

The Construction Contracts Amendment Act (CCA Act) was passed in 2015 and included regulations to protect retention payments withheld from contractors in the construction industry. The intent of these regulations was that retention money withheld by the party owing the retentions (Payer) could be placed in a separate bank account for benefit of the party owed the retentions (Payee) or comingled with other monies and would be deemed to be held in trust. Those who are owed retentions have the right to inquire how their retentions are held and the payer must provide the information in a timely manner. The regulations do not contain any specified penalties for entities or directors who do not comply with the Act.

Since the CCA Act came into force in April 2017, the Specialist Trade Contractors Federation (STCF) have had many complaints from our members that their inquiries regarding how their retention monies are held by Payers are ignored or vague statements are made regarding the security of their retentions. Also, since April 2017 several large construction companies have failed, leaving subcontractors out of pocket for millions of dollars. Retentions held by these failed companies have been available to the Payees owed retentions when the monies have been placed in specified accounts for named recipients. Where this has not been the case, Payees owed retentions have not been paid out and the comingled retentions have been included in the overall funds of the company, generally being paid to other secured and priority creditors. Also, where funds are held in a trust account, the receiver or liquidator must apply to the court to have access to the fund for disbursement, adding costs and delays.

The BDO 2019 Construction Survey Report, states 70% of subcontractors surveyed did not ask to inspect how their retentions were held, for those who did ask to inspect, almost half (47%) found at least one customer who was not holding funds in trust.

Of those surveyed who are holding retentions, 65% were holding cash in trust, 25% say they always have enough cash but do not hold it in a trust account, 2% had retentions insurance cover, 1% were using non-cash assets as security and 7% declined to answer. In effect, in the case of a company failing, only those creditors owed retentions whose money is held in a trust account or covered by insurance (67%) are assured of payment.

STCF recognises that protection of retentions is a relatively small part of the overall problems facing the construction sector. However, construction is the only industry in New Zealand where retentions are held by creditors, meaning up to 10% of subcontractor's revenue is held by main contractors and therefore at risk for periods of months and sometimes years.

STCF believes five additional regulations need to be added to the CCA Act to remedy this situation:

1. Retentions must be held in a separate bank account or investment account named "retentions account", which will be deemed to be held in trust for the beneficiaries recorded by the holder as being owed retentions. Retentions must be deposited in the "retentions account" at a time no later than when the payment from which the retention is deducted is paid. Retentions from various contracts and creditors may be held in the same "retentions account".

This will resolve the current issue of retention monies being co-mingled and not protected by trust. The market has had ample time to adjust to the loss of cashflow this will impose on payers not currently putting money in trust. It is important the legislation is specific that this fund will be deemed held in trust, without needing to add the compliance required to establish a formal trust account.

2. The entity holding the retentions will provide, in addition to monthly payment schedules, regular statements (At least every three months.) to all parties who are owed retentions detailing the amount

held, the name and number of the “retention account” and a directors declaration that retentions are held in accordance with the Construction Contracts Act.

This will put the onus on the payer to report on how the retention monies are secured and remove the current untenable requirement for the payee to ask to inspect how the retention money is held. A similar scheme operates in Victoria, Australia, where the regulator checks that companies withholding retentions are complying with their regulatory obligations. A similar system in NZ would ensure compliance.

3. In the event of a failure of the payer, the receiver/liquidator automatically becomes the trustee of the “retention account” and may access the “retention account” to disburse payments of retentions as they come due.

This will remove the requirement for the receiver or liquidator to apply to the court to disburse the funds.

4. The reasonable costs for managing disbursement of the retention fund shall be paid from the “retention account” and deducted from payees on a pro-rata basis. Total fees shall be no more than 10% of the funds held in the “retention account” without court approval. Retentions due may be paid out less 10%, in advance of full disbursement costs being calculated, and a final adjustment made when all costs are realised.

This will remove the need for the receiver or liquidator to apply to the court to receive payment from the “retention account” to cover fair costs for disbursement.

5. Regulations shall set penalties for entities that do not comply with the requirements of the act, or if the entity ceases to exist, the directors of the entity at the time of the failure shall be liable for the penalties. The regulations will stipulate the regulatory body responsible for prosecuting breaches of the regulations.

Penalties are required to ensure companies and directors apply the CCA Act. Currently, underfunded main contractors can use retentions withheld from their suppliers as working capital without risk of prosecution, this encourages anti-competitive behaviour from some main contractors.

The STCF has taken advice from insolvency practitioners and other industry experts who have endorsed the introduction of these extra regulations. STCF believe there will be minimal if any extra compliance required of companies who are currently complying with the CCA Act. Significant improvements will be gained in security for suppliers as well as improvement to the culture and reputation of the construction industry. These changes are needed urgently to prevent more subcontractors losing retention money owed to them.

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