



**New Zealand
Institute of Architects
Incorporated**

Submission on the Construction Contracts Amendment Bill

25 July 2013

Submitted to:
The Commerce Select Committee

**The New Zealand
Institute of Architects**

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New Zealand Institute of Architects Inc.

1. This submission is from the New Zealand Institute of Architects (NZIA or we). It has been prepared by a sub-committee of NZIA Members with diverse practice and project experience (small, medium and large Architect Practices, and across residential, commercial, civic and rebuild projects). Some of the sub-committee Members hold professional credentials as Registered Architects and Fellows (Arbitration and Mediation), practice as adjudicators under the Construction Contracts Act 2002 (CCA), and appear on the Adjudicator List for the Arbitrators' and Mediators' Institute of New Zealand.
2. The NZIA, which has been in existence since 1905, is the professional body representing more than 90 per cent of New Zealand's registered Architects and a majority of recent graduates entering the profession; we have 2,700 members. The NZIA is active not only in advocating in the interests of our members, but also in promoting practices and providing education that will improve the quality and sustainability of New Zealand's built environment.
3. The NZIA is governed by a Council (of not less than 10 and no more than 13 Architect Members) comprising the President, Immediate Past President or President Elect, Elected Councillors and not more than three persons determined by Council to maintain the balance of membership and regions or for any other reason identified by Council. The eight Elected Councillors are elected from and by the Members of each Branch. This governance structure provides the NZIA with experience and expertise across the country on building and construction related matters.
4. The NZIA has, through its membership, significant professional experience in the New Zealand construction industry. That experience includes a huge variety of projects across all construction types and scales. The NZIA also has more than a century of experience assisting our members and their clients with project management and project-related issues (e.g., payment, contracts, insurance).
5. We welcome the opportunity to provide our views on the Construction Contracts Amendment Bill (the Amendment Bill) which extends the definition of 'construction work' to include design, engineering and quantity surveying work.
6. The NZIA wishes to appear before the Committee to speak to our submission. Our contact is:

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7. The NZIA supports Government initiatives to deliver a more productive, efficient and accountable building and construction sector. As a profession, we support the policy objectives of the Amendment Bill, which are aimed at ensuring faster and more cost-effective dispute resolution and a more user-friendly process. We do, however, wish to draw the Government's attention to a number of potential issues arising from the Amendment Bill and in some instances offer remedies to address these issues.
8. Our submission has focused on those issues relevant to Architects and 'design work'. We have summarised our issues into four key areas:
 - 8.1 Scope of the Amendment Bill;
 - 8.2 Adjudication matters and 'design work';
 - 8.3 Dispute management; and
 - 8.4 Process and administrative matters of the Amendment Bill.

Summary of NZIA Recommendations

9. The NZIA **supports** the stated intent of the Amendment Bill. However, such support is subject to certain changes being made to give effect to the stated purpose of the Amendment Bill and to ensure that the legislation is practicable to administer.
10. In respect of the definition of 'construction work':
 - 10.1 we think that the application of different categories of 'construction work' to different professions is inappropriate and problematic. The NZIA considers that if design, engineering and quantity surveying work is to be included in the CCA, all elements of construction work contained in section 6 of the CCA should apply equally to those professions; and
 - 10.2 the Amendment Bill should define 'design or engineering work' and 'quantity surveying work' to avoid any unintended consequence such as capturing the role as 'certifier' or 'administrator' under a construction contract.
11. Whilst an ability to use the CCA regime to quickly demand and enforce payment from clients could be helpful to Architects in principle, the NZIA considers that there is no payment problem to be "fixed" in the architecture services industry.
12. The NZIA considers that a prohibition on conditional payment provisions in relation to architecture services does not reflect industry norms. Architects often participate in speculative work/design competitions requiring the assistance of other professional disciplines which could fall foul of this prohibition.
13. The NZIA **does not support** the proposal to expand the role of the adjudication process under the CCA to include the ability to enforce decisions in respect of non-monetary disputes due to the concerns around the definition of 'construction work'.
14. We think the CCA is unfit to deal with the type of disputes arising from the nature of design or engineering work relating to a construction project. Particularly as:
 - 14.1 the time constraints relating to the initiation of the adjudication process are too short and unfairly prejudice Architects' ability to respond to complex design related claims;
 - 14.2 20 working days is insufficient for an adjudicator to fully understand and consider all of the factual and legal issues arising out of a design work claim; and
 - 14.3 the quality of decisions of adjudicators is significantly impaired due to the fact that adjudicators often proceed "on the papers" and without the cross-examination of witnesses.
15. NZIA also submits that the timeframes proposed by the Amendment Bill will raise issues in regard to professional indemnity insurance for Architects. Such insurance exists for the benefit of both the professional insured and the client.
16. Professional indemnity policies respond on a 'claims made' basis and require the Insured to notify the insurer of any claim or circumstances which may give rise to a claim. There are very real practical and significant difficulties arising from the Amendment Bill in the context of adjudication and the timelines it imposes.

17. The NZIA recommends several changes in relation to the adjudication process if it is to be enforceable in relation to non-monetary related design disputes. Specifically, the Amendment Bill should include:
 - 17.1 eligibility criteria for adjudicators of design-related disputes;
 - 17.2 an expanded right to challenge an adjudication order; and
 - 17.3 useful and meaningful reporting of adjudications to allow for Architects to adhere to precedents set by previous claims.
18. The NZIA **does not support** the proposal in clause 15 of the Amendment Bill to make pre-adjudication conferences compulsory as we consider the provisions of the CCA are sufficiently clear. Moreover, such a requirement is an unfair burden on Architects, particularly those who provide services from a different part of the country to where the conference is being held.
19. The NZIA requests that the Amendment Bill should not come into force until at least six months after being enacted to ensure NZIA has time to amend its widely used suite of standard form construction/architectural services contracts (which will also require input from the construction industry generally and professional indemnity insurers).
20. The NZIA **supports** the proposed removal of most of the distinctions between residential and commercial construction contracts as proposed.
21. In summary, given the challenges of defining 'construction work' and the role of Architects in the building and construction industry, the one-size fits all approach of the Amendment Bill is problematic and may not achieve the full extent of the benefits proposed.

Specific Comments on the Amendment Bill

Unique position of Architects and Engineers in the industry

22. It is important to recognise that Architects and Engineers offer a unique point of difference from other professions in the building and construction industry. Registered Architects by their training are capable of leading a project through concept/detailed design, detailed design/approvals, procurement and observation and contract administration. No other profession can participate in construction projects in the same manner and to the same degree as Architects and Engineers. This is an important point for the Committee to consider in the context of the Amendment Bill provisions. An explanation of NZIA's key issues and concerns is detailed below.
23. Architectural services can be provided and completed with absolutely no on-site construction activity (especially if previous engineering tests or town planning advice and resource management advice, for example, is relied on). Depending on economic conditions, the obtaining of resource and building consents, etc., construction work may occur years after design. At this point the Architect might be engaged to provide supervision contract observation and/or administration or contract monitoring.
24. Professional architectural advice and service is about developing good relationships with clients and creating trust and confidence around the professional commission. Using what could be construed as a heavy handed legislated commercial device to facilitate payment of outstanding fees is alien to this proposition.

Key Area 1: Scope of Amendment Bill

Definition of 'construction work' under Amendment Bill

25. Clause 6 of the Amendment Bill extends the definition of 'construction work' to work of the kind described in paragraphs (a) to (d) for design or engineering work. For quantity surveying work, the reference is to paragraphs (a) to (g). The same meaning of construction work should apply to Architects because they can be involved in the design of cleaning and building maintenance systems, landscaping and painting and decorating. Whilst Architects do not normally carry out any physical works, that is also true for the matters included in paragraphs (a) to (d).
26. Having different definitions of 'construction work' for different professions is inappropriate and problematic. For example, if an Architect is subject to the Act for his or her design of windows (including exterior ledges and framing) is it not anomalous that Architect not be subject to the Act for his or her specification of the system to clean the windows or provide the design of access systems to maintain them?
27. Further, the Amendment Bill does not provide any definition for 'design or engineering work' or 'quantity surveying work'. As a consequence these terms will likely be widely interpreted. For example, will 'design work' include work undertaken by an engineer or Architect as certifier and administrator under a construction contract (for example, the engineer to a NZS3910 construction contract)? If the definition extends too far, parties engaged in ancillary work may find themselves unexpectedly subject to adjudication.
28. The NZIA considers it problematic to limit the definition of 'construction work' to the additional professions – designers, engineers and quantity surveyors. If the Government's intention is have the Act apply to the construction industry generally and therefore include all relevant industries involved in a construction project, then the definition of 'construction work' under clause 6 of the Amendment Bill is insufficient.
29. The range of matters outlined in paragraphs (a) to (g) of section 6 of the CCA will typically involve a wider range of professions than those specifically stated in the Amendment Bill. The NZIA believes that an expansion of the definition of 'construction work' is required in order to give the CCA the necessary scope to be beneficial in relation to all facets of larger construction projects. On this basis, the Amendment Bill should recognise all relevant parties, not just a select few. For example: the work of project managers is integral to managing the relationship of many professionals and contractors in a construction project, especially in large commercial construction contracts, and therefore 'construction management' services should be included in the definition of 'construction work' in the same way as design, engineering and quantity survey work is included in clause 6 of the Amendment Bill.

Inclusion of Architects under the Amendment Bill

30. In addition to the problems identified by the definition of 'construction work' noted above, the NZIA believes that the benefit of Architects being included in the payment protection mechanisms of the CCA is limited. The NZIA notes that generally Architects are engaged directly by a principal and that most design work is undertaken prior to a construction contractor being appointed to a particular project. This means that Architects will not usually be part of the contractual 'chain' requiring relief using the Act to ensure ease of cash flow in the construction industry.

31. Further, the three purposes of the Act to¹:
- (a) facilitate regular and timely payments;
 - (b) provide for efficient dispute resolution; and
 - (c) provide remedies for the recovery of payments;

are already adequately provided for under the NZIA's standard professional services contracts between a principal and an architect². These contracts are prevalent in the construction industry (in relation to architectural services) and are actively reviewed and updated by the NZIA often in consultation with client parties. For example, the NZIA and Master Builders' convene a Joint Contracts Committee which continually reviews and updates the Standard Conditions of Contract for use by Architects and builders.

32. Given the challenges of defining 'construction work' and the role of Architects in the building and construction industry, the one-size fits all approach of the Amendment Bill is problematic and may not achieve the full extent of the benefits proposed.
33. Whilst the Amendment Bill has a policy objective to protect consumers by holding suppliers of services such as Architects accountable under the Act, Architects are already held accountable by the New Zealand Registered Architects Board (NZRAB) which administers a complaints and disciplinary procedure for Architects.

Types of projects that Architects are involved in

34. The NZIA notes that there is a danger that a prohibition on 'paid if paid' arrangements in relation to design work could be in conflict with accepted and recognised industry practice for 'ideas generation and/or speculative design work' (e.g., design competitions where a principal requests multiple design responses from the market, often supplied by consortia which include Architects and other professional consulting disciplines, with the winning design selected for engagement and payment).
35. Inviting competitive design submissions can be a very productive way for clients to explore the full potential of a project and to evaluate the quality of the design responses. The NZIA Architectural Design Competition Guidelines assist all parties involved in architectural competitions and allow organisers to apply for NZIA endorsement. A recent example of a design competition was the 'Breathe' competition for a new urban village in Christchurch.
36. We suggest that if design work is to be included in the definition of 'construction work' a specific exception is inserted, clarifying that 'ideas generation and/or speculative work' will not be in breach of the provisions of the Act.

¹ See section 3 of the Construction Contract Act

² For example, see the NZIA's Agreement for Architects Services (NZIA AAS 2011)

Key Area 2: Adjudication Matters and 'Design Work'

Impact of potentially expanded scope of adjudication and design work

37. The NZIA supports the Government's aim to improve the existing adjudication process so that it is more cost-effective and efficient. We also acknowledge the importance of timely resolution of payment-related disputes and the liquidity of the construction industry.
38. However, the NZIA **does not support** the proposal to expand the role of the adjudication process under the CCA to include the ability to enforce decisions in respect of non-monetary disputes, particularly in relation to **design work** disputes. The NZIA **strongly** considers that the adjudication process under the CCA (particularly as it would stand after enactment of the Amendment Bill) is unfit to deal with the type and style of disputes arising from the nature of design or engineering work relating to a construction project.
39. In addition to the matters discussed below, one reason for our position is because Architects' briefs for complex design work are often provided and altered by third parties such as project managers or even local territorial authorities, who may not be able to be included in adjudicated disputes. Thus uncertainty would be introduced into the adjudication process when design matters are brought into disputes. Again, the NZIA sees no issue with the status quo in relation to disputes in relation to design work generally.

Adjudication process

40. If the Amendment Bill must include provisions relating to enforceable determinations on non-monetary disputes (which the NZIA strongly advises against), the NZIA submits that it is critical to modify the existing regime to accommodate the type and nature of non-monetary disputes, especially in relation to design work. The NZIA has a number of suggestions in this respect which are provided below.

Key Area 3: Dispute Management

41. The NZIA notes the following specific issues in relation to an expanded scope of dispute resolution (by virtue of the enforceability of non-monetary related adjudications pursuant to the amendments in clause 20 of the Amendment Bill):

- 41.1 **Response to adjudication claim:** The time constraints on parties are considered too short for the potential type and nature of non-monetary design disputes. Specifically, a five working day allowance to serve a written claim response (including any supporting documents) is insufficient for a potentially complex design dispute and will not allow a respondent Architect to gather adequate evidence (such as expert evidence) to fairly defend a claim. Architects are therefore at risk of being ‘ambushed’ by an adjudication claim by a principal (or other contractual counterparty).

Whilst the NZIA acknowledges that clause 16 of the Amendment Bill introduces an ability for adjudicators to give a respondent more time to serve a written response (if the additional time is necessary because of size or complexity of the claim), this is at the discretion of the adjudicator (who may not have appropriate knowledge of skill to make such a decision (see further comments at paragraph 36 below).

In the absence of any compulsion to allow a reasonable time, clause 16 as currently drafted will allow/encourage variability in adjudicators’ practice; some will allow extensions and others will be reluctant to do so. The stated ‘conditions’ for an adjudicator to allow additional time does not include a ‘surprise claim’, which creates an ambush scenario and exploits a respondent’s vulnerability.

The NZIA would **support** an adjudicator being required to exercise discretion when it is apparent that the timing of a claim is being driven by a client’s strategic/tactical position (as opposed to cashflow).

The NZIA’s suggested recommendations are consistent with the objectives of the changes to the CCA, detailed in the Cabinet Paper, which highlighted that the CCA should be amended ‘to clarify how respondents may seek a time extension for preparing a response to a claim’.

- 41.2 **Compulsory pre-adjudication conferences:** The NZIA **does not support** the proposal in clause 15 of the Amendment Bill to make pre-adjudication conferences compulsory. The current provisions in the CCA are adequate to deal with any queries that parties may have about the adjudication process (currently addressed through the prescribed notice). The clause also imposes an unnecessary compliance burden for parties, particularly due to the very short timeframes and the lack of guidance in respect of jurisdiction / location of the pre-adjudication conference. (Architectural services are often not provided from the location of the actual construction works).

It is also unclear why this conference is mandatory as an Adjudicator already has the power under section 42 to call a conference of parties.

- 41.3 **Determination:** The requirement for an adjudicator to make a determination within 20 working days for payment disputes is appropriate for the facilitation of cashflow, but is less appropriate for non-monetary disputes. The NZIA considers 20 working days insufficient for an adjudicator to fully understand and consider all

of the factual and legal issues arising out of a design work claim. We would suggest that if non-monetary disputes are included within the Bill, the timeframe should be: 'as soon as is practicable having regard to the nature and complexity of the dispute' (rather than an arbitrary 20 working days). This approach is used in other parts of the CCA.

- 41.4 **Incomplete information:** The NZIA believes the quality of decisions of an adjudicator will be significantly impaired because adjudicators generally proceed 'on the papers' and without the cross-examination of witnesses (who are critical in respect of issues about the competency of design work).
- 41.5 **Appeal limited:** The right to challenge an adjudication order is limited and there is no express right to appeal against an adjudicator's determination under the CCA. Parties may challenge a determination through judicial review, but only in relation to the adjudicator's decision-making process. This means that decisions based on incorrect facts could still be upheld if the process was adhered to.
- 41.6 **No precedent value:** As currently drafted the Amendment Bill does not provide any reporting of adjudication issues. Whilst wishing to maintain the confidentiality of determinations, precedents need to be understood by both the professions involved and adjudicators. The NZIA **recommends** that the Government amends clause 31 of the Amendment Bill to enable and allow the Secretary to seek more detailed adjudication information to review or audit the efficacy of the adjudication process and nature of disputes under the CCA.

Insurance issues with enforcement of non-monetary disputes

42. Architects' professional indemnity insurance policies respond on a 'claims made' basis and require Architects to notify their insurers of any claim or circumstances which may give rise to a claim. The proposed expanded scope of adjudication in the Amendment Bill (and the timelines to be imposed) could significantly prejudice Architects' insurance coverage.
43. It is standard international insurance practice for insurers to require notification and briefing on the nature of any claim/potential claim in order to inform how the insurer will respond. The adjudication timeframes imposed under the Amendment Bill will significantly affect this process, particularly as insurers are often based outside of New Zealand and often wish to be separately represented in any legal proceedings, including adjudication under the CCA. This means it would be extremely difficult to adhere to the timeframes proposed by the Amendment Bill and maintain insurance cover.
44. Such insurance exists for the benefit of both the professional Insured and the client. The NZIA further considers it would not be in the best interests of the consumers of architectural services were the Amendment Bill to create a situation where insurance is unavailable to Architects for disputes under the CCA. An impecunious architectural practice is of little value in a dispute where an Architect is liable under the CCA. As a result, the client could be left with no relief from the costs or damages incurred.

Capability of adjudicators to decide on design-related disputes

45. The NZIA recommends that the Government considers the inclusion of an eligibility criteria provision specific for adjudicators of design-related disputes. The NZIA is concerned that the risks outlined above will be magnified if adjudicators do not have the necessary expertise to decide on design-related issues.

Quality assurance of adjudicators

46. The NZIA also recommends that the Government consider including provisions for quality assurance of adjudicators, both in terms of adjudicators' competence, and the quality of their decisions. Currently there are no provisions in the CCA or the Amendment Bill to safeguard against incompetent or under-qualified adjudicators. For example, while the Building Disputes Tribunal (an Authorised Nominating Authority) has a process for scrutinising its adjudicators' decisions, this is only with regard to 'form' and not substance. Training and professional development will be critical to the success of the Amendment Bill if enacted, both for the professions proposed to be included in the Amendment Bill and the adjudicators.

On-going professional learning and development

47. Given that non-monetary adjudications are proposed to be enforceable, the NZIA considers that such adjudications require visibility in the industry, including reporting on issues that arise and the frequency that they occur. The current regime fails to capture learnings from the adjudication process which would be one of the most useful benefits to extending the powers of adjudication under the CCA.
48. Further, the NZIA recommends that an option should be made available for the adjudicator to specially make 'no determination' if the matter is too complex. This would lower the risk of incorrect determinations and protect parties from having such determinations enforced by entry as a judgment.

The Australian experience

49. For completeness, and by way of comparison, the NZIA notes that in Australia design and the supply of 'related goods and services' are included under construction contracts legislation but the enforceability of determinations is limited to monetary disputes. The overall policy focus in Australia is similar to New Zealand, that is, to protect subcontractors and ensure cashflow in the construction industry. The NZIA submits that the Australian distinction between monetary and non-monetary disputes is preferable in New Zealand.

Key Area 4: Process and Administrative Matters of the Construction Contracts Amendment Bill

Commencement date

50. To date, architectural services contracts have not been subject to the CCA and therefore such contracts are not drafted with regard to the specific requirements of the CCA. As noted above, NZIA has many standard form contracts which it administers which are widely used within the construction industry (e.g., the NZIA Agreement for Architectural Services – short and long form, and the Standards Conditions of Contract – short and long form).
51. If the issues in this submission can be adequately remedied, then the NZIA requests that the Amendment Bill not come into force until six months after it is passed. As the reporting back date for the Committee is 11 December 2013, the final form of the legislation likely will not be known until the first quarter of 2014. Only then will the standard form contracts produced by NZIA be able to be amended. The amendments will need the approval of Professional Indemnity insurers for Architects, and most likely their overseas reinsurers.
52. The NZIA will also have to run training programmes for its members on the application of the CCA to them and their staff, including the preparation of Practice Notes. The same will presumably also be the case for other professions coming within the ambit of the CCA for the first time, such as Engineers and Quantity Surveyors.
53. Some coordination with the other professions and professions and trades already covered by the CCA is likely to be required; and we believe that six months is the minimum time necessary to ensure that any extended coverage of the CCA operates smoothly. Anything less is likely to lead to problems.

Meaning of 'renewed'

54. Clause 7 of the Amendment Bill (amending section 9 of the CCA) means the CCA will apply to construction contracts relating to Architects' design work if they are 'renewed' after that the proposed commencement of the Amendment Bill.
55. The NZIA acknowledges that this provision is designed, rightfully, to cover services contracts which have specific terms or periods of operation and not the usual contracts in which Architects are subject to. Notwithstanding, the NZIA submits that as contracts in the construction industry are, as a matter of course, often subject to variations during their lifecycle the word 'renewed' needs to be clarified to ensure that such variations are not caught in the ambit of section 9 of the CCA.

Distinction between commercial and residential construction contracts

56. The consistent treatment of commercial and residential contracts is a positive change, which the NZIA supports, as it will allow for more consistent and speedy recovery of debts than is currently possible under the Act. It is, however, noted that the change will also alter the requirements for a valid payment claim. Those in the construction industry will know that a payment claim cannot be enforced unless it includes all the information required under the Act. As previously identified a delayed commencement time of six months is being sought by the NZIA. This will allow businesses in the industry sufficient time to ensure that their invoicing systems are up-to-date and their payment claims are enforceable.
57. We also agree with the proposed exception in relation to the use of charging orders as a remedy for non-payment for residential projects.



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