

Contractors Debts Act 1997 No 110

[1997-110]



New South Wales

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Contractors Debts Act 1997 No 110



New South Wales

An Act to provide for the recovery of debts owed to persons for work carried out or materials supplied and to repeal the *Contractors' Debts Act 1897*.

Part 1 Preliminary

1 Name of Act

This Act is the *Contractors Debts Act 1997*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

approved form means a form approved by the Minister.

certified debt, in relation to an unpaid person, means the amount specified in a debt certificate as being owed to the unpaid person.

contract means an express or implied contract, whether or not in writing.

debt certificate means a certificate issued under section 7.

defaulting contractor—see section 5.

discharge notice means a notice referred to in section 13.

notice of claim means a notice referred to in section 6.

principal—see section 5.

unpaid person—see section 5.

(2) This Act applies to a debt that is owed partially for work carried out and partially for materials supplied in the same way as it applies to a debt that is owed solely for work carried out or solely for materials supplied.

(3) A reference in this Act:

- (a) to the carrying out of work includes a reference to construction work (within the meaning of the *Building and Construction Industry Security of Payment Act 1999*) carried out or undertaken to be carried out under a construction contract within the meaning of that Act, and
- (b) to the supply of materials includes a reference to related goods and services (within the meaning of that Act) supplied or undertaken to be supplied under any such contract.

4 Notes

Notes included in this Act are explanatory notes and do not form part of this Act.

Part 2 Obtaining payment of debt

5 Unpaid persons can obtain payment from principal

- (1) A person (the **unpaid person**) who is owed money for work carried out for or materials supplied to some other person (the **defaulting contractor**) can obtain payment of that money in accordance with this Act out of money that is payable or becomes payable to the defaulting contractor by some other person (the **principal**) for work or materials that the principal engaged the defaulting contractor to carry out or supply under a contract.
- (2) However, the unpaid person can obtain payment from the principal under this Act only if the work carried out or materials supplied by the unpaid person are, or are part of or incidental to, the work or materials that the principal engaged the defaulting contractor to carry out or supply.

Note—

A typical example of an unpaid person is a tradesperson, labourer or supplier (including a corporation).

6 Procedure for obtaining payment

- (1) The following procedure must be followed to obtain payment of the money owed:
 - (a) firstly, a debt certificate must have been issued for the money owed (as provided for by section 7),
 - (b) secondly, the unpaid person must serve a notice of claim on the principal.
- (2) A notice of claim is a notice in an approved form together with a copy of the debt certificate.

7 Certification of debt by court

- (1) When judgment is given or entered up in any proceedings relating to the recovery of

money owed to a person for work carried out or materials supplied, the court may, by order made on the application of the person in whose favour the judgment is given, issue a certificate (a **debt certificate**) in respect of the debt under this section.

- (1A) If an adjudication certificate within the meaning of the *Building and Construction Industry Security of Payment Act 1999* has been filed as a judgment for a debt in accordance with section 25 of that Act, the court may, by order made on the application by the person who filed the adjudication certificate, issue a debt certificate in respect of the debt under this section.
- (2) If the debt concerned consists of daily, weekly or monthly wages, and the debt exceeds 120 days' wages, the amount certified in the debt certificate is not to exceed 120 days' wages.
- (3) A debt certificate is not to be issued if the court is satisfied that the work was done on something moveable and it would be practicable for the applicant to exercise a lien by retaining the thing in the applicant's possession.
- (4) A debt certificate is to be in an approved form.
- (5) In this section, **judgment** includes a default judgment.

8 Notice of claim operates as assignment of debt

- (1) Service of a notice of claim on the principal operates to assign to the unpaid person the obligation of the principal to pay the money owed under the contract to the defaulting contractor.
- (2) The assignment is limited to the amount of the unpaid person's certified debt.
- (3) The assignment is subject to any prior assignment under this Act that is binding on the principal and the defaulting contractor.

9 Payment of defaulting contractor's debt by principal

- (1) After a notice of claim is served on a principal in accordance with this Part, the principal must pay the money owed to the defaulting contractor to the unpaid person.
- (2) The principal must make the payments to the unpaid person as they become payable under the contract with the defaulting contractor until whichever of the following first occurs:
 - (a) the principal receives a discharge notice, or discharge notices, indicating that the certified debt has been fully discharged, or
 - (b) the payments are no longer payable under the contract.

10 Priority of assignments under Act

- (1) The priority of assignments under this Act is to be determined by the order of service of notices of claim on the principal.
- (2) All notices of claim in respect of debts owed by the same defaulting contractor that are served on the principal within the period of 7 days after the first notice in respect of the defaulting contractor is served on the principal are taken to be served at the same time and, accordingly, take equal priority.
- (3) The principal is not to make any payment to an unpaid person who serves a notice of claim until that 7 day period has elapsed (despite section 9).
- (4) If assignments take equal priority, the principal is to make the payments by distributing the money payable between the unpaid persons who have equal priority pro rata in proportion to the amount of their respective certified debts.
- (5) The principal must continue to make those payments to each unpaid person until whichever of the following first occurs:
 - (a) the principal receives a discharge notice, or discharge notices, indicating that each certified debt has been fully discharged, or
 - (b) the payments are no longer payable under the contract.

11 Right of recovery if principal fails to pay

- (1) An assignment effected by operation of this Act is valid at law.
- (2) Accordingly, if the principal fails to make any payment required to be made by this Act, the unpaid person may sue for and recover the debt assigned to the unpaid person, in the unpaid person's own name.
- (3) Proceedings for recovery of the debt may be taken in any manner in which the defaulting contractor might have taken them had there been no assignment.
- (4) An unpaid person's right of recovery under this section is subject to any defence that the principal would have had against recovery of the debt by the defaulting contractor had there been no assignment, other than a defence based on something done by the principal after the notice of claim was served on the principal.

Note—

For example, if the principal continues to make the contract payments to the defaulting contractor, rather than the unpaid person, after having been served with a notice of claim, the unpaid person is still entitled to recover the money from the principal.

12 Assignment ceases to operate on discharge of debt

- (1) If the debt owed to an unpaid person by a defaulting contractor is discharged, or the

judgment or order that resulted in a debt certificate being issued in respect of the debt is set aside, any assignment effected by operation of this Act in connection with that debt ceases to operate.

- (2) If only part of the debt is discharged, the assignment effected in respect of that part of the debt ceases to operate.
- (3) This section does not affect any payment or dealing that is made by a principal in good faith before the principal receives notice, and sufficient evidence of, the discharge of the debt or the setting aside of the judgment or order. To the extent necessary to give effect to such a payment or dealing, the assignment effected by operation of this Act is taken to continue in force.

Note—

If a principal makes a payment to an unpaid person (as required by section 9), instead of paying the defaulting contractor, without knowing that the debt owed to the unpaid person has been discharged by the defaulting contractor, this section protects the principal from being required by the defaulting contractor to make the payment to the defaulting contractor.

13 Unpaid person required to provide discharge notice

- (1) If a defaulting contractor or principal makes a payment to an unpaid person in partial or full discharge of the debt owed to the unpaid person, the unpaid person must, on the request of the person making the payment, give that person a discharge notice in respect of the payment.
- (2) A discharge notice is a notice in an approved form that acknowledges the payment of the amount paid and is signed by the unpaid person.
- (3) If the unpaid person does not give the notice within 7 days of such a payment and request, the unpaid person is to forfeit and pay to the person who made the payment a sum equal to the amount paid. The penalty is recoverable by the person who made the payment as a debt in a court of competent jurisdiction.

Part 3 General

14 Attachment order

- (1) If proceedings are commenced by an unpaid person against a person (the **defendant**) for the recovery of money owed to the unpaid person by the defendant for work carried out or materials supplied by the person, the court may, on the application of the unpaid person, make an order under this section (an **attachment order**) against any other person from whom the unpaid person may be able to recover the debt under this Act.
- (2) An application for an attachment order:
 - (a) may be made on the commencement of the proceedings or at any time before

judgment is given in the proceedings, and

(b) may be heard in the absence of other parties, and

(c) is to be verified by oath or affirmation.

(3) The court may make an attachment order only if it is satisfied, on the basis of the application, that:

(a) the defendant owes the unpaid person money for work carried out or materials supplied by the unpaid person, and

(b) the work or materials are, or are part of or incidental to, work or materials for which the defendant is to be paid under a contract with the person against whom the order is sought.

(4) On service of a copy of the attachment order on the person against whom the order is made, any money that is payable or becomes payable to the defendant under the contract concerned, not exceeding the amount specified in the order, is attached for the purposes of the proceedings and is to remain in the hands of the person against whom the order is made until judgment is given in the proceedings or until the court otherwise orders.

(5) An attachment order:

(a) is to be in an approved form, and

(b) is to specify the amount that is attached for the purposes of the proceedings (being the amount sued for by the unpaid person or such other amount as the court considers appropriate).

(6) An attachment order may be varied or set aside on the application of any person.

15 Defaulting contractor to give information concerning principal

(1) If a debt certificate is issued in respect of a debt owed by a defaulting contractor, the defaulting contractor must, on the demand of any person to whom the defaulting contractor owes money for work or materials, supply to the person a notice in an approved form that sets out the name of any person from whom the person may be able to recover the debt under this Act.

Maximum penalty: 20 penalty units.

(2) A person who gives or purports to give a person a notice under this section knowing that it is false or misleading in a material particular is guilty of an offence.

Maximum penalty: 20 penalty units.

16 Act capable of application to series of contractual arrangements

- (1) If a principal fails to pay a debt assigned to an unpaid person by operation of this Act and the unpaid person takes proceedings against the principal for recovery of the debt (as provided for by section 11), this Act applies in respect of the debt as if it were a debt owed to the unpaid person by the principal for work carried out for or materials supplied to the principal by the unpaid person (instead of work carried out for or materials supplied to the principal by the defaulting contractor).
- (2) Accordingly, the unpaid person can obtain payment of the debt in accordance with this Act out of money that is payable to the principal by some other person.

Note—

An example of a situation to which this section might apply is where a person engages another person (a contractor) to carry out work or supply materials and the contractor then engages someone else (a subcontractor) to carry out that work or supply those materials. If a person is engaged by the subcontractor to carry out any of the work or supply the materials and the subcontractor fails to pay the person for the work or materials, the unpaid person can seek payment of the debt in accordance with this Act from the contractor. Under this section, if the contractor fails to pay the debt, the unpaid person can then seek payment from the person who engaged the contractor. In other words, this section allows an unpaid person to pursue payment of an unpaid debt from any number of “defaulting contractors”.

17 Limitation period

- (1) Proceedings under this Act in respect of a debt cannot be taken more than 12 months after the debt becomes payable.
- (2) A debt that is payable to an unpaid person because of an assignment effected by operation of this Act becomes payable when it would have become payable to the defaulting contractor had there been no assignment.

18 No contracting out

- (1) The provisions of this Act have effect despite any stipulation to the contrary in any contract.
- (2) No contract entered into before or after the commencement of this section operates to annul, vary or exclude any of the provisions of this Act.

19 Act does not affect other remedies

This Act does not affect:

- (a) any remedy an unpaid person may have against a defaulting contractor or any other person in respect of a debt owed to the unpaid person, or
- (b) any rights a defaulting contractor, principal or other person may have under any contract or otherwise (except as expressly provided by this Act), or

(c) any rights or obligations a person may have under the *Industrial Relations Act 1996*.

20 Proceedings for offences

Proceedings for an offence against this Act are to be dealt with summarily before the Local Court.

21 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

22 Repeal

The *Contractors' Debts Act 1897* is repealed.

23 Savings, transitional and other provisions

Schedule 1 has effect.

24 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 Savings, transitional and other provisions

(Section 23)

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of Act

2 Definition

In this Part, **repealed Act** means the *Contractors' Debts Act 1897*.

3 General savings

- (1) Any act, matter or thing that, immediately before the repeal of the repealed Act, had effect under a provision of that Act, is taken on that repeal to have effect under the corresponding provision of this Act.
- (2) In particular, a certificate issued under section 3 of the repealed Act that, immediately before the repeal of the repealed Act, had effect under that Act, is taken to have been issued under section 7 of this Act.

4 Application of Act

- (1) This Act extends to work carried out or materials supplied by an unpaid person before the repeal of the repealed Act.
- (2) This Act extends to any debt owed to an unpaid person for work carried out or materials supplied by the unpaid person that became payable before the repeal of the repealed Act.
- (3) However, proceedings under this Act cannot be taken in respect of a debt owed for work or materials if the debt became payable more than 3 months before the repeal of the repealed Act.