

Building and Construction Industry (Security of Payment) Bill 2021

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Western Australia

LEGISLATIVE ASSEMBLY

**Building and Construction Industry (Security of
Payment) Bill 2021**

A Bill for

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

The Parliament of Western Australia enacts as follows:

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Part 1 — Preliminary

Division 1 — Introductory

1. Short title

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

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 (but only Division 1) — on the day on which this Act receives the Royal Assent (*assent day*);
- (b) Part 5 (but only Division 1 and only section 98) — on the day after assent day;
- (c) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

3. Object of Act

- (1) The object of this Act is to provide an effective and fair process for securing payments to persons who undertake to carry out construction work, or to supply related goods and services, in the building and construction industry.
- (2) That object is achieved primarily by —
 - (a) giving those persons a statutory entitlement to progress payments; and
 - (b) establishing an expedited procedure for making claims for progress payments, for responding to those claims and for the adjudication of disputed claims; and
 - (c) ensuring money is held on trust if it has been retained to secure the performance of the contractual obligations of those persons; and
 - (d) giving those persons other statutory entitlements, including the right to suspend work or supply if not paid

1 and to access retained money by substituting a
2 performance bond.

3 **Division 2 — Interpretation**

4 **4. Terms used**

5 (1) In this Act —

6 *adjudicated amount* means —

- 7 (a) the amount of a progress payment that an adjudicator
8 determines is payable under section 38(1)(a); or
9 (b) if the determination of the adjudicator is quashed on
10 review — the amount of a progress payment that a
11 review adjudicator determines is payable under
12 section 48(2)(a);

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

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

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

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

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

22 *adjudicator* means —

- 23 (a) an individual registered by the Building Commissioner
24 under Part 5 Division 2 as an adjudicator; and
25 (b) in relation to an adjudication application — the
26 adjudicator appointed under section 32 to determine the
27 application;

- 1 ***administrative duties***, of adjudicators or review adjudicators,
2 includes —
- 3 (a) sending and receiving documents, submissions or other
4 communications to and from claimants, respondents or
5 the Building Commissioner; and
- 6 (b) arranging conferences, inspections and tests; and
- 7 (c) engaging experts; and
- 8 (d) giving invoices to claimants or respondents for
9 adjudication fees and expenses;
- 10 ***approved form*** means a mandatory form approved and
11 published by the Building Commissioner under section 114(1);
- 12 ***authorised nominating authority*** means a person authorised by
13 the Building Commissioner under Part 5 Division 1;
- 14 ***Building Commissioner*** means the officer referred to in the
15 *Building Services (Complaint Resolution and Administration)*
16 *Act 2011* section 85;
- 17 ***business day*** means a day other than —
- 18 (a) a Saturday, Sunday or public holiday; or
- 19 (b) any other day that falls between 22 December in any
20 year and 10 January in the following year (inclusive);
- 21 ***claimant*** means a person who makes a payment claim;
- 22 ***claimed amount*** has the meaning given in section 24(1)(b);
- 23 ***construction contract*** has the meaning given in section 5;
- 24 ***construction work*** has the meaning given in section 6;
- 25 ***corporation in liquidation*** means —
- 26 (a) a company that is being wound up under the
27 *Corporations Act 2001* (Commonwealth); or
- 28 (b) any other corporation that is being wound up under the
29 written law of the jurisdiction in which it is established;
- 30 ***corresponding security of payment law*** means a law of the
31 Commonwealth or of another State or a Territory that
32 corresponds substantially with this Act;

- 1 ***court of competent jurisdiction***, in relation to a payment claim
2 or a certified copy of the determination of an adjudicator or
3 review adjudicator, means a court with jurisdiction to deal with
4 a claim for the recovery of a debt of the same amount as the
5 amount that is payable as set out in the payment claim or
6 determination;
- 7 ***due date***, for a progress payment, means the date on which the
8 progress payment becomes payable under section 20;
- 9 ***head contractor*** has the meaning given in subsection (3);
- 10 ***home building work*** has the meaning given in the *Home*
11 *Building Contracts Act 1991* section 3(1);
- 12 ***multiple dwellings*** —
- 13 (a) means 2 or more dwellings as defined in the *Home*
14 *Building Contracts Act 1991* section 3(1); but
- 15 (b) does not include —
- 16 (i) 2 dwellings (whether attached or detached) on
17 the one lot of land; or
- 18 (ii) a strata-titled dwelling as defined in that Act;
- 19 ***named month*** means January, February, March, April, May,
20 June, July, August, September, October, November or
21 December;
- 22 ***payment claim*** has the meaning given in section 22(1);
- 23 ***payment schedule*** has the meaning given in section 25(1);
- 24 ***performance bond*** has the meaning given in section 56;
- 25 ***performance security*** has the meaning given in section 56;
- 26 ***principal*** has the meaning given in subsection (2);
- 27 ***progress payment*** has the meaning given in section 17;
- 28 ***recognised financial institution*** means —
- 29 (a) an authorised deposit-taking institution as defined in the
30 *Banking Act 1959* (Commonwealth) section 5(1); or
- 31 (b) any other body prescribed by the regulations for the
32 purposes of this definition;

- 1 **recourse**, to performance security, means —
- 2 (a) in the case of a performance bond — the person named
- 3 in the bond demanding and receiving payment under the
- 4 bond; or
- 5 (b) in the case of retention money — the person who retains
- 6 the retention money taking the money for themselves;
- 7 **related goods and services** has the meaning given in section 7;
- 8 **release**, of performance security, means —
- 9 (a) in the case of a performance bond — the return or
- 10 cancellation of the bond; or
- 11 (b) in the case of retention money — payment of the money
- 12 to the party who has carried out construction work, or
- 13 supplied related goods and services, under a
- 14 construction contract;
- 15 **respondent** means a person who is given a payment claim under
- 16 section 22(1);
- 17 **retention money** means —
- 18 (a) money (inclusive of GST) retained by a party to a
- 19 construction contract, out of money payable by that
- 20 party under the contract to another party to the contract,
- 21 as security for the performance of obligations of that
- 22 other party under the contract in relation to the carrying
- 23 out of construction work, or the supply of related goods
- 24 and services, by that other party; or
- 25 (b) money (inclusive of GST) paid to a party to a
- 26 construction contract, by or on behalf of another party to
- 27 the contract, and retained as security for the performance
- 28 of obligations of that other party under the contract in
- 29 relation to the carrying out of construction work, or the
- 30 supply of related goods and services, by that other party;
- 31 Note for this definition:
- 32 Retention money is also referred to in the building and construction
- 33 industry as a “hold-back”.

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

3 **review adjudicator** means —

- 4 (a) an individual registered by the Building Commissioner
5 under Part 5 Division 2 as a review adjudicator; and
6 (b) in relation to an adjudication review application — the
7 review adjudicator appointed under section 44 to
8 determine the application;

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

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

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

15 **value** —

- 16 (a) in relation to a construction contract — has the meaning
17 given in section 8(1); or
18 (b) in relation to construction work or related goods and
19 services — means the value of the work or of the goods
20 and services determined under section 19.

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

- 22 (a) for whom construction work is to be carried out, or to
23 whom related goods and services are to be supplied,
24 under a construction contract to which the person is a
25 party (the **main contract**); and
26 (b) who is not themselves engaged under a construction
27 contract to carry out construction work or supply related
28 goods and services as part of or incidental to the work
29 carried out, or goods and services supplied, under the
30 main contract.

- 1 (3) In this Act, the *head contractor* is the person —
- 2 (a) who, as a party to the main contract, undertakes under
- 3 that contract to carry out construction work for, or to
- 4 supply related goods and services to, the principal; and
- 5 (b) for whom construction work is to be carried out, or to
- 6 whom related goods and services are to be supplied, by
- 7 another person under a separate construction contract as
- 8 part of or incidental to the work carried out, or goods
- 9 and services supplied, under the main contract.

10 Note for this subsection:

11 There is no head contractor when the principal contracts directly with

12 subcontractors.

13 **5. Term used: construction contract**

14 In this Act —

15 *construction contract* means a contract, agreement or other

16 arrangement under which one party undertakes to carry out

17 construction work, or to supply related goods and services, for

18 another party.

19 **6. Term used: construction work**

20 (1) In this Act —

21 *construction work* means the following —

- 22 (a) the construction of buildings, structures or civil works
- 23 (whether permanent or not) that form, or are to form,
- 24 part of land (including the seabed);
- 25 (b) the installation in or on any building, structure or civil
- 26 work referred to in paragraph (a) of fittings that form, or
- 27 are to form, part of the building, structure or civil work,
- 28 including for —
- 29 (i) the supply of electricity, gas or water; and
- 30 (ii) air-conditioning, heating, ventilation, lighting,
- 31 fire protection, irrigation, sanitation, cleaning,
- 32 security or communication systems; and

- 1 (iii) lifts or escalators;
- 2 (c) the alteration, repair, restoration, maintenance,
3 extension, demolition, dismantling or removal of any
4 building, structure or civil work referred to in
5 paragraph (a) or fitting referred to in paragraph (b);
- 6 (d) the reclamation, dredging or prevention of subsidence or
7 erosion of land;
- 8 (e) any work that is preparatory to, necessary for or an
9 integral part of anything referred to in paragraphs (a)
10 to (d), including —
- 11 (i) site clearing, excavating, earth-moving,
12 tunnelling or boring; and
- 13 (ii) laying foundations; and
- 14 (iii) erecting, maintaining or dismantling cranes,
15 scaffolding or other temporary buildings or
16 structures; and
- 17 (iv) cleaning, painting, decorating or treating
18 surfaces; and
- 19 (v) site restoration and landscaping;
- 20 (f) work prescribed by the regulations to be construction
21 work for the purposes of this Act.
- 22 (2) In subsection (1) —
- 23 ***civil works*** includes the following —
- 24 (a) roads;
- 25 (b) railways (including light rail);
- 26 (c) bridges or underpasses;
- 27 (d) airport runways;
- 28 (e) waterways, harbours, ports or marinas;
- 29 (f) electricity or telecommunication lines;
- 30 (g) water, gas, oil, sewage or other pipelines;

- 1 (h) dams, levees, aqueducts, drains, seawalls or retaining
2 walls;
- 3 (i) pavements, ramps, slipways or tunnels;
- 4 (j) works, apparatus or structures associated with the works
5 referred to in paragraphs (a) to (i).
- 6 (3) However, in this Act **construction work** does not include —
- 7 (a) drilling for the purposes of discovering or extracting oil
8 or natural gas, whether on land or not; or
- 9 (b) constructing a shaft, pit or quarry, or drilling, for the
10 purposes of discovering or extracting any mineral or
11 other substance; or
- 12 (c) constructing or fitting out the whole or any part of a
13 watercraft; or
- 14 (d) work prescribed by the regulations not to be
15 construction work for the purposes of this Act.

16 **7. Term used: related goods and services**

- 17 (1) In this Act —
- 18 **related goods and services** means —
- 19 (a) goods of the following kinds —
- 20 (i) materials or components (whether pre-fabricated
21 or not) that are to form part of any building,
22 structure, civil work or other thing resulting from
23 construction work;
- 24 (ii) plant or materials (whether supplied by sale, hire
25 or otherwise) for use in connection with the
26 carrying out of construction work;
- 27 and
- 28 (b) services of the following kinds —
- 29 (i) the provision of labour to carry out construction
30 work;

- 1 (ii) professional services that relate directly to
2 construction work or the assessment of its
3 feasibility, including surveying, planning,
4 costing, testing, architectural, design, plan
5 drafting, engineering, quantity surveying, and
6 project management services, but not including
7 accounting, financial or legal services;
- 8 and
- 9 (c) goods or services prescribed by the regulations to be
10 related goods and services for the purposes of this Act.
- 11 (2) However, in this Act *related goods and services* does not
12 include any goods or services of a kind prescribed by the
13 regulations not to be related goods and services for the purposes
14 of this Act.
- 15 (3) A reference in this Act to related goods and services includes a
16 reference to related goods or services.
- 17 **8. Value of construction contract**
- 18 (1) In this Act —
- 19 *value*, of a construction contract at any relevant time, means —
- 20 (a) the total amount payable under the contract at that time
21 for construction work undertaken to be carried out, or
22 related goods and services undertaken to be supplied,
23 under the contract (inclusive of GST); or
- 24 (b) if the contract does not provide for the total amount
25 payable under the contract at that time — a reasonable
26 estimate of the total amount at that time calculated as
27 follows —
- 28 (i) the estimate is to be based on all the construction
29 work to be carried out and all the related goods
30 and services to be supplied, including any to be
31 carried out or supplied at the option of either
32 party to the contract;

- 1 (ii) an estimate of quantities is to take into account
2 all relevant information in the possession of the
3 parties to the contract at that time;
- 4 (iii) the estimate is to be based on prevailing rates or
5 prices in the building and construction industry
6 at that time;
- 7 (iv) the estimate is to take into account any
8 anticipated movements in those rates or prices
9 during the period of the contract.
- 10 (2) The value of a construction contract that is a component
11 contract for a project is taken to be the total value of all the
12 component contracts for that project.
- 13 (3) Construction contracts are component contracts for a project
14 if —
- 15 (a) the parties to the contracts are the same; and
16 (b) the construction contracts are for the carrying out of
17 construction work, or the supply of related goods and
18 services, at the same site or at adjacent sites; and
19 (c) a single construction contract could have been entered
20 into instead of those separate contracts; and
21 (d) the construction contracts do not include a contract
22 entered into after a separate tender process.

23 **Division 3 — Application of Act**

24 **9. Construction contracts to which Act applies**

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

27 Notes for this subsection:

- 28 1. Section 2(c) enables the staged commencement of this Act, including
29 the later commencement of new industry requirements (such as those
30 relating to retention money trusts).
- 31 2. The *Construction Contracts Act 2004* (renamed the *Construction*
32 *Contracts (Former Provisions) Act 2004*) continues to apply to

1 construction contracts entered into before the commencement of
2 section 22 of this Act.

3 (2) This Act applies to a construction contract —

- 4 (a) whether written or oral, or partly written and partly oral
5 (and even if it is required by this Act to be written); and
6 (b) whether entered into in this State or elsewhere; and
7 (c) whether expressed to be governed by the law of this
8 State or the law of another jurisdiction.

9 **10. Construction contracts to which Act does not apply**

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

- 12 (a) the principal is an individual; and
13 (b) the work is not carried out in relation to multiple
14 dwellings or for the purposes of a residential
15 development business of the principal; and
16 (c) the value of the contract does not exceed \$500 000 (or
17 any greater amount prescribed by the regulations for the
18 purposes of this paragraph); and
19 (d) the contract is not between a head contractor and a
20 subcontractor, and not between 2 subcontractors, in
21 relation to the carrying out of the work.

22 Note for this subsection:

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

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

- 1 (3) This Act does not apply to a construction contract to the extent
2 that it provides that a party undertakes to carry out construction
3 work, or supply related goods and services, as a condition of a
4 loan agreement with a recognised financial institution.
- 5 (4) This Act does not apply to a construction contract to the extent
6 that it forms part of a loan, guarantee or insurance agreement
7 under which a recognised financial institution undertakes any of
8 the following or to the extent that it provides that a party to the
9 contract undertakes any of the following —
- 10 (a) to lend money or to repay money lent;
11 (b) to guarantee payment of money owing or repayment of
12 money lent;
13 (c) to provide an indemnity with respect to construction
14 work carried out, or related goods and services supplied,
15 under the contract.
- 16 (5) This Act does not apply to a construction contract to the extent
17 that it provides that the consideration payable for construction
18 work carried out, or for related goods and services supplied,
19 under the contract —
- 20 (a) is not monetary consideration; or
21 (b) is to be calculated otherwise than by reference to the
22 value of the work carried out or the goods and services
23 supplied.
- 24 (6) This Act does not apply to a construction contract to the extent
25 that it deals with construction work carried out outside Western
26 Australia or with related goods and services supplied for
27 construction work carried out outside Western Australia.
- 28 (7) For the purposes of subsection (6), Western Australia includes
29 any area of water adjacent to Western Australia —
- 30 (a) that is within the territorial limits of the State; or
31 (b) that is outside the territorial limits of the State if the
32 construction contract is governed by the law of the State.

1 **11. Act binds Crown**

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

1 **Part 2 — Construction contracts and right to progress**
2 **payments**

3 **Division 1 — Form and content of construction contracts**

4 **12. Model forms of construction contracts**

- 5 (1) The Building Commissioner may, for the purpose of assisting
6 participants in the building and construction industry, prepare
7 and publish model forms of construction contracts.
- 8 (2) Different model forms may be prepared and published for use in
9 different circumstances.
- 10 (3) The use of a model form of construction contract is not
11 mandatory.

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

- 14 (1) In this section —
15 *building service* has the meaning given in the *Building Services*
16 *(Complaint Resolution and Administration) Act 2011* section 3;
17 *building service contractor* means a person registered under the
18 *Building Services (Registration) Act 2011* section 18.
- 19 (2) This section applies to a construction contract if —
20 (a) a party to the contract is a building service contractor;
21 and
22 (b) the contract is for the carrying out by that or the other
23 party to the contract of construction work that is a
24 building service or for the supply by that or the other
25 party to the contract of related goods and services for a
26 building service; and
27 (c) the registration of the building service contractor entitles
28 the contractor to carry out the building service referred
29 to in paragraph (b); and

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

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

5 (a) the contract is not in writing; or

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

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

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

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

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

17 Penalty for this subsection: fine of \$2 000.

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

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

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

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

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

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

- 1 (c) a general description of the construction work to be
2 carried out or of the related goods and services to be
3 supplied;
- 4 (d) the amount to be paid for carrying out the construction
5 work or supplying the related goods and services (or
6 how that amount is to be calculated);
- 7 (e) any other information prescribed by the regulations for
8 the purposes of this paragraph.

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

12 **14. Prohibited terms: pay when paid provisions**

13 (1) In this section —

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

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

- 20 (a) that makes the liability of one party (the **first party**) to
21 pay an amount owing to another party (the **second**
22 **party**) contingent on payment to the first party by a
23 further person (the **third party**) of the whole or any part
24 of that amount; or
- 25 (b) that makes the due date for payment of an amount owing
26 by the first party to the second party dependent on the
27 date on which payment of the whole or any part of that
28 amount is made to the first party by the third party; or
- 29 (c) that otherwise makes any of the following contingent or
30 dependent on the operation of another contract —
- 31 (i) the liability to pay an amount owing;
- 32 (ii) the due date for payment of an amount owing;

- 1 (iii) the making of a claim for an amount owing;
2 (iv) the release of retention money or of a
3 performance bond.

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

8 Note for this section:

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

12 **15. Other prohibited terms prescribed by regulations**

- 13 (1) The regulations may prohibit other provisions of construction
14 contracts.
15 (2) The regulations may prohibit those provisions in all or any class
16 of construction contracts.
17 (3) A provision of a construction contract that is prohibited by the
18 regulations has no effect.

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

- 21 (1) In this section —
22 *notice* includes notice of the actual or estimated time or cost for
23 doing a thing, notice of intention to do a thing, notice of the
24 description of a thing or notice of any other kind;
25 *notice-based time bar provision*, of a construction contract,
26 means a provision of the contract that makes any of the
27 following contingent on the provision of notice by a party to the
28 contract —
29 (a) an entitlement to payment for construction work carried
30 out or undertaken to be carried out, or for related goods

- 1 and services supplied or undertaken to be supplied,
2 under the contract;
- 3 (b) an extension of time for doing a thing that affects an
4 entitlement referred to in paragraph (a).
- 5 (2) A notice-based time bar provision of a construction contract
6 may be declared under this section to be unfair in the case of a
7 particular entitlement under the contract if compliance with the
8 provision in that case —
- 9 (a) is not reasonably possible; or
10 (b) would be unreasonably onerous.
- 11 (3) A notice-based time bar provision of a construction contract
12 may be declared to be unfair by —
- 13 (a) an adjudicator or review adjudicator for the purposes of
14 adjudication proceedings under this Act in relation to the
15 contract; or
- 16 (b) a court for the purposes of proceedings for the recovery
17 of money or enforcing other rights under the contract; or
- 18 (c) an arbitrator for the purposes of arbitration proceedings
19 under the contract or under any separate agreement
20 between the parties; or
- 21 (d) an expert appointed by the parties for the purposes of
22 proceedings to determine a matter under the contract.
- 23 (4) A notice-based time bar provision of a construction contract that
24 is declared to be unfair has no effect in the case of the particular
25 entitlement that is the subject of the proceedings in which it was
26 declared unfair, but continues to have effect in other
27 circumstances or challenges arising under the same or a related
28 contract.
- 29 (5) The party in any proceedings who alleges that a notice-based
30 time bar provision is unfair bears the onus of establishing that it
31 is unfair.

- 1 (6) In determining whether a notice-based time bar provision is
2 unfair, the adjudicator, review adjudicator, court, arbitrator or
3 expert must take the following into account —
- 4 (a) when the party required to give notice would reasonably
5 have become aware of the relevant event or
6 circumstance, having regard to the last day on which
7 notice could have been given;
- 8 (b) when and how notice was required to be given;
- 9 (c) the relative bargaining power of each party in entering
10 into the construction contract;
- 11 (d) the irrebuttable presumption that the parties have read
12 and understood the terms of the construction contract;
- 13 (e) the rebuttable presumption that the party required to
14 give notice possesses the commercial and technical
15 competence of a reasonably competent contractor;
- 16 (f) if compliance with the provision is alleged to be
17 unreasonably onerous — whether the matters set out in
18 the notice are final and binding;
- 19 (g) any matter prescribed by the regulations for the purposes
20 of this paragraph.
- 21 (7) In determining whether a notice-based time bar provision is
22 unfair, the adjudicator, review adjudicator, court, arbitrator or
23 expert must not take into account the provisions of any related
24 contract or the things that happened under any related contract.

25 **Division 2 — Right to progress payments**

26 **17. Right to progress payments**

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

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- 1 (2) A progress payment to which a person is entitled under this
2 section includes the following —
- 3 (a) the final payment for construction work carried out, or
4 for related goods and services supplied, under a
5 construction contract;
- 6 (b) a single or one-off payment for construction work
7 carried out, or for related goods and services supplied,
8 under a construction contract;
- 9 (c) a milestone payment under a construction contract,
10 being a payment that is based on an event or date.
- 11 (3) A progress payment to which a person is entitled under this
12 section does not include payment for any expenses, loss or
13 damages incurred because of a breach of a construction
14 contract.
- 15 (4) The entitlement to receive a progress payment under this section
16 is, subject to section 55(3), a separate and additional entitlement
17 to any entitlement to payment under a construction contract, and
18 accordingly a reference in this Act to a progress payment is a
19 reference to a progress payment to which a person is entitled
20 under this section.
- 21 (5) A person is not entitled to receive a progress payment under this
22 section in respect of anything for which the person is not
23 entitled to monetary or other consideration under the *Building*
24 *Services (Registration) Act 2011* because of a contravention of
25 section 7(1) of that Act.
- 26 Notes for this section:
- 27 1. Section 23 sets out when claims for progress payments under this Part
28 may be made.
- 29 2. Section 55(3) prevents double payment by requiring any progress
30 payment under this section to be deducted from any payments that a
31 court would otherwise order to be paid in proceedings to enforce the
32 construction contract.
- 33 3. A person contravenes the *Building Services (Registration) Act 2011*
34 section 7(1) by doing a thing without the appropriate registration as a
35 building service contractor required under that Act for doing that thing.

1 **18. Amount of progress payment**

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

- 4 (a) if the contract provides for the matter — the amount
5 calculated in accordance with the contract; or
6 (b) if the contract does not provide for the matter — the
7 amount calculated on the basis of the value of
8 construction work carried out or undertaken to be
9 carried out, or of related goods and services supplied or
10 undertaken to be supplied, by the person under the
11 contract.

12 **19. Valuation of construction work and related goods and**
13 **services**

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

- 17 (a) if the contract provides for the matter — in accordance
18 with the contract; or
19 (b) if the contract does not provide for the matter — having
20 regard to each of the following —
21 (i) the contract price for the work;
22 (ii) any other rates or prices set out in the contract;
23 (iii) any variation agreed to by the parties to the
24 contract by which the contract price, or any other
25 rate or price set out in the contract, is to be
26 adjusted by a stated amount;
27 (iv) if any of the work is defective — the estimated
28 cost of rectifying the defect.

- 1 (2) Related goods and services supplied or undertaken to be
2 supplied under a construction contract must be valued for the
3 purposes of a progress payment —
- 4 (a) if the contract provides for the matter — in accordance
5 with the contract; or
- 6 (b) if the contract does not provide for the matter — having
7 regard to each of the following —
- 8 (i) the contract price for the goods and services;
- 9 (ii) any other rates or prices set out in the contract;
- 10 (iii) any variation agreed to by the parties to the
11 contract by which the contract price, or any other
12 rate or price set out in the contract, is to be
13 adjusted by a stated amount;
- 14 (iv) if any of the goods are defective — the estimated
15 cost of rectifying the defect.
- 16 (3) In the case of materials and components that are to form part of
17 any building, structure, work or other thing resulting from
18 construction work, the only materials and components to be
19 included in the valuation for the purposes of subsection (2)(b)
20 are those that have become or, on payment, will become the
21 property of the party or other person for whom the construction
22 work is being carried out.

23 **20. Due date for payment**

- 24 (1) A progress payment (other than for home building work)
25 becomes payable —
- 26 (a) in the case of a progress payment to be made by a
27 principal to a head contractor — on the date that is
28 20 business days after a payment claim is made under
29 Part 3 for the progress payment; or

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

5 Note for this subsection:

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

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

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

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

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

22 Note for this section:

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

25 **21. Interest on payment after due date**

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

28 (a) the rate provided in the construction contract;

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

1 **Part 3 — Procedure for obtaining progress payments**

2 **Division 1 — Payment claims and schedules**

3 **22. Making payment claims**

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

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

10 Note for this section:

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

13 **23. When payment claims may be made**

14 (1) In this section —

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

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

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

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

25 *practical completion*, of construction work under a construction
26 contract, means —

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

- 1 (b) in any other case — the day on which the work is
2 completed in compliance with the requirements of the
3 contract and without any omission or defect that
4 unreasonably affects the intended use of the work.
- 5 (2) A payment claim for a progress payment may be made —
- 6 (a) on or after the last day of the named month in which
7 construction work was first carried out, or related goods
8 and services were first supplied, under the construction
9 contract; and
- 10 (b) on or after the last day of each subsequent named
11 month.
- 12 (3) However, if the construction contract provides that a payment
13 claim for a particular named month may be made on or after an
14 earlier date, then the payment claim may be made on or after
15 that earlier date.
- 16 (4) A payment claim for a progress payment (other than for a final
17 payment) may only be made before whichever of the following
18 is the later —
- 19 (a) the date (if any) determined in accordance with the
20 construction contract;
- 21 (b) the date that is 6 months after the construction work to
22 which the payment claim relates was last carried out or
23 the related goods and services to which the payment
24 claim relates were last supplied.
- 25 (5) A payment claim for a final payment may only be made before
26 whichever of the following is the latest —
- 27 (a) the date (if any) determined in accordance with the
28 construction contract;
- 29 (b) the date that is 28 days after the end of the last defects
30 liability period for the construction contract;

- 1 (c) the date that is 6 months after the completion of all
2 construction work to be carried out under the
3 construction contract;
- 4 (d) the date that is 6 months after the supply of all related
5 goods and services to be supplied under the construction
6 contract.
- 7 (6) If the construction contract is terminated, a payment claim may
8 be made on or after the date of termination and before the
9 relevant date provided by this section.
- 10 (7) Unless the construction contract otherwise provides, a claimant
11 may only make one payment claim under the construction
12 contract for a particular named month.
- 13 (8) Subsection (7) does not prevent the claimant from —
- 14 (a) making a single payment claim in respect of more than
15 one progress payment; or
- 16 (b) including in a payment claim an unpaid amount that has
17 been the subject of a previous payment claim.

18 Note for this section:

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

22 **24. Content of payment claims**

- 23 (1) A payment claim must —
- 24 (a) be made in writing and be in the approved form (if any);
25 and
- 26 (b) indicate the amount of the progress payment that the
27 claimant claims is payable by the respondent (the
28 ***claimed amount***); and
- 29 (c) describe the items and quantities of construction work,
30 or related goods and services, to which the progress
31 payment relates; and

- 1 (d) state that it is made under this Act; and
2 (e) include any other information required by the
3 regulations.
- 4 (2) A payment claim given to the principal for home building work
5 under a construction contract the value of which exceeds the
6 amount referred to in section 10(1)(c) must include a
7 homeowner's notice in the form prescribed by the regulations
8 unless —
- 9 (a) the principal is a corporation; or
10 (b) the work is carried out in relation to multiple dwellings
11 or for the purposes of a residential development business
12 of the principal.
- 13 Note for this subsection:
14 A homeowner's notice is not required for a payment claim given under
15 a contract between a head contractor and a subcontractor or under a
16 contract between 2 subcontractors.
- 17 (3) A payment claim may be a document described as an invoice
18 and, if so, the amount stated in the invoice is sufficient
19 indication of the claimed amount.
- 20 (4) A payment claim need not be signed by the claimant.

21 **25. Response to payment claim: payment schedule**

- 22 (1) The respondent may respond to a payment claim by giving a
23 schedule (a *payment schedule*) to the claimant before the earlier
24 of the following —
- 25 (a) the time required by the construction contract;
26 (b) 15 business days after the payment claim is made.
- 27 (2) A payment schedule must —
- 28 (a) be given in writing and be in the approved form (if any);
29 and
30 (b) identify the payment claim to which it relates; and

- 1 (c) indicate the amount of the payment (if any) that the
2 respondent proposes to make (the *scheduled amount*);
3 and
4 (d) if the respondent does not propose to make any
5 payment — indicate that the respondent does not
6 propose to make any payment.
- 7 (3) If the scheduled amount is less than the claimed amount or no
8 payment is proposed, the payment schedule must indicate —
9 (a) why the scheduled amount is less or no payment is
10 proposed; and
11 (b) if the reason is that the respondent is withholding
12 payment — the reason why the respondent is
13 withholding payment.

14 Notes for this section:

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

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

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

1 **27. Consequences of not paying claimed or scheduled amount**

2 (1) In this section —

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

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

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

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

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

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

25 Notes for this subsection:

26 1. Division 7 provides that in addition to taking debt recovery action or
27 making an adjudication application, the claimant may suspend work or
28 supply under the construction contract.

29 2. If no payment is proposed in a payment schedule, the claimant cannot
30 commence proceedings in a court under this section, but may make an
31 adjudication application.

- 1 (3) If the claimant commences proceedings under this section in a
2 court of competent jurisdiction to recover from the respondent
3 the unpaid portion of the claimed or scheduled amount owed —
- 4 (a) judgment in favour of the claimant is not to be given
5 unless the court is satisfied that the relevant
6 circumstances exist; and
- 7 (b) the respondent is not, in those proceedings, entitled —
- 8 (i) to bring any cross-claim against the claimant; or
9 (ii) to raise any defence in relation to matters arising
10 under the construction contract.
- 11 (4) The relevant circumstances for the purposes of subsection (3)(a)
12 are as follows —
- 13 (a) the respondent —
- 14 (i) did not respond to the payment claim by giving a
15 payment schedule to the claimant within the time
16 allowed for the response; or
- 17 (ii) did respond to the payment claim by giving a
18 payment schedule to the claimant within the time
19 allowed for the response, and the payment
20 schedule indicates the scheduled amount that the
21 respondent proposes to pay to the claimant;
- 22 (b) the respondent has not paid the claimed or scheduled
23 amount owed to the claimant in full on or before the due
24 date for the progress payment;
- 25 (c) if the payment of the claimed or scheduled amount owed
26 is dependent on the substitution of performance security
27 under Division 6 — the requisite compliant performance
28 bond has been duly executed by an authorised issuing
29 institution as referred to in that Division.

1 **Division 2 — Adjudication of payment disputes**

2 **28. When claimant may apply for adjudication of payment**
3 **claim**

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

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

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

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

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

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

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

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

1 **29. To whom adjudication application made**

- 2 (1) An adjudication application must be made —
- 3 (a) if the construction contract provides for the person who
- 4 is to be the adjudicator for the application — to that
- 5 adjudicator; or
- 6 (b) in any other case — to the authorised nominating
- 7 authority chosen by the claimant.
- 8 (2) Despite subsection (1)(a), an adjudication application may be
- 9 made to any authorised nominating authority chosen by the
- 10 claimant if it is another adjudication application referred to in
- 11 section 32(8) or 37(5)(b).
- 12 (3) A claimant is not bound by any provision of the construction
- 13 contract that designates or restricts the authorised nominating
- 14 authority to which an adjudication application may be made.

15 **30. Requirements relating to adjudication application**

- 16 (1) An adjudication application —
- 17 (a) must be made in writing and be in the approved form (if
- 18 any); and
- 19 (b) must identify the payment claim and the payment
- 20 schedule (if any) to which it relates; and
- 21 (c) must be accompanied by a copy of the construction
- 22 contract or of the relevant provisions of the construction
- 23 contract; and
- 24 (d) if made to an authorised nominating authority — must
- 25 be accompanied by the application fee (if any)
- 26 determined by that authority; and
- 27 (e) may contain submissions relevant to the application that
- 28 the claimant chooses to include.

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

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

8 Note for this section:

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

12 **31. Withdrawal of adjudication application**

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

16 (a) to the respondent; and

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

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

23 **32. Appointment of adjudicator**

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

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

30 (a) the authority must appoint an adjudicator; and

- 1 (b) the adjudicator is taken to be appointed to determine the
2 application when written notice of the appointment is
3 given by the authority to the claimant and the
4 respondent.
- 5 (3) An adjudicator must, within 5 business days after an
6 adjudication application is made, be appointed in accordance
7 with this section to determine the application.
- 8 (4) An adjudicator who gives written notice of acceptance of the
9 appointment, or an authorised nominating authority who gives
10 written notice of the appointment of an adjudicator, must give a
11 copy of the notice to the Building Commissioner.
- 12 (5) An adjudicator may, at any time before determining an
13 adjudication application, withdraw from the adjudication by
14 giving written notice of the withdrawal and the reasons for the
15 withdrawal to the claimant and the respondent.
- 16 (6) An adjudicator who gives written notice of withdrawal from the
17 adjudication must give a copy of the notice to the Building
18 Commissioner and, if appointed by an authorised nominating
19 authority, to the authority.
- 20 (7) An adjudication application is taken to be withdrawn if —
21 (a) an adjudicator has not, within 5 business days after the
22 adjudication application is made, been appointed in
23 accordance with this section to determine the
24 adjudication application; or
25 (b) the adjudicator withdraws from the adjudication under
26 subsection (5).
- 27 (8) If an adjudication application is taken to be withdrawn under
28 subsection (7), the claimant may make another adjudication
29 application within 5 business days after the withdrawal despite
30 the expiry of the time otherwise allowed for making
31 adjudication applications.

- 1 **33. Disqualification of adjudicator with conflict of interest in**
2 **adjudication application**
- 3 (1) In this section —
- 4 ***relevant contract***, in relation to an adjudication application,
5 means —
- 6 (a) the construction contract the subject of the application;
7 or
- 8 (b) any other construction contract if the work or supply
9 under that other contract is part of, or incidental to, the
10 work or supply under the construction contract the
11 subject of the application.
- 12 (2) An adjudicator has a conflict of interest in relation to an
13 adjudication application if the adjudicator —
- 14 (a) is a party to a relevant contract; or
- 15 (b) prepared (or was involved in the preparation of) a
16 relevant contract or the payment claim, payment
17 schedule, adjudication application or adjudication
18 response; or
- 19 (c) has a material personal interest in the outcome of the
20 adjudication; or
- 21 (d) has a conflict of interest of a kind prescribed by the
22 regulations for the purposes of this paragraph.
- 23 (3) An adjudicator does not have a conflict of interest in relation to
24 an adjudication application —
- 25 (a) merely because of a previous appointment to adjudicate
26 a payment claim, or of a previous conflict of interest,
27 involving either or both of the parties; or
- 28 (b) merely because a previous determination of the
29 adjudicator involving either or both of the parties was
30 set aside or quashed by a review adjudicator or by a
31 court.

- 1 (4) An authorised nominating authority must not appoint an
2 adjudicator to determine an adjudication application if the
3 authority is aware that the adjudicator has a conflict of interest
4 in relation to the application.
- 5 (5) An adjudicator must not accept an appointment to determine an
6 adjudication application if the adjudicator is aware that the
7 adjudicator has a conflict of interest in relation to the
8 application.
- 9 (6) If, after being appointed to determine an adjudication
10 application, the adjudicator becomes aware that the adjudicator
11 has a conflict of interest in relation to the application, the
12 adjudicator must withdraw from the adjudication in accordance
13 with section 32.
- 14 **34. Adjudication response**
- 15 (1) If the respondent has given the claimant a payment schedule
16 within the time allowed by this Part, the respondent may give
17 the adjudicator a response to the claimant's adjudication
18 application (the *adjudication response*) within 10 business days
19 after receiving a copy of the adjudication application.
- 20 (2) The adjudication response —
- 21 (a) must be given in writing and be in the approved form (if
22 any); and
- 23 (b) must identify the adjudication application to which it
24 relates; and
- 25 (c) may contain submissions relevant to the response that
26 the respondent chooses to include.
- 27 (3) The respondent cannot include in the adjudication response any
28 reasons for withholding payment unless those reasons have
29 already been included in the payment schedule given to the
30 claimant.

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

4 Note for this section:

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

7 **35. Adjudication procedures**

- 8 (1) An adjudicator must, subject to complying with the
9 requirements of this Division, determine an adjudication
10 application fairly and as quickly, informally and inexpensively
11 as possible.
- 12 (2) An adjudicator cannot delegate the determination of an
13 adjudication application to another person or body.
- 14 (3) For the purposes of determining an adjudication application, the
15 adjudicator may do any of the following —
- 16 (a) request further submissions from either party and give
17 the other party an opportunity to make submissions
18 commenting on any further submissions made;
- 19 (b) set deadlines for any further submissions;
- 20 (c) call a conference of the parties;
- 21 (d) carry out an inspection, or arrange for a test, of any
22 matter or thing to which the payment claim relates;
- 23 (e) engage an expert to investigate and report on any matter
24 to which the payment claim relates;
- 25 (f) engage an authorised nominating authority to assist the
26 adjudicator with administrative duties.
- 27 (4) A conference of the parties that is called by the adjudicator must
28 be conducted informally.
- 29 (5) The adjudicator cannot carry out an inspection, arrange for a test
30 or engage an expert if all the parties object.

- 1 (6) This section does not authorise the carrying out of an inspection
2 or testing in any premises, or the inspection or testing of any
3 thing, without the consent of the occupier of the premises or the
4 owner of the thing.
- 5 (7) An adjudicator's determination of an adjudication application is
6 not affected by the failure of a party to make a submission
7 within the time allowed or to comply with the adjudicator's call
8 for a conference.
- 9 (8) An adjudicator is not bound by the rules of evidence.
- 10 (9) Adjudicators may, to the extent that their procedure is not
11 otherwise regulated under this Act, determine their own
12 procedure.
- 13 **36. Jurisdiction to make determination, frivolous or vexatious**
14 **applications and complex applications**
- 15 (1) An adjudicator must consider whether the adjudicator has
16 jurisdiction to determine the adjudication application.
- 17 (2) If the adjudicator decides that the adjudicator does not have
18 jurisdiction to determine the adjudication application, the
19 adjudicator's determination of the application must set out that
20 decision and provide that no amount is payable under the
21 determination.
- 22 (3) If an adjudicator decides that an adjudication application is
23 frivolous or vexatious, or is too complex for the adjudicator to
24 make a fair determination within the time available to the
25 adjudicator, the adjudicator's determination of the application
26 must set out that decision and provide that no amount is payable
27 under the determination.
- 28 (4) An adjudicator's determination must set out the reasons for a
29 decision that the adjudicator does not have jurisdiction to
30 determine the adjudication application or that the adjudication
31 application is too complex.

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

3 **37. Time allowed for adjudicator to determine adjudication**
4 **application**

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

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

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

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

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

22 (3) However, the claimant and the respondent may agree to extend
23 the time by which the adjudicator must determine the
24 adjudication application under this section, but only if the total
25 period of all extensions under this section does not exceed
26 20 business days.

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

- 1 (5) If the adjudicator fails to determine an adjudication application
2 within the time allowed by this section (or, if that time is
3 extended under section 51(2), within that time as extended) —
- 4 (a) the claimant may withdraw the application by giving
5 written notice of the withdrawal to the adjudicator and
6 the respondent; and
- 7 (b) the claimant may make another adjudication application
8 within 5 business days after the withdrawal despite the
9 expiry of the time otherwise allowed for making
10 adjudication applications.
- 11 (6) Despite subsection (1), the adjudicator may determine an
12 adjudication application before an adjudication response is
13 given if the adjudicator decides that the adjudicator does not
14 have jurisdiction to determine the application or that the
15 application is frivolous or vexatious.
- 16 Notes for this section:
- 17 1. Under Division 4 the adjudicator may, when determining the proportion
18 of adjudication fees and expenses payable by each party, have regard
19 to any unreasonable withholding of consent by a party to extending the
20 time for determining the adjudication application.
- 21 2. Under Division 4 the adjudicator is not entitled to adjudication fees and
22 expenses if the adjudicator fails to determine the adjudication
23 application within the time allowed by this Part.

24 **38. Adjudicator's determination**

- 25 (1) The adjudicator must determine —
- 26 (a) the amount of the progress payment, if any, to be paid
27 by the respondent to the claimant; and
- 28 (b) the due date for the payment of that amount under
29 section 20; and
- 30 (c) the rate of interest payable on that amount under
31 section 21; and
- 32 (d) if no amount of progress payment is required to be
33 paid — that no amount is payable.

- 1 Notes for this subsection:
- 2 1. Part 4 provides that the adjudicator may also determine that an amount
3 of money is to be paid out of a retention money trust account under
4 that Part.
- 5 2. Division 4 provides that the adjudicator is to determine the amount of
6 adjudication fees and expenses payable to the adjudicator and the
7 proportion of the amount for which each party is liable.
- 8 3. Sections 58 and 59 provide that a determination may require the
9 release of performance security or the substitution of performance
10 security that is proposed in a payment claim.
- 11 (2) In determining an adjudication application, the adjudicator may
12 consider only the following matters —
- 13 (a) this Act and the regulations;
- 14 (b) the relevant construction contract;
- 15 (c) the relevant payment claim and the adjudication
16 application, together with submissions (including
17 accompanying documents) duly made by the claimant in
18 support of the claim and application;
- 19 (d) the relevant payment schedule and adjudication response
20 (if any), together with submissions (including
21 accompanying documents) duly made by the respondent
22 in support of the schedule and response;
- 23 (e) any further submissions of the claimant or respondent
24 (including accompanying documents) requested by the
25 adjudicator;
- 26 (f) the outcome of any conference of the parties called by
27 the adjudicator;
- 28 (g) the results of any inspection carried out or testing
29 arranged by the adjudicator;
- 30 (h) any expert report obtained by the adjudicator.
- 31 (3) In determining an adjudication application, the adjudicator must
32 not consider the following matters —
- 33 (a) an adjudication response that is given after the time
34 allowed by this Division;

- 1 (b) any reasons included in an adjudication response for
2 withholding payment that cannot under this Division be
3 included in the adjudication response because those
4 reasons were not included in the payment schedule;
- 5 (c) any submissions (including accompanying documents)
6 made to the adjudicator that are not authorised to be
7 made under this Division or that contravene any other
8 limitation prescribed by the regulations on the
9 submissions that may be made.
- 10 (4) The adjudicator's determination must —
- 11 (a) be made in writing and be in the approved form (if any);
12 and
- 13 (b) include the reasons for the determination; and
- 14 (c) be given by the adjudicator to the claimant, respondent
15 and Building Commissioner.
- 16 (5) Subsection (6) applies if the adjudicator (or any other
17 adjudicator or review adjudicator) has, for the purposes of a
18 previous determination, calculated —
- 19 (a) the value of any construction work carried out under a
20 construction contract; or
- 21 (b) the value of any related goods and services supplied
22 under a construction contract.
- 23 (6) The adjudicator is, in a subsequent determination that involves
24 calculating the value of construction work or related goods and
25 services referred to in subsection (5), to give the work or related
26 goods and services the same value as that previously calculated
27 unless the claimant or respondent satisfies the adjudicator that
28 the value has changed since the previous calculation.
- 29 (7) The adjudicator may, on the adjudicator's own initiative or on
30 the application of the claimant or respondent, correct the
31 adjudicator's determination if it contains —
- 32 (a) a clerical mistake or defect of form; or

- 1 (b) an error arising from an accidental slip or omission; or
2 (c) a material arithmetic error or a material mistake in the
3 description of any person, thing or matter.

4 **Division 3 — Review of adjudications**

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

- 7 (1) A claimant or respondent may apply for a review of an
8 adjudicator's determination of an adjudication application (an
9 ***adjudication review application***) if authorised to do so by this
10 section.
- 11 (2) A claimant may apply for a review of the adjudicator's
12 determination of an adjudication application if —
- 13 (a) the respondent has not already applied for a review of
14 the adjudicator's determination (or, if the respondent has
15 already applied, the respondent has withdrawn their
16 application); and
- 17 (b) either —
- 18 (i) the adjudicated amount is less than the claimed
19 amount and the amount of that difference
20 exceeds the minimum amount prescribed by the
21 regulations for the purposes of this paragraph; or
- 22 (ii) the adjudicator decided that the adjudicator did
23 not have jurisdiction to determine the application
24 and the claimed amount exceeds the minimum
25 amount prescribed by the regulations for the
26 purposes of this paragraph.
- 27 (3) A respondent may apply for a review of the adjudicator's
28 determination of an adjudication application if —
- 29 (a) the respondent gave the claimant a payment schedule
30 within the time allowed by this Part; and

- 1 (b) the respondent gave the adjudicator an adjudication
2 response within the time allowed by this Part; and
- 3 (c) the adjudicated amount is more than the scheduled
4 amount and the amount of that difference exceeds the
5 minimum amount prescribed by the regulations for the
6 purposes of this paragraph; and
- 7 (d) the claimant has not already applied for a review of the
8 adjudicator's determination (or, if the claimant has
9 already applied, the claimant has withdrawn their
10 application).
- 11 (4) A decision that the adjudicator had jurisdiction to determine an
12 adjudication application cannot be challenged by the respondent
13 in an adjudication review application.
- 14 (5) An adjudication review application must be made within
15 5 business days after the claimant or respondent making the
16 application is given the adjudicator's determination.
- 17 **40. Adjudicated amount in dispute to be paid into trust account**
18 **before respondent may make adjudication review**
19 **application**
- 20 (1) The respondent cannot make an adjudication review application
21 unless —
- 22 (a) the respondent has paid any part of the adjudicated
23 amount that is not disputed by the respondent to the
24 claimant; and
- 25 (b) the respondent has paid the adjudicated amount (or part)
26 that is disputed by the respondent into a trust account
27 with a recognised financial institution —
- 28 (i) established by the respondent; or
29 (ii) established by the authorised nominating
30 authority to which the application was made;
- 31 and

- 1 (c) the respondent has given the claimant written notice of
2 the payment into the trust account, together with
3 information that identifies the trust account.
- 4 (2) Money held in a trust account under this section (including any
5 accrued interest) is taken to be held by the respondent or the
6 authorised nominating authority (as the case requires) on
7 trust for the benefit of the claimant until the adjudication review
8 application is determined or withdrawn and all money required
9 to be paid to the claimant as a result of that determination or
10 withdrawal has been paid.
- 11 (3) After all that money has been paid to the claimant —
- 12 (a) in the case of a trust account established by the
13 respondent — the respondent is entitled to any money
14 remaining in the trust account; and
- 15 (b) in the case of a trust account established by an
16 authorised nominating authority — the authority is
17 entitled to any money remaining in the trust account that
18 is equal to the amount of accrued interest to the date of
19 payment to the claimant and the respondent is entitled to
20 any remainder.
- 21 (4) The regulations may make provision for or with respect to trust
22 accounts under this section and payments from the accounts,
23 including by applying provisions of Part 4, with or without
24 modification.

25 **41. To whom adjudication review application made**

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

1 **42. Requirements relating to adjudication review application**

- 2 (1) An adjudication review application —
- 3 (a) must be made in writing and be in the approved form (if
- 4 any); and
- 5 (b) must be accompanied by a copy of the following —
- 6 (i) the construction contract or the relevant
- 7 provisions of the construction contract;
- 8 (ii) the payment claim;
- 9 (iii) the payment schedule (if any);
- 10 (iv) the adjudication application;
- 11 (v) the adjudication response (if any);
- 12 (vi) any submissions made to the adjudicator by the
- 13 claimant or respondent (including accompanying
- 14 documents);
- 15 (vii) the adjudicator's determination;
- 16 and
- 17 (c) must be accompanied by the application fee (if any)
- 18 determined by the authorised nominating authority to
- 19 which the adjudication review application is made; and
- 20 (d) may contain submissions relevant to the application that
- 21 the claimant or respondent making the application
- 22 chooses to include.
- 23 (2) The claimant or respondent cannot include any reasons for a
- 24 matter in the adjudication review application unless those
- 25 reasons were raised in the original adjudication being reviewed.
- 26 (3) The claimant or respondent making the adjudication review
- 27 application must give a copy of the application (and of any
- 28 accompanying documents) to the other party within 1 business
- 29 day after the application is made.
- 30 (4) The regulations may prescribe the maximum application fee that
- 31 an authorised nominating authority may determine under this

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

3 Note for this section:

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

7 **43. Withdrawal of adjudication review application**

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

- 12 (a) to the other party to the adjudication review; and
13 (b) to the review adjudicator appointed to determine the
14 application or the authorised nominating authority to
15 which the application was made.

16 **44. Appointment of review adjudicator**

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

- 19 (a) the authority must appoint a review adjudicator; and
20 (b) the review adjudicator is taken to be appointed to
21 determine the application when written notice of the
22 appointment is given by the authority to the claimant
23 and the respondent.

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

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

- 1 (4) A review adjudicator may, at any time before determining an
2 adjudication review application, withdraw from the adjudication
3 review by giving written notice of the withdrawal and the
4 reasons for the withdrawal to the claimant and the respondent.
- 5 (5) A review adjudicator who gives written notice of withdrawal
6 from the adjudication review must give a copy of the notice to
7 the Building Commissioner and to the authorised nominating
8 authority that appointed the review adjudicator.
- 9 (6) An adjudication review application is taken to be withdrawn
10 if —
- 11 (a) a review adjudicator has not, within 5 business days
12 after the adjudication review application is made, been
13 appointed in accordance with this section to determine
14 the application; or
- 15 (b) the review adjudicator withdraws from the adjudication
16 review under subsection (4).
- 17 (7) If an adjudication review application is taken to be withdrawn
18 under subsection (6), the claimant or respondent (as the case
19 may be) may make another adjudication review application
20 within 5 business days after the withdrawal despite the expiry of
21 the time otherwise allowed for making adjudication review
22 applications.
- 23 (8) Section 33 applies to a conflict of interest of a review
24 adjudicator in relation to an adjudication review application in
25 the same way as it applies to a conflict of interest of an
26 adjudicator in relation to an adjudication application.
- 27 (9) The adjudicator who made the determination that is the subject
28 of the adjudication review application cannot be appointed as
29 the review adjudicator.

1 **45. Adjudication review response**

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

8 (2) The adjudication review response —

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

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

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

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

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

22 **46. Adjudication review procedures**

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

25 (a) this Act and the regulations;

26 (b) the relevant construction contract;

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

- 1 (d) the relevant payment claim, payment schedule,
2 adjudication application and adjudication response (if
3 any), together with submissions (including
4 accompanying documents) duly made.
- 5 (2) In determining an adjudication review application, the review
6 adjudicator must not consider the following matters —
- 7 (a) an adjudication review response that is given after the
8 time allowed by this Division;
- 9 (b) any reasons for a matter that have been raised unless
10 those reasons were raised in the original adjudication
11 being reviewed;
- 12 (c) any submissions (including accompanying documents)
13 made to the review adjudicator that are not authorised to
14 be made under this Division or that contravene any other
15 limitation prescribed by the regulations on the
16 submissions that may be made.
- 17 (3) A review adjudicator cannot delegate the determination of an
18 adjudication review application to another person or body.
- 19 (4) A review adjudicator may engage an authorised nominating
20 authority to assist the adjudicator with administrative duties.
- 21 (5) A review adjudicator is not bound by the rules of evidence.
- 22 (6) Review adjudicators may, to the extent that their procedure is
23 not otherwise regulated under this Act, determine their own
24 procedure.
- 25 **47. Time allowed for review adjudicator to determine**
26 **adjudication review application**
- 27 (1) The review adjudicator must not determine the adjudication
28 review application until after the adjudication review response
29 is given or, if not given, until after the last date on which the
30 response could have been given.

- 1 (2) The review adjudicator must determine an adjudication review
2 application within 10 business days after —
- 3 (a) if an adjudication review response is given within the
4 time allowed under this Division — the date on which
5 the adjudication review response is given; or
- 6 (b) if an adjudication review response is not given within
7 the time allowed under this Division — the last date on
8 which the response could have been given.
- 9 (3) However, the claimant and the respondent may agree to extend
10 the time by which the review adjudicator must determine the
11 adjudication review application under this section, but only if
12 the total period of all extensions under this section does not
13 exceed 10 business days.
- 14 (4) A review adjudicator’s determination is not invalid merely
15 because it is made after the time allowed by this section for
16 determining the adjudication review application.
- 17 (5) If the review adjudicator fails to determine an adjudication
18 review application within the time allowed by this section (or, if
19 that time is extended under section 51(2), within that time as
20 extended) —
- 21 (a) the claimant or respondent who made the application
22 may withdraw the application by giving written notice
23 of the withdrawal to the review adjudicator and the other
24 party to the adjudication review; and
- 25 (b) the claimant or respondent may make another
26 adjudication review application within 5 business days
27 after the withdrawal despite the expiry of the time
28 otherwise allowed for making adjudication review
29 applications.

30 Notes for this section:

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

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

4 **48. Review adjudicator's determination**

5 (1) The review adjudicator must —

- 6 (a) confirm the determination of the adjudicator that is the
7 subject of the adjudication review application; or
8 (b) quash that determination and make a determination
9 under this section.

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

- 12 (a) the amount of the progress payment, if any, to be paid
13 by the respondent to the claimant; and
14 (b) the due date for the payment of that amount under
15 section 20; and
16 (c) the rate of interest payable on that amount under
17 section 21; and
18 (d) if no amount of progress payment is required to be
19 paid — that no amount is payable.

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

- 22 (a) the amount is taken to have been paid by the respondent
23 under the determination of the review adjudicator; and
24 (b) if the amount exceeds the amount payable under the
25 determination of the review adjudicator — the claimant
26 must repay that excess amount to the respondent and
27 pay interest on that excess amount at the same rate as
28 the respondent is required to pay on the adjudicated
29 amount under section 21.

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

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

- 1 (b) any excess amount that is repayable by the claimant and
2 the date on which it becomes repayable.
- 3 (5) The review adjudicator's determination must —
- 4 (a) be made in writing and be in the approved form (if any);
5 and
- 6 (b) include the reasons for the determination; and
- 7 (c) be given by the review adjudicator to the claimant, the
8 respondent, the authorised nominating authority that
9 appointed the review adjudicator and the Building
10 Commissioner.
- 11 (6) The Building Commissioner may give a copy of the review
12 adjudicator's determination to the adjudicator who made the
13 determination that was the subject of the adjudication review
14 application.
- 15 (7) The review adjudicator may, on the review adjudicator's own
16 initiative or on the application of the claimant or respondent,
17 correct the review adjudicator's determination if it contains —
- 18 (a) a clerical mistake or defect of form; or
- 19 (b) an error arising from an accidental slip or omission; or
- 20 (c) a material arithmetic error or a material mistake in the
21 description of any person, thing or matter.

22 **Division 4 — Adjudication fees and expenses**

23 **49. Terms used**

24 In this Division —

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

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

- 1 **50. Adjudication fees and expenses**
- 2 (1) An adjudicator or review adjudicator is entitled to be paid by
- 3 way of fees and expenses for adjudicating an adjudication
- 4 application or adjudication review application —
- 5 (a) the amount agreed between the adjudicator or review
- 6 adjudicator and the parties to the adjudication or
- 7 adjudication review; or
- 8 (b) if the amount is not agreed — the amount determined at
- 9 the rates approved and published by the Building
- 10 Commissioner.
- 11 (2) However, the amount of adjudication fees and expenses cannot
- 12 exceed any maximum amount prescribed by the regulations for
- 13 the purposes of this subsection.
- 14 (3) The regulations may prescribe different maximum amounts of
- 15 adjudication fees and expenses depending on the amount of the
- 16 payment claim or on other specified factors.
- 17 (4) The parties to an adjudication or adjudication review are —
- 18 (a) jointly and severally liable for the payment of
- 19 adjudication fees and expenses; and
- 20 (b) each liable to contribute to the payment of adjudication
- 21 fees and expenses in equal proportions or in any other
- 22 proportions determined by the adjudicator or review
- 23 adjudicator.
- 24 (5) The adjudicator or review adjudicator may have regard to the
- 25 following matters in determining the proportion of adjudication
- 26 fees and expenses that each party is liable to pay —
- 27 (a) the conduct of the parties and whether either party acted
- 28 unreasonably before or during the adjudication or
- 29 adjudication review;
- 30 (b) the reasons given by a party (or the failure to give
- 31 reasons) for not making the progress payment
- 32 concerned;

- 1 (c) any attempt by the respondent to raise new reasons in
2 relation to the application that were not included in the
3 respondent's payment schedule;
- 4 (d) the relative success of the parties in relation to the
5 application;
- 6 (e) whether a party made, or acted in relation to, the
7 application —
- 8 (i) for an improper purpose; or
9 (ii) vexatiously or frivolously; or
10 (iii) without reasonable prospects of success;
- 11 (f) the services provided by the adjudicator or review
12 adjudicator (including the time taken to consider
13 different aspects of the application);
- 14 (g) any other matter the adjudicator or review adjudicator
15 considers relevant.
- 16 (6) The determination of an adjudication application or adjudication
17 review application under this Part must include —
- 18 (a) the amount of adjudication fees and expenses payable to
19 the adjudicator or review adjudicator; and
20 (b) the proportion of that amount that each party is liable to
21 pay.
- 22 (7) Apart from liability for the payment of adjudication fees and
23 expenses, the parties to an adjudication or adjudication review
24 are liable for their own costs and cannot recover those costs
25 from each other.
- 26 (8) An adjudicator or review adjudicator is not entitled to
27 adjudication fees and expenses if the adjudicator or review
28 adjudicator fails to determine the adjudication application or
29 adjudication review application within the time allowed under
30 this Part.

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

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

9 **51. Miscellaneous provisions relating to adjudication fees and**
10 **expenses**

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

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

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

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

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Division 5 Payment and recovery of adjudicated and other amounts

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- 1 (3) If a review adjudicator determines that the claimant must repay
2 an excess amount of payment, the claimant must pay that excess
3 amount to the respondent on or before —
- 4 (a) the date that is 5 business days after the date on which
5 the review adjudicator gives a copy of the determination
6 to the claimant; or
- 7 (b) if the review adjudicator has determined that the amount
8 becomes payable to the respondent on a later date —
9 that later date.
- 10 (4) If any interest payable on the adjudicated amount or the excess
11 amount is not paid by the due date, the amount of the unpaid
12 interest is added to (and becomes part of) the adjudicated
13 amount payable, or the excess amount repayable, under this
14 section.
- 15 (5) If a party to an adjudication or adjudication review has paid the
16 other party's share of the adjudication fees and expenses but has
17 not been reimbursed by the other party, the adjudicator or
18 review adjudicator may, at the request of the party who paid that
19 share, adjust the determination of the adjudication or
20 adjudication review so that the amount of that share becomes
21 part of the adjudicated amount or other amount payable under
22 the determination to the party who paid that share.

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

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

31 Note for this subsection:

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

- 1 (2) The Building Commissioner cannot provide the claimant with a
2 certified copy of the determination of an adjudicator if an
3 adjudication review application in relation to the determination
4 has been made but not determined or withdrawn.
- 5 (3) If the claimant fails to repay the excess amount in full as
6 required by section 52, the respondent may request the Building
7 Commissioner to provide a certified copy of the determination
8 of the review adjudicator to enable enforcement of the excess
9 amount as a monetary judgment of a court of competent
10 jurisdiction.
- 11 (4) A certified copy of a determination is a copy of the
12 determination that the Building Commissioner certifies is a true
13 and accurate copy of the determination.
- 14 (5) The Building Commissioner may charge a reasonable fee for
15 providing a certified copy of a determination under this section.

16 **54. Certified copy of determination enforceable as monetary**
17 **judgment**

- 18 (1) In this section —
19 **monetary judgment** has the meaning given in the *Civil*
20 *Judgments Enforcement Act 2004* section 3.
- 21 (2) A certified copy of a determination provided by the Building
22 Commissioner under section 53 is taken to be a monetary
23 judgment of a court of competent jurisdiction.
- 24 (3) A certified copy of a determination cannot be enforced under
25 the *Civil Judgments Enforcement Act 2004* Part 4 unless the
26 application for an enforcement order under that Part is
27 accompanied by an affidavit of the applicant that the
28 adjudicated amount or excess amount (as the case requires) has
29 not been paid or repaid in full at the time the application is
30 made.

- 1 (4) If the affidavit indicates that only a part of the amount has been
2 paid or repaid, the monetary judgment is only for the part of the
3 amount not paid or repaid.
- 4 (5) If the person required to pay the amount of a monetary
5 judgment commences proceedings to have the monetary
6 judgment set aside, the person is not entitled in those
7 proceedings —
- 8 (a) to bring any cross-claim against the person to whom the
9 amount of the monetary judgment is payable; or
- 10 (b) to raise any defence in relation to matters arising under
11 the relevant construction contract; or
- 12 (c) to challenge the relevant determination of the
13 adjudicator or review adjudicator.
- 14 (6) The person commencing proceedings to have the monetary
15 judgment set aside must pay into court as security the amount of
16 the monetary judgment.
- 17 (7) The court may direct that the amount paid into court be paid to
18 the person to whom the amount is payable under the monetary
19 judgment pending the determination of the proceedings to have
20 the monetary judgment set aside.

21 **55. Effect of this Part on civil proceedings**

- 22 (1) Nothing in this Part affects any right that a party to a
23 construction contract —
- 24 (a) may have under the contract; or
- 25 (b) may have apart from this Act in respect of anything
26 done or omitted to be done under the contract.
- 27 (2) Nothing done under or for the purposes of this Part affects any
28 civil proceedings arising under a construction contract, whether
29 under this Part or otherwise, except as provided by
30 subsection (3).

- 1 (3) In any proceedings before a court or tribunal in relation to any
2 matter arising under a construction contract, the court or
3 tribunal —
- 4 (a) must, in any order or award it makes in those
5 proceedings, allow for any amount paid or repaid to a
6 party to the contract under or for the purposes of this
7 Part; and
- 8 (b) may make any orders it considers appropriate for the
9 restitution of any amount so paid or repaid, and any
10 other orders it considers appropriate, having regard to its
11 decision in those proceedings.
- 12 (4) Evidence of anything lawfully said or done in the course of an
13 adjudication or adjudication review under this Part is not
14 admissible before a court, arbitrator or other person or body,
15 unless the parties to the adjudication or adjudication review
16 consent to the admission of the evidence.
- 17 (5) This section does not affect —
- 18 (a) the operation of section 111; or
19 (b) proceedings referred to in section 27(3) or 54(5); or
20 (c) an entitlement conferred by Division 7 or 8 or anything
21 arising from the exercise of that entitlement.

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

24 **56. Terms used**

25 In this Division —

26 ***authorised issuing institution*** means —

- 27 (a) a recognised financial institution; or
28 (b) a person authorised under the *Insurance Act 1973*
29 (Commonwealth) to carry on insurance business in
30 Australia;

- 1 ***compliant performance bond*** means a performance bond that
2 meets the requirements of section 60 for the purposes of the
3 substitution of performance security under this Division;
4 ***performance bond*** means a legally binding instrument (whether
5 described as a bond, guarantee or otherwise) issued by an
6 authorised issuing institution to pay a party to a construction
7 contract named in the instrument an amount of money up to a
8 specified limit on demand by that party, as security for the
9 performance of obligations under the contract of another party
10 to the contract;
11 ***performance security*** means retention money or a performance
12 bond;
13 ***substitution of performance security*** means the release of
14 retention money and the substitution for the retention money of
15 a performance bond referred to in section 59.

16 **57. Right to receive notice before recourse to performance**
17 **security**

- 18 (1) A party to a construction contract is not entitled to have
19 recourse to performance security under the contract unless —
20 (a) the party has given the other party to the contract notice
21 of the intention to have recourse to the performance
22 security; and
23 (b) at least 5 business days have passed since the party gave
24 that notice or, if the contract provides a longer period,
25 the period specified in the contract has passed.
- 26 (2) A notice of intention to have recourse to the performance
27 security must —
28 (a) be given in writing and be in the approved form (if any);
29 and
30 (b) identify the construction contract and the provisions of
31 the contract that the party relies on to have recourse to
32 the performance security; and

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

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

6 **58. Right to release of performance security**

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

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

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

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

20 **59. Right to substitute performance security**

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

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

27 (3) A claimant —
28 (a) may seek the release of a single amount of retention
29 money under a construction contract by substituting
30 several separate performance bonds; and

- 1 (b) may seek a second or subsequent release of retention
2 money under the construction contract by substituting
3 further performance bonds.
- 4 (4) A payment claim in which a claimant seeks the substitution of
5 performance security must, in addition to the requirements of
6 Division 1 —
- 7 (a) identify the construction contract for which the
8 substitution is proposed; and
- 9 (b) indicate the amount of retention money to be released;
10 and
- 11 (c) state that it is made under this Act; and
- 12 (d) be accompanied by a draft of the compliant performance
13 bond, or of each compliant performance bond, that the
14 claimant proposes to provide in substitution for the
15 release of the retention money (being a draft in final
16 form except for its execution by the authorised issuing
17 institution); and
- 18 (e) include any other information required by the
19 regulations.
- 20 (5) The determination of an adjudicator or review adjudicator may
21 require the substitution of performance security that is proposed
22 in a payment claim.
- 23 (6) An adjudication application or adjudication review application
24 that seeks the substitution of performance security proposed in a
25 payment claim must be accompanied by a compliant
26 performance bond executed by the authorised issuing institution
27 that is in the same form, or substantially in the same form, as the
28 draft performance bond that accompanied the payment claim.
- 29 (7) The respondent may, in an adjudication response or adjudication
30 review response, dispute —
- 31 (a) the authenticity of an executed performance bond (or the
32 lack of reference or other information that would enable
33 its authenticity to be confirmed); or

- 1 (b) that an executed performance bond is a compliant
2 performance bond or is in the same form, or
3 substantially in the same form, as the draft that
4 accompanied the payment claim.
- 5 (8) Subsection (7) applies whether or not the respondent disputed
6 the matter in the payment schedule.
- 7 (9) An adjudicator or review adjudicator must, in any determination
8 for the substitution of performance security, satisfy themselves
9 that the executed performance bond is an authentic and
10 compliant performance bond.
- 11 **60. Requirements for compliant performance bond for**
12 **substitution of performance security**
- 13 (1) A performance bond is a compliant performance bond for the
14 purposes of the substitution of performance security under this
15 Division if it complies with each of the following
16 requirements —
- 17 (a) the performance bond is unconditional;
- 18 (b) the performance bond does not expire and is wholly
19 irrevocable;
- 20 (c) the amount payable under the performance bond (or, if it
21 is one of multiple performance bonds to be substituted,
22 the total amount payable under those bonds) is not less
23 than the amount of retention money to be released;
- 24 (d) the amount payable under the performance bond is in
25 the same currency as the retention money to be released;
- 26 (e) unless the relevant construction contract provides
27 otherwise, the applicable law that applies to the
28 performance bond and the courts with jurisdiction to
29 determine disputes relating to the performance bond are
30 the law and courts of this State;
- 31 (f) the performance bond identifies the party to the relevant
32 construction contract who retains or otherwise withholds

- 1 the retention money to be released as the only person
2 who may demand and receive payment under the bond
3 (unless the relevant construction contract or a
4 subsequent agreement between the parties to the
5 contract provides that another person may demand and
6 receive payments under the bond);
- 7 (g) the performance bond identifies an authorised issuing
8 institution as the institution issuing the bond (including
9 its Australian Business Number and its Australian
10 Company Number or Australian Registered Body
11 Number);
- 12 (h) the times for release of performance security under the
13 relevant construction contract are maintained by the
14 performance bond;
- 15 (i) the credit rating of the authorised issuing institution
16 issuing the performance bond satisfies any minimum
17 credit rating requirement that is prescribed by the
18 regulations;
- 19 (j) the performance bond satisfies any other requirements
20 prescribed by the regulations for the purposes of this
21 paragraph.
- 22 (2) If a performance bond that is not a compliant performance bond
23 is included in multiple performance bonds sought to be
24 substituted at the same time for retention money, the right to
25 substitute performance security is not affected if the remaining
26 bonds are compliant performance bonds that satisfy the
27 requirements of this section for the substitution of performance
28 security.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1 (2) A claimant cannot suspend work or supply under
2 subsection (1)(b) while an adjudication review application made
3 by the respondent has not been determined.
- 4 (3) A claimant cannot suspend work or supply unless —
5 (a) the claimant has given the respondent written notice of
6 the claimant's intention to suspend work or supply under
7 the construction contract; and
8 (b) at least 2 business days have passed since the claimant
9 gave that notice.
- 10 (4) A notice of intention to suspend work or supply must state that
11 it is given under this Act.
- 12 (5) The right to suspend work or supply conferred by
13 subsection (1)(a) or (b) continues until 3 business days have
14 passed since the claimant received the amount payable by the
15 respondent.
- 16 (6) The right to suspend work or supply conferred by
17 subsection (1)(c) continues until —
18 (a) the respondent pays the retention money into a retention
19 money trust account and notifies the claimant that the
20 retention money has been paid into the account; and
21 (b) 3 business days have passed since the claimant was so
22 notified.
- 23 (7) A right under this Division to suspend work or supply is in
24 addition to the rights conferred by this Act to recover a claimed
25 or scheduled amount owed (as defined in section 27(1)), to
26 enforce payment of an adjudicated amount or to require
27 payment of retention money into a retention money trust
28 account.

29 **63. Provisions relating to suspension of work or supply**

- 30 (1) In this section —
31 *loss* includes expense and damage.

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

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

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

10 **Division 9 — Miscellaneous provisions relating to payment**
11 **claims**

12 **65. Threatening or intimidating claimants or persons entitled to**
13 **make claim**

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

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

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

19 Penalty: a fine of \$50 000.

20 **66. Jurisdictional error in determination of adjudicator or**
21 **review adjudicator**

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

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

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

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

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

11 **68. Application of Part to corporate claimant in liquidation**

- 12 (1) A corporation in liquidation cannot —
- 13 (a) make a payment claim under this Part; or
 - 14 (b) take any action under this Part to enforce a payment
15 claim (including by making an adjudication application
16 or adjudication review application or by taking recovery
17 proceedings referred to in section 27(3)); or
 - 18 (c) take any action under this Part to enforce the
19 determination of an adjudicator or review adjudicator.
- 20 (2) If a corporation in liquidation has made an adjudication
21 application or adjudication review application that is not finally
22 determined immediately before the day on which it commenced
23 to be a corporation in liquidation, the application is taken to
24 have been withdrawn on that day.

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Part 4 — Retention money trusts

69. Terms used

(1) In this Part —

government party —

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

(b) includes the following —

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

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

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

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

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

party A, in relation to retention money, means —

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

1 (b) in the case of retention money referred to in
 2 paragraph (b) of the definition of *retention money* in
 3 section 4(1) — the party to the construction contract
 4 who is paid the retention money;

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

8 **retention money trust commencement date**, for retention
 9 money, means —

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

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

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

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

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

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

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

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1 under the construction contract or an order of a court or
2 tribunal;

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

6 (2) For the purposes of this Part —

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

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

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

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

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

28 **70. Construction contracts to which Part applies**

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

31 (a) if the party to the contract for whom construction work
32 is to be carried out, or to whom related goods and

-
- 1 services are to be supplied, under the contract is a
 2 government party; or
- 3 (b) if the value of the contract at the time it is first entered
 4 into, and at any later time following any variation of the
 5 contract or of estimates used to value the contract, does
 6 not exceed the amount prescribed by the regulations for
 7 the purposes of this paragraph (the *prescribed retention*
 8 *money threshold*); or
- 9 (c) if the contract is for home building work of a kind that is
 10 excluded from this Part by subsection (2); or
- 11 (d) if the contract is of a kind excluded from this Part by the
 12 regulations.
- 13 (2) A construction contract for home building work the value of
 14 which exceeds the amount referred to in section 10(1)(c) is
 15 excluded from this Part, unless —
- 16 (a) the principal is a corporation; or
- 17 (b) the work is carried out in relation to multiple dwellings
 18 or for the purposes of a residential development business
 19 of the principal; or
- 20 (c) the contract —
- 21 (i) is between a head contractor and a subcontractor,
 22 or between 2 subcontractors, in relation to the
 23 carrying out of the work; and
- 24 (ii) is not of a kind excluded from this Part by
 25 regulations made for the purposes of
 26 subsection (1)(d).
- 27 (3) If a construction contract is excluded from this Part because its
 28 value does not exceed the prescribed retention money threshold
 29 at the time it is first entered into, but later ceases to be so
 30 excluded because its value exceeds the prescribed retention
 31 money threshold at that later time, this Part applies only in
 32 relation to retention money retained after the contract becomes
 33 subject to this Part.

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

7 **71. Retention money to be held on trust**

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

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

17 (3) While retention money under a construction contract is held on
18 trust under this Part —
19 (a) it is not available for payment to a third-party creditor of
20 any of the parties to the contract; and
21 (b) it is not liable to be attached or taken in execution for
22 satisfying a monetary judgment entered in favour of a
23 third-party creditor of any of the parties to the contract.

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

28 (5) If a court replaces a party to a construction contract as trustee of
29 the trust created by this section in the exercise of its jurisdiction
30 to supervise the administration of the trust —
31 (a) the relevant retention money is then held on trust by the
32 replacement trustee; and

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

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

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

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

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

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

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

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

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

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- 1 (2) If party A does not have sufficient money to pay the retention
2 money into a retention money trust account, party A must draw
3 down any available debt facility (or access any other available
4 source of money) to pay the retention money into a retention
5 money trust account.
- 6 (3) If party A fails to pay the retention money into a retention
7 money trust account within 3 business days after the entitlement
8 to the retention money first arises, a court of competent
9 jurisdiction may, on application by party B, order party A to
10 draw down an available debt facility or access any other
11 available source of money for payment into the retention money
12 trust account.
- 13 (4) For the purposes of subsection (3), a court of competent
14 jurisdiction is a court with jurisdiction to deal with a claim for
15 the recovery of a debt of the same amount as the amount of
16 retention money concerned.

17 Note for this section:

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

21 **74. Establishment of retention money trust accounts and**
22 **payments into trust accounts**

- 23 (1) A party to a construction contract who retains retention money
24 under the contract that is held on trust under this Part must
25 ensure that the money is paid into a trust account established by
26 that party with a recognised financial institution in accordance
27 with this Part (a *retention money trust account*).
- 28 (2) The retention money trust account must be established within
29 10 business days after the parties enter into the construction
30 contract or, if the contract becomes a construction contract to
31 which this Part applies after it is entered into, within 20 business
32 days after it becomes a construction contract to which this Part
33 applies.

- 1 (3) However, if the retention money will not be money retained
2 from money otherwise payable but money separately paid as
3 security, the retention money trust account must be established
4 before the money is paid as security under the contract.
- 5 (4) Retention money trust accounts may be established as —
- 6 (a) separate trust accounts in respect of each person who
7 may become entitled to the release of the retention
8 money (whether under one or more construction
9 contracts); or
- 10 (b) a single trust account for all retention money under 2 or
11 more construction contracts in respect of different
12 persons who may become entitled to the release of the
13 retention money.
- 14 (5) If a single retention money trust account is established for
15 multiple construction contracts, the trust account records must
16 identify the contract in respect of which each payment into and
17 out of the account is made.

18 **75. Requirements relating to establishment of retention money**
19 **trust accounts**

- 20 (1) The following requirements apply to any retention money trust
21 account —
- 22 (a) the account must be a deposit or transaction account of
23 the recognised financial institution;
- 24 (b) the name of the account and the description of the
25 account in the records of the party who established the
26 account must include the words “trust account”;
- 27 (c) as soon as practicable after the account is established (or
28 after a previously established account for one
29 construction contract is first used for another
30 construction contract), the party who established the
31 account must give the other party to the contract written

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- 1 notice of the establishment of the account and the
2 following particulars of the account —
- 3 (i) the name of the recognised financial institution
4 with which the account has been established;
- 5 (ii) the name of the account;
- 6 (iii) the BSB number and account number for the
7 account;
- 8 (iv) any other particulars prescribed by the
9 regulations for the purposes of this subparagraph.
- 10 (2) If any of the particulars referred to in subsection (1)(c) change,
11 the party who established the account must give the other party
12 written notice of the change.
- 13 (3) A retention money trust account may be closed —
- 14 (a) after retention money is no longer retained under the
15 construction contract for which it was established or for
16 which it was being used; or
- 17 (b) after any money in the account is transferred to another
18 retention money trust account that has been established
19 in accordance with this Part.
- 20 (4) If a retention money trust account is closed, the party who
21 established the account must, as soon as practicable, give
22 written notice of the closure to the other party to the contract.
- 23 **76. Withdrawals from retention money trust accounts**
- 24 (1) A party who holds retention money on trust may withdraw
25 money from the retention money trust account only in
26 accordance with this section.
- 27 (2) Money may be withdrawn only —
- 28 (a) for the purpose of the release of, or recourse to, the
29 retention money in accordance with the relevant
30 construction contract; or

- 1 (b) as agreed between the parties to the relevant
2 construction contract; or
- 3 (c) in accordance with a determination of an adjudicator or
4 review adjudicator under Part 3 relating to the relevant
5 construction contract, a decision of an arbitrator under
6 the relevant construction contract, an order of a court or
7 tribunal relating to the relevant construction contract or
8 a decision of an expert appointed by the parties to
9 determine a matter under the relevant construction
10 contract; or
- 11 (d) for the purpose of returning money paid into the account
12 in error; or
- 13 (e) for the purpose of transferring all or any of the money to
14 another retention money trust account established in
15 accordance with this Part; or
- 16 (f) after the retention money trust end date for the retention
17 money; or
- 18 (g) for the purpose of making any other payment authorised
19 by this Part; or
- 20 (h) for any other purpose, or in any other circumstances,
21 prescribed by the regulations for the purposes of this
22 paragraph.
- 23 (3) Money may be withdrawn only by cheque or electronic funds
24 transfer.
- 25 (4) Money may be withdrawn only in accordance with any other
26 requirements prescribed by the regulations for the purposes of
27 this subsection.
- 28 (5) To remove doubt, the obligation of a party to release retention
29 money to a party to the relevant construction contract or an
30 entitlement of the party to have recourse to the retention money
31 continues to apply even if there is insufficient money in the
32 relevant retention money trust account to make the payment or
33 have the recourse.

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

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

- 6 (a) an adjudicator or review adjudicator in any
7 determination under Part 3 of an adjudication
8 application or adjudication review application relating to
9 the relevant construction contract; or
- 10 (b) a court or tribunal in any order relating to the relevant
11 construction contract; or
- 12 (c) an arbitrator in any arbitration under the relevant
13 construction contract; or
- 14 (d) an expert appointed by the parties in any determination
15 of a matter under the relevant construction contract.

16 **78. Trust account interest and fees**

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

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

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

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

5 **79. Trust records**

- 6 (1) The party to a construction contract who established and
7 operates a retention money trust account must keep proper
8 accounting records relating to the account.
- 9 (2) The accounting records must —
- 10 (a) record all transactions relating to the money held in the
11 retention money trust account; and
- 12 (b) show a true position in relation to the outcome of those
13 transactions; and
- 14 (c) be able to be readily and properly audited; and
- 15 (d) be in the English language; and
- 16 (e) comply with any other requirements prescribed by the
17 regulations for the purposes of this paragraph.
- 18 (3) The party to a construction contract who established and
19 operates a retention money trust account must, on being given
20 reasonable notice by any other person with a beneficial interest
21 in money in the account, and without charge —
- 22 (a) allow the other person to inspect and take copies of any
23 accounting records relating to money in which the other
24 person has a beneficial interest; and
- 25 (b) provide any other information or assistance relating to
26 those accounting records prescribed by the regulations
27 for the purposes of this paragraph.
- 28 (4) The regulations may provide exceptions to the obligations
29 imposed by this section for the purposes of avoiding the
30 disclosure of commercially sensitive information.

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

4 **80. Power to employ agents**

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

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

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

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

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

- 19 (a) is not under any obligation to control or supervise
20 transactions in relation to the account or to see to the
21 application of money withdrawn from the account; and
22 (b) does not have, in relation to any liability of a party to a
23 relevant construction contract to the recognised financial
24 institution, any recourse or right (whether by way of
25 set-off, counterclaim, charge or otherwise) against
26 money in the account.

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

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

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

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

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

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

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

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

18 **84. General jurisdiction of courts to supervise trusts preserved**

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

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

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

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

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

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1 **85. Application of *Trustees Act 1962***

- 2 (1) Except as otherwise expressly provided by this Act, the *Trustees*
3 *Act 1962* and any other written law or equitable principles
4 relating to trusts apply to the trusts created by this Part and to
5 the trustees and beneficiaries of the trusts.
- 6 (2) The following duties under the *Trustees Act 1962* or any other
7 written law or equitable principles do not apply to a trust created
8 by this Part or to the trustees or beneficiaries of the trust —
- 9 (a) a duty to act personally and not delegate the payment of
10 money held on trust or other acts relating to the
11 administration of a trust;
- 12 (b) a duty to insure the property of a trust;
- 13 (c) a duty to pay money held on trust on demand by a
14 beneficiary if the demand is not made in accordance
15 with an obligation imposed by this Act or by the
16 provisions of a construction contract that are not
17 inconsistent with this Act.
- 18 (3) The *Trustees Act 1962* section 51 does not apply to a retention
19 money trust account.

20 **86. Indemnity of trustee from trust under this Part**

- 21 The trustee of a trust created by this Part does not have the right
22 to an indemnity from the trust for their expenses in
23 administering the trust except in the following circumstances —
- 24 (a) the trustee has been appointed by a court to replace the
25 existing trustee in the exercise of its jurisdiction to
26 supervise the administration of the trust;
- 27 (b) the trustee is a corporation in liquidation;
- 28 (c) the affairs of the trustee are being administered by a
29 trustee in bankruptcy.

1 **87. Offence for failure to comply with certain requirements of**
2 **this Part**

3 A party to a construction contract commits an offence if the
4 party fails to comply, without reasonable excuse, with
5 section 74(1) or 79(3)(a).

6 Penalty: a fine of \$50 000.

1 **Part 5 — Nominating authorities, adjudicators and**
2 **review adjudicators**

3 **Division 1 — Authorisation of nominating authorities**

4 **88. Application for authorisation**

5 (1) A person may apply to the Building Commissioner to be
6 authorised as a nominating authority.

7 (2) An application must —

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

10 (b) be accompanied by the fee (if any) prescribed by the
11 regulations; and

12 (c) provide information or documents as to the eligibility of
13 the applicant to be authorised.

14 (3) The Building Commissioner may require the applicant to
15 provide further information or documents and may refuse the
16 application if the further information or documents are not
17 provided by the time specified by the Building Commissioner.

18 **89. Maximum number of persons who may be authorised**

19 The regulations may prescribe the maximum number of persons
20 who may be authorised as nominating authorities at any one
21 time.

22 **90. Authorisation of nominating authorities**

23 (1) The Building Commissioner may authorise a person to be a
24 nominating authority if —

25 (a) the person has duly applied for an authorisation; and

26 (b) the person is eligible to be authorised under this
27 Division; and

- 1 (c) the authorisation would not result in the maximum
2 number of authorised persons prescribed by the
3 regulations being exceeded.
- 4 (2) If the Building Commissioner decides to refuse an application
5 for authorisation, the Building Commissioner must give the
6 applicant written notice of the decision and the reasons for the
7 decision.
- 8 (3) The Building Commissioner must keep a register of authorised
9 nominating authorities and publish the register on an
10 appropriate website.

11 **91. Eligibility to be authorised**

- 12 (1) In this section —
13 *related person*, in relation to a corporation, means an officer of
14 the corporation as defined in the *Corporations Act 2001*
15 (Commonwealth) section 9.
- 16 (2) A person is eligible to be authorised as a nominating authority if
17 the Building Commissioner is satisfied that —
- 18 (a) the person is reasonably capable of performing the tasks
19 required under this Act of an authorised nominating
20 authority, having regard to —
- 21 (i) the processes the person has, or intends to have,
22 in place to ensure the appointment of
23 adjudicators and review adjudicators to
24 determine adjudication applications or
25 adjudication review applications under this Act;
26 and
- 27 (ii) the processes the person has, or intends to have,
28 in place to ensure that any conflicts of interest
29 that adjudicators or review adjudicators may
30 have are identified and dealt with; and

- 1 (iii) the person's reputation and any past performance
2 under a previous authorisation under this
3 Division or a similar authorisation under a
4 corresponding security of payment law; and
- 5 (iv) any other matter the Building Commissioner
6 considers relevant;
- 7 and
- 8 (b) a previous authorisation of the person under this
9 Division, or a similar authorisation of the person under a
10 corresponding security of payment law, has not been
11 withdrawn or revoked (otherwise than at the request of
12 the person); and
- 13 (c) the person has not been refused a previous application
14 for an authorisation under this Division, or an
15 application for a similar authorisation under a
16 corresponding security of payment law, within the
17 period of 5 years before making the application to be
18 authorised under this Division; and
- 19 (d) the person (or a related person) has not been convicted
20 of a serious offence; and
- 21 (e) the person (or a related person) has not been a bankrupt
22 within the period of 3 years before making the
23 application to be authorised under this Division; and
- 24 (f) the person (or a related person) has not been a
25 corporation in liquidation within the period of 3 years
26 before making the application to be authorised under
27 this Division.
- 28 (3) A person is eligible to be both authorised as a nominating
29 authority and registered as an adjudicator or review adjudicator.
- 30 (4) However, a person is not capable of being appointed as the
31 adjudicator or review adjudicator for an adjudication application
32 or adjudication review application while the person is also an
33 authorised nominating authority or a related person of an
34 authorised nominating authority.

1 **92. Conditions of authorisation**

- 2 (1) The authorisation of a person as a nominating authority may be
3 unconditional or subject to conditions imposed by the Building
4 Commissioner.
- 5 (2) The Building Commissioner may, by written notice given to an
6 authorised nominating authority, amend, revoke or add
7 conditions to which the authorisation is subject.

8 **93. Term of authorisation**

- 9 (1) The authorisation of a person as a nominating authority is given
10 for the period (not exceeding 5 years) specified in the
11 authorisation.
- 12 (2) An authorised nominating authority may be given a further
13 authorisation on application made no earlier than 6 months before
14 the expiry of the existing authorisation.
- 15 (3) If an application is duly made for a further authorisation and the
16 application has not been determined before the expiry of the
17 existing authorisation, the existing authorisation continues in
18 force until the application is determined.

19 **94. Revocation of authorisation**

- 20 (1) The Building Commissioner may revoke the authorisation of a
21 person as a nominating authority if satisfied that the person —
- 22 (a) provided information in connection with the application
23 for authorisation that was false or misleading in a
24 material particular; or
- 25 (b) has contravened this Act or the regulations; or
- 26 (c) has contravened a condition of the authorisation; or
- 27 (d) has contravened a code of practice under section 97; or
- 28 (e) has been convicted of a serious offence since the grant
29 of the authorisation; or

- 1 (f) in the case of an individual — has become a bankrupt
2 since the grant of the authorisation; or
- 3 (g) in the case of a body corporate — has become a
4 corporation in liquidation since the grant of the
5 authorisation.
- 6 (2) Before revoking the authorisation of a person as a nominating
7 authority, the Building Commissioner must give the person the
8 opportunity to make a submission within the period specified by
9 the Building Commissioner.
- 10 (3) If the Building Commissioner decides to revoke the
11 authorisation of a person as a nominating authority, the Building
12 Commissioner must give the person written notice of the
13 decision and the reasons for the decision.
- 14 (4) An authorised nominating authority may surrender its
15 authorisation under this Division by written notice to the
16 Building Commissioner.
- 17 **95. Review by State Administrative Tribunal of decisions of**
18 **Building Commissioner**
- 19 A person who is aggrieved by any of the following decisions of
20 the Building Commissioner may apply to the State
21 Administrative Tribunal for a review of the decision —
- 22 (a) the refusal of an application by the person for
23 authorisation as a nominating authority;
- 24 (b) the imposition or amendment of a condition of the
25 person's authorisation as a nominating authority;
- 26 (c) the revocation of the person's authorisation as a
27 nominating authority.

1 **96. Information to be provided to Building Commissioner by**
2 **authorised nominating authorities**

3 An authorised nominating authority must provide the following
4 information to the Building Commissioner at the time and in the
5 form the Building Commissioner requires —

- 6 (a) the names of the parties to an adjudication application or
7 adjudication review application made to the authority,
8 the amount of the disputed payment claim and any other
9 information about the application that the Building
10 Commissioner requires the authority to provide;
- 11 (b) the name of the adjudicator or review adjudicator
12 appointed by the authority to determine the application
13 and the date of the appointment;
- 14 (c) a copy of any policy document of the authority that
15 describes how adjudicators or review adjudicators are
16 appointed (including any policy document relating to
17 their grading);
- 18 (d) the rates of fees generally charged by the authority and
19 the adjudicators or review adjudicators it appoints;
- 20 (e) any other information relating to the performance of the
21 functions of the authority under this Act that the
22 Building Commissioner requires the authority to
23 provide.

24 Note for this section:

25 Part 3 Divisions 2 and 3 provide that copies of determinations made by
26 adjudicators and review adjudicators are to be provided to the Building
27 Commissioner.

28 **97. Code of practice for nominating authorities**

- 29 (1) The regulations may prescribe or adopt a code of practice for
30 the performance of the functions under this Act of authorised
31 nominating authorities.
- 32 (2) Authorised nominating authorities are required to perform their
33 functions under this Act in accordance with the code of practice.

- 1 (3) A contravention of the code of practice by an authorised
2 nominating authority may be taken into account by the Building
3 Commissioner under this Division, but does not invalidate any
4 decision of the authority under this Act.

5 **98. Making and determining applications for authorisation**
6 **before commencement of Division**

- 7 (1) An application for authorisation as a nominating authority may
8 be made and determined under this Division before all the
9 provisions of this Division come into operation.
- 10 (2) The application may be made and determined as if all of the
11 provisions of this Act had come into operation, but any
12 determination of the application does not have effect until all of
13 the provisions of this Division come into operation.

14 **Division 2 — Registration of adjudicators and review**
15 **adjudicators**

16 **99. Registration of individual as adjudicator, review**
17 **adjudicator or both**

18 An individual may be registered under this Division as an
19 adjudicator or a review adjudicator, or both.

20 **100. Application for registration**

- 21 (1) An individual may apply to the Building Commissioner for
22 registration under this Division.
- 23 (2) An individual may make a single application to be registered as
24 both an adjudicator and a review adjudicator.
- 25 (3) An application must —
- 26 (a) be made in writing and be in the approved form (if any);
27 and
- 28 (b) be accompanied by the application fee (if any)
29 prescribed by the regulations; and

- 1 (c) be accompanied by the registration fee (if any)
2 prescribed by the regulations; and
- 3 (d) provide information or documents as to the eligibility of
4 the applicant to be registered.
- 5 (4) The Building Commissioner may waive any application fee or
6 registration fee if satisfied it is reasonable to do so.
- 7 (5) The Building Commissioner may require the applicant to
8 provide further information or documents and may refuse the
9 application if the further information or documents are not
10 provided by the time specified by the Building Commissioner.
- 11 **101. Registration as adjudicator or review adjudicator**
- 12 (1) The Building Commissioner may register an individual as an
13 adjudicator if the individual —
- 14 (a) has duly applied for registration as an adjudicator; and
15 (b) is eligible to be registered as an adjudicator under this
16 Division.
- 17 (2) The Building Commissioner may register an individual as a
18 review adjudicator if the individual —
- 19 (a) has duly applied for registration as a review adjudicator;
20 and
21 (b) is eligible to be registered as a review adjudicator under
22 this Division.
- 23 (3) If the Building Commissioner decides to refuse an application
24 for registration, the Building Commissioner must give the
25 applicant written notice of the decision and the reasons for the
26 decision.
- 27 (4) The regulations may provide for the registration of different
28 grades of adjudicators and for any related matter.

1 **102. Eligibility to be registered**

- 2 (1) An individual is eligible to be registered as an adjudicator if the
3 Building Commissioner is satisfied that —
- 4 (a) the individual has the qualifications, expertise and
5 experience required by the regulations for registration as
6 an adjudicator; and
- 7 (b) the registration of the individual as an adjudicator is not
8 suspended under this Division and has not previously
9 been cancelled under this Division or the *Construction*
10 *Contracts (Former Provisions) Act 2004*; and
- 11 (c) a similar registration of the individual under a
12 corresponding security of payment law is not suspended
13 or has not previously been cancelled (otherwise than at
14 the request of the individual); and
- 15 (d) the individual has not been convicted of a serious
16 offence; and
- 17 (e) the individual has not been a bankrupt within the period
18 of 3 years before making the application to be registered
19 under this Division.
- 20 (2) An individual is eligible to be registered as a review adjudicator
21 if the Building Commissioner is satisfied that the individual —
- 22 (a) is registered or eligible to be registered as an
23 adjudicator; and
- 24 (b) has the qualifications, expertise and experience required
25 by the regulations for registration as a review
26 adjudicator.

27 **103. Conditions of registration**

- 28 (1) The registration of an adjudicator or review adjudicator is
29 subject to the following conditions —
- 30 (a) the performance of the functions of the adjudicator or
31 review adjudicator under this Act in a competent and
32 professional manner;

- 1 (b) the completion of any requirements for continuing
2 professional development (or other training
3 requirements) prescribed by the regulations for the
4 purposes of this paragraph;
5 (c) compliance with a code of practice under section 109;
6 (d) compliance with the requirements of Part 3 Division 4
7 relating to adjudication fees and expenses of the
8 adjudicator or review adjudicator;
9 (e) any other conditions imposed by the Building
10 Commissioner.
- 11 (2) The Building Commissioner may, by written notice given to an
12 adjudicator or review adjudicator, amend or revoke the
13 conditions of registration imposed by the Building
14 Commissioner or add conditions to which the registration is
15 subject.

16 **104. Renewal of registration**

- 17 (1) Registration under this Division may be renewed by the
18 Building Commissioner if the adjudicator or review
19 adjudicator —
20 (a) has duly applied for renewal of the registration; and
21 (b) continues to be eligible for registration; and
22 (c) has completed the requirements for continuing
23 professional development (or other training
24 requirements) prescribed by the regulations for the
25 purposes of this paragraph.
- 26 (2) An application for renewal of registration must be made no later
27 than 1 month before the expiry of the existing registration.
- 28 (3) Section 100 applies to an application for renewal of registration
29 in the same way it applies to an application for registration.
- 30 (4) If an application is duly made for renewal of registration and the
31 application has not been determined before the expiry of the

1 existing registration, the existing registration continues in force
2 until the application is determined.

3 (5) If the Building Commissioner decides to refuse an application
4 for renewal of registration, the Building Commissioner must
5 give the applicant written notice of the decision and the reasons
6 for the decision.

7 **105. Term of registration**

8 Individuals may be registered (or their registration renewed)
9 under this Division for the period (not exceeding 3 years)
10 determined by the Building Commissioner.

11 **106. Suspension or cancellation of registration**

12 (1) The Building Commissioner may suspend (for a period not
13 exceeding 3 years) or cancel the registration of an individual as
14 an adjudicator or as a review adjudicator if satisfied that the
15 individual —

16 (a) provided information in connection with the application
17 for registration that was false or misleading in a material
18 particular; or

19 (b) is no longer eligible under this Division to be registered
20 as an adjudicator or review adjudicator; or

21 (c) has contravened a condition of the registration.

22 (2) Before suspending or cancelling the registration of an individual
23 as an adjudicator or review adjudicator, the Building
24 Commissioner must give the individual the opportunity to make
25 a submission within the period specified by the Building
26 Commissioner.

27 (3) If the Building Commissioner decides to suspend or cancel the
28 registration of an individual as an adjudicator or review
29 adjudicator, the Building Commissioner must give the
30 individual written notice of the decision and the reasons for the
31 decision.

1 (4) An adjudicator or review adjudicator may surrender their
2 registration under this Division by written notice to the Building
3 Commissioner.

4 **107. Public register of adjudicators and review adjudicators**

5 (1) The Building Commissioner must keep a register of
6 adjudicators and review adjudicators containing relevant
7 information about their registration and publish the register on
8 an appropriate website.

9 (2) If the registration of an individual as an adjudicator or review
10 adjudicator expires and is not renewed, or is suspended,
11 cancelled or surrendered, the Building Commissioner must
12 update the register and may include in the register details about
13 the refusal of any application for renewal or about any
14 suspension, cancellation or surrender of registration.

15 (3) The Building Commissioner may issue certificates of
16 registration to adjudicators and review adjudicators on the
17 register.

18 **108. Review by State Administrative Tribunal of decisions of**
19 **Building Commissioner**

20 An individual who is aggrieved by any of the following
21 decisions of the Building Commissioner may apply to the State
22 Administrative Tribunal for a review of the decision —

- 23 (a) the refusal of an application by the individual for
24 registration or renewal of registration as an adjudicator
25 or review adjudicator;
- 26 (b) the imposition or amendment of a condition of the
27 individual's registration as an adjudicator or review
28 adjudicator;
- 29 (c) the suspension or cancellation of the individual's
30 registration as an adjudicator or review adjudicator.

1 **109. Code of practice for adjudicators and review adjudicators**

2 (1) The regulations may prescribe or adopt a code of practice for
3 the performance of the functions under this Act of adjudicators
4 and review adjudicators.

5 (2) Adjudicators and review adjudicators are required to perform
6 their functions under this Act in accordance with the code of
7 practice.

8 (3) A contravention of the code of practice by an adjudicator or
9 review adjudicator may be taken into account by the Building
10 Commissioner under this Division, but does not invalidate any
11 decision or determination of the adjudicator or review
12 adjudicator under this Act.

13 **110. Transitional registration on commencement of Division**

14 (1) On the commencement of this Division, the registration of an
15 individual as an adjudicator under the *Construction Contracts*
16 *(Former Provisions) Act 2004* is taken to be a registration of the
17 individual under this Division as an adjudicator (a *provisional*
18 *registration*) if —

19 (a) the Building Commissioner is satisfied that the
20 individual has undertaken a training course approved by
21 the Building Commissioner for the purposes of this
22 paragraph; and

23 (b) the Building Commissioner issues a certificate of
24 provisional registration to the individual.

25 (2) Unless a provisional registration is sooner cancelled under this
26 Division, the provisional registration continues in force until the
27 end of the period of 12 months after the commencement of this
28 Division.

29 (3) The Building Commissioner must cancel the provisional
30 registration of an individual if an application by the individual
31 for registration as an adjudicator or review adjudicator under
32 this Division is refused.

Part 6 — Miscellaneous

111. No contracting out

- (1) This Act has effect despite any provision in any contract, agreement or other arrangement.
- (2) A provision of any contract, agreement or other arrangement is void to the extent that it —
- (a) is inconsistent with this Act; or
 - (b) purports to exclude, modify or restrict the operation of this Act or has the effect of excluding, modifying or restricting the operation of this Act; or
 - (c) requires a party to a construction contract to reimburse the other party to the contract for any costs or expenses incurred in connection with the taking of action under this Act, except as authorised by this Act; or
 - (d) may be reasonably construed as an attempt to deter a person from taking action under this Act.

112. Immunity from civil liability

- (1) In this section —

protected person means —

- (a) an adjudicator or review adjudicator appointed to determine an adjudication application or adjudication review application; or
- (b) an authorised nominating authority; or
- (c) the Building Commissioner; or
- (d) a person acting under the direction of —
 - (i) an adjudicator or review adjudicator appointed to determine an adjudication application or adjudication review application; or
 - (ii) an authorised nominating authority; or
 - (iii) the Building Commissioner;

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- 1 or
2 (e) a person who was a person referred to in paragraphs (a)
3 to (d).
- 4 (2) No civil liability is incurred by a protected person for anything
5 the person has done or omitted to do, in good faith, in the
6 performance or purported performance of a function under this
7 Act.
- 8 (3) The protection given by subsection (2) applies even though the
9 thing done as described in that subsection may have been
10 capable of being done whether or not this Act or any other
11 written law had been enacted.
- 12 (4) Despite subsection (2), the State is not relieved of any liability
13 that it might have for another person having done or omitted to
14 do anything described in that subsection.

15 **113. Service of documents**

- 16 (1) In this section —
17 *document* includes any written notice, claim, response or
18 determination;
19 *give* includes serve, send or otherwise provide.
- 20 (2) Any document that by or under this Act is authorised or
21 required to be given by a party to a construction contract to
22 another party to the contract in relation to matters arising under
23 the contract —
- 24 (a) must be given in the manner (if any) provided in the
25 contract if it is reasonably practicable to do so; or
26 (b) in any other case — must be given in a manner provided
27 by subsection (3).
- 28 (3) Any document that by or under this Act is authorised or
29 required to be given to a person may, subject to subsection (2),
30 be given to the person —
- 31 (a) by delivering the document to the person personally; or

- 1 (b) by leaving the document for the person at the person's
2 ordinary place of business; or
- 3 (c) by sending the document by post to the person's
4 ordinary place of business; or
- 5 (d) by email to an email address specified by the person for
6 giving documents of that kind to the person; or
- 7 (e) by any other method (including the use of an electronic
8 database, document system or any other means by which
9 a document can be accessed electronically) authorised
10 by the regulations for giving documents of that kind to
11 the person.
- 12 (4) The regulations may make provision for or in relation to the
13 time at which a document that is given in a particular manner is
14 taken to have been given.
- 15 (5) A document given or received under this Act by the agent of a
16 person is taken for the purposes of this Act to have been given
17 or received by that person.

18 **114. Approved forms**

- 19 (1) The Building Commissioner may approve and publish forms for
20 use under any provision of this Act.
- 21 (2) An approved form published by the Building Commissioner is
22 required to be used for the purpose for which it is approved,
23 unless the Building Commissioner directs when publishing the
24 approved form that it is recommended but not mandatory.
- 25 (3) An approved form published by the Building Commissioner
26 may require —
- 27 (a) the form to be accompanied by specified documents;
28 and
- 29 (b) information to be verified by statutory declaration.

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1 **115. Annual report on operation of Act**

2 (1) Without limiting the *Financial Management Act 2006*
3 section 61, the annual report for a financial year prepared under
4 that section by the accountable authority for the department of
5 the Public Service principally assisting in the administration of
6 this Act must contain (or must be accompanied by a separate
7 report that contains) information about the operation of this Act.

8 (2) The report must also contain information about any significant
9 residual operation of the *Construction Contracts (Former*
10 *Provisions) Act 2004*.

11 **116. Use or disclosure of confidential information**

12 (1) In this section —

13 ***confidential information*** means information that is the subject
14 of a duty of confidentiality or secrecy or that is of a
15 commercially sensitive nature;

16 ***relevant officer*** means the following —

- 17 (a) the Building Commissioner or other public official or
18 employee engaged in the administration of this Act;
19 (b) an authorised nominating authority;
20 (c) an adjudicator or review adjudicator;
21 (d) a person who was a person referred to in paragraphs (a)
22 to (c).

23 (2) A relevant officer must not, directly or indirectly, use or
24 disclose any confidential information obtained by the relevant
25 officer under or for the purposes of this Act.

26 Penalty for this subsection: a fine of \$10 000.

27 (3) A person does not commit an offence under subsection (2) in
28 relation to the use or disclosure of confidential information if —

- 29 (a) the information is already in the public domain; or

- 1 (b) the use or disclosure of the information is authorised
2 under subsection (4) or (5).
- 3 (4) The use or disclosure of confidential information obtained under
4 or for the purposes of this Act is authorised for the purposes of
5 this section if the information is used or disclosed in good faith
6 in any of the following circumstances —
- 7 (a) for the purposes of performing a function under (or
8 complying with) this Act or another written law;
- 9 (b) with the consent of each person to whom the
10 confidential information relates;
- 11 (c) to a court or other person or body acting judicially in the
12 course of proceedings before the court, person or body;
- 13 (d) under an order of a court or other person or body acting
14 judicially;
- 15 (e) as otherwise required by law.
- 16 (5) The Building Commissioner may authorise the disclosure of
17 confidential information obtained under or for the purposes of
18 this Act to any of the following persons or bodies if, in the
19 opinion of the Building Commissioner, the information is or is
20 likely to be relevant to the person or body —
- 21 (a) the Small Business Commissioner referred to in the
22 *Small Business Development Corporation Act 1983*
23 section 13;
- 24 (b) the Department CEO as defined in the *Procurement*
25 *Act 2020* section 4(1) in connection with the functions
26 of the Department CEO under Part 7 of that Act;
- 27 (c) a person or body prescribed by the regulations for the
28 purposes of this paragraph.

29 **117. Criminal proceedings generally**

- 30 (1) A prosecution for an offence against this Act may be
31 commenced by, and only by, the Building Commissioner or a
32 person authorised to do so by the Building Commissioner.

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- 1 (2) Subsection (1) does not limit the functions of the Director of
2 Public Prosecutions under the *Director of Public Prosecutions*
3 *Act 1991* section 11.
- 4 (3) In the absence of evidence to the contrary, proof is not required
5 in any proceedings for an offence against this Act —
6 (a) that the prosecutor is authorised to commence the
7 prosecution; or
8 (b) that a signature on a prosecution notice alleging the
9 offence is the signature of a person authorised to
10 commence the prosecution.
- 11 (4) A prosecution for an offence against this Act must be
12 commenced within 3 years after the day on which the offence is
13 alleged to have been committed.
- 14 (5) Despite subsection (4), if a prosecution notice alleging an
15 offence against this Act specifies the day on which evidence of
16 the alleged offence first came to the attention of a person who
17 has authority to commence the prosecution —
18 (a) the prosecution may be commenced within 3 years after
19 that day; and
20 (b) the prosecution notice need not contain particulars of the
21 day on which the offence is alleged to have been
22 committed.
- 23 (6) The day on which evidence first came to the attention of a
24 person who has authority to commence the prosecution is, in the
25 absence of proof to the contrary, the day specified in the
26 prosecution notice.

27 **118. Liability of directors and others for offences by bodies**
28 **corporate**

- 29 (1) In this section —
30 *officer*, in relation to a body corporate, has the meaning given in
31 the *Corporations Act 2001* (Commonwealth) section 9.

- 1 (2) This section applies to an offence under section 65 or 87.
- 2 (3) If a body corporate is guilty of an offence to which this section
3 applies, an officer of the body corporate is also guilty of the
4 offence if the officer failed to take all reasonable steps to
5 prevent the commission of the offence by the body corporate.
- 6 (4) In determining whether things done or omitted to be done by the
7 officer constitute reasonable steps, a court must have regard
8 to —
- 9 (a) what the officer knew, or ought to have known, about
10 the commission of the offence by the body corporate;
11 and
- 12 (b) whether the officer was in a position to influence the
13 conduct of the body corporate in relation to the
14 commission of the offence; and
- 15 (c) any other relevant matter.
- 16 (5) This section does not affect the liability of a body corporate for
17 any offence.
- 18 (6) This section does not affect the liability of an officer of a body
19 corporate, or any other person, under *The Criminal Code*
20 Chapters II, LVII, LVIII and LIX.
- 21 (7) An officer of a body corporate may be charged with, and
22 convicted of, an offence in accordance with this section whether
23 or not the body corporate is charged with, or convicted of, the
24 principal offence committed by the body corporate.
- 25 (8) If an officer of a body corporate charged with an offence in
26 accordance with this section claims that the body corporate
27 would have a defence if it were charged with the offence —
- 28 (a) the onus of proving the defence is on the officer; and
29 (b) the standard of proof required is the standard that would
30 apply to the body corporate in relation to the defence.

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1 (9) Subsection (8) does not limit any other defence available to the
2 officer.

3 **119. Regulations**

4 (1) The Governor may make regulations prescribing matters —
5 (a) required or permitted by this Act to be prescribed; or
6 (b) necessary or convenient to be prescribed for giving
7 effect to this Act.

8 (2) The regulations may provide that contravention of a regulation
9 is an offence, and provide, for an offence against the
10 regulations, for a penalty not exceeding a fine of \$2 000.

11 **120. Review of Act**

12 (1) The Minister must review the operation and effectiveness of this
13 Act, and prepare a report based on the review, as soon as
14 practicable after the 5th anniversary of the day on which
15 section 71 comes into operation.

16 (2) The Minister must cause the report to be laid before each House
17 of Parliament as soon as practicable after it is prepared, but not
18 later than 12 months after the 5th anniversary.

1 **Part 7 — Consequential amendments to other Acts**

2 **Division 1 — *Building Services (Complaint Resolution and***
3 ***Administration) Act 2011* amended**

4 **121. Act amended**

5 This Division amends the *Building Services (Complaint*
6 *Resolution and Administration) Act 2011*.

7 **122. Section 3 amended**

8 In section 3 in the definition of *building service Act*:

9 (a) after paragraph (b) insert:

10
11 (ba) the *Building and Construction Industry*
12 *(Security of Payment) Act 2021*;

13
14 (b) delete paragraph (d) and insert:

15
16 (d) the *Construction Contracts (Former*
17 *Provisions) Act 2004*;

18
19 **123. Section 70 amended**

20 In section 70 in the Penalty delete “\$10 000.” and insert:

21
22 \$25 000.

23
24 **124. Section 71 amended**

25 In section 71(2) delete the Penalty and insert:

26
27 Penalty for this subsection: a fine of \$25 000.

28

1 **Division 2 — *Building Services (Registration) Act 2011* amended**

2 **125. Act amended**

3 This Division amends the *Building Services (Registration)*
4 *Act 2011*.

5 **126. Section 3 amended**

6 In section 3 delete the definition of *insolvent* and insert:

7

8 *insolvent* has the meaning given in section 63A(1);

9

10 **127. Section 18 amended**

11 After section 18(1)(f) insert:

12

13 (fa) has paid any building service debt of a kind
14 referred to in section 53(4) that the applicant
15 has incurred; and

16

17 **128. Section 32A inserted**

18 After section 32 insert:

19

20 **32A. Notification of new directors**

21 (1) In this section —

22 *director*, of a body, has the meaning given in the
23 Corporations Act section 9.

24 (2) A body that is a building service contractor must give
25 the Board written notice of the appointment of any new
26 director of the body.

27 Penalty for this subsection: a fine of \$5 000.

- 1 (3) The notice referred to in subsection (2) must be given
2 no later than 7 days after the day on which the new
3 director is appointed and must include any information
4 prescribed by the regulations.
5

6 **129. Section 53 amended**

- 7 (1) In section 53(1):

8 (a) in paragraph (a)(ii) after “the *Building Act 2011*,” insert:
9
10 the *Building and Construction Industry (Security of*
11 *Payment) Act 2021*,

12
13 (b) in paragraph (m) delete “contractor.” and insert:
14
15 contractor;

16
17 (c) after paragraph (m) insert:

18
19 (n) that the registered building service provider has
20 not paid a building service debt of a kind
21 referred to in subsection (4) that the registered
22 building service provider has incurred.
23

24 (2) After section 53(3) insert:

25
26 (4) A building service debt of a registered building service
27 provider is any of the following —

28 (a) a debt for which judgment has been entered in a
29 court of competent jurisdiction, after the
30 commencement of the *Building and*
31 *Construction Industry (Security of Payment)*
32 *Act 2021* section 129, against the provider in

- 1 connection with a contract for a building
2 service or for the supply of goods or services
3 for a building service;
- 4 (b) an amount that an adjudicator or review
5 adjudicator determines, after the
6 commencement of the *Building and*
7 *Construction Industry (Security of Payment)*
8 *Act 2021* section 129, is payable by the
9 provider under Part 3 of that Act;
- 10 (c) an amount that an adjudicator determines, after
11 the commencement of the *Building and*
12 *Construction Industry (Security of Payment)*
13 *Act 2021* section 129, is payable by the
14 provider under the *Construction Contracts*
15 *(Former Provisions) Act 2004* section 31(2)(b).
- 16 (5) A judgment debt is a building service debt under
17 subsection (4) only if —
- 18 (a) the amount is not paid in full within 28 days
19 after the judgment debt was entered (or within
20 any longer period for payment allowed by the
21 court); and
- 22 (b) the judgment debtor has not entered into a
23 payment arrangement with the judgment
24 creditor or, if any payment arrangement is
25 entered into, the judgment debtor has failed to
26 comply with the arrangement; and
- 27 (c) either —
- 28 (i) proceedings have not been instituted to
29 appeal or set aside the judgment debt
30 within the time allowed for instituting
31 the proceedings; or

- 1 (ii) any proceedings so instituted do not
2 result in the judgment debt being
3 quashed or set aside and the debt has not
4 been paid in full within 5 days after the
5 termination of the proceedings.
- 6 (6) An adjudicated amount is a building service debt under
7 subsection (4) only if —
- 8 (a) the amount is not paid in full by the due date
9 for payment of the adjudicated amount (or
10 within any longer period for payment allowed
11 by the adjudicator or review adjudicator); and
- 12 (b) either —
- 13 (i) an adjudication review or judicial
14 review has not been instituted within the
15 time allowed for doing so; or
- 16 (ii) any review so instituted does not result
17 in the adjudicated amount being
18 quashed or set aside and the amount has
19 not been paid in full within 5 days after
20 the termination of the review.
- 21 (7) The reference to the time allowed for instituting a
22 judicial review in subsection (6)(b)(i) does not include
23 time that is allowed only with the leave of a court.
- 24 (8) For the purposes of subsection (4), it does not matter
25 that the judgment debt or adjudication determination
26 resulted from matters arising before the
27 commencement of the *Building and Construction*
28 *Industry (Security of Payment) Act 2021* section 129.
29

1 **130. Section 57 amended**

2 In section 57(1)(d) delete “section.” and insert:

3

4 section or the exercise of power relates only to a disciplinary
5 matter referred to in section 53(1)(n).

6

7 **131. Section 58 amended**

8 (1) In section 58(1)(i) delete “(m),” and insert:

9

10 (n),

11

12 (2) After section 58(3) insert:

13

14 (4) If the State Administrative Tribunal orders the
15 cancellation of the registration of a person as a building
16 service contractor, it may, for the purposes of Part 5A,
17 certify that the person is unable to meet the person’s
18 financial obligations as and when they fall due if the
19 Tribunal made its order wholly or partly on that basis.

20

21 **132. Section 59 amended**

22 In section 59(3) delete “(m)” and insert:

23

24 (n)

25

1 **133. Part 5A inserted**

2 After section 63 insert:

3

4 **Part 5A — Insolvency of building service**
5 **contractors**

6 **63A. Terms used**

7 (1) In this Part —

8 **construction company** means a corporation or
9 non-corporate body that directly or indirectly —

10 (a) carries out construction work in this State or in
11 any other State or a Territory; or

12 (b) carried out construction work in this State or in
13 any other State or a Territory during the period
14 of 2 years immediately before becoming an
15 insolvent;

16 **construction work** has the meaning given in the
17 *Building and Construction Industry (Security of*
18 *Payment) Act 2021* section 6;

19 **excluded contractor** means a temporarily excluded
20 contractor or a permanently excluded contractor;

21 **influential person**, for a corporation or non-corporate
22 body —

23 (a) means an individual who controls or
24 substantially influences the conduct of the
25 corporation or body; but

26 (b) does not include —

27 (i) a lawyer, accountant, business
28 consultant or other professional who
29 provides professional advice to the
30 corporation or body and who influences
31 the conduct of the corporation or body

- 1 only because of the provision of that
2 professional advice; or
- 3 (ii) an individual who regulates or
4 otherwise influences the conduct of the
5 corporation or body in the exercise of
6 public functions under a written law;
- 7 **insolvency event** means any event occurring after the
8 commencement of the *Building and Construction*
9 *Industry (Security of Payment) Act 2021* section 133
10 that results in an individual, corporation, non-corporate
11 body or construction company becoming an insolvent;
- 12 **insolvent** means —
- 13 (a) in the case of an individual or officer of a
14 non-corporate body — a person who is,
15 according to the *Interpretation Act 1984*
16 section 13D, a bankrupt or a person whose
17 affairs are under insolvency laws; or
- 18 (b) in the case of a corporation — a corporation
19 that has a liquidator, provisional liquidator,
20 administrator (including an administrator of a
21 deed of company arrangement) or receiver
22 appointed, or that is otherwise being wound up,
23 under the Corporations Act; or
- 24 (c) in any case — a person whose registration as a
25 building service contractor is cancelled by
26 order of the State Administrative Tribunal if the
27 Tribunal certifies under section 58(4) that the
28 person is unable to meet the person’s financial
29 obligations as and when they fall due;
- 30 **non-corporate body** means a partnership or
31 unincorporated body;

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officer —

(a) of a corporation —

- (i) means an officer of the corporation as defined in the Corporations Act section 9; and
- (ii) includes an influential person for the corporation; and
- (iii) does not include an administrator, receiver or liquidator appointed under the Corporations Act;

or

(b) of a non-corporate body —

- (i) means an officer of an entity that is neither an individual nor a corporation as defined in the Corporations Act section 9; and
- (ii) includes an influential person for the body;

permanently excluded contractor means a person excluded from being registered as a building service contractor under section 63C(2)(b);

registration means registration under Part 3 as a building service contractor;

temporarily excluded contractor means a person excluded from being registered as a building service contractor under section 63C(2)(a).

- (2) A reference in this Part to a person becoming an insolvent is a reference to the person becoming an insolvent after the commencement of the *Building and Construction Industry (Security of Payment) Act 2021* section 133.

- 1 (3) A reference in this Part to a non-corporate body
2 becoming an insolvent is a reference to an officer of
3 the body becoming an insolvent after the
4 commencement of the *Building and Construction*
5 *Industry (Security of Payment) Act 2021* section 133.

6 **63B. Excluded contractors not to be registered**

- 7 (1) The Board must refuse to register or renew the
8 registration of an excluded contractor as a building
9 service contractor.
- 10 (2) The Board must cancel the registration of an excluded
11 contractor as a building service contractor.

12 **63C. Declaration of excluded contractors**

- 13 (1) This section applies to a person (being an individual,
14 non-corporate body or corporation) who is an applicant
15 for registration or renewal of registration as a building
16 service contractor or who is a building service
17 contractor.
- 18 (2) The Board may, in accordance with section 63D or
19 63E, declare that the person is excluded from being
20 registered as a building service contractor —
- 21 (a) for the period ending 3 years after the date of
22 the last insolvency event (specified by the
23 Board) on which the declaration of the Board is
24 based; or
- 25 (b) on a permanent basis.
- 26 (3) The Board may at any time revoke a declaration under
27 this section.

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63D. When individual or non-corporate body may be declared excluded contractor

- (1) An individual or non-corporate body may be declared to be a temporarily excluded contractor if —
 - (a) the individual or an officer of the non-corporate body became an insolvent on at least one occasion; and
 - (b) the period of 3 years has not elapsed since the insolvency event that resulted in the insolvency.
- (2) An individual or non-corporate body may be declared to be a permanently excluded contractor if —
 - (a) the individual or an officer of the non-corporate body became an insolvent on 2 separate occasions; and
 - (b) the insolvency event that resulted in the second insolvency occurred within 5 years after the insolvency event that resulted in the first insolvency.
- (3) The declaration of an individual or non-corporate body as an excluded contractor is subject to section 63F.

63E. When corporation may be declared excluded contractor

- (1) A corporation may be declared to be a temporarily excluded contractor if —
 - (a) the corporation became an insolvent on at least one occasion; and
 - (b) the period of 3 years has not elapsed since the insolvency event that resulted in the insolvency.

- 1 (2) A corporation may also be declared to be a temporarily
2 excluded contractor if an officer of the corporation —
- 3 (a) was an officer of a construction company at the
4 time the company became an insolvent (or
5 within 2 years immediately before the company
6 became an insolvent) and the period of 3 years
7 has not elapsed since the insolvency event that
8 resulted in the insolvency; or
- 9 (b) is an individual who could (subject to
10 compliance with section 63F) be declared to be
11 a temporarily excluded contractor.
- 12 (3) A corporation may be declared to be a permanently
13 excluded contractor if —
- 14 (a) the corporation became an insolvent on
15 2 separate occasions; and
- 16 (b) the insolvency event that resulted in the second
17 insolvency occurred within 5 years after the
18 insolvency event that resulted in the first
19 insolvency.
- 20 (4) A corporation may also be declared to be a
21 permanently excluded contractor if an officer of the
22 corporation —
- 23 (a) was an officer of a construction company at the
24 time the company became an insolvent on
25 2 separate occasions (or within 2 years
26 immediately before each occasion on which the
27 company became an insolvent) and the
28 insolvency event that resulted in the second
29 insolvency occurred within 5 years after the
30 insolvency event that resulted in the first
31 insolvency; or

- 1 (b) was an officer of a construction company at the
2 time the company became an insolvent (or
3 within 2 years immediately before the company
4 became an insolvent) and is an individual who
5 also became an insolvent, and the insolvency
6 event that resulted in the later insolvency
7 occurred within 5 years after the insolvency
8 event that resulted in the earlier insolvency; or
9 (c) is an individual who could (subject to
10 compliance with section 63F) be declared to be
11 a permanently excluded contractor.
- 12 (5) The Board must not declare a corporation to be a
13 permanently excluded contractor because of insolvency
14 on 2 separate occasions if the corporation satisfies the
15 Board that those insolvencies arose out of the same set
16 of circumstances.
- 17 (6) The declaration of a corporation as an excluded
18 contractor is subject to section 63F.

19 **63F. Procedure for declaring excluded contractor**

- 20 (1) The Board must not declare a person to be an excluded
21 contractor unless —
- 22 (a) the Board has given the person a written notice
23 of its intention to consider making the
24 declaration (a *show cause notice*); and
- 25 (b) the show cause notice identifies the insolvency
26 event or events on which the declaration would
27 be based; and
- 28 (c) the Board has given the person the opportunity
29 to make a submission to the Board on the
30 matter within 28 days or any longer period that
31 is specified in the show cause notice.

- 1 (2) The Board must not declare a person to be an excluded
2 contractor if the person satisfies the Board that —
- 3 (a) reasonable steps were taken to avoid the
4 circumstances that resulted in the insolvency or
5 insolvencies concerned; and
- 6 (b) sufficient arrangements are in place to ensure
7 that the person’s construction work business
8 will be managed in a competent and proficient
9 manner.
- 10 (3) The Board must not declare a corporation to be an
11 excluded contractor because a particular individual is
12 an officer of the corporation if the corporation satisfies
13 the Board that the individual is no longer an officer of
14 the corporation.
- 15 (4) For the purposes of this section, the reasonable steps
16 taken to avoid the circumstances that resulted in
17 insolvency may include (but are not limited to) the
18 following —
- 19 (a) keeping proper accounting records;
- 20 (b) obtaining appropriate financial or legal advice
21 before entering into significant business
22 arrangements;
- 23 (c) reporting fraud or theft in relation to the
24 business;
- 25 (d) putting in place appropriate credit arrangements
26 and taking reasonable steps to recover
27 outstanding money owed;
- 28 (e) making adequate provision for Commonwealth
29 and State taxes and employee entitlements;
- 30 (f) ensuring there are sufficient assets to meet
31 guarantees.

- 1 (5) Reasonable steps for the purposes of this section do not
2 require a person to contribute additional equity to a
3 business to prevent insolvency.
- 4 (6) Reasonable steps for the purposes of this section
5 require consideration of the circumstances existing
6 before an insolvency that were known to the
7 individuals who could have prevented the insolvency
8 and whether the individuals were in a position to
9 control the circumstances that resulted in the
10 insolvency.
- 11 (7) For the purposes of this section, sufficient
12 arrangements to ensure that a person's construction
13 work business will be managed in a competent and
14 proficient manner may include (but are not limited to)
15 the following —
- 16 (a) the appointment of additional company
17 directors or business managers;
- 18 (b) the engagement of financial or legal advisers on
19 an ongoing basis;
- 20 (c) the provision of sufficient working capital and
21 equity;
- 22 (d) credit management arrangements and other
23 appropriate business plans.

24 **63G. When declaration of excluded contractor takes**
25 **effect**

26 The declaration of a person as an excluded contractor
27 does not take effect —

- 28 (a) until the expiration of the period of 28 days
29 after written notice of the decision of the Board
30 to make the declaration has been given to the
31 person; or

- 1 (b) if the person duly applies within that period to
2 the State Administrative Tribunal for a review
3 of the decision under Part 6 — unless the
4 application is withdrawn or the decision is
5 confirmed following the review.
6

7 **134. Section 64 amended**

- 8 (1) In section 64(1) in the definition of *reviewable decision* after
9 paragraph (d) insert:
10

- 11 (da) to declare that a person is excluded from being
12 registered as a building service contractor under
13 section 63C; or
14

- 15 (2) After section 64(2) insert:
16

- 17 (3) A decision to refuse to grant or renew registration as a
18 building service contractor, or to cancel the registration
19 of a building service contractor, is not subject to review
20 under this Part if it was made only on the basis of a
21 declaration under section 63C that has been reviewed
22 and confirmed by the Tribunal or that was not the
23 subject of an application for review by the Tribunal.
24

25 **Division 3 — Construction Contracts Act 2004 amended**

26 **135. Act amended**

- 27 This Division amends the *Construction Contracts Act 2004*.

1 **136. Section 1 amended**

2 In section 1 delete “may be cited as the *Construction Contracts*
3 *Act 2004.*” and insert:

4

5 is the *Construction Contracts (Former Provisions) Act 2004.*

6

7 **137. Section 7 amended**

8 In section 7(1) delete “operation.” and insert:

9

10 operation and before the *Building and Construction Industry*
11 *(Security of Payment) Act 2021* section 22 comes into operation.

12

13 **138. Section 48 amended**

14 (1) After section 48(2) insert:

15

16 (2A) The Building Commissioner must not register an
17 individual as a registered adjudicator after the *Building*
18 *and Construction Industry (Security of Payment)*
19 *Act 2021* Part 5 Division 2 comes into operation.

20

21 (2) After section 48(5) insert:

22

23 (5A) The registration of an individual as a registered
24 adjudicator is cancelled if the individual’s registration
25 as an adjudicator or review adjudicator under the
26 *Building and Construction Industry (Security of*
27 *Payment) Act 2021* Part 5 Division 2 is cancelled.

28

1 **139. Section 52 deleted**

2 Delete section 52.

3 **Division 4 — Procurement Act 2020 amended**

4 **140. Act amended**

5 This Division amends the *Procurement Act 2020*.

6 **141. Section 4 amended**

7 In section 4(1) in the definition of *goods, services or works*
8 paragraph (c) delete “*Construction Contracts Act 2004*” and
9 insert:

10
11 *Construction Contracts (Former Provisions) Act 2004*
12
13

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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)
adjudicated amount	4(1)
adjudicating.....	49
adjudication application	4(1), 28(1)
adjudication fees and expenses	4(1), 49
adjudication response.....	4(1), 34(1)
adjudication review application	4(1), 39(1)
adjudication review response	4(1), 45(1)
adjudicator	4(1)
administrative duties	4(1)
amount owing	14(1)
approved form.....	4(1)
assent day.....	2
authorised issuing institution	56
authorised nominating authority	4(1)
Building Commissioner	4(1)
building service.....	13(1)
building service contractor.....	13(1)
business day	4(1)
civil works	6(2)
claimant.....	4(1)
claimed amount.....	4(1), 24(1)
claimed or scheduled amount owed	27(1)
compliant performance bond	56
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corresponding security of payment law	4(1)
court of competent jurisdiction	4(1)
defects liability period.....	23(1)
document.....	113(1)
due date	4(1)
final payment	23(1)
first party.....	14(1)
give	113(1)
government party	69(1)
head contractor.....	4(1) and (3)
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Defined terms

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notice-based time bar provision	16(1)
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prescribed retention money threshold	70(1)
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progress payment	4(1), 17(1)
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related goods and services	4(1), 7(1) and (2)
related person.....	91(1)
release	4(1)
relevant contract.....	33(1)
relevant officer.....	116(1)
respondent.....	4(1)
retention money	4(1)
retention money trust account	4(1), 74(1)
retention money trust commencement date.....	69(1)
retention money trust end date	69(1)
review adjudicator.....	4(1)
scheduled amount	4(1), 25(2)
second party	14(1)
serious offence	4(1)
subcontractor.....	4(1)
substitution of performance security	56
third party.....	14(1)
value.....	4(1), 8(1)