

Construction Contracts (Retention Money) Amendment Bill

Government Bill

Explanatory note

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.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2021&no=45>

Regulatory impact statement

The Ministry of Business, Innovation and Employment produced a regulatory impact statement on 12 March 2020 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <https://www.mbie.govt.nz/dmsdocument/11528-impact-summary-proposed-amendments-to-the-construction-contracts-act-2002-retention-money-regime-proactiverelease-pdf>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

This Bill amends the Construction Contracts Act 2002 (the **Act**). It will come into force 6 months after it is enacted.

Part 1 of the Bill amends subpart 2A of Part 2 of the Act, which relates to retention money. *Part 2* of the Bill relates to transitional matters.

Subpart 2A of Part 2 of the Act applies if a commercial construction contract allows one party to the contract (**party A**) to withhold an amount that would otherwise be payable to another party (**party B**) as security for the performance of party B's obligations under the contract.

The new provisions elaborate on the previous definition of retention money to clarify what retention money is and when it becomes retention money.

Retention money is held on trust by party A for party B. The trust arises as soon as the amount becomes retention money and continues until the retention money is paid to party B, the money ceases to be payable to party B (under the contract or otherwise by operation of law), or party B gives up any claim to it.

As the retention money is held on trust, all of the rules of the common law and equity relating to trusts apply to the trust, to party A as trustee, and to the retention money as trust property (except to the extent the Act provides otherwise). Importantly, this means that—

- party A must keep the retention money separate from their other money and assets; and
- in dealing with the retention money, party A must act in the best interests of party B; and
- party A cannot use the retention money for any purpose other than—
 - to remedy any defects in the performance of party B’s obligations under the contract; and
 - to pay it to party B when required by the contract; and
- if party A goes into receivership or liquidation, the retention money cannot be taken by the receiver or liquidator to meet party A’s other debts.

Under *new section 18D*, party A must keep the retention money in a bank account at a registered bank in New Zealand unless they instead hold a complying instrument that covers the debt to party B.

Party A can use a single bank account for retention money they hold for party B under a particular contract, or under 2 or more contracts. Alternatively, party A can use a single bank account for retention money they hold for 2 or more persons. The bank account cannot be used for any other purpose. If a single account is kept for 2 or more contracts or 2 or more party Bs (or both), party A must keep proper accounting records showing which party B and which contract each payment into or out of the account relates to.

Instead of putting the retention money into a bank account, party A can hold a financial instrument (such as an insurance policy or bank guarantee) that requires an insurance company, a bank, or another prescribed issuer to pay to party B an amount equal to the retention money if party A does not pay the retention money to party B when required by the construction contract.

To qualify as a complying instrument, the conditions in section 18FB of the Act must be complied with. If any of the conditions cease to be met, the instrument would cease to be complying instrument and party A would be in breach of their obligation under *new section 18D*.

It will be an offence for party A to fail to keep retention money in a bank account or complying instruments. If party A is a body corporate, its directors will also commit

the offence. There is a defence if the person charged with the offence took all reasonable steps to ensure that the offence did not occur.

If party A is the Crown, it still holds the retention money on trust for party B, but it must be held in accordance with the provisions in the Public Finance Act 1989 (which relate to all trust property held by the Crown) instead of the provisions of this Act.

New section 18FC requires party A to keep proper accounting and other records of all retention money. Failing to comply with this section is an offence.

New section 18FD requires party A to give party B information about the retention money when the money is first withheld and then at least every 3 months. Failing to comply with this section is an offence.

If party A goes into receivership or liquidation, *new section 18J* appoints the receiver or liquidator to replace party A as the trustee of the retention money trust. They must collect, manage, and disburse the retention money in the same way as party A is required to do. Although the same person will be receiver or liquidator of party A and trustee of the retention money trust, the retention money is still subject to the trust so cannot be used to meet party A's other debts.

New Schedule 1 is added to the Act to provide transitional provisions. The retention money regime, as amended by this Bill, will apply to all construction contracts entered into after this Bill commences and to any construction contracts entered into before that date but amended afterwards. Other contracts entered into before this Bill commences will continue to be governed by the Act as in force before this Bill commences. However, *new sections 18J to 18L* (relating to receivership and liquidation) apply in all cases if party A goes into receivership or liquidation after this Bill commences (regardless of when the construction contract was entered into or when the retention money was retained).

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	New Schedule 1 inserted	

The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Construction Contracts (Retention Money) Amendment Act **2021**.
- 2 Commencement** 5
This Act comes into force on the day that is 6 months after the date on which it receives the Royal assent.
- 3 Principal Act**
This Act amends the Construction Contracts Act 2002.

- Part 1** 10
Amendments to Part 2 of principal Act
- 4 Sections 18A to 18F and cross-heading replaced**
Replace sections 18A to 18F and the cross-heading above section 18E with:
- 18A Interpretation** 15
In this subpart—
complying instrument has the meaning set out in section 18FB
party A and **party B** have the meanings set out in **section 18B(1)**
protected amount, in relation to a complying instrument, means the amount of retention money held by party A for party B that is protected by the instrument
registered bank has the same meaning as in section 2(1) of the Reserve Bank of New Zealand Act 1989 20

retention money has the meaning set out in **section 18B**

retention money trust means a trust created by **section 18C** under which party A (or a replacement trustee) holds retention money for party B.

18B Application of subpart and meaning of retention money

- (1) This subpart applies if a commercial construction contract allows one party to the contract (**party A**) to withhold an amount that would otherwise be payable to another party (**party B**) as security for the performance of party B's obligations under the contract. 5

Retention money if payment made

- (2) If party A makes a payment to party B and withholds an amount as security, the amount withheld is **retention money** with effect from the date on which the payment is made. 10

- (3) For the purposes of **subsection (2)**, it does not matter whether party A—

- (a) has set the amount aside from other moneys; or
(b) has complied with **section 18D**. 15

Retention money if payment not made

- (4) **Subsection (5)** applies if party A—

- (a) is liable to pay an amount (the **full amount**) to party B part of which (the **retainable amount**) could be withheld as security; and
(b) does not pay the full amount to party B on the date on which the amount (other than the retainable amount) is due. 20

- (5) If this subsection applies,—

- (a) party A is taken to have withheld the retainable amount as security on that due date; and
(b) that amount is **retention money**. 25

- (6) For the purposes of **subsections (4) and (5)**, it does not matter whether party A—

- (a) has calculated the retainable amount (as long as it is capable of being calculated); or
(b) has prepared, or given to party B, a payment schedule or other record of an amount being withheld; or
(c) has paid any part of the full amount to party B; or
(d) has set aside any amount as security (but if they have, the amount set aside is part of the retention money). 30

De minimis amount

- (7) Despite **subsections (2) to (6)**, if the total amount withheld from party B by party A under the contract is less than the de minimis amount prescribed in regulations, it is not retention money. 35

18C Retention money is held on trust

- (1) Retention money is trust property, held on trust by Party A for party B, and party A must deal with it in accordance with this subpart.
- (2) The trust is created, by operation of this section, when the amount becomes retention money (*see section 18B(2) and (5)*). 5
- (3) The trust ends when—
 - (a) all the retention money is paid to party B; or
 - (b) party B, in writing, gives up any claim to all of the retention money; or
 - (c) all the retention money ceases to be payable to party B, under the contract or otherwise by operation of law. 10
- (4) To avoid doubt,—
 - (a) if party A holds retention money for 2 or more persons (each being party B), the retention money held for each of them is the subject of a separate trust; and
 - (b) the retention money is trust property whether or not party A complies with this subpart; and 15
 - (c) all of the rules of the common law and equity relating to trusts apply to the trust, party A as trustee, and the retention money as trust property (except to the extent this subpart provides otherwise).

18D Investment and use of retention money

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- (1) Party A must keep all retention money in 1 or more bank accounts in accordance with **section 18E**, except as permitted by **subsections (2) and (3)**.
- (2) The retention money (or a portion of it) need not be kept in a bank account if party A holds a complying instrument for the payment of an equivalent amount to party B. 25
- (3) To the extent permitted by the construction contract, party A may use retention money to remedy defects in the performance of party B's obligations under the contract (in which case the amount used ceases to be retention money).
- (4) Interest earned on retention money is not part of the retention money and is the property of party A (unless the construction contract provides otherwise). 30

18DA Failure to keep retention money as required

- (1) If party A fails to comply with **section 18D**,—
 - (a) party A commits an offence and is liable, on conviction, to a fine not exceeding \$200,000; and
 - (b) if party A is a body corporate, each of its directors also commits an offence and is liable, on conviction, to a fine not exceeding \$50,000. 35
- (2) It is a defence to a charge under **subsection (1)** if the defendant proves—

- (a) that party A took all reasonable steps to ensure that party A complied with **section 18D**; or
- (b) if the defendant is a director, that they took all reasonable steps to ensure that party A complied with that provision.
- (3) In this section, **director**, in relation to party A, includes the following: 5
- (a) a person occupying the position of director by whatever name called:
- (b) a person who—
- (i) exercises or is entitled to exercise; or
- (ii) controls, or is entitled to control, the exercise of,— 10
- powers that, apart from party A’s constitution, would fall to be exercised by party A’s board:
- (c) a person to whom a power or duty of party A’s board has been directly delegated by the board with that person’s consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the board: 15
- (d) a person in accordance with whose directions or instructions—
- (i) a person referred to in **paragraph (a), (b), or (c)** may be required or is accustomed to act; or
- (ii) party A’s board may be required or is accustomed to act.
- (4) However, **director**, in relation to party A, does not include a receiver or liquidator. 20
- 18E Bank account**
- (1) A bank account for the purposes of **section 18D(1)** must—
- (a) be at a registered bank in New Zealand; and
- (b) be established and used solely for the purpose of holding retention money (and any interest retained under **section 18D(4)**) that is held by party A— 25
- (i) for party B under a particular construction contract; or
- (ii) for party B under 2 or more construction contracts; or
- (iii) for 2 or more persons (each being a party B) for whom party A holds retention money under 1 or more construction contracts. 30
- (2) The account name must—
- (a) include the words “retention money trust account”; and
- (b) if **subsection (1)(b)(i) or (ii)** applies, include party B’s name; and
- (c) if **subsection (1)(b)(iii)** applies,— 35
- (i) identify the construction contracts; or

(ii)	indicate that it is for all construction contracts under which party A holds retention money.	
(3)	Party A must—	
(a)	ensure that the bank is informed that the account is a trust account for retention money under this Act; and	5
(b)	ensure, as far as is practicable, that the account is identified in the bank’s records as an account of that sort.	
(4)	If subsection (1)(b)(ii) or (iii) applies, the accounting records required by section 18FC must include separate ledger accounts for each party B, and in relation to each construction contract, for which money is held in the account.	10
(5)	Each ledger account must identify the party B and construction contract to which it relates.	
(6)	Each payment into or out of the bank account must be recorded in the ledger account for the party B and construction contract to which the payment relates.	
18F	Public Finance Act 1989 applies if party A is the Crown	15
	If party A is the Crown,—	
(a)	the retention money must be held and dealt with in accordance with Part 7 of the Public Finance Act 1989 (which deals with trust money); and	
(b)	sections 18D (other than subsection (3)), 18E, and 18FB do not apply.	20
5	Section 18FA amended (Protection of retention money)	
	In section 18FA, replace “Retention money held on trust”, with “Without limiting section 18C(4)(b) , retention money”.	
6	Cross-heading above section 18FB repealed	
	Repeal the cross-heading above section 18FB.	25
7	Section 18FB amended (Complying instruments)	
	In section 18FB(8), repeal the definition of registered bank .	
8	Cross-heading above section 18FC repealed	
	Repeal the cross-heading above section 18FC.	
9	Section 18FC replaced (Accounting and records)	30
	Replace section 18FC with:	
18FC	Accounts and records	
(1)	Party A must keep proper accounting and other records of all retention money held for party B.	
(2)	The records must be kept in a way that—	35

- (a) enables the preparation of financial statements that comply with generally accepted accounting practice (as defined in section 8 of the Financial Reporting Act 2013); and
- (b) complies with any other requirements specified in the regulations.
- (3) If party A keeps any of the retention money in a bank account, the records must— 5
 - (a) include details of all payments into and out of the account; and
 - (b) comply with **section 18E(4) to (6)** (if applicable).
- (4) If party A holds any complying instruments for party B, the records must include— 10
 - (a) a copy of each instrument; and
 - (b) for each instrument,—
 - (i) a record of party B’s interest in the instrument, including the protected amount; and
 - (ii) if the instrument is also held for the benefit of 1 or more other persons (each being party B under separate retention money trusts),— 15
 - (A) for each of those persons, the information specified in **sub-paragraph (i)**; and
 - (B) the total of all protected amounts under the instrument; and 20
 - (iii) if the issuer’s liability under the instrument is limited, details of that limitation; and
 - (iv) evidence that the premium or other money that is, or that may become, payable to the issuer for the instrument has been fully paid by party A; and 25
 - (v) a record of any failure to comply with the terms and conditions of the instrument.
- (5) The records must include any other information required by the regulations.
- (6) Party A must make the accounting and other records and financial statements available for inspection by party B at all reasonable times and without charge. 30
- (7) If party A fails to comply with this section, party A commits an offence and is liable, on conviction, to a fine not exceeding \$50,000.

18FD Party A must report on retention money

- (1) Party A must give the information required by **subsection (2)** to party B— 35
 - (a) as soon as practicable after an amount becomes retention money (which may be in the payment schedule given to party B under section 21 in relation to the payment from which the amount is withheld); and

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Part 1 cl 10

- (b) at least once in every 3 months (whether or not a payment schedule is required under section 21) until the retention money trust ends (*see section 18C(3)*).
- (2) The required information is,—
 - (a) for information given under **subsection (1)(a)**, the most recent amount withheld, the construction contract under which it is retained, and the date of its retention; and 5
 - (b) the total amount of retention money held by party A for party B under each construction contract between party A and party B; and
 - (c) the account details for any bank account in which any of the retention money is held; and 10
 - (d) the instrument information for each complying instrument held for the benefit of party B; and
 - (e) a statement that party B may inspect the accounts and records kept by party A in accordance with **section 18FC**; and 15
 - (f) any other information specified in regulations.
- (3) The **account details** for a bank account are the following:
 - (a) the name of the bank and the branch at which the account is held:
 - (b) the name of the account:
 - (c) if the account has separate ledgers, the name of the ledger relating to party B: 20
 - (d) the balance in the account that is held for party B.
- (4) The **instrument details** for a complying instrument are the following:
 - (a) the name of the issuer:
 - (b) sufficient information to identify the instrument (such as a policy number or other unique identifier): 25
 - (c) the protected amount.
- (5) Party A must also give any other information specified in regulations to party B at other times specified in the regulations.
- (6) Party A must not give information under this section that is false or misleading. 30
- (7) If party A fails to comply with this section, party A commits an offence and is liable, on conviction, to a fine not exceeding \$50,000.

10 Section 18I amended (Prohibited provisions)

In section 18I(1)(c), replace “a trust or an instrument under” with “retention money or any bank account or instrument held for the purposes of”. 35

11 New sections 18J to 18L inserted

After section 18I, insert:

18J Effect of receivership or liquidation of party A

- (1) This section applies if—
 - (a) a receiver is appointed under the Receiverships Act 1993 in respect of all or substantially all of the assets and undertaking of Party A; or
 - (b) a liquidator is appointed under the Companies Act 1993 for party A. 5
- (2) When the receiver or liquidator is appointed,—
 - (a) party A ceases to be trustee of the retention money trust; and
 - (b) the receiver or liquidator (or each of them if there is more than 1) becomes trustee of the retention money trust.
- (3) However, this section does not apply if party A has already been replaced as trustee. 10

18K Receiver or liquidator as trustee

- (1) A receiver or liquidator (**new trustee**) who becomes trustee of a retention money trust under **section 18J** must collect, manage, and disburse the retention money in the same way as party A is required by the Act to do. 15
- (2) For the purpose of doing so, the new trustee has (in addition to their powers and functions as a trustee),—
 - (a) if they are a receiver, all of the powers and functions of a receiver appointed under the Receiverships Act 1993; or
 - (b) if they are a liquidator, all of the powers and functions of a liquidator under Schedule 6 of the Companies Act 1993. 20
- (3) The new trustee is entitled to have their reasonable fees and costs met from the retention money trust.
- (4) The new trustee must—
 - (a) notify party B of their appointment within 10 working days of becoming trustee; and
 - (b) give to party B all of the information that the person, in their capacity as receiver or liquidator, gives to creditors of party A when it is given to the creditors. 25
- (5) The new trustee is not liable for any unlawful or improper action taken by party A in their capacity as trustee of the retention money trust before the new trustee was appointed. 30

18L Change of trustee

- (1) The High Court may, on application, remove or replace a receiver or liquidator as trustee of the retention money trust if it considers it appropriate to do so. 35
- (2) An application may be made by a receiver or liquidator who is a trustee or by party B.

- (3) If a receiver or liquidator is the only trustee of the trust and is not willing or able to continue as trustee, they must apply to the court for the appointment of a replacement.

12 Section 21 amended (Payment schedules)

After section 21(3), insert:

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- (4) If the payer withholds retention money (as defined in **section 18B**) from the claimed amount, or the payer already holds retention money on behalf of the payee, the payment schedule must include the information required by **section 18FD**.

Part 2

10

Amendments relating to transitional matters

13 Cross-heading above section 11A inserted

Before section 11A, insert:

Transitional, savings, and related provisions

14 New section 11B inserted (Transitional, savings, and related provisions)

15

After section 11A, insert:

11B Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

15 New Schedule 1 inserted

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After section 83, insert the Schedule 1 set out in the Schedule of this Act.

Schedule
New Schedule 1 inserted

s 15

Schedule 1
Transitional, savings, and related provisions

5

s 11B

Part 1
Provisions relating to Construction Contracts (Retention Money)
Amendment Act 2021

- 1 Transitional matters** 10
- (1) This Act, as amended by the Construction Contracts (Retention Money) Amendment Act **2021** (the **2021 Act**), applies in relation to a commercial construction contract that—
- (a) is entered into after the 2021 Act commenced; or
- (b) was entered into before the 2021 Act commenced and is amended afterwards. 15
- (2) This Act, as in force before the 2021 Act commenced, continues to apply in relation to any other commercial construction contract that was entered into before that Act commenced.
- (3) However, **sections 18J to 18L** apply in relation to a receivership or liquidation that commences after the 2021 Act commenced (regardless of when the construction contract was entered into or when the retention money was withheld). 20