

Construction Contracts Amendment Bill

Government Bill

Explanatory note

General policy statement

The Construction Contracts Act 2002 (the **Act**)—

- creates default progress payment provisions for construction contracts; and
- provides an adjudication framework for disputes involving construction contracts; and
- provides remedies for recovering payments under construction contracts.

In 2009, the Government undertook a review of the Building Act 2004. Submissions on the review indicated broad support for the adjudication process under the Construction Contracts Act 2002 for resolving a range of building disputes. However, submitters identified areas in which the Act could be improved to help parties to resolve disputes, particularly in relation to residential construction contracts and disputes over the quality of work or rights and obligations under contracts.

The building and construction sector is vital for New Zealand's economic performance and prosperity. The Government is making changes to legislation across the sector to provide incentives for building professionals and trades people to take responsibility for the quality of their work, changes that are expected to deliver a

productive, efficient, and accountable building sector. Improving the adjudication process under the Act is important in the context of these changes.

The amendments in this Bill will make the existing adjudication process a faster, more cost-effective, and efficient option for people with disputes under construction contracts.

The amendments will—

- remove most of the distinctions between how the Act applies to residential and commercial construction contracts (except in relation to the use of charging orders as a remedy for non-payment):
- widen the definition of construction work to include design, engineering, and quantity surveying work:
- remove the distinction between enforcement of payment determinations and rights and obligations determinations:
- speed up enforcement processes by reducing the amount of time a defendant has to oppose an application to have a determination entered as a judgment:
- clarify procedural matters, such as how to seek time extensions to respond to adjudication claims:
- require adjudicators to convene a pre-adjudication conference to answer questions parties have about the process:
- clarify how determinations can be appealed against, contested, and reviewed:
- make other minor and technical amendments.

Regulatory impact statement

The Department of Building and Housing (as it then was) produced a regulatory impact statement on 21 March 2011 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <http://www.dbh.govt.nz/ris-construction-contracts-act-review>
- <http://www.treasury.govt.nz/publications/information-releases/ris>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides that the Bill comes into force on **1 November 2013**.

Clause 3 provides that the Bill amends the Construction Contracts Act 2002 (the Act).

Part 1

Amendments to preliminary provisions

Clause 4 amends section 4, the overview, to reflect changes made by the Bill to the Act.

Clause 5 amends section 5, the interpretation section, to—

- repeal the definitions of commercial construction contract, residential construction contract, and residential occupier; and
- amend the definition of construction contract; and
- replace the definitions of defendant, plaintiff, and progress payment; and
- amend the definition of working day; and
- insert definitions of chief executive, premises, and related services.

Clause 6 amends section 6 to include design, engineering, and quantity surveying work in the definition of construction work.

Clause 7 amends section 9 to provide that the Act applies to contracts for design, engineering, and quantity surveying work entered into or renewed on or after **1 November 2013**.

Clause 8 repeals section 10.

Part 2

Amendments to principal provisions

Clause 9 amends section 20, which relates to payment claims, so that all payment claims (not just claims served on residential occupiers) must be accompanied by—

- an outline of the process for responding to the claim; and
- an explanation of the consequences of not responding or not paying the claimed amount or a scheduled amount.

Clause 10 inserts a *new section 24A* in a *new subpart 4* of Part 2 to re-enact the current section 72.

Clause 11 amends section 26(3) to clarify that an adjudicator must terminate adjudication proceedings whenever the dispute is determined (before the adjudicator makes a determination) under another dispute resolution procedure.

Clause 12 inserts a *new section 28(3)* to require that all adjudication notices (not just those served on residential occupiers) contain a statement of the respondent's rights and obligations and a brief explanation of the adjudication process. The provision replaces the current section 62(1), which is being repealed.

Clause 13 replaces section 31 with *new sections 31 and 31A*. *New section 31* relates to charging orders in respect of dwellinghouses. Section 10 of the Act prohibits charging orders where the construction site is the owner's residence. *New section 31* will also prohibit charging orders where a construction site is owned by a family trust and occupied by a beneficiary of the trust. *New section 31A* re-enacts section 64.

Clause 14 amends section 35 to define notice of acceptance, which is referred to in sections 35 to 37.

Clause 15 inserts a *new section 36A*, which requires an adjudicator to hold a pre-adjudication conference to answer questions about the adjudication process.

Clause 16 amends section 37 to require adjudicators to give a respondent additional time to serve a written response on the claimant if additional time is necessary owing to the size or complexity of the claim.

Clause 17 re-enacts sections 63 and 67 as *new sections 38A and 38B*.

Clause 18 amends section 47 to require an adjudicator to advise a defendant of the consequences of not taking steps to oppose an application by a plaintiff to enforce an adjudicator's determinations about rights and obligations.

Clause 19 repeals sections 52 to 55 (which are being re-enacted as *new sections 71A to 71D*).

Clause 20 amends section 58 to make adjudicators' determinations about rights and obligations under a construction contract enforceable.

Clause 21 inserts a *new section 59A*, allowing a party in whose favour a determination is made regarding rights and obligations to enforce the determination by entry as a judgment.

Clause 22 makes a minor amendment to section 60 to reflect the amendment to section 58.

Clause 23 repeals section 61.

Clause 24 repeals sections 62 to 64 and 67. (Sections 63, 64, and 67 are being re-enacted as *new sections 31A, 38A, and 38B*.)

Clause 25 amends the Part 4 heading.

Clause 26 inserts a *new subpart 1AA* in Part 4, re-enacting the existing sections 52 to 55 as *new sections 71A to 71D*.

Clause 27 repeals subpart 1 of Part 4.

Clause 28 amends section 73 to allow all adjudicators' determinations to be enforced by entry as a judgment, not just determinations regarding payment.

Clause 29 amends section 74 to—

- shorten, from 15 to 5 working days, the period in which a defendant can apply to the District Court to oppose a plaintiff's application for a determination to be enforced by entry as a judgment; and
- allow a defendant to oppose entry of a determination as a judgment if the time allowed by the adjudicator for compliance has not elapsed.

Clause 30 amends section 75 to shorten, from 15 to 5 working days, the period after which the court must enter a determination as a judgment if the defendant takes no steps to oppose an application for entry as a judgment.

Part 3

Amendments to miscellaneous provisions

Clause 31 inserts a *new section 83* to allow the Chief Executive of the Ministry of Business, Innovation, and Employment to collect information on adjudications for statistical or research purposes.

Hon Maurice Williamson

Construction Contracts Amendment Bill

Government Bill

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Part 3

Amendments to miscellaneous provisions

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Construction Contracts Amendment Act **2013**.
- 2 Commencement**
This Act comes into force on **1 November 2013**. 5
- 3 Principal Act**
This Act amends the Construction Contracts Act 2002 (the **principal Act**).

Part 1

Amendments to preliminary provisions 10

- 4 Section 4 amended (Overview)**
Replace section 4(f) to (h) with:
 - “(f) provisions granting a party to a construction contract who is owed money a statutory right to suspend work until payment is made are set out in **section 24A**: 15
 - “(g) provisions relating to the adjudication of disputes are set out in Part 3:
 - “(h) provisions enabling an adjudicator’s determination to be reviewed or enforced are set out in Part 4.”.

5 Section 5 amended (Interpretation)

- (1) In section 5, repeal the definitions of **commercial construction contract**, **residential construction contract**, and **residential occupier**.
- (2) In section 5, definition of **construction contract**, replace paragraph (a) with: 5
“(a) means a contract for carrying out construction work; and”.
- (3) In section 5, replace the definition of **defendant** with: 10
“**defendant** means a party—
“(a) against whom an adjudication determination is made; and
“(b) against whom enforcement of the determination is sought”.
- (4) In section 5, replace the definitions of **plaintiff** and **progress payment** with: 15
“**plaintiff** means a party—
“(a) in whose favour an adjudication determination is made; and
“(b) who seeks enforcement of the determination 20
“**progress payment**—
“(a) means a payment for construction work carried out under a construction contract that is in the nature of an instalment (whether or not of equal value) of the contract price for the contract; and 25
“(b) includes any final payment under the contract; but
“(c) does not include an amount that is, or is in the nature of, a deposit under the contract”.
- (5) In section 5, definition of **working day**, replace paragraph (c) with: 30
“(c) for the purposes of sections 18, 22, **24A**, 33, 35 to 37, 46, 47, 59, and 66, a day in the period commencing on 24 December in any year and ending with the close of 5 January in the following year; and”.
- (6) In section 5, definition of **working day**, paragraph (d), replace “53” with “**71B**”. 35
- (7) In section 5, insert in their appropriate alphabetical order:

“**chief executive** means the chief executive of the department responsible for the administration of this Act

“**premises**, in relation to related services, includes intended premises

“**related services** means construction work of the kind referred to in **section 6(1A)**”.

6 Section 6 amended (Meaning of construction work)

After section 6(1), insert:

“(1A) **Construction work** includes—

“(a) design or engineering work carried out in New Zealand in respect of work of the kind referred to in subsection (1)(a) to (d):

“(b) quantity surveying work carried out in New Zealand in respect of work of the kind referred to in subsection (1)(a) to (g).”

7 Section 9 amended (When Act applies: general)

(1) In section 9, after “Subject to”, insert “**subsection (2)** and”.

(2) In section 9, insert as subsection (2):

“(2) Despite subsection (1), this Act only applies to contracts for related services—

“(a) entered into on or after **1 November 2013**; or

“(b) renewed on or after **1 November 2013**, but only in relation to obligations incurred or undertaken on or after that date.”

8 Section 10 repealed (When Act applies: residential construction contracts)

Repeal section 10.

Part 2

Amendments to principal provisions

Payments

9 Section 20 amended (Payment claims)

In section 20(3), replace “If a payment claim is served on a residential occupier, it” with “A payment claim”.

10 New subpart 4 of Part 2 inserted

After section 24, insert:

“Subpart 4—Suspension of work

“24A Suspension of construction work

- “(1) A party who carries out construction work under a construction contract (**party A**) has the right to 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 under section 23(2)(b), 24(2)(b), or 59(2)(b), as the case may be; and
 - “(c) the amount mentioned in **paragraph (a)(i) or (ii)** is not paid, or the determination mentioned in **paragraph (a)(iii)** is not complied with, within 5 working days after the date of that notice.
- “(2) If party A exercises the right conferred by **subsection (1)**, party A—
- “(a) is not in breach of the construction contract; and
 - “(b) is not liable for any loss or damage suffered by party B, or by any person claiming through party B; and
 - “(c) is entitled to an extension of time to complete the contract, but is not entitled solely by reason of this Act to recover any costs incurred as a consequence of the extension of time; and
 - “(d) keeps party A’s rights under the contract, including any right to terminate the contract; and
 - “(e) may at any time lift the suspension, even if the amount has not been paid or the determination has not been complied with.

- “(3) To avoid doubt, **subsection (2)(c)** does not affect party A’s rights to recover (whether in an adjudication or otherwise) any costs incurred as a consequence of the extension of time that exist other than solely by reason of this Act, nor does it add anything to those rights. 5
- “(4) If party A exercises the right conferred by **subsection (1)**, the exercise of that right does not—
- “(a) affect any rights that would otherwise have been available to party A under the Contractual Remedies Act 1979; or 10
- “(b) enable party B to exercise any rights that may otherwise have been available to party B under that Act as a direct consequence of party A exercising the right conferred by **subsection (1)**.
- “(5) The right to suspend work under a construction contract ceases when party B pays the amount in full or complies with the adjudicator’s determination. 15
- “Compare: 2002 No 46 s 72”.

Adjudication of disputes

- 11 Section 26 amended (Relationship between Part and other dispute resolution procedures)** 20
In section 26(3), replace “However, an” with “An”.
- 12 Section 28 amended (How to initiate adjudication)**
After section 28(2), insert:
- “(3) A notice of adjudication must also set out prominently, in the prescribed form (if any),— 25
- “(a) a statement of the respondent’s rights and obligations in the adjudication; and
- “(b) a brief explanation of the adjudication process.”
- 13 Section 31 replaced (When claimant may not seek approval for issue of charging order)** 30
Replace section 31 with:

“31 When claimant may not seek approval for issue of charging order

- “(1) A claimant may not seek any of the matters referred to in section 29 or 30 against an owner who is—
- “(a) an individual who is occupying, or intends to occupy, wholly or mainly as a dwellinghouse, the premises that are the subject of a construction contract: 5
 - “(b) a trustee of a family trust, where the premises that are the subject of a construction contract are—
 - “(i) owned by the trust; and 10
 - “(ii) occupied, or intended to be occupied, wholly or mainly as a dwellinghouse, by any beneficiary of the trust.
- “(2) In **subsection (1), family trust** means a trust that is established primarily to benefit a natural person for whom the settlor has natural love and affection. 15

“31A Compliance with requirements of Act relating to supply of certain information

- “(1) No notice of adjudication is invalid for any failure to comply strictly with the requirements of section 28(2)(a) to (d) and (g) as long as— 20
- “(a) the notice is in writing; and
 - “(b) the nature of the dispute and the names of the parties involved are stated in the notice; and
 - “(c) any non-compliance does not mislead or unjustly affect the interests of the recipient. 25
- “(2) If a notice of adjudication fails, in accordance with section 28(2)(e) or (f), to state whether a charging order is being sought, approval for the issue of a charging order may not be given. 30
- “(3) A notice of adjudication that fails to comply with **section 28(3)** has no effect and—
- “(a) this Part applies as if no notice of adjudication had been served; and
 - “(b) the claimant may serve on the respondent a new notice of adjudication that complies with **section 28(3)**. 35
- “(4) If a party to an adjudication wishes to provide another party or the adjudicator with copies of, or extracts from, the construc-

tion contract but is for any reason unable to do so (for example, in a case where the contract is oral), that party may provide the missing information in the form of a statutory declaration together with any supporting documents that are available.

“Compare: 2002 No 46 s 64”.

5

14 Section 35 amended (Appointment of adjudicator)

In section 35(2), after “notice of acceptance”, insert “(a **notice of acceptance**)”.

15 New section 36A inserted (Pre-adjudication conference)

After section 36, insert:

10

“36A Pre-adjudication conference

“(1) An adjudicator must make arrangements for a pre-adjudication conference to be held within 2 working days after serving the notice of acceptance on the parties.

“(2) The purpose of the pre-adjudication conference is for the adjudicator to answer the parties’ questions about the adjudication process.

15

“(3) A pre-adjudication conference does not need to be held if each party consents to the pre-adjudication conference not being held.”

20

16 Section 37 amended (Response to adjudication claim)

(1) Replace section 37(1) with:

“(1) A respondent may serve on the adjudicator a written response to the adjudication claim—

“(a) within 5 working days after receiving that claim or the adjudicator’s notice of acceptance (whichever is the later); or

25

“(b) within any further time that the parties to the adjudication agree; or

“(c) within any further time that the adjudicator allows.”

30

(2) After section 37(3), insert:

“(4) For the purpose of **subsection (1)(c)**, an adjudicator—

“(a) must allow the respondent additional time to serve a written response if the adjudicator considers it neces-

sary to complete the response, having regard to the size or complexity of the claim:

- “(b) may allow the respondent additional time to serve a written response if the adjudicator considers that additional time is reasonably required for any reason.” 5

17 New sections 38A and 38B inserted

After section 38, insert:

“38A Special provisions for adjudication if approval for charging order sought by claimant

An adjudication in which the claimant seeks approval for the issue of a charging order in respect of a construction site must be conducted by an adjudicator who— 10

- “(a) is nominated for the purpose by an authorised nominating authority; and
 “(b) has the specific additional qualifications, expertise, and experience that may be prescribed for the purposes of this section (if any). 15

“Compare: 2002 No 46 s 63

“38B Parties may be represented at adjudication proceedings

- “(1) Any party to a dispute that has been referred to adjudication may be represented by the representatives (whether legally qualified or not) that the party considers appropriate. 20

- “(2) **Subsection (1)** is subject to the adjudicator’s power to direct that the number of representatives present at a conference of the parties is to be limited to allow for the efficient conduct of proceedings. 25

“Compare: 2002 No 46 s 67”.

18 Section 47 amended (Adjudicator’s determination: form)

In section 47(1)(b)(iii), delete “in a case where the adjudicator determines that a party to the adjudication is liable to make a payment,”. 30

19 Sections 52 to 55 repealed

Repeal sections 52 to 55.

- 20 Section 58 amended (Enforceability of adjudicator’s determination)**
- (1) In section 58(2), replace “is not enforceable” with “is enforceable in accordance with **section 59A**”.
- (2) Repeal section 58(3). 5
- 21 New section 59A inserted (Consequence of not complying with adjudicator’s determination under section 48(1)(b) or (2))**
- After section 59, insert:
- “59A Consequence of not complying with adjudicator’s determination under section 48(1)(b) or (2)** 10
- “(1) This section applies if a party against whom an adjudication determination is made fails to comply with the adjudicator’s determination in respect of rights and obligations under the contract. 15
- “(2) The party in whose favour the determination was made may apply for the determination to be enforced by entry as a judgment in accordance with sections 73 to 78 (but only after such date, if any, specified in the adjudicator’s determination for compliance).” 20
- 22 Section 60 amended (Effect of review or other proceeding on adjudicator’s determination under section 48(1)(a))**
- In section 60 and the heading to section 60, delete “under section 48(1)(a)”.
- 23 Section 61 repealed (Consequence of not complying with adjudicator’s determination under section 48(1)(b) or (2))** 25
- Repeal section 61.
- 24 Sections 62 to 64 and 67 repealed**
- Repeal sections 62 to 64 and 67.
- Review and enforcement of adjudicator’s determination* 30
- 25 Part 4 heading replaced**
- Replace the Part 4 heading with:

**“Part 4
“Review and enforcement of adjudicator’s
determination”.**

- 26 New subpart 1AA of Part 4 inserted** 5
- After the Part 4 heading, insert:
- “Subpart 1AA—Review of adjudicator’s
determination**
- “Review of adjudicator’s determination in
respect of owner who is not respondent*
- “71A Owner who is not respondent may apply to District Court
for review of adjudicator’s determination** 10
- “(1) An owner who is not a respondent may apply to a District
Court for a review of—**
- “(a) an adjudicator’s determination that the owner is jointly
and severally liable with the respondent to make a pay- 15
ment to the claimant; and**
- “(b) an adjudicator’s approval for the issue of a charging
order in respect of the construction site.**
- “(2) A District Court has the jurisdiction to hear and determine an
application for review under this section despite any limits im- 20
posed on District Courts in their ordinary civil jurisdiction by
sections 29 to 34 of the District Courts Act 1947.**
- “Compare: 2002 No 46 s 52*
- “71B Procedure for seeking review**
- “(1) An application for review under **section 71A** must be made 25
by filing a notice, in the prescribed form (if any), in the District
Court nearest to the place at which the adjudication proceed-
ings to which the application for review relates were held.**
- “(2) The notice must be filed—**
- “(a) within 20 working days after the date of the determin- 30
ation to which the application for review relates; or**
- “(b) within any further time that the District Court may allow
on application made before or after the expiration of the
period referred to in **paragraph (a)**.**
- “Compare: 2002 No 46 s 53* 35

“71C Powers of District Court on review

- “(1) For the purpose of hearing the application for review, the District Court—
 - “(a) must conduct the review as a hearing *de novo* of the relevant dispute; and 5
 - “(b) has all the powers, duties, functions, and discretions of the adjudicator in making the determination to which the application for review relates; and
 - “(c) has all the powers vested in a District Court in its civil jurisdiction. 10
 - “(2) On hearing the application for review, the District Court may—
 - “(a) quash the determination, and substitute for it any other determination that the adjudicator could have made in respect of the original proceedings; or 15
 - “(b) refuse the application.
 - “(3) A District Court’s determination under **subsection (2)(a)**—
 - “(a) has effect as if it were a determination made by an adjudicator for the purposes of this Act; and
 - “(b) is not a final determination of the dispute between the claimant and respondent to the adjudication under review. 20
 - “(4) **Subsection (3)(b)** does not prevent any proceedings between the claimant and respondent to the adjudication under review from being heard and determined at the same time as the application for review under this section. 25
- “Compare: 2002 No 46 s 54

“71D Effect of review on adjudicator’s determination

An application for review under **section 71A** does not operate as a stay of the adjudicator’s determination unless a District Court Judge, on application, so determines. 30

“Compare: 2002 No 46 s 55”.

27 Subpart 1 of Part 4 repealed

Repeal subpart 1 of Part 4.

28 Section 73 amended (Enforcement of adjudicator's determination)

- (1) Repeal section 73(1).
- (2) Replace section 73(2) with:
- “(2) A plaintiff may apply for an adjudicator's determination to be enforced by entry as a judgment in accordance with this subpart.” 5
- (3) Replace section 73(5) with:
- “(5) Despite **subsection (2)**, a plaintiff in whose favour a determination has been made may only apply for that determination to be enforced by entry as a judgment— 10
- “(a) in the case of an amount of money payable under the determination, if any conditions imposed by the adjudicator for payment have been met:
- “(b) in the case of a determination regarding rights and obligations, after the date (if any) specified in the adjudicator's determination for compliance.” 15

29 Section 74 amended (Defendant may oppose entry as judgment)

- (1) In section 74(1), replace “15” with “5”. 20
- (2) After section 74(2)(c), insert:
- “(d) the date (if any) specified in the adjudicator's determination for compliance has not passed.”

30 Section 75 amended (Entry as judgment if defendant takes no steps)

In section 75, replace “15” with “5”. 25

Part 3**Amendments to miscellaneous provisions****31 New section 83 inserted (Secretary may require adjudication information)**

After section 82, insert:

“83 Secretary may require adjudication information

- “(1) The chief executive may, for statistical or research purposes, require adjudicators, nominating authorities, or nominating

bodies to provide any information (in their possession or under their control) regarding adjudications, including, for example, the number, nature, or outcome of adjudications initiated under this Act.

- “(2) A person must not disclose information under **subsection (1)** 5
except—
- “(a) with the consent of the relevant party to the dispute and any identifiable person to whom it relates; or
 - “(b) to the extent that the information is already in the public domain; or 10
 - “(c) in statistical or summary form arranged in a manner that prevents any information disclosed from being identified by any person as relating to any particular person; or
 - “(d) if the information is to be used for statistical or research 15
purposes and will not be published in a form that could reasonably be expected to identify any particular person.”
-