

House of Representatives

Supplementary Order Paper

Wednesday, 7 May 2014

Construction Contracts Amendment Bill

Proposed amendments

Julie Anne Genter, in Committee, to move the following amendments:

Clause 9A

Replace *clause 9A* (page 7, lines 22 and 23), with:

9A Section 21 amended (Payment schedules)

In section 21(2), replace paragraph (c) with:

- “(c) state a scheduled amount; and
- “(d) identify any amount withheld in accordance with any provisions relating to the retention of money in the construction contract.”

New clause 9B

After *clause 9A* (page 7, after line 23), insert:

9B New section 22A (Provisions relating to retention of money)

After section 22, insert:

“22A Provisions relating to retention of money

- “(1) If a construction contract provides for a payer to withhold retentions from a payee, the payer must hold those retentions in accordance with the construction contract and subject to such other conditions as may be prescribed by any regulations made under section 82.
- “(2) The payer must hold retentions in trust for the benefit of the payee.
- “(3) Despite any provision in a construction contract to the contrary, a payee is entitled to provide a bond in lieu of retentions in the prescribed form and in accordance with any regulations made under section 82.

- “(4) A payer that refuses to accept a bond in the prescribed form from a payee is not entitled to withhold retentions from that payee.”
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Explanatory note

This Supplementary Order Paper amends the Bill to deal with the withholding of retention payments to subcontractors. Section 17(1)(c) of the Construction Contracts Act 2002 (the **Act**) currently provides that the amount of any progress payment must be calculated with reference to any provisions relating to the retention of money. However, while the purpose of the Act is to facilitate timely payments in the industry, the Act does not address the status of retention funds, even though they are held against work already performed by a payee. These retention funds are often held for far longer than is necessary and expose a payee to the risk of the payer’s insolvency.

The present regime also allows a head contractor to retain more against its subcontractors than is held against it by its client. This means that a main contractor can use the retention imbalance as a source of working capital, which also increases the risk of a main contractor trading while insolvent. For example, the liquidator’s reports into the Mainzeal collapse show that Mainzeal had \$11 million in retentions held against it, but Mainzeal was actually withholding over \$18 million in retentions from its subcontractors.

We therefore propose that a *new section 21(2)(d)* be added to make it clear that where a construction contract provides for the provision of retentions, these are clearly identified in any payment schedule. We also propose a *new section 22A* that qualifies the status of retention monies and the basis on which they may be held. This Supplementary Order Paper also allows for regulations to be made in support of this provision.
