

Construction Contracts (Retention Money) Amendment Bill

Government Bill

As reported from the Transport and Infrastructure Committee

Commentary

Recommendation

The Transport and Infrastructure Committee has examined the Construction Contracts (Retention Money) Amendment Bill and recommends that it be passed. We recommend all amendments unanimously.

Introduction

This bill would amend the Construction Contracts Act 2002 to strengthen and clarify the provisions regarding retention money. The bill would not change other parts of the Act.

Retention money is part of a payment under a construction contract that is held back by a payer (often the head contractor) as security to ensure that a payee (a subcontractor) fixes any defects with their work. The amount can be as much as 10 percent of the total contract value, and a recipient can sometimes wait two years or more for the retention to be released. Retentions are voluntary, but are applied to most contracts in the construction industry. The Act's provisions only apply if retention money is held.

Sometimes eligible subcontractors do not receive their retention money. This may be because a contractor becomes insolvent, or because the money has been mixed with the contractor's other money or assets and spent. This bill aims to reduce the likelihood of this happening by strengthening the protection for subcontractors.

The bill would clarify that retention money:

- is automatically held on trust by a contractor for a subcontractor (or other party it is being held for) at the time at which the construction contract allows it to be withheld from party B

- must be held on trust separately from the contractor's other money and assets
- must be paid into a bank account in a registered bank in New Zealand as soon as practicable after it becomes retention money or be held in the form of complying instruments (such as an insurance policy or a guarantee).

The Act and bill refer to head contractors as party A and subcontractors as party B. This commentary echoes that language.

The bill would require party A to give information to party B about the retention money when it is first withheld and at least every three months after that. It would introduce offences and penalties for party A and its directors for not complying with the bill's requirements.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We wish to bring the House's attention to an issue relating to section 18FC, which we discuss in more detail later in this commentary. We would also like to note that this bill includes strict liability offences.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Retention money requirements

We propose numerous changes in clause 4 of the bill, largely for purposes of clarification. This clause would replace sections 18A to 18F of Part 2, subpart 2A of the Act. This subpart explains what retention money is, how it can be used, and how it should be held on trust. It also sets out the offences and penalties for noncompliance.

When an amount becomes retention money

As introduced, section 18B sets out the application of subpart 2A and the meaning of retention money. However, it does not explicitly specify when an amount withheld becomes retention money. It is important for this to be clear as it triggers the creation of a trust. Section 18C(2) states that a trust is created when the amount becomes retention money. The bill is also unclear about when the money needs to be deposited into a retention money account. For clarity, we recommend replacing this section.

Our new section 18B(1) would better set out when subpart 2A applies. New section 18B(2) and (3) would specify more clearly when an amount would be treated as retention money for the purposes of the legislation. This would be when a construction contract allows party A to withhold payment of an amount from party B. The amount would be considered retention money at this point whether or not:

- the money had been set aside
- the amount had been calculated
- a record of the amount being held has been prepared or supplied to party B

- party B had been paid any amount owed to them.

Despite the above, new section 18B(4) would make it clear that a retainable amount would not become retention money if party A chose not to retain an amount and has paid it to party B, or if the retainable amount was less than a minimum specified in regulations.

When retention money ceases to be held on trust

We recommend replacing section 18C(3) to make it clear when retention money ceases to be trust property (that is, held on trust by party A for party B). As a consequence of this change, we recommend inserting new section 18D(5) to make it clear that party A may pay any person entitled to the retention money once it ceases to be trust property.

How retention money must be kept and used

Proposed section 18D sets out how retention money should be kept and how it could be used. Retention money could be used to pay for the work needed to remedy any defects in party B's work. We recommend replacing section 18D to make the following changes.

Our proposed new section 18D(1) would make clear when the retention money must be deposited into a bank account that complies with new section 18E. It must be deposited as soon as practicable after it becomes retention money.

As introduced, the bill would not require notice to be given before retention money could be used to remedy defects. However, we consider that not giving notice would not give party B a chance to fix the defects themselves or dispute party A's claim. We therefore propose including new section 18D(4) to require written notice to be given at least 10 working days before party A uses the retention money.

As introduced, section 18D(3) would allow contractors to use retention money to remedy defects but it does not set out the parameters of this section. We recommend inserting paragraphs (a) to (c) into new section 18D(4) to specify the circumstances in which retention money can be used.

Trust accounts

Section 18E sets out the bank account requirements for trust accounts. We recommend amending it to clarify that retention money does not need to be held in a statutory trust account.

This amendment would help avoid confusion between the concept of "money held on trust" and a statutory trust account (a banking product designed to comply with statutory requirements). Retention money does not need to be placed into a statutory trust account. However, the bank would need to be informed that the account holding the money is for the purpose of holding retention money on trust under the Act so that banks and all parties understand that the money in the account is trust money. This would ensure it is not subject to banker's lien or other set-off rights.

Our recommendation would replace section 18E(3)(a) with new section 18E(2)(c). The new section clearly sets out what kind of bank account is needed to hold the trust money. As a consequence of this change we also recommend amending section 18E(1)(b).

Third party accounts

We recommend inserting section 18E(3) to make it clear that retention money can be kept in third party accounts. As introduced, the bill did not go into detail about who the account holder could be. Third party account holders could be legal practitioners, accountants, or statutory trustee companies. Independent third parties could monitor transactions and provide additional protection to subcontractors. Our amendment would replace section 18E(3) to set out the classes of persons whose bank accounts may be used to hold retention money.

Naming accounts

We recommend amending sections 18E(2) and 18FD(3) to clarify how accounts should be named. The original bill prescribed naming requirements for trust accounts. However, it would not be possible to require third parties to name their accounts in a specific manner. This is why the naming provisions need moving from section 18E(2), which is about bank account requirements, to the ledger record-keeping requirements provisions in section 18FC(3) and 18FD(3).

Aligning terminology with other accounting systems

We recommend amending section 18E(4), (5), and (6) as the terminology used in this bill does not align with that used in accounting systems that are commonly used by construction companies.

Our recommendation would replace the word “accounts” with “record”. This would avoid companies needing to alter their accounting software.

Treatment of unallocated withdrawals or deposits

We recommend amending clause 4 to insert new section 18EA, setting out what should happen to unallocated withdrawals or deposits of retention money.

We understand that in some cases party A could keep all the retention monies for numerous party Bs in the same account. The bill does not explicitly state what should happen in these cases where the amount of money held is insufficient for all and it is unclear which party B should receive the money.

Our amendment would insert new section 18EA to make it clear that, in such a case, any amount that is withdrawn or deposited and is not clearly attributed to a particular party B is to be apportioned between the party Bs in accordance with their balances in the ledger record. It would also specify that if the records have not been kept in accordance with section 18E(4) the ledger balance is taken to be the amount it would have been if the records were correctly up to date.

Offences and penalties

Clause 4, section 18DA covers what happens if party A fails to keep retention money as required. As introduced, some of the provisions in this section are ambiguous. We recommend three changes to make it clear that:

- a penalty will be incurred for each breach of the offence
- a defence is available for the use of money in good faith to remedy defects
- the terminology aligns with existing legislation.

Section 18DA(1) sets out that it is an offence to not abide by the record-keeping requirements. If party A commits this offence it would be liable to a fine of up to \$200,000. Section 18DA(1) also states that if party A is a body corporate each of the directors would have committed the offence and would be liable to a fine not exceeding \$50,000.

We recommend amending section 18DA(1) to make it clear that a penalty would apply for each breach of the offence. As introduced, it is unclear whether the penalty would be charged for one breach or a collection of breaches. As a consequential change, this amendment would also be made in clause 9, sections 18FC(7) and 18FD(7).

Whether a defect occurred can be contested. It may be found that the defect was not party B's responsibility, but party A has already spent the retention money on fixing the issue. In this situation party A should have an opportunity to defend their use of the money. We recommend inserting new section 18DA(3) to provide for party A to have a defence if they can prove that they acted in good faith and honestly believed they were using the retention money for the purpose allowed under new section 18D(4).

Finally, we recommend aligning the definition of "director" in section 18DA to match that in the Financial Markets Conduct Act 2013. Also, section 18K(1) and (2) in clause 11 should be amended so that the word "duties" replaces the word "functions". Duties is the term used for similar purposes in other legislation. These changes would ensure that the terminology in these provisions is consistent with other legislation.

Accounts and records must be kept and made available

Clause 9 of the bill would replace section 18FC of the Act to specify how to keep accounts and records of money held on trust. As introduced, it would require records to be kept in a way that enables the creation of financial statements that comply with the Financial Reporting Act 2013. However, we believe this could create an unnecessary compliance burden on trustees.

We think meeting the full requirements of the Financial Reporting Act may not be necessary. Other record-keeping may be appropriate, having regard to the amount of retention money and the circumstances. Our amendment would replace section 18FC(2) to set out the minimum record-keeping requirements and allow more detailed or more stringent requirements to be specified in regulations. We also pro-

pose removing the term “financial statements” from section 18FC(6). This would ensure that no excessive compliance burdens are created by this bill.

In section 18FC(1), we agree with advice from the Office of the Clerk that the word “proper” to describe accounting and records could cause confusion. We recommend removing this word.

Proposed section 18FC(6) would require party A to make accounting and other records available for party B to inspect. We support this to increase transparency about retention money, but recommend an amendment to clarify the types of records that must be made available. Each party B only needs access to the records related to retention money that party A holds for them under their own contract.

Interest rate under construction contract cannot be below rate in regulations

We recommend inserting clause 9A, amending section 18G, to make it clear that the interest rate on late payments cannot be less than the rate prescribed in regulations.

Section 18G of the Act sets out when and how much interest is payable on retention money. It states that the rate of interest is that agreed under the construction contract or, if no rate is specified, the rate prescribed in regulations. Our amendment is designed to protect payees in the event of late payment of retentions, by ensuring that the parties could not agree to a rate that was unreasonably low.

Party A in receivership or liquidation

Clause 11 would insert new sections 18J to 18L setting out the process to be followed if party A goes into receivership or liquidation. We recommend the following changes to refine the details of the new sections.

Court can review or fix fees

Section 18J states that if a receiver or liquidator is appointed for party A, they would become the new trustee of the retention money. Section 18K specifies the duties of the trustee to collect, manage, and disburse the retention money. It states that trustees are entitled to use the retention money to cover any reasonable fees and costs they incur.

The bill as introduced does not provide for party B to contest the trustee’s use of retention money. We recommend inserting new section 18K(3A) to clarify that the High Court could review or fix the trustee’s fees and costs, and make such orders as the court considers appropriate.

What information the trustee must provide to party B

Section 18K(4)(b) states that the new trustee must provide party B with all information that they give to creditors in their capacity as receiver or liquidator. However, sometimes information provided to secured creditors may be commercially sensitive and confidential. To ensure that only appropriate information is shared with party B, we recommend inserting the word “unsecured” before “creditors”.

New trustees not liable for previous actions of party A or others

We also recommend clarifying that any subsequent trustee is not liable for any unlawful or improper action taken by party A or any other person. As introduced section 18K(5) would only provide for the first appointed trustee to not be liable for the actions of party A. However, other people may be involved in the insolvency process and would not be protected from the unlawful or improper actions of those that were appointed before them.

Allowing automatic change of liquidator

Section 18L sets out how a trustee can be replaced. We recommend amending this section to provide for an automatic change of trustee if a receiver or liquidator is replaced. As introduced, section 18L only provides for courts to replace receivers or liquidators if appropriate and for receivers or liquidators to apply to the court for a replacement if they are no longer willing or able to continue as trustee.

Payment schedule does not have to include retention money

Clause 12 of the bill would require retention money to be included in party A's payment schedule. We do not agree with this approach.

We believe the payment schedule and retention money regime serve different purposes, and so should be kept separate. The retention money regime provides for regular reporting about retention money every three months. Including it in the payment schedule would make this reporting a monthly requirement.

We think at least every three months is sufficient, so we recommend deleting clause 12. As a consequential change, we recommend removing references to the payment schedule in section 18FD(1)(a) and (b).

Appendix

Committee process

The Construction Contracts (Retention Money) Amendment Bill was referred to the committee on 8 June 2021.

The closing date for submissions on the bill was 23 July 2021. We received and considered 42 submissions from interested groups and individuals. We heard oral evidence from seven submitters at hearings held via videoconference.

We received advice on the bill from the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Greg O'Connor (Chairperson)

Hon David Bennett

Paul Eagle

Hon Julie Anne Genter

Shanan Halbert

Dr James McDowall

Terisa Ngobi

Tim van de Molen

Helen White

**Construction Contracts (Retention Money) Amendment
Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Poto Williams

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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

retention money has the meaning set out in **section 18B(2)** 5

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. 10

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. 15

(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**.

Retention money if payment not made 20

(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. 25

(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**.

(6) For the purposes of **subsections (4) and (5)**, it does not matter whether party A— 30

- (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 35
- (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).

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.~~

18B Application of subpart and meaning of retention money

5

- (1) This subpart applies if a commercial construction contract allows one party to the contract (**party A**) to—

- (a) withhold payment of an amount (a **retainable amount**) that would otherwise be payable to another party (**party B**); and
(b) hold that amount as security for the performance of party B's obligations under the contract.

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- (2) A retainable amount becomes **retention money** at the time at which the construction contract allows party A to withhold payment of the amount from party B.

- (3) The retainable amount becomes retention money in accordance with **subsection (2)** whether or not party A—

15

- (a) has withheld any amount from party B;
(b) has complied with **section 18D**;
(c) has calculated the retainable amount (as long as it is capable of being calculated);
(d) has prepared, or given to party B, a payment schedule or other record of an amount being withheld;
(e) has paid any amount owing to party B under the contract.

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- (4) Despite **subsection (2)**, a retainable amount does not become retention money if—

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- (a) party A chooses not to retain the amount and has paid it to party B; or
(b) the total retainable amount under the contract is less than the de minimis amount prescribed in regulations.

18C Retention money is held on trust

- (1) Retention money is trust property, held on trust by ~~Party~~ party A for party B, and party A must deal with it in accordance with this subpart.

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- (2) The trust is created, by operation of this section, when the amount becomes retention money ~~(see **section 18B(2) and (5)**)~~ under **section 18B(2)**.

- (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~~

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- (e) ~~all the retention money ceases to be payable to party B, under the contract or otherwise by operation of law.~~
- (3) Retention money ceases to be trust property when 1 or more of the following applies to it:
- (a) it is paid to party B: 5
 - (b) party B, in writing, gives up any claim to it:
 - (c) it is used to remedy defects in the performance of party B's obligations under the construction contract in accordance with **section 18D(4)**:
 - (d) it otherwise ceases to be payable to party B.
- (4) To avoid doubt,— 10
- (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,~~ and any other person dealing with the trust property (except to the extent this subpart provides otherwise).
- 18D Investment and use of retention money** 20
- (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
- 18D How retention money must be kept and used**
- (1) Party A must deposit retention money into a bank account that complies with **section 18E** as soon as practicable after it becomes retention money under **section 18B(2)**.
 - (2) Party A must retain the retention money in a bank account that complies with **section 18E** until it ceases to be trust property under **section 18C(3)**. 35
 - (3) Despite **subsections (1) and (2)**, party A is not required to deposit retention money into a bank account, or keep it in a bank account, to the extent that party

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- A holds a complying instrument for the payment of an equivalent amount to party B.
- (4) Party A may use retention money to remedy defects in the performance of party B's obligations under the construction contract only if—
- (a) the use of the money for that purpose is permitted by the contract; and 5
 - (b) any provisions of the contract relating to the use of the retention money are complied with; and
 - (c) at least 10 working days before using the money for that purpose, party A gives party B written notice setting out—
 - (i) party A's intention to use the retention money for that purpose; and 10
 - (ii) details of the defects to be remedied.
- (5) If retention money ceases to be trust property under **section 18C(3)(b), (c), or (d)**, party A may pay the money to any person who is lawfully entitled to it.
- (6) 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 or section 18G applies). 15

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 for each offence; and 20
 - (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 for each offence.
- (2) It is a defence to a charge under **subsection (1)** if the defendant proves— 25
- (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: 30
- (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,—~~
~~powers that, apart from party A's constitution, would fall to be exercised by party A's board;~~ 35
 - (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:

- (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 5
 - (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.
- (3) It is a defence to a charge under **subsection (1)** of using retention money in contravention of **section 18D(2) and (4)** if the defendant proves that they acted in good faith and honestly and reasonably believed that the use of the money was permitted by **section 18D(4)**. 10
- (4) In this section, **director** means a person who is a director (as defined in section 6 of the Financial Markets Conduct Act 2013), but not a receiver or liquidator who is a new trustee under **section 18K**. 15

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—~~
 - (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.~~ 25
 - (b) comply with **subsection (2) or (3)**.
- (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,— 30
 - (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 35

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- (b) ensure, as far as is practicable, that the account is identified in the bank's records as an account of that sort.
- (2) A bank account complies with this subsection if—
- (a) the account holder is party A in their capacity as trustee of the retention money; and 5
- (b) the account is used solely for the purpose of holding retention money (and any interest earned on it even if, under **section 18D(6)**, it is not retention money) that is held by party A—
- (i) for party B under a particular construction contract; or
- (ii) for party B under 2 or more construction contracts; or 10
- (iii) for 2 or more persons (each being a party B) for whom party A holds retention money under 1 or more construction contracts; and
- (c) party A has informed the bank that the account is for the purpose of holding retention money that party A holds on trust under this Act.
- (3) A bank account complies with this subsection if— 15
- (a) it is a bank account ordinarily used to hold trust money; and
- (b) the account holder is—
- (i) a practitioner or an incorporated firm (both as defined in section 6 of the Lawyers and Conveyancers Act 2006); or
- (ii) the Public Trust (as defined in section 4 of the Public Trust Act 2001); or 20
- (iii) a trustee company (as defined in section 2 of the Trustee Companies Act 1967); or
- (iv) a chartered accountant (as defined in section 2 of the New Zealand Institute of Chartered Accountants Act 1996); or 25
- (v) a person holding a licence under the Auditor Regulation Act 2011 or a registered audit firm (as defined in section 6 of that Act); or
- (vi) a person of a kind prescribed by regulations; and
- (c) party A informs the account holder that the money to be held in the account is retention money that party A holds on trust under this Act. 30
- (4) ~~If **subsection (1)(b)(ii) or (iii)** **subsection (2)(b)(ii) or (iii)** or **(3)** applies,~~ the ~~accounting~~ records required by **section 18FC** must include separate ledger ~~accounts~~ records for each party B, and in relation to each construction contract, for which money is held in the account.
- (5) Each ledger ~~account~~ record must identify the party B and construction contract to which it relates. 35
- (6) Each payment into or out of the bank account must be recorded in the ledger ~~account~~ record for the party B and construction contract to which the payment relates.

18EA Treatment of unallocated withdrawals or deposits

(1) This section applies if retention money held by party A for 2 or more party Bs is (or is recorded in the ledger records as being) kept in the same bank account.

(2) If—

- (a) retention money is withdrawn from the bank account; and 5
- (b) the ledger records do not record which party B the withdrawal is attributable to; and
- (c) it is not otherwise clear from the circumstances which party B the withdrawal is attributable to,—

the amount withdrawn is to be apportioned between the party Bs in proportion to their respective balances in the ledger records at the time the withdrawal is made. 10

(3) If—

- (a) there is a deficiency in the amount of retention money held in the bank account for 1 or more of the party Bs; and 15
- (b) an amount is deposited into the bank account; and
- (c) the ledger records do not record which of those party Bs the deposit is attributable to; and
- (d) it is not otherwise clear from the circumstances which party B the deposit is attributable to,— 20

the amount deposited is to be apportioned between the party Bs referred to in paragraph (a) in proportion to their respective balances in the ledger records at the time the deposit is made.

(4) If the ledger records have not been kept as required by section 18E, the references in subsections (2) and (3) to the balances in those records are taken to be references to what those balances would have been had the ledger records been correctly kept until the withdrawal or deposit in question was made. 25

(5) In this section, ledger records means the ledger records that party A is required by section 18E(4) to keep in relation to the bank account.

18F Public Finance Act 1989 applies if party A is the Crown 30

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(1), (2), and (3) (other than subsection (3)), 18E, and 18FB do not apply.** 35

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.

7 Section 18FB amended (Complying instruments)

In section 18FB(8), repeal the definition of **registered bank**.

8 Cross-heading above section 18FC repealed

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Repeal the cross-heading above section 18FC.

9 Section 18FC replaced (Accounting and records)

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. 10

(2) ~~The records must be kept in a way that—~~

(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~~ 15

(b) ~~complies with any other requirements specified in the regulations.~~

(2) ~~The records must—~~

(a) ~~include details of—~~

(i) ~~all bank accounts in which retention money is held for party B (see **subsection (3)**); and~~ 20

(ii) ~~all complying instruments held for party B (see **subsection (4)**); and~~

(b) ~~be appropriate, having regard to the amount of retention money and the circumstances of the case; and~~

(c) ~~include any other information required by regulations; and~~ 25

(d) ~~be kept in a way that complies with any requirements specified in regulations.~~

(3) If party A keeps any of the retention money in a bank account, the records must—

(aaa) ~~identify the bank account as an account in which retention money is held for party B; and~~ 30

(aab) ~~identify the construction contracts under which that money is retained; and~~

(a) ~~include details of all payments into and out of the account; and~~

(ab) ~~if the bank account holds retention money for any other party B, record that fact; and~~ 35

- (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—
- (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),—
 - (A) for each of those persons, the information specified in **subparagraph (i)**; and
 - (B) the total of all protected amounts under the instrument; and
 - (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
 - (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 required by this section in relation to retention money held for party B available for inspection by party B at all reasonable times and without charge.~~
- (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 for each offence.

18FD Party A must report on retention money

- (1) Party A must give the information required by **subsection (2)** to party B—
- (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~~
 - (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 under **section 18C(3)**).~~
- (2) The required information is—
- (a) ~~for information given under **subsection (1)(a)**, the most recent amount withheld, each amount retained, the construction contract under which it is retained, and the date of its retention; and~~

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- (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
 - (d) the instrument information details for each complying instrument held for the benefit of party B; and 5
 - (e) a statement that party B may inspect the accounts and records ~~kept by party A in accordance with **section 18FC**~~ that party A is required by **section 18FC** to keep in relation to retention money held for party B; and 10
 - (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;~~ 15
 - (d) ~~the balance in the account that is held for party B.~~
- (3) The **account details** for a bank account are,—
- (a) if the account holder is party A,—
 - (i) the name of the bank and the branch at which the account is held; 20
 - and
 - (ii) the name of the account; and
 - (b) if the account holder is not party A,—
 - (i) the name of the account holder; and
 - (ii) the category of account holder under **section 18E(3)(b)** that the account holder belongs to; and 25
 - (c) the balance in the bank account that is held for party B; and
 - (d) if separate ledger records are required under **section 18E(4)**, the name of each ledger record relating to party B and the balance in that ledger record. 30
- (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):
 - (c) the protected amount. 35
- (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.

- (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 for each offence.

9A Section 18G amended (Interest on late payment)

Replace section 18G(2) with:

- (2) The interest referred to in subsection (1) accrues at the rate prescribed in regulations or any higher rate specified in the construction contract. 5

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”.

11 New sections 18J to 18L inserted 10

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~~ party A; or 15
 - (b) a liquidator is appointed under the Companies Act 1993 for party A.
- (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. 20
- (3) However, this section does not apply if party A has already been replaced as trustee.

18K Receiver or liquidator as trustee

- (1) A ~~receiver or liquidator~~ **(new trustee)** person who becomes trustee of a retention money trust under **section 18J or 18L** **(the new trustee)** must collect, manage, and disburse the retention money in the same way as party A is required by the Act to do. 25
- (2) For the purpose of doing so, the new trustee has (in addition to their powers and ~~functions~~ duties as a trustee),—
- (a) if they are a receiver, all of the powers and ~~functions~~ duties of a receiver appointed under the Receiverships Act 1993; or 30
 - (b) if they are a liquidator, all of the powers and ~~functions~~ duties of a liquidator under Schedule 6 of the Companies Act 1993.
- (3) The new trustee is entitled to have their reasonable fees and costs met from the retention money trust. 35

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- (3A) The High Court may, on application by party B or the new trustee, review or fix the new trustee's fees and costs and make such orders in relation to them as the court considers appropriate.
- (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 unsecured creditors of party A when it is given to ~~the~~ those creditors.
- (5) The new trustee is not liable for any unlawful or improper action taken by party A or any other person in their capacity as trustee of the retention money trust before the new trustee was appointed.
- 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.
- (2) An application may be made by a receiver or liquidator who is a trustee of the retention money trust 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.
- (4) If a receiver or liquidator who is a trustee of the retention money trust is replaced as receiver or liquidator by another person, that other person becomes trustee of the retention money trust in place of the previous receiver or liquidator.
- 12 Section 21 amended (Payment schedules)**
- After section 21(3), insert:
- (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

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)

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.

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15 New Schedule 1 inserted

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

Legislative history

1 June 2021
8 June 2021

Introduction (Bill 45–1)
First reading and referral to Transport and Infrastructure
Committee