BUDDLE FINDLAY

Out of the frying pan and into the fire: Changes to adjudication under the Construction Contracts Act Amendment Bill

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Adjudication under the Construction Contracts Act 2002 (the Act) is primarily a quick fire process to resolve monetary disputes and to ensure liquidity in the building industry. The Construction Contracts Act Amendment Bill, expected to come into force in New Zealand in late 2015, introduces significant changes to the industry and aims to make resolving construction disputes faster, clearer, and more cost-effective[1]. Not only will the distinction between residential and commercial construction contracts be largely removed, but the scope of the Act is to be significantly expanded, along with a revised adjudication format. The goals of the reforms are admirable but it is questionable whether the changes will result in practical improvement.

Currently, parties to design, engineering and quantity surveying contracts are not covered by the Act and are unable to use the adjudication process. The Bill amends the definition of "construction work" to include "design or engineering work" and "quantity surveying work". This will result in reduced costs for consumers who will be able to access one adjudication process for disputes involving a range of consultants. While consumers will certainly gain, there is much uncertainty for consultants as there is no definition of the expanded terms included in the Bill. It is unclear whether "design work" includes work undertaken by an engineer or architect as certifier and administrator under a NZS3910 construction contract. The only certainty regarding the new scope of the Act is that it will provide fruitful ground for dispute.

It is not surprising that consultants are reluctant to fall within the ambit of the Act. There is arguably little need for them to access the Act's monetary protection provisions as consultant contracts usually contain provisions relating to timely payment. Negligent design claims are complex and often occur years after the design work is completed. These types of disputes do not easily lend themselves to resolution by an abbreviated dispute resolution process.

Under the proposed regime, adjudicators' determinations in relation to "rights and obligations" will be enforceable (not just those in respect of payments). This addresses the current situation where a successful party is left without an enforceable remedy and issues are re-litigated at considerable expense. While this change has admirable intentions, the practical implications are considerable. Disputes about "rights and obligations" concern a broad range of issues including site access, scope of work, quality, fitness for purpose, bond and guarantee compliance and rights to suspend or terminate. These types of disputes seem ill-suited for a short form resolution process which has no discovery, no expert evidence and no cross examination. The Act was not originally devised as a short form process to resolve complex disputes but rather to ensure the swift movement of money.

There is also a question mark over how a decision on rights and obligations will be implemented given the process sits alongside alternative dispute resolution. It is relatively simple to undo the exchange of money if a different result is reached in any parallel proceedings but an order for the completion of works is a more difficult matter.

The Bill accelerates enforcement of adjudication orders by reducing the time to oppose an application from 15 days to five days. While this speeds up enforcement there will be little time to gain expert opinion in relation to any complex matter. More significantly, and at a practical level, claims involving rights and obligations inevitably result in notification to an insurer under a professional indemnity policy. Most polices operate on a "claims made" basis and notification must be given of circumstances giving rise to a claim. The insurer retains the right to conduct any defence and, post-earthquake, New Zealand insurers have adopted a "hands-on" approach to managing litigation. An insured will need to act fast to both trigger a claim and meet the reduced timeframes for a response.

The practicality of the proposed changes will need to be tested. What is certain is that parties to a construction contract will need to be well-prepared and have good lines of communication with their insurer if they do not want to be caught out by the amended adjudication process.

This article was written by Susan Rowe for the Australasian Lawyer magazine (Issue 2.3, June 2015). Susan specialises in commercial litigation and dispute resolution with expertise in insurance and construction, local government and employment law.

[1] Review of the Construction Contracts Act 2002: Proposals for change, 2011 Regulatory Impact Statement, Ministry of Business, Innovation and Employment

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