information

Published reviews or evaluations

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?	YES
<i>Retention Money Provisions: An implementation review of the retention money provisions in the Construction Contracts Act 2002</i> , KPMG, 27 August 2019 (accessible at https://www.building.govt.nz/assets/Uploads/projects-and-consents/retention-money-provisions.pdf).	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

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

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?	NO
<p>The original regulatory impact statement was not reviewed by the RIA Team in the Treasury as it did not meet the threshold for their assessment. A regulatory impact statement was prepared and submitted at the time that Cabinet approval was sought for initial policy decisions relating to the Bill. MBIE's Regulatory Impact Analysis Review Panel determined that it met the criteria necessary for Ministers to make informed decisions on the proposals.</p> <p>Treasury's Regulatory Impact Analysis Team has determined that the proposal to amend the Act to clarify the enforcement of offences introduced in the Bill, is exempt from the requirement to provide a Regulatory Impact Statement on the grounds that it has no or only minor impacts on businesses, individuals, and not-for-profit entities.</p>	

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?	YES
--	------------

The regulatory impact statement submitted in 2020 did not include the clarification that the Chief Executive of MBIE will enforce the newly introduced offences in the Bill.

During the select committee process, submitters asked for clarity on who will enforce the retention money regime. To address this, Cabinet agreed that the Chief Executive of the department responsible for the administration of the Act (currently MBIE) be given the function to investigate and enforce the newly introduced offences in the Bill, and that the building levy will be used to fund this as well as supporting functions:

- to provide information and education,
- monitor compliance of the regime, and
- provide advice to the Minister for Building and Construction on the retention money regime.

These additional functions are made by Supplementary Order Paper and support the investigation and enforcement functions, and support MBIE in its role as steward of the building regulatory system. The Supplementary Order Paper also includes additional offences and penalties to support the investigation and enforcement functions.

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	YES
<p>MBIE estimates that initial administrative costs (bank fees, book keeping and audit costs) will be approximately \$55 million. However, once separate bank accounts are set up, 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 \$50-\$100 million per annum, based on avoided financing and insolvency costs and feedback from stakeholders. Smaller organisations (with fewer than 20 employees) are expected to be approximately \$718 per annum better off on average, while 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>There is no additional analysis available on this point for the changes made by the Supplementary Order Paper.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be affected by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES

The Bill introduces offences, penalties and defences for companies and their directors for failure to comply with the requirements in the Act. Failure to hold retention money aside can create uncertainty and undermine business confidence within the building and construction sector. The intent of these changes is to improve compliance with the retention money regime.

The Bill makes it an offence not to hold retention money held as cash in a separate bank account. If convicted, a head contractor is liable to a fine of up to \$200,000. If a head contractor is a body corporate, each of its directors also commits the offence and is liable to a fine of up to \$50,000 each. It is a defence if the head contractor took all reasonable steps to ensure that they complied with the requirement to keep retention money in a separate bank account. It is also a defence if, where the defendant is a director, they took all reasonable steps to ensure that the head contractor complied with requirements.

The Bill also makes it an offence for a head contractor not to keep proper accounting and other records of retention money held for subcontractors, including information on all payments into and out of the bank account where retention money is held, and the subcontractor's interest in any instrument where retention money is held as a complying financial instrument. If convicted, a head contractor is liable to a fine of up to \$50,000.

The Bill also makes it an offence for a head contractor not to regularly (at least every three months) provide the subcontractor with information on the amount of retention money withheld, and where and in what form it is being held. The head contractor also commits an offence if they provide misleading information to subcontractors. If convicted, the head contractor is liable to a fine of up to \$50,000.

The Supplementary Order Paper to the Bill clarifies that the Chief Executive of the department responsible for the administration of the Act (currently MBIE) be given the function to investigate and enforce the newly introduced offences in the Bill.

The Chief Executive will also have complementary functions to:

- provide information and education on the retention money regime;
- monitor compliance with the retention money regime; and
- provide advice to the Minister for Building and Construction on the retention money regime.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

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?

MBIE is unaware of any relevant 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

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?

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

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?

NO

There is no statutory requirement for a Supplementary Order paper to be vetted against the Bill of Rights Act 1990. MBIE does not consider there is any inconsistency between the Supplementary Order Paper and the Bill of Rights Act 1990.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
<p>Clause 4 of the Bill, new section 18DA, makes it an offence not to hold retention money held as cash in a separate bank account. If convicted, a head contractor is liable to a fine of up to \$200,000. If a head contractor is a body corporate, each of its directors also commits the offence and is liable to a fine of up to \$50,000 each. It is a defence if the head contractor took all reasonable steps to ensure that it complied with the requirement in new section 18D to keep retention money in a separate bank account. It is also a defence if, where the defendant is a director, they took all reasonable steps to ensure that the head contractor complied with new section 18D. At the Select Committee stage, the offence was amended so that the penalty attaches to each instance of the offence, and an additional defence was added for when a defendant proves they acted in good faith and honestly and reasonably believed their use of retention money was permitted by the regime.</p> <p>Clause 4 of the Bill, new section 18FC(7), makes it an offence for a head contractor not to keep proper accounting and other records of retention money held for subcontractors, including information on all payments into and out of the bank account where retention money is held, and the subcontractor's interest in any instrument where retention money is held as a complying financial instrument, as required by new section 18FC. If convicted, a head contractor is liable to a fine of up to \$50,000. At the Select Committee stage, the offence was amended so that the penalty attaches to each instance of the offence.</p> <p>Clause 4 of the Bill, new section 18FD(7), makes it an offence for a head contractor not to regularly (at least every three months) provide the subcontractor with information on the amount of retention money withheld, and where and in what form it is being held, as required by new section 18FD. Under this new section, the head contractor also commits an offence if they provide misleading information to subcontractors. If convicted, the head contractor is liable to a fine of up to \$50,000. At the Select Committee stage, the offence was amended to clarify that the penalty attaches to each instance of the offence.</p> <p>The Supplementary Order Paper gives the Chief Executive of the department responsible for the administration of the Act (currently MBIE) the functions:</p> <ul style="list-style-type: none"> • to monitor compliance with the retention money regime; and • take enforcement action (including taking proceedings for offences) to enforce compliance with the retention money regime, if the Chief Executive considers that it is desirable to do so. <p>To support these functions, the Supplementary Order Paper introduces offences and penalties. The Supplementary Order Paper inserts new section 18O into the Bill, which makes it an offence for:</p> <ul style="list-style-type: none"> • intentionally failing to provide the Chief Executive with the information or document as requested. • knowingly providing the Chief Executive with information or a document that has false or misleading material information, or contains a material omission. <p>If convicted, an individual is liable for a fine of up to \$50,000, and a body corporate is liable for a fine of up to \$200,000.</p> <p>The Supplementary Order Paper also inserts new section 18Q into the Bill, which states that a person must not knowingly obstruct, hinder, or resist the Chief Executive or a person authorised by a search warrant, in the execution of their powers in the retention money regime. If convicted, an individual is liable for a fine of up to \$50,000, and a body corporate is liable for a fine of up to \$200,000.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>MBIE consulted the Ministry of Justice on these provisions in the Bill and Supplementary Order Paper. Specific feedback was sought on the power of entry, the offences and the penalty levels. Advice from the Ministry of Justice was incorporated into the development of the Bill and Supplementary Order Paper.</p>	

Privacy issues

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?	NO

External consultation

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?	YES
<p>MBIE 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.</p> <p>In submissions to the Transport and Infrastructure Committee, submitters raised the issue of a lack of clarity on who will enforce the retention money regime. Submitters said that the lack of clarity on this point diminished the effectiveness of the protections in the retention money regime. The Supplementary Order Paper amends the Bill in response to these points. The change is a clarification that the Chief Executive of the department responsible for the administration of the Act (currently MBIE) will have the function of investigating and enforcing the newly introduced offences in the Bill. The changes contained in the Supplementary Order Paper were not consulted on externally.</p>	

Other testing of proposals

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?	YES
<p>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.</p> <p>The changes to the Bill contained in the Supplementary Order Paper are in response to submissions to the Transport and Infrastructure Committee, which raised the issue of a lack of clarity on who will enforce the retention money regime. MBIE has consulted on the changes internally with operational subject matter experts, as well as externally with other departments. None of the matters in the Supplementary Order Paper have required formal testing.</p>	

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

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

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the 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 failure to keep retention money in a separate bank account or hold a complying instrument as prescribed in new section 18D. 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 also includes a defence if the party A charged with the offence took all reasonable steps to comply with the requirements in new section 18D, or (if the defendant is a director) they took all reasonable steps to ensure that party A complied with new section 18D.</p> <p>Clause 9 creates offences for failure to keep proper accounting records of all retention money held for party B, failure to provide party B with the information on retention money required by new section 18FD at least every three months, and for providing false information on retention money.</p> <p>The Supplementary Order Paper does not create strict or absolute liability offences.</p>	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

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

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

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>New section 18B(4)(b) allows regulation to be made regarding a de minimis amount required for money held back to become retention money (and for the retention money regime to apply).</p> <p>New section 18E(3)(b)(vi) allows regulation to be made regarding what class of third parties may hold retention money in a separate bank account.</p> <p>New section 18FC(2)(c) allows regulation to be made regarding other information that party A must keep a record of with regards to party B's retention money.</p> <p>New section 18FC(2)(d) allows regulation to be made regarding how party A must keep records with regards to party B's retention money.</p> <p>New section 18FD(2)(f) allows regulation to be made regarding other information that party A is required to provide to party B as soon as practicable after an amount becomes retention money, and at least once every 3 months.</p> <p>New section 18FD(5) allows regulation to be made regarding other information that party A must provide party B and when that information must be provided.</p> <p>New section 18G(2) allows regulation to be made regarding the rate at which interest on retention money accrues.</p> <p>The Supplementary Order Paper does not create or amend any other powers to make delegated legislation.</p>	

Any other unusual provisions or features

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