

13 May 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Construction Contracts (Retention Money) Amendment Bill

Purpose

1. We have considered whether the Construction Contracts (Retention Money) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 23023/8.2). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion we have considered the consistency of the Bill with s 14 (freedom of expression) and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

4. The Construction Contracts Act 2002 (the principal Act) regulates retention money for construction companies that decide to hold retention money. The Bill amends that Act to strengthen and clarify the regime.
5. 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.
6. The Bill makes the following changes to the retention money regime:
 - a. clarifying that retention money held on trust must be kept separate from other money or assets;
 - b. providing that retention money is held by party A on trust for party B as soon as possible;
 - c. 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 guarantee);
 - d. 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;
 - e. introducing offences and penalties for a company and its directors for not complying with these requirements; and,

- f. if party A becomes insolvent, making the liquidator, receiver, or other administrator receiver of the retention money for the purpose of collecting and distributing it.
7. These amendments are intended to provide greater security and transparency regarding the use of retention money in the construction industry, and to provide recourse for party Bs to reclaim retention money in the event of company failure or liquidation.

Consistency of the Bill with the Bill of Rights Act

Section 14 – freedom of expression

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. Section 14 has been interpreted as including the freedom not to be compelled to say certain things or to be compelled to provide certain information.¹
9. Several clauses in the Bill require contractors to disclose certain information or otherwise regulates how information must be imparted:
 - a. clause 4 replaces s 18E in the principal Act. This section requires a party A, when opening an account to hold retention money, to inform the bank that it is a trust account, and requires the trust account name must include the words “retention money trust account” and the name of the construction project or the name of the payee (the party B), as the case requires;
 - b. clause 9 amends s 18FC of the principal Act. This section requires party A to maintain accounting records that enable the preparation of financial statements; and
 - c. clause 10 inserts new s18FD into the principal Act. This section requires a party A to provide information to a party B relating to the form in which the retention money is held and details of any money that has been withheld.

These requirements *prima facie* limit freedom of expression under s 14 of the Bill of Rights Act.

10. However, a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. The s 5 inquiry asks whether the objective of the provision is sufficiently important to justify some limitation on the freedom of expression, and if so, whether the limit on the right is rationally connected and proportionate to achieving that objective and limits the right no more than reasonably necessary to achieve the objective.²
11. The information required to be provided by party A is rationally connected to the Bill’s objective of providing greater security and transparency to payees about retention money. The required information is regulatory in nature and of limited expressive value. We consider that requiring this information is proportionate to the

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7

importance of protecting payees' rights to reclaim their money in the event of insolvency, as the money will be clearly identifiable and separate from other assets held by party A.

12. For these reasons, we consider limits on the right to freedom of expression within the Bill to be justified under s 5 of the Bill of Rights Act.

Section 25(c)- right to be presumed innocent until proven guilty

13. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law. This requires the prosecution to prove an accused person's guilt beyond reasonable doubt.
14. Clause 4 of the Bill amends s 18DA of the principal Act, which introduces a strict liability offence for failing to comply with the requirement set out in s 18D to hold retention money on trust and in a separate trust account. Strict liability offences prima facie limit s 25(c) of the Bill of Rights Act because the accused is required to prove a defence, or disprove a presumption, in order to avoid liability.
15. We consider that this limit on the presumption of innocence by the strict liability offence is justified under s 5 of the Bill of Rights Act because:
 - a. the offence is in the nature of a public welfare regulatory offence and does not result in a criminal conviction;
 - b. the maximum penalty of \$200,000 for a Party A and \$50,000 for a director of a body corporate is proportionate in the circumstances, as non-compliance with the retention money regime impacts the Construction Contracts Act 2002 achieving its aim, and can create significant financial harm for subcontractors and flow on effects for the sector;
 - c. the Bill allows, in s 18(DA)(2) for statutory defences of taking all reasonable steps to comply with the requirements set out in s 18DA; and
 - d. the alleged offender is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite.
16. On this basis we regard the limit on s 25(c) to be justifiable under s 5 of the Bill of Rights Act.

Conclusion

17. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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