

# Construction Act Reform – Improving payment practices in the construction industry

## In summary

The Construction Act came into force in 1998 to reduce confrontation, and facilitate better cash flow and fair play.

Various industry surveys indicated that poor payment practices are a major issue for many in construction.

Amendments have been proposed to improve transparency and clarity, encourage parties to resolve disputes by adjudication and improve the right to suspend performance under the contract.

The CIOB supports the proposed amendments.

## The issues

### The Construction Act 1996

The Construction Act came into force in 1998 to reduce confrontation, and facilitate better cash flow and fair play by:

- Ensuring prompt cash flow.
- Allowing swift resolution of disputes by way of adjudication.

The Act currently achieves this by:

- Providing a statutory right to refer disputes to adjudication. The adjudicator's decision is binding until finally determined by legal proceedings or arbitration.
- Providing the right to interim, periodic or stage payments.
- Requiring that contracts should provide a mechanism to determine what payments become due and when, and a final date for payment.
- Requiring that the payer gives the payee early communication of the amount he has paid or proposes to pay.
- Providing that the payer may not withhold money from the sum due unless he has given an effective withholding notice to the payee.
- Providing that the payee may suspend performance where a sum due is not paid in full by the final date for payment.
- Prohibiting pay when paid clauses which link payment to payments received by the payer under a separate contract.

## Construction Act review

A review of the Construction Act was announced in the 2004 Budget. This concluded that the Act was generally working well but that some improvements would be helpful.

Since 2004 there has been ongoing consultation with industry. Detailed proposals have been made to amend the existing framework and address specific issues that have arisen during the nine years the Act has been in operation.

The proposed amendments are not intended to be wholesale reform, but proportionate to the existing framework. Legislative intervention is only recommended where necessary to achieve the aims of the original legislation.

## Proposed amendments

The proposed amendments aim to:

- 1 Improve transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow.
- 2 Encourage the parties to resolve disputes by adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation.
- 3 Improve the right to suspend performance under the contract.

This will be achieved through a number of changes to the adjudication and payment frameworks, and by improving the right to suspend performance.

## On adjudication

- Improving access to the right to refer disputes for adjudication by:
  - Applying the legislation to oral and partly oral contracts.
  - Preventing the use of agreements that interim payment decisions will be conclusive to avoid adjudication on interim payment disputes.
- Ensuring the costs involved in the process are fairly allocated.

## On payment

- Preventing unnecessary duplication of payment notices. Clarifying the requirement to serve a section 110(2) payment notice.
- Clarifying the content of payment and withholding notices. Ensuring the payment framework creates a clear entitlement to interim payment. Prohibiting the use of pay-when-certified clauses.

## On suspension

- Improving the statutory right to suspend performance by allowing the suspending party to claim the costs and consequential delay.

### The CIOB recommends and supports:

- Prompt and fair payment practice throughout construction supply chains to better enable the industry to adopt integrated working as the norm.
- Construction Act amendments that will improve transparency and clarity, encourage parties to resolve disputes by adjudication and improve the right to suspend performance under the contract.
- Guidance as the preferred route to improve the operation of construction contracts, with legislative intervention where absolutely necessary.



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