

Impact on surveyors, engineers and multi-disciplinary firms

(1) Timing for effect

- The amendment act was passed on 22 October 2015.
- The amendment act will come into effect on 1 December 2015.
- **The Act will not apply to professional services contracts entered into prior to 1 September 2016.**
 - **Unless both parties agree that the Act will cover the contract.**

(2) Construction Contracts Act extended to include professional services

The Amendment act extends the Construction Contracts Act to include:

- Design or engineering
- Quantity surveying

This includes any consultancy work connected to either the construction of structures, infrastructure including roads, water, electricity, sewerage, telecommunications etc and the preparation of or restoration of any such works.

(3) Removal of distinction between residential and commercial

The current Act distinguishes between residential and commercial construction projects. This has been removed. The intention of Parliament is to provide the same remedies to consumers under the Act as well as give service providers the rights to receive payment.

(4) What the Act covers

Payments

- Allows parties to agree on their own payment arrangements but where they have failed to do so, the Act provides default mechanisms for determining the amounts and dates for when progress payments must be made.
- E.g. Prevents parties from not making payments for work done because they haven't received funds from some other party.

Retentions

- Retentions are often held back in order to ensure that the head contractor or principal has funds available to remedy any defective works.
- In light of the Mainzeal collapse however, subcontractor's retentions were unsecured debts and therefore fell behind other secured creditors. It was considered that these retentions should be protected.
- The amendment act introduces the following:
 - Retentions are amounts withheld as security for the performance of obligations under a contract.
 - All retention money must be held on trust.
 - Retention money can only be used to remedy defects in performance of obligations.
 - Legal protection for retention money in the event of a company collapse / liquidation.

Disputes

- Rules outlining when and how a dispute can be heard by an adjudicator.
- Adjudicators can hear the following disputes
 - Amounts liable to be paid under a contract
 - Rights and obligations of parties under a contract where the dispute doesn't concern payment (i.e. breaches of contract)

- Timing
 - There is a detailed processes around the timing of the appointment of the adjudicator the responses from both parties and the timing the adjudicator must make a decision. This can be less than 40 days from start to finish, unless the parties agree otherwise.
- Rulings and determinations can be enforced by the courts

Suspension of Work

- The Act allows a party to suspend construction work when:
 - Payments are not made in full by the due date; or
 - A party has not complied with an adjudicators ruling.
- Notice must be served in line with the requirements of the Act however and not complied with for 5 working days.

(5) Disputes to include negligence

The Act has extended the scope of disputes that can be heard at adjudication to include negligence. At this stage it is simply unclear how the adjudication process will operate in practice in respect of such a dispute. The speed of adjudication process is more suited towards having disputes around payments resolved quickly to ensure work on construction projects is not delayed and that payments are made for work completed. Negligence disputes tend to involve more complicated issues which can take longer to work through and may not be suited to the type of adjudication process outlined in the Act.

(6) Contracting out of the Act

- The Act cannot be contracted out of.
- This means that any contract that says that the Construction Contracts Act will not apply to it, is not a legally binding term.

(7) Impact on Insurance

Members could confirm that in respect of the Act:

- Disputes relating to professional services that would be covered by your professional indemnity policy will be covered under the main insuring clause and the corresponding limit of indemnity.
- Due to the speed of the adjudication process, clients will need to let their insurance adviser know if a claim is made against them under the adjudication process that relates to negligent services. Please note, disputes purely around the timing of payments, or bad debts are generally not covered by professional indemnity policies.

Action Points

- To decide whether you want the Act to apply to your standard agreements from 1 December 2015.
- To decide whether you will sign third party agreements that include it before 1 September 2016, when it becomes compulsory.
- This may require separate legal advice and Glenn Stone Insurance are not giving any advice on this decision whatsoever.

Disclaimer

Glenn Stone Insurance Ltd are not legal advisers and this information is provided in order to give context as to why confirmation of coverage in respect of your professional indemnity insurance policy is necessary only. This document does purport to give any advice or recommendation whatsoever as to whether you may want to contract into the Act prior to 1 September 2016.