

CONSTRUCTION CONTRACTS ACT 2002

Introduction

The purpose of the Construction Contracts Act 2002 (“the Act”) is to reform the law relating to construction contracts and in particular to:

- (a) facilitate regular and timely payment between the parties to a construction contract;
- (b) provide for the speedy resolution of disputes arising under a construction contract; and
- (c) provide remedies for the recovery of payments under a construction contract.

The Act achieves the first objective by making conditional payment provisions and pay if paid claims in construction contracts unenforceable and by making express provision for progress payments and the procedure for making and responding to payment claims for progress payments.

The Act achieves the second objective by providing for the adjudication of disputes relating to construction contracts.

The Act achieves the last objective by setting out remedies for a party’s failure to pay or to comply with the determination of an adjudicator.

No contracting out

Section 12 of the Act provides that parties to a construction contract cannot contract out of the Act.

Application of the Act

The Act applies to all contracts, whether residential or commercial, for the carrying out of construction work.

Construction work is defined broadly in the Act and covers all types of construction work including the construction of buildings or other structures, painting, site clearing and earth moving, roading, landscaping, cleaning in the course of construction and the installation of services as well as fixtures and fittings.

There are some types of work not covered by the Act including:

- (a) drilling for or extracting oil or natural gas and extracting minerals;
- (b) design, surveying and quantity surveying consultants’ work; and
- (c) the supply of materials.

Residential construction contracts

A “residential construction contract” is a construction contract where one of the contracting parties occupies or intends to occupy the premises being built under the construction contract. The Act provides that certain default provisions and remedies do not apply to residential construction contracts.

Certain provisions of the Act are more onerous for residential construction contracts, such as

the need to specify the process for responding to a payment claim and the consequences of not responding to the payment claim or not paying in full.

Where the contracting party is a trust or a company the construction contract will not be a residential construction contract as the contracting party is not a person who can occupy the premises.

Prohibition of conditional payment provisions

Section 13(1) of the Act stipulates that a conditional payment provision of a construction contract has no legal effect and is not enforceable in civil proceedings and cannot be used as a basis for withholding progress payments.

A “conditional payment provision” is defined in the Act as a provision of a construction contract that:

- (a) makes the obligation of one party to pay an amount owed to another party conditional on the first party receiving payment from a further party;
- (b) makes the due date for payment of an amount owed by one party to another party contingent on the date on which the second party receives payment from a third party;
- (c) that is referred to in the construction industry as a “pay when paid” or a “pay if paid” clause.

Progress payments

The Act provides that the parties to a construction contract are free to agree upon a mechanism for determining:

- (a) the number of progress payments under the contract;
- (b) the interval between those payments;
- (c) the amount of each of those payments;
- (d) the date when each of those payments becomes due.

Where the parties do not agree upon a mechanism for determining progress payments, sections 16 to 18 of the Act provide default provisions.

Making and responding to payment claims

The Act provides that a payee may serve a “payment claim” on a payer requiring the payer to make a progress payment. A payment claim must:

- (a) be in writing;
- (b) identify the construction contract to which it relates;
- (c) identify the work to which the claim relates;
- (d) indicate the claimed amount and the due date for payment;

- (e) indicate the manner in which the payer calculated the amount; and
- (f) state that it is a payment claim under the Construction Contracts Act 2002.

The payer has 20 working days (unless the construction contract provides otherwise) to respond to the payment claim with what is called a “payment schedule”. A payment schedule must:

- (a) be in writing;
- (b) identify the payment claim to which it relates;
- (c) indicate the amount that will be paid; and
- (d) if the amount to be paid is different than the payment claim give reasons as to why there is a difference;
- (e) if the amount to be paid is less than the payment claim give reasons as to why an amount is being withheld.

If the payer does not provide a payment schedule within 20 working days the payer will be liable to pay the whole amount of the payment claim within the time provided in the contract or, if the contract does not provide a time, within 20 working days of the service of the payment claim.

If the payer issues a payment schedule, the payer must pay the amount that is agreed to be paid by due date or the payer becomes liable to pay the scheduled amount.

If the payee disputes the payment schedule the dispute must be referred to adjudication under the Act.

Method of service of payment claims and payment schedules

Payment claims and payment claims can be served by:

- (a) hand delivering to the other party;
- (b) posting to the other party’s place or residence or business;
- (c) fax; or
- (d) email provided that the claim will only be deemed to be received when it comes to the attention of the recipient. The best way to ensure that this is the case is to ask for the recipient to acknowledge receipt of the email.

Remedies for failure to pay

There are two principal remedies available to a payee to recover monies due:

- (a) recover from the payer, as a debt due to the payee, in any Court:
 - (i) the unpaid portion of the claimed amount or the scheduled amount if a payment

schedule has been issued; and

- (ii) the actual and reasonable costs of recovery ordered against the payer by the Court;
- (b) serve notice on the payer of the payee's intention to suspend the carrying out of construction work.

Suspension of work

A party (party A) to a construction contract may suspend work under that contract if:

- (a) any of the following circumstances applies:
 - (i) a claimed amount is not paid in full by the due date for its payment and no payment schedule has been provided by the party who it is claimed is liable for the payment (party B);
 - (ii) a scheduled amount is not paid in full by the due date for its payment even though a payment schedule given by party B indicates a scheduled amount that party B proposes to pay to party A;
 - (iii) party B has not complied with an adjudicator's determination that party B must pay an amount to party A by a particular date; and
- (b) party A has served on party B a notice of party A's intention to suspend construction work and the notice sets out the grounds for suspending work and that the notice is given under the Construction Contracts Act 2002;
- (c) the amount mentioned in subsections (a)(i) or (a)(ii) above are not paid, or the determination mentioned in subsection (a)(iii) is not complied with, within 5 working days after the date of that notice.

It is very important that, notwithstanding any other provision of the construction contract, if a contracting party wishes to suspend construction work that the above procedure is followed and the correct notice is served on the other contracting party.

The party suspending work is not in breach of the contract, is not liable for damages to the party failing to pay and is entitled to an extension of time to complete the contract. The right to suspend work ceases when the defaulting party pays the outstanding amount in full or complies with an adjudicator's determination.

Adjudication

Adjudication is a fast track dispute resolution process which is designed to provide an interim determination of a dispute between the parties to a construction contract.

The adjudicator is chosen by agreement between the parties or, failing agreement, by a nominating body chosen by the parties or, if the parties have not agreed on a nominating body, an authorised nominating body (the Arbitrators' and Mediators' Institute of New Zealand).

Any party to a construction contract may refer a dispute to adjudication by serving the other

party with a notice of adjudication setting out the matters required by the Act. It is critical that there must be a “dispute or difference” between the parties under a construction contract before a matter can be referred to adjudication.

Where the respondent to an adjudication claim is the owner of the construction site, the claimant can seek an order from the adjudicator for a charging order over the construction site to secure payment of the amount claimed. A claimant can also apply for a charging order over land owned by a non-respondent owner where the adjudicator has determined that the owner is jointly and severally liable to pay with the respondent the amount claimed in the adjudication.

A party can still apply to a Court or a Tribunal for the resolution of a dispute even though an adjudication under the Act has been commenced in relation to the same dispute. The adjudication will run contemporaneously with the other proceedings until such time as the other proceedings are determined in which case the adjudication must stop. If the adjudication resolves the dispute before the other proceedings, then the adjudication determination stands until such time as the other proceedings have been completed.

An adjudication determination may be enforced through the District Court.

Conclusion

As it is not possible to contract out of the Act, it is very important that persons involved in the construction industry are fully aware of their obligations under the Act.

Failure to comply with the provisions of, and time limits imposed by, the Act can result in disastrous consequences for parties to a construction contract.

This information paper is an overview only of some of the key provisions of the Act. Please do not hesitate to contact us if you require further information or have any questions about the application of the Act.