

# Building and Construction Industry Security of Payment Act 1999 No 46

[1999-46]



New South Wales

## Status Information

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 2016 No 55](#) (not commenced — to commence on 6.1.2017)

### Authorisation

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# Building and Construction Industry Security of Payment Act 1999 No 46



New South Wales

An Act with respect to payments for construction work carried out, and related goods and services supplied, under construction contracts; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Building and Construction Industry Security of Payment Act 1999*.

### 2 Commencement

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

### 3 Object of Act

- (1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
  - (a) the making of a payment claim by the person claiming payment, and
  - (b) the provision of a payment schedule by the person by whom the payment is payable, and
  - (c) the referral of any disputed claim to an adjudicator for determination, and
  - (d) the payment of the progress payment so determined.

(4) It is intended that this Act does not limit:

- (a) any other entitlement that a claimant may have under a construction contract, or
- (b) any other remedy that a claimant may have for recovering any such other entitlement.

#### 4 Definitions

(1) In this Act:

**adjudicated amount** means the amount of a progress payment that an adjudicator determines to be payable, as referred to in section 22.

**adjudication application** means an application referred to in section 17.

**adjudication certificate** means a certificate provided by an authorised nominating authority under section 24.

**adjudication fees** means any fees or expenses charged by an authorised nominating authority, or by an adjudicator, under this Act.

**adjudication response** means a response referred to in section 20.

**adjudicator**, in relation to an adjudication application, means the person appointed in accordance with this Act to determine the application.

**authorised nominating authority** means a person authorised by the Minister under section 28 to nominate persons to determine adjudication applications.

**business day** means any day other than:

- (a) a Saturday, Sunday or public holiday, or
- (b) 27, 28, 29, 30 or 31 December.

**claimant** means a person by whom a payment claim is served under section 13.

**claimed amount** means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 13.

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

**construction work** is defined in section 5.

**due date**, in relation to a progress payment, means the due date for the progress payment, as referred to in section 11.

**exempt residential construction contract** means a construction contract specified in section 7 (2) (b) as a construction contract to which this Act does not apply.

**exercise** a function includes perform a duty.

**function** includes a power, authority or duty.

**head contractor** means the person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the **main contract**) and for whom construction work is to be carried out or related goods and services supplied under a construction contract as part of or incidental to the work or goods and services carried out or supplied under the main contract.

**Note—**

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

**payment claim** means a claim referred to in section 13.

**payment schedule** means a schedule referred to in section 14.

**principal** means the person for whom construction work is to be carried out or related goods and services supplied under a construction contract (the **main contract**) and 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 or goods and services carried out or supplied under the main contract.

**progress payment** means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

- (a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or
- (b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or
- (c) a payment that is based on an event or date (known in the building and construction industry as a “milestone payment”).

**recognised financial institution** means a bank or any other person or body prescribed by the regulations for the purposes of this definition.

**related goods and services** is defined in section 6.

**respondent** means a person on whom a payment claim is served under section 13.

**scheduled amount** means the amount of a progress payment that is proposed to be made under a payment schedule, as referred to in section 14.

**subcontractor** means a person who is to carry out construction work or supply

related goods and services under a construction contract otherwise than as head contractor.

**Note—**

A subcontractor's contract can be with the head contractor or (when there is no head contractor) with the principal directly.

- (2) A reference in this Act to a contract that is connected with an exempt residential construction contract is a reference to a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the exempt residential construction contract.
- (3) Notes included in this Act do not form part of this Act.

**5 Definition of “construction work”**

- (1) In this Act, **construction work** means any of the following work:
- (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),
  - (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection,
  - (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems,
  - (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension,
  - (e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including:
    - (i) site clearance, earth-moving, excavation, tunnelling and boring, and
    - (ii) the laying of foundations, and
    - (iii) the erection, maintenance or dismantling of scaffolding, and



- (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site, and
  - (v) site restoration, landscaping and the provision of roadways and other access works,
  - (f) the painting or decorating of the internal or external surfaces of any building, structure or works,
  - (g) any other work of a kind prescribed by the regulations for the purposes of this subsection.
- (2) Despite subsection (1), **construction work** does not include any of the following work:
- (a) the drilling for, or extraction of, oil or natural gas,
  - (b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose,
  - (c) any other work of a kind prescribed by the regulations for the purposes of this subsection.

## 6 Definition of “related goods and services”

- (1) In this Act, **related goods and services**, in relation to construction work, means any of the following goods and services:
- (a) goods of the following kind:
    - (i) materials and components to form part of any building, structure or work arising 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,
  - (b) services of the following kind:
    - (i) the provision of labour to carry out construction work,
    - (ii) architectural, design, surveying or quantity surveying services in relation to construction work,
    - (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,
  - (c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.
- (2) Despite subsection (1), **related goods and services** does not include any goods or

services of a kind prescribed by the regulations for the purposes of this subsection.

- (3) In this Act, a reference to related goods and services includes a reference to related goods or services.

## **7 Application of Act**

- (1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.
- (2) This Act does not apply to:
- (a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes:
    - (i) to lend money or to repay money lent, or
    - (ii) to guarantee payment of money owing or repayment of money lent, or
    - (iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract, or
  - (b) a construction contract for the carrying out of residential building work (within the meaning of the *Home Building Act 1989*) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in, or
  - (c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.
- (3) This Act does not apply to a construction contract to the extent to which it contains:
- (a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee (within the meaning of the *Industrial Relations Act 1996*) of the party for whom the work is to be carried out or the related goods and services are to be supplied, or
  - (b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution, or
  - (c) provisions under which a party undertakes:
    - (i) to lend money or to repay money lent, or
    - (ii) to guarantee payment of money owing or repayment of money lent, or

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

(4) This Act does not apply to a construction contract to the extent to which it deals with:

- (a) construction work carried out outside New South Wales, and
- (b) related goods and services supplied in respect of construction work carried out outside New South Wales.

(5) This Act does not apply to any construction contract, or class of construction contracts, prescribed by the regulations for the purposes of this section.

## **Part 2 Rights to progress payments**

### **8 Rights to progress payments**

(1) On and from each reference date under a construction contract, a person:

- (a) who has undertaken to carry out construction work under the contract, or
- (b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

(2) In this section, **reference date**, in relation to a construction contract, means:

- (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or
- (b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

### **9 Amount of progress payment**

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

- (a) the amount calculated in accordance with the terms of the contract, or
- (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

## **10 Valuation of construction work and related goods and services**

- (1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:
  - (a) in accordance with the terms of the contract, or
  - (b) if the contract makes no express provision with respect to the matter, having regard to:
    - (i) the contract price for the work, and
    - (ii) any other rates or prices set out in the contract, and
    - (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 specific amount, and
    - (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 are to be valued:
  - (a) in accordance with the terms of the contract, or
  - (b) if the contract makes no express provision with respect to the matter, having regard to:
    - (i) the contract price for the goods and services, and
    - (ii) any other rates or prices set out in the contract, and
    - (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 specific amount, and
    - (iv) if any of the goods are defective, the estimated cost of rectifying the defect, and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

## **11 Due date for payment**

- (1) Subject to this section and any other law, a progress payment to be made under a construction contract is payable in accordance with the applicable terms of the contract.

- (1A) A progress payment to be made by a principal to a head contractor under a construction contract becomes due and payable on:
- (a) the date occurring 15 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or
  - (b) an earlier date as provided in accordance with the terms of the contract.

**Note—**

This Act does not apply to a progress payment to be made by a principal to a head contractor under an exempt residential construction contract. (See section 7 (2) (b).) Subsection (1C) applies to progress payments under a construction contract that is connected with an exempt residential construction contract.

- (1B) A progress payment to be made to a subcontractor under a construction contract (other than a construction contract that is connected with an exempt residential construction contract) becomes due and payable on:
- (a) the date occurring 30 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or
  - (b) an earlier date as provided in accordance with the terms of the contract.
- (1C) A progress payment to be made under a construction contract that is connected with an exempt residential construction contract becomes due and payable:
- (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or
  - (b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.
- (2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate:
- (a) prescribed under section 101 of the *Civil Procedure Act 2005*, or
  - (b) specified under the construction contract,
- whichever is the greater.
- (3) If a progress payment becomes due and payable, the claimant is entitled to exercise a lien in respect of 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.
- (4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (3).

- (5) Subsection (3) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials.
- (6) Except as otherwise provided by this section, the rules and principles of the common law and equity apply to the determination of priorities between a lien under subsection (3) over any unfixed plant and materials and any other interest in the plant and materials.
- (7) Section 73 (2) of the *Personal Property Securities Act 2009* of the Commonwealth is declared to apply to liens under subsection (3).
- (8) A provision in a construction contract has no effect to the extent it allows for payment of a progress payment later than the relevant date it becomes due and payable under subsection (1A) or (1B).

## 12 Effect of “pay when paid” provisions

- (1) A pay when paid provision of a construction contract has no effect in relation to any 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.

- (2) In this section:

**money owing**, in relation to a construction contract, means money 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 money owing to another party (the **second party**) contingent on payment to the first party by a further party (the **third party**) of the whole or any part of that money, or
- (b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party, or
- (c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

## 12A Trust account requirements for retention money

- (1) The regulations may make provision for or with respect to requiring retention money to be held in trust for the subcontractor entitled to the money and requiring the head contractor who holds retention money to pay the money into a trust account (a **retention money trust account**) established and operated in accordance with the

regulations.

- (2) The regulations may provide for the trust account into which retention money is to be paid to be a trust account established with a financial institution by the head contractor or a trust account established and operated by the Small Business Commissioner.
- (3) Without limitation, the regulations under this section may include provision for or with respect to the following:
  - (a) the procedures to be followed in connection with the authorisation of payments out of a retention money trust account,
  - (b) the keeping of records in connection with the operation of a retention money trust account and the inspection of those records by the Small Business Commissioner,
  - (c) the resolution of disputes in connection with the operation of a retention money trust account.
- (4) A regulation may create an offence punishable by a penalty not exceeding 200 penalty units for any failure to comply with the requirements of the regulations under this section.
- (5) In this section, **retention money** means money retained by a head contractor out of money payable by the head contractor to a subcontractor under a construction contract, as security for the performance of obligations of the subcontractor under the contract.

## **Part 3 Procedure for recovering progress payments**

### **Division 1 Payment claims and payment schedules**

#### **13 Payment claims**

- (1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the **claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim:
  - (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
  - (b) must indicate the amount of the progress payment that the claimant claims to be due (the **claimed amount**), and
  - (c) if the construction contract is connected with an exempt residential construction contract, must state that it is made under this Act.

- (3) The claimed amount may include any amount:
- (a) that the respondent is liable to pay the claimant under section 27 (2A), or
  - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be served only within:
- (a) the period determined by or in accordance with the terms of the construction contract, or
  - (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),
- whichever is the later.
- (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.
- (7) A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.
- Maximum penalty: 200 penalty units.
- (8) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.
- Maximum penalty: 200 penalty units or 3 months imprisonment, or both.
- (9) In this section:

**supporting statement** means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

#### 14 Payment schedules

- (1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule:



- (a) must identify the payment claim to which it relates, and
  - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If:
- (a) a claimant serves a payment claim on a respondent, and
  - (b) the respondent does not provide a payment schedule to the claimant:
    - (i) within the time required by the relevant construction contract, or
    - (ii) within 10 business days after the payment claim is served,whichever time expires earlier,
- 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.

#### **15 Consequences of not paying claimant where no payment schedule**

- (1) This section applies if the respondent:
- (a) becomes liable to pay the claimed amount to the claimant under section 14 (4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and
  - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant:
- (a) may:
    - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
    - (ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and
  - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:
  - (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), 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.

#### **16 Consequences of not paying claimant in accordance with payment schedule**

- (1) This section applies if:
  - (a) a claimant serves a payment claim on a respondent, and
  - (b) the respondent provides a payment schedule to the claimant:
    - (i) within the time required by the relevant construction contract, or
    - (ii) within 10 business days after the payment claim is served,whichever time expires earlier, and
  - (c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and
  - (d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant:
  - (a) may:
    - (i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
    - (ii) make an adjudication application under section 17 (1) (a) (ii) in relation to the payment claim, and
  - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.

- (4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the scheduled amount from the respondent as a debt:
  - (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), 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.

## **Division 2 Adjudication of disputes**

### **17 Adjudication applications**

- (1) A claimant may apply for adjudication of a payment claim (an **adjudication application**) if:
  - (a) the respondent provides a payment schedule under Division 1 but:
    - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
    - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or
  - (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1) (b) applies cannot be made unless:
  - (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, 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) An adjudication application:
  - (a) must be in writing, and
  - (b) must be made to an authorised nominating authority chosen by the claimant, and
  - (c) in the case of an application under subsection (1) (a) (i)—must be made within 10 business days after the claimant receives the payment schedule, and

- (d) in the case of an application under subsection (1) (a) (ii)—must be made within 20 business days after the due date for payment, and
  - (e) in the case of an application under subsection (1) (b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and
  - (f) must identify the payment claim and the payment schedule (if any) to which it relates, and
  - (g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and
  - (h) may contain such submissions relevant to the application as the claimant chooses to include.
- (4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.
  - (5) A copy of an adjudication application must be served on the respondent concerned.
  - (6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

### **18 Eligibility criteria for adjudicators**

- (1) A person is eligible to be an adjudicator in relation to a construction contract:
  - (a) if the person is a natural person, and
  - (b) if the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section.
- (2) A person is not eligible to be an adjudicator in relation to a particular construction contract:
  - (a) if the person is a party to the contract, or
  - (b) in such circumstances as may be prescribed by the regulations for the purposes of this section.

### **19 Appointment of adjudicator**

- (1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent.
- (2) On accepting an adjudication application, the adjudicator is taken to have been

appointed to determine the application.

## **20 Adjudication responses**

- (1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the **adjudication response**) at any time within:
  - (a) 5 business days after receiving a copy of the application, or
  - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application,whichever time expires later.
- (2) The adjudication response:
  - (a) must be in writing, and
  - (b) must identify the adjudication application to which it relates, and
  - (c) may contain such submissions relevant to the response as the respondent chooses to include.
- (2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14 (4) or 17 (2) (b).
- (2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.
- (3) A copy of the adjudication response must be served on the claimant.

## **21 Adjudication procedures**

- (1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.
- (2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.
- (3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:
  - (a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or
  - (b) within such further time as the claimant and the respondent may agree.

- (4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:
  - (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and
  - (b) may set deadlines for further submissions and comments by the parties, and
  - (c) may call a conference of the parties, and
  - (d) may carry out an inspection of any matter to which the claim relates.
- (4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.
- (5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

## **22 Adjudicator's determination**

- (1) An adjudicator is to determine:
  - (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the **adjudicated amount**), and
  - (b) the date on which any such amount became or becomes payable, and
  - (c) the rate of interest payable on any such amount.
- (2) In determining an adjudication application, the adjudicator is to consider the following matters only:
  - (a) the provisions of this Act,
  - (b) the provisions of the construction contract from which the application arose,
  - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
  - (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) The adjudicator's determination must:

(a) be in writing, and

(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:

(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,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

(5) If the adjudicator's determination contains:

(a) a clerical mistake, or

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

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or

(d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

### **23 Respondent required to pay adjudicated amount**

(1) In this section:

**relevant date** means:

(a) the date occurring 5 business days after the date on which the adjudicator's determination is served on the respondent concerned, or

(b) if the adjudicator determines a later date under section 22 (1) (b)—that later date.

(2) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

## 24 Consequences of not paying claimant adjudicated amount

- (1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may:
  - (a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and
  - (b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (2) A notice under subsection (1) (b) must state that it is made under this Act.
- (3) An adjudication certificate must state that it is made under this Act and specify the following matters:
  - (a) the name of the claimant,
  - (b) the name of the respondent who is liable to pay the adjudicated amount,
  - (c) the adjudicated amount,
  - (d) the date on which payment of the adjudicated amount was due to be paid to the claimant.
- (4) If any amount of interest that is due and payable on the adjudicated amount is not paid by the respondent, the claimant may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate. If it is specified in the adjudication certificate, any such amount is to be added to (and becomes part of) the adjudicated amount.
- (5) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication but has not been reimbursed by the respondent for that amount (the **unpaid share**), the claimant may request the authorised nominating authority to specify the unpaid share in the adjudication certificate. If it is specified in the adjudication certificate, any such unpaid share is to be added to (and becomes part of) the adjudicated amount.

## 25 Filing of adjudication certificate as judgment debt

- (1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
- (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
- (3) If the affidavit indicates that part of the adjudicated amount has been paid, the



judgment is for the unpaid part of that amount only.

- (4) If the respondent commences proceedings to have the judgment set aside, the respondent:
- (a) 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, or
    - (iii) to challenge the adjudicator's determination, and
  - (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

## **26 Claimant may make new application in certain circumstances**

- (1) This section applies if:
- (a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or
  - (b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21 (3).
- (2) In either of those circumstances, the claimant:
- (a) may withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made, and
  - (b) may make a new adjudication application under section 17.
- (3) Despite section 17 (3) (c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).
- (4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17.

## **Division 2A Claimant's rights against principal contractor**

### **26A Principal contractor can be required to retain money owed to respondent**

- (1) A claimant who has made an adjudication application for a payment claim can require a principal contractor for the claim to retain sufficient money to cover the claim out of money that is or becomes payable by the principal contractor to the respondent.
- (2) Such a requirement is made by serving on the principal contractor a request (a

**payment withholding request**) in the form approved by the Director-General of the Department of Finance and Services.

- (3) A payment withholding request must include a statement in writing by the claimant in the form of a statutory declaration declaring that the claimant genuinely believes that the amount of money claimed is owed by the respondent to the claimant.
- (4) A **principal contractor** for a claim is a person by whom money is or becomes payable to the respondent for work carried out or materials supplied by the respondent to the person as part of or incidental to the work or materials that the respondent engaged the claimant to carry out or supply.
- (5) A person who is served with a payment withholding request must, within 10 business days after receiving the request, notify the claimant concerned if the person is not (or is no longer) a principal contractor for the claim.

Maximum penalty: 5 penalty units.

**Note—**

A person may no longer be a principal contractor as a result of money owed to the respondent having been paid by the person before the payment withholding request was served.

**26B Obligation of principal contractor to retain money owed to respondent**

- (1) A principal contractor who has been served with a payment withholding request must retain, out of money owed to the respondent, the amount of money to which the payment claim relates (or the amount owed by the principal contractor to the respondent if that amount is less than the amount to which the payment claim relates).
- (2) The amount is only required to be retained out of money that is or becomes payable by the principal contractor to the respondent for work carried out or materials supplied by the respondent to the principal contractor as part of or incidental to the work or materials that the respondent engaged the claimant to carry out or supply.
- (3) The obligation to retain money under this section remains in force only until whichever of the following happens first:
  - (a) the adjudication application for the payment claim is withdrawn,
  - (b) the respondent pays to the claimant the amount claimed to be due under the payment claim,
  - (c) the claimant serves a notice of claim on the principal contractor for the purposes of section 6 of the [Contractors Debts Act 1997](#) in respect of the payment claim,
  - (d) a period of 20 business days elapses after a copy of the adjudicator's determination of the adjudication application is served on the principal contractor.

- (4) A part payment of the amount claimed to be due under the payment claim removes the obligation under this section to retain money to the extent of the payment.
- (5) When the claimant's adjudication application is determined, the claimant must serve a copy of the adjudicator's determination on the principal contractor within 5 business days after the adjudicator's determination is served on the claimant.

Maximum penalty: 5 penalty units.

#### **26C Contravention of requirement by principal contractor**

- (1) If a principal contractor discharges the principal contractor's obligation to pay money owed under a contract to the respondent in contravention of a requirement under this Division to retain the money, the principal contractor becomes jointly and severally liable with the respondent in respect of the debt owed by the respondent to the claimant (but only to the extent of the amount of money to which the contravention relates).
- (2) The principal contractor can recover as a debt from the respondent any amount that the claimant recovers from the principal contractor pursuant to a right of action conferred by this section.

#### **26D Protections for principal contractor**

- (1) An obligation under this Division to retain money owed by a principal contractor to the respondent operates (while the obligation continues) as a defence against recovery of the money by the respondent from the principal contractor.
- (2) Any period for which a principal contractor retains money pursuant to an obligation under this Division is not to be taken into account for the purposes of reckoning any period for which money owed by the principal contractor to the respondent has been unpaid.
- (3) A claimant who has served a payment withholding request on a principal contractor in connection with an adjudication application must, if the adjudication application is withdrawn, give the principal contractor written notice of the withdrawal of the application within 5 business days after it is withdrawn.

Maximum penalty: 10 penalty units.

- (4) The principal contractor is entitled to rely in good faith on a statement in writing by the respondent in the form of a statutory declaration that:
  - (a) a specified amount claimed to be due under an adjudication application has been paid, or
  - (b) an adjudication application has been withdrawn.

## **26E Respondent to provide information about principal contractor**

(1) An adjudicator may, in connection with an adjudication application and at the request of the claimant, direct the respondent to provide information to the claimant as to the identity and contact details of any person who is a principal contractor in relation to the claim.

(2) A respondent must comply with a direction of an adjudicator under this section.

Maximum penalty: 10 penalty units.

(3) A respondent must not, in purported compliance with a direction of an adjudicator under this section, provide information that the respondent knows is false or misleading in a material particular.

Maximum penalty: 10 penalty units.

## **26F Other rights of claimant not affected**

This Division (including any action taken by a claimant under this Division) does not limit or otherwise affect the taking of any other action by a claimant to enforce a payment claim or adjudication determination.

## **Division 3 Claimant's right to suspend construction work**

### **27 Claimant may suspend work**

(1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 24.

(2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 15 (1), 16 (1) or 23 (2).

(2A) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses.

(3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension.

## Division 4 General

### 28 Nominating authorities

- (1) Subject to the regulations, the Minister:
  - (a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act, and
  - (b) may withdraw any authority so given.
- (1A) The Minister may:
  - (a) limit the number of persons who may, for the time being, be authorised under this section, and
  - (b) refuse an application under subsection (1) if authorising the applicant would result in any such number being exceeded.
- (2) A person:
  - (a) whose application for authority to nominate adjudicators for the purposes of this Act is refused (otherwise than on the ground referred to in subsection (1A) (b)), or
  - (b) whose authority to nominate adjudicators is withdrawn,may apply to the Civil and Administrative Tribunal for an administrative review under the [Administrative Decisions Review Act 1997](#) of the Minister's decision to take that action.
- (3) An authorised nominating authority may charge a fee for any service provided by the authority in connection with an adjudication application made to the authority. The amount that may be charged for any such service must not exceed the amount (if any) determined by the Minister.
- (4) The claimant and respondent are:
  - (a) jointly and severally liable to pay any such fee, and
  - (b) each liable to contribute to the payment of any such fee in equal proportions or in such proportions as the adjudicator to whom the adjudication application is referred may determine.
- (5) An authorised nominating authority must provide the Minister with such information as may be requested by the Minister in relation to the activities of the authority under this Act (including information as to the fees charged by the authority under this Act).

### 29 Adjudicator's fees

- (1) An adjudicator is entitled to be paid for adjudicating an adjudication application:

- (a) such amount, by way of fees and expenses, as is agreed between the adjudicator and the parties to the adjudication, or
  - (b) if no such amount is agreed, such amount, by way of fees and expenses, as is reasonable having regard to the work done and expenses incurred by the adjudicator.
- (2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.
- (3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.
- (4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21 (3).
- (5) Subsection (4) does not apply:
- (a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid, or
  - (b) in such other circumstances as may be prescribed by the regulations for the purposes of this section.

### **30 Protection from liability for adjudicators and authorised nominating authorities**

- (1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:
- (a) in exercising the adjudicator's functions under this Act, or
  - (b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.
- (2) No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith:
- (a) in exercising the nominating authority's functions under this Act, or
  - (b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority's functions under this Act.

### **31 Service of notices**

- (1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:
  - (a) by delivering it to the person personally, or
  - (b) by lodging it during normal office hours at the person's ordinary place of business, or
  - (c) by sending it by post or facsimile addressed to the person's ordinary place of business, or
  - (d) in such other manner as may be prescribed by the regulations for the purposes of this section, or
  - (e) in such other manner as may be provided under the construction contract concerned.
- (2) Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1) (c), is taken to have been effected when the notice is received at that place.
- (3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices.

### **32 Effect of Part on civil proceedings**

- (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
  - (a) may have under the contract, or
  - (b) may have under Part 2 in respect of the contract, or
  - (c) 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 allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
  - (b) may make such orders as it considers appropriate for the restitution of any

amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

## **Part 4 Miscellaneous**

### **33 Act binds Crown**

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

### **34 No contracting out**

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
- (2) A provision of any agreement (whether in writing or not):
  - (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or
  - (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void.

### **34A Nature of proceedings for offences**

Proceedings for an offence under this Act may be dealt with summarily before the Local Court.

### **35 Regulations**

- (1) 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.
- (2) The regulations may, either unconditionally or subject to conditions, exempt:
  - (a) any specified person or class of persons, or
  - (b) any specified matter or class of matters,from the operation of this Act or of any specified provision of this Act.
- (3) The commencement of a regulation referred to in section 5, 6 or 7 does not affect the operation of this Act with respect to construction work carried out, or related goods and services supplied, under a construction contract entered into before that commencement.



### **36 Investigation of compliance with provisions regarding supporting statements**

- (1) The Director-General of the Department of Finance and Services may, by order in writing, appoint a Public Service employee (an **authorised officer**) for the purpose of investigating compliance with section 13 (7) or (8).
- (2) An authorised officer may, by notice in writing, require a person whom the officer reasonably believes:
  - (a) is or was a head contractor, or
  - (b) is or was employed or engaged by a person whom the officer reasonably believes is or was a head contractor,

to provide the officer with information, and all documents, relating to compliance with section 13 (7) or (8) and in particular relating to the payment of subcontractors by or on behalf of the head contractor in respect of specified construction work.

- (3) A person must not:
  - (a) refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it, or
  - (b) in purported compliance with such a notice, provide information or a document knowing that the information or document is false or misleading in a material particular.

Maximum penalty: 200 penalty units or 3 months imprisonment, or both.

- (4) A person is not excused from providing information or a document in response to a notice under this section on the ground that the information or document may tend to incriminate the head contractor.

### **36A Dealing with documents produced**

- (1) An authorised officer may inspect a document produced in response to a notice under section 36 and may make copies of, or take extracts from, the document.
- (2) An authorised officer may:
  - (a) take possession, and
  - (b) retain possession for as long as is necessary for the purposes of this Act,of a document produced in response to a notice under section 36, if the person otherwise entitled to possession of the document is supplied, as soon as practicable, with a copy certified by an officer to be a true copy.
- (3) A certified copy provided under subsection (2) is receivable in all courts as if it were

the original.

- (4) Until a certified copy of a document is provided under subsection (2), the person having possession of the document must, at such times and places as he or she thinks appropriate, permit:
- (a) the person otherwise entitled to possession of the document, or
  - (b) a person authorised by the person so entitled,
- to inspect the document and make copies of, or take extracts from, the document.

### **36B Preservation of secrecy**

- (1) A person engaged in the administration of this Act must not:
- (a) in the course of that administration, disclose to another person so engaged any information or the contents of any document provided in response to a notice under section 36 without informing the other person that the information or document was so provided, or
  - (b) otherwise than in the course of that administration, disclose any such information or contents to any person without the written permission of the Director-General of the Department of Finance and Services given in relation to the disclosure.

Maximum penalty: 200 penalty units.

- (2) A person who was, but is no longer, engaged in the administration of this Act must not, without the written permission of the Director-General of the Department of Finance and Services, disclose to any other person any information or the contents of any document provided in response to a notice under section 36 that came to his or her knowledge in the course of that administration.

Maximum penalty: 200 penalty units.

- (3) It is not a contravention of subsection (1) or (2) if a person discloses any such information or contents:
- (a) in any proceedings for an offence against this Act, or
  - (b) in any civil proceedings arising under a construction contract, whether under Part 3 or otherwise, or
  - (c) in any legal proceedings where the disclosure is made in answering a question that the person is compellable to answer in those proceedings.

### **37 Savings and transitional provisions**

Schedule 2 has effect.

### **38 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 3 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 3 months after the end of the period of 3 years.
- (4) A further review of this Act (as amended by the *Building and Construction Industry Security of Payment Amendment Act 2002*) is to be undertaken by the Minister as soon as possible after the period of 12 months from the commencement of Schedule 1 [29] to that Act.
- (5) A report on the outcome of the further review is to be tabled in each House of Parliament within 3 months after the end of that period of 12 months.

### **Schedule 1 (Repealed)**

### **Schedule 2 Savings and transitional provisions**

(Section 37)

#### **Part 1 Preliminary**

##### **1 Savings and transitional regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.
- (2) Such a provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.
- (3) To the extent to which such a 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 that 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 that publication.

#### **Part 2 Provisions consequent on enactment of *Building and***

## **Construction Industry Security of Payment Act 1999**

### **2 Certain construction contracts not affected**

A provision of this Act does not apply to a construction contract entered into before the commencement of that provision.

## **Part 3 Provisions consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2002**

### **3 Application of amendments**

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2002* does not apply to or in respect of a payment claim served before the commencement of the amendment and any such payment claim is to be dealt with in accordance with this Act as if the amendment had not been made.

## **Part 4 Provisions consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2010**

### **4 Application of amendments**

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2010* extends to matters arising before the commencement of the amendment (including an adjudication application made before that commencement and pending on that commencement).

## **Part 5 Provision consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2013**

### **5 Application of amendments**

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2013* does not apply in relation to a construction contract entered into before the commencement of the amendment.