



Cabinet Economic Growth and Infrastructure Committee

EGI Min (14) 20/7

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Minute of Decision

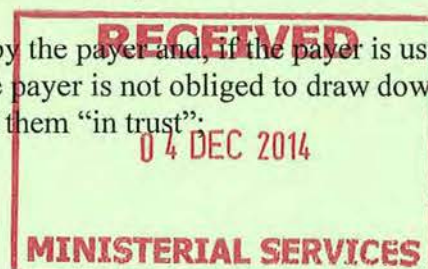
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Regulating the Use of Retentions in the Construction Market: Final Policy Decisions

Portfolio: Building and Housing

On 3 December 2014, the Cabinet Economic Growth and Infrastructure Committee:

- 1 **noted** that on 11 August 2014, Cabinet agreed in principle to amend the Construction Contracts Act 2002 (the Act) to regulate the use of retentions in the construction market [CAB Min (14) 27/9];
- 2 **agreed** to amend the Act to:
 - 2.1 clarify that the ban on “pay when paid” includes any term in a construction contract that makes a payment conditional on anything other than the performance of the obligations stated in the construction contract, but does not include a term that provides for retentions to be withheld when a payee has not fully performed its obligations under the contract;
 - 2.2 provide for a default rate of interest (to be prescribed in regulations) to be applied to late payment of retentions in the absence of a rate of interest being specified in the construction contract;
 - 2.3 define “retentions” as “money retained by a payer out of money payable by the payer to a payee under a commercial construction contract, as security for the performance of obligations of the payee under the contract to the standard specified in the contract”;
 - 2.4 impose a trust on cash retentions and a fiduciary duty on the payer of the retentions to ensure the funds are spent for the purpose for which they are held (as specified in the construction contract);
 - 2.5 specify the following matters in respect of the trust requirement:
 - 2.5.1 the trust applies to cash retained by the payer and, if the payer is using debt to fund the construction work, the payer is not obliged to draw down funds for retentions and separately hold them “in trust”;

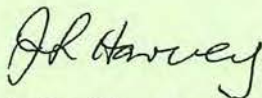


- 2.5.2 the trust obligation ends when either:
 - 2.5.2.1 the retentions are paid in full to the payee; or
 - 2.5.2.2 the retentions are used for the purpose, specified in the construction contract, for which they were retained, e.g: to fix defective work;
- 2.5.3 the payer can keep any interest earned on the trust money, but the payer cannot charge any costs of administration against the trust money;
- 2.5.4 small amounts of retentions (de minimis amounts) will not be subject to the trust requirement, with the minimum amount of retentions to be prescribed in regulations;
- 2.6 add a new regulation-making power to enable other details about how the trust requirement will operate in practice to be prescribed, such as:
 - 2.6.1 events that may result in ending the trust obligation, in addition to those specified in the Act;
 - 2.6.2 the minimum (de minimis) amount of retentions retained that will trigger the “in trust” requirement;
 - 2.6.3 methods for accounting for the money held in trust that will be acceptable (but not mandatory) for complying with the “in trust” requirement, e.g: if the money is held in a separate bank account, that is acceptable;
- 3 **agreed** that the amendments requiring retentions to be held “in trust” will only apply to new commercial construction contracts entered into after 31 March 2016;
- 4 **noted** that no new offences are proposed to be prescribed in relation to the requirement for retentions to be held “in trust” because existing offences in the Crimes Act 1961, for breach of trust and theft by a person with a special relationship, will provide sufficient deterrence and punishment for any breach of the trust requirement;

Legislative implications

- 5 **invited** the Minister for Building and Housing to issue drafting instructions to the Parliamentary Counsel Office to include the amendments outlined in paragraph 2 above in a Supplementary Order Paper to the Construction Contracts Amendment Bill (the Bill);
- 6 **noted** that the Bill is currently awaiting its committee of the whole House stage;
- 7 **authorised** the Minister for Building and Housing to approve any further amendments required to give effect to the proposals in paragraph 2 above, and to include other minor or technical amendments to the Bill (including any consequential amendments to the Act) in the Supplementary Order Paper;

- 8 **noted** that a copy of the paper under EGI (14) 202 and the associated minute will be posted on the Ministry of Business, Innovation and Employment's website.



Janine Harvey
Committee Secretary

Reference: EGI (14) 202

Present:

Hon Bill English (Chair)
Hon Steven Joyce
Hon Paula Bennett
Hon Amy Adams
Hon Simon Bridges
Hon Dr Nick Smith
Hon Nathan Guy
Hon Tim Groser
Hon Todd McClay
Hon Craig Foss
Hon Jo Goodhew
Hon Nicky Wagner
Hon Louise Upston

Officials present from:

Office of the Prime Minister
Officials Committee for EGI

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