



# COMMUNIQUE

*Newsletter of the New Zealand Architects Cooperative Society Ltd  
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## **The Construction Contracts Act: Potential Liability**

The **Construction Contracts Act 2002 (CCA)** provides default terms of payment in construction contracts, and unavoidable procedures for deciding disputes or enforcing due payment. **NZIA** conditions of contract (*and NZS3910*) payment terms will generally prevail over the default terms in the Act, so members do not face a “*sea change*” in payment procedures. However, the **CCA** does provide “*teeth*” to enforce payment provisions, and the consequences of dilatory or poor procedures could be significant.

In order to minimise liability exposure, Members need to process payment claims on time, and be sure to give adequate reasons whenever the amounts certified do not match the Contractor’s claim.

Members should educate Clients about the consequences of slow payment or short-payment so that they can accommodate the risks as they see fit. They may otherwise seek retribution – on the basis of a latent but un-notified risk - when the Contractor walks off the job or stymies on-sale (*or financing arrangements*) by exercising their rights under the Act.

Members should encourage Contractors to adequately document their claims, and advise them of the specific documentation required for residential contracts. There will be a clear mandate to reject an inadequate claim, and in addition, the Contractor may be denied the opportunity of enforcement. But a rejected claim easily leads into a spiral of dispute, sucking in others along the way.

The **Construction Contracts Regulations 2003 Form 1** has to be issued by the Contractor when making a claim on a residential project, and it describes the process and consequences well.

It is available on the Internet at:

[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_regs](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_regs)

With very little adaptation (deletion of “*served on residential occupier*” from the title, and addition of a new paragraph near the end: “*Commercial Contracts: failure to meet payment procedures may entitle the contractor to suspend work on site and (following adjudication) to obtain a charging order over the site*”) the same form would be useful as an advice note to contractors generally and for commercial clients.

Any matter in dispute at any level of the contract chain can be put to adjudication. The adjudicator (*and any experts reporting to him or her*) carries no liability (*unless acting in bad faith*) and is under pressure to make a decision to facilitate cash flow. Hence, a dispute at subcontractor level could impact on the project as a whole, and the “*quick-fire*” determination of it may be made without the due consideration available in mediation or arbitration. It would be easy for an architect to appear culpable in such disputes, and far harder to prove innocence by revisiting the issues in a later forum.

An adjudicator's determination (or expert's report) may later be proven to be wrong; therefore, if it varies from the Member's view, that difference should be made known both before and after the determination, so that the member's performance can be judged on its own merits. This would extend to annotating subsequent payment certificates (*and/or other documentation*) when they must be produced in accordance with the determination.

As with all contract administration issues - and particularly those related to a dispute - the documentation and audit trail should anticipate the determination being revisited in mediation, arbitration, or the Courts.

The general view held by **NZACS** is that an adjudication falls into the area of "*contract administration*" rather than a "*dispute*", but no firm view on the matter is likely to be formed. Whilst in many cases it would be unnecessary to notify us of a potential claim that may change if adjudication tends to replace arbitration. Members should consider complexity, dollar values, site circumstances, and their potential exposure: the Claims Committee is always available to help, and only a phone call away.

### **Weathertight Homes Claims: Beware the Notice and Form.**

This topic is also covered in **Communiqué April 03 (issue 2)** and in *NZIA Practice Notes 8.313*

A claimant (*house owner*) can apply to the **Weathertight Homes Resolution Service (WHRS)** for an assessment of their problem, and on the basis of the assessment, can choose to proceed to mediation or adjudication, and can nominate the respondents to the claim.

The first indication that you are involved in a claim may be the letter the **WHRS** sends you advising that you are "*listed as a person who has had an interest or involvement in a leaky building*". An enclosure sets out the procedures and an explanation of what happens in a mediation or adjudication: mediation is a confidential process aimed at reaching an agreement between all parties, and adjudication is a public "*judicial*" process where the adjudicator decides who is liable and to what extent. Also enclosed is a form ("*Confirmation Of Address & Confidentiality Statement*") for you to fill out and return within 10 working days.

By filling out the form, you confirm that the information to be provided to you will be kept confidential, except that you may consult with professional or legal advisors. The form does not commit you to participation in mediation.

We would have no problem with your infilling and returning this form, as it enables us to gather the information that will be required in any defence of the claim on your behalf. However, you should advise us of a potential claim under your policy as soon as practicable: our website [www.nzacs.co.nz](http://www.nzacs.co.nz) has proforma letters for the purpose.

Any further actions, which move the matter toward mediation or adjudication should not be undertaken without advising us of the claim, so that we can make an assessment of how the problem may best, be dealt with. The selection of adjudication or mediation may itself require technical and legal consideration, despite the apparent attractiveness of trying to reach a confidential mediated agreement.

As soon as you get the further information from the **WHRS**, please forward a copy to us, along with any comments you can add, so that the Claims Committee can form a preliminary view of how the dispute should be dealt with. Aon and/or the Claims Committee will respond and confirm whether you should agree to mediation or not.

A pre-mediation meeting or teleconference to deal with procedural items will precede the mediation: the date of this is beyond our control so please don't leave the papers in the "round tuit" pile! Before that meeting the Claims Committee needs to have a good grasp on the issues in order to establish that the right parties are involved, the need for further documentation and/or preparation, the appropriate timelines, and the need for legal or expert assistance .

So far, it would appear that very few of the notifications to the **WHRS** involve architects, but as we all know, numbers of claims are unrelated to dollars, or to the chance that you may be next!!!

### **Claims Committee Assistance**

Sometimes, threatened claims or problems on jobs do not involve claim, or maybe are not covered by your policy. The **NZIA Chat Line** has been a great source of information, to which sometimes the Claims Committee have contributed, but many of the answers are in the **NZIA Practice Notes**, or in your **NZACS Manual**, or on our website [www.nzacs.co.nz](http://www.nzacs.co.nz).

However, **NZACS** is not an insurer, it is a co-operative; if Risk Management problems can't be laid to rest after due research, the Claims Committee will help with non-financial assistance to Members where they can. Contact details are also on the website.

## **COMMUNIQUÉ**

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***We welcome contributions from readers, on how they manage risk.***