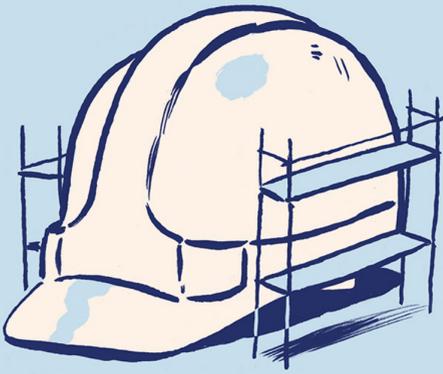


## Insights / Construction

# Retentions in the construction industry – more problems and a possible fix?



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The NBR has recently published two articles on two cases currently before the courts (Decmil NZ and Downey Construction) relating to the retention regime under the Construction Contracts Act 2002 (Act).

The retentions regime under the act continues to be a fraught area, with industry players complying with the regime to varying degrees (in some cases not at all).

The theory of the regime is simple: money withheld as retentions should be held as liquid assets (or other permitted alternatives) and proper accounting records should be kept to track which parties are owed retentions and how much those parties are owed. The aim is to ring fence the retentions for the benefit of the retention creditors in the event of insolvency.

This theory has been difficult to apply in practice, with many of the concerns well-documented. In our view, one of the key issues is the fact that a deemed trust over retention monies can only be created if proper accounting records are kept. This, coupled with no penalties or personal liability for directors in the Act, creates a limited incentive for compliance.

In a post-Covid environment we are likely to see insolvency issues in the already under pressure construction industry increase and it is crucial that the legislature amends the regime to protect the parties owed retentions.

There is some hope as changes to the legislative regime have been signalled by Minister Jenny Salesa. The proposed changes will:

- introduce a new offence and penalties for company directors and firms who don't comply with their responsibilities
- strengthen how retention money is held to prevent firms from dipping into retention money to use as working capital
- require those holding retention money to issue a transparency statement stating how much is being held and where

The proposed changes are outlined at <https://www.beehive.govt.nz/release/govt-delivers-security-construction-subcontractors>

These changes will go a long way to reducing the issues with the current regime. If you have questions about how to comply with the current retention regime or want to make sure that your retentions are held in accordance with the Act then contact our team.

The NBR articles referred to above are available here:

[https://www.nbr.co.nz/story/tough-new-retentions-rules-way?utm\\_medium=email&utm\\_source=Heads%20Up](https://www.nbr.co.nz/story/tough-new-retentions-rules-way?utm_medium=email&utm_source=Heads%20Up)

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