

Submission

to the

Ministry of Business,
Innovation and Employment

on

Possible amendments to
the Construction Contracts
Act 2002 (Retentions
Regime)

21 February 2020

About NZBA

1. The New Zealand Bankers' Association (NZBA) is the voice of the banking industry. We and work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.
2. The following seventeen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - China Construction Bank
 - Citibank N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - Industrial and Commercial Bank of China (New Zealand) Limited
 - JPMorgan Chase Bank N.A.
 - Kiwibank Limited
 - MUFG Bank Ltd
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited

Introduction

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on possible amendments to the Construction Contracts Act 2002 (**Retentions Regime**). NZBA commends the work that has gone into developing the proposed amendments to the Retentions Regime.

Trusts requirement

4. NZBA supports the proposal to clarify the trust provision within the Construction Contracts Act 2002 (**CCA**) to ensure that retentions are safeguarded.
5. However, we would also like to see changes that require each trust account to be designated by way of an account name, such as "Retention Trust Account" (or similar). That will help make it clearer to the bank and other interested third parties that the aggregate funds in that account are held on trust for, and are receivables of, the retention trust beneficiary, and not assets of the head contractor. An untitled account has the potential to cause confusion and inadvertently be subject to banker's lien and other set-off rights. A clearly designated account will also help mitigate constructive trust/fiduciary duty risk for the account banks. A similar

designation should also apply to cash equivalents or complying financial instruments.

6. Additionally, we have some concerns that this alone will not be sufficient to ensure that retentions are retained for sub-contractors. There is a risk that trust funds under the control of head contractors may continue to be misused if they are not appropriately administered.

Co-mingling of funds

7. NZBA supports the proposal to clarify the co-mingling provisions. Anecdotally, our members are aware of attempts by distressed participants in the construction industry to use retention monies as working capital. This change is a necessity to better protect retention monies, and the position of sub-contractors more generally.
8. This may still leave situations where (i) a head contractor could inappropriately deal with co-mingled retention monies of other retention beneficiaries and (ii) it is hard for an insolvency practitioner to identify which portion of co-mingled monies belong to which beneficiary in any one trust account.
9. A potential solution is to only allow co-mingling by the head contractor of retention funds relating to each retention trust beneficiary rather than among all beneficiaries. This could be facilitated by requiring a separate trust account to be opened for each retention trust beneficiary, effectively ring-fencing retention monies to that beneficiary. We note that this solution may not be appropriate for all head contractors as the administration of such accounts may be too burdensome for those that are smaller in scale. To address this, a threshold could be applied, similar to that in Australia. We think this solution would also decrease the risk of a finding of constructive trust/fiduciary duty.

Enhanced transparency

10. NZBA supports the proposal to enhance transparency.
11. It may be helpful that the changes include a proposed form of confirmation so that this becomes an efficient and easy to use process. Failure by a party to provide such a confirmation within a certain timeframe should result in a breach of the CCA and be subject to penalties. An audit requirement could also be considered to enhance transparency, although we note that would need to be considered in light of the cost vs benefit.

Enforcement

12. NZBA supports the proposal to enhance powers given to adjudicators, but we query how effectual it will be if there is no ongoing supervision and audit to identify breaches.
13. In relation to the proposal to introduce penalties for failures to comply, given the financial constraints most industry operators have, together with the inequality in

bargaining power between head-contractors vs. sub-contractors, there could be merit in establishing a confidential whistle-blowing hot-line or 'ombudsman' for sub-contractors. Such an authority would be a welcome protector for those who may feel in a weak position relative to their counterparties, or lack the appropriate funds to initiate the actions referred to in Proposal 4.

Contact details

14. If you would like to discuss any aspect of this submission, please contact:

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