Western Australia

Building and Construction Industry (Security of Payment) Act 2021

Compare between:

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Building and Construction Industry (Security of Payment) Act 2021

An Act to provide an effective and fair process for securing payments under construction contracts in the building and construction industry, and for related purposes.

Part 1 — Preliminary

Division 1 — Introductory

1. Short title

This is the *Building and Construction Industry (Security of Payment) Act 2021*.

2. Commencement

This Act comes into operation as follows —

(a) Part 1 (but only Division 1) — on the day on which this Act receives the Royal Assent (***assent day***);

(b) Part 5 (but only Division 1 and only section 98) — on the day after assent day;

(c) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

3. Object of Act

(1) The object of this Act is to provide an effective and fair process for securing payments to persons who undertake to carry out construction work, or to supply related goods and services, in the building and construction industry.

(2) That object is achieved primarily by —

(a) giving those persons a statutory entitlement to progress payments; and

(b) establishing an expedited procedure for making claims for progress payments, for responding to those claims and for the adjudication of disputed claims; and

(c) ensuring money is held on trust if it has been retained to secure the performance of the contractual obligations of those persons; and

(d) giving those persons other statutory entitlements, including the right to suspend work or supply if not paid and to access retained money by substituting a performance bond.

Division 2 — Interpretation

4. Terms used

(1) In this Act —

adjudicated amount means —

(a) the amount of a progress payment that an adjudicator determines is payable under section 38(1)(a); or

(b) if the determination of the adjudicator is quashed on review — the amount of a progress payment that a review adjudicator determines is payable under section 48(2)(a);

adjudication application has the meaning given in section 28(1);

adjudication fees and expenses has the meaning given in section 49;

adjudication response has the meaning given in section 34(1);

adjudication review application has the meaning given in section 39(1);

adjudication review response has the meaning given in section 45(1);

adjudicator means —

(a) an individual registered by the Building Commissioner under Part 5 Division 2 as an adjudicator; and

(b) in relation to an adjudication application — the adjudicator appointed under section 32 to determine the application;

administrative duties, of adjudicators or review adjudicators, includes —

(a) sending and receiving documents, submissions or other communications to and from claimants, respondents or the Building Commissioner; and

(b) arranging conferences, inspections and tests; and

(c) engaging experts; and

(d) giving invoices to claimants or respondents for adjudication fees and expenses;

approved form means a mandatory form approved and published by the Building Commissioner under section 114(1);

authorised nominating authority means a person authorised by the Building Commissioner under Part 5 Division 1;

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) any other day that falls between 22 December in any year and 10 January in the following year (inclusive);

claimant means a person who makes a payment claim;

claimed amount has the meaning given in section 24(1)(b);

construction contract has the meaning given in section 5;

construction work has the meaning given in section 6;

corporation in liquidation means —

(a) a company that is being wound up under the *Corporations Act 2001* (Commonwealth); or

(b) any other corporation that is being wound up under the written law of the jurisdiction in which it is established;

corresponding security of payment law means a law of the Commonwealth or of another State or a Territory that corresponds substantially with this Act;

court of competent jurisdiction, in relation to a payment claim or a certified copy of the determination of an adjudicator or review adjudicator, 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 as set out in the payment claim or determination;

due date, for a progress payment, means the date on which the progress payment becomes payable under section 20;

head contractor has the meaning given in subsection (3);

home building work has the meaning given in the *Home Building Contracts Act 1991* section 3(1);

multiple dwellings —

(a) means 2 or more dwellings as defined in the *Home Building Contracts Act 1991* section 3(1); but

(b) does not include —

(i) 2 dwellings (whether attached or detached) on the one lot of land; or

(ii) a strata-titled dwelling as defined in that Act;

named month means January, February, March, April, May, June, July, August, September, October, November or December;

payment claim has the meaning given in section 22(1);

payment schedule has the meaning given in section 25(1);

performance bond has the meaning given in section 56;

performance security has the meaning given in section 56;

principal has the meaning given in subsection (2);

progress payment has the meaning given in section 17;

recognised financial institution means —

(a) an authorised deposit-taking institution as defined in the *Banking Act 1959* (Commonwealth) section 5(1); or

(b) any other body prescribed by the regulations for the purposes of this definition;

recourse, to performance security, means —

(a) in the case of a performance bond — the person named in the bond demanding and receiving payment under the bond; or

(b) in the case of retention money — the person who retains the retention money taking the money for themselves;

related goods and services has the meaning given in section 7;

release, of performance security, means —

(a) in the case of a performance bond — the return or cancellation of the bond; or

(b) in the case of retention money — payment of the money to the party who has carried out construction work, or supplied related goods and services, under a construction contract;

respondent means a person who is given a payment claim under section 22(1);

retention money means —

(a) money (inclusive of GST) retained by a party to a construction contract, out of money payable by that party under the contract to another party to the contract, as security for the performance of obligations of that other party under the contract in relation to the carrying out of construction work, or the supply of related goods and services, by that other party; or

(b) money (inclusive of GST) paid to a party to a construction contract, by or on behalf of another party to the contract, and retained as security for the performance of obligations of that other party under the contract in

relation to the carrying out of construction work, or the supply of related goods and services, by that other party;

Note for this definition:

Retention money is also referred to in the building and construction industry as a "hold-back".

retention money trust account has the meaning given in section 74(1);

review adjudicator means —

(a) an individual registered by the Building Commissioner under Part 5 Division 2 as a review adjudicator; and

(b) in relation to an adjudication review application — the review adjudicator appointed under section 44 to determine the application;

scheduled amount has the meaning given in section 25(2)(c);

serious offence means an offence for which the maximum penalty is (or includes) imprisonment for 5 years or more;

subcontractor means a person who undertakes to carry out construction work, or to supply related goods and services, under a construction contract otherwise than as head contractor;

value —

(a) in relation to a construction contract — has the meaning given in section 8(1); or

(b) in relation to construction work or related goods and services — means the value of the work or of the goods and services determined under section 19.

(2) In this Act, the ***principal*** is the person —

(a) for whom construction work is to be carried out, or to whom related goods and services are to be supplied, under a construction contract to which the person is a party (the ***main contract***); and

(b) who is not themselves engaged under a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work carried out, or goods and services supplied, under the main contract.

(3) In this Act, the ***head contractor*** is the person —

(a) who, as a party to the main contract, undertakes under that contract to carry out construction work for, or to supply related goods and services to, the principal; and

(b) for whom construction work is to be carried out, or to whom related goods and services are to be supplied, by another person under a separate construction contract as part of or incidental to the work carried out, or goods and services supplied, under the main contract.

Note for this subsection:

There is no head contractor when the principal contracts directly with subcontractors.

5. Term used: construction contract

In this Act —

construction contract means a contract, agreement or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

6. Term used: construction work

(1) In this Act —

construction work means the following —

(a) the construction of buildings, structures or civil works (whether permanent or not) that form, or are to form, part of land (including the seabed);

(b) the installation in or on any building, structure or civil work referred to in paragraph (a) of fittings that form, or

are to form, part of the building, structure or civil work, including for —

(i) the supply of electricity, gas or water; and

(ii) air-conditioning, heating, ventilation, lighting, fire protection, irrigation, sanitation, cleaning, security or communication systems; and

(iii) lifts or escalators;

(c) the alteration, repair, restoration, maintenance, extension, demolition, dismantling or removal of any building, structure or civil work referred to in paragraph (a) or fitting referred to in paragraph (b);

(d) the reclamation, dredging or prevention of subsidence or erosion of land;

(e) any work that is preparatory to, necessary for or an integral part of anything referred to in paragraphs (a) to (d), including —

(i) site clearing, excavating, earth-moving, tunnelling or boring; and

(ii) laying foundations; and

(iii) erecting, maintaining or dismantling cranes, scaffolding or other temporary buildings or structures; and

(iv) cleaning, painting, decorating or treating surfaces; and

(v) site restoration and landscaping;

(f) work prescribed by the regulations to be construction work for the purposes of this Act.

(2) In subsection (1) —

civil works includes the following —

(a) roads;

(b) railways (including light rail);

(c) bridges or underpasses;

(d) airport runways;

(e) waterways, harbours, ports or marinas;

(f) electricity or telecommunication lines;

(g) water, gas, oil, sewage or other pipelines;

(h) dams, levees, aqueducts, drains, seawalls or retaining walls;

(i) pavements, ramps, slipways or tunnels;

(j) works, apparatus or structures associated with the works referred to in paragraphs (a) to (i).

(3) However, in this Act ***construction work*** does not include —

(a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not; or

(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral or other substance; or

(c) constructing or fitting out the whole or any part of a watercraft; or

(d) work prescribed by the regulations not to be construction work for the purposes of this Act.

7. Term used: related goods and services

(1) In this Act —

related goods and services means —

(a) goods of the following kinds —

(i) materials or components (whether pre-fabricated or not) that are to form part of any building, structure, civil work or other thing resulting from construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

and

(b) services of the following kinds —

(i) the provision of labour to carry out construction work;

(ii) professional services that relate directly to construction work or the assessment of its feasibility, including surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying, and project management services, but not including accounting, financial or legal services;

and

(c) goods or services prescribed by the regulations to be related goods and services for the purposes of this Act.

(2) However, in this Act ***related goods and services*** does not include any goods or services of a kind prescribed by the regulations not to be related goods and services for the purposes of this Act.

(3) A reference in this Act to related goods and services includes a reference to related goods or services.

8. Value of construction contract

(1) In this Act —

value, of a construction contract at any relevant time, means —

(a) the total amount payable under the contract at that time for construction work undertaken to be carried out, or related goods and services undertaken to be supplied, under the contract (inclusive of GST); or

(b) if the contract does not provide for the total amount payable under the contract at that time — a reasonable estimate of the total amount at that time calculated as follows —

(i) the estimate is to be based on all the construction work to be carried out and all the related goods and services to be supplied, including any to be carried out or supplied at the option of either party to the contract;

(ii) an estimate of quantities is to take into account all relevant information in the possession of the parties to the contract at that time;

(iii) the estimate is to be based on prevailing rates or prices in the building and construction industry at that time;

(iv) the estimate is to take into account any anticipated movements in those rates or prices during the period of the contract.

(2) The value of a construction contract that is a component contract for a project is taken to be the total value of all the component contracts for that project.

(3) Construction contracts are component contracts for a project if —

(a) the parties to the contracts are the same; and

(b) the construction contracts are for the carrying out of construction work, or the supply of related goods and services, at the same site or at adjacent sites; and

(c) a single construction contract could have been entered into instead of those separate contracts; and

(d) the construction contracts do not include a contract entered into after a separate tender process.

Division 3 — Application of Act

9. Construction contracts to which Act applies

(1) A provision of this Act applies to construction contracts entered into after the provision comes into operation under section 2(c).

Notes for this subsection:

1. Section 2(c) enables the staged commencement of this Act, including the later commencement of new industry requirements (such as those relating to retention money trusts).
2. The *Construction Contracts Act 2004* (renamed the *Construction Contracts (Former Provisions) Act 2004*) continues to apply to construction contracts entered into before the commencement of section 22 of this Act.

(2) This Act applies to a construction contract —

(a) whether written or oral, or partly written and partly oral (and even if it is required by this Act to be written); and

(b) whether entered into in this State or elsewhere; and

(c) whether expressed to be governed by the law of this State or the law of another jurisdiction.

10. Construction contracts to which Act does not apply

(1) This Act does not apply to a construction contract for home building work if —

(a) the principal is an individual; and

(b) the work is not carried out in relation to multiple dwellings or for the purposes of a residential development business of the principal; and

(c) the value of the contract does not exceed $500 000 (or any greater amount prescribed by the regulations for the purposes of this paragraph); and

(d) the contract is not between a head contractor and a subcontractor, and not between 2 subcontractors, in relation to the carrying out of the work.

Note for this subsection:

On the enactment of this Act, a construction contract the value of which is $500 000 (or another amount prescribed by the regulations) or more is not a home building work contract as defined in the *Home Building Contracts Act 1991*.

(2) This Act does not apply to a construction contract to the extent that it provides that a party undertakes to carry out construction work, or supply related goods and services, as an employee (as defined in the *Industrial Relations Act 1979* section 7(1)) of the party for whom the work is to be carried out or to whom the related goods and services are to be supplied.

(3) This Act does not apply to a construction contract to the extent that it provides that a party undertakes to carry out construction work, or supply related goods and services, as a condition of a loan agreement with a recognised financial institution.

(4) This Act does not apply to a construction contract to the extent that it forms part of a loan, guarantee or insurance agreement under which a recognised financial institution undertakes any of the following or to the extent that it provides that a party to the contract undertakes any of the following —

(a) to lend money or to repay money lent;

(b) to guarantee payment of money owing or repayment of money lent;

(c) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the contract.

(5) This Act does not apply to a construction contract to the extent that it provides that the consideration payable for construction work carried out, or for related goods and services supplied, under the contract —

(a) is not monetary consideration; or

(b) is to be calculated otherwise than by reference to the value of the work carried out or the goods and services supplied.

(6) This Act does not apply to a construction contract to the extent that it deals with construction work carried out outside Western Australia or with related goods and services supplied for construction work carried out outside Western Australia.

(7) For the purposes of subsection (6), Western Australia includes any area of water adjacent to Western Australia —

(a) that is within the territorial limits of the State; or

(b) that is outside the territorial limits of the State if the construction contract is governed by the law of the State.

11. Act binds Crown

This Act binds the Crown in right of Western Australia and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

Part 2 — Construction contracts and right to progress payments

Division 1 — Form and content of construction contracts

12. Model forms of construction contracts

(1) The Building Commissioner may, for the purpose of assisting participants in the building and construction industry, prepare and publish model forms of construction contracts.

(2) Different model forms may be prepared and published for use in different circumstances.

(3) The use of a model form of construction contract is not mandatory.

13. Construction contracts that are to be in writing and contain mandatory information

(1) In this section —

building service has the meaning given in the *Building Services (Complaint Resolution and Administration) Act 2011* section 3;

building service contractor means a person registered under the *Building Services (Registration) Act 2011* section 18.

(2) This section applies to a construction contract if —

(a) a party to the contract is a building service contractor; and

(b) the contract is for the carrying out by that or the other party to the contract of construction work that is a building service or for the supply by that or the other party to the contract of related goods and services for a building service; and

(c) the registration of the building service contractor entitles the contractor to carry out the building service referred to in paragraph (b); and

(d) the value of the contract exceeds the amount prescribed by the regulations for the purposes of this paragraph.

(3) A building service contractor who enters into a construction contract to which this section applies commits an offence if —

(a) the contract is not in writing; or

(b) the contract is in writing but does not include the mandatory contract information under subsection (6).

Penalty for this subsection: a fine of $2 000.

(4) A building service contractor who has entered into a contract that becomes a construction contract to which this section applies because of a variation of the contract commits an offence if —

(a) the contract as varied is not in writing; or

(b) the contract as varied is in writing but does not include the mandatory contract information under subsection (6).

Penalty for this subsection: fine of $2 000.

(5) It is a defence to a charge for an offence under subsection (3) or (4) to prove that —

(a) it was not reasonably practicable to comply with that subsection; and

(b) the work was required to be carried out, or the related goods and services were required to be supplied, urgently.

(6) For the purposes of subsections (3)(b) and (4)(b), the mandatory contract information is as follows —

(a) the names of the parties to the construction contract;

(b) the registration number of the building service contractor;

(c) a general description of the construction work to be carried out or of the related goods and services to be supplied;

(d) the amount to be paid for carrying out the construction work or supplying the related goods and services (or how that amount is to be calculated);

(e) any other information prescribed by the regulations for the purposes of this paragraph.

(7) A construction contract is not invalidated because a building service contractor contravenes this section in relation to the contract.

14. Prohibited terms: pay when paid provisions

(1) In this section —

amount owing, in relation to a construction contract, means the amount owing for construction work carried out or undertaken to be carried out, or for related goods and services supplied or undertaken to be supplied, under the contract;

pay when paid provision, of a construction contract, means a provision of the contract —

(a) that makes the liability of one party (the ***first party***) to pay an amount owing to another party (the ***second party***) contingent on payment to the first party by a further person (the ***third party***) of the whole or any part of that amount; or

(b) that makes the due date for payment of an amount owing by the first party to the second party dependent on the date on which payment of the whole or any part of that amount is made to the first party by the third party; or

(c) that otherwise makes any of the following contingent or dependent on the operation of another contract —

(i) the liability to pay an amount owing;

(ii) the due date for payment of an amount owing;

(iii) the making of a claim for an amount owing;

(iv) the release of retention money or of a performance bond.

(2) A pay when paid provision of a construction contract has no effect in relation to any payment for construction work to be carried out, or for related goods and services to be supplied, under the contract.

Note for this section:

Some provisions defined in this section as pay when paid provisions may also be referred to in the building and construction industry as "pay if paid" provisions or "pass-through" provisions.

15. Other prohibited terms prescribed by regulations

(1) The regulations may prohibit other provisions of construction contracts.

(2) The regulations may prohibit those provisions in all or any class of construction contracts.

(3) A provision of a construction contract that is prohibited by the regulations has no effect.

16. Notice-based time bar has no effect if declared unfair in particular case

(1) In this section —

notice includes notice of the actual or estimated time or cost for doing a thing, notice of intention to do a thing, notice of the description of a thing or notice of any other kind;

notice-based time bar provision, of a construction contract, means a provision of the contract that makes any of the following contingent on the provision of notice by a party to the contract —

(a) an entitlement to payment for construction work carried out or undertaken to be carried out, or for related goods

and services supplied or undertaken to be supplied, under the contract;

(b) an extension of time for doing a thing that affects an entitlement referred to in paragraph (a).

(2) A notice-based time bar provision of a construction contract may be declared under this section to be unfair in the case of a particular entitlement under the contract if compliance with the provision in that case —

(a) is not reasonably possible; or

(b) would be unreasonably onerous.

(3) A notice-based time bar provision of a construction contract may be declared to be unfair by —

(a) an adjudicator or review adjudicator for the purposes of adjudication proceedings under this Act in relation to the contract; or

(b) a court for the purposes of proceedings for the recovery of money or enforcing other rights under the contract; or

(c) an arbitrator for the purposes of arbitration proceedings under the contract or under any separate agreement between the parties; or

(d) an expert appointed by the parties for the purposes of proceedings to determine a matter under the contract.

(4) A notice-based time bar provision of a construction contract that is declared to be unfair has no effect in the case of the particular entitlement that is the subject of the proceedings in which it was declared unfair, but continues to have effect in other circumstances or challenges arising under the same or a related contract.

(5) The party in any proceedings who alleges that a notice-based time bar provision is unfair bears the onus of establishing that it is unfair.

(6) In determining whether a notice-based time bar provision is unfair, the adjudicator, review adjudicator, court, arbitrator or expert must take the following into account —

(a) when the party required to give notice would reasonably have become aware of the relevant event or circumstance, having regard to the last day on which notice could have been given;

(b) when and how notice was required to be given;

(c) the relative bargaining power of each party in entering into the construction contract;

(d) the irrebuttable presumption that the parties have read and understood the terms of the construction contract;

(e) the rebuttable presumption that the party required to give notice possesses the commercial and technical competence of a reasonably competent contractor;

(f) if compliance with the provision is alleged to be unreasonably onerous — whether the matters set out in the notice are final and binding;

(g) any matter prescribed by the regulations for the purposes of this paragraph.

(7) In determining whether a notice-based time bar provision is unfair, the adjudicator, review adjudicator, court, arbitrator or expert must not take into account the provisions of any related contract or the things that happened under any related contract.

Division 2 — Right to progress payments

17. Right to progress payments

(1) A person who, under a construction contract, has undertaken to carry out construction work, or to supply related goods and services, is entitled to receive payment under this section (a ***progress payment***).

(2) A progress payment to which a person is entitled under this section includes the following —

(a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract;

(b) a single or one-off payment for construction work carried out, or for related goods and services supplied, under a construction contract;

(c) a milestone payment under a construction contract, being a payment that is based on an event or date.

(3) A progress payment to which a person is entitled under this section does not include payment for any expenses, loss or damages incurred because of a breach of a construction contract.

(4) The entitlement to receive a progress payment under this section is, subject to section 55(3), a separate and additional entitlement to any entitlement to payment under a construction contract, and accordingly a reference in this Act to a progress payment is a reference to a progress payment to which a person is entitled under this section.

(5) A person is not entitled to receive a progress payment under this section in respect of anything for which the person is not entitled to monetary or other consideration under the *Building Services (Registration) Act 2011* because of a contravention of section 7(1) of that Act.

Notes for this section:

1. Section 23 sets out when claims for progress payments under this Part may be made.
2. Section 55(3) prevents double payment by requiring any progress payment under this section to be deducted from any payments that a court would otherwise order to be paid in proceedings to enforce the construction contract.
3. A person contravenes the *Building Services (Registration) Act 2011* section 7(1) by doing a thing without the appropriate registration as a building service contractor required under that Act for doing that thing.

18. Amount of progress payment

The amount of a progress payment to which a person is entitled in relation to a construction contract is —

(a) if the contract provides for the matter — the amount calculated in accordance with the contract; or

(b) if the contract does not provide for the matter — the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or of related goods and services supplied or undertaken to be supplied, by the person under the contract.

19. Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract must be valued for the purposes of a progress payment —

(a) if the contract provides for the matter — in accordance with the contract; or

(b) if the contract does not provide for the matter — having regard to each of the following —

(i) the contract price for the work;

(ii) any other rates or prices set out in the contract;

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a stated amount;

(iv) if any of the work is defective — the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract must be valued for the purposes of a progress payment —

(a) if the contract provides for the matter — in accordance with the contract; or

(b) if the contract does not provide for the matter — having regard to each of the following —

(i) the contract price for the goods and services;

(ii) any other rates or prices set out in the contract;

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a stated amount;

(iv) if any of the goods are defective — the estimated cost of rectifying the defect.

(3) In the case of materials and components that are to form part of any building, structure, work or other thing resulting from construction work, the only materials and components to be included in the valuation for the purposes of subsection (2)(b) are those that have become or, on payment, will become the property of the party or other person for whom the construction work is being carried out.

20. Due date for payment

(1) A progress payment (other than for home building work) becomes payable —

(a) in the case of a progress payment to be made by a principal to a head contractor — on the date that is 20 business days after a payment claim is made under Part 3 for the progress payment; or

(b) in the case of a progress payment to be made to a subcontractor — on the date that is 25 business days after a payment claim is made under Part 3 for the progress payment.

Note for this subsection:

The due date for payment by a principal when there is no head contractor is 25 business days after the payment claim is made as provided by paragraph (b) — see definitions of ***head contractor*** and ***subcontractor*** in section 4(1).

(2) However, if the construction contract provides that the progress payment becomes payable on an earlier date than that provided by subsection (1), the progress payment becomes payable on that earlier date.

(3) A progress payment for home building work becomes payable —

(a) if the construction contract provides for the matter — on the date determined in accordance with the contract; or

(b) if the construction contract does not provide for the matter — on the date that is 10 business days after a payment claim is made under Part 3 for the progress payment.

Note for this section:

Section 14(2) provides that a pay when paid provision in a construction contract has no effect.

21. Interest on payment after due date

Interest is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates —

(a) the rate provided in the construction contract;

(b) the rate prescribed under the *Civil Judgments Enforcement Act 2004* section 8(1)(a).

Part 3 — Procedure for obtaining progress payments

Division 1 — Payment claims and schedules

22. Making payment claims

(1) A person who is or claims to be entitled to a progress payment may give a claim for the progress payment (a ***payment claim***) to the person who, under the relevant construction contract, is or may be liable to make the progress payment.

(2) A payment claim is made for the purposes of this Act when the claim is given under subsection (1).

Note for this section:

Section 113 deals with the manner in which claims and other documents are to be given under this Act.

23. When payment claims may be made

(1) In this section —

defects liability period, for a construction contract, means the period that —

(a) starts on the day of the practical completion of construction work under the contract; and

(b) ends on the last day that any omission or defect in the construction work may be required or directed to be rectified under the contract and written law;

final payment means the final payment (or a single or one-off payment) for construction work carried out, or related goods and services supplied, under a construction contract;

practical completion, of construction work under a construction contract, means —

(a) if the contract provides for the day on which there is practical completion of the work — that day; or

(b) in any other case — the day on which the work is completed in compliance with the requirements of the contract and without any omission or defect that unreasonably affects the intended use of the work.

(2) A payment claim for a progress payment may be made —

(a) on or after the last day of the named month in which construction work was first carried out, or related goods and services were first supplied, under the construction contract; and

(b) on or after the last day of each subsequent named month.

(3) However, if the construction contract provides that a payment claim for a particular named month may be made on or after an earlier date, then the payment claim may be made on or after that earlier date.

(4) A payment claim for a progress payment (other than for a final payment) may only be made before whichever of the following is the later —

(a) the date (if any) determined in accordance with the construction contract;

(b) the date that is 6 months after the construction work to which the payment claim relates was last carried out or the related goods and services to which the payment claim relates were last supplied.

(5) A payment claim for a final payment may only be made before whichever of the following is the latest —

(a) the date (if any) determined in accordance with the construction contract;

(b) the date that is 28 days after the end of the last defects liability period for the construction contract;

(c) the date that is 6 months after the completion of all construction work to be carried out under the construction contract;

(d) the date that is 6 months after the supply of all related goods and services to be supplied under the construction contract.

(6) If the construction contract is terminated, a payment claim may be made on or after the date of termination and before the relevant date provided by this section.

(7) Unless the construction contract otherwise provides, a claimant may only make one payment claim under the construction contract for a particular named month.

(8) Subsection (7) does not prevent the claimant from —

(a) making a single payment claim in respect of more than one progress payment; or

(b) including in a payment claim an unpaid amount that has been the subject of a previous payment claim.

Note for this section:

Division 6 extends the payment claim provisions of this Part to claims for the release of retention money or other performance security or for the substitution of performance security.

24. Content of payment claims

(1) A payment claim must —

(a) be made in writing and be in the approved form (if any); and

(b) indicate the amount of the progress payment that the claimant claims is payable by the respondent (the ***claimed amount***); and

(c) describe the items and quantities of construction work, or related goods and services, to which the progress payment relates; and

(d) state that it is made under this Act; and

(e) include any other information required by the regulations.

(2) A payment claim given to the principal for home building work under a construction contract the value of which exceeds the amount referred to in section 10(1)(c) must include a homeowner's notice in the form prescribed by the regulations unless —

(a) the principal is a corporation; or

(b) the work is carried out in relation to multiple dwellings or for the purposes of a residential development business of the principal.

Note for this subsection:

A homeowner's notice is not required for a payment claim given under a contract between a head contractor and a subcontractor or under a contract between 2 subcontractors.

(3) A payment claim may be a document described as an invoice and, if so, the amount stated in the invoice is sufficient indication of the claimed amount.

(4) A payment claim need not be signed by the claimant.

25. Response to payment claim: payment schedule

(1) The respondent may respond to a payment claim by giving a schedule (a ***payment schedule***) to the claimant before the earlier of the following —

(a) the time required by the construction contract;

(b) 15 business days after the payment claim is made.

(2) A payment schedule must —

(a) be given in writing and be in the approved form (if any); and

(b) identify the payment claim to which it relates; and

(c) indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***); and

(d) if the respondent does not propose to make any payment — indicate that the respondent does not propose to make any payment.

(3) If the scheduled amount is less than the claimed amount or no payment is proposed, the payment schedule must indicate —

(a) why the scheduled amount is less or no payment is proposed; and

(b) if the reason is that the respondent is withholding payment — the reason why the respondent is withholding payment.

Notes for this section:

1. This Division provides that if no payment schedule is given within the time allowed, the respondent becomes liable to pay the claimed amount.
2. Division 2 provides that if no payment schedule is given within the time allowed, the respondent cannot make an adjudication response to an adjudication application, and that if a payment schedule is given the respondent cannot include in an adjudication response reasons for withholding payment that were not identified in the payment schedule.
3. Division 3 provides that if no payment schedule is given, the respondent is not entitled to make an adjudication review application.

26. Claimed amount becomes payable if payment schedule not duly given

The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates if the respondent does not respond to the claim by giving a payment schedule to the claimant within the time allowed for the response.

27. Consequences of not paying claimed or scheduled amount

(1) In this section —

claimed or scheduled amount owed, in relation to a payment claim, means —

(a) if the respondent did not respond to the payment claim by giving a payment schedule to the claimant within the time allowed for the response — the claimed amount under the payment claim; or

(b) if the respondent did respond to the payment claim by giving a payment schedule to the claimant within the time allowed for the response and the payment schedule indicates the scheduled amount that the respondent proposes to pay to the claimant — that scheduled amount.

(2) If a claimant makes a payment claim for a progress payment and the respondent does not pay the claimed or scheduled amount owed to the claimant in full on or before the due date for the progress payment, the claimant may do either but not both of the following —

(a) recover from the respondent the unpaid portion of the claimed or scheduled amount owed as a debt due to the claimant in a court of competent jurisdiction;

(b) make an adjudication application in relation to the payment claim.

Notes for this subsection:

1. Division 7 provides that in addition to taking debt recovery action or making an adjudication application, the claimant may suspend work or supply under the construction contract.
2. If no payment is proposed in a payment schedule, the claimant cannot commence proceedings in a court under this section, but may make an adjudication application.

(3) If the claimant commences proceedings under this section in a court of competent jurisdiction to recover from the respondent the unpaid portion of the claimed or scheduled amount owed —

(a) judgment in favour of the claimant is not to be given unless the court is satisfied that the relevant circumstances exist; and

(b) the respondent is not, in those proceedings, entitled —

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

(4) The relevant circumstances for the purposes of subsection (3)(a) are as follows —

(a) the respondent —

(i) did not respond to the payment claim by giving a payment schedule to the claimant within the time allowed for the response; or

(ii) did respond to the payment claim by giving a payment schedule to the claimant within the time allowed for the response, and the payment schedule indicates the scheduled amount that the respondent proposes to pay to the claimant;

(b) the respondent has not paid the claimed or scheduled amount owed to the claimant in full on or before the due date for the progress payment;

(c) if the payment of the claimed or scheduled amount owed is dependent on the substitution of performance security under Division 6 — the requisite compliant performance bond has been duly executed by an authorised issuing institution as referred to in that Division.

Division 2 — Adjudication of payment disputes

28. When claimant may apply for adjudication of payment claim

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if —

(a) the respondent has not paid the claimed or scheduled amount owed (as defined in section 27(1)) to the claimant in full on or before the due date for the progress payment; or

(b) the scheduled amount is less than the claimed amount or no payment is proposed in the payment schedule given by the respondent.

(2) If the respondent does not provide a payment schedule in response to a payment claim, an adjudication application cannot be made unless —

(a) the claimant has, within 20 business days after the due date for the progress payment, given written notice to the respondent of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

(3) The due date for a progress payment is not extended because the respondent is given a further opportunity to provide a payment schedule.

(4) An adjudication application must be made within 20 business days after the claimant first becomes entitled to make the application.

29. To whom adjudication application made

(1) An adjudication application must be made —

(a) if the construction contract provides for the person who is to be the adjudicator for the application — to that adjudicator; or

(b) in any other case — to the authorised nominating authority chosen by the claimant.

(2) Despite subsection (1)(a), an adjudication application may be made to any authorised nominating authority chosen by the claimant if it is another adjudication application referred to in section 32(8) or 37(5)(b).

(3) A claimant is not bound by any provision of the construction contract that designates or restricts the authorised nominating authority to which an adjudication application may be made.

30. Requirements relating to adjudication application

(1) An adjudication application —

(a) must be made in writing and be in the approved form (if any); and

(b) must identify the payment claim and the payment schedule (if any) to which it relates; and

(c) must be accompanied by a copy of the construction contract or of the relevant provisions of the construction contract; and

(d) if made to an authorised nominating authority — must be accompanied by the application fee (if any) determined by that authority; and

(e) may contain submissions relevant to the application that the claimant chooses to include.

(2) The claimant must give a copy of the adjudication application (and of any accompanying documents) to the respondent within 1 business day after the application is made.

(3) The regulations may prescribe the maximum application fee that an authorised nominating authority may determine under this section (including different maximum amounts depending on the amount of the payment claim or on other specified factors).

Note for this section:

Under Division 4 the authorised nominating authority or adjudicator may require the payment of a deposit or security for the estimated adjudication fees and expenses of the adjudicator.

31. Withdrawal of adjudication application

(1) An adjudication application may be withdrawn by the claimant at any time before the application is determined by giving written notice of the withdrawal —

(a) to the respondent; and

(b) to the adjudicator appointed to determine the application or to the authorised nominating authority to which the application was made.

(2) An adjudication application is taken to be withdrawn if the respondent has, before the application is determined, paid the claimant the claimed amount in full.

32. Appointment of adjudicator

(1) If an adjudication application is made to an adjudicator, the adjudicator is taken to be appointed to determine the application when written notice of the acceptance of the appointment is given by the adjudicator to the claimant and the respondent.

(2) If an adjudication application is made to an authorised nominating authority —

(a) the authority must appoint an adjudicator; and

(b) the adjudicator is taken to be appointed to determine the application when written notice of the appointment is given by the authority to the claimant and the respondent.

(3) An adjudicator must, within 5 business days after an adjudication application is made, be appointed in accordance with this section to determine the application.

(4) An adjudicator who gives written notice of acceptance of the appointment, or an authorised nominating authority who gives written notice of the appointment of an adjudicator, must give a copy of the notice to the Building Commissioner.

(5) An adjudicator may, at any time before determining an adjudication application, withdraw from the adjudication by giving written notice of the withdrawal and the reasons for the withdrawal to the claimant and the respondent.

(6) An adjudicator who gives written notice of withdrawal from the adjudication must give a copy of the notice to the Building Commissioner and, if appointed by an authorised nominating authority, to the authority.

(7) An adjudication application is taken to be withdrawn if —

(a) an adjudicator has not, within 5 business days after the adjudication application is made, been appointed in accordance with this section to determine the adjudication application; or

(b) the adjudicator withdraws from the adjudication under subsection (5).

(8) If an adjudication application is taken to be withdrawn under subsection (7), the claimant may make another adjudication application within 5 business days after the withdrawal despite the expiry of the time otherwise allowed for making adjudication applications.

33. Disqualification of adjudicator with conflict of interest in adjudication application

(1) In this section —

relevant contract, in relation to an adjudication application, means —

(a) the construction contract the subject of the application; or

(b) any other construction contract if the work or supply under that other contract is part of, or incidental to, the work or supply under the construction contract the subject of the application.

(2) An adjudicator has a conflict of interest in relation to an adjudication application if the adjudicator —

(a) is a party to a relevant contract; or

(b) prepared (or was involved in the preparation of) a relevant contract or the payment claim, payment schedule, adjudication application or adjudication response; or

(c) has a material personal interest in the outcome of the adjudication; or

(d) has a conflict of interest of a kind prescribed by the regulations for the purposes of this paragraph.

(3) An adjudicator does not have a conflict of interest in relation to an adjudication application —

(a) merely because of a previous appointment to adjudicate a payment claim, or of a previous conflict of interest, involving either or both of the parties; or

(b) merely because a previous determination of the adjudicator involving either or both of the parties was set aside or quashed by a review adjudicator or by a court.

(4) An authorised nominating authority must not appoint an adjudicator to determine an adjudication application if the authority is aware that the adjudicator has a conflict of interest in relation to the application.

(5) An adjudicator must not accept an appointment to determine an adjudication application if the adjudicator is aware that the adjudicator has a conflict of interest in relation to the application.

(6) If, after being appointed to determine an adjudication application, the adjudicator becomes aware that the adjudicator has a conflict of interest in relation to the application, the adjudicator must withdraw from the adjudication in accordance with section 32.

34. Adjudication response

(1) If the respondent has given the claimant a payment schedule within the time allowed by this Part, the respondent may give the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) within 10 business days after receiving a copy of the adjudication application.

(2) The adjudication response —

(a) must be given in writing and be in the approved form (if any); and

(b) must identify the adjudication application to which it relates; and

(c) may contain submissions relevant to the response that the respondent chooses to include.

(3) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule given to the claimant.

(4) The respondent must give a copy of the adjudication response to the claimant within 1 business day after the response is given to the adjudicator.

Note for this section:

Division 3 provides that if no adjudication response is given, the respondent is not entitled to make an adjudication review application.

35. Adjudication procedures

(1) An adjudicator must, subject to complying with the requirements of this Division, determine an adjudication application fairly and as quickly, informally and inexpensively as possible.

(2) An adjudicator cannot delegate the determination of an adjudication application to another person or body.

(3) For the purposes of determining an adjudication application, the adjudicator may do any of the following —

(a) request further submissions from either party and give the other party an opportunity to make submissions commenting on any further submissions made;

(b) set deadlines for any further submissions;

(c) call a conference of the parties;

(d) carry out an inspection, or arrange for a test, of any matter or thing to which the payment claim relates;

(e) engage an expert to investigate and report on any matter to which the payment claim relates;

(f) engage an authorised nominating authority to assist the adjudicator with administrative duties.

(4) A conference of the parties that is called by the adjudicator must be conducted informally.

(5) The adjudicator cannot carry out an inspection, arrange for a test or engage an expert if all the parties object.

(6) This section does not authorise the carrying out of an inspection or testing in any premises, or the inspection or testing of any thing, without the consent of the occupier of the premises or the owner of the thing.

(7) An adjudicator's determination of an adjudication application is not affected by the failure of a party to make a submission within the time allowed or to comply with the adjudicator's call for a conference.

(8) An adjudicator is not bound by the rules of evidence.

(9) Adjudicators may, to the extent that their procedure is not otherwise regulated under this Act, determine their own procedure.

36. Jurisdiction to make determination, frivolous or vexatious applications and complex applications

(1) An adjudicator must consider whether the adjudicator has jurisdiction to determine the adjudication application.

(2) If the adjudicator decides that the adjudicator does not have jurisdiction to determine the adjudication application, the adjudicator's determination of the application must set out that decision and provide that no amount is payable under the determination.

(3) If an adjudicator decides that an adjudication application is frivolous or vexatious, or is too complex for the adjudicator to make a fair determination within the time available to the adjudicator, the adjudicator's determination of the application must set out that decision and provide that no amount is payable under the determination.

(4) An adjudicator's determination must set out the reasons for a decision that the adjudicator does not have jurisdiction to determine the adjudication application or that the adjudication application is too complex.

(5) This section does not prevent an adjudicator's determination specifying any adjudication fees and expenses that are payable.

37. Time allowed for adjudicator to determine adjudication application

(1) If the respondent is entitled to give an adjudication response, the adjudicator must not determine the adjudication application until after the response is given or, if not given, until after the last date on which the response could have been given.

(2) The adjudicator must determine an adjudication application within 10 business days after —

(a) if the respondent is entitled to give an adjudication response and has given an adjudication response within the time allowed under this Division — the date on which the response is given; or

(b) if the respondent is entitled to give an adjudication response but has not given an adjudication response within the time allowed under this Division — the last date on which the response could have been given; or

(c) if the respondent is not entitled to give an adjudication response — the date on which the adjudicator was appointed to determine the application.

(3) However, the claimant and the respondent may agree to extend the time by which the adjudicator must determine the adjudication application under this section, but only if the total period of all extensions under this section does not exceed 20 business days.

(4) An adjudicator's determination is not invalid merely because it is made after the time allowed by this section for determining the adjudication application.

(5) If the adjudicator fails to determine an adjudication application within the time allowed by this section (or, if that time is extended under section 51(2), within that time as extended) —

(a) the claimant may withdraw the application by giving written notice of the withdrawal to the adjudicator and the respondent; and

(b) the claimant may make another adjudication application within 5 business days after the withdrawal despite the expiry of the time otherwise allowed for making adjudication applications.

(6) Despite subsection (1), the adjudicator may determine an adjudication application before an adjudication response is given if the adjudicator decides that the adjudicator does not have jurisdiction to determine the application or that the application is frivolous or vexatious.

Notes for this section:

1. Under Division 4 the adjudicator may, when determining the proportion of adjudication fees and expenses payable by each party, have regard to any unreasonable withholding of consent by a party to extending the time for determining the adjudication application.
2. Under Division 4 the adjudicator is not entitled to adjudication fees and expenses if the adjudicator fails to determine the adjudication application within the time allowed by this Part.

38. Adjudicator's determination

(1) The adjudicator must determine —

(a) the amount of the progress payment, if any, to be paid by the respondent to the claimant; and

(b) the due date for the payment of that amount under section 20; and

(c) the rate of interest payable on that amount under section 21; and

(d) if no amount of progress payment is required to be paid — that no amount is payable.

Notes for this subsection:

1. Part 4 provides that the adjudicator may also determine that an amount of money is to be paid out of a retention money trust account under that Part.
2. Division 4 provides that the adjudicator is to determine the amount of adjudication fees and expenses payable to the adjudicator and the proportion of the amount for which each party is liable.
3. Sections 58 and 59 provide that a determination may require the release of performance security or the substitution of performance security that is proposed in a payment claim.

(2) In determining an adjudication application, the adjudicator may consider only the following matters —

(a) this Act and the regulations;

(b) the relevant construction contract;

(c) the relevant payment claim and the adjudication application, together with submissions (including accompanying documents) duly made by the claimant in support of the claim and application;

(d) the relevant payment schedule and adjudication response (if any), together with submissions (including accompanying documents) duly made by the respondent in support of the schedule and response;

(e) any further submissions of the claimant or respondent (including accompanying documents) requested by the adjudicator;

(f) the outcome of any conference of the parties called by the adjudicator;

(g) the results of any inspection carried out or testing arranged by the adjudicator;

(h) any expert report obtained by the adjudicator.

(3) In determining an adjudication application, the adjudicator must not consider the following matters —

(a) an adjudication response that is given after the time allowed by this Division;

(b) any reasons included in an adjudication response for withholding payment that cannot under this Division be included in the adjudication response because those reasons were not included in the payment schedule;

(c) any submissions (including accompanying documents) made to the adjudicator that are not authorised to be made under this Division or that contravene any other limitation prescribed by the regulations on the submissions that may be made.

(4) The adjudicator's determination must —

(a) be made in writing and be in the approved form (if any); and

(b) include the reasons for the determination; and

(c) be given by the adjudicator to the claimant, respondent and Building Commissioner.

(5) Subsection (6) applies if the adjudicator (or any other adjudicator or review adjudicator) has, for the purposes of a previous determination, calculated —

(a) the value of any construction work carried out under a construction contract; or

(b) the value of any related goods and services supplied under a construction contract.

(6) The adjudicator is, in a subsequent determination that involves calculating the value of construction work or related goods and services referred to in subsection (5), to give the work or related goods and services the same value as that previously calculated unless the claimant or respondent satisfies the adjudicator that the value has changed since the previous calculation.

(7) The adjudicator may, on the adjudicator's own initiative or on the application of the claimant or respondent, correct the adjudicator's determination if it contains —

(a) a clerical mistake or defect of form; or

(b) an error arising from an accidental slip or omission; or

(c) a material arithmetic error or a material mistake in the description of any person, thing or matter.

Division 3 — Review of adjudications

39. When claimant or respondent may apply for review of adjudication

(1) A claimant or respondent may apply for a review of an adjudicator's determination of an adjudication application (an ***adjudication review application***) if authorised to do so by this section.

(2) A claimant may apply for a review of the adjudicator's determination of an adjudication application if —

(a) the respondent has not already applied for a review of the adjudicator's determination (or, if the respondent has already applied, the respondent has withdrawn their application); and

(b) either —

(i) the adjudicated amount is less than the claimed amount and the amount of that difference exceeds the minimum amount prescribed by the regulations for the purposes of this paragraph; or

(ii) the adjudicator decided that the adjudicator did not have jurisdiction to determine the application and the claimed amount exceeds the minimum amount prescribed by the regulations for the purposes of this paragraph.

(3) A respondent may apply for a review of the adjudicator's determination of an adjudication application if —

(a) the respondent gave the claimant a payment schedule within the time allowed by this Part; and

(b) the respondent gave the adjudicator an adjudication response within the time allowed by this Part; and

(c) the adjudicated amount is more than the scheduled amount and the amount of that difference exceeds the minimum amount prescribed by the regulations for the purposes of this paragraph; and

(d) the claimant has not already applied for a review of the adjudicator's determination (or, if the claimant has already applied, the claimant has withdrawn their application).

(4) A decision that the adjudicator had jurisdiction to determine an adjudication application cannot be challenged by the respondent in an adjudication review application.

(5) An adjudication review application must be made within 5 business days after the claimant or respondent making the application is given the adjudicator's determination.

40. Adjudicated amount in dispute to be paid into trust account before respondent may make adjudication review application

(1) The respondent cannot make an adjudication review application unless —

(a) the respondent has paid any part of the adjudicated amount that is not disputed by the respondent to the claimant; and

(b) the respondent has paid the adjudicated amount (or part) that is disputed by the respondent into a trust account with a recognised financial institution —

(i) established by the respondent; or

(ii) established by the authorised nominating authority to which the application was made;

and

(c) the respondent has given the claimant written notice of the payment into the trust account, together with information that identifies the trust account.

(2) Money held in a trust account under this section (including any accrued interest) is taken to be held by the respondent or the authorised nominating authority (as the case requires) on trust for the benefit of the claimant until the adjudication review application is determined or withdrawn and all money required to be paid to the claimant as a result of that determination or withdrawal has been paid.

(3) After all that money has been paid to the claimant —

(a) in the case of a trust account established by the respondent — the respondent is entitled to any money remaining in the trust account; and

(b) in the case of a trust account established by an authorised nominating authority — the authority is entitled to any money remaining in the trust account that is equal to the amount of accrued interest to the date of payment to the claimant and the respondent is entitled to any remainder.

(4) The regulations may make provision for or with respect to trust accounts under this section and payments from the accounts, including by applying provisions of Part 4, with or without modification.

41. To whom adjudication review application made

An adjudication review application must be made to the authorised nominating authority chosen by the claimant or respondent making the application.

42. Requirements relating to adjudication review application

(1) An adjudication review application —

(a) must be made in writing and be in the approved form (if any); and

(b) must be accompanied by a copy of the following —

(i) the construction contract or the relevant provisions of the construction contract;

(ii) the payment claim;

(iii) the payment schedule (if any);

(iv) the adjudication application;

(v) the adjudication response (if any);

(vi) any submissions made to the adjudicator by the claimant or respondent (including accompanying documents);

(vii) the adjudicator's determination;

and

(c) must be accompanied by the application fee (if any) determined by the authorised nominating authority to which the adjudication review application is made; and

(d) may contain submissions relevant to the application that the claimant or respondent making the application chooses to include.

(2) The claimant or respondent cannot include any reasons for a matter in the adjudication review application unless those reasons were raised in the original adjudication being reviewed.

(3) The claimant or respondent making the adjudication review application must give a copy of the application (and of any accompanying documents) to the other party within 1 business day after the application is made.

(4) The regulations may prescribe the maximum application fee that an authorised nominating authority may determine under this

section (including different maximum amounts depending on the amount of the payment claim or on other specified factors).

Note for this section:

Under Division 4 the authorised nominating authority or review adjudicator may require the payment of a deposit or security for the estimated adjudication fees and expenses of the review adjudicator.

43. Withdrawal of adjudication review application

An adjudication review application may be withdrawn by the claimant or respondent who made the application at any time before the application is determined by giving written notice of the withdrawal —

(a) to the other party to the adjudication review; and

(b) to the review adjudicator appointed to determine the application or the authorised nominating authority to which the application was made.

44. Appointment of review adjudicator

(1) If an adjudication review application is made to an authorised nominating authority —

(a) the authority must appoint a review adjudicator; and

(b) the review adjudicator is taken to be appointed to determine the application when written notice of the appointment is given by the authority to the claimant and the respondent.

(2) A review adjudicator must, within 5 business days after an adjudication review application is made, be appointed in accordance with this section to determine the application.

(3) The authorised nominating authority must give a copy of the notice of appointment of the review adjudicator to the Building Commissioner and to the adjudicator whose adjudication determination is being reviewed.

(4) A review adjudicator may, at any time before determining an adjudication review application, withdraw from the adjudication review by giving written notice of the withdrawal and the reasons for the withdrawal to the claimant and the respondent.

(5) A review adjudicator who gives written notice of withdrawal from the adjudication review must give a copy of the notice to the Building Commissioner and to the authorised nominating authority that appointed the review adjudicator.

(6) An adjudication review application is taken to be withdrawn if —

(a) a review adjudicator has not, within 5 business days after the adjudication review application is made, been appointed in accordance with this section to determine the application; or

(b) the review adjudicator withdraws from the adjudication review under subsection (4).

(7) If an adjudication review application is taken to be withdrawn under subsection (6), the claimant or respondent (as the case may be) may make another adjudication review application within 5 business days after the withdrawal despite the expiry of the time otherwise allowed for making adjudication review applications.

(8) Section 33 applies to a conflict of interest of a review adjudicator in relation to an adjudication review application in the same way as it applies to a conflict of interest of an adjudicator in relation to an adjudication application.

(9) The adjudicator who made the determination that is the subject of the adjudication review application cannot be appointed as the review adjudicator.

45. Adjudication review response

(1) The respondent (if an adjudication review application is made by the claimant) or the claimant (if an adjudication review application is made by the respondent) may give the review adjudicator a response to the adjudication review application (the ***adjudication review response***) within 10 business days after receiving a copy of the adjudication review application.

(2) The adjudication review response —

(a) must be given in writing and be in the approved form (if any); and

(b) must identify the adjudication review application to which it relates; and

(c) may contain submissions relevant to the response that the respondent or claimant chooses to include.

(3) The respondent or claimant cannot include any reasons for a matter in the adjudication review response unless those reasons were raised in the original adjudication being reviewed.

(4) The party giving the adjudication review response must give a copy of the response to the other party to the adjudication review within 1 business day after the response is given to the review adjudicator.

46. Adjudication review procedures

(1) In determining an adjudication review application, the review adjudicator may consider only the following matters —

(a) this Act and the regulations;

(b) the relevant construction contract;

(c) the relevant adjudication review application and adjudication review response (if any), together with submissions (including accompanying documents) duly made;

(d) the relevant payment claim, payment schedule, adjudication application and adjudication response (if any), together with submissions (including accompanying documents) duly made.

(2) In determining an adjudication review application, the review adjudicator must not consider the following matters —

(a) an adjudication review response that is given after the time allowed by this Division;

(b) any reasons for a matter that have been raised unless those reasons were raised in the original adjudication being reviewed;

(c) any submissions (including accompanying documents) made to the review adjudicator that are not authorised to be made under this Division or that contravene any other limitation prescribed by the regulations on the submissions that may be made.

(3) A review adjudicator cannot delegate the determination of an adjudication review application to another person or body.

(4) A review adjudicator may engage an authorised nominating authority to assist the adjudicator with administrative duties.

(5) A review adjudicator is not bound by the rules of evidence.

(6) Review adjudicators may, to the extent that their procedure is not otherwise regulated under this Act, determine their own procedure.

47. Time allowed for review adjudicator to determine adjudication review application

(1) The review adjudicator must not determine the adjudication review application until after the adjudication review response is given or, if not given, until after the last date on which the response could have been given.

(2) The review adjudicator must determine an adjudication review application within 10 business days after —

(a) if an adjudication review response is given within the time allowed under this Division — the date on which the adjudication review response is given; or

(b) if an adjudication review response is not given within the time allowed under this Division — the last date on which the response could have been given.

(3) However, the claimant and the respondent may agree to extend the time by which the review adjudicator must determine the adjudication review application under this section, but only if the total period of all extensions under this section does not exceed 10 business days.

(4) A review adjudicator's determination is not invalid merely because it is made after the time allowed by this section for determining the adjudication review application.

(5) If the review adjudicator fails to determine an adjudication review application within the time allowed by this section (or, if that time is extended under section 51(2), within that time as extended) —

(a) the claimant or respondent who made the application may withdraw the application by giving written notice of the withdrawal to the review adjudicator and the other party to the adjudication review; and

(b) the claimant or respondent may make another adjudication review application within 5 business days after the withdrawal despite the expiry of the time otherwise allowed for making adjudication review applications.

Notes for this section:

1. Under Division 4 the review adjudicator may, when determining the proportion of adjudication fees and expenses payable by each party, have regard to any unreasonable withholding of consent by a party to extending the time for determining an adjudication review application.

2. Under Division 4 the review adjudicator is not entitled to adjudication fees and expenses if the review adjudicator fails to determine an adjudication review application within the time allowed by this Part.

48. Review adjudicator's determination

(1) The review adjudicator must —

(a) confirm the determination of the adjudicator that is the subject of the adjudication review application; or

(b) quash that determination and make a determination under this section.

(2) If that determination is quashed, the review adjudicator must determine —

(a) the amount of the progress payment, if any, to be paid by the respondent to the claimant; and

(b) the due date for the payment of that amount under section 20; and

(c) the rate of interest payable on that amount under section 21; and

(d) if no amount of progress payment is required to be paid — that no amount is payable.

(3) If the respondent has already paid an amount to the claimant under a determination of an adjudicator that is quashed —

(a) the amount is taken to have been paid by the respondent under the determination of the review adjudicator; and

(b) if the amount exceeds the amount payable under the determination of the review adjudicator — the claimant must repay that excess amount to the respondent and pay interest on that excess amount at the same rate as the respondent is required to pay on the adjudicated amount under section 21.

(4) The review adjudicator's determination must specify —

(a) the amount that has already been paid by the respondent; and

(b) any excess amount that is repayable by the claimant and the date on which it becomes repayable.

(5) The review adjudicator's determination must —

(a) be made in writing and be in the approved form (if any); and

(b) include the reasons for the determination; and

(c) be given by the review adjudicator to the claimant, the respondent, the authorised nominating authority that appointed the review adjudicator and the Building Commissioner.

(6) The Building Commissioner may give a copy of the review adjudicator's determination to the adjudicator who made the determination that was the subject of the adjudication review application.

(7) The review adjudicator may, on the review adjudicator's own initiative or on the application of the claimant or respondent, correct the review adjudicator's determination if it contains —

(a) a clerical mistake or defect of form; or

(b) an error arising from an accidental slip or omission; or

(c) a material arithmetic error or a material mistake in the description of any person, thing or matter.

Division 4 — Adjudication fees and expenses

49. Terms used

In this Division —

adjudicating means accepting, considering and determining an adjudication application or adjudication review application;

adjudication fees and expenses means the amount, by way of fees and expenses, payable to an adjudicator or review adjudicator under this Division for adjudicating an adjudication application or adjudication review application.

50. Adjudication fees and expenses

(1) An adjudicator or review adjudicator is entitled to be paid by way of fees and expenses for adjudicating an adjudication application or adjudication review application —

(a) the amount agreed between the adjudicator or review adjudicator and the parties to the adjudication or adjudication review; or

(b) if the amount is not agreed — the amount determined at the rates approved and published by the Building Commissioner.

(2) However, the amount of adjudication fees and expenses cannot exceed any maximum amount prescribed by the regulations for the purposes of this subsection.

(3) The regulations may prescribe different maximum amounts of adjudication fees and expenses depending on the amount of the payment claim or on other specified factors.

(4) The parties to an adjudication or adjudication review are —

(a) jointly and severally liable for the payment of adjudication fees and expenses; and

(b) each liable to contribute to the payment of adjudication fees and expenses in equal proportions or in any other proportions determined by the adjudicator or review adjudicator.

(5) The adjudicator or review adjudicator may have regard to the following matters in determining the proportion of adjudication fees and expenses that each party is liable to pay —

(a) the conduct of the parties and whether either party acted unreasonably before or during the adjudication or adjudication review;

(b) the reasons given by a party (or the failure to give reasons) for not making the progress payment concerned;

(c) any attempt by the respondent to raise new reasons in relation to the application that were not included in the respondent's payment schedule;

(d) the relative success of the parties in relation to the application;

(e) whether a party made, or acted in relation to, the application —

(i) for an improper purpose; or

(ii) vexatiously or frivolously; or

(iii) without reasonable prospects of success;

(f) the services provided by the adjudicator or review adjudicator (including the time taken to consider different aspects of the application);

(g) any other matter the adjudicator or review adjudicator considers relevant.

(6) The determination of an adjudication application or adjudication review application under this Part must include —

(a) the amount of adjudication fees and expenses payable to the adjudicator or review adjudicator; and

(b) the proportion of that amount that each party is liable to pay.

(7) Apart from liability for the payment of adjudication fees and expenses, the parties to an adjudication or adjudication review are liable for their own costs and cannot recover those costs from each other.

(8) An adjudicator or review adjudicator is not entitled to adjudication fees and expenses if the adjudicator or review adjudicator fails to determine the adjudication application or adjudication review application within the time allowed under this Part.

(9) If an adjudication application or adjudication review application is withdrawn, the adjudicator or review adjudicator is only entitled to adjudication fees and expenses up to the time of the withdrawal.

(10) If the adjudicator determines that no amount is payable by the respondent because the adjudication application was frivolous or vexatious, the adjudication fees and expenses are payable by the claimant.

51. Miscellaneous provisions relating to adjudication fees and expenses

(1) An adjudicator or review adjudicator may withhold giving the determination of the adjudication application or adjudication review application to the parties until the adjudication fees and expenses are paid if the adjudicator or review adjudicator has given the parties an invoice for the adjudication fees and expenses before the time allowed for determining the application.

(2) The time allowed for determining the adjudication application or adjudication review application is extended until the time that the adjudication fees and expenses are paid to the adjudicator or review adjudicator.

(3) The authorised nominating authority to which an adjudication application or adjudication review application is made may require the applicant to provide a reasonable deposit or security for the adjudication fees and expenses of the adjudicator or review adjudicator appointed to determine the application.

(4) If a deposit or security is not held by the authorised nominating authority, the adjudicator or review adjudicator may require one or both of the parties to provide a reasonable deposit or security for the adjudication fees and expenses of the adjudicator or review adjudicator.

(5) The deposit or security must be held by the authorised nominating authority or the adjudicator or review adjudicator (as the case requires) in a trust account with a recognised financial institution and dealt with in accordance with the provisions of this Division relating to the payment of the adjudication fees and expenses.

(6) Adjudication fees and expenses that are payable by a person may be recovered from that person as a debt due to the adjudicator or review adjudicator in a court of competent jurisdiction.

(7) The conditions that may be imposed on the authorisation of a nominating authority under Part 5 include the maximum amount that the authority may charge an adjudicator or review adjudicator for performing administrative duties for the adjudicator or review adjudicator.

Division 5 — Payment and recovery of adjudicated and other amounts

52. Requirement to pay adjudicated amount or to repay excess amount

(1) If an adjudicator or review adjudicator determines that the respondent must pay an adjudicated amount, the respondent must pay that amount to the claimant on or before —

(a) the date that is 5 business days after the date on which the adjudicator or review adjudicator gives a copy of the determination to the respondent; or

(b) if the adjudicator or review adjudicator has determined that the amount becomes payable to the claimant on a later date — that later date.

(2) The requirement under subsection (1) that the respondent pay the amount determined by an adjudicator to the claimant is subject to section 40.

(3) If a review adjudicator determines that the claimant must repay an excess amount of payment, the claimant must pay that excess amount to the respondent on or before —

(a) the date that is 5 business days after the date on which the review adjudicator gives a copy of the determination to the claimant; or

(b) if the review adjudicator has determined that the amount becomes payable to the respondent on a later date — that later date.

(4) If any interest payable on the adjudicated amount or the excess amount is not paid by the due date, the amount of the unpaid interest is added to (and becomes part of) the adjudicated amount payable, or the excess amount repayable, under this section.

(5) If a party to an adjudication or adjudication review has paid the other party's share of the adjudication fees and expenses but has not been reimbursed by the other party, the adjudicator or review adjudicator may, at the request of the party who paid that share, adjust the determination of the adjudication or adjudication review so that the amount of that share becomes part of the adjudicated amount or other amount payable under the determination to the party who paid that share.

53. Certification of determination if adjudicated amount not paid or excess amount not repaid

(1) If the respondent fails to pay the adjudicated amount in full as required by section 52, the claimant may request the Building Commissioner to provide a certified copy of the determination of the adjudicator or review adjudicator to enable enforcement of the adjudicated amount as a monetary judgment of a court of competent jurisdiction.

Note for this subsection:

Division 7 provides that in addition to the right to request a certified copy of a determination for debt recovery action, the claimant may suspend work or supply under the construction contract.

(2) The Building Commissioner cannot provide the claimant with a certified copy of the determination of an adjudicator if an adjudication review application in relation to the determination has been made but not determined or withdrawn.

(3) If the claimant fails to repay the excess amount in full as required by section 52, the respondent may request the Building Commissioner to provide a certified copy of the determination of the review adjudicator to enable enforcement of the excess amount as a monetary judgment of a court of competent jurisdiction.

(4) A certified copy of a determination is a copy of the determination that the Building Commissioner certifies is a true and accurate copy of the determination.

(5) The Building Commissioner may charge a reasonable fee for providing a certified copy of a determination under this section.

54. Certified copy of determination enforceable as monetary judgment

(1) In this section —

monetary judgment has the meaning given in the *Civil Judgments Enforcement Act 2004* section 3.

(2) A certified copy of a determination provided by the Building Commissioner under section 53 is taken to be a monetary judgment of a court of competent jurisdiction.

(3) A certified copy of a determination cannot be enforced under the *Civil Judgments Enforcement Act 2004* Part 4 unless the application for an enforcement order under that Part is accompanied by an affidavit of the applicant that the adjudicated amount or excess amount (as the case requires) has not been paid or repaid in full at the time the application is made.

(4) If the affidavit indicates that only a part of the amount has been paid or repaid, the monetary judgment is only for the part of the amount not paid or repaid.

(5) If the person required to pay the amount of a monetary judgment commences proceedings to have the monetary judgment set aside, the person is not entitled in those proceedings —

(a) to bring any cross-claim against the person to whom the amount of the monetary judgment is payable; or

(b) to raise any defence in relation to matters arising under the relevant construction contract; or

(c) to challenge the relevant determination of the adjudicator or review adjudicator.

(6) The person commencing proceedings to have the monetary judgment set aside must pay into court as security the amount of the monetary judgment.

(7) The court may direct that the amount paid into court be paid to the person to whom the amount is payable under the monetary judgment pending the determination of the proceedings to have the monetary judgment set aside.

55. Effect of this Part on civil proceedings

(1) Nothing in this Part affects any right that a party to a construction contract —

(a) may have under the contract; or

(b) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal —

(a) must, in any order or award it makes in those proceedings, allow for any amount paid or repaid to a party to the contract under or for the purposes of this Part; and

(b) may make any orders it considers appropriate for the restitution of any amount so paid or repaid, and any other orders it considers appropriate, having regard to its decision in those proceedings.

(4) Evidence of anything lawfully said or done in the course of an adjudication or adjudication review under this Part is not admissible before a court, arbitrator or other person or body, unless the parties to the adjudication or adjudication review consent to the admission of the evidence.

(5) This section does not affect —

(a) the operation of section 111; or

(b) proceedings referred to in section 27(3) or 54(5); or

(c) an entitlement conferred by Division 7 or 8 or anything arising from the exercise of that entitlement.

Division 6 — Claimant's rights with respect to performance security

56. Terms used

In this Division —

authorised issuing institution means —

(a) a recognised financial institution; or

(b) a person authorised under the *Insurance Act 1973* (Commonwealth) to carry on insurance business in Australia;

compliant performance bond means a performance bond that meets the requirements of section 60 for the purposes of the substitution of performance security under this Division;

performance bond means a legally binding instrument (whether described as a bond, guarantee or otherwise) issued by an authorised issuing institution to pay a party to a construction contract named in the instrument an amount of money up to a specified limit on demand by that party, as security for the performance of obligations under the contract of another party to the contract;

performance security means retention money or a performance bond;

substitution of performance security means the release of retention money and the substitution for the retention money of a performance bond referred to in section 59.

57. Right to receive notice before recourse to performance security

(1) A party to a construction contract is not entitled to have recourse to performance security under the contract unless —

(a) the party has given the other party to the contract notice of the intention to have recourse to the performance security; and

(b) at least 5 business days have passed since the party gave that notice or, if the contract provides a longer period, the period specified in the contract has passed.

(2) A notice of intention to have recourse to the performance security must —

(a) be given in writing and be in the approved form (if any); and

(b) identify the construction contract and the provisions of the contract that the party relies on to have recourse to the performance security; and

(c) describe the circumstances that entitle the party to have recourse to the performance security.

(3) A requirement of this section is taken to be a term of every construction contract and has effect despite any other terms of the contract.

58. Right to release of performance security

(1) A payment claim for a progress payment may seek the release of performance security to which the progress payment relates.

(2) An adjudication application or adjudication review application may seek the release of performance security that was sought in a payment claim but which has not been released.

(3) The determination of an adjudicator or review adjudicator may require the release of any performance security that is no longer required because the obligations secured by the performance security have been performed.

(4) An adjudicator or review adjudicator may only make a determination for the release of any performance security if it is due for release in accordance with the relevant construction contract.

59. Right to substitute performance security

(1) A party to a construction contract is entitled to the release of retention money under the contract by substituting a performance bond for the retention money in accordance with this section.

(2) A claimant may seek the substitution of performance security in a payment claim for a progress payment.

(3) A claimant —

(a) may seek the release of a single amount of retention money under a construction contract by substituting several separate performance bonds; and

(b) may seek a second or subsequent release of retention money under the construction contract by substituting further performance bonds.

(4) A payment claim in which a claimant seeks the substitution of performance security must, in addition to the requirements of Division 1 —

(a) identify the construction contract for which the substitution is proposed; and

(b) indicate the amount of retention money to be released; and

(c) state that it is made under this Act; and

(d) be accompanied by a draft of the compliant performance bond, or of each compliant performance bond, that the claimant proposes to provide in substitution for the release of the retention money (being a draft in final form except for its execution by the authorised issuing institution); and

(e) include any other information required by the regulations.

(5) The determination of an adjudicator or review adjudicator may require the substitution of performance security that is proposed in a payment claim.

(6) An adjudication application or adjudication review application that seeks the substitution of performance security proposed in a payment claim must be accompanied by a compliant performance bond executed by the authorised issuing institution that is in the same form, or substantially in the same form, as the draft performance bond that accompanied the payment claim.

(7) The respondent may, in an adjudication response or adjudication review response, dispute —

(a) the authenticity of an executed performance bond (or the lack of reference or other information that would enable its authenticity to be confirmed); or

(b) that an executed performance bond is a compliant performance bond or is in the same form, or substantially in the same form, as the draft that accompanied the payment claim.

(8) Subsection (7) applies whether or not the respondent disputed the matter in the payment schedule.

(9) An adjudicator or review adjudicator must, in any determination for the substitution of performance security, satisfy themselves that the executed performance bond is an authentic and compliant performance bond.

60. Requirements for compliant performance bond for substitution of performance security

(1) A performance bond is a compliant performance bond for the purposes of the substitution of performance security under this Division if it complies with each of the following requirements —

(a) the performance bond is unconditional;

(b) the performance bond does not expire and is wholly irrevocable;

(c) the amount payable under the performance bond (or, if it is one of multiple performance bonds to be substituted, the total amount payable under those bonds) is not less than the amount of retention money to be released;

(d) the amount payable under the performance bond is in the same currency as the retention money to be released;

(e) unless the relevant construction contract provides otherwise, the applicable law that applies to the performance bond and the courts with jurisdiction to determine disputes relating to the performance bond are the law and courts of this State;

(f) the performance bond identifies the party to the relevant construction contract who retains or otherwise withholds

the retention money to be released as the only person who may demand and receive payment under the bond (unless the relevant construction contract or a subsequent agreement between the parties to the contract provides that another person may demand and receive payments under the bond);

(g) the performance bond identifies an authorised issuing institution as the institution issuing the bond (including its Australian Business Number and its Australian Company Number or Australian Registered Body Number);

(h) the times for release of performance security under the relevant construction contract are maintained by the performance bond;

(i) the credit rating of the authorised issuing institution issuing the performance bond satisfies any minimum credit rating requirement that is prescribed by the regulations;

(j) the performance bond satisfies any other requirements prescribed by the regulations for the purposes of this paragraph.

(2) If a performance bond that is not a compliant performance bond is included in multiple performance bonds sought to be substituted at the same time for retention money, the right to substitute performance security is not affected if the remaining bonds are compliant performance bonds that satisfy the requirements of this section for the substitution of performance security.

61. Application of Division where third parties involved in performance securities

(1) Section 57 extends to recourse to performance security that is held by or provided to a third party and accordingly a reference in that section to a party to the construction contract who has

recourse to performance security includes a reference to that third party.

(2) If a party to a construction contract has recourse to performance security in contravention of section 57 and the performance security is secured over the property of a third party, a claim for damages that the third party may have against the other party to the contract may be made directly against the party that contravened section 57 as if the third party were a party to the contract.

(3) Section 58 extends to the release of performance security that is held by or provided to a third party.

(4) A performance bond cannot be substituted for retention money under section 59 if —

(a) the retention money is held by a third party; or

(b) the performance bond is provided by a third party.

Division 7 — Claimant's right to suspend work or supply

62. Claimant's right to suspend work or supply for non-payment

(1) A claimant may suspend carrying out construction work, or supplying related goods and services, under a construction contract if the claimant makes a payment claim for a progress payment and —

(a) the respondent does not pay the claimed or scheduled amount owed (as defined in section 27(1)) to the claimant in full on or before the due date for the progress payment; or

(b) the respondent does not pay the adjudicated amount in full as required by section 52; or

(c) the respondent fails to pay any retention money relating to the progress payment into a retention money trust account as required by Part 4.

(2) A claimant cannot suspend work or supply under subsection (1)(b) while an adjudication review application made by the respondent has not been determined.

(3) A claimant cannot suspend work or supply unless —

(a) the claimant has given the respondent written notice of the claimant's intention to suspend work or supply under the construction contract; and

(b) at least 2 business days have passed since the claimant gave that notice.

(4) A notice of intention to suspend work or supply must state that it is given under this Act.

(5) The right to suspend work or supply conferred by subsection (1)(a) or (b) continues until 3 business days have passed since the claimant received the amount payable by the respondent.

(6) The right to suspend work or supply conferred by subsection (1)(c) continues until —

(a) the respondent pays the retention money into a retention money trust account and notifies the claimant that the retention money has been paid into the account; and

(b) 3 business days have passed since the claimant was so notified.

(7) A right under this Division to suspend work or supply is in addition to the rights conferred by this Act to recover a claimed or scheduled amount owed (as defined in section 27(1)), to enforce payment of an adjudicated amount or to require payment of retention money into a retention money trust account.

63. Provisions relating to suspension of work or supply

(1) In this section —

loss includes expense and damage.

(2) If a claimant, in exercising a right under this Division to suspend carrying out construction work or supplying related goods and services, incurs a loss because the respondent removes any part of the work or supply from the construction contract (whether pursuant to a right conferred by the contract or otherwise), the respondent is liable to pay the claimant the amount of the loss.

(3) A payment claim may be made for the amount of that loss as if it were an amount owing to the claimant by the respondent under the construction contract, and this Part applies accordingly with any necessary modifications.

(4) A claimant who suspends carrying out construction work or supplying related goods and services in accordance with a right under this Division is not liable for any loss suffered by the respondent (or any person claiming through the respondent) because the claimant did not carry out the work or supply the goods and services during the period of suspension.

(5) The protection from liability for loss under subsection (4) is not affected if a court finds that a thing done or arising under this Act that was relied on by the claimant in good faith to suspend work or supply was invalid.

Division 8 — Claimant's right to lien

64. Lien over unfixed plant and materials in respect of unpaid progress payments

(1) If a progress payment becomes payable, the claimant is entitled to exercise a lien in relation to the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.

(2) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes payable takes priority over a lien under this section.

(3) This section does not confer on a claimant any right against a third party who is the owner of the unfixed plant or materials.

(4) Except as provided by this section, the law applying to the determination of priorities between different interests in personal property applies to the determination of priorities between a lien under this section over any unfixed plant or materials and any other interest in the unfixed plant or materials.

(5) The *Personal Property Securities Act 2009* (Commonwealth) section 73(2) is declared to apply to liens under this section.

Division 9 — Miscellaneous provisions relating to payment claims

65. Threatening or intimidating claimants or persons entitled to make claim

A person must not directly or indirectly threaten or intimidate, or attempt to threaten or intimidate, a claimant or a person entitled to make a payment claim in relation to —

(a) their entitlement to, or claim for, a progress payment; or

(b) their exercise of any other rights under this Part.

Penalty: a fine of $50 000.

66. Jurisdictional error in determination of adjudicator or review adjudicator

(1) This section applies to any proceedings before the Supreme Court relating to any matter arising under a construction contract in which the Court makes a finding that a jurisdictional error has occurred in relation to the determination of an adjudicator or review adjudicator under this Part.

(2) The Supreme Court may set aside the whole or any part of the determination.

(3) Without limiting subsection (2), the Supreme Court may set aside that part of the determination that it identifies as being affected by jurisdictional error and confirm that part of the determination not affected by jurisdictional error.

67. No appeal or review of determination of adjudicator or review adjudicator except under this Part

Except as provided by section 66 and Division 3, a decision or determination of an adjudicator on an adjudication application, or of a review adjudicator on an adjudication review application, is not subject to appeal or review.

68. Application of Part to corporate claimant in liquidation

(1) A corporation in liquidation cannot —

(a) make a payment claim under this Part; or

(b) take any action under this Part to enforce a payment claim (including by making an adjudication application or adjudication review application or by taking recovery proceedings referred to in section 27(3)); or

(c) take any action under this Part to enforce the determination of an adjudicator or review adjudicator.

(2) If a corporation in liquidation has made an adjudication application or adjudication review application that is not finally determined immediately before the day on which it commenced to be a corporation in liquidation, the application is taken to have been withdrawn on that day.

Part 4 — Retention money trusts

69. Terms used

(1) In this Part —

government party —

(a) means a party to a construction contract that is a State, a Territory or the Commonwealth; and

(b) includes the following —

(i) a Minister of a State, a Territory or the Commonwealth;

(ii) an agency or organisation as those terms are defined in the *Public Sector Management Act 1994* section 3(1) or a similar public sector agency or organisation of another State, a Territory or the Commonwealth;

(iii) a local government, regional local government or regional subsidiary of this State or a similar local government authority of another State or a Territory;

(iv) a body, or the holder of an office, established or continued for a public purpose under a law of a State, a Territory or the Commonwealth;

(v) a corporation owned or controlled by a State, a Territory or the Commonwealth or by any person or entity referred to in subparagraphs (i) to (iv);

party A, in relation to retention money, means —

(a) in the case of retention money referred to in paragraph (a) of the definition of ***retention money*** in section 4(1) — the party to the construction contract who retains the retention money; and

(b) in the case of retention money referred to in paragraph (b) of the definition of ***retention money*** in

section 4(1) — the party to the construction contract who is paid the retention money;

party B, in relation to retention money, means the party to the construction contract the performance of whose obligations is being secured by the retention money;

retention money trust commencement date, for retention money, means —

(a) in the case of retention money referred to in paragraph (a) of the definition of ***retention money*** in section 4(1) — the date on which the money first becomes payable to party B for carrying out construction work, or supplying related goods and services, under the contract (but for the right of party A to retain the money); or

(b) in the case of retention money referred to in paragraph (b) of the definition of ***retention money*** in section 4(1) — the date the money is paid to party A;

retention money trust end date, for retention money, means the earliest of the following —

(a) the date on which the retention money is paid to party B for carrying out construction work, or supplying related goods and services, under the construction contract;

(b) the date on which party B gives written notice to party A that party B will not make a claim under Part 3 or the construction contract for the release of the retention money;

(c) the date on which party A becomes entitled under the construction contract to recourse to the retention money;

(d) the date that the retention money is no longer required to be held as security under the construction contract following a determination of an adjudicator or review adjudicator under Part 3, a decision of an arbitrator under the construction contract or an order of a court or tribunal;

(e) the date that is 2 years after the date on which party A gives party B written notice that the retention money is due to be released to party B.

(2) For the purposes of this Part —

(a) money is taken to be paid to a party to a construction contract as referred to in paragraph (b) of the definition of ***retention money*** in section 4(1) if it is paid into an account of, or under the control of, the party; and

(b) money that is paid (or taken to be paid) to a party to a construction contract as so referred to is taken to be retained by the party.

(3) For the purposes of this Part, money that a party to a construction contract is entitled to retain out of an amount payable by the party is taken to be retained by the party at the time the money would be payable (but for the right of the party to retain the money) for construction work carried out, or for related goods and services supplied, under the contract, so long as the amount of the money can be determined at that time, even if —

(a) the party has not yet set the money aside nor paid it into a retention money trust account; or

(b) the other party who carried out the work or supplied the goods and services has not yet made a claim for payment under this Act or the contract in relation to the work or supply.

70. Construction contracts to which Part applies

(1) This Part applies to a construction contract to which this Act applies, except —

(a) if the party to the contract for whom construction work is to be carried out, or to whom related goods and services are to be supplied, under the contract is a government party; or

(b) if the value of the contract at the time it is first entered into, and at any later time following any variation of the contract or of estimates used to value the contract, does not exceed the amount prescribed by the regulations for the purposes of this paragraph (the ***prescribed retention money threshold***); or

(c) if the contract is for home building work of a kind that is excluded from this Part by subsection (2); or

(d) if the contract is of a kind excluded from this Part by the regulations.

(2) A construction contract for home building work the value of which exceeds the amount referred to in section 10(1)(c) is excluded from this Part, unless —

(a) the principal is a corporation; or

(b) the work is carried out in relation to multiple dwellings or for the purposes of a residential development business of the principal; or

(c) the contract —

(i) is between a head contractor and a subcontractor, or between 2 subcontractors, in relation to the carrying out of the work; and

(ii) is not of a kind excluded from this Part by regulations made for the purposes of subsection (1)(d).

(3) If a construction contract is excluded from this Part because its value does not exceed the prescribed retention money threshold at the time it is first entered into, but later ceases to be so excluded because its value exceeds the prescribed retention money threshold at that later time, this Part applies only in relation to retention money retained after the contract becomes subject to this Part.

(4) If a construction contract, at the time it is first entered into or at a later time, is subject to this Part because its value exceeds the prescribed retention money threshold at the relevant time, the contract does not cease to be subject to this Part because its value does not exceed the prescribed retention money threshold at a later time.

71. Retention money to be held on trust

(1) Retention money under a construction contract to which this Part applies is, by the operation of this section, held on trust by the party to the contract who retains the money from the retention money trust commencement date until the retention money trust end date.

(2) Until retention money held on trust under this Part is paid into a retention money trust account, the trust applies to the property of the party who retains the money, but only to the extent of the amount of the retention money.

(3) While retention money under a construction contract is held on trust under this Part —

(a) it is not available for payment to a third-party creditor of any of the parties to the contract; and

(b) it is not liable to be attached or taken in execution for satisfying a monetary judgment entered in favour of a third-party creditor of any of the parties to the contract.

(4) For the purposes of subsection (3), a third-party creditor of a party to a construction contract is any creditor of the party, other than the other party to the contract in connection with a liability arising under the contract.

(5) If a court replaces a party to a construction contract as trustee of the trust created by this section in the exercise of its jurisdiction to supervise the administration of the trust —

(a) the relevant retention money is then held on trust by the replacement trustee; and

(b) the replacement trustee has the functions under this Part of that party.

72. Beneficial interests of parties to contract in retention money trusts

(1) Retention money held on trust under this Part is held on trust for —

(a) the party to the construction contract who retains the retention money and who is entitled to have recourse to it in accordance with the contract; and

(b) the party to the construction contract who carries out construction work, or supplies related goods and services, under the contract and who is entitled to the release, in accordance with the contract, of the retention money remaining after any recourse to that money by the other party.

(2) The party to a construction contract who holds retention money on trust under this Part is not entitled to set off, against any retention money to be released to the other party to the contract, any liability of the other party under another contract.

(3) If the party to a construction contract who holds retention money on trust under this Part assigns any entitlement to recourse to the retention money, the retention money continues to be held on trust under this Part and the beneficial interests in that trust of any other party to the contract are not affected by the assignment.

73. Requirement to draw down debt facility or otherwise set aside retention money required to be held on trust

(1) This section applies in relation to retention money referred to in paragraph (a) of the definition of ***retention money*** in section 4(1).

(2) If party A does not have sufficient money to pay the retention money into a retention money trust account, party A must draw down any available debt facility (or access any other available source of money) to pay the retention money into a retention money trust account.

(3) If party A fails to pay the retention money into a retention money trust account within 3 business days after the entitlement to the retention money first arises, a court of competent jurisdiction may, on application by party B, order party A to draw down an available debt facility or access any other available source of money for payment into the retention money trust account.

(4) For the purposes of subsection (3), a court of competent jurisdiction is a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount of retention money concerned.

Note for this section:

Part 3 Division 7 enables the claimant to suspend work or supply if retention money under a construction contract is not paid into a retention money trust account as required by this Part.

74. Establishment of retention money trust accounts and payments into trust accounts

(1) A party to a construction contract who retains retention money under the contract that is held on trust under this Part must ensure that the money is paid into a trust account established by that party with a recognised financial institution in accordance with this Part (a ***retention money trust account***).

(2) The retention money trust account must be established within 10 business days after the parties enter into the construction contract or, if the contract becomes a construction contract to which this Part applies after it is entered into, within 20 business days after it becomes a construction contract to which this Part applies.

(3) However, if the retention money will not be money retained from money otherwise payable but money separately paid as security, the retention money trust account must be established before the money is paid as security under the contract.

(4) Retention money trust accounts may be established as —

(a) separate trust accounts in respect of each person who may become entitled to the release of the retention money (whether under one or more construction contracts); or

(b) a single trust account for all retention money under 2 or more construction contracts in respect of different persons who may become entitled to the release of the retention money.

(5) If a single retention money trust account is established for multiple construction contracts, the trust account records must identify the contract in respect of which each payment into and out of the account is made.

75. Requirements relating to establishment of retention money trust accounts

(1) The following requirements apply to any retention money trust account —

(a) the account must be a deposit or transaction account of the recognised financial institution;

(b) the name of the account and the description of the account in the records of the party who established the account must include the words “trust account”;

(c) as soon as practicable after the account is established (or after a previously established account for one construction contract is first used for another construction contract), the party who established the account must give the other party to the contract written

notice of the establishment of the account and the following particulars of the account —

(i) the name of the recognised financial institution with which the account has been established;

(ii) the name of the account;

(iii) the BSB number and account number for the account;

(iv) any other particulars prescribed by the regulations for the purposes of this subparagraph.

(2) If any of the particulars referred to in subsection (1)(c) change, the party who established the account must give the other party written notice of the change.

(3) A retention money trust account may be closed —

(a) after retention money is no longer retained under the construction contract for which it was established or for which it was being used; or

(b) after any money in the account is transferred to another retention money trust account that has been established in accordance with this Part.

(4) If a retention money trust account is closed, the party who established the account must, as soon as practicable, give written notice of the closure to the other party to the contract.

76. Withdrawals from retention money trust accounts

(1) A party who holds retention money on trust may withdraw money from the retention money trust account only in accordance with this section.

(2) Money may be withdrawn only —

(a) for the purpose of the release of, or recourse to, the retention money in accordance with the relevant construction contract; or

(b) as agreed between the parties to the relevant construction contract; or

(c) in accordance with a determination of an adjudicator or review adjudicator under Part 3 relating to the relevant construction contract, a decision of an arbitrator under the relevant construction contract, an order of a court or tribunal relating to the relevant construction contract or a decision of an expert appointed by the parties to determine a matter under the relevant construction contract; or

(d) for the purpose of returning money paid into the account in error; or

(e) for the purpose of transferring all or any of the money to another retention money trust account established in accordance with this Part; or

(f) after the retention money trust end date for the retention money; or

(g) for the purpose of making any other payment authorised by this Part; or

(h) for any other purpose, or in any other circumstances, prescribed by the regulations for the purposes of this paragraph.

(3) Money may be withdrawn only by cheque or electronic funds transfer.

(4) Money may be withdrawn only in accordance with any other requirements prescribed by the regulations for the purposes of this subsection.

(5) To remove doubt, the obligation of a party to release retention money to a party to the relevant construction contract or an entitlement of the party to have recourse to the retention money continues to apply even if there is insufficient money in the relevant retention money trust account to make the payment or have the recourse.

77. Decisions on payments into or out of retention money trust accounts by adjudicators, courts, arbitrators and experts

A decision on retention money that is required to be paid into, or that can be withdrawn from, a retention money trust account may be made by —

(a) an adjudicator or review adjudicator in any determination under Part 3 of an adjudication application or adjudication review application relating to the relevant construction contract; or

(b) a court or tribunal in any order relating to the relevant construction contract; or

(c) an arbitrator in any arbitration under the relevant construction contract; or

(d) an expert appointed by the parties in any determination of a matter under the relevant construction contract.

78. Trust account interest and fees

(1) Interest earned on any money held in a retention money trust account is payable to the party who established and operates the account unless it relates to any period after the money is required to be released to the other party to the construction contract.

(2) Interest earned on any money held in a retention money trust account that relates to any period after it is required to be so released to that other party is payable to that other party, but must be offset against any liability to pay interest to that other party for late payment of that money.

(3) Except for the receipt of interest on money held in a retention money trust account, the party who established and operates the account cannot invest the money in any other form of investment.

(4) The fees and charges payable to the recognised financial institution for the establishment and operation of a retention money trust account are payable by the party who established and operates the account.

79. Trust records

(1) The party to a construction contract who established and operates a retention money trust account must keep proper accounting records relating to the account.

(2) The accounting records must —

(a) record all transactions relating to the money held in the retention money trust account; and

(b) show a true position in relation to the outcome of those transactions; and

(c) be able to be readily and properly audited; and

(d) be in the English language; and

(e) comply with any other requirements prescribed by the regulations for the purposes of this paragraph.

(3) The party to a construction contract who established and operates a retention money trust account must, on being given reasonable notice by any other person with a beneficial interest in money in the account, and without charge —

(a) allow the other person to inspect and take copies of any accounting records relating to money in which the other person has a beneficial interest; and

(b) provide any other information or assistance relating to those accounting records prescribed by the regulations for the purposes of this paragraph.

(4) The regulations may provide exceptions to the obligations imposed by this section for the purposes of avoiding the disclosure of commercially sensitive information.

(5) The party who established and operates a retention money trust account must retain the accounting records while the account is in operation and for at least 3 years after the account is closed.

80. Power to employ agents

(1) The party to a construction contract who established and operates a retention money trust account may employ, or otherwise engage, an agent to act on behalf of the party in making payments of money held on trust or doing other acts relating to the administration of the account.

(2) The party is liable for the acts and defaults of its agent as if they were the party's own acts and defaults.

(3) The costs of employing or otherwise engaging an agent are not recoverable from a retention money trust account or from any of the other beneficiaries of the trust.

81. Recognised financial institutions not subject to certain obligations and liabilities

(1) A recognised financial institution with which a retention money trust account is established —

(a) is not under any obligation to control or supervise transactions in relation to the account or to see to the application of money withdrawn from the account; and

(b) does not have, in relation to any liability of a party to a relevant construction contract to the recognised financial institution, any recourse or right (whether by way of set-off, counterclaim, charge or otherwise) against money in the account.

(2) Subsection (1) does not relieve a recognised financial institution from any liability to which it is subject apart from this Part.

82. Application of *Personal Property Securities Act 2009* (Cwlth)

(1) The interests of the parties to a construction contract in money held on trust under this Part have priority over any other security interests (as defined in the *Personal Property Securities Act 2009* (Commonwealth) section 12) in that money.

(2) The *Personal Property Securities Act 2009* (Commonwealth) section 73(2) is declared to apply to interests in money held on trust under this Part.

(3) This section applies whether or not money held on trust under this Part has been paid into a retention money trust account.

83. Trusts under this Part prevail over construction or other contracts

(1) A trust created by this Part, and the beneficial interests prescribed by this Part in that trust, have effect despite anything to the contrary in a construction contract or any other contract.

(2) Subsection (1) does not limit the operation of section 111 in relation to this Part.

84. General jurisdiction of courts to supervise trusts preserved

(1) Nothing in this Part affects a court's inherent jurisdiction to supervise the administration of a trust created by this Part.

(2) The Supreme Court may, on the application of the trustee, give directions about —

(a) any money or entitlement held in trust under this Part; or

(b) the performance of any function of the trustee or other matter relating to the administration of the trust.

(3) A copy of any application under subsection (2) must be given to any other beneficiary of the trust unless otherwise directed by the Supreme Court.

85. Application of *Trustees Act 1962*

(1) Except as otherwise expressly provided by this Act, the *Trustees Act 1962* and any other written law or equitable principles relating to trusts apply to the trusts created by this Part and to the trustees and beneficiaries of the trusts.

(2) The following duties under the *Trustees Act 1962* or any other written law or equitable principles do not apply to a trust created by this Part or to the trustees or beneficiaries of the trust —

(a) a duty to act personally and not delegate the payment of money held on trust or other acts relating to the administration of a trust;

(b) a duty to insure the property of a trust;

(c) a duty to pay money held on trust on demand by a beneficiary if the demand is not made in accordance with an obligation imposed by this Act or by the provisions of a construction contract that are not inconsistent with this Act.

(3) The *Trustees Act 1962* section 51 does not apply to a retention money trust account.

86. Indemnity of trustee from trust under this Part

The trustee of a trust created by this Part does not have the right to an indemnity from the trust for their expenses in administering the trust except in the following circumstances —

(a) the trustee has been appointed by a court to replace the existing trustee in the exercise of its jurisdiction to supervise the administration of the trust;

(b) the trustee is a corporation in liquidation;

(c) the affairs of the trustee are being administered by a trustee in bankruptcy.

87. Offence for failure to comply with certain requirements of this Part

A party to a construction contract commits an offence if the party fails to comply, without reasonable excuse, with section 74(1) or 79(3)(a).

Penalty: a fine of $50 000.

Part 5 — Nominating authorities, adjudicators and review adjudicators

Division 1 — Authorisation of nominating authorities

88. Application for authorisation

(1) A person may apply to the Building Commissioner to be authorised as a nominating authority.

(2) An application must —

(a) be made in writing and be in the approved form (if any); and

(b) be accompanied by the fee (if any) prescribed by the regulations; and

(c) provide information or documents as to the eligibility of the applicant to be authorised.

(3) The Building Commissioner may require the applicant to provide further information or documents and may refuse the application if the further information or documents are not provided by the time specified by the Building Commissioner.

89. Maximum number of persons who may be authorised

The regulations may prescribe the maximum number of persons who may be authorised as nominating authorities at any one time.

90. Authorisation of nominating authorities

(1) The Building Commissioner may authorise a person to be a nominating authority if —

(a) the person has duly applied for an authorisation; and

(b) the person is eligible to be authorised under this Division; and

(c) the authorisation would not result in the maximum number of authorised persons prescribed by the regulations being exceeded.

(2) If the Building Commissioner decides to refuse an application for authorisation, the Building Commissioner must give the applicant written notice of the decision and the reasons for the decision.

(3) The Building Commissioner must keep a register of authorised nominating authorities and publish the register on an appropriate website.

91. Eligibility to be authorised

(1) In this section —

related person, in relation to a corporation, means an officer of the corporation as defined in the *Corporations Act 2001* (Commonwealth) section 9.

(2) A person is eligible to be authorised as a nominating authority if the Building Commissioner is satisfied that —

(a) the person is reasonably capable of performing the tasks required under this Act of an authorised nominating authority, having regard to —

(i) the processes the person has, or intends to have, in place to ensure the appointment of adjudicators and review adjudicators to determine adjudication applications or adjudication review applications under this Act; and

(ii) the processes the person has, or intends to have, in place to ensure that any conflicts of interest that adjudicators or review adjudicators may have are identified and dealt with; and

(iii) the person's reputation and any past performance under a previous authorisation under this Division or a similar authorisation under a corresponding security of payment law; and

(iv) any other matter the Building Commissioner considers relevant;

and

(b) a previous authorisation of the person under this Division, or a similar authorisation of the person under a corresponding security of payment law, has not been withdrawn or revoked (otherwise than at the request of the person); and

(c) the person has not been refused a previous application for an authorisation under this Division, or an application for a similar authorisation under a corresponding security of payment law, within the period of 5 years before making the application to be authorised under this Division; and

(d) the person (or a related person) has not been convicted of a serious offence; and

(e) the person (or a related person) has not been a bankrupt within the period of 3 years before making the application to be authorised under this Division; and

(f) the person (or a related person) has not been a corporation in liquidation within the period of 3 years before making the application to be authorised under this Division.

(3) A person is eligible to be both authorised as a nominating authority and registered as an adjudicator or review adjudicator.

(4) However, a person is not capable of being appointed as the adjudicator or review adjudicator for an adjudication application or adjudication review application while the person is also an

authorised nominating authority or a related person of an authorised nominating authority.

92. Conditions of authorisation

(1) The authorisation of a person as a nominating authority may be unconditional or subject to conditions imposed by the Building Commissioner.

(2) The Building Commissioner may, by written notice given to an authorised nominating authority, amend, revoke or add conditions to which the authorisation is subject.

93. Term of authorisation

(1) The authorisation of a person as a nominating authority is given for the period (not exceeding 5 years) specified in the authorisation.

(2) An authorised nominating authority may be given a further authorisation on application made no earlier than 6 months before the expiry of the existing authorisation.

(3) If an application is duly made for a further authorisation and the application has not been determined before the expiry of the existing authorisation, the existing authorisation continues in force until the application is determined.

94. Revocation of authorisation

(1) The Building Commissioner may revoke the authorisation of a person as a nominating authority if satisfied that the person —

(a) provided information in connection with the application for authorisation that was false or misleading in a material particular; or

(b) has contravened this Act or the regulations; or

(c) has contravened a condition of the authorisation; or

(d) has contravened a code of practice under section 97; or

(e) has been convicted of a serious offence since the grant of the authorisation; or

(f) in the case of an individual — has become a bankrupt since the grant of the authorisation; or

(g) in the case of a body corporate — has become a corporation in liquidation since the grant of the authorisation.

(2) Before revoking the authorisation of a person as a nominating authority, the Building Commissioner must give the person the opportunity to make a submission within the period specified by the Building Commissioner.

(3) If the Building Commissioner decides to revoke the authorisation of a person as a nominating authority, the Building Commissioner must give the person written notice of the decision and the reasons for the decision.

(4) An authorised nominating authority may surrender its authorisation under this Division by written notice to the Building Commissioner.

95. Review by State Administrative Tribunal of decisions of Building Commissioner

A person who is aggrieved by any of the following decisions of the Building Commissioner may apply to the State Administrative Tribunal for a review of the decision —

(a) the refusal of an application by the person for authorisation as a nominating authority;

(b) the imposition or amendment of a condition of the person's authorisation as a nominating authority;

(c) the revocation of the person's authorisation as a nominating authority.

96. Information to be provided to Building Commissioner by authorised nominating authorities

An authorised nominating authority must provide the following information to the Building Commissioner at the time and in the form the Building Commissioner requires —

(a) the names of the parties to an adjudication application or adjudication review application made to the authority, the amount of the disputed payment claim and any other information about the application that the Building Commissioner requires the authority to provide;

(b) the name of the adjudicator or review adjudicator appointed by the authority to determine the application and the date of the appointment;

(c) a copy of any policy document of the authority that describes how adjudicators or review adjudicators are appointed (including any policy document relating to their grading);

(d) the rates of fees generally charged by the authority and the adjudicators or review adjudicators it appoints;

(e) any other information relating to the performance of the functions of the authority under this Act that the Building Commissioner requires the authority to provide.

Note for this section:

Part 3 Divisions 2 and 3 provide that copies of determinations made by adjudicators and review adjudicators are to be provided to the Building Commissioner.

97. Code of practice for nominating authorities

(1) The regulations may prescribe or adopt a code of practice for the performance of the functions under this Act of authorised nominating authorities.

(2) Authorised nominating authorities are required to perform their functions under this Act in accordance with the code of practice.

(3) A contravention of the code of practice by an authorised nominating authority may be taken into account by the Building Commissioner under this Division, but does not invalidate any decision of the authority under this Act.

98. Making and determining applications for authorisation before commencement of Division

(1) An application for authorisation as a nominating authority may be made and determined under this Division before all the provisions of this Division come into operation.

(2) The application may be made and determined as if all of the provisions of this Act had come into operation, but any determination of the application does not have effect until all of the provisions of this Division come into operation.

Division 2 — Registration of adjudicators and review adjudicators

99. Registration of individual as adjudicator, review adjudicator or both

An individual may be registered under this Division as an adjudicator or a review adjudicator, or both.

100. Application for registration

(1) An individual may apply to the Building Commissioner for registration under this Division.

(2) An individual may make a single application to be registered as both an adjudicator and a review adjudicator.

(3) An application must —

(a) be made in writing and be in the approved form (if any); and

(b) be accompanied by the application fee (if any) prescribed by the regulations; and

(c) be accompanied by the registration fee (if any) prescribed by the regulations; and

(d) provide information or documents as to the eligibility of the applicant to be registered.

(4) The Building Commissioner may waive any application fee or registration fee if satisfied it is reasonable to do so.

(5) The Building Commissioner may require the applicant to provide further information or documents and may refuse the application if the further information or documents are not provided by the time specified by the Building Commissioner.

101. Registration as adjudicator or review adjudicator

(1) The Building Commissioner may register an individual as an adjudicator if the individual —

(a) has duly applied for registration as an adjudicator; and

(b) is eligible to be registered as an adjudicator under this Division.

(2) The Building Commissioner may register an individual as a review adjudicator if the individual —

(a) has duly applied for registration as a review adjudicator; and

(b) is eligible to be registered as a review adjudicator under this Division.

(3) If the Building Commissioner decides to refuse an application for registration, the Building Commissioner must give the applicant written notice of the decision and the reasons for the decision.

(4) The regulations may provide for the registration of different grades of adjudicators and for any related matter.

102. Eligibility to be registered

(1) An individual is eligible to be registered as an adjudicator if the Building Commissioner is satisfied that —

(a) the individual has the qualifications, expertise and experience required by the regulations for registration as an adjudicator; and

(b) the registration of the individual as an adjudicator is not suspended under this Division and has not previously been cancelled under this Division or the *Construction Contracts (Former Provisions) Act 2004*; and

(c) a similar registration of the individual under a corresponding security of payment law is not suspended or has not previously been cancelled (otherwise than at the request of the individual); and

(d) the individual has not been convicted of a serious offence; and

(e) the individual has not been a bankrupt within the period of 3 years before making the application to be registered under this Division.

(2) An individual is eligible to be registered as a review adjudicator if the Building Commissioner is satisfied that the individual —

(a) is registered or eligible to be registered as an adjudicator; and

(b) has the qualifications, expertise and experience required by the regulations for registration as a review adjudicator.

103. Conditions of registration

(1) The registration of an adjudicator or review adjudicator is subject to the following conditions —

(a) the performance of the functions of the adjudicator or review adjudicator under this Act in a competent and professional manner;

(b) the completion of any requirements for continuing professional development (or other training requirements) prescribed by the regulations for the purposes of this paragraph;

(c) compliance with a code of practice under section 109;

(d) compliance with the requirements of Part 3 Division 4 relating to adjudication fees and expenses of the adjudicator or review adjudicator;

(e) any other conditions imposed by the Building Commissioner.

(2) The Building Commissioner may, by written notice given to an adjudicator or review adjudicator, amend or revoke the conditions of registration imposed by the Building Commissioner or add conditions to which the registration is subject.

104. Renewal of registration

(1) Registration under this Division may be renewed by the Building Commissioner if the adjudicator or review adjudicator —

(a) has duly applied for renewal of the registration; and

(b) continues to be eligible for registration; and

(c) has completed the requirements for continuing professional development (or other training requirements) prescribed by the regulations for the purposes of this paragraph.

(2) An application for renewal of registration must be made no later than 1 month before the expiry of the existing registration.

(3) Section 100 applies to an application for renewal of registration in the same way it applies to an application for registration.

(4) If an application is duly made for renewal of registration and the application has not been determined before the expiry of the

existing registration, the existing registration continues in force until the application is determined.

(5) If the Building Commissioner decides to refuse an application for renewal of registration, the Building Commissioner must give the applicant written notice of the decision and the reasons for the decision.

105. Term of registration

Individuals may be registered (or their registration renewed) under this Division for the period (not exceeding 3 years) determined by the Building Commissioner.

106. Suspension or cancellation of registration

(1) The Building Commissioner may suspend (for a period not exceeding 3 years) or cancel the registration of an individual as an adjudicator or as a review adjudicator if satisfied that the individual —

(a) provided information in connection with the application for registration that was false or misleading in a material particular; or

(b) is no longer eligible under this Division to be registered as an adjudicator or review adjudicator; or

(c) has contravened a condition of the registration.

(2) Before suspending or cancelling the registration of an individual as an adjudicator or review adjudicator, the Building Commissioner must give the individual the opportunity to make a submission within the period specified by the Building Commissioner.

(3) If the Building Commissioner decides to suspend or cancel the registration of an individual as an adjudicator or review adjudicator, the Building Commissioner must give the individual written notice of the decision and the reasons for the decision.

(4) An adjudicator or review adjudicator may surrender their registration under this Division by written notice to the Building Commissioner.

107. Public register of adjudicators and review adjudicators

(1) The Building Commissioner must keep a register of adjudicators and review adjudicators containing relevant information about their registration and publish the register on an appropriate website.

(2) If the registration of an individual as an adjudicator or review adjudicator expires and is not renewed, or is suspended, cancelled or surrendered, the Building Commissioner must update the register and may include in the register details about the refusal of any application for renewal or about any suspension, cancellation or surrender of registration.

(3) The Building Commissioner may issue certificates of registration to adjudicators and review adjudicators on the register.

108. Review by State Administrative Tribunal of decisions of Building Commissioner

An individual who is aggrieved by any of the following decisions of the Building Commissioner may apply to the State Administrative Tribunal for a review of the decision —

(a) the refusal of an application by the individual for registration or renewal of registration as an adjudicator or review adjudicator;

(b) the imposition or amendment of a condition of the individual's registration as an adjudicator or review adjudicator;

(c) the suspension or cancellation of the individual's registration as an adjudicator or review adjudicator.

109. Code of practice for adjudicators and review adjudicators

(1) The regulations may prescribe or adopt a code of practice for the performance of the functions under this Act of adjudicators and review adjudicators.

(2) Adjudicators and review adjudicators are required to perform their functions under this Act in accordance with the code of practice.

(3) A contravention of the code of practice by an adjudicator or review adjudicator may be taken into account by the Building Commissioner under this Division, but does not invalidate any decision or determination of the adjudicator or review adjudicator under this Act.

110. Transitional registration on commencement of Division

(1) On the commencement of this Division, the registration of an individual as an adjudicator under the *Construction Contracts (Former Provisions) Act 2004* is taken to be a registration of the individual under this Division as an adjudicator (a ***provisional registration***) if —

(a) the Building Commissioner is satisfied that the individual has undertaken a training course approved by the Building Commissioner for the purposes of this paragraph; and

(b) the Building Commissioner issues a certificate of provisional registration to the individual.

(2) Unless a provisional registration is sooner cancelled under this Division, the provisional registration continues in force until the end of the period of 12 months after the commencement of this Division.

(3) The Building Commissioner must cancel the provisional registration of an individual if an application by the individual for registration as an adjudicator or review adjudicator under this Division is refused.

Part 6 — Miscellaneous

111. No contracting out

(1) This Act has effect despite any provision in any contract, agreement or other arrangement.

(2) A provision of any contract, agreement or other arrangement is void to the extent that it —

(a) is inconsistent with this Act; or

(b) purports to exclude, modify or restrict the operation of this Act or has the effect of excluding, modifying or restricting the operation of this Act; or

(c) requires a party to a construction contract to reimburse the other party to the contract for any costs or expenses incurred in connection with the taking of action under this Act, except as authorised by this Act; or

(d) may be reasonably construed as an attempt to deter a person from taking action under this Act.

112. Immunity from civil liability

(1) In this section —

protected person means —

(a) an adjudicator or review adjudicator appointed to determine an adjudication application or adjudication review application; or

(b) an authorised nominating authority; or

(c) the Building Commissioner; or

(d) a person acting under the direction of —

(i) an adjudicator or review adjudicator appointed to determine an adjudication application or adjudication review application; or

(ii) an authorised nominating authority; or

(iii) the Building Commissioner;

or

(e) a person who was a person referred to in paragraphs (a) to (d).

(2) No civil liability is incurred by a protected person for anything the person has done or omitted to do, in good faith, in the performance or purported performance of a function under this Act.

(3) The protection given by subsection (2) applies even though the thing done as described in that subsection may have been capable of being done whether or not this Act or any other written law had been enacted.

(4) Despite subsection (2), the State is not relieved of any liability that it might have for another person having done or omitted to do anything described in that subsection.

113. Service of documents

(1) In this section —

document includes any written notice, claim, response or determination;

give includes serve, send or otherwise provide.

(2) Any document that by or under this Act is authorised or required to be given by a party to a construction contract to another party to the contract in relation to matters arising under the contract —

(a) must be given in the manner (if any) provided in the contract if it is reasonably practicable to do so; or

(b) in any other case — must be given in a manner provided by subsection (3).

(3) Any document that by or under this Act is authorised or required to be given to a person may, subject to subsection (2), be given to the person —

(a) by delivering the document to the person personally; or

(b) by leaving the document for the person at the person's ordinary place of business; or

(c) by sending the document by post to the person's ordinary place of business; or

(d) by email to an email address specified by the person for giving documents of that kind to the person; or

(e) by any other method (including the use of an electronic database, document system or any other means by which a document can be accessed electronically) authorised by the regulations for giving documents of that kind to the person.

(4) The regulations may make provision for or in relation to the time at which a document that is given in a particular manner is taken to have been given.

(5) A document given or received under this Act by the agent of a person is taken for the purposes of this Act to have been given or received by that person.

114. Approved forms

(1) The Building Commissioner may approve and publish forms for use under any provision of this Act.

(2) An approved form published by the Building Commissioner is required to be used for the purpose for which it is approved, unless the Building Commissioner directs when publishing the approved form that it is recommended but not mandatory.

(3) An approved form published by the Building Commissioner may require —

(a) the form to be accompanied by specified documents; and

(b) information to be verified by statutory declaration.

115. Annual report on operation of Act

(1) Without limiting the *Financial Management Act 2006* section 61, the annual report for a financial year prepared under that section by the accountable authority for the department of the Public Service principally assisting in the administration of this Act must contain (or must be accompanied by a separate report that contains) information about the operation of this Act.

(2) The report must also contain information about any significant residual operation of the *Construction Contracts (Former Provisions) Act 2004*.

116. Use or disclosure of confidential information

(1) In this section —

confidential information means information that is the subject of a duty of confidentiality or secrecy or that is of a commercially sensitive nature;

relevant officer means the following —

(a) the Building Commissioner or other public official or employee engaged in the administration of this Act;

(b) an authorised nominating authority;

(c) an adjudicator or review adjudicator;

(d) a person who was a person referred to in paragraphs (a) to (c).

(2) A relevant officer must not, directly or indirectly, use or disclose any confidential information obtained by the relevant officer under or for the purposes of this Act.

Penalty for this subsection: a fine of $10 000.

(3) A person does not commit an offence under subsection (2) in relation to the use or disclosure of confidential information if —

(a) the information is already in the public domain; or

(b) the use or disclosure of the information is authorised under subsection (4) or (5).

(4) The use or disclosure of confidential information obtained under or for the purposes of this Act is authorised for the purposes of this section if the information is used or disclosed in good faith in any of the following circumstances —

(a) for the purposes of performing a function under (or complying with) this Act or another written law;

(b) with the consent of each person to whom the confidential information relates;

(c) to a court or other person or body acting judicially in the course of proceedings before the court, person or body;

(d) under an order of a court or other person or body acting judicially;

(e) as otherwise required by law.

(5) The Building Commissioner may authorise the disclosure of confidential information obtained under or for the purposes of this Act to any of the following persons or bodies if, in the opinion of the Building Commissioner, the information is or is likely to be relevant to the person or body —

(a) the Small Business Commissioner referred to in the *Small Business Development Corporation Act 1983* section 13;

(b) the Department CEO as defined in the *Procurement Act 2020* section 4(1) in connection with the functions of the Department CEO under Part 7 of that Act;

(c) a person or body prescribed by the regulations for the purposes of this paragraph.

117. Criminal proceedings generally

(1) A prosecution for an offence against this Act may be commenced by, and only by, the Building Commissioner or a person authorised to do so by the Building Commissioner.

(2) Subsection (1) does not limit the functions of the Director of Public Prosecutions under the *Director of Public Prosecutions Act 1991* section 11.

(3) In the absence of evidence to the contrary, proof is not required in any proceedings for an offence against this Act —

(a) that the prosecutor is authorised to commence the prosecution; or

(b) that a signature on a prosecution notice alleging the offence is the signature of a person authorised to commence the prosecution.

(4) A prosecution for an offence against this Act must be commenced within 3 years after the day on which the offence is alleged to have been committed.

(5) Despite subsection (4), if a prosecution notice alleging an offence against this Act specifies the day on which evidence of the alleged offence first came to the attention of a person who has authority to commence the prosecution —

(a) the prosecution may be commenced within 3 years after that day; and

(b) the prosecution notice need not contain particulars of the day on which the offence is alleged to have been committed.

(6) The day on which evidence first came to the attention of a person who has authority to commence the prosecution is, in the absence of proof to the contrary, the day specified in the prosecution notice.

118. Liability of officers for offence by body corporate

The Criminal Code section 39 (which provides for the criminal liability of officers of a body corporate) applies to an offence under section 65 or 87 of this Act.

[Section 118 inserted: No. 9 of 2023 s. 34.]

119. Regulations

(1) The Governor may make regulations prescribing matters —

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for giving effect to this Act.

(2) The regulations may provide that contravention of a regulation is an offence, and provide, for an offence against the regulations, for a penalty not exceeding a fine of $2 000.

120. Review of Act

(1) The Minister must review the operation and effectiveness of this Act, and prepare a report based on the review, as soon as practicable after the 5th anniversary of the day on which section 71 comes into operation.

(2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 5th anniversary.

Part 7 — Consequential amendments to other Acts

Division 1 — *Building Services (Complaint Resolution and Administration) Act 2011* amended

121. Act amended

This Division amends the *Building Services (Complaint Resolution and Administration) Act 2011*.

122. Section 3 amended

In section 3 in the definition of ***building service Act***:

(a) after paragraph (b) insert:

(ba) the *Building and Construction Industry (Security of Payment) Act 2021*;

(b) delete paragraph (d) and insert:

(d) the *Construction Contracts (Former Provisions) Act 2004*;

123. Section 70 amended

In section 70 in the Penalty delete "$10 000." and insert:

$25 000.

124. Section 71 amended

In section 71(2) delete the Penalty and insert:

Penalty for this subsection: a fine of $25 000.

Division 2 — *Building Services (Registration) Act 2011* amended

125. Act amended

This Division amends the *Building Services (Registration) Act 2011*.

126. Section 3 amended

In section 3 delete the definition of ***insolvent*** and insert:

insolvent has the meaning given in section 63A(1);

127. Section 18 amended

After section 18(1)(f) insert:

(fa) has paid any building service debt of a kind referred to in section 53(4) that the applicant has incurred; and

128. Section 32A inserted

After section 32 insert:

32A. Notification of new directors

(1) In this section —

director, of a body, has the meaning given in the Corporations Act section 9.

(2) A body that is a building service contractor must give the Board written notice of the appointment of any new director of the body.

Penalty for this subsection: a fine of $5 000.

(3) The notice referred to in subsection (2) must be given no later than 7 days after the day on which the new director is appointed and must include any information prescribed by the regulations.

129. Section 53 amended

(1) In section 53(1):

(a) in paragraph (a)(ii) after "the *Building Act 2011*," insert:

the *Building and Construction Industry (Security of Payment) Act 2021*,

(b) in paragraph (m) delete "contractor." and insert:

contractor;

(c) after paragraph (m) insert:

(n) that the registered building service provider has not paid a building service debt of a kind referred to in subsection (4) that the registered building service provider has incurred.

(2) After section 53(3) insert:

(4) A building service debt of a registered building service provider is any of the following —

(a) a debt for which judgment has been entered in a court of competent jurisdiction, after the commencement of the *Building and Construction Industry (Security of Payment) Act 2021* section 129, against the provider in

connection with a contract for a building service or for the supply of goods or services for a building service;

(b) an amount that an adjudicator or review adjudicator determines, after the commencement of the *Building and Construction Industry (Security of Payment) Act 2021* section 129, is payable by the provider under Part 3 of that Act;

(c) an amount that an adjudicator determines, after the commencement of the *Building and Construction Industry (Security of Payment) Act 2021* section 129, is payable by the provider under the *Construction Contracts (Former Provisions) Act 2004* section 31(2)(b).

(5) A judgment debt is a building service debt under subsection (4) only if —

(a) the amount is not paid in full within 28 days after the judgment debt was entered (or within any longer period for payment allowed by the court); and

(b) the judgment debtor has not entered into a payment arrangement with the judgment creditor or, if any payment arrangement is entered into, the judgment debtor has failed to comply with the arrangement; and

(c) either —

(i) proceedings have not been instituted to appeal or set aside the judgment debt within the time allowed for instituting the proceedings; or

(ii) any proceedings so instituted do not result in the judgment debt being quashed or set aside and the debt has not been paid in full within 5 days after the termination of the proceedings.

(6) An adjudicated amount is a building service debt under subsection (4) only if —

(a) the amount is not paid in full by the due date for payment of the adjudicated amount (or within any longer period for payment allowed by the adjudicator or review adjudicator); and

(b) either —

(i) an adjudication review or judicial review has not been instituted within the time allowed for doing so; or

(ii) any review so instituted does not result in the adjudicated amount being quashed or set aside and the amount has not been paid in full within 5 days after the termination of the review.

(7) The reference to the time allowed for instituting a judicial review in subsection (6)(b)(i) does not include time that is allowed only with the leave of a court.

(8) For the purposes of subsection (4), it does not matter that the judgment debt or adjudication determination resulted from matters arising before the commencement of the *Building and Construction Industry (Security of Payment) Act 2021* section 129.

130. Section 57 amended

In section 57(1)(d) delete "section." and insert:

section or the exercise of power relates only to a disciplinary matter referred to in section 53(1)(n).

131. Section 58 amended

(1) In section 58(1)(i) delete "(m)," and insert:

(n),

(2) After section 58(3) insert:

(4) If the State Administrative Tribunal orders the cancellation of the registration of a person as a building service contractor, it may, for the purposes of Part 5A, certify that the person is unable to meet the person's financial obligations as and when they fall due if the Tribunal made its order wholly or partly on that basis.

132. Section 59 amended

In section 59(3) delete "(m)" and insert:

(n)

133. Part 5A inserted

After section 63 insert:

Part 5A — Insolvency of building service contractors

63A. Terms used

(1) In this Part —

construction company means a corporation or non-corporate body that directly or indirectly —

(a) carries out construction work in this State or in any other State or a Territory; or

(b) carried out construction work in this State or in any other State or a Territory during the period of 2 years immediately before becoming an insolvent;

construction work has the meaning given in the *Building and Construction Industry (Security of Payment) Act 2021* section 6;

excluded contractor means a temporarily excluded contractor or a permanently excluded contractor;

influential person, for a corporation or non-corporate body —

(a) means an individual who controls or substantially influences the conduct of the corporation or body; but

(b) does not include —

(i) a lawyer, accountant, business consultant or other professional who provides professional advice to the corporation or body and who influences the conduct of the corporation or body

only because of the provision of that professional advice; or

(ii) an individual who regulates or otherwise influences the conduct of the corporation or body in the exercise of public functions under a written law;

insolvency event means any event occurring after the commencement of the *Building and Construction Industry (Security of Payment) Act 2021* section 133 that results in an individual, corporation, non-corporate body or construction company becoming an insolvent;

insolvent means —

(a) in the case of an individual or officer of a non-corporate body — a person who is, according to the *Interpretation Act 1984* section 13D, a bankrupt or a person whose affairs are under insolvency laws; or

(b) in the case of a corporation — a corporation that has a liquidator, provisional liquidator, administrator (including an administrator of a deed of company arrangement) or receiver appointed, or that is otherwise being wound up, under the Corporations Act; or

(c) in any case — a person whose registration as a building service contractor is cancelled by order of the State Administrative Tribunal if the Tribunal certifies under section 58(4) that the person is unable to meet the person's financial obligations as and when they fall due;

non-corporate body means a partnership or unincorporated body;

officer —

(a) of a corporation —

(i) means an officer of the corporation as defined in the Corporations Act section 9; and

(ii) includes an influential person for the corporation; and

(iii) does not include an administrator, receiver or liquidator appointed under the Corporations Act;

or

(b) of a non-corporate body —

(i) means an officer of an entity that is neither an individual nor a corporation as defined in the Corporations Act section 9; and

(ii) includes an influential person for the body;

permanently excluded contractor means a person excluded from being registered as a building service contractor under section 63C(2)(b);

registration means registration under Part 3 as a building service contractor;

temporarily excluded contractor means a person excluded from being registered as a building service contractor under section 63C(2)(a).

(2) A reference in this Part to a person becoming an insolvent is a reference to the person becoming an insolvent after the commencement of the *Building and Construction Industry (Security of Payment) Act 2021* section 133.

(3) A reference in this Part to a non-corporate body becoming an insolvent is a reference to an officer of the body becoming an insolvent after the commencement of the *Building and Construction Industry (Security of Payment) Act 2021* section 133.

63B. Excluded contractors not to be registered

(1) The Board must refuse to register or renew the registration of an excluded contractor as a building service contractor.

(2) The Board must cancel the registration of an excluded contractor as a building service contractor.

63C. Declaration of excluded contractors

(1) This section applies to a person (being an individual, non-corporate body or corporation) who is an applicant for registration or renewal of registration as a building service contractor or who is a building service contractor.

(2) The Board may, in accordance with section 63D or 63E, declare that the person is excluded from being registered as a building service contractor —

(a) for the period ending 3 years after the date of the last insolvency event (specified by the Board) on which the declaration of the Board is based; or

(b) on a permanent basis.

(3) The Board may at any time revoke a declaration under this section.

63D. When individual or non-corporate body may be declared excluded contractor

(1) An individual or non-corporate body may be declared to be a temporarily excluded contractor if —

(a) the individual or an officer of the non-corporate body became an insolvent on at least one occasion; and

(b) the period of 3 years has not elapsed since the insolvency event that resulted in the insolvency.

(2) An individual or non-corporate body may be declared to be a permanently excluded contractor if —

(a) the individual or an officer of the non-corporate body became an insolvent on 2 separate occasions; and

(b) the insolvency event that resulted in the second insolvency occurred within 5 years after the insolvency event that resulted in the first insolvency.

(3) The declaration of an individual or non-corporate body as an excluded contractor is subject to section 63F.

63E. When corporation may be declared excluded contractor

(1) A corporation may be declared to be a temporarily excluded contractor if —

(a) the corporation became an insolvent on at least one occasion; and

(b) the period of 3 years has not elapsed since the insolvency event that resulted in the insolvency.

(2) A corporation may also be declared to be a temporarily excluded contractor if an officer of the corporation —

(a) was an officer of a construction company at the time the company became an insolvent (or within 2 years immediately before the company became an insolvent) and the period of 3 years has not elapsed since the insolvency event that resulted in the insolvency; or

(b) is an individual who could (subject to compliance with section 63F) be declared to be a temporarily excluded contractor.

(3) A corporation may be declared to be a permanently excluded contractor if —

(a) the corporation became an insolvent on 2 separate occasions; and

(b) the insolvency event that resulted in the second insolvency occurred within 5 years after the insolvency event that resulted in the first insolvency.

(4) A corporation may also be declared to be a permanently excluded contractor if an officer of the corporation —

(a) was an officer of a construction company at the time the company became an insolvent on 2 separate occasions (or within 2 years immediately before each occasion on which the company became an insolvent) and the insolvency event that resulted in the second insolvency occurred within 5 years after the insolvency event that resulted in the first insolvency; or

(b) was an officer of a construction company at the time the company became an insolvent (or within 2 years immediately before the company became an insolvent) and is an individual who also became an insolvent, and the insolvency event that resulted in the later insolvency occurred within 5 years after the insolvency event that resulted in the earlier insolvency; or

(c) is an individual who could (subject to compliance with section 63F) be declared to be a permanently excluded contractor.

(5) The Board must not declare a corporation to be a permanently excluded contractor because of insolvency on 2 separate occasions if the corporation satisfies the Board that those insolvencies arose out of the same set of circumstances.

(6) The declaration of a corporation as an excluded contractor is subject to section 63F.

63F. Procedure for declaring excluded contractor

(1) The Board must not declare a person to be an excluded contractor unless —

(a) the Board has given the person a written notice of its intention to consider making the declaration (a ***show cause notice***); and

(b) the show cause notice identifies the insolvency event or events on which the declaration would be based; and

(c) the Board has given the person the opportunity to make a submission to the Board on the matter within 28 days or any longer period that is specified in the show cause notice.

(2) The Board must not declare a person to be an excluded contractor if the person satisfies the Board that —

(a) reasonable steps were taken to avoid the circumstances that resulted in the insolvency or insolvencies concerned; and

(b) sufficient arrangements are in place to ensure that the person's construction work business will be managed in a competent and proficient manner.

(3) The Board must not declare a corporation to be an excluded contractor because a particular individual is an officer of the corporation if the corporation satisfies the Board that the individual is no longer an officer of the corporation.

(4) For the purposes of this section, the reasonable steps taken to avoid the circumstances that resulted in insolvency may include (but are not limited to) the following —

(a) keeping proper accounting records;

(b) obtaining appropriate financial or legal advice before entering into significant business arrangements;

(c) reporting fraud or theft in relation to the business;

(d) putting in place appropriate credit arrangements and taking reasonable steps to recover outstanding money owed;

(e) making adequate provision for Commonwealth and State taxes and employee entitlements;

(f) ensuring there are sufficient assets to meet guarantees.

(5) Reasonable steps for the purposes of this section do not require a person to contribute additional equity to a business to prevent insolvency.

(6) Reasonable steps for the purposes of this section require consideration of the circumstances existing before an insolvency that were known to the individuals who could have prevented the insolvency and whether the individuals were in a position to control the circumstances that resulted in the insolvency.

(7) For the purposes of this section, sufficient arrangements to ensure that a person's construction work business will be managed in a competent and proficient manner may include (but are not limited to) the following —

(a) the appointment of additional company directors or business managers;

(b) the engagement of financial or legal advisers on an ongoing basis;

(c) the provision of sufficient working capital and equity;

(d) credit management arrangements and other appropriate business plans.

63G. When declaration of excluded contractor takes effect

The declaration of a person as an excluded contractor does not take effect —

(a) until the expiration of the period of 28 days after written notice of the decision of the Board to make the declaration has been given to the person; or

(b) if the person duly applies within that period to the State Administrative Tribunal for a review of the decision under Part 6 — unless the application is withdrawn or the decision is confirmed following the review.

134. Section 64 amended

(1) In section 64(1) in the definition of ***reviewable decision*** after paragraph (d) insert:

(da) to declare that a person is excluded from being registered as a building service contractor under section 63C; or

(2) After section 64(2) insert:

(3) A decision to refuse to grant or renew registration as a building service contractor, or to cancel the registration of a building service contractor, is not subject to review under this Part if it was made only on the basis of a declaration under section 63C that has been reviewed and confirmed by the Tribunal or that was not the subject of an application for review by the Tribunal.

Division 3 — *Construction Contracts Act 2004* amended

135. Act amended

This Division amends the *Construction Contracts Act 2004*.

136. Section 1 amended

In section 1 delete "may be cited as the *Construction Contracts Act 2004*." and insert:

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

137. Section 7 amended

In section 7(1) delete "operation." and insert:

operation and before the *Building and Construction Industry (Security of Payment) Act 2021* section 22 comes into operation.

138. Section 48 amended

(1) After section 48(2) insert:

(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.

(2) After section 48(5) insert:

(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.

139. Section 52 deleted

Delete section 52.

Division 4 — *Procurement Act 2020* amended

140. Act amended

This Division amends the *Procurement Act 2020*.

141. Section 4 amended

In section 4(1) in the definition of ***goods, services or works*** paragraph (c) delete "*Construction Contracts Act 2004*" and insert:

Construction Contracts (Former Provisions) Act 2004

Notes

This is a compilation of the *Building and Construction Industry (Security of Payment) Act 2021* and includes amendments made by other written laws. For provisions that have come into operation see the compilation table. For provisions that have not yet come into operation see the uncommenced provisions table.

Compilation table

Short title	Number and year	Assent	Commencement
Building and Construction Industry (Security of Payment) Act 2021	4 of 2021	25 Jun 2021	Pt. 1 Div. 1: 25 Jun 2021 (see s. 2(a)); Pt. 5 Div. 1 (s. 98 only): 26 Jun 2021 (see s. 2(b)); Pt. 1 Div. 2 and 3, Pt. 2, Pt. 3 (other than s. 57, 59-61 and 65), s. 88-97, Pt. 5 Div. 2, Pt. 6 (other than s. 118) and Pt. 7 (other than s. 123 and 124 and Div. 2): 1 Aug 2022 (see s. 2(c) and SL 2022/78 cl. 2(2)(a)); s. 57 and 65, Pt. 4 (other than s. 87), s. 118, 123 and 124 and Pt. 7 Div. 2: 1 Feb 2023 (see s. 2(c) and SL 2022/78 cl. 2(2)(b)); s. 59-61 and 87: 1 Feb 2024 (see s. 2(c) and SL 2022/78 cl. 2(2)(c))
Directors' Liability Reform Act 2023 Pt. 3 Div. 11	9 of 2023	4 Apr 2023	5 Apr 2023 (see s. 2(j))

Uncommenced provisions table

To view the text of the uncommenced provisions see *Acts as passed* on the WA Legislation website.

Short title	Number and year	Assent	Commencement
Building and Construction Industry (Security of Payment) Amendment Act 2026 Pt. 2	16 of 2026	21 Oct 2026	To be proclaimed (see s. 2(b))

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