

Legal update - Construction Contracts Act Amendment Bill

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In January of this year, Parliament introduced a Bill to update and amend the Construction Contracts Act 2002 (the Act). Among the proposed changes are several that may have a significant impact on the construction industry, though in many ways the Bill does not go far enough in addressing concerns raised about the current Act.

This update is intended as an alert about the changes that could be expected later in the year if the Bill is passed, and a comment on some issues that could be improved by Select Committee review and public submissions.

Background

Broadly, the Act creates default progress payment provisions for construction contracts, provides an adjudication framework for disputes under construction contracts and provides remedies for recovering payments under construction contracts.

The key changes proposed by the Bill are:

- Removing most differences between residential and commercial contracts, including requiring the same disclosures for commercial payment claims as for residential payment claims
- Expanding the Act's scope to cover the work of engineers, designers and quantity surveyors
- Updating and clarifying the adjudication procedure.

These changes reflect the recommendations of the Building and Housing Group of the Ministry of Business, Innovation and Employment (MBIE) (formerly the Department of Building and Housing) following its review of the Act in 2011. The MBIE report showed that the payment enforcement scheme under the Act worked well for the most part, but that the adjudication system was not working as well as it could.

Removing the differences between residential and commercial contracts

The MBIE report concluded that there was no meaningful difference between residential and commercial contracts that justified their existing unequal treatment under the Act.

Under the proposed regime, the Act's provisions in relation to the default rules for progress payments, service of notices to suspend work, and getting security for payment (if necessary), will apply to residential contracts, where previously they applied to commercial contracts only.

The only distinction that will remain is that contractors cannot put a charging order over a residential property constructed for its owner or for a family trust if the owner or the beneficiary of the trust is to live in the property. Contractors will instead have to enforce payment through other methods in the Act, such as suspending work or bringing debt recovery proceedings in the District Court.

The consistent treatment of commercial and residential contracts is a positive change, and will allow for more consistent and speedy recovery of debts than is currently possible under the Act. In particular, the change will benefit contractors under residential contracts when homeowners resist paying the final payment when works are materially completed but for minor defects which can be remedied during the defects period.

This change will also alter the requirements for a valid payment claim. Those in the construction industry will know that a payment claim cannot be enforced unless it includes all the information required under the Act. We recommend that businesses in the industry take the opportunity to ensure that their invoicing systems are up to date and that their payment claims are enforceable.

Expanding the scope of the act

The MBIE report found that the Act could be clearer on which of its rules applied to which contracts and disputes. The Bill

represents an improvement in this regard. In particular, parties to design, engineering and quantity surveying contracts are currently unable to use the adjudication process under the Act to resolve disputes. The Bill will amend the definition of "construction work" to include design, engineering and quantity surveying work.

Before the Act was introduced in 2002, professional organisations for engineers and architects successfully lobbied to be excluded on the basis that the relationship between clients and consultants differed from the relationship between clients and contractors. However, the MBIE appears to have decided that the difference no longer justifies excluding consultants from the ambit of the Act, given that the MBIE report was prepared after receiving opposing submissions from organisations like the New Zealand Institute of Architects (NZIA) and the Institution of Professional Engineers New Zealand.

Currently, consultancy contracts govern relationships between consultants and clients. Consultancy contracts are likely to be on the consultant's standard form and, as NZIA noted in its submission to the MBIE, are likely to contain sufficient measures to encourage timely payments from clients. It is therefore hardly surprising that consultants are not interested in falling under the Act's ambit, especially since it is not possible to contract out of the Act.

Consumers, then, are likely to benefit most from this change. When consumers have a dispute involving building contractors and designers, engineers or quantity surveyors, they will not need to initiate different dispute resolution processes against each party. This will reduce costs and increase consistency of outcomes.

One problem that we hope will be resolved through Select Committee review and public submissions is the ambiguous meaning of "design, engineering and quantity surveying work", which is not expressly defined in the Bill as drafted. It is not clear how far the scope of the Act will be extended. If it extends too far, parties engaged in ancillary work may find themselves unexpectedly subject to adjudication. Furthermore, parties may use arguments over the scope of design, engineering and quantity surveying work as a delaying tactic or to avoid meeting their obligations under the Act. The ambiguity could undermine the "fast-track" purpose of the Act. We hope this issue will be resolved before the Bill is passed.

Updating and clarifying the adjudication procedure

The MBIE report found a need for the adjudication procedure to be updated to resolve procedural problems that had arisen in the 10 years since the Act's inception. With the proposed changes, it appears that the adjudication procedure is likely to operate more smoothly and therefore be faster, clearer, and more cost-effective.

In particular, we note that under the proposed new regime, all adjudicators' determinations will be enforceable. Previously only determinations in relation to payments were enforceable, and not those about rights and obligations. This often left the successful party without an enforceable remedy and resulted in issues being re-litigated in the District Court at a greater expense to both parties.

The Bill also accelerates enforcement of adjudication orders in the District Court, by reducing to five days (from 15) the time a defendant has to oppose such an application. Though this speeds up enforcement, parties engaged in adjudication will need to be well-prepared to oppose such applications if necessary.

The changes to procedure are welcome, but arguably do not go far enough especially in light of the added complexity that will inevitably flow from the Act covering more trades in the industry. In this regard, by way of example, we would hope to see in the final version of the Bill express provision for adjudications in relation to the same project to be amalgamated. Otherwise, there may be inconsistent outcomes on similar issues.

Timeframe for changes

The proposed changes to the Act are mostly positive and we expect that in large they will make enforcement under construction contracts faster and more effective.

We hope to see the kinks ironed out before final passage of the Bill later this year, and look forward to seeing how Parliament responds to the issues raised above.

There will be an opportunity for interested parties to make submissions to the Select Committee in the near future.

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