



Joint submission from the Registered Master Builders Association
and the New Zealand Institute of Building

on

The Construction Contracts (Retention Money) Amendment Bill

July 2021

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The Registered Master Builders Association and the New Zealand Institute of Building (“the submitters”) welcome this opportunity to jointly submit on the Construction Contracts (Retention Money) Amendment Bill (“the Bill”).

About the submitters

The Registered Master Builders Association

The RMBA represents over 3,000 commercial and residential builders and are the leading sector advocates on the built environment. Our sector is a key contributor to the New Zealand economy, with every \$1 million spent on house building supporting \$2.6 million across the wider economy.

We are working hard to lead the change our sector needs. Ensuring we have the regulatory systems and processes which will enable us to build faster and better. We are supporting our members to grow their capability and business acumen to ensure a strong and healthy sector; to innovate and make the most of new technologies so we can tackle emerging issues such as climate change; and to attract, train and retain skilled talent. We are proud to be New Zealand’s best builders.

The New Zealand Institute of Building

The New Zealand Institute of Building (NZIOB) is the professional institute in New Zealand for building and construction professionals. The NZIOB’s 650 financial members are comprised of skilled managers and professionals who are engaged in building practice in a managerial, technical, design, costing, or administrative capacity within the construction sector. NZIOB members affected by the proposed Construction Contracts (Retention Money) Amendment Bill, includes:

- Members who manage and own Main Contractor and Specialist Trades firms.
- Members who advise clients and manage building projects on their behalf.
- Members who own and manage companies that manufacture and/or supply products to the building industry.

The multi-disciplinary nature of the NZIOB’s membership profile, provides a broad perspective to government proposals that affect the construction sector.

Purpose of the CAA Bill

According to the Explanatory Note of the Bill:

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 CAA 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.

Summary of Submission

The submitters support improving protections for retention money and, as such, support the intent of the Bill - to reduce complexity in the current approach, make the approach as practicable as possible and provide much clarity where necessary.

Although supportive of efforts to achieve the above, we are mindful of ensuring the following:

- The amendments proposed in the Bill are appropriate, not overly complicated, and able to be practically implemented.
- Ensuring a workable definition of “retention monies”.
- Making proposed Clause 18FC explicit that the requirements only relate to retention monies, not all financial statements.
- That the requirements of disclosure do not breach the Privacy Act obligations regarding the protecting of an individual’s personal privacy rights.
- Clarifying when the retention obligation is created for the purposes of a deemed trust
- Avoiding confusion when referencing “regulations” by issuing regulations. It is ambiguous to have a requirement to adhere to regulations when those regulations do not exist or have not been issued.
- That an adequate and appropriate transition period is provided for to enable sufficient liquid assets to comply with the Bill.

Specific clauses are discussed in more detail below.

Proposed Clause 18B - Application of subpart and meaning of retention money

We propose clarifying this clause by making explicit that retention money is deemed “retention money” for the purposes of the Bill on the date that a payment schedule is issued (or by default if not issued within time), as this is when the obligation for payment is formed and is recorded in the accounts of Party A.

Proposed Clause 18C – Retention money is held on trust

Current wording of subclauses 18C(2) and 18C(4)(b) creates risk that all of Party A’s assets form part of the deemed trust, which will likely negatively impact the rights of unsecured creditors. It should be made clear that this Clause only relates to funds in a deemed trust specifically for retention monies.

Proposed Clause 18DA – Failure to keep retention money as required

Although understanding the necessity for penalties for non-compliance it is important that any fines are not punitive in nature, and only act as a deterrent to non-compliance. We are of the view that a fine of \$200,000 (or \$50,000 if a Director of a Body Corporate) may be viewed as excessive, and as such, we recommend a significantly smaller fine that only deters non-compliance rather than acts as a punishment.

Proposed Clause 18E – Bank account

We would like this clause to safeguard against requiring the sector to have to modify or develop new software to adhere to it. This can be done by referring to a ledger “record” rather than ledger account.

Consider removing sub-clauses 4 to 6 as they are unnecessary and are just stating normal accounting practice

Proposed Clause 18FC – Accounts and records

We recommend making this clause more explicit that the requirements only relate to retentions monies, and no other financial information.

Below are specific recommendations regarding this clause:

1. Remove sub-clause 2(a) – it is unnecessary
2. Issue regulations regarding sub-clause 2(b) otherwise remove. It is onerous to require adherence to regulations that do not exist.
3. Ensure that the requirements of sub-clause 3(a) maintain all individual's privacy conferred under the Privacy Act, and ensure that by recording all transactions in and out individuals are not able to access other individual's transaction details
4. Issue regulations regarding sub-clause 5 otherwise remove. It is onerous to require adherence to regulations that do not exist.
5. Amend sub-section 6 as follows: *"Party A must make the accounting records as set out in the subsections above in so far as they relate to retentions held for Party B available for inspection by Party B at all reasonable times and without charge"*. Ensure that this requirement maintains individual's privacy conferred under the Privacy Act.

Commencement period

We note that there is currently a six-month commencement period. We are supportive of a longer commencement period to ensure the sector is prepared for the changes and able to readily comply when the Act commences. As such, we suggest considering a one-year commencement period rather than six months.

We are available to discuss our submission if required.



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