

Construction Contracts Amdt Act 2015

Which bits come into force on 1 December 2015

After 5 years in gestation, the Construction Contracts Amendment Act 2015 received Royal Assent on 22 October 2015. It will now come into effect in three stages, starting on 1 December 2015. This paper outlines those changes.

The industry needs the very best of construction law that will work for massive, multibillion-dollar projects like the Waterview tunnel down to smaller projects like home alterations. This task of ensuring our construction law is fit for purpose is even more important now than ever, given the massive building programme projected over the next few years. It is during such boom times that there is a risk of commercial and building practices getting sloppy.

Hon Dr Nick Smith, Minister of Building & Housing on the introduction of the
Third Reading of the Construction Contracts Amendment Bill 2015
Hansard - 20 October 2015. Volume:709;Page:7333

1. Construction Contracts Amendment Act 2015

The Construction Contracts Amendment Act 2015 is the result of a lengthy process, starting with a limited survey by the Department of Building and Housing in 2010 as part of the Building Act review; stalled by the failure of Mainzeal Property and Construction Limited; considered at length by the Commerce Select Committee, after numerous submissions by industry groups; and ultimately passed on 22 October 2015, after four further Supplementary Order Papers.

The Act, as passed, and the Regulations that followed, are to be applauded for taking the Act a step further, and largely building on the positive experiences of the last 13 years.

The majority of the changes will take effect in relation to new construction contracts awarded from 1 December 2015; then the Act's ambit will be extended to design, engineering and quantity surveying contracts entered into from 1 September 2016; and finally the retention provisions will apply to retentions made from 31 March 2017.

The purpose of this paper is to outline the changes coming into effect on 1 December 2015.

2. The Changes in Summary

There are a number of changes which are technical in nature, which are unlikely to be of particular concern.

Broadly, the changes fall into the following general subjects:

- Removal of references to *progress payments* in favour of the more general reference to *payments* due in connection with the contract (see sections 4(c), 5, 13 & Part 2 SubPart 2)
- Removal of the distinction between *residential* and *commercial* construction contracts (see sections 4(d), 5, 10 (deleted) & 31), save for charging orders and retentions
- Ambit of disputes capable of adjudication (see sections 25(2), 58(2), 59A & 73)
- Adjudication procedure (see sections 28(3), 31A, 33(2)(b) & (c), 35A, 37(1), (4) & (5) & 37A)
- Enforcement and opposing enforcement

3. Timing

As mentioned above, section 11A provides that the amendments set out in the 2015 Amendment Act only apply to contracts entered into on or after 1 December 2015, or which are renewed for a further term after that date; or if the parties agree that the amendments are to apply.

In practical terms, that will mean that while the majority of the changes to the Act will come into effect on 1 December 2015, they will apply only to contracts entered into on or after that date. The law, as it applies to any contracts entered into prior to 1 December will continue to be governed by the Act, unamended. From a contract administration perspective, and more particularly for adjudication as that is where most of the amendments will apply, there will be two alternative regimes in place.

Similarly, for the extension of *construction work* to include *related services*, the definitive point in time will be when the contract for such services will be entered into – before 1 September 2016, or on or after? This aspect will be covered in more detail in the AMINZ seminar series, but the critical misapprehension to dispel is that those providing related services – designers, engineers and quantity surveyors – will not be exposed to claims under the main contract, but purely for disputes under their own appointment contracts. It is unlikely that adjudication proceedings under the construction contract and a related services will be consolidated, as that will raise procedural and logistical issues of its own. Time will tell if anyone attempts to do this.

In relation to the provisions on retentions, the issue of commencement is unlikely to be problematic. The obligation to maintain a trust will either apply, or the parties will secure the obligations in relation to rectification of defects in another way, and the complications involved in giving effect to the Act on this point will not arise.

4. Payment

SubPart 2 of Part 2 of the Act, dealing with payments, has been extensively amended to remove references to *progress payments*; this amendment has been carried through the rest of the Act (see sections 4(c), 5, 13 & Part 2 SubPart 2).

While the amendment appears to be largely cosmetic, the critical distinction is made in the new definition of *payment* in clause 19, which is as follows:

payment means–

- (a) *a progress payment for construction work carried out under a construction contract;*
or
- (b) *another type of payment under a construction contract to which a party who has agreed to carry out construction work under the contract is entitled for, or in relation to, construction work carried out by that party under the contract.*

So, while in the early days of adjudication, the argument was made (typically unsuccessfully) that the Act was only to secure *progress payments*, the amendment removes any doubt that the ability to recover payments due extends to any other payment which a contractor "*is entitled for, or in relation to, construction work carried out by that party*".

The removal of the distinction between determinations of *liability to make a payment under the contract* under section 48(1)(a), and *rights and obligations* under sections 48(1)(b) & (2) in terms of their enforceability will almost certainly make such distinctions academic.

5. Residential construction contracts

For all intents and purposes, the distinction between *residential* and *commercial* construction contracts is removed, in relation to contracts awarded on or after 1 December 2015 (see *the deletion of section 10*).

This will mean that all contracts will be capable of suspension (under the relocated provisions in section 24A), subject to the default payment provisions in Part 2, and the enforcement provisions in Part 4 of the Act.

The sole remaining distinctions applicable to residential construction contracts are that:

- approval to charging orders is still not available in adjudication under section 31;
and
- the provisions relating to trusts for retentions do not apply.

It is also important to note that the difficult issue of homes held by family trusts has now been dealt with in section 31(2).

The other change of note is that the notice requirements for residential construction contracts have been carried over to all contracts, both residential and commercial in sections 20(3) & 28(3).

In practical terms, this will mean that contractors, and designers, engineers and quantity surveyors appointed from 1 September 2016, will need to amend their standard payment claims to include the explanatory notes referred to in sections 20(3), 28(3) and regulations 4 & 5, if they wish to take advantage of the payment regime in the Act.

6. Adjudication of Disputes

The amendments to adjudication are more wide ranging. One of the more significant changes has been to the adjudicability of disputes more generally.

In the first instance, the definition of *dispute* (see section 25(2)) has been widened to expressly include *whether an amount is payable* under a construction contract (note, it does not say whether or not a *payment*, as defined, is due) and breaches of terms implied in the Building Act 2004, which include the warranties implied in Part 4A.

By avoiding using the term *payment*, as defined in section 19, arguments previously raised that adjudication is only to enforce progress payments becomes more difficult to sustain. Furthermore, with the definition of dispute in section 25(2) being unrelated to *payment*, as defined and determinations on rights and obligations being capable enforcement on the same footing as determinations in relation to payments (see section 58(2)), damages are clearly recoverable in adjudication.

Read together, however, it appears that provided a claim is for a determination that *an amount is payable* under a construction contract, that amount does not need to relate to construction work or to scheduled payments; it simply needs to be payable under the contract.

7. Adjudication procedure

Further significant amendment has been made to the adjudication procedures:

- The *notice of adjudication* must now include a statement of the rights and obligations of the parties and an explanation of the adjudication process (see section 28(3)) in the form prescribed (see regulation 5). This is the same form as previously applied only to residential occupiers.
- If the adjudicator is to be appointed by an *authorised nominating authority*, in terms of section 33(1)(d), that application must be made 2 to 5 working days after the notice of adjudication has been served.

In practical terms, that means that the claimant must wait at least 2 working days after the service of the notice before applying for the appointment of an adjudicator.

The form of the notice of acceptance of appointment of the adjudicator is now prescribed (see section 35A and regulation 5A). It is worth noting that the adjudicator must confirm that they meet the eligibility criteria in section 34 and that they have been appointed by an authorised nominating authority (if that is the case):

because the parties could not or did not agree on an adjudicator or a nominating body.

The fact that the claimant seeks the appointment of an adjudicator by an ANA means that the parties did not agree on an adjudicator, and the requirements of the form of notice have been met.

- Section 37(5) spells out the considerations adjudicators must take into account in granting extensions of the time for submitting a response. None of this will be particularly new to most adjudicators, as it spells out the sort of considerations most adjudicators will have been taking into account already.
- A new section 37A provides for a reply to the response, and for a rejoinder to the discretion of the adjudicator.

In most cases, adjudicators will probably allow a rejoinder if sought, for the purposes of avoiding natural justice challenges, if nothing else.

Under clause 37A(4)(a), the adjudicator may refuse to consider any *new material or issues raised in the reply*. This provision needs to be considered with some care; the reply is strictly in reply to the response. However, if the response raises issues relevant to the dispute, but not covered in the claim, it is inevitable that the claimant will provide new material in reply which are necessary to properly address the response.

It would be a mistake, in those circumstances, to reject new material which is properly in reply.

- The Act expressly recognises that parties may be represented by non-legally qualified persons (see section 38B).

8. Enforcement

The biggest disappointment in the 2015 Amendment Act is the failure to address the problems with enforcement under the 2002 Act. While this has not been a problem with disputes on large infrastructure projects or with reputable disputants, the amendment fails to address in any real way the difficulties with the enforcement of adjudication determinations.

Under sections 74(1) and 75, the time within which a person may oppose entry of a determination as a judgment has been reduced from 15 working days to 5 working days.

However, in relation to determinations of rights and obligations under sections 48(1)(b) & (2), enforcement may be resisted on the grounds that it is not possible to comply with the determination due to a *change in circumstance* not caused by the person resisting enforcement. At this stage, it is not entirely clear what this phrase means, or how it will be applied.

9. Regulations

New regulations have been promulgated, setting new forms for acceptance of appointment etc.