



LEGISLATION ADVISORY COMMITTEE

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Jonathan Young
Chair
Commerce Committee
Parliament Buildings
WELLINGTON 6160

Dear Committee Members

CONSTRUCTION CONTRACTS AMENDMENT BILL

Legislation Advisory Committee

1. The Legislation Advisory Committee (“LAC”) was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It produces and updates guidelines for legislation, known as the Guidelines on the Process and Content of Legislation. These have been adopted by Cabinet.
2. The terms of reference of the LAC include:
 - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

General Comments

3. Section 3 of the Construction Contracts Act 2002 (principal Act) states that the Act’s purpose is to:
 - a. facilitate regular and timely payments between the parties to a construction contract; and

- 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.
- 4. The explanatory note to the Construction Contracts Amendment Bill explains that the Bill's purpose is to build upon these objectives by making the "existing adjudication process a faster, more cost-effective, and efficient option for people with disputes under construction contracts." Both the principal Act and the Construction Contracts Amendment Bill aim to deal with payment problems, particularly downstream payments to contractors and subcontractors, in the construction industry.
- 5. The recent Mainzeal receivership indicates the continued vulnerability of subcontractors where a construction company collapses, and the failure of the principal Act to adequately protect subcontractors. While we note that the Construction Contracts Amendment Bill does not seek to significantly alter the contractor protection mechanisms in the principal Act, we think it would be unfortunate for the principal Act to be amended in the post-Mainzeal environment without consideration of whether alternative or additional mechanisms, such as ring-fencing of payments, would better fulfil the principal Act's objectives.
- 6. We do not advocate for any particular proposal, but believe that this Bill provides an opportunity for officials to undertake detailed policy analysis on alternative options.

Prospective operation of legislation

- 7. The Bill extends the coverage of the principal Act so that it applies to design, engineering and quantity surveying work relating to relevant construction work. Clause 7(2) of the Bill explicitly provides that this extension is to operate prospectively. The absence of any such explicit provision in relation to the Bill's other amendments means that it is arguable that those amendments will apply to construction contracts that are already in existence at the time of the Bill's commencement.
- 8. The LAC Guidelines state the "general principle is that statutes and regulations operate prospectively, that is, they do not affect existing situations". As the LAC Guidelines note, not all legislation that retrospectively alters existing rights and obligations is unfair or objectionable; the question will always be one of fairness to those affected.
- 9. The Bill's amendments, if held to be retrospective, would affect existing construction contracts in two primary ways:
 - a. Generally treating residential construction contracts on the same basis as other construction contracts (except that charging orders will not be possible for owner/occupier residential contract costs awards). At present, progress payment provisions, suspension of work, and

charging order provisions do not apply to residential construction contracts.

- b. Applying the enforcement regime that applies to monetary awards to include enforcement of dispute process decisions about rights and obligations for all kinds of construction contracts; such as a dispute process order that certain work be done. This will apply to both non-residential and residential construction contracts.
10. Parties enter into a construction contract on the basis of their understanding of the law existing at the time. Particularly in relation to residential construction contracts, parties may reasonably expect that legislation will not be amended so as to affect their existing contracts. Arguably, the retrospectivity of some amendments (such as those relating to the enforcement mechanisms for adjudication determinations) are not objectionable as they could be regarded as conferring a benefit on parties, by seeking to ensure that such determinations are enforceable. However, these amendments alter the expectations of parties to a construction contract as to the impact of an adjudication process.
 11. We submit that the Committee should consider whether all the changes made by the Bill are beneficial when compared to what the parties to a residential construction contract might have freely agreed. Some changes made by the Bill could be considered to advantage one party while disadvantaging another. The Committee ought to expressly consider whether existing contracts covered by this Bill should remain on the basis of the process and terms as agreed between the parties.
 12. There is a further complication in that s 12 of the current Act states, ostensibly simply, "*This Act has effect despite any provision to the contrary in any agreement of contract*". What is less clear is how that provision can be applied sensibly and with certainty to provisions in a contract that were not subject to the Act when they were agreed, but become subject to the Act by reason of the enactment of the Bill part way through the performance of the contract. It is one thing to draft a contract knowing that s 12 applies, but quite another thing to apply it to an existing contract.
 13. We therefore suggest that the Committee make a recommendation to clarify that the Bill only apply to contracts entered into after the Bill has commenced unless all the parties to the contract agree to amend it so that the provisions of the Bill apply. In this regard we note that typical residential contracts would be of relatively short duration anyway, so there ought not to be a significant transition period in those cases.

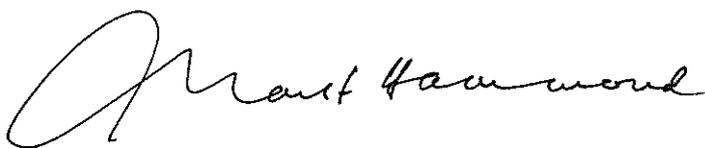
Enforcement of adjudications on rights and obligations

14. The Bill provides that the enforcement regime that currently applies to payments should be expanded to decisions regarding the rights and obligations of parties, such as an adjudication determination that certain work be done. This will mean that such determinations can be "*entered as a judgment*" in the District Court. However, it is not immediately clear what

the Court can do as a practical matter to enforce the judgment, other than the fact that a defaulting party may be in contempt of court. This is fundamentally different from the current regime which is confined to orders for the payment of money. We suggest that the Committee request officials to consult with the Courts and set out in the departmental report how a court judgment obtained in this manner will be able to be enforced in practice.

15. There is also a risk that the enforcement process is not sufficiently flexible to take into account practical matters that may make it impossible to comply with an adjudication determination. For instance, the ability to complete work by a required time may be affected by matters outside of the defaulting party's control, such as where the work is contingent on another party completing something (such as erecting scaffolding) or the weather. The grounds in s 74 of the principal Act even as amended by the Bill for opposing entry as a judgment are not broad enough to cover situations where an adjudication determination on rights or obligations is simply incapable of being performed because of subsequent events. The same issue does not arise with orders for the payment of money.
16. We acknowledge that this problem may be anticipated by adjudicators who could impose conditions to ensure this situation does not occur, particularly if parties to the adjudication process raise these risks. That may make the determinations complex and possibly with long compliance times to avoid contingencies that may not eventuate. We ask the Committee to consider whether an additional ground for opposition under s 74(2) should be along the lines of "*the adjudicator's determination cannot be complied with because of a change of circumstances outside the control of the defendant occurring after the adjudication*".
17. Thank you for considering the LAC's submission. The LAC does not wish to be heard on this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read "Grant Hammond". The signature is fluid and cursive, with a large initial 'G'.

Hon Sir Grant Hammond
Chair
Legislation Advisory Committee