



Western Australia

# **Construction Contracts (Former Provisions) Act 2004**

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# Construction Contracts (Former Provisions) Act 2004

## Contents

### Part 1 — Preliminary

1.	Short title	2
2.	Commencement	2
3.	Terms used	2
4.	Construction work	4
5.	Goods and services related to construction work	7
6.	Payment dispute	8
7.	Construction contracts to which this Act applies	9
8.	Application to Crown	10

### Part 2 — Content of construction contracts

#### Division 1 — Prohibited provisions

9.	Prohibited: pay if paid/when paid provisions	11
10.	Prohibited: provisions requiring payment to be made after 42 days	11
11.	Prohibited: prescribed provisions	11
12.	Other provisions of contract not affected	11

#### Division 2 — Implied provisions

13.	Variations of contractual obligations	11
14.	Contractor's entitlement to be paid	12
15.	Contractor's entitlement to claim progress payments	12
16.	Making claims for payment	12
17.	Responding to claims for payment	12
18.	Time for payment	12

19.	Interest on overdue payments	13
20.	Ownership of goods	13
21.	Duties as to unfixed goods on insolvency	13
22.	Retention money	13
23.	Implied provisions: interpretation etc.	14
	<b>Part 3 — Adjudication of disputes</b>	
	<b>Division 1 — Preliminary</b>	
24.	Interpretation of construction contract	15
	<b>Division 2 — Commencing adjudication</b>	
25.	Who can apply for adjudication	15
26.	Applying for adjudication	15
27.	Responding to application for adjudication	16
28.	Appointment of adjudicator in absence of agreed appointment	17
29.	Adjudicators: conflicts of interest	18
	<b>Division 3 — The adjudication process</b>	
30.	Object of adjudication process	19
31.	Adjudicator's functions	19
32.	Adjudication procedure	21
33.	Interest up to determination	22
34.	Costs of parties to payment disputes	23
35.	Certificates of completion etc., effect of	24
36.	Determination, content of	24
37.	Dismissed applications	25
	<b>Division 4 — Effect of determinations</b>	
38.	Determinations have effect despite other proceedings	25
39.	Payment of amount determined and interest	26
40.	Progress payments under determinations to be on account	26
41.	Determinations are final	27
	<b>Division 5 — Enforcing determinations</b>	
42.	Non-compliance by principal, contractor may suspend its obligations	27
43.	Determinations may be enforced as orders of court	28
	<b>Division 6 — General</b>	
44.	Costs of adjudications	29

---

45.	Effect of this Part on civil proceedings	31
46.	Review, limited right of	31
	<b>Part 4 — Administration</b>	
48.	Registering adjudicators	33
49.	Review of registration decisions	34
50.	Publication of adjudicators' decisions	34
51.	Appointors' and adjudicators' rates to be published	35
	<b>Part 5 — Miscellaneous</b>	
53.	No contracting out	36
54.	Immunity from tortious liability	36
55.	Regulations	37
56.	Review of Act	37
	<b>Part 6 — Transitional provisions</b>	
	<b>Division 1 — Provisions relating to the <i>Construction Contracts Amendment Act 2016</i></b>	
57.	Resubmitted claims: previous adjudications	38
58.	Extension of periods of time	38
59.	Effect of notices under s. 42(1) after commencement and before 1 January 2017	38
60.	Payment periods: contracts entered into before 3 April 2017	39
	<b>Schedule 1 — Implied provisions</b>	
	<b>Division 1 — Variations</b>	
1.	Variations must be agreed	40
	<b>Division 2 — Contractor's entitlement to be paid</b>	
2.	Contractor entitled to be paid	40
	<b>Division 3 — Claims for progress payments</b>	
3.	Entitlement to claim progress payments	40
4.	When claims for progress payments can be made	40
	<b>Division 4 — Making claims for payment</b>	
5.	Claim for payment, content	41
	<b>Division 5 — Responding to claims for payment</b>	
6.	Term used: payment claim	42

Contents

---

7.	Responding to payment claim	42
	<b>Division 6 — Interest on overdue payments</b>	
8.	Interest payable on overdue payments	43
	<b>Division 7 — Ownership of goods</b>	
9.	When ownership of goods supplied by contractor passes	44
	<b>Division 8 — Duties as to unfixed goods on insolvency</b>	
10.	Duties of principal or landowner etc. as to unfixed goods on insolvency	44
	<b>Division 9 — Retention money</b>	
11.	Retention money to be held on trust	45
	<b>Notes</b>	
	Compilation table	47
	Other notes	47
	<b>Defined terms</b>	

Western Australia

## **Construction Contracts (Former Provisions) Act 2004**

**An Act —**

- **to prohibit or modify certain provisions in construction contracts;**
  - **to imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts;**
  - **to provide a means for adjudicating payment disputes arising under construction contracts,**
- and for related purposes.**

## **Part 1 — Preliminary**

### **1. Short title**

This Act is the *Construction Contracts (Former Provisions) Act 2004*.

*[Section 1 amended: No. 4 of 2021 s. 136.]*

### **2. Commencement**

- (1) This Act comes into operation on a day fixed by proclamation.
- (2) Different days may be fixed under subsection (1) for different provisions.

### **3. Terms used**

In this Act, unless the contrary intention appears —

***adjudication*** means the adjudication of a payment dispute in accordance with Part 3;

***applicant***, in relation to an adjudication, means the person who, under section 26, makes the application for the adjudication;

***appointed adjudicator***, in relation to a payment dispute, means the registered adjudicator who, having been appointed under Part 3 to adjudicate the dispute, has been served with the application for adjudication;

***Building Commissioner*** means the officer referred to in the *Building Services (Complaint Resolution and Administration) Act 2011* section 85;

***business day*** means a day other than —

- (a) a Saturday, Sunday or public holiday; or
- (b) a day in the period beginning on 25 December in a year and ending on 7 January in the following year;

**construction contract** means a contract or other agreement, whether in writing or not, under which a person (the **contractor**) has one or more of these obligations —

- (a) to carry out construction work;
- (b) to supply to the site where construction work is being carried out any goods that are related to construction work by virtue of section 5(1);
- (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2);
- (d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b);

**construction work** has the meaning given to that term in section 4;

**contractor** has the meaning given by the definition of **construction contract**;

**costs of an adjudication** has the meaning given to that term in section 44;

**determination** means a determination, made on an adjudication under Part 3, of the merits of a payment dispute;

**obligations**, in relation to a contractor, means those of the obligations described in the definition of **construction contract** that the contractor has under the construction contract;

**party**, in relation to an adjudication, means the applicant and any person on whom an application for the adjudication is served;

**party**, in relation to a construction contract, means a party to the contract;

**payment claim** —

- (a) means a claim made under a construction contract —
  - (i) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or
  - (ii) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract;

and

- (b) includes a payment claim that includes matters covered by a previous payment claim;

**payment dispute** has the meaning given to that term in section 6;

**prescribed appointor** means a person prescribed as such by the regulations;

**principal**, in relation to a construction contract, means the party to whom the contractor is bound under the contract;

**registered adjudicator** means an individual registered as such under section 48.

[Section 3 amended: No. 16 of 2011 s. 128(2)-(4); No. 55 of 2016 s. 4.]

#### **4. Construction work**

- (1) In this section —

**civil works** includes —

- (a) a road, railway, tramway, aircraft runway, canal, waterway, harbour, port or marina; and
- (b) a line or cable for electricity or telecommunications; and
- (c) a pipeline for water, gas, oil, sewage or other material; and

- (d) a path, pavement, ramp, tunnel, slipway, dam, well, aqueduct, drain, levee, seawall or retaining wall; and
- (e) any works, apparatus, fittings, machinery or plant associated with any works referred to in paragraph (a), (b), (c) or (d);

**site in WA** means a site in Western Australia, whether on land or off-shore.

- (2) In this Act —

**construction work** means any of the following work on a site in WA —

- (a) reclaiming, draining, or preventing the subsidence, movement or erosion of, land;
- (b) installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, any works, apparatus, fittings, machinery, or plant, associated with any work referred to in paragraph (a);
- (c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form, whether permanently or not and whether in WA or not, part of land or the sea bed whether above or below it;
- (d) fixing or installing on or in any thing referred to in paragraph (c) any fittings forming, or to form, whether permanently or not, part of the thing, including —
  - (i) fittings for electricity, gas, water, fuel oil, air, sanitation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing, and the safety of people; and
  - (ii) lifts, escalators, insulation, furniture and furnishings;
- (e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any thing referred to in paragraph (c) or any fittings described in paragraph (d) that form part of that thing;

**s. 4**

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- (f) any work that is preparatory to, necessary for, an integral part of, or for the completion of, any work referred to in paragraph (a), (b), (c), (d) or (e), including —
    - (i) site or earth works, excavating, earthmoving, tunnelling or boring; and
    - (ii) laying foundations; and
    - (iii) erecting, maintaining or dismantling temporary works, a temporary building, or a temporary structure including a crane or other lifting equipment, and scaffolding; and
    - (iv) cleaning, painting, decorating or treating any surface; and
    - (v) site restoration and landscaping;
  - (g) any work that is prescribed by regulations to be construction work for the purposes of this Act.
- (3) Despite subsection (2) construction work does not include any of the following work on a site in WA —
- (a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;
  - (b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;
  - (c) fabricating or assembling items of plant used for extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance;
  - [(d) deleted]*
  - (e) work prescribed by the regulations not to be construction work for the purposes of this Act.

- (4) In this Act —  
**construction work** does not include constructing the whole or part of any watercraft.

*[Section 4 amended: No. 55 of 2016 s. 5.]*

**5. Goods and services related to construction work**

- (1) For the purposes of this Act, goods are related to construction work if they are —
- (a) materials or components (whether pre-fabricated or not) that will form part of any thing referred to in section 4(2)(b) or 4(2)(c) or of any fittings referred to in section 4(2)(d); or
  - (b) any fittings referred to in section 4(2)(d) (whether pre-fabricated or not); or
  - (c) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of the construction work at the site of the construction work; or
  - (d) goods prescribed by the regulations to be related to construction work for the purposes of this Act.
- (2) For the purposes of this Act, professional services are related to construction work if they are —
- (a) services that are provided by a profession and that relate directly to construction work or to assessing its feasibility (whether or not it proceeds) —
    - (i) including surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying, and project management, services; but
    - (ii) not including accounting, financial, or legal, services;
- or

- (b) services that are provided by a profession that are prescribed by the regulations to be professional services related to construction work for the purposes of this Act.
- (3) For the purposes of this Act, on-site services —
  - (a) are services other than professional services referred to in subsection (2); and
  - (b) are related to construction work if they are —
    - (i) services that relate directly to construction work, including the provision of labour to carry out construction work; or
    - (ii) services prescribed by the regulations to be on-site services related to construction work for the purposes of this Act.
- (4) The regulations may prescribe goods, professional services or on-site services that are not related to construction work for the purposes of this Act.

**6. Payment dispute**

- (1) For the purposes of this Act, a payment dispute arises if —
  - (aa) a payment claim is rejected or wholly or partly disputed; or
  - (a) by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full; or
  - (b) by the time when any money retained by a party under the contract is due to be paid under the contract, the money has not been paid; or
  - (c) by the time when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.
- (2) Despite subsection (1), a payment dispute does not arise under subsection (1)(aa) or (a) to the extent to which the payment

claim includes matters that were the subject of an application for adjudication that has been dismissed or determined under section 31(2).

- (3) If a payment dispute arises under both subsection (1)(aa) and (a) in relation to a payment claim then, for the purposes of this Act, the dispute arises on the earlier of the 2 occurrences.

*[Section 6 amended: No. 55 of 2016 s. 6.]*

**7. Construction contracts to which this Act applies**

- (1) This Act applies to a construction contract entered into after this Act comes into operation and before the *Building and Construction Industry (Security of Payment) Act 2021* section 22 comes into operation.

- (2) This Act applies to a construction contract —

- (a) irrespective of whether it is written or oral or partly written and partly oral; and
- (b) irrespective of where it is entered into; and
- (c) irrespective of whether it is expressed to be governed by the law of a place other than Western Australia.

- (3) This Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods or services that are related to construction work, as an employee (as defined in the *Industrial Relations Act 1979* section 7) of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.

- (4) This Act, or a provision of this Act, does not apply to a construction contract, or a class of construction contracts, prescribed by the regulations as a contract or class of contracts to which this Act, or that provision, does not apply.

*[Section 7 amended: No. 4 of 2021 s. 137.]*

**8. Application to Crown**

This Act binds the Crown.

## **Part 2 — Content of construction contracts**

### **Division 1 — Prohibited provisions**

**9. Prohibited: pay if paid/when paid provisions**

A provision in a construction contract has no effect if it purports to make the liability of a party (A) to pay money under the contract to another party contingent, whether directly or indirectly, on A being paid money by another person (whether or not a party).

**10. Prohibited: provisions requiring payment to be made after 42 days**

A provision in a construction contract that purports to require a payment to be made more than 42 days after the payment is claimed is to be read as being amended to require the payment to be made within 42 days after it is claimed.

*[Section 10 amended: No. 55 of 2016 s. 7.]*

**11. Prohibited: prescribed provisions**

A provision in a construction contract has no effect if it is a provision that is prescribed by the regulations to be a prohibited provision.

**12. Other provisions of contract not affected**

A provision in a construction contract that has no effect because of section 9 or 11 or that is modified under section 10 does not prejudice or affect the operation of other provisions of the contract.

### **Division 2 — Implied provisions**

**13. Variations of contractual obligations**

The provisions in Schedule 1 Division 1 are implied in a construction contract that does not have a written provision

about variations of the contractor's obligations under the contract.

**14. Contractor's entitlement to be paid**

The provisions in Schedule 1 Division 2 are implied in a construction contract that does not have a written provision about the amount, or a means of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.

**15. Contractor's entitlement to claim progress payments**

The provisions in Schedule 1 Division 3 are implied in a construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed.

**16. Making claims for payment**

The provisions in Schedule 1 Division 4 are implied in a construction contract that does not have a written provision about how a party is to make a claim to another party for payment.

**17. Responding to claims for payment**

The provisions in Schedule 1 Division 5 about when and how a party is to respond to a claim for payment made by another party are implied in a construction contract that does not have a written provision about that matter.

**18. Time for payment**

The provisions in Schedule 1 Division 5 about the time by when a payment must be made are implied in a construction contract that does not have a written provision about that matter.

**19. Interest on overdue payments**

The provisions in Schedule 1 Division 6 are implied in a construction contract that does not have a written provision about interest to be paid on any payment that is not made at the time required by the contract.

**20. Ownership of goods**

The provisions in Schedule 1 Division 7 are implied in a construction contract that does not have a written provision about when the ownership of goods that are —

- (a) related to construction work; and
- (b) supplied to the site of the construction work by the contractor under its obligations,

passes from the contractor.

**21. Duties as to unfixd goods on insolvency**

The provisions in Schedule 1 Division 8 are implied in a construction contract that does not have a written provision about what is to happen to unfixd goods of a kind referred to in section 20 if either of the following persons becomes insolvent —

- (a) the principal; or
- (b) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work.

**22. Retention money**

The provisions in Schedule 1 Division 9 are implied in a construction contract that does not have a written provision about the status of money retained by the principal for the performance by the contractor of its obligations.

**23. Implied provisions: interpretation etc.**

The *Interpretation Act 1984* and sections 3 to 6 of this Act apply to the interpretation and construction of a provision that is implied in a construction contract under this Part despite any provision in a construction contract to the contrary.

## **Part 3 — Adjudication of disputes**

### **Division 1 — Preliminary**

#### **24. Interpretation of construction contract**

Without affecting the operation of section 9, 11 or 53, a reference in this Part to a construction contract is a reference to the contract including any provision that is modified under section 10 or implied in the contract under Part 2 Division 2.

### **Division 2 — Commencing adjudication**

#### **25. Who can apply for adjudication**

If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless —

- (a) an application for adjudication has already been made by a party, whether or not a determination has been made, but subject to section 37(2); or
- (b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.

#### **26. Applying for adjudication**

- (1) To apply to have a payment dispute adjudicated, a party to the contract, within 90 business days after the dispute arises or, if applicable, within the period provided for by section 37(2)(b), must —
  - (a) prepare a written application for adjudication; and
  - (b) serve it on each other party to the contract; and

- (c) serve it —
    - (i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, on the adjudicator;
    - (ii) if the parties to the contract have appointed a prescribed appointor, on that appointor;
    - (iii) otherwise, on a prescribed appointor chosen by the party;and
  - (d) provide any deposit or security for the costs of the adjudication that the adjudicator or the prescribed appointor requires under section 44(8) or (9).
- (2) The application —
- (a) must be prepared in accordance with, and contain the information prescribed by, the regulations; and
  - (b) must set out the details of, or have attached to it —
    - (i) the construction contract involved or relevant extracts of it; and
    - (ii) any payment claim that has given rise to the payment dispute;and
  - (c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.
- (3) A prescribed appointor that is served with an application for adjudication made under subsection (1) must comply with section 28.

*[Section 26 amended: No. 55 of 2016 s. 8.]*

**27. Responding to application for adjudication**

- (1) Within 10 business days after the date on which a party to a construction contract is served with an application for

adjudication, the party must prepare a written response to the application and serve it on —

- (a) the applicant and on any other party that has been served with the application; and
  - (b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointor on which the application was served under section 26(1)(c).
- (2) The response —
- (a) must be prepared in accordance with, and contain the information prescribed by, the regulations; and
  - (b) must set out the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and
  - (c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

*[Section 27 amended: No. 55 of 2016 s. 9.]*

**28. Appointment of adjudicator in absence of agreed appointment**

- (1) If an application for adjudication is served on a prescribed appointor the appointor, within 5 business days after being served, must —
  - (a) appoint a registered adjudicator to adjudicate the payment dispute concerned; and
  - (b) send the application and any response received by it to the adjudicator; and
  - (c) notify the parties in writing accordingly; and
  - (d) notify the Building Commissioner in writing accordingly.
- (2) If a prescribed appointor does not make an appointment under subsection (1) the Building Commissioner may appoint a

registered adjudicator to adjudicate the payment dispute concerned.

- (3) If the Building Commissioner makes an appointment under subsection (2), the Building Commissioner must —
- (a) notify the prescribed appointor in writing accordingly and require the appointor to serve the application and any response received by it on the adjudicator appointed by the Building Commissioner; and
  - (b) notify the parties in writing accordingly.

*[Section 28 amended: No. 16 of 2011 s. 128(6); No. 55 of 2016 s. 10.]*

**29. Adjudicators: conflicts of interest**

- (1) An appointed adjudicator who has a material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract is disqualified from adjudicating the dispute.
- (2) If an appointed adjudicator is disqualified —
- (a) the adjudicator must notify the parties in writing of the disqualification and the reasons for it; and
  - (b) unless, within 5 business days after the date of the adjudicator's notice, all of the parties in writing authorise the adjudicator to continue as the appointed adjudicator, the adjudicator's appointment ceases; and
  - (c) the applicant may again apply for adjudication in accordance with section 26(1); and
  - (d) the period commencing on the date when the adjudicator was served with the application for adjudication and ending on and including the date when the adjudicator notifies the parties under paragraph (a) does not count for the purposes of section 26(1).

- (3) A party to a payment dispute may apply to the State Administrative Tribunal for a declaration that an appointed adjudicator is disqualified under subsection (1).
- (4) The application must be made before the person is notified of a decision or determination made under section 31(2).

*[Section 29 amended: No. 55 of 2016 s. 11.]*

### **Division 3 — The adjudication process**

#### **30. Object of adjudication process**

The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.

#### **31. Adjudicator's functions**

- (1) In this section —

*prescribed time* means —

- (a) if the appointed adjudicator is served with a response under section 27(1) — 10 business days after the date of the service of the response;
  - (b) if the appointed adjudicator is not served with a response under section 27(1) — 10 business days after the last date on which a response is required to be served under section 27(1).
- (2) An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a) —
    - (a) dismiss the application without making a determination of its merits if —
      - (i) the contract concerned is not a construction contract; or
      - (ia) the applicant gives written notice, to the adjudicator and each other party to the dispute, that they wish to withdraw the application; or

- (ii) the application has not been prepared and served in accordance with section 26(1) and (2)(b) and (c); or
  - (iia) the application has not been prepared in accordance with section 26(2)(a), unless the adjudicator is satisfied that the application complies with section 26(2)(a) sufficiently for the adjudicator to commence adjudicating the dispute; or
  - (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or
  - (iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;
- (b) otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security and, if so, determine —
  - (i) the amount to be paid or returned and any interest payable on it under section 33; and
  - (ii) the date on or before which the amount is to be paid, or the security is to be returned, as the case requires.
- (2A) Without limiting subsection (2)(b), an appointed adjudicator may, with the consent of the parties, make a determination under subsection (2)(b) in terms agreed to by the parties.
- (3) If an application is not dismissed or determined under subsection (2) within the prescribed time, or any extension of it

made under section 32(3)(a), the application is to be taken to have been dismissed when the time has elapsed.

*[Section 31 amended: No. 55 of 2016 s. 12.]*

**32. Adjudication procedure**

- (1) For the purposes of making a determination, an appointed adjudicator —
  - (a) must act informally and if possible make the determination on the basis of —
    - (i) the application and its attachments; and
    - (ii) if a response has been prepared and served in accordance with section 27, the response and its attachments;
  - and
  - (b) is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.
- (2) In order to obtain sufficient information to make a determination, an appointed adjudicator may —
  - (a) request a party to make a, or a further, written submission or to provide information or documentation, and may set a deadline for doing so;
  - (b) request the parties to attend a conference with the adjudicator;
  - (c) unless all the parties object —
    - (i) inspect any work or thing to which the payment dispute relates, provided the occupier of any place concerned consents to the entry and inspection;
    - (ii) arrange for any thing to which the payment dispute relates to be tested, provided the owner of the thing consents to the testing;

- (iii) engage an expert to investigate and report on any matter relevant to the payment dispute.
- (3) An appointed adjudicator may —
- (a) with the consent of the parties, extend the time prescribed by section 31(2) for making a determination;
  - (b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties;
  - (c) adjudicate a payment dispute simultaneously with one or more other payment disputes if satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the disputes in accordance with section 30.
- (4) If an appointed adjudicator adjudicates simultaneously 2 or more payment disputes, the adjudicator may, in adjudicating one, take into account information the adjudicator receives in relation to the other, and vice versa.
- (5) An adjudicator's power to make a determination is not affected by the failure of either or both of the parties to make a submission or provide information within time or to comply with the adjudicator's request to attend a conference with the adjudicator.
- (6) To the extent that the practice and procedure in relation to adjudications is not regulated by this Part or the regulations, an appointed adjudicator may determine his or her own procedure.

*[Section 32 amended: No. 55 of 2016 s. 13.]*

**33. Interest up to determination**

- (1) If an appointed adjudicator determines that a party to a payment dispute is liable to make a payment, he or she may also determine that interest is to be paid —
- (a) if the payment is overdue under the construction contract, on the payment in accordance with the contract; or

- (b) otherwise, on the whole or a part of the payment from the date the payment dispute arose at a rate not greater than the rate prescribed under the *Civil Judgments Enforcement Act 2004* section 8(1)(a),

until and including the date of the determination.

- (2) Subsection (1) does not authorise the awarding of interest upon interest.

*[Section 33 amended: No. 8 of 2009 s. 38(2).]*

### **34. Costs of parties to payment disputes**

- (1) Subject to subsection (2), parties to a payment dispute bear their own costs in relation to an adjudication of the dispute.
- (2) If an appointed adjudicator is satisfied that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.
- (3) If an appointed adjudicator makes a decision under subsection (2) the adjudicator must —
  - (a) decide the amount of the costs and the date on which the amount is payable; and
  - (b) give reasons for the decisions; and
  - (c) communicate the decisions and the reasons in writing to the parties.
- (4) Divisions 4 and 5, with any necessary changes, apply to a decision made under subsection (2) as if it were a determination of an appointed adjudicator.

**35. Certificates of completion etc., effect of**

- (1) This section applies if —
- (a) the construction contract to which a payment dispute relates provides for a person to certify —
    - (i) that obligations under the contract have been performed; or
    - (ii) the amount of a payment that is to be made by a party;
- and
- (b) such a certificate is provided by a party to an adjudicator in the course of an adjudication.
- (2) For the purposes of the adjudication —
- (a) if the certificate relates to the final amount payable under the contract and has the effect of finalising the contract, the certificate is to be taken to be conclusive evidence of its contents;
  - (b) in any other case the certificate is to have such evidentiary weight as the appointed adjudicator thinks fit.

**36. Determination, content of**

An appointed adjudicator's decision made under section 31(2)(b) must —

- (a) be in writing; and
  - (b) be prepared in accordance with, and contain the information prescribed by, the regulations; and
  - (c) state —
    - (i) the amount to be paid and the date on or before which it is to be paid; or
    - (ii) the security to be returned and the date on or before which it is to be returned,
- as the case requires; and

- (d) give reasons for the determination; and
- (e) identify any information in it that, because of its confidential nature, is not suitable for publication by the Building Commissioner under section 50; and
- (f) be given to the parties to the adjudication; and
- (g) be given to the Building Commissioner.

*[Section 36 amended: No. 16 of 2011 s. 128(6).]*

**37. Dismissed applications**

- (1) If under section 31(2)(a) an appointed adjudicator dismisses an application for adjudication, he or she must —
  - (a) give reasons for doing so; and
  - (b) communicate the decision and the reasons in writing to the parties.
- (2) If under section 31(3) an application for an adjudication of a payment dispute is taken to be dismissed —
  - (a) nothing in this Part prevents a further application being made under this Part for an adjudication of the dispute; and
  - (b) any further application must be made within 20 business days after the previous application is taken to be dismissed under section 31(3).

*[Section 37 amended: No. 55 of 2016 s. 14.]*

**Division 4 — Effect of determinations**

**38. Determinations have effect despite other proceedings**

An appointed adjudicator's determination is binding on the parties to the construction contract under which the payment dispute concerned arose even though other proceedings relating to the payment dispute have been commenced before an arbitrator or other person or a court or other body.

**39. Payment of amount determined and interest**

- (1) A party that is liable to pay an amount under a determination must do so on or before the date specified in the determination.
- (2) Unless the determination provides otherwise, interest at the rate prescribed under the *Civil Judgments Enforcement Act 2004* section 8(1)(a) is to be paid on such of the amount as is unpaid after the date specified in the determination.
- (3) The interest to be paid under subsection (2) forms part of the determination.
- (4) Interest under subsection (2) ceases to accrue when a copy of the determination is filed in a court under section 43.

*[Section 39 amended: No. 8 of 2009 s. 38(3); No. 55 of 2016 s. 15.]*

**40. Progress payments under determinations to be on account**

If —

- (a) an appointed adjudicator —
    - (i) determines a payment dispute concerning a claim by a contractor for payment for part performance of its obligations but not for a final payment by the principal; and
    - (ii) determines that the principal is to pay the contractor an amount in respect of the claim;
- and
- (b) the principal, in accordance with the determination, pays the amount,

the payment is to be taken to be an advance towards the total amount payable under the contract by the principal to the contractor.

**41. Determinations are final**

- (1) If on the adjudication of a payment dispute the appointed adjudicator makes a determination —
  - (a) the adjudicator cannot subsequently amend or cancel the determination except with the consent of the parties; and
  - (b) a party to the dispute may not apply subsequently for an adjudication of the dispute.
- (2) Despite subsection (1)(a), if an adjudicator's determination contains —
  - (a) an accidental slip or omission; or
  - (b) a material arithmetic error; or
  - (c) a material mistake in the description of any person, thing or matter,

the adjudicator, on the application of a party or, after notifying the parties, on the adjudicator's own initiative, may correct the determination.

**Division 5 — Enforcing determinations**

**42. Non-compliance by principal, contractor may suspend its obligations**

- (1) If a determination requires the principal to pay the contractor an amount and the principal does not pay in accordance with the determination, the contractor may give the principal notice of the contractor's intention to suspend the performance of its obligations.
- (2) The notice must —
  - (a) be in writing; and
  - (b) be prepared in accordance with, and contain the information prescribed by, the regulations; and
  - (c) state the date on which the contractor intends to suspend the performance of its obligations; and

- (d) be given to the principal at least 3 business days before that date.
- (3) If on the date stated under subsection (2)(c) in the notice the principal has not paid the contractor the amount in accordance with the determination, the contractor may suspend the performance of its obligations until no longer than 3 business days after the date on which the amount is paid.
- (4) Subsection (3) does not prevent the contractor from at any time resuming the performance of its obligations.
- (5) A contractor that suspends the performance of its obligations in accordance with this section —
  - (a) is not liable for any loss or damage suffered by the principal or by any person claiming through the principal; and
  - (b) retains its rights under the contract, including any right to terminate the contract.

*[Section 42 amended: No. 55 of 2016 s. 16.]*

**43. Determinations may be enforced as orders of court**

- (1) In this section —

***court of competent jurisdiction***, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.
- (2) A party entitled to be paid an amount under a determination may enforce the determination by filing in a court of competent jurisdiction —
  - (a) a copy of the determination that the Building Commissioner has certified to be a true copy; and
  - (b) an affidavit as to the amount not paid under the determination.

- (3) On filing under subsection (2), the determination is taken to be an order of the court, and may be enforced accordingly.

*[Section 43 amended: No. 16 of 2011 s. 128(6); No. 55 of 2016 s. 17.]*

### **Division 6 — General**

#### **44. Costs of adjudications**

- (1) For the purposes of this section the costs of an adjudication are —
- (a) the entitlements of the appointed adjudicator under subsection (2); and
  - (b) the costs of any testing done, or of any expert engaged, under section 32(2)(c).
- (2) If an appointed adjudicator, within the prescribed time in section 31(2), dismisses an application for adjudication or makes a determination of the dispute, he or she is entitled —
- (a) to be paid for his or her work —
    - (i) at a rate agreed between the adjudicator and the parties that is not more than the maximum rate, if any, prescribed by the regulations; or
    - (ii) if a rate was not agreed, at the rate published under section 51 in respect of the adjudicator;and
  - (b) to be reimbursed any expenses reasonably incurred in connection with that work.
- (3) An appointed adjudicator who is disqualified under section 29 has the entitlements in subsection (2) in respect of any adjudication work done before the disqualification is notified to the parties.
- (4) Despite subsection (2), an appointed adjudicator may refuse to communicate his or her decision or determination under

section 31(2) or 34(2) or subsection (10) until he or she has been paid and reimbursed in accordance with subsection (2).

- (5) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.
- (6) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.
- (7) Subsections (5) and (6) do not prevent a decision being made under section 34(2).
- (8) An appointed adjudicator may at any time require one or more parties to provide a reasonable deposit, or reasonable security, for the, or any anticipated costs of the adjudication.
- (9) A prescribed appointor, before appointing an adjudicator, may require the applicant for adjudication to provide a deposit, or reasonable security, for the, or any anticipated costs of the adjudication.
- (10) If a party involved in a dispute has paid more than the party's share of the costs of an adjudication of the dispute, having regard to subsection (6), the appointed adjudicator may decide that another party must pay to the first-mentioned party such amount of the costs as would result in all the parties paying an equal amount of the costs.
- (11) If an appointed adjudicator makes a decision under subsection (10) —
  - (a) the adjudicator must include in the decision the date on which the amount is payable; and
  - (b) Divisions 4 and 5, with any necessary changes, apply to the decision as if it were a determination of an appointed adjudicator.
- (12) An appointed adjudicator may recover the costs of an adjudication from a person liable to pay the costs in a court of

competent jurisdiction as if the costs were a debt due to the adjudicator.

**45. Effect of this Part on civil proceedings**

- (1) This Part does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.
- (2) If other such proceedings are instituted in relation to a payment dispute that is being adjudicated under this Part, the adjudication is to proceed despite those proceedings unless all of the parties, in writing, require the appointed adjudicator to discontinue the adjudication.
- (3) Evidence of anything said or done in an adjudication is not admissible before an arbitrator or other person or a court or other body, except for the purposes of an application made under section 29(3) or an appeal made under section 46.
- (4) An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract —
  - (a) must, in making any award, judgment or order, allow for any amount that has been or is to be paid to a party under a determination of a payment dispute arising under the contract; and
  - (b) may make orders for the restitution of any amount so paid, and any other appropriate orders as to such a determination.

**46. Review, limited right of**

- (1) A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision.
- (2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make

**Construction Contracts (Former Provisions) Act 2004**

**Part 3** Adjudication of disputes

**Division 6** General

**s. 46**

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a determination under section 31(2)(b) within 10 business days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

- (3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

*[Section 46 amended: No. 55 of 2016 s. 18.]*

## Part 4 — Administration

[47. Deleted: No. 16 of 2011 s. 128(5)]

### 48. Registering adjudicators

- (1) An individual is eligible to be a registered adjudicator if he or she has the qualifications and experience prescribed by the regulations.
- (2) The Building Commissioner may register an individual as a registered adjudicator —
  - (a) on the application of an individual; or
  - (b) on the nomination of a prescribed appointor.
- (2A) The Building Commissioner must not register an individual as a registered adjudicator after the *Building and Construction Industry (Security of Payment) Act 2021* Part 5 Division 2 comes into operation.
- (3) The regulations may prescribe a fee to be paid on making such an application or nomination.
- (4) The Building Commissioner must not register an individual as a registered adjudicator unless satisfied that the individual is eligible to be registered.
- (5) The Building Commissioner may cancel the registration of an individual as a registered adjudicator if satisfied that the individual —
  - (a) has ceased to be eligible to be registered;
  - (b) has misconducted, or is incompetent or unsuitable to conduct, adjudications under Part 3.
- (5A) The registration of an individual as a registered adjudicator is cancelled if the individual's registration as an adjudicator or review adjudicator under the *Building and Construction Industry (Security of Payment) Act 2021* Part 5 Division 2 is cancelled.

**s. 49**

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- (6) The Building Commissioner must keep a register of registered adjudicators and make it available for public inspection at no charge.
- (7) A certificate by the Building Commissioner stating that an individual was or was not at a time or in a period, or is or is not, a registered adjudicator is proof of the content of the certificate in the absence of evidence to the contrary.

*[Section 48 amended: No. 16 of 2011 s. 128(6); No. 4 of 2021 s. 138.]*

**49. Review of registration decisions**

A person who is aggrieved by a decision of the Building Commissioner made under section 48 may apply to the State Administrative Tribunal for a review of the decision.

*[Section 49 amended: No. 16 of 2011 s. 128(6).]*

**50. Publication of adjudicators' decisions**

- (1) The Building Commissioner may make available for public inspection the result, or a report, of the decisions of registered adjudicators.
- (2) The Building Commissioner is to ensure that there is not included in the result, or a report, of the determination made available under subsection (1) —
  - (a) the identities of the parties to the adjudication;
  - (b) any information in the determination that is identified under section 36(e) as being not suitable for publication because of its confidential nature.
- (3) No charge is payable for inspecting the result, or a report, of a determination made available under subsection (1).

*[Section 50 amended: No. 16 of 2011 s. 128(6).]*

**51. Appointors' and adjudicators' rates to be published**

- (1) A registered adjudicator is to ensure that the rate at which the adjudicator charges for his or her work under this Act is published in a manner approved by the Building Commissioner.
- (2) A prescribed appointor is to ensure that the rate at which the appointor charges for its work under this Act is published in a manner approved by the Building Commissioner.
- (3) Nothing in subsection (1) or (2) prevents any of the parties from agreeing the rate to be charged by a registered adjudicator or a prescribed appointor for work under this Act.
- (4) A published or agreed rate as referred to in this section is not to be more than the maximum rate, if any, prescribed by the regulations.

*[Section 51 amended: No. 16 of 2011 s. 128(6).]*

*[52. Deleted: No. 4 of 2021 s. 139.]*

## **Part 5 — Miscellaneous**

### **53. No contracting out**

- (1) A provision in an agreement or arrangement, whether a construction contract or not and whether in writing or not, that purports to exclude, modify or restrict the operation of this Act has no effect.
- (2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.
- (3) Any purported waiver, whether in a construction contract or not and whether in writing or not, of an entitlement under this Act has no effect.

### **54. Immunity from tortious liability**

- (1) In this section —  
*protected person* means an appointed adjudicator, a prescribed appointor or the Building Commissioner.
- (2) In this section, a reference to the doing of anything includes a reference to an omission to do anything.
- (3) An action in tort does not lie against a protected person for anything that the person has done, in good faith, in the performance or purported performance of a function under this Act.
- (4) The protection given by subsection (3) applies even though the thing done as described in that subsection may have been capable of being done whether or not this Act has been enacted.
- (5) Despite subsection (3), the State is not relieved of any liability that it might have for the Building Commissioner having done anything as described in that subsection.

*[Section 54 amended: No. 16 of 2011 s. 128(6).]*

**55. Regulations**

- (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.
- (2) Without limiting subsection (1), the regulations may regulate the practice and procedure in adjudications.

**56. Review of Act**

- (1) As soon as practicable after the 5<sup>th</sup> anniversary of its commencement, the Minister must review the operation and effectiveness of this Act and prepare a report about the review.
- (2) As soon as practicable after preparing the report, the Minister must cause it to be laid before each House of Parliament.

## **Part 6 — Transitional provisions**

*[Heading inserted: No. 55 of 2016 s. 19.]*

### **Division 1 — Provisions relating to the Construction Contracts Amendment Act 2016**

*[Heading inserted: No. 55 of 2016 s. 19.]*

#### **57. Resubmitted claims: previous adjudications**

The reference in section 6(2) to an adjudication that has been dismissed or determined under section 31(2) includes a reference to an adjudication that was dismissed or determined under section 31(2) before 15 December 2016.

*[Section 57 inserted: No. 55 of 2016 s. 19.]*

#### **58. Extension of periods of time**

- (1) This section applies to a period of time, specified in section 26(1), 28(1) or 29(2)(b), that expired before 15 December 2016.
- (2) If a thing that could be done, or was required to be done, within the period was not done, and the period, as extended by the amendment in the *Construction Contracts Amendment Act 2016* section 8, 10 or 11 (whichever is relevant), expires on or after 15 December 2016, the thing may be done within the period as extended.

*[Section 58 inserted: No. 55 of 2016 s. 19.]*

#### **59. Effect of notices under s. 42(1) after commencement and before 1 January 2017**

A notice purportedly given for the purposes of section 42(1) on or after 15 December 2016 and before 1 January 2017, but which was not given in compliance with section 42(2)(d), is taken to be as valid and as effective as it would have been if

section 42(2)(d) had not been amended by the *Construction Contracts Amendment Act 2016* section 16.

*[Section 59 inserted: No. 55 of 2016 s. 19.]*

**60. Payment periods: contracts entered into before 3 April 2017**

Section 10 applies to a construction contract entered into before 3 April 2017 as if the *Construction Contracts Amendment Act 2016* section 7 had not come into operation.

*[Section 60 inserted: No. 55 of 2016 s. 20.]*

## **Schedule 1 — Implied provisions**

[s. 13 to 22]

### **Division 1 — Variations**

#### **1. Variations must be agreed**

The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on —

- (a) the nature and extent of the variation of those obligations; and
- (b) the amount, or a means of calculating the amount, that the principal is to pay the contractor in relation to the variation of those obligations.

### **Division 2 — Contractor's entitlement to be paid**

#### **2. Contractor entitled to be paid**

- (1) The contractor is entitled to be paid a reasonable amount for performing its obligations.
- (2) Subclause (1) applies whether or not the contractor performs all of its obligations.

### **Division 3 — Claims for progress payments**

#### **3. Entitlement to claim progress payments**

The contractor is entitled to make one or more claims for a progress payment in relation to those of the contractor's obligations that the contractor has performed and for which it has not been paid by the principal.

#### **4. When claims for progress payments can be made**

- (1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.
- (2) The making of a claim for a progress payment does not prevent the contractor from making any other claim for moneys payable to the contractor under or in connection with this contract.

## Division 4 — Making claims for payment

### 5. Claim for payment, content

- (1) In this clause —  
*payment claim* means a claim —
- (a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under this contract; or
  - (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under this contract.
- (2) A payment claim must —
- (a) be in writing; and
  - (b) be addressed to the party to which the claim is made; and
  - (c) state the name of the claimant; and
  - (d) state the date of the claim; and
  - (e) state the amount claimed; and
  - (f) in the case of a claim by the contractor — itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and
  - (g) in the case of a claim by the principal — describe the basis for the claim in sufficient detail for the contractor to assess the claim; and
  - (h) be signed by the claimant; and
  - (i) be given to the party to which the claim is made.
- (3) In the case of a claim by the contractor, the amount claimed in a payment claim —
- (a) must be calculated in accordance with this contract; or
  - (b) if this contract does not provide a means of calculating the amount, must be —
    - (i) if this contract says that the principal is to pay the contractor one amount (the *contract sum*) for the

performance by the contractor of all of its obligations under this contract (the *total obligations*) — the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or

- (ii) if this contract says that the principal is to pay the contractor in accordance with rates specified in this contract — the value of the obligations performed and detailed in the claim calculated by reference to those rates; or
  - (iii) in any other case — a reasonable amount for the obligations performed and detailed in the claim.
- (4) Paragraph (b) of subclause (3) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subparagraphs (i), (ii) and (iii) of that paragraph.

### **Division 5 — Responding to claims for payment**

#### **6. Term used: payment claim**

In this Division —

*payment claim* means a claim —

- (a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under this contract; or
- (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under this contract.

#### **7. Responding to payment claim**

- (1) If a party that receives a payment claim —
- (a) believes the claim should be rejected because the claim has not been made in accordance with this contract; or
  - (b) disputes the whole or part of the claim,

the party must, within 14 days after receiving the claim, give the claimant a notice of dispute.

- (2) A notice of dispute must —
- (a) be in writing; and
  - (b) be addressed to the claimant; and
  - (c) state the name of the party giving the notice; and
  - (d) state the date of the notice; and
  - (e) identify the claim to which the notice relates; and
  - (f) if the claim is being rejected under subclause (1)(a) — state the reasons for the belief that the claim has not been made in accordance with this contract; and
  - (g) if the claim is being disputed under subclause (1)(b) — identify each item of the claim that is disputed and state, in relation to each of those items, the reasons for disputing it; and
  - (h) be signed by the party giving the notice.
- (3) Within 28 days after a party receives a payment claim, the party must do one of the following, unless the claim has been rejected or wholly disputed in accordance with subclause (1) —
- (a) pay the part of the amount of the claim that is not disputed;
  - (b) pay the whole of the amount of the claim.
- (4) If under this contract the principal is entitled to retain a portion of any amount payable by the principal to the contractor —
- (a) subclause (3) does not affect the entitlement; and
  - (b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of any amount retained under the entitlement.

### **Division 6 — Interest on overdue payments**

#### **8. Interest payable on overdue payments**

- (1) Interest is payable on so much of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.

- (2) The interest is to be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.
- (3) The rate of interest at any time is equal to that prescribed for that time under the *Civil Judgments Enforcement Act 2004* section 8(1)(a).

[Clause 8 amended: No. 8 of 2009 s. 38(4).]

### **Division 7 — Ownership of goods**

#### **9. When ownership of goods supplied by contractor passes**

The ownership of goods that are —

- (a) related to construction work; and
- (b) supplied to the site of the construction work by the contractor under its obligations under this contract,

passes from the contractor when whichever of the following happens first —

- (c) when the contractor is paid for the goods; or
- (d) when the goods become fixtures.

### **Division 8 — Duties as to unfixed goods on insolvency**

#### **10. Duties of principal or landowner etc. as to unfixed goods on insolvency**

- (1) In this clause —  
*insolvent* means —

- (a) in relation to a natural person, an insolvent under administration as that term is defined in the *Corporations Act 2001* of the Commonwealth;
- (b) in relation to a body corporate, an externally-administered body corporate as that term is defined in the *Corporations Act 2001* of the Commonwealth.

(2) If —

- (a) goods that are related to construction work have been supplied to the site of the construction work by the contractor under its obligations under this contract; and
- (b) the contractor has not been paid for the goods; and
- (c) the goods have not become fixtures; and
- (d) ownership of the goods has not passed from the contractor; and
- (e) the goods are in the possession of or under the control of —
  - (i) the principal; or
  - (ii) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work;

and

- (f) the principal or that person becomes an insolvent,

the principal and that person —

- (g) must not, during the insolvency, allow the goods to become fixtures or to fall into the possession of or under the control of any other person, other than the contractor, except with the prior written consent of the contractor; and
- (h) must allow the contractor a reasonable opportunity to repossess the goods.

### **Division 9 — Retention money**

#### **11. Retention money to be held on trust**

If the principal retains from an amount payable by the principal to the contractor for the performance by the contractor of its obligations a portion of that amount (the *retention money*), the principal holds the retention money on trust for the contractor until whichever of the following happens first —

- (a) the money is paid to the contractor; or

**Construction Contracts (Former Provisions) Act 2004**

**Schedule 1** Implied provisions

**Division 9** Retention money

**cl. 11**

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- (b) the contractor, in writing, agrees to give up any claim to the money; or
- (c) the money ceases to be payable to the contractor by virtue of the operation of this contract; or
- (d) an adjudicator, arbitrator, or other person, or a court, tribunal or other body, determines that the money ceases to be payable to the contractor.

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## Notes

This is a compilation of the *Construction Contracts (Former Provisions) Act 2004* and includes amendments made by other written laws. For provisions that have come into operation, and for information about any reprints, see the compilation table.

### Compilation table

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>Construction Contracts Act 2004</i> <sup>1</sup>	16 of 2004	8 Jul 2004	s. 1 and 2: 8 Jul 2004; Act other than s. 1 and 2: 1 Jan 2005 (see s. 2 and <i>Gazette</i> 14 Dec 2004 p. 5999)
<i>Statutes (Repeals and Miscellaneous Amendments) Act 2009</i> s. 38	8 of 2009	21 May 2009	22 May 2009 (see s. 2(b))
<i>Building Services (Complaint Resolution and Administration) Act 2011</i> s. 128	16 of 2011	25 May 2011	29 Aug 2011 (see s. 2(b) and <i>Gazette</i> 26 Aug 2011 p. 3475)
<b>Reprint 1: The Construction Contracts Act 2004 as at 12 Aug 2016</b> (includes amendments listed above)			
<i>Construction Contracts Amendment Act 2016</i>	55 of 2016	29 Nov 2016	s. 1 and 2: 29 Nov 2016 (see s. 2(a)); Act other than s. 1, 2, 7 and 20: 15 Dec 2016 (see s. 2(b)); s. 7 and 20: 3 Apr 2017 (see s. 2(c))
<i>Building and Construction Industry (Security of Payment) Act 2021</i> Pt. 7 Div. 3	4 of 2021	25 Jun 2021	1 Aug 2022 (see s. 2(c) and SL 2022/78 cl. 2(2)(a)(vii))

### Other notes

<sup>1</sup> Now known as the *Construction Contracts (Former Provisions) Act 2004*; short title changed (see note under s. 1).

## Defined terms

*[This is a list of terms defined and the provisions where they are defined.*

*The list is not part of the law.]*

<b>Defined term</b>	<b>Provision(s)</b>
A .....	9
adjudication.....	3
applicant.....	3
appointed adjudicator.....	3
Building Commissioner .....	3
business day .....	3
civil works .....	4(1)
construction contract.....	3
construction work .....	3, 4(2) and (4)
contract sum.....	Sch. 1 cl. 5(3)
contractor .....	3
costs of an adjudication.....	3
court of competent jurisdiction .....	43(1)
determination .....	3
insolvent.....	Sch. 1 cl. 10(1)
obligations.....	3
party .....	3, 3
payment claim.....	3, Sch. 1 cl. 5(1) and 6
payment dispute .....	3
prescribed appointor.....	3
prescribed time.....	31(1)
principal .....	3
protected person .....	54(1)
registered adjudicator.....	3
retention money .....	Sch. 1 cl. 11
site in WA .....	4(1)
total obligations.....	Sch. 1 cl. 5(3)