



COVERSHEET

Minister	Hon Jenny Salesa	Portfolio	Building and Construction
Title of Cabinet paper	Proposed Amendments to the Construction Contracts Act 2002 (Retention Money Regime)	Date to be published	7 July 2020

List of documents that have been proactively released

Date	Title	Author
25 May 2020	Proposed Amendments to the Construction Contracts Act 2002 (Retention Money Regime)	Office of Hon Jenny Salesa
25 May 2020	CAB-20-MIN-0239 Minute	Cabinet Office
18 May 2020	CAB-20-MIN-0231.02 Minute	Cabinet Office
13 May 2020	DEV-20-MIN-0076 Minute	Cabinet Office
12 March 2020	Impact Summary: Proposed Amendments to the Construction Contracts Act 2002 (retention money regime)	Ministry of Business, Innovation and Employment

Information redacted

NO

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Construction Contracts Act 2002: Proposed Amendments to Retention Money Regime

Portfolio **Building and Construction**

On 25 May 2020, Cabinet, following reference from the Cabinet Economic Development Committee (DEV):

Background

- 1 **noted** that subpart 2A of the Construction Contracts Act 2002 contains provisions for holding retention money for construction contracts;
- 2 **noted** that:
 - 2.1 on 4 December 2019, DEV agreed to the Construction Sector Accord Transformation Plan [DEV-19-MIN-0335];
 - 2.2 the proposed changes to strengthen and clarify the retention money regime, outlined in the paragraphs below, align with the Plan;

Clarifying the trust requirement

- 3 **noted** that there are concerns in the construction sector that the trust requirement in the Construction Contract Act does not sufficiently protect retention money held on trust for subcontractors in the event of company insolvency;
- 4 **agreed** to amend the Construction Contracts Act to clarify the existing trust requirements to:
 - 4.1 remove the ability for retention money to be co-mingled with other payer money;
 - 4.2 require that retention money must be held on trust in a separate bank account;

Offences and penalties

- 5 **agreed** to amend the Construction Contracts Act so that it will be a strict liability offence for a payer to fail to hold retention money on trust in a separate bank account or complying financial instrument, with a maximum fine of \$200,000;
- 6 **agreed** to include personal liability for directors when a company, as a payer, is in breach of its obligations to hold retention money on trust in a separate bank account or complying financial instrument, with a maximum fine of \$50,000;

- 7 **agreed** to include statutory defences for the offences outlined above to recognise that in some cases there may be extenuating circumstances that may impact on a payer's failure to comply, including:
- 7.1 where all reasonable and proper steps have been taken to ensure that the payer complied with the requirements of the Construction Contracts Act;
 - 7.2 where the person took all reasonable steps to ensure that the payer complied with the requirements;
 - 7.3 in the circumstances, the person could not reasonably have been expected to take steps to ensure they complied with requirements;

Enhanced transparency

- 8 **agreed** to amend the Construction Contracts Act to require a payment schedule to stipulate the amount of retention money held (if any) and the how the retention money is being held;

Aligning with insolvency practices

- 9 **agreed** that the receiver or liquidator appointed to a construction company be given the ability to administer the retention money account, in the event that the business becomes insolvent;
- 10 **agreed** that retention money held on trust in a separate bank account:
- 10.1 is not available to meet the debts owed to any other creditor of the construction company;
 - 10.2 is not liable to be attached or taken in execution under the order or process of any court at the instance of another creditor of the construction company;
- 11 **agreed** that the reasonable fees of a receiver or liquidator appointed to a construction company, to administer the retention money account, be able to be met from the retention money held on trust;

Transitional arrangements

- 12 **agreed** that the new requirements:
- 12.1 come into force six months after Royal Assent;
 - 12.2 apply to new construction contracts, and renewed or new construction contracts entered into for an existing project;

Legislative implications

- 13 **noted** that:
- 13.1 the above proposals will be given effect through the Construction Contracts Amendment Bill;
 - 13.2 a category 2 priority has been sought for the Bill on the 2020 Legislation Programme (must be passed in 2020);

- 14 **invited** the Minister for Building and Construction to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 15 **authorised** the Minister for Building and Construction to make decisions consistent with the proposals in the paper under CAB-20-SUB-0239, on any issues which arise during the drafting process.

Michael Webster
Secretary of the Cabinet

PROACTIVELY RELEASED



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Construction Contracts Act 2002: Proposed Amendments to Retention Money Regime

Portfolio **Building and Construction**

On 18 May 2020, following reference from the Cabinet Economic Development Committee, Cabinet:

- 1 **deferred** consideration of the item *Construction Contracts Act 2002: Proposed Amendments to Retention Money Regime* [DEV-20-MIN-0076] until Cabinet on 25 May 2020;
- 2 **invited** the Minister for Building and Construction, in consultation with the Minister of Justice, to give further consideration to the proposed offences and penalties and to provide an updated paper for Cabinet if required.

Michael Webster
Secretary of the Cabinet

Secretary's Note: *This minute replaces DEV-20-MIN-0076.*



Cabinet Economic Development Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Construction Contracts Act 2002: Proposed Amendments to Retention Money Regime

Portfolio **Building and Construction**

On 13 May 2020, the Cabinet Economic Development Committee (DEV):

Background

- 1 **noted** that subpart 2A of the Construction Contracts Act 2002 contains provisions for holding retention money for construction contracts;
- 2 **noted** that:
 - 2.1 on 4 December 2019, DEV agreed to the Construction Sector Accord Transformation Plan [DEV-19-MIN-0335];
 - 2.2 the proposed changes to strengthen and clarify the retention money regime, outlined in the paragraphs below, align with the Plan;

Clarifying the trust requirement

- 3 **noted** that there are concerns in the construction sector that the trust requirements in the Construction Contracts Act do not sufficiently protect retention money held on trust for subcontractors in the event of company insolvency;
- 4 **agreed** to amend the Construction Contracts Act to clarify the existing trust requirements to:
 - 4.1 remove the ability for retention money to be co-mingled with other payer money;
 - 4.2 require that retention money must be held on trust in a separate bank account;

Offences and penalties

- 5 **agreed** to amend the Construction Contracts Act so that it will be a strict liability offence for a payer to fail to hold retention money on trust in a separate bank account or complying financial instrument, with a maximum fine of \$200,000;

6 **agreed** to include statutory defences for the offence outlined above to recognise that in some cases there may be extenuating circumstances that may impact on a payer's failure to comply, including:

6.1 where all reasonable and proper steps have been taken to ensure that the money is held on trust in a separate bank account;

6.2 a failure to comply was due to some cause beyond the persons control;

Enhanced transparency

7 **agreed** to amend the Construction Contracts Act to require a payment schedule to stipulate the amount of retention money held (if any) and the how the retention money is being held;

Aligning with insolvency practices

8 **agreed** that the receiver or liquidator appointed to a construction company be given the ability to administer the retention money account, in the event that the business becomes insolvent;

9 **agreed** that retention money held on trust in a separate bank account:

9.1 is not available to meet the debts owed to any other creditor of the construction company;

9.2 is not liable to be attached or taken in execution under the order or process of any court at the instance of another creditor of the construction company;

10 **agreed** that the reasonable fees of a receiver or liquidator appointed to a construction company, to administer the retention money account, be able to be met from the retention money held on trust;

Transitional arrangements

11 **agreed** that the new requirements:

11.1 come into force six months after Royal Assent;

11.2 apply to new construction contracts, and renewed or new construction contracts entered into for an existing project;

Legislative implications

12 **noted** that:

12.1 the above proposals will be given effect through the Construction Contracts Amendment Bill;

12.2 a category 2 priority has been sought for the Bill on the 2020 Legislation Programme (must be passed in 2020);

13 **invited** the Minister for Building and Construction to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;

- 14 **authorised** the Minister for Building and Construction to make decisions consistent with the proposals in the paper under DEV-20-SUB-0076, on any issues which arise during the drafting process.

Janine Harvey
Committee Secretary

Present:

Rt Hon Winston Peters
Hon Grant Robertson (Chair)
Hon Phil Twyford
Hon Dr Megan Woods
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Iain Lees-Galloway
Hon Jenny Salesa
Hon Damien O'Connor
Hon Kris Faafoi
Hon Shane Jones
Hon Willie Jackson
Hon James Shaw
Hon Eugenie Sage

Officials present from:

Office of the Prime Minister
Officials Committee for DEV

PROACTIVELY RELEASED