

RECOMMENDATIONS FOR THE CONTINUED QUALITY IMPROVEMENT OF THE CONSTRUCTIONS CONTRACT ACT

The purpose of this document is to outline a set of recommendations to help improve the operability of the Act so that it better protects the supply chain, cashflow and speeds up the adjudication process while delivering greater value

Section	Reference	Issue	Proposal	Reason for Proposal
Matters which are critical to the successful adoption of the legislation and are affecting its ongoing operation				
3 (3)	Payments	Unbalanced payment terms between contractor and subcontractor.	The Act should provide for “back to back” 30 days payment terms for both a contractor and subcontractor.	45 - 90 day payment terms are standard terms with large investors and multinationals. Under the current Act, Main Contractors are required to pay their entire supply chain every 30 days, while they are subjected to 90 days payment terms. This cashflow risk is extremely difficult to administer and plan over the duration of a construction project. It is self-evident that this places huge cashflow pressure on main contractors and their own ability to financially manage their business.
3 (5)	Pay when certified	Failure to pay an amount due in accordance with a properly issued payment claim notice as it has not been certified by another party.	After the word ‘payment’ on the 3rd line of section 3(5) insert the words ‘or certification’.	This would remove the defense that an amount has not been certified by a third party and therefore is potentially not due for payment, in the circumstances where a properly constituted payment claim notice (PCN) was served and no contradictory response to a PCN was issued.
6 (1)	Right to Adjudication	Limiting the scope of the act to a “payment dispute” is too restrictive and does not allow the service to meet its full potential as a fast track mechanism to resolve disputes in the sector.	Expand text to include disputes in relation to the contract.	Disputes in construction generally lead to some claim for the recovery of costs, which translate then into a dispute over the interim or final payment. However, because the act is narrowly defined, many operators choose other costly legal mechanisms to resolve their disputes rather than making use of the CCA as they are unsure if their dispute qualifies. By under-utilising the potential of the Act it is impacting on the efficient delivery of projects, cashflow in the supply chain, industry performance and productivity.
6 (15)	Right to Adjudication	Bearing of legal/professional advisor costs associated with an adjudication.	Adjudicators should be entitled to award costs for the preparation of a claim, referral to adjudication and the professional support required to support that process.	This is unfair on small to medium enterprises who generally find themselves in dispute with much larger and better resourced respondents. Often the adjudicators costs can take up a significant amount of an award to an extent that the SME is no better off. This is a significant inhibitor for SMEs in using the service.
5 (5,6) 7 (4,5)	Suspension	The Act provides for an “Extension of Time” on foot of suspension, however the meaning of the wording “ <i>Period of suspension shall be disregarded</i> ” is unclear.	Delay due to a valid suspension should equal an automatic “Extension of Time” (EoT) . The Act should also allow for compensation for costs arising from a valid suspension.	Construction contracts are complex and involve multiple layers of sub-contractors that are connected laterally and downwardly. The ambiguity of this wording is causing significant difficulty for main contractors because a suspension by one sub-contractor is leading to delays on other sub-contracted work, which in turn leads to delays in the main contract. The main contractor is not being granted an automatic EoT resulting in legal exposure to the application of Liquidated and Ascertained Damages. This is impacting on project delivery, concurrent subcontracting and supply chain cashflow.
Items that would improve the legislation and avoid unnecessary court cases by providing a definitive interpretation				
4 (3)	Payment claim notices	There is no default position or mechanism provided in the event that there is no valid response from the other party to a payment claim notice being issued.	Add new section 4(3c) specifying the default position if there is no valid response to a payment claim notice being issued.	The referral to the CCA Service can only occur when an actual dispute has in fact occurred. Contractors are experiencing situations where clients are frustrating the process by not complying with 4(3).
Schedule	Clause 2	On contracts of less than 45 days this could lead to a single payment entitlement up to 89 days after commencement.	Delete section or insert shorter payment periods, for example 10-15 days after commencement.	Small contractors particularly on retrofitting projects are carrying out works without any cashflow for the projects until 44 days after they completed it. This is not sustainable as it is significantly impacts on the small contractor to maintain their ability to finance future projects.
Schedule	Clause 5b	The terminology “any amendments” is erroneous and does not reflect standard conditions of contract, which include adjustments to the contract sum as result of variations/change orders or delay costs. These are not the same as amendments to the contract conditions, but rather mechanisms to manage events during works.	5b – Delete “Any Amendments” and replace with “Change Orders”/ “Variations”/ “Delay Costs”.	Many contractors/subcontractors choose other costly legal mechanisms to resolve their disputes rather than making use of the CCA as they are unsure if their dispute qualifies because it appears that payment disputes that include claims relating to variations and delays will not be heard. This is impacting on the efficient delivery of projects, cashflow in the supply chain, industry performance and productivity.
6 (12)	Right to Adjudication	The decision of the adjudicator is binding and the use of the term “If binding” is unhelpful.	Remove “if binding”.	This is causing serious confusion and many members are using other forms of legal dispute resolutions mechanisms rather than the CCA as they think that the adjudicators decision is not binding and therefore the services could be abused by a respondent to bully and frustrate a less well resourced contractor/sub-contractor.
1	Interpretation	Final payment, final completion, retention, and substantial completion are not defined. This causes difficulties in regards to the release of retention for sectional completion of works particularly in regards to subcontractors.	Provide definitions for these terms.	Better cashflow in the supply chain .
Schedule	Clause 1	No provision for interim payment claims notices after Substantial Completion (SC).	1 - Put in place a provision for interim payments after SC “where required”.	1 - Offers flexibility and reflects practice.
4 (1, 4)	Payment claim notices	Terminology needs clarification and refinement.	4 (1) – clarify the meaning of the terms “ <i>payment claim</i> ” and “ <i>payment claim notice</i> ” 4 (4) – remove “or otherwise”.	This is confusing to contractors and sub-contractors when they preparing their claims.
7 (3b)	Suspension	Its is unfair to be required to return to site after the decision of the adjudicator is referred to arbitration or to other proceedings.	Delete.	You should not have to return to site if you have not been paid as this will impact on future cashflow, contractual relationships and lead to further disputes.