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Submissions to the Transport and Infrastructure Select Committee

On the Construction Contracts (Retention Money) Amendment Bill

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Civil Contractors New Zealand Inc would like to appear before the committee to support this submission.

Introduction

Civil Contractors New Zealand Inc (CCNZ) represents the interests of more than 600 companies that carry out the construction and maintenance of Aotearoa's essential infrastructure. We represent contractors that range in size from large multi-nationals through to national and regional companies and small one or two person companies.

Our members are both head contractors and subcontractors and are often engaged by central and local government but are also engaged by commercial and residential developers to complete site works including earthworks and the installation of roading, water and energy supplies.

CCNZ's membership and Board is made up of a combination of large national contractors, SME companies and industry suppliers. Many of our members hold retention monies from subcontractors and at the same time have retentions held from them by clients or head contractors. This places CCNZ in a very good position to make informed comments about retentions and the Amendment Bill.

Key submissions

CCNZ strongly supports the proposed amendments for the following reasons.

- Put simply by many of our members - **retention money does not belong to the person holding the money and therefore should not be used to support their business cash flow**.

- The introduction of the Construction Accord has been a major step forward for the construction industry. The Accord refers to building trust and confidence. The

current retentions regime has been demonstrated to have weaknesses and loopholes that undermine trust and confidence.

- The current regime enables retention money to be “co-mingled” making it very difficult or impossible in the event of an insolvency to prove what is and is not retention money. This risks retention money, often belonging to SME businesses, being claimed by secured creditors.

- The current retentions regime has weaknesses when the company holding retentions becomes insolvent. This is the very time that our members most need robust, effective and legally enforceable provisions.

- The lack of enforcement provisions and penalties is a major weakness of the current system. It enables companies and persons mis-managing retentions to hide behind administrative processes to avoid responsibility for the current management and payment of retentions money.

- The current situation gives those that use retention money to support their cash flow an advantage over those that manage retention money in a business-like and appropriate way. The proposed amendments will level the playing field.

- It should be noted that while the explanatory note correctly states that retention money is commonly between 10% and 2% of contract value, it is a very significant proportion of the total profit that a head contractor and sub-contractor may make on a job.

- We are sure that the costs of compliance will be raised by some parties. CCNZ does not believe there will be substantial additional costs over and above those that responsible companies holding retentions already face. It also needs to be remembered that any interest earned on the amounts held accrues to those holding the retentions. The other option if the costs of holding retentions is too high is that companies can choose to not hold retentions in the first place.

Specific comments on the proposed changes

1. **Retention money held on trust must be kept separate from other money or assets. The Bill states that retentions will now be trust property, and the trust will be expressly deemed to be created the moment the money is withheld as security by the payer.**
   CCNZ supports this change.

   This is particularly important in the event of an insolvency. This is a key provision as it also means that retention money is held and used for the purpose for which it is withheld not for some other purpose. Having retention money in a separate account significantly reduces the risk of the money being used for other purposes and in the event of an insolvency claimed by secured creditors.

These provisions expressly close the gap created by the Ebert case, *Bennet & Ors v Ebert Construction Limited (in rec and liq) [2018] NZHC 2934*, that found that whether the trust was in existence in any given instance was a question of fact for the court, applying the usual three-pronged test for the existence of a trust.

2. **Retention money must as soon as possible be held on trust.**
   CCNZ supports the intent.

   However, we would like to see the bill amended to specify that any retentions are to be placed into the separate account on the same day that the payment from which they were deducted is made.

3. **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)**
   CCNZ fully supports this change.

   This is critical in terms of protecting retentions.

4. **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.**
   CCNZ supports this change.

   The current regime is not working. Many sub-contractors are reliant on a small number of developers, other clients and head contractors for a significant proportion of their work and therefore their family's livelihood. In this situation SMEs are often reluctant to request information on retentions due to the fear they will not be offered or asked to quote for future work**.**

   Where members have written to Payers seeking access to the retention records, often this is met with silence.

   The proposed provisions rightly place the obligation of proactive reporting on the company that has withheld the retentions money.

   We support the blanket provision of information on a regular basis. This will build trust and confidence across the sector. It will also mean that people holding retentions money will need to actively manage their retentions accounts and this will make it easier for receivers and liquidators to collect and distribute retentions following an insolvency.

5. **Introducing offences and penalties for the company and its directors for not complying with these requirements**
   CCNZ supports this provision.

   In many cases we envisage there would be many retentions held in one account. Further clarity is required as to whether the penalties are per account. or per

retention held.

Section 18B refers to ‘a commercial construction contract’ but more in our view is required. It makes sense not to amend the three penalties provisions (ss 18DA(1), 18FC(7) and 18FD(7)) but to clarify in a single place the penalties apply per contract. If this improvement is not adopted, then we believe that the penalties are far too low as many accounts could have millions of dollars in them so the fines would not be sufficient deterrent for those intentionally mis-managing retentions money.

There is a clear need for offences and penalties to be in place to ensure companies and Directors make this a priority and put good systems and processes in place.

There are however questions about who will actively enforce this regime, and we would request further clarity on this point.

6. **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.**
CCNZ supports this change.

   The current situation where a High Court decision was required to give the receiver the powers to deal with retention funds is clearly unacceptable. We agree that the liquidators or receivers’ costs should be covered. The regular supply of information to those owned retention money should make the task of sorting the funds straight forward.

7. **The provisions of the Bill come into force six months after being passed.**
CCNZ would like to see the provisions introduced earlier.

   Consideration should be given to introducing the provisions earlier given that they are in effect putting in place the intent of the Construction Contracts Amendment Act 2015 and reflect what many responsible companies have had in place since the 2015 amendments came into force.

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