



## Consultants – Are you ready?

### How will the changes to the Construction Contracts Act 2002 affect Architects, Engineers and Quantity Surveyors?

#### 1. What are the changes?

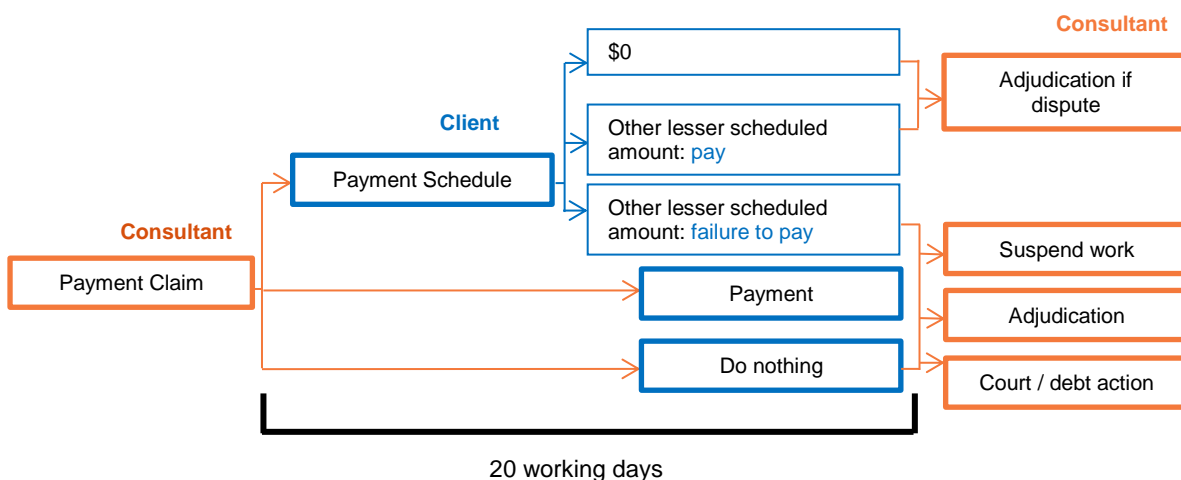
The [Construction Contracts Act 2002 \(CCA\)](#) applies to “*construction contracts*” (ie a contract for carrying out construction work, including any variations). From 1 September 2016, “*construction work*” will include design, engineering and quantity surveying work. If you are engaging in this work (or your subconsultants are), with very limited exceptions, the CCA will apply to all new and renewed appointments after 1 September 2016.

#### 2. Practically speaking, what does this mean for me?

For the first time, you will be subject to, and able to take advantage of, the CCA’s payment and adjudication regimes. These regimes are underpinned by a “pay now, argue later” philosophy.

#### 3. What is the CCA’s payment regime?

The payment regime provides process for regular and timely payments during the course of a project. The payment claim is the key element of that process. Payees (you and/or your sub-consultant) will need to serve payment claims for work done. Within strict timeframes, the payer (your client or you if your subconsultant is claiming) must respond by payment in full, or by providing a payment schedule and paying a lesser amount. If the payer fails pay the full amount claimed or issue a payment schedule, the full amount becomes a debt due, which can be enforced.



a. What is a “payment claim”?

The (sub)consultant’s claim for payment from its client in accordance with the contract and the CCA. A detailed invoice may suffice, but all of the following requirements must be met:

- (i) The claim must be in writing; and
- (ii) It must contain sufficient details to identify the contract to which it relates; and
- (iii) It must identify the work and relevant period to which the payment relates; and
- (iv) It must state a claimed amount and the due date for payment; and
- (v) It must indicate how the payee calculated the claimed amount (eg by attaching a spreadsheet); and
- (vi) It must state that it is a payment claim made under the CCA; and
- (vii) It must be accompanied by the prescribed information ([Form 1](#)).

b. When can I make a “payment claim”?

Once per month, unless the contract specifies a different interval. If the contract is silent, the first payment is calculated for the period commencing on the day the work first started, to the end of that month (so may be short). Further claims are then calendar month by month.

c. What if I’m late with my “payment claim”?

The contract may spell out the consequences – eg your “payment claim” may be treated as being received on the next due date (by default, in a month’s time).

If the contract is silent, a late payment claim may not be valid (which means the pressure mechanisms in the CCA are not available to you – refer 3(g) below – and you would need to wait until the next month to issue a further valid one).

d. When will I get paid?

Within 20 working days of a payment claim, unless the contract specifies a different time. The due date will need be stated on the payment claim itself.

A payer/client has two options when it receives a payment claim: (1) make payment in full by the due date; or (2) use a payment schedule to dispute the amount claimed and pay a lesser amount (possibly \$0). The payment schedule must be served *and* the lesser amount must be paid within the due date.

e. What is a “payment schedule”?

A “payment schedule” allows a client to dispute up to 100% of the payment claim. There is no set form, but the schedule must:

- (i) Be in writing; and
- (ii) Identify the payment claim to which it relates; and
- (iii) State an amount which it proposes to pay (possibly \$0) (**scheduled amount**); and

If the scheduled amount is less than the claimed amount, the payment schedule must also:

- (i) Indicate how the scheduled amount has been calculated;
- (ii) Explain the reasons why the scheduled amount is less; and
- (iii) If the difference is because the client is withholding payment, the reasons why payment is being withheld.

f. When will I get a “payment schedule”?

If the client wishes to serve one, within the time for payment (see 3(d) above).

g. What if I disagree with the client’s payment schedule?

You may initiate adjudication.

h. What if the client does nothing? Or gives me a payment schedule and then doesn’t pay the scheduled amount by the due date on the payment claim?

You could suspend work, adjudicate (including seeking a charging order except in residential projects), or commence Court action (a simple debt claim).

i. What if I receive a “payment claim”?

If this is because you have subcontracted “*construction work*”, you will be entitled to serve a payment schedule and pay a lesser amount if there is a basis to do so. Refer to 3(d) to (f) above. Also note 3(g)– you will need to respond in time.

#### 4. What is the CCA’s adjudication regime?

Adjudication is a quick and relatively inexpensive way of resolving construction disputes, to keep projects moving. There are tight timeframes for responding to an adjudication claim, and for the appointed adjudicator to issue a decision. In limited cases, extensions of time may be granted. Adjudications usually take between five to seven weeks, compared with months or years for arbitration or litigation.

a. Do I have to adjudicate?

If you and/or your subconsultant are carrying out “*construction work*”, the other party to the contract may adjudicate (even if the contract specifies another dispute resolution method). If you have a claim, you can decide whether to adjudicate or follow the dispute resolution method specified in the contract.

b. What should I do if I receive a notice to adjudicate?

**Immediately contact your lawyer.** The timeframes for responding to an adjudication are very short. The usual period (from receiving a Notice of Adjudication to submitting a response) is 10-12 working days, but it could be as short as 5 working days. This does not allow a lot of time to prepare submissions and any written evidence.

c. What if I don't agree with the adjudication decision?

You may have the claim re-heard by arbitration (if this is specified in your contract) or otherwise by the courts. However, the adjudicator's decision is binding in the meantime.

**5. What should I do to get ready for the CCA applying to consultants?**

You should review your standard terms and payment systems to make sure they are in line with the CCA's payment regime. This includes having compliant standard form payment claims (and schedules, where you engage subconsultants).

You should also contact your insurance broker about any changes that might be needed to your Professional Indemnity policy (especially regarding notification and control) if you were to receive an adjudication. It would also be sensible to discuss notifying your insurer prior to commencing an adjudication yourself as this could prompt a retaliatory claim.

Relevant staff should be educated on the payment and adjudication regimes and especially the strict timeframes with these.

If you are a professional whose work will be captured by these changes, we would be happy to assist with ensuring your terms and conditions of engagement and payment practices comply with the CCA.

For more information, or to discuss any aspect of construction law, please contact:

**Nick Gillies** – [nick.gillies@heskethhenry.co.nz](mailto:nick.gillies@heskethhenry.co.nz) or +64 9 375 8767

**Christina Bryant** – [Christina.bryant@heskethhenry.co.nz](mailto:Christina.bryant@heskethhenry.co.nz) or +64 9 375 8789

**Helen MacFarlane** – [helen.macfarlane@heskethhenry.co.nz](mailto:helen.macfarlane@heskethhenry.co.nz) or +64 9 375 8711

**Sarah Holderness** – [sarah.holderness@heskethhenry.co.nz](mailto:sarah.holderness@heskethhenry.co.nz) or +64 9 375 8778

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