



# Cabinet

CAB Min (14) 27/9

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## Minute of Decision

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### Legislative Solutions to issues Relating to the Use of Retentions in the Construction Market

Portfolio: Building and Construction

On 11 August 2014, Cabinet:

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- 1 **noted** that long standing practices relating to the use of retentions in the construction market have created the following issues:
    - 1.1 subcontractors risk non-payment of retentions due to the insolvency of clients or head contractors, and they are not the best party to manage this risk;
    - 1.2 the high risk of insolvency in the construction market (relative to other markets), and therefore the higher risk of loss of retentions, detracts from the sector's growth and productivity;
    - 1.3 the use of retentions as working capital by clients and head contractors supports poor practices, such as low-price tendering;
  
  - 2 **agreed in principle**, to amend the Construction Contracts Act 2002 (the Act), **subject to** the report in paragraph 6 below, to:
    - 2.1 clarify that the ban on "pay when paid" includes any tactics that delay payment of retentions beyond the date specified in the construction contract (or under the default provisions in the Act);
    - 2.2 provide for a default rate of interest (prescribed in regulations) to be applied to the late payment of retentions in the absence of a rate of interest being specified in the construction contract;
    - 2.3 require retentions to be held "in trust", and to include the following features:
      - 2.3.1 the statute imposes a trust on the retention monies earned on a project for the benefit of the subcontractors on that project;
      - 2.3.2 the contractor in receipt of the money becomes trustee of the funds and owes a fiduciary duty to the beneficiaries (i.e. subcontractors) to exercise proper and honest judgement – the primary duty is to ensure that funds are spent on the particular project for which they were received;



- 2.3.3 there are penalties for an entity that fails in its fiduciary responsibilities to the trust beneficiaries and that uses the funds to pay off debts not related to the specific project;
- 3 **noted** that the Construction Contracts Amendment Bill (the Bill) is currently awaiting its committee of the whole House stage;
- 4 **invited** the Minister for Building and Construction (the Minister) to issue drafting instructions to the Parliamentary Counsel Office to include the amendments in paragraph 2 above in a Supplementary Order Paper (SOP) to the Bill;
- 5 **authorised** the Minister to include other minor or technical amendments to the Bill in the SOP;
- 6 **invited** the Minister, before submitting the SOP to the Cabinet Legislation Committee, to report to the Cabinet Economic Growth and Infrastructure Committee with:
- 6.1 a Regulatory Impact Statement;
- 6.2 details of any transitional arrangements that may be needed to avoid any negative impacts for construction companies;
- 6.3 details of the implementation, enforcement and monitoring of the changes to retentions reflected in paragraph 2 above;
- 6.4 the results of further consultation with the construction sector, banks, and government entities that enter into substantial construction contracts;
- 7 **noted** that the Minister intends to inform the sector about the decisions relating to the above decisions and to publicly announce the decisions before the general election;
- 8 **noted** that the Ministry of Business, Innovation, and Employment intends to place a copy of the paper under CAB (14) 460, and the associated Cabinet minute, on its website.

  
Secretary of the Cabinet

Reference: CAB (14) 460

**Distribution:**

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