

**FRUSTRATED CONTRACTS ACT, 1978, No. 105**

**New South Wales**



ANNO VICESIMO SEPTIMO

**ELIZABETHÆ II REGINÆ**

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**Act No. 105, 1978.**

An Act to amend the law relating to frustrated contracts.  
[Assented to, 20th December, 1978.]

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See also Limitation (Frustrated Contracts) Amendment Act, 1978, District Court (Frustrated Contracts) Amendment Act, 1978, Courts of Petty Sessions (Frustrated Contracts) Amendment Act, 1978.

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**BE** it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

Short title.     **1.** This Act may be cited as the "Frustrated Contracts Act, 1978".

Commence-     **2.** (1) This section and section 1 shall commence on the date  
ment.           of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Arrange-     **3.** This Act is divided as follows :—  
ment.

PART I.—PRELIMINARY—ss. 1–6.

PART II.—EFFECT OF FRUSTRATION OF CONTRACT—ss.  
7, 8.

PART III.—ADJUSTMENT ON FRUSTRATION OF CONTRACT  
—ss. 9–15.

DIVISION 1.—*Adjustment where performance  
(excluding payment of money) received*—ss.  
9–11.

DIVISION 2.—*Other adjustments*—ss. 12, 13.

DIVISION 3.—*Recovery of money payable*—s. 14.

DIVISION 4.—*Adjustment by the court*—s. 15.

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PART IV.—REMOVAL OF ACTION FROM PETTY SESSIONS  
INTO DISTRICT COURT—ss. 16–20.

4. This Act binds the Crown, not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities. Act binds the Crown.

5. (1) In this Act, except to the extent that the context or subject-matter otherwise indicates or requires— Interpretation.

“agreed return”, in relation to performance of a contract by a party, means such performance of the contract by another party as is contemplated by the contract as consideration for the firstmentioned performance;

“court”, in relation to any matter, means the court or arbitrator before whom the matter falls to be determined;

“frustration” includes avoidance of an agreement under section 12 of the Sale of Goods Act, 1923;

“party” includes the assigns of a party;

“performance”, in relation to a contract, means—

- (a) performance, wholly or in part, of a promise in the contract; or
- (b) fulfilment, wholly or in part, of a condition of or in the contract.

(2) Where performance of a contract is referred to in a provision of this Act—

- (a) a reference in the provision to the performing party is a reference to the party to the contract by whom the performance was, or was intended to be, given: and

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(b) a reference in the provision to the other party to the contract is a reference to the party by whom performance of the contract is contemplated by the contract as consideration for the performance referred to in the provision.

(3) For the purposes of this Act, performance of a contract is given and received if received as contemplated by the contract, whether received by a party to the contract or not.

(4) For the purposes of this Act, where a contract has been frustrated and a thing is done or suffered under the contract after the time of frustration but before the party who does or suffers that thing knows or ought to know of the circumstances (whether matters of fact or law) giving rise to the frustration, that thing has effect as if done or suffered before the time of frustration.

(5) It is the intention of Parliament that, except to the extent that the parties to a contract otherwise agree, a court other than a court of New South Wales may exercise the powers given to a court by Part III in relation to the contract.

**Act does  
not apply  
to certain  
contracts.**

**6. (1) This Act—**

- (a) does not apply to a contract made before the commencement of this Act;
- (b) does not apply to a charter-party, except a time charter-party and except a charter-party by way of demise;
- (c) does not apply to a contract (other than a charter-party) for the carriage of goods by sea;
- (d) does not apply to a contract of insurance; and
- (e) Part IV excepted, does not apply to any other contract in so far as the parties thereto have agreed that this Act does not apply to the contract.

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(2) This Act does not apply to a contract embodied in or constituted by the memorandum or articles of association or rules or other instrument or agreement constituting, or regulating the affairs of, any of the following bodies—

- (a) a company within the meaning of the Companies Act, 1961;
- (b) an unregistered company within the meaning of Division 5 of Part X of the Companies Act, 1961;
- (c) a credit union registered under the Credit Union Act, 1969;
- (d) a society registered under—
  - (i) the Building and Co-operative Societies Act, 1901;
  - (ii) the Co-operation Act, 1923;
  - (iii) the Friendly Societies Act, 1912; or
  - (iv) the Permanent Building Societies Act, 1967;
- (e) a trade union registered under the Trade Union Act 1881;
- (f) a partnership within the meaning of the Partnership Act, 1892; or
- (g) any association which, on a proper case arising, is liable to be wound up or dissolved by order of the Supreme Court of New South Wales.

in any case in which the circumstances alleged to give rise to frustration of the contract furnish a case for the winding up or dissolution of the body.

(3) Where a contract is severable into parts and one or more but not all parts are frustrated, this Act does not apply to the part or parts not frustrated.

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## PART II.

## EFFECT OF FRUSTRATION OF CONTRACT.

Promise not  
performed.

7. (1) Where a promise under a frustrated contract was due to be, but was not, performed before the time of frustration, the promise is discharged except to the extent necessary to support a claim for damages for breach of the promise before the time of frustration.

(2) Subsection (1) does not affect a promise due for performance before frustration which would not have been discharged by the frustration if it had been due for performance after the time of frustration.

Damages  
assessed  
after  
frustration.

8. Where a contract is frustrated and a liability for damages for breach of the contract has accrued before the time of frustration, regard shall be had, in assessing those damages after that time, to the fact that the contract has been frustrated.

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PART III.

## ADJUSTMENT ON FRUSTRATION OF CONTRACT.

DIVISION 1.—*Adjustment where performance (excluding payment of money) received.*

Interpre-  
tation.

9. In this Division “performance” in relation to a contract does not include—

- (a) performance, wholly or in part, of a promise in the contract to pay money; or
- (b) fulfilment, wholly or in part, of a condition of or in the contract that money be paid.

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10. Where a contract is frustrated and the whole of the performance to be given by a party under the contract has been received before the time of frustration, the performing party shall be paid by the other party to the contract an amount equal to the value of the agreed return for the performance.

Adjustment where whole performance received.

11. (1) In this section—

“attributable cost”, in relation to performance received under a frustrated contract, means—

Adjustment where part performance only received.

- (a) where there is no incidental gain to the performing party, and except as provided by paragraph (c)—an amount equal to the reasonable cost of the performance;
- (b) where there is an incidental gain to the performing party, and except as provided by paragraph (c)—such part of the reasonable cost of the performance as is equal to an amount calculated by deducting from the reasonable cost of the performance the value of that incidental gain; or
- (c) where the amount referred to in paragraph (a) or (b) exceeds the proportionate allowance for the performance—such part of the reasonable cost of the performance as is equal in amount to that proportionate allowance;

“attributable value”, in relation to performance received under a frustrated contract, means an amount equal to the value of the proportionate allowance for that performance reduced by the lost value of that performance;

“incidental gain”, in relation to a party to a contract who suffers a detriment referred to in the definition of “reasonable cost”, means any property or improvement to property acquired or derived by that party as a

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consequence of doing or suffering the acts or things that caused him to suffer the detriment, except to the extent that the property or improvement so acquired or derived is comprised in any performance given by that party under the contract or is expended or disposed of in giving any such performance;

“lost value”, in relation to performance received under a frustrated contract, is a reference to the amount (if any) by which the value of that performance was reduced by reason of the frustration of the contract, that value being assessed as at the time immediately before the frustration of the contract and on the basis that the contract would not be frustrated;

“proportionate allowance”, in relation to performance received under a frustrated contract, means such part of the value of the agreed return for complete performance of the contract by the performing party as is appropriate to be charged to the other party for the performance received, having regard to the extent to which the performance received is less than the whole of the performance contracted to be given by the performing party;

“reasonable cost”, in relation to performance received under a frustrated contract, is an amount that would be fair compensation to the performing party for any detriment suffered by him in reasonably paying money, doing work or doing or suffering any other act or thing to the extent to which the detriment was suffered for the purpose of giving the performance so received.

(2) Where a contract is frustrated and part, but not the whole, of the performance to be given by a party under the contract has been received before the time of frustration, the performing party shall be paid by the other party to the contract—

(a) an amount equal to the attributable value of the performance, except where the attributable cost of the performance exceeds its attributable value; or



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- (b) where the attributable cost of the performance exceeds its attributable value—an amount equal to the sum of—
- (i) the attributable value of the performance; and
  - (ii) one-half of the amount by which the attributable cost of the performance exceeds its attributable value.

**DIVISION 2.—Other adjustments.**

**12.** Where a contract is frustrated and a party to the contract has paid money to another person (whether or not a party to the contract) as, or as part of, an agreed return for performance of the contract by another party (whether or not that other party is the person to whom the payment was made and whether or not there has been any such performance) that other party shall pay the same amount of money to the party who made the payment. Return of money paid.

**13.** (1) Where a contract is frustrated and, by reasonably paying money, doing work or doing or suffering any other act or thing for the purpose of giving performance under the contract (not being performance which has been received) the performing party has suffered a detriment, the performing party shall be paid by the other party to the contract an amount equal to one-half of the amount that would be fair compensation for the detriment suffered. Adjustment of certain losses and gains.

(2) Where a performing party referred to in subsection (1) has, as a consequence of doing or suffering the acts or things that caused him to suffer the detriment so referred to, acquired or derived any property or improvement to property, he shall pay to the other party so referred to one-half of the value of the property or improvement so acquired or derived.

**DIVISION 3.—Recovery of money payable.**

**14.** A person entitled under Division 1 or 2 to be paid an amount of money by another person may recover the amount from that other person as a debt in a court of competent jurisdiction. Recovery of money as a debt.

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DIVISION 4.—*Adjustment by the court.*Adjustment  
by the  
court.

15. (1) Where the court is satisfied that the terms of a frustrated contract or the events which have occurred are such that, in respect of the contract—

- (a) Divisions 1 and 2 are manifestly inadequate or inappropriate;
- (b) application of Divisions 1 and 2 would cause manifest injustice; or
- (c) application of Divisions 1 and 2 would be excessively difficult or expensive.

the court may, by order, exclude the contract from the operation of Divisions 1 and 2 and, subject to subsection (8), may, by order, substitute such adjustments in money or otherwise as it considers proper.

(2) Orders which the court may make under subsection (1) include—

- (a) orders for the payment of interest; and
- (b) orders as to the time when money shall be paid.

(3) In addition to its jurisdiction under subsections (1) and (2), the Supreme Court or the District Court may, for the purposes of this section, make orders for—

- (a) the making of any disposition of property;
- (b) the sale or other realisation of property;
- (c) the disposal of the proceeds of sale or other realisation of property;
- (d) the creation of a charge on property in favour of any person;
- (e) the enforcement of a charge so created;
- (f) the appointment and regulation of the proceedings of a receiver of property; and
- (g) the vesting of property in any person.

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(4) Sections 78 and 79 of the Trustee Act, 1925, apply to a vesting order, and to the power to make a vesting order, under subsection (3).

(5) Section 78 (2) of the Trustee Act, 1925, applies to a vesting order under subsection (3) as if subsection (3) were included in the provisions of Part III of that Act.

(6) In relation to a vesting order of the District Court, sections 78 and 79 of the Trustee Act, 1925, shall be read as if "Court" in those sections meant the District Court.

(7) Subsections (2) to (6) do not limit the generality of subsection (1).

(8) This section does not authorise a court of petty sessions to give a judgment otherwise than for the payment of money.

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PART IV.

REMOVAL OF ACTION FROM PETTY SESSIONS INTO  
DISTRICT COURT.

**16.** In this Part, "proclaimed place" and "nearest proclaimed place" have the meanings ascribed thereto in sections 4 and 5 respectively of the District Court Act, 1973. <sup>Interpre-</sup>  
<sup>tation.</sup>

**17.** (1) Where an action for the recovery of money under Part III is pending in a court of petty sessions, the District Court may, on application by a party to the action, order that the action be removed into the District Court sitting at such proclaimed place as the District Court may specify in the order. <sup>Removal</sup>  
<sup>generally.</sup>

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(2) Subject to section 20 (4), the District Court may make an order under subsection (1) upon such terms as to payment of costs, giving of security for any amount claimed or for costs, or otherwise, as the District Court thinks fit.

(3) An order for removal made under subsection (1) shall take effect on service of a copy of the order on the registrar of the court of petty sessions or on earlier notification of the order to the registrar of the court of petty sessions in such manner as the District Court may direct.

(4) Subject to section 20 (3), an order for removal made under subsection (1) shall not affect the validity of any order made or other thing done in the action before the order for removal takes effect.

(5) Where the District Court has made an order for removal under subsection (1), the applicant for the order shall, within 10 days after the making of the order or within such other time as the District Court may direct, or, if the applicant defaults, any other party may, lodge with the registrar of the District Court for the place specified in the order for removal a copy of each document filed in the action in the court of petty sessions.

**Stay of  
proceedings  
in petty  
sessions.**

**18.** (1) Where an application is pending in the District Court for an order under section 17 for removal of an action in a court of petty sessions, the District Court may make orders for a stay of proceedings in the action.

(2) An order under subsection (1) for a stay of proceedings shall take effect on service of a copy of the order on the registrar of the court of petty sessions or on earlier notification of the order to the registrar of the court of petty sessions in such manner as the District Court may direct.

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**19.** (1) Proceedings in the District Court for an order under section 17 for removal of an action in a court of petty sessions, or for a stay under section 18 of proceedings in an action in a court of petty sessions, shall be commenced at the nearest proclaimed place to the court of petty sessions. Place of application for removal or stay.

(2) Where proceedings to which subsection (1) applies are commenced at a proclaimed place that is not a place at which they ought, under subsection (1), to have been commenced, the District Court may, on the application of a party to the proceedings or without any such application—

- (a) order that the proceedings be continued in the District Court notwithstanding that they were commenced at that place;
- (b) order a change of venue of the proceedings, under section 40 of the District Court Act, 1973, to such other proclaimed place as the District Court thinks proper; or
- (c) strike out the proceedings.

**20.** (1) Where an order under section 17 for removal of an action in a court of petty sessions into the District Court takes effect, the action ceases to be an action in the court of petty sessions and continues in the District Court as if it had been commenced in the District Court— Proceedings after removal.

- (a) at the place specified in the order for removal; and
- (b) on the date on which the plaint commencing the action was filed in the court of petty sessions.

(2) Subsection (1) has effect subject to—

- (a) the District Court Act, 1973, and the rules made under that Act; and
- (b) any order of the District Court as to procedure.

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(3) Any order made by a court of petty sessions in an action removed under subsection (1) into the District Court may be set aside or varied, and is subject to appeal, as if made by the District Court.

(4) Any costs payable under the District Court Act, 1973, or under an order of the District Court, in respect of any step in an action in a court of petty sessions removed under subsection (1) into the District Court shall be limited as may be prescribed by rules made under the Courts of Petty Sessions (Civil Claims) Act, 1970.

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