



Construction Contracts (Retention Money) Amendment Act 2023

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Date of assent 5 April 2023
Commencement see section 2

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Construction Contracts (Retention Money) Amendment Act 2023.

2 Commencement

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

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

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) or (5)

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 Banking (Prudential Supervision) Act 1989

retention money has the meaning set out in section 18B(2) or (6)(a)

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 payment of an amount (a **retainable amount**) that would otherwise be payable to another party (**party B**) as security for the performance of party B's obligations under the contract.
- (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—
 - (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.
- (4) Despite subsection (2), a retainable amount does not become retention money if—
 - (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.
- (5) This subpart also applies if one party to a commercial construction contract (**party A**) withholds payment of 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 even though the contract does not provide for that.
- (6) In that case,—
 - (a) the withheld amount referred to in subsection (5) becomes **retention money** when it is withheld; and
 - (b) a reference in this subpart to retention money retained under a contract includes retention money retained in connection with the contract referred to in that subsection.

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 under section 18B(2) or (6)(a).
- (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;
 - (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, but only if—
 - (i) the use of the money for that purpose is permitted by the contract; and
 - (ii) any provisions of the contract relating to the use of the retention money are complied with; and
 - (iii) at least 10 working days before using the money for that purpose, party A gives party B written notice setting out—
 - (A) party A's intention to use the retention money for that purpose; and
 - (B) details of the defects to be remedied:
 - (d) it otherwise ceases to be payable to party B.
- (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
- (c) all of the rules of the common law and equity relating to trusts apply to the trust, party A as trustee, the retention money as trust property, and any other person dealing with the trust property (except to the extent that this subpart provides otherwise).

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) or (6)(a).
- (2) Party A must keep the retention money in a bank account that complies with section 18E until it ceases to be trust property under section 18C(3).
- (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 there is a complying instrument in force in relation to the payment of an equivalent amount to party B.
- (4) 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.
- (5) 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).

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
 - (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—
 - (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) It is a defence to a charge under subsection (1) of using retention money in contravention of section 18D(2) 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 18C(3)(c).
- (4) In this section, **director** means a person who is a director (as defined in section 6(1) of the Financial Markets Conduct Act 2013), but not—

- (a) a member (as defined in section 5(1) of the Local Government Act 2002); or
- (b) a receiver or liquidator who is a new trustee under section 18K.

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) comply with subsection (2) or (3).
- (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
 - (b) the account is used solely for the purpose of holding retention money (and any interest earned on it even though, under section 18D(5), 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
 - (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—
 - (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
 - (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
 - (v) a person holding a licence under the Auditor Regulation Act 2011 or a registered audit firm (as defined in section 6(1) of that Act); or
 - (vi) in a case where party A is a council-controlled organisation (as defined in section 6 of the Local Government Act 2002), a local authority that holds shares in, controls, or has a right to appoint directors of that organisation; or
 - (vii) 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.
- (4) If subsection (2)(b)(ii) or (iii) or (3) applies, the records required by section 18FC must include separate ledger records for each party B, and in relation to each construction contract, for which money is held in the account.
- (5) Each ledger record 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 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
 - (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.
- (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
 - (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,—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.
- (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

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), 18E, and 18FB do not apply.

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)

(1) Replace section 18FB(3)(a) with:

- (a) be issued in favour of, or endorsed with the interests of,—
 - (i) party B; or
 - (ii) party B and 1 or more other persons (each being a party B under a construction contract); or
 - (iii) a class of persons (all being party Bs under construction contracts) of which party B is a member; and

(2) 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)

Replace section 18FC with:

18FC Accounts and records

- (1) Party A must keep accounting and other records of all retention money held for party B.
- (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
 - (ii) if party A relies on section 18D(3), all complying instruments that relate to 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
 - (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—
- (a) identify the bank account as an account in which retention money is held for party B; and
 - (b) identify the construction contracts under which that money is retained; and
 - (c) include details of all payments into and out of the account; and
 - (d) if the bank account holds retention money for any other party B, record that fact; and
 - (e) comply with section 18E(4) to (6) (if applicable).
- (4) If party A relies on section 18D(3), the records must include—
- (a) a copy of all complying instruments that relate to party B; 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 also relates to 1 or more other persons (as permitted by section 18FB(3)(a)(ii) and (iii)),—
 - (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) Party A must make the accounting and other records 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.
- (6) 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; and

- (b) at least once in every 3 months until the retention money trust ends under section 18C(3).
- (2) The required information is—
 - (a) each amount retained, the construction contract under which it is retained, and the date of its retention; and
 - (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) if party A relies on section 18D(3), the instrument details for each complying instrument that relates to party B; and
 - (e) a statement that party B may inspect the accounts and records that party A is required by section 18FC to keep in relation to retention money held for party B; and
 - (f) any other information specified in regulations.
- (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; 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
 - (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.
- (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.
- (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.

10 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.

11 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”.

12 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 (as defined in section 2(1) of the Receiverships Act 1993) is appointed 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.
- (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.

18K Receiver or liquidator as trustee

- (1) A 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 this Act to do.
- (2) For the purpose of doing so, the new trustee has (in addition to their powers and duties as a trustee),—
 - (a) if they are a receiver, all of the powers and duties that they have in their capacity as receiver; or
 - (b) if they are a liquidator, all of the powers and 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.
- (4) 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.

- (5) 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 those creditors.
- (6) 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 became trustee.

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.

Enforcement of retention money provisions

18M Functions of chief executive

The chief executive has the following functions in relation to this subpart:

- (a) to disseminate information and provide educational programmes on matters relating to this subpart:
- (b) to publish guidance information on the requirements of this subpart:
- (c) to monitor compliance with this subpart:
- (d) to take enforcement action (including taking proceedings for offences) if the chief executive considers that it is desirable to do so—
 - (i) to enforce compliance with this subpart; or
 - (ii) to establish or clarify any matter of principle relating to this subpart or the interpretation of any provision of this subpart:
- (e) to provide advice to the Minister in relation to this subpart and to matters relating to retention money generally:
- (f) to carry out any other functions and duties specified in this subpart:

- (g) to take all necessary steps for the implementation and administration of this subpart:
- (h) to carry out any functions that are incidental and related to, or consequential upon, the functions set out in paragraphs (a) to (g).

18N Power to require information

- (1) The chief executive may require any person to provide any information or document that the chief executive considers is reasonably necessary for the purposes of monitoring, investigating, or enforcing compliance with this subpart.
- (2) The chief executive must give written notice to the person that specifies—
 - (a) the information or document that must be provided; and
 - (b) how the information or document must be provided; and
 - (c) a reasonable deadline by which the information or document must be provided.
- (3) The chief executive may copy or retain any information or document provided.
- (4) The recipient of a notice has the same privileges in relation to things required by the notice as a witness has in proceedings before a court.

Guidance note

The privileges of a witness include the privilege against self-incrimination and the other privileges set out in subpart 8 of Part 2 of the Evidence Act 2006.

18O Offences relating to information and documents

- (1) A person given a notice under section 18N must provide the information or document as required by the notice.
- (2) A person who intentionally fails to comply with subsection (1)—
 - (a) commits an offence; and
 - (b) is liable on conviction,—
 - (i) in the case of an individual, to a fine not exceeding \$50,000;
 - (ii) in the case of a body corporate, to a fine not exceeding \$200,000.
- (3) A person given a notice under section 18N must not provide information or a document if the person knows that—
 - (a) the information or document is false or misleading in a material particular; or
 - (b) there is a material omission from the information or document.
- (4) A person who fails to comply with subsection (3)—
 - (a) commits an offence; and
 - (b) is liable on conviction,—

- (i) in the case of an individual, to a fine not exceeding \$50,000:
- (ii) in the case of a body corporate, to a fine not exceeding \$200,000.

18P Power of entry

- (1) The chief executive or a person authorised by the chief executive may apply for a search warrant in respect of any place.
- (2) The application must be made in accordance with subpart 3 of Part 4 of the Search and Surveillance Act 2012.
- (3) An issuing officer may issue a search warrant in respect of the place if satisfied that there are reasonable grounds—
 - (a) to suspect that an offence against this subpart has been, is being, or will be committed; and
 - (b) to believe that there is evidential material in the place.
- (4) The provisions of Part 4 of the Search and Surveillance Act 2012 (except sections 118 and 119) apply.
- (5) In this section, **evidential material** and **issuing officer** have the same meanings as in section 3(1) of the Search and Surveillance Act 2012.

18Q Hindering chief executive

- (1) A person must not obstruct, hinder, or resist the chief executive or a person authorised under section 18P in the execution of their powers under this subpart.
- (2) However, the person has the same privileges in relation to things required by the notice as a witness has in proceedings before a court.

Guidance note

The privileges of a witness include the privilege against self-incrimination and the other privileges set out in subpart 8 of Part 2 of the Evidence Act 2006.

- (3) A person who intentionally contravenes subsection (1)—
 - (a) commits an offence; and
 - (b) is liable on conviction,—
 - (i) in the case of an individual, to a fine not exceeding \$50,000:
 - (ii) in the case of a body corporate, to a fine not exceeding \$200,000.

Part 2**Amendments relating to transitional matters and consequential amendment****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.

15 New Schedule 1 inserted

Insert the Schedule 1 set out in the Schedule of this Act as the first schedule to appear after the last section of the principal Act.

*Consequential amendment***16 Principal Act**

Section 17 amends the Search and Surveillance Act 2012.

17 Schedule amended

In the Schedule, insert in its appropriate alphabetical order:

Construction Contracts Act 2002	18P	Power to enter premises to investigate offences	All (except sections 118 and 119)
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Schedule New Schedule 1 inserted

s 15

Schedule 1 Transitional, savings, and related provisions

s 11B

Part 1 Provisions relating to Construction Contracts (Retention Money) Amendment Act 2023

1 Transitional matters

- (1) This Act, as amended by the Construction Contracts (Retention Money) Amendment Act 2023 (the **2023 Act**), applies in relation to a commercial construction contract that—
 - (a) is entered into after the 2023 Act commenced; or
 - (b) was entered into before the 2023 Act commenced and is renewed afterwards.
- (2) This Act, as in force before the 2023 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 2023 Act commenced (regardless of when the construction contract was entered into or when the retention money was withheld).

Legislative history

1 June 2021	Introduction (Bill 45–1)
8 June 2021	First reading and referral to Transport and Infrastructure Committee
22 November 2021	Reported from Transport and Infrastructure Committee (Bill 45–2)
23 August 2022	Second reading
28 March 2023	Committee of the whole House, third reading
5 April 2023	Royal assent

This Act is administered by the Ministry of Business, Innovation, and Employment.