ICNZ Insurance Council of New Zealand
Te Kāhui Inihua o Aotearoa

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Committee Secretariat
Transport and Infrastructure Committee
Parliament Buildings
Wellington

Emailed to: ti@parliament.govt.nz

Dear Committee Members,

ICNZ submission on the Construction Contracts (Retention Money) Amendment Bill

Thank you for the opportunity to submit on the Construction Contracts (Retention Money) Amendment Bill (**the Bill**).

The Insurance Council of New Zealand/Te Kāhui Inihua o Aotearoa (**ICNZ**) represents general insurers and reinsurers that insure about 95 percent of the Aotearoa New Zealand general insurance market, including about a trillion dollars' worth of Aotearoa New Zealand property and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, commercial property, and directors and officers insurance).

Please contact Jane Brown (jane@icnz.org.nz or 04 495 8008) if you have any questions on our submission or require further information.

Submission

ICNZ supports the intention of the Bill and agrees that parties subject to the retention money regime should be afforded greater protection. At a time when there is such an emphasis on building more houses and ensuring that those houses are built to a sufficiently high standard, the Government should ensure that the parties involved in the construction process are being compensated for their work.

While we support the intent of the Bill, we outline some concerns below about the possible impact the proposed obligations, and penalties for breach of those obligations, may have on the already-stretched liability insurance market.

The potential impact on liability insurance

It is well known that Directors and Officers insurance (**D&O**) is experiencing a period of low capacity and high premiums,[1] driven partly by the rise of litigation funder-supported class actions in Australia. In Australia, D&O premiums have increased by an average of 225% with some increases as high as 500% for large ASX-listed companies.[2] While increases in Aotearoa New Zealand have not been as significant, the impacts of the hardening Australian market have certainly been felt by businesses here. It is possible that the introduction of new penalties for directors, like those in clause 18DA(1)(b) of the Bill could contribute to further premium adjustments, as the penalties increase the level of possible risk that a director is exposed to. Clause 18DA(1)(a) which appears to target the entity itself, could have a similar effect on statutory liability insurance (which provides cover for certain unintentional breaches of legislation), although statutory liability has not seen the same significant price increases as D&O. Despite this, statutory liability policies, like D&O, could see pricing changes to reflect the increased uncertainty presented by the new penalties and the need to pay defence costs to defend claims.

Insurers will also have to consider whether the additional risks introduced by the Bill are ones that they want to provide cover for. This will involve a much more detailed examination of an entity, including it's handling of retention money, before an insurer agrees to accept cover. If the entity falls outside an insurer's risk appetite, they will not offer insurance, or may look to limit or exclude cover in relation to breach of the retention money provisions of the Construction Contracts Act 2002. The other possibility is that insurance cover for these particular risks remains available but becomes unaffordable for all those except very large companies with high levels of financial capacity. Some entities may already find it problematic to secure D&O insurance for construction risks depending on what is being built and how it is financed, and these amendments could exacerbate that difficulty.

The ability to deter offenders

While the intention of the Bill should be beneficial to those whose money is being held by another party, we question whether the legislation will have the desired effect on the parties responsible for the retention money. If, for example, an entity who has not complied with their new obligations under the legislation to keep retention money separate from other funds, subsequently becomes insolvent or bankrupt, there would not be any money available to the party whose payment had been withheld. Nor would the threat of a financial penalty under the new legislation provide any deterrent to the mishandling of funds, as an insolvent company would not have the money to pay a fine.

We therefore question whether a pecuniary penalty is the most effective deterrent for this legislation, or whether consideration ought to be given to other punitive measures.

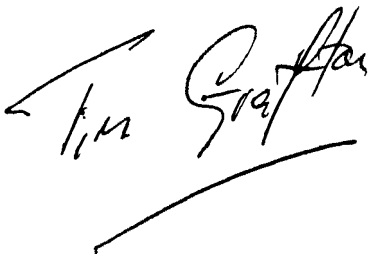
Conclusion

Thank you again for the opportunity to submit on the Bill. If you have any questions, please contact our Legal Counsel on (04) 475 8008 or by emailing jane@icnz.org.nz.

[1] For further information on this, see the Institute of Directors, Marsh, and MinterEllisonRuddWatts report *D&O insurance in a hard market*.

[2] https://www.insurancebusinessmag.com/au/news/professional-liability/marsh-issues-dando-insurance-warning-225364.aspx

Yours sincerely,



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