

Construction Contracts Bill 2004

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Defined Terms

Western Australia

LEGISLATIVE ASSEMBLY

(As amended in Committee)

Construction Contracts Bill 2004

A Bill for

An Act —

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

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Construction Contracts Act 2004*.

2. Commencement

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

3. Interpretation

In this Act, unless the contrary intention appears —

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

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

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

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

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

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b);

5

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

“contractor” has the meaning given by the definition of “construction contract”;

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

10

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

15

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

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

20

“party”, in relation to a construction contract, means a party to the contract;

“payment claim” means a claim made under a construction contract —

25

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

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

30

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

“prescribed appointor” means a person prescribed as such by the regulations;

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

“registered adjudicator” means an individual registered as such under section 48;

5 **“Registrar”** means the Construction Contracts Registrar designated under section 47.

4. Construction work

(1) In this section —

“civil works” includes —

- 10 (a) a road, railway, tramway, aircraft runway, canal, waterway, harbour, port or marina;
- (b) a line or cable for electricity or telecommunications;
- (c) a pipeline for water, gas, oil, sewage or other material;
- 15 (d) a path, pavement, ramp, tunnel, slipway, dam, well, aqueduct, drain, levee, seawall or retaining wall; and
- (e) any works, apparatus, fittings, machinery or plant associated with any works referred to in paragraph (a), (b), (c) or (d);

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

(2) In this Act —

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

- 25 (a) reclaiming, draining, or preventing the subsidence, movement or erosion of, land;
- (b) installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, any works, apparatus, fittings, machinery, or plant,
- 30 associated with any work referred to in paragraph (a);

- 5
- (c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form, whether permanently or not and whether in WA or not, part of land or the sea bed whether above or below it;
- (d) fixing or installing on or in any thing referred to in paragraph (c) any fittings forming, or to form, whether permanently or not, part of the thing, including —
- 10
- (i) fittings for electricity, gas, water, fuel oil, air, sanitation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing, and the safety of people; and
- 15
- (ii) lifts, escalators, insulation, furniture and furnishings;
- (e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any thing referred to in paragraph (c) or any fittings described in paragraph (d) that form part of that thing;
- 20
- (f) any work that is preparatory to, necessary for, an integral part of, or for the completion of, any work referred to in paragraph (a), (b), (c), (d) or (e), including —
- 25
- (i) site or earth works, excavating, earthmoving, tunnelling or boring;
- (ii) laying foundations;
- (iii) erecting, maintaining or dismantling temporary works, a temporary building, or a temporary structure including a crane or other lifting equipment, and scaffolding;
- 30
- (iv) cleaning, painting, decorating or treating any surface; and
- (v) site restoration and landscaping;

s. 5

(g) any work that is prescribed by regulations to be construction work for the purposes of this Act.

(3) Despite subsection (2) construction work does not include any of the following work on a site in WA —

- 5 (a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;
- (b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;
- 10 (c) constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance;
- (d) constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations and murals;
- 15 (e) work prescribed by the regulations not to be construction work for the purposes of this Act.

(4) In this Act —

20 **“construction work”** does not include constructing the whole or part of any watercraft.

5. Goods and services related to construction work

(1) For the purposes of this Act, goods are related to construction work if they are —

- 25 (a) materials or components (whether pre-fabricated or not) that will form part of any thing referred to in section 4(2)(b) or 4(2)(c) or of any fittings referred to in section 4(2)(d);
- (b) any fittings referred to in section 4(2)(d) (whether pre-fabricated or not);
- 30 (c) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of

the construction work at the site of the construction work; or

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

5 (2) For the purposes of this Act, professional services are related to construction work if they are —

(a) services that are provided by a profession and that relate directly to construction work or to assessing its feasibility (whether or not it proceeds) —

10 (i) including surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying, and project management, services; but

15 (ii) not including accounting, financial, or legal, services;

or

(b) services that are provided by a profession that are prescribed by the regulations to be professional services related to construction work for the purposes of this Act.

20 (3) For the purposes of this Act, on-site services —

(a) are services other than professional services referred to in subsection (2); and

(b) are related to construction work if they are —

25 (i) services that relate directly to construction work, including the provision of labour to carry out construction work; or

(ii) services prescribed by the regulations to be on-site services related to construction work for the purposes of this Act.

30 (4) The regulations may prescribe goods, professional services or on-site services that are not related to construction work for the purposes of this Act.

6. Payment dispute

For the purposes of this Act, a payment dispute arises if —

- 5 (a) by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed;
- (b) by the time when any money retained by a party under the contract is due to be paid under the contract, the money has not been paid; or
- 10 (c) by the time when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

7. Construction contracts to which this Act applies

- 15 (1) This Act applies to a construction contract entered into after this Act comes into operation.
- (2) This Act applies to a construction contract —
 - (a) irrespective of whether it is written or oral or partly written and partly oral;
 - (b) irrespective of where it is entered into; and
 - 20 (c) irrespective of whether it is expressed to be governed by the law of a place other than Western Australia.
- (3) This Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods or services that are related to construction work, as an employee (as defined in the *Industrial Relations Act 1979* section 7) of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.
- 25 (4) This Act, or a provision of this Act, does not apply to a construction contract, or a class of construction contracts,
- 30

prescribed by the regulations as a contract or class of contracts to which this Act, or that provision, does not apply.

8. Application to Crown

This Act binds the Crown.

Part 2 — Content of construction contracts

Division 1 — Prohibited provisions

9. Prohibited: pay if paid/when paid provisions

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

10. Prohibited: provisions requiring payment to be made after 50 days

10 A provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed is to be read as being amended to require the payment to be made within 50 days after it is claimed.

11. Prohibited: prescribed provisions

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

12. Other provisions of contract not affected

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

Division 2 — Implied provisions

13. Variations of contractual obligations

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

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

14. Contractor's entitlement to be paid

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

15. Contractor's entitlement to claim progress payments

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

15 **16. Making claims for payment**

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

20 **17. Responding to claims for payment**

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

25 **18. Time for payment**

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

19. Interest on overdue payments

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

20. Ownership of goods

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

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

passes from the contractor.

21. Duties as to unfixed goods on insolvency

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

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

25 **22. Retention money**

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

23. Implied provisions: interpretation etc.

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

5

Part 3 — Adjudication of disputes

Division 1 — Preliminary

24. Interpretation of “construction contract”

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

Division 2 — Commencing adjudication

25. Who can apply for adjudication

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

- 15
- (a) an application for adjudication has already been made
by a party, whether or not a determination has been
made, but subject to section 37(2); or
 - (b) the dispute is the subject of an order, judgment or other
finding by an arbitrator or other person or a court or
other body dealing with a matter arising under a
construction contract.

26. Applying for adjudication

- 20
- (1) To apply to have a payment dispute adjudicated, a party to the
contract, within 28 days after the dispute arises or, if applicable,
within the period provided for by section 37(2)(b), must —
- 25
- (a) prepare a written application for adjudication;
 - (b) serve it on each other party to the contract;
 - (c) serve it —
 - (i) if the parties to the contract have appointed a
registered adjudicator and that adjudicator
consents, on the adjudicator;

- (ii) if the parties to the contract have appointed a prescribed appointor, on that appointor;
- (iii) otherwise, on a prescribed appointor chosen by the party;

5

and

- (d) provide any deposit or security for the costs of the adjudication that the adjudicator or the prescribed appointor requires under section 44(8) or (9).

(2) The application —

10

- (a) must be prepared in accordance with, and contain the information prescribed by, the regulations;

- (b) must set out the details of, or have attached to it —

- (i) the construction contract involved or relevant extracts of it; and

15

- (ii) any payment claim that has given rise to the payment dispute;

and

- (c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

20

- (3) A prescribed appointor that is served with an application for adjudication made under subsection (1) must comply with section 28.

27. Responding to an application for adjudication

25

- (1) Within 14 days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on —

30

- (a) the applicant and on any other party that has been served with the application; and

(b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointor on which the application was served under section 26(1)(c).

(2) The response —

- 5 (a) must be prepared in accordance with, and contain the information prescribed by, the regulations;
- (b) must set out the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and
- 10 (c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

28. Appointment of adjudicator in absence of agreed appointment

- 15 (1) If an application for adjudication is served on a prescribed appointor the appointor, within 5 days after being served, must —
- (a) appoint a registered adjudicator to adjudicate the payment dispute concerned;
- 20 (b) send the application and any response received by it to the adjudicator;
- (c) notify the parties in writing accordingly; and
- (d) notify the Registrar in writing accordingly.
- (2) If a prescribed appointor does not make an appointment under subsection (1) the Registrar may appoint a registered adjudicator to adjudicate the payment dispute concerned.
- 25 (3) If the Registrar makes an appointment under subsection (2), the Registrar must —
- (a) notify the prescribed appointor in writing accordingly and require the appointor to serve the application and any response received by it on the adjudicator appointed by the Registrar; and
- 30

(b) notify the parties in writing accordingly.

29. Adjudicators: conflicts of interest

- 5 (1) An appointed adjudicator who has a material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract is disqualified from adjudicating the dispute.
- (2) If an appointed adjudicator is disqualified —
- 10 (a) the adjudicator must notify the parties in writing of the disqualification and the reasons for it;
- (b) unless, within 5 days after the date of the adjudicator's notice, all of the parties in writing authorise the adjudicator to continue as the appointed adjudicator, the adjudicator's appointment ceases;
- 15 (c) the applicant may again apply for adjudication in accordance with section 26(1); and
- (d) the period commencing on the date when the adjudicator was served with the application for adjudication and ending on and including the date when the adjudicator notifies the parties under paragraph (a) does not count for the purposes of section 26(1).
- 20
- (3) A party to a payment dispute may apply to the State Administrative Tribunal for a declaration that an appointed adjudicator is disqualified under subsection (1).
- 25 (4) The application must be made before the person is notified of a decision or determination made under section 31(2).

Division 3 — The adjudication process

30. Object of the adjudication process

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

31. Adjudicator's functions

(1) In this section —

“prescribed time” means —

- 5
- (a) if the appointed adjudicator is served with a response under section 27(1) — 14 days after the date of the service of the response;
 - (b) if the appointed adjudicator is not served with a response under section 27(1) — 14 days after the last date on which a response is required to be served under section 27(1).
- 10

(2) An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a) —

- 15
- (a) dismiss the application without making a determination of its merits if —
 - (i) the contract concerned is not a construction contract;
 - (ii) the application has not been prepared and served in accordance with section 26;
 - (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or
 - (iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;
 - (b) otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security and, if so, determine —
 - (i) the amount to be paid or returned and any interest payable on it under section 33; and
- 20
- 25
- 30

(ii) the date on or before which the amount is to be paid, or the security is to be returned, as the case requires.

5 (3) If an application is not dismissed or determined under subsection (2) within the prescribed time, or any extension of it made under section 32(3)(a), the application is to be taken to have been dismissed when the time has elapsed.

32. Adjudication procedure

10 (1) For the purposes of making a determination, an appointed adjudicator —

(a) must act informally and if possible make the determination on the basis of —

(i) the application and its attachments; and

15 (ii) if a response has been prepared and served in accordance with section 27, the response and its attachments;

and

(b) is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.

20 (2) In order to obtain sufficient information to make a determination, an appointed adjudicator may —

(a) request a party to make a, or a further, written submission or to provide information or documentation, and may set a deadline for doing so;

25 (b) request the parties to attend a conference with the adjudicator;

(c) unless all the parties object —

30 (i) inspect any work or thing to which the payment dispute relates, provided the occupier of any place concerned consents to the entry and inspection;

- 5
- (ii) arrange for any thing to which the payment dispute relates to be tested, provided the owner of the thing consents to the testing;
- (iii) engage an expert to investigate and report on any matter relevant to the payment dispute.
- 10
- (3) An appointed adjudicator may —
- (a) with the consent of the parties, extend the time prescribed by section 31(2) for making a determination;
- (b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties;
- (c) with the consent of all the parties concerned, adjudicate the payment dispute simultaneously with another payment dispute.
- 15
- (4) If an appointed adjudicator adjudicates simultaneously 2 or more payment disputes, the adjudicator may, in adjudicating one, take into account information the adjudicator receives in relation to the other, and vice versa.
- 20
- (5) An adjudicator's power to make a determination is not affected by the failure of either or both of the parties to make a submission or provide information within time or to comply with the adjudicator's request to attend a conference with the adjudicator.
- 25
- (6) To the extent that the practice and procedure in relation to adjudications is not regulated by this Part or the regulations, an appointed adjudicator may determine his or her own procedure.

33. Interest up to determination

- 30
- (1) If an appointed adjudicator determines that a party to a payment dispute is liable to make a payment, he or she may also determine that interest is to be paid —
- (a) if the payment is overdue under the construction contract, on the payment in accordance with the contract; or

(b) otherwise, on the whole or a part of the payment from the date the payment dispute arose at a rate not greater than the rate prescribed under the *Supreme Court Act 1935* section 142,

5 until and including the date of the determination.

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

34. Costs of parties to payment disputes

10 (1) Subject to subsection (2), parties to a payment dispute bear their own costs in relation to an adjudication of the dispute.

(2) If an appointed adjudicator is satisfied that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other
15 party must pay some or all of those costs.

(3) If an appointed adjudicator makes a decision under subsection (2) the adjudicator must —

(a) decide the amount of the costs and the date on which the amount is payable;

20 (b) give reasons for the decisions; and

(c) communicate the decisions and the reasons in writing to the parties.

(4) Divisions 4 and 5, with any necessary changes, apply to a decision made under subsection (2) as if it were a determination
25 of an appointed adjudicator.

35. Certificates of completion etc., effect of

(1) This section applies if —

(a) the construction contract to which a payment dispute relates provides for a person to certify —

30 (i) that obligations under the contract have been performed; or

- (ii) the amount of a payment that is to be made by a party;
 - and
 - (b) such a certificate is provided by a party to an adjudicator in the course of an adjudication.
- 5
- (2) For the purposes of the adjudication —
- (a) if the certificate relates to the final amount payable under the contract and has the effect of finalising the contract, the certificate is to be taken to be conclusive evidence of its contents;
- 10
- (b) in any other case the certificate is to have such evidentiary weight as the appointed adjudicator thinks fit.

36. Determination, content of

- 15 An appointed adjudicator's decision made under section 31(2)(b) must —
- (a) be in writing;
 - (b) be prepared in accordance with, and contain the information prescribed by, the regulations;
- 20
- (c) state —
 - (i) the amount to be paid and the date on or before which it is to be paid; or
 - (ii) the security to be returned and the date on or before which it is to be returned,
- 25 as the case requires;
- (d) give reasons for the determination;
 - (e) identify any information in it that, because of its confidential nature, is not suitable for publication by the Registrar under section 50;
- 30
- (f) be given to the parties to the adjudication; and
 - (g) be given to the Registrar.

37. Dismissed applications

- (1) If under section 31(2)(a) an appointed adjudicator dismisses an application for adjudication, he or she must —
- (a) give reasons for doing so; and
 - (b) communicate the decision and the reasons in writing to the parties.
- (2) If under section 31(3) an application for an adjudication of a payment dispute is taken to be dismissed —
- (a) nothing in this Part prevents a further application being made under this Part for an adjudication of the dispute; and
 - (b) any further application must be made within 28 days after the previous application is taken to be dismissed under section 31(3).

Division 4 — Effect of determinations

38. Determinations have effect despite other proceedings

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

39. Payment of amount determined and interest

- (1) A party that is liable to pay an amount under a determination must do so on or before the date specified in the determination.
- (2) Unless the determination provides otherwise, interest at the rate prescribed under the *Supreme Court Act 1935* section 142 is to be paid on such of the amount as is unpaid after the date specified in the determination.
- (3) The interest to be paid under subsection (2) forms part of the determination.

- (4) If under section 43(2) a judgment is entered in the terms of a determination, interest under subsection (2) ceases to accrue.

40. Progress payments under determinations to be on account

If —

5

- (a) an appointed adjudicator —

(i) determines a payment dispute concerning a claim by a contractor for payment for part performance of its obligations but not for a final payment by the principal; and

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(ii) determines that the principal is to pay the contractor an amount in respect of the claim;

and

- (b) the principal, in accordance with the determination, pays the amount,

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

41. Determinations are final

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- (1) If on the adjudication of a payment dispute the appointed adjudicator makes a determination —

(a) the adjudicator cannot subsequently amend or cancel the determination except with the consent of the parties; and

(b) a party to the dispute may not apply subsequently for an adjudication of the dispute.

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- (2) Despite subsection (1)(a), if an adjudicator's determination contains —

(a) an accidental slip or omission;

(b) a material arithmetic error; or

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

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

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Division 5 — Enforcing determinations

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

- (1) If a determination requires the principal to pay the contractor an amount and the principal does not pay in accordance with the determination, the contractor may give the principal notice of the contractor's intention to suspend the performance of its obligations.
10
- (2) The notice must —
15
 - (a) be in writing;
 - (b) be prepared in accordance with, and contain the information prescribed by, the regulations;
 - (c) state the date on which the contractor intends to suspend the performance of its obligations; and
 - (d) be given to the principal at least 3 days before that date.
- (3) If on the date stated under subsection (2)(c) in the notice the principal has not paid the contractor the amount in accordance with the determination, the contractor may suspend the performance of its obligations until no longer than 3 days after the date on which the amount is paid.
25
- (4) Subsection (3) does not prevent the contractor from at any time resuming the performance of its obligations.
- (5) A contractor that suspends the performance of its obligations in accordance with this section —
30
 - (a) is not liable for any loss or damage suffered by the principal or by any person claiming through the principal; and

- (b) retains its rights under the contract, including any right to terminate the contract.

43. Determinations may be enforced as judgments

- (1) In this section —

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“court of competent jurisdiction”, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.

- (2) A determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect, and if such leave is given, judgment may be entered in terms of the determination.

- (3) For the purposes of subsection (2), a determination signed by an adjudicator and certified by the Registrar as having been made by a registered adjudicator under this Part is to be taken as having been made under this Part.

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Division 6 — General

44. Costs of adjudications

- (1) For the purposes of this section the costs of an adjudication are —

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- (a) the entitlements of the appointed adjudicator under subsection (2); and
- (b) the costs of any testing done, or of any expert engaged, under section 32(2)(c).

- (2) If an appointed adjudicator, within the prescribed time in section 31(2), dismisses an application for adjudication or makes a determination of the dispute, he or she is entitled —

25

- (a) to be paid for his or her work —
 - (i) at a rate agreed between the adjudicator and the parties that is not more than the maximum rate, if any, prescribed by the regulations; or

30

- (ii) if a rate was not agreed, at the rate published under section 51 in respect of the adjudicator;
- and
- 5 (b) to be reimbursed any expenses reasonably incurred in connection with that work.
- (3) An appointed adjudicator who is disqualified under section 29 has the entitlements in subsection (2) in respect of any adjudication work done before the disqualification is notified to the parties.
- 10 (4) Despite subsection (2), an appointed adjudicator may refuse to communicate his or her decision or determination under section 31(2) or 34(2) or subsection (10) until he or she has been paid and reimbursed in accordance with subsection (2).
- 15 (5) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.
- (6) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.
- 20 (7) Subsections (5) and (6) do not prevent a decision being made under section 34(2).
- (8) An appointed adjudicator may at any time require one or more parties to provide a reasonable deposit, or reasonable security, for the, or any anticipated costs of the adjudication.
- 25 (9) A prescribed appointor, before appointing an adjudicator, may require the applicant for adjudication to provide a deposit, or reasonable security, for the, or any anticipated costs of the adjudication.
- 30 (10) If a party involved in a dispute has paid more than the party's share of the costs of an adjudication of the dispute, having regard to subsection (6), the appointed adjudicator may decide that another party must pay to the first-mentioned party such

amount of the costs as would result in all the parties paying an equal amount of the costs.

(11) If an appointed adjudicator makes a decision under subsection (10) —

- 5 (a) the adjudicator must include in the decision the date on which the amount is payable; and
- (b) Divisions 4 and 5, with any necessary changes, apply to the decision as if it were a determination of an appointed adjudicator.

10 (12) An appointed adjudicator may recover the costs of an adjudication from a person liable to pay the costs in a court of competent jurisdiction as if the costs were a debt due to the adjudicator.

45. Effect of this Part on civil proceedings

15 (1) This Part does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.

20 (2) If other such proceedings are instituted in relation to a payment dispute that is being adjudicated under this Part, the adjudication is to proceed despite those proceedings unless all of the parties, in writing, require the appointed adjudicator to discontinue the adjudication.

25 (3) Evidence of anything said or done in an adjudication is not admissible before an arbitrator or other person or a court or other body, except for the purposes of an application made under section 29(3) or an appeal made under section 46.

(4) An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract —

- 30 (a) must, in making any award, judgment or order, allow for any amount that has been or is to be paid to a party

under a determination of a payment dispute arising under the contract; and

- (b) may make orders for the restitution of any amount so paid, and any other appropriate orders as to such a determination.

5

46. Review, limited right of

- (1) A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision.

- 10 (2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 14 days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

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

Part 4 — Administration

47. Registrar, appointment and functions

- 5 (1) There is to be an office called the Construction Contracts Registrar or such other name as the Minister declares by a notice in the *Gazette*.
- (2) The Minister, by a notice in the *Gazette*, is to designate a public service officer (as defined in the *Public Sector Management Act 1994* section 3(1)) to be the Registrar.
- 10 (3) The Registrar's functions are those conferred on the Registrar by this Act.
- (4) A document purporting to be signed by the Registrar is to be taken to have been signed by a person who was at the time duly appointed as the Registrar, in the absence of evidence to the contrary.

15 48. Registering adjudicators

- (1) An individual is eligible to be a registered adjudicator if he or she has the qualifications and experience prescribed by the regulations.
- 20 (2) The Registrar may register an individual as a registered adjudicator —
- (a) on the application of an individual; or
 - (b) on the nomination of a prescribed appointor.
- (3) The regulations may prescribe a fee to be paid on making such an application or nomination.
- 25 (4) The Registrar must not register an individual as a registered adjudicator unless satisfied that the individual is eligible to be registered.

- 5 (5) The Registrar may cancel the registration of an individual as a registered adjudicator if satisfied that the individual —
- (a) has ceased to be eligible to be registered;
 - (b) has misconducted, or is incompetent or unsuitable to conduct, adjudications under Part 3.
- 10 (6) The Registrar must keep a register of registered adjudicators and make it available for public inspection at no charge.
- (7) A certificate by the Registrar stating that an individual was or was not at a time or in a period, or is or is not, a registered adjudicator is proof of the content of the certificate in the absence of evidence to the contrary.

49. Review of registration decisions

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

50. Publication of adjudicators' decisions

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

s. 51

51. Appointors' and adjudicators' rates to be published

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

52. Annual report

- 15 Before 1 November in each year, the Registrar must give the Minister a written report about the operation and effectiveness of this Act in the financial year that ended in that year.

Part 5 — Miscellaneous

53. No contracting out

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

54. Immunity from tortious liability

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

s. 55

55. Regulations

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

56. Review of Act

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

Schedule 1 — Implied provisions

[s. 13 to 22]

Division 1 — Variations

1. Variations must be agreed

- 5 The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on —
- (a) the nature and extent of the variation of those obligations; and
 - (b) the amount, or a means of calculating the amount, that the principal is to pay the contractor in relation to the variation of those obligations.
- 10

Division 2 — Contractor's entitlement to be paid

2. Contractor entitled to be paid

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

Division 3 — Claims for progress payments

3. Entitlement to claim progress payments

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

4. When claims for progress payments can be made

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

Division 4 — Making claims for payment

5. Claim for payment, content

(1) In this clause —

“**payment claim**” means a claim —

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

(2) A payment claim must —

- 15 (a) be in writing;
- (b) be addressed to the party to which the claim is made;
- (c) state the name of the claimant;
- (d) state the date of the claim;
- (e) state the amount claimed;
- 20 (f) in the case of a claim by the contractor — itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;
- (g) in the case of a claim by the principal — describe the basis for the claim in sufficient detail for the contractor to assess the claim;
- 25 (h) be signed by the claimant; and
- (i) be given to the party to which the claim is made.

(3) In the case of a claim by the contractor, the amount claimed in a payment claim —

- 30 (a) must be calculated in accordance with this contract; or
- (b) if this contract does not provide a means of calculating the amount, must be —
- (i) if this contract says that the principal is to pay the contractor one amount (the “**contract sum**”) for the performance by the contractor of all of its obligations

under this contract (the “**total obligations**”) — the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations;

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

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

6. **Interpretation in Division 5**

In this Division —

“**payment claim**” means a claim —

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

25 7. **Responding to a payment claim**

- (1) If a party that receives a payment claim —
- (a) believes the claim should be rejected because the claim has not been made in accordance with this contract; or
- (b) disputes the whole or part of the claim,
- 30 the party must, within 14 days after receiving the claim, give the claimant a notice of dispute.

- (2) A notice of dispute must —
- (a) be in writing;
 - (b) be addressed to the claimant;
 - (c) state the name of the party giving the notice;
 - 5 (d) state the date of the notice;
 - (e) identify the claim to which the notice relates;
 - (f) if the claim is being rejected under subclause (1)(a) — state the reasons for the belief that the claim has not been made in accordance with this contract;
 - 10 (g) if the claim is being disputed under subclause (1)(b) — identify each item of the claim that is disputed and state, in relation to each of those items, the reasons for disputing it; and
 - (h) be signed by the party giving the notice.
- (3) Within 28 days after a party receives a payment claim, the party must do one of the following, unless the claim has been rejected or wholly disputed in accordance with subclause (1) —
- (a) pay the part of the amount of the claim that is not disputed;
 - (b) pay the whole of the amount of the claim.
- (4) If under this contract the principal is entitled to retain a portion of any amount payable by the principal to the contractor —
- (a) subclause (3) does not affect the entitlement; and
 - (b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of any amount retained under the entitlement.
- 25

Division 6 — Interest on overdue payments

8. Interest payable on overdue payments

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

- (2) The interest is to be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.
- (3) The rate of interest at any time is equal to that prescribed for that time under the *Supreme Court Act 1935* section 142.

Division 7 — Ownership of goods

9. When ownership of goods supplied by contractor passes

The ownership of goods that are —

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

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

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

Division 8 — Duties as to unfixed goods on insolvency

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

- (1) In this clause —

“insolvent” means —

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

- (2) If —

- (a) goods that are related to construction work have been supplied to the site of the construction work by the contractor under its obligations under this contract;
- (b) the contractor has not been paid for the goods;

- (c) the goods have not become fixtures;
 - (d) ownership of the goods has not passed from the contractor;
 - (e) the goods are in the possession of or under the control of —
 - (i) the principal; or
 - (ii) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work;
- 5
- 10 and
- (f) the principal or that person becomes an insolvent, the principal and that person —
 - (g) must not, during the insolvency, allow the goods to become fixtures or to fall into the possession of or under the control of any other person, other than the contractor, except with the prior written consent of the contractor; and
 - (h) must allow the contractor a reasonable opportunity to repossess the goods.
- 15

Division 9 — Retention money

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

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

25

- (a) the money is paid to the contractor;
 - (b) the contractor, in writing, agrees to give up any claim to the money;
 - (c) the money ceases to be payable to the contractor by virtue of the operation of this contract; or
 - (d) an adjudicator, arbitrator, or other person, or a court, tribunal or other body, determines that the money ceases to be payable to the contractor.
- 30

Defined Terms

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

The list is not part of the law.]

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