

# **Building & Construction Law Conference 2016:** The updated CCA: Responding to changes in the industry



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## **Introduction**

- Construction Contracts Amendment Act received royal assent on 22 October 2015.
- Many important changes and updates to the Construction Contracts Act 2012 (CCA).
- Aim was to offer more consumer protection, better access to CCA's dispute resolution process and payment security.
- Progressive implementation: 1 December 2015, 1 September 2016 and 31 March 2017.

## Overview

- Expanded definition of 'Construction Site' and 'Construction Work'.
- Improved payment regime.
- Progressive implementation – overview of what you should be aware of.



## 'Construction Site'

- Previously (Section 5):

***Construction site** means the land on which the claimant has been carrying out construction work under the relevant construction contract.*

- Now:

***Construction site** means—*

*(a) the land on which the claimant has been carrying out construction work under the relevant construction contract:*

*(b) in relation to related services, the land or premises that are the subject of the contract.*

## 'Construction Site' (cont.)

- Includes land where construction work is intended to be carried out.
- Enables 'related services' to utilise the CCA even when physical construction has yet to commence.



## 'Construction Work'

- 1 September 2016 (Section 6):

***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) and (f):*

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

## 'Construction Work' (cont.)

- Expanded to include design, engineering and quantity surveying work ('related services').
- New definition includes consultants who carry out similar types of work.
- Parties will have access to CCA's dispute resolution process.
- Double-edged sword as it means parties are both covered and liable under the CCA's dispute resolution process.
- Insurers need to be aware.

## 'Construction Work' (cont.)

- What is the difference between 'design or engineering work' and 'quantity surveying work'?
- 'Design or engineering work' and 'quantity surveying work' is not defined. Scope is unclear.
- What will these definitions cover? Project Managers?



## Improved Payment Regime

- Triggered by the Mainzeal collapse.
- What retention issues were considered?



## **Improved Payment Regime (cont.)**

- Deemed trust regime comes into force 31 March 2017.
- Why this model?
  - Flexible.
  - Low compliance costs.
- Retentions in the form of cash or liquid assets.
- Retentions do not need to be kept in a separate account.
- Retentions are protected from being claimed by retention holder's preferential creditors.

## Improved Payment Regime (cont.)

- Deemed trust? What does it mean?
  - Contractor holding retention becomes trustee.
  - 'Good faith'.
  - Act in the interest of the subcontractor.
  - Manage the trust with 'skill and care'.
- Transparency through proper accounting records.
- Cannot use retention to pay other creditors.
- Cannot contract out of this regime.
- When do these obligations cease?



## **Improved Payment Regime (cont.)**

- Retention funds can still be invested in accordance with the Trustee Act 1956.  
What does this mean?
  - Profits from investments can be retained by contractor holding retention.
  - If there is a loss, it must be repaid.
- Does not affect “de minimis” retentions.

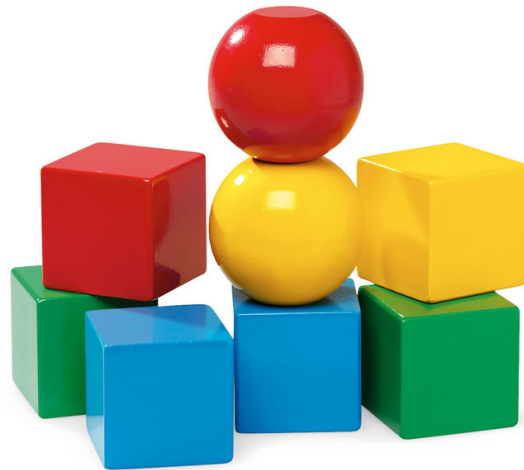
## Improved Payment Regime (cont.)

- Challenges?
  - Increased bond amounts.
  - Tracing. Robust accounting systems? Onus on the subcontractor?
  - Insufficient funds, multiple retentions.



## **Progressive Implementation - Overview**

- Commercial and residential construction contract distinctions largely removed.
- Increased scope of enforceable adjudicator determinations.
- Clarified and streamlined adjudication process.



## **Progressive Implementation (cont.)**

### **Commercial/Residential Distinction**

- Residential construction no longer excluded from CCA's default payment provisions and adjudication process.
- Some distinctions still remain:
  - Deemed trust regime does not apply to residential construction contracts.
  - Charging orders unavailable for residential construction contracts.

## **Progressive Implementation (cont.)**

### **Adjudicator Determinations**

- Previously only payment determinations.
- Now, determinations extended to those involving rights and obligations. For example:
  - Scope of work.
  - Interpretation issues.
  - Right to terminate a contract.



## **Progressive Implementation (cont.)**

### **Updated Adjudication Process**

- Aim was to clarify the process, streamline it and prevent ambush claims.
- Updated process:
  - 1) Adjudication notice requirements.
  - 2) At least 2 working days before selection of adjudicator.
  - 3) Adjudicator notice of acceptance requirements.
  - 4) 5 working days for respondent to respond.

## **Progressive Implementation (cont.)**

### **Updated Adjudication Process (cont.)**

- Process (cont.):
  - 5) Applications for additional time.
  - 6) 5 working days for claimant to respond.
  - 7) Adjudicator can refuse response or allow 2 working days for the respondent to serve a rejoinder.

## Progressive Implementation (cont.)

### Updated Adjudication Process (cont.)

- Challenges?
  - Large complex construction cases.
  - Design disputes.
  - Increased exposure to claims.



## Summary

- Progressive implementation.
- Inclusion of 'related services'.
- Deemed trust regime for retentions.
- Commercial and residential distinction.
- Updated adjudication process.



## Questions?

