

# **Building and Construction Industry (Security of Payment) Bill 2020**

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**Defined terms**





Western Australia

LEGISLATIVE ASSEMBLY

# **Building and Construction Industry (Security of Payment) Bill 2020**

**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:

1 **Part 1 — Preliminary**

2 **Division 1 — Introductory**

3 **1. Short title**

4 This is the *Building and Construction Industry (Security of*  
5 *Payment) Act 2020*.

6 **2. Commencement**

7 This Act comes into operation as follows —

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

14 **3. Object of Act**

15 (1) The object of this Act is to provide an effective and fair process  
16 for securing payments to persons who undertake to carry out  
17 construction work, or to supply related goods and services, in  
18 the building and construction industry.

19 (2) That object is achieved primarily by —

- 20 (a) giving those persons a statutory entitlement to progress  
21 payments; and
- 22 (b) establishing an expedited procedure for making claims  
23 for progress payments, for responding to those claims  
24 and for the adjudication of disputed claims; and
- 25 (c) ensuring money is held on trust if it has been retained to  
26 secure the performance of the contractual obligations of  
27 those persons; and
- 28 (d) giving those persons other statutory entitlements,  
29 including the right to suspend work or supply if not paid

and to access retained money by substituting a  
performance bond.

## Division 2 — Interpretation

### 4. Terms used: general

In this Act —

***adjudicated amount*** means —

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

***adjudication application*** has the meaning given in section 28;

***adjudication response*** has the meaning given in section 34;

***adjudication review application*** has the meaning given in section 39;

***adjudication review response*** has the meaning given in section 45;

***adjudicator*** means —

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

***administrative duties***, of adjudicators or review adjudicators, includes —

- (a) sending and receiving documents, submissions or other communications to and from claimants, respondents or the Building Commissioner; and
- (b) arranging conferences, inspections and tests; and
- (c) engaging experts; and

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

**due date**, for a progress payment, means the date on which the progress payment becomes payable under section 20;

**head contractor** means the person who undertakes to carry out construction work, or to supply related goods and services, for the principal under a construction contract and for whom all or any of that construction work is to be carried out, or to whom all or any of those related goods and services are to be supplied, by another person under a separate construction contract;

Note for this definition:

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

**home building work** has the meaning given in the *Home Building Contracts Act 1991* section 3(1);

**multiple dwellings** —

(a) means 2 or more dwellings as defined in the *Home Building Contracts Act 1991* section 3(1); but

(b) does not include —

(i) 2 dwellings (whether attached or detached) on the one lot of land; or

(ii) a strata-titled dwelling as defined in that Act;

**named month** means January, February, March, April, May, June, July, August, September, October, November or December;

**payment claim** means a claim for a progress payment referred to in section 22;

**payment schedule** means a schedule relating to payments proposed by the respondent in a response to a payment claim referred to in section 25;

**performance bond** has the meaning given in section 56;

**performance security** has the meaning given in section 56;

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

- 1 who is not themselves engaged under a construction contract to  
2 carry out construction work or supply related goods and services  
3 as part of or incidental to the work or goods and services carried  
4 out or supplied under the main contract;
- 5 **progress payment** has the meaning given in section 17;
- 6 **recognised financial institution** means —
- 7 (a) an authorised deposit-taking institution as defined in the  
8 *Banking Act 1959* (Commonwealth) section 5(1); or
- 9 (b) any other body prescribed by the regulations for the  
10 purposes of this definition;
- 11 **recourse**, to performance security, means —
- 12 (a) in the case of a performance bond — the person named  
13 in the bond demanding and receiving payment under the  
14 bond; or
- 15 (b) in the case of retention money — the person who retains  
16 the retention money taking the money for themselves;
- 17 **related goods and services** has the meaning given in section 7;
- 18 **release**, of performance security, means —
- 19 (a) in the case of a performance bond — the return or  
20 cancellation of the bond; or
- 21 (b) in the case of retention money — payment of the money  
22 to the party who has carried out construction work, or  
23 supplied related goods and services, under a  
24 construction contract;
- 25 **respondent** means the person who is given a payment claim;
- 26 **retention money** has the meaning given in section 69;
- 27 **retention money trust account** has the meaning given in  
28 section 74;
- 29 **review adjudicator** means —
- 30 (a) an individual registered by the Building Commissioner  
31 under Part 5 Division 2 as a review adjudicator; and

- 1 (b) in relation to an adjudication review application — the  
2 review adjudicator appointed under section 44 to  
3 determine the application;
- 4 **scheduled amount** has the meaning given in section 25(2);
- 5 **serious offence** means an offence for which the maximum  
6 penalty is (or includes) imprisonment for 5 years or more;
- 7 **subcontractor** means a person who undertakes to carry out  
8 construction work, or to supply related goods and services,  
9 under a construction contract otherwise than as head contractor;
- 10 **value**, of a construction contract, has the meaning given in  
11 section 8;
- 12 **value**, of construction work or of related goods and services,  
13 means the value of the work or of the goods and services  
14 determined under section 19.

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

16 In this Act —

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

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

22 (1) In this Act —

23 **construction work** means the following —

- 24 (a) the construction of buildings, structures or civil works  
25 (whether permanent or not) that form, or are to form,  
26 part of land (including the seabed);
- 27 (b) the installation in or on any building, structure or civil  
28 work referred to in paragraph (a) of fittings that form, or  
29 are to form, part of the building, structure or civil work,  
30 including for —
- 31 (i) the supply of electricity, gas or water; and

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



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

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

- 18 (1) In this Act —  
19 **related goods and services** means —  
20 (a) goods of the following kinds —  
21 (i) materials or components (whether pre-fabricated  
22 or not) that are to form part of any building,  
23 structure, civil work or other thing resulting from  
24 construction work;  
25 (ii) plant or materials (whether supplied by sale, hire  
26 or otherwise) for use in connection with the  
27 carrying out of construction work;  
28 and  
29 (b) services of the following kinds —  
30 (i) the provision of labour to carry out construction  
31 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. Term used: 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 by proclamation  
27 under section 2(c).

28 Notes for this subsection:

- 29 1. Section 2(c) enables the staged commencement of this Act, including  
30 the later commencement of new industry requirements (such as those  
31 relating to retention money trusts).

- 1                   2.     The *Construction Contracts Act 2004* (renamed the *Construction*  
2                         *Contracts (Former Provisions) Act 2004*) continues to apply to  
3                         construction contracts entered into before the commencement of  
4                         Part 3 of this Act.
- 5           (2)   This Act applies to a construction contract —  
6                   (a)   whether written or oral, or partly written and partly oral  
7                         (and even if it is required by this Act to be written); and  
8                   (b)   whether entered into in this State or elsewhere; and  
9                   (c)   whether expressed to be governed by the law of this  
10                         State or the law of another jurisdiction.
- 11   **10.     Construction contracts to which Act does not apply**
- 12           (1)   This Act does not apply to a construction contract for home  
13                   building work if —  
14                   (a)   the principal is an individual; and  
15                   (b)   the work is not carried out in relation to multiple  
16                         dwellings or for the purposes of a residential  
17                         development business of the principal; and  
18                   (c)   the value of the contract does not exceed \$500 000 (or  
19                         any greater amount prescribed by the regulations for the  
20                         purposes of this subsection); and  
21                   (d)   the contract is not between a head contractor and a  
22                         subcontractor or other head contractor in relation to the  
23                         carrying out of the work.
- 24                   Note for this subsection:  
25                         On the enactment of this Act, a construction contract the value of  
26                         which is \$500 000 (or other amount prescribed by the regulations) or  
27                         more is not a home building work contract as defined in the *Home*  
28                         *Building Contracts Act 1991*.
- 29           (2)   This Act does not apply to a construction contract to the extent  
30                   that it provides that a party undertakes to carry out construction  
31                   work, or supply related goods and services, as an employee (as  
32                   defined in the *Industrial Relations Act 1979* section 7(1)) of the  
33                   party for whom the work is to be carried out or to whom the  
34                   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)    This section applies to a construction contract if —
- 15            (a)   a party to the contract is a building service contractor  
16                registered under the *Building Services (Registration)*  
17                *Act 2011* section 18; and
- 18            (b)   the contract is for the carrying out by that or the other  
19                party to the contract of construction work that is a  
20                building service (as defined in the *Building Services*  
21                *(Complaint Resolution and Administration) Act 2011*  
22                section 3) or for the supply by that or the other party to  
23                the contract of related goods and services for a building  
24                service (as so defined); and
- 25            (c)   the registration of the building service contractor entitles  
26                the contractor to carry out the class of building service  
27                referred to in paragraph (b); and
- 28            (d)   the value of the contract exceeds the amount prescribed  
29                by the regulations for the purposes of this section.

- 1       (2) A building service contractor who enters into a construction  
2       contract to which this section applies commits an offence if —
- 3           (a) the contract is not in writing; or
- 4           (b) the contract is in writing but does not include the  
5           mandatory contract information under subsection (5).
- 6       Penalty for this subsection: a fine of \$2 000.
- 7       (3) A building service contractor who has entered into a contract  
8       that becomes a construction contract to which this section  
9       applies because of a variation of the contract commits an  
10      offence if —
- 11          (a) the contract as varied is not in writing; or
- 12          (b) the contract as varied is in writing but does not include  
13          the mandatory contract information under  
14          subsection (5).
- 15      Penalty for this subsection: fine of \$2 000.
- 16      (4) It is a defence to a charge for an offence under subsection (2)  
17      or (3) to prove that —
- 18          (a) it was not reasonably practicable to comply with that  
19          subsection; and
- 20          (b) the work was required to be carried out, or the related  
21          goods and services were required to be supplied,  
22          urgently.
- 23      (5) For the purposes of subsections (2)(b) and (3)(b), the mandatory  
24      contract information is as follows —
- 25          (a) the names of the parties to the construction contract;
- 26          (b) the registration number of the building service  
27          contractor;
- 28          (c) a general description of the construction work to be  
29          carried out or of the related goods and services to be  
30          supplied;



- 1           (d) the amount to be paid for carrying out the construction  
2           work or supplying the related goods and services (or  
3           how that amount is to be calculated);  
4           (e) any other information prescribed by the regulations for  
5           the purposes of this subsection.  
6       (6) A construction contract is not invalidated because a building  
7       service contractor contravenes this section in relation to the  
8       contract.

9       **14. Prohibited terms: “pay when paid” provisions**

- 10       (1) In this section —  
11       *amount owing*, in relation to a construction contract, means the  
12       amount owing for construction work carried out or undertaken  
13       to be carried out, or for related goods and services supplied or  
14       undertaken to be supplied, under the contract;  
15       *pay when paid provision*, of a construction contract, means a  
16       provision of the contract —  
17       (a) that makes the liability of one party (the *first party*) to  
18       pay an amount owing to another party (the *second*  
19       *party*) contingent on payment to the first party by a  
20       further person (the *third party*) of the whole or any part  
21       of that amount; or  
22       (b) that makes the due date for payment of an amount owing  
23       by the first party to the second party dependent on the  
24       date on which payment of the whole or any part of that  
25       amount is made to the first party by the third party; or  
26       (c) that otherwise makes any of the following contingent or  
27       dependent on the operation of another contract —  
28           (i) the liability to pay an amount owing;  
29           (ii) the due date for payment of an amount owing;  
30           (iii) the making of a claim for an amount owing;  
31           (iv) the release of retention money or of a  
32           performance bond.

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

5 Note for this section:

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

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

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

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

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

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

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

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

21 **17. Right to progress payments**

- 22 (1) A person who, under a construction contract, has undertaken to  
23 carry out construction work, or to supply related goods and  
24 services, is entitled to receive payment under this section  
25 (a *progress payment*).
- 26 (2) A progress payment to which a person is entitled under this  
27 section includes the following —
- 28 (a) the final payment for construction work carried out, or  
29 for related goods and services supplied, under a  
30 construction contract;

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

- 1       (2) However, if the construction contract provides that the progress  
2       payment becomes payable on an earlier date than that provided  
3       by subsection (1), then the progress payment becomes payable  
4       on that earlier date.
- 5       (3) A progress payment for home building work becomes  
6       payable —
- 7           (a) if the construction contract provides for the matter — on  
8           the date determined in accordance with the contract; or
- 9           (b) if the construction contract does not provide for the  
10          matter — on the date that is 10 business days after a  
11          payment claim is made under Part 3 for the progress  
12          payment.
- 13       Notes for this section:
- 14       1. The due date for payment by a principal when there is no head  
15       contractor is 25 business days after the payment claim is made as  
16       provided by subsection (1)(b) — see definitions in section 4 of **head**  
17       **contractor** and **subcontractor**.
- 18       2. Section 14 provides that a “pay when paid” provision in a construction  
19       contract has no effect.

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

- 21       Interest is payable on the unpaid amount of a progress payment  
22       that has become payable at the greater of the following rates —
- 23           (a) the rate provided in the construction contract;
- 24           (b) the rate prescribed under the *Civil Judgments*  
25           *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               (the *claimant*) may give a claim for the progress payment to the  
6               person who, under the relevant construction contract, is or may  
7               be liable to make the progress payment (the *respondent*).

8         (2)    A payment claim is made for the purposes of this Act when the  
9               claim is given to the respondent.

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               *final payment* means the final payment (or a single or one-off  
16               payment) for construction work carried out, or related goods  
17               and services supplied, under a construction contract.

18         (2)    A payment claim for a progress payment may be made —  
19               (a)    on or after the last day of the named month in which  
20                       construction work was first carried out, or related goods  
21                       and services were first supplied, under the construction  
22                       contract; and

23               (b)    on or after the last day of each subsequent named  
24                       month.

25         (3)    However, if the construction contract provides that a payment  
26               claim for a particular named month may be made on or after an  
27               earlier date, then the payment claim may be made on or after  
28               that earlier date.

- 1 (4) A payment claim for a progress payment (other than for a final  
2 payment) may only be made before whichever of the following  
3 is the later —
- 4 (a) the date (if any) determined in accordance with the  
5 construction contract;
- 6 (b) 6 months after the construction work to which the  
7 payment claim relates was last carried out or the related  
8 goods and services to which the payment claim relates  
9 were last supplied.
- 10 (5) A payment claim for a final payment may only be made before  
11 whichever of the following is the later —
- 12 (a) the date (if any) determined in accordance with the  
13 construction contract;
- 14 (b) 28 days after the end of the last defects liability period  
15 for the construction contract;
- 16 (c) 6 months after the completion of all construction work  
17 to be carried out under the construction contract;
- 18 (d) 6 months after the supply of all related goods and  
19 services to be supplied under the construction contract.
- 20 (6) In subsection (5) and this subsection —
- 21 ***defects liability period***, for a construction contract, means the  
22 period that —
- 23 (a) starts on the day of the practical completion of  
24 construction work under the contract; and
- 25 (b) ends on the last day that any omission or defect in the  
26 construction work may be required or directed to be  
27 rectified under the contract and written law;
- 28 ***practical completion***, of construction work under a construction  
29 contract, means —
- 30 (a) if the contract provides for the day on which there is  
31 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       (7) If a construction contract is terminated, a payment claim may be  
6       made on or after the date of termination and before the relevant  
7       date provided by this section.
- 8       (8) Unless the construction contract otherwise provides, a claimant  
9       may only make one payment claim under the construction  
10      contract for a particular named month.
- 11      (9) Subsection (8) does not prevent the claimant from —
- 12           (a) making a single payment claim in respect of more than  
13           one progress payment; or
- 14           (b) including in a payment claim an unpaid amount that has  
15           been the subject of a previous payment claim.

16           Note for this section:

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

20   **24. Content of payment claims**

- 21      (1) A payment claim must —
- 22           (a) be made in writing and be in the approved form (if any);  
23           and
- 24           (b) indicate the amount of the progress payment that the  
25           claimant claims is payable by the respondent (the  
26           *claimed amount*); and
- 27           (c) describe the items and quantities of construction work,  
28           or related goods and services, to which the progress  
29           payment relates; and
- 30           (d) state that it is made under this Act; and
- 31           (e) include any other information required by the  
32           regulations.

- 1       (2) A payment claim given to the principal for home building work  
2       under a construction contract the value of which exceeds the  
3       amount referred to in section 10(1)(c) must include a  
4       homeowner's notice in the form prescribed by the regulations  
5       unless —  
6           (a) the principal is a corporation; or  
7           (b) the work is carried out in relation to multiple dwellings  
8           or for the purposes of a residential development business  
9           of the principal; or  
10          (c) the contract is between a head contractor and a  
11          subcontractor or other head contractor in relation to the  
12          carrying out of the work.
- 13       (3) A payment claim may be a document described as an invoice  
14       and, if so, the amount stated in the invoice is sufficient  
15       indication of the claimed amount.
- 16       (4) A payment claim need not be signed by the claimant.
- 17       **25. Response to payment claim: payment schedule**
- 18       (1) The respondent may respond to a payment claim by giving a  
19       payment schedule to the claimant before the earlier of the  
20       following —  
21           (a) the time required by the construction contract;  
22           (b) 15 business days after the payment claim is made.
- 23       (2) A payment schedule must —  
24           (a) be given in writing and be in the approved form (if any);  
25           and  
26           (b) identify the payment claim to which it relates; and  
27           (c) indicate the amount of the payment (if any) that the  
28           respondent proposes to make (the *scheduled amount*);  
29           and

1           (d) if the respondent does not propose to make any  
2           payment — indicate that the respondent does not  
3           propose to make any payment.

4       (3) If the scheduled amount is less than the claimed amount or no  
5       payment is proposed, the payment schedule must indicate —

6           (a) why the scheduled amount is less or no payment is  
7           proposed; and

8           (b) if the reason is that the respondent is withholding  
9           payment — the reason why the respondent is  
10          withholding payment.

11       Notes for this section:

12       1. This Division provides that if no payment schedule is given within the  
13       time allowed, the respondent becomes liable to pay the claimed  
14       amount.

15       2. Division 2 provides that if no payment schedule is given within the time  
16       allowed, the respondent cannot make an adjudication response to an  
17       adjudication application, and that if a payment schedule is given the  
18       respondent cannot include in an adjudication response reasons for  
19       withholding payment that were not identified in the payment schedule.

20       3. Division 3 provides that if no payment schedule is given, the  
21       respondent is not entitled to make an adjudication review application  
22       that challenges the determination of an adjudicator.

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

25       The respondent becomes liable to pay the claimed amount to the  
26       claimant on the due date for the progress payment to which the  
27       payment claim relates if the respondent does not respond to the  
28       claim by giving a payment schedule to the claimant within the  
29       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(7) or 37(6).
- 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.
- 29         (2)   The claimant must give a copy of the adjudication application
- 30               (and of any accompanying documents) to the respondent within
- 31               1 business day after the application is made.

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

5       Note for this section:

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

9       **31. Withdrawal of adjudication application**

- 10       (1) An adjudication application may be withdrawn by the claimant  
11       at any time before the application is determined by giving  
12       written notice of the withdrawal —  
13               (a) to the respondent; and  
14               (b) to the adjudicator appointed to determine the application  
15               or to the authorised nominating authority to which the  
16               application was made.  
17       (2) An adjudication application is taken to be withdrawn if the  
18       respondent has, before the application is determined, paid the  
19       claimant the claimed amount in full.

20       **32. Appointment of adjudicator**

- 21       (1) If an adjudication application is made to an adjudicator, the  
22       adjudicator is taken to be appointed to determine the application  
23       when written notice of the acceptance of the appointment is  
24       given by the adjudicator to the claimant and the respondent.  
25       (2) If an adjudication application is made to an authorised  
26       nominating authority —  
27               (a) the authority must appoint an adjudicator; and  
28               (b) the adjudicator is taken to be appointed to determine the  
29               application when written notice of the appointment is  
30               given by the authority to the claimant and the  
31               respondent.

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

1   **33.     Disqualification of adjudicator with conflict of interest in**  
2       **adjudication application**

3       (1) In this section —

4       ***relevant construction contract***, in relation to an adjudication  
5       application, 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 construction contract; or

15           (b) prepared (or was involved in the preparation of) a  
16           relevant construction contract or the payment claim,  
17           payment schedule, adjudication application or  
18           adjudication 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 section.

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 Division 1, 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       **35. Adjudication procedures**

- 5       (1) An adjudicator must, subject to complying with the  
6       requirements of this Division, determine an adjudication  
7       application fairly and as quickly, informally and inexpensively  
8       as possible.
- 9       (2) An adjudicator cannot delegate the determination of an  
10      adjudication application to another person or body.
- 11      (3) For the purposes of determining an adjudication application, the  
12      adjudicator may do any of the following —
- 13              (a) request further submissions from either party and give  
14              the other party an opportunity to make submissions  
15              commenting on any further submissions made;
- 16              (b) set deadlines for any further submissions;
- 17              (c) call a conference of the parties;
- 18              (d) carry out an inspection, or arrange for a test, of any  
19              matter or thing to which the claim relates;
- 20              (e) engage an expert to investigate and report on any matter  
21              to which the claim relates;
- 22              (f) engage an authorised nominating authority to assist the  
23              adjudicator with administrative duties.
- 24      (4) A conference of the parties that is called by the adjudicator must  
25      be conducted informally.
- 26      (5) The adjudicator cannot carry out an inspection, arrange for a test  
27      or engage an expert if all the parties object.
- 28      (6) This section does not authorise the carrying out of an inspection  
29      or testing in any premises, or the inspection or testing of any  
30      thing, without the consent of the occupier of the premises or the  
31      owner of the thing.

1       (7) An adjudicator's determination of an adjudication application is  
2       not affected by the failure of a party to make a submission  
3       within the time allowed or to comply with the adjudicator's call  
4       for a conference.

5       (8) An adjudicator is not bound by the rules of evidence.

6       (9) Adjudicators may, to the extent that their procedure is not  
7       otherwise regulated under this Act, determine their own  
8       procedure.

9       **36. Jurisdiction to make determination, frivolous or vexatious**  
10       **applications and complex applications**

11       (1) An adjudicator must consider whether the adjudicator has  
12       jurisdiction to determine the adjudication application.

13       (2) If the adjudicator decides that the adjudicator does not have  
14       jurisdiction to determine the adjudication application, the  
15       adjudicator's determination of the application must set out that  
16       decision and provide that no amount is payable under the  
17       determination.

18       (3) If an adjudicator decides that an adjudication application —

19           (a) is frivolous or vexatious; or

20           (b) is too complex for the adjudicator to make a fair  
21           determination within the time available to the  
22           adjudicator,

23       the adjudicator's determination of the application must set out  
24       that decision and provide that no amount is payable under the  
25       determination.

26       (4) An adjudicator's determination must set out the reasons for a  
27       decision that the adjudicator does not have jurisdiction to  
28       determine the adjudication application or that the adjudication  
29       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 has given an adjudication response  
12 within the time allowed under this Division — the date  
13 on which the response is given; or
- 14           (b) if the respondent has not given an adjudication response  
15 within the time allowed under this Division — the last  
16 date on which the response could have been given; or
- 17           (c) if the respondent is not entitled to give an adjudication  
18 response — the date on which the adjudicator was  
19 appointed to determine the application.
- 20       (3) However, the claimant and the respondent may agree to extend  
21 the time by which the adjudicator must determine the  
22 adjudication application under this section, but only if the total  
23 period of all extensions does not exceed 20 business days.
- 24       (4) An adjudicator's determination is not invalid merely because it  
25 is made after the time allowed by this section for determining  
26 the adjudication application.
- 27       (5) If the adjudicator fails to determine an adjudication application  
28 within the time required by this section —
- 29           (a) the claimant may withdraw the application by giving  
30 written notice of the withdrawal to the adjudicator and  
31 the respondent; and



1           (b) the claimant may make another adjudication application  
2           within 5 business days after the withdrawal despite the  
3           expiry of the time otherwise allowed for making  
4           adjudication applications.

5       (6) Despite subsection (1), the adjudicator may determine an  
6       adjudication application before an adjudication response is  
7       given if the adjudicator decides that the adjudicator does not  
8       have jurisdiction to determine the application or that the  
9       application is frivolous or vexatious.

10       Notes for this section:

- 11       1. Under Division 4 the adjudicator may, when determining the proportion  
12       of adjudication fees and expenses payable by each party, have regard  
13       to any unreasonable withholding of consent by a party to extending the  
14       period for determining the adjudication application.
- 15       2. Under Division 4 the adjudicator is not entitled to adjudication fees and  
16       expenses if the adjudicator fails to determine the adjudication  
17       application within the time allowed by this section.

18       **38. Adjudicator's determination**

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

29       Notes for this subsection:

- 30       1. Part 4 provides that the adjudicator may also determine that an amount  
31       of money is to be paid out of a retention money trust account under  
32       that Part.
- 33       2. Division 4 provides that the adjudicator is to determine the amount of  
34       adjudication fees and expenses payable to the adjudicator and the  
35       proportion of the amount for which each party is liable.

- 1                   3.     Sections 58 and 59 provide that a determination may require the  
2                             release of performance security or the substitution of performance  
3                             security that is proposed in a payment claim.
- 4           (2)     In determining an adjudication application, the adjudicator may  
5                   consider only the following matters —
- 6                   (a)     this Act and the regulations;
- 7                   (b)     the relevant construction contract;
- 8                   (c)     the relevant payment claim and the adjudication  
9                             application, together with all submissions (including  
10                            accompanying documents) duly made by the claimant in  
11                            support of the claim and application;
- 12                  (d)     the relevant payment schedule and adjudication response  
13                            (if any), together with all submissions (including  
14                            accompanying documents) duly made by the respondent  
15                            in support of the schedule and response;
- 16                  (e)     any further submissions of the claimant or respondent  
17                            (including accompanying documents) requested by the  
18                            adjudicator;
- 19                  (f)     the outcome of any conference of the parties called by  
20                            the adjudicator;
- 21                  (g)     the results of any inspection carried out or testing  
22                            arranged by the adjudicator;
- 23                  (h)     any expert report obtained by the adjudicator.
- 24           (3)     In determining an adjudication application, the adjudicator must  
25                   not consider the following matters —
- 26                   (a)     an adjudication response that is given after the time  
27                            allowed by this Division;
- 28                   (b)     any reasons included in an adjudication response for  
29                            withholding payment that cannot under this Division be  
30                            included in the adjudication response because those  
31                            reasons were not included in the payment schedule;
- 32                   (c)     any submissions (including accompanying documents)  
33                            made to the adjudicator that are not authorised to be  
34                            made under this Division or that contravene any other

- 1                    limitation prescribed by the regulations on the  
2                    submissions that may be made.
- 3        (4)    The 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 adjudicator to the claimant, respondent  
8                    and Building Commissioner.
- 9        (5)    If the adjudicator (or any other adjudicator or review  
10                  adjudicator) has, for the purposes of a previous determination,  
11                  calculated —
- 12                  (a)    the value of any construction work carried out under a  
13                  construction contract; or  
14                  (b)    the value of any related goods and services supplied  
15                  under a construction contract,
- 16                  the adjudicator is, in a subsequent determination that involves  
17                  calculating the value of that construction work or of those  
18                  related goods and services, to give the work or related goods  
19                  and services the same value as that previously calculated unless  
20                  the claimant or respondent satisfies the adjudicator that the  
21                  value has changed since the previous calculation.
- 22        (6)    The adjudicator may, on the adjudicator's own initiative or on  
23                  the application of the claimant or respondent, correct the  
24                  adjudicator's determination if it contains —
- 25                  (a)    a clerical mistake or defect of form; or  
26                  (b)    an error arising from an accidental slip or omission; or  
27                  (c)    a material arithmetic error or a material mistake in the  
28                  description of any person, thing or matter.

**Division 3 — Review of adjudications**

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

- (1) A claimant or respondent may apply for a review of an adjudicator's determination of an adjudication application if authorised to do so by this section (an *adjudication review application*).
- (2) A claimant may apply for a review of the adjudicator's determination of an adjudication application if —
  - (a) the adjudicated amount is less than the claimed amount and the amount of that difference exceeds the minimum amount prescribed by the regulations for the purposes of this paragraph; or
  - (b) the adjudicator decided that the adjudicator did not have jurisdiction to determine the application and the claimed amount exceeds the minimum amount prescribed by the regulations for the purposes of this paragraph.
- (3) A respondent may apply for a review of the adjudicator's determination of an adjudication application if —
  - (a) the respondent gave the claimant a payment schedule within the time allowed by Division 1; and
  - (b) the adjudicated amount is more than the scheduled amount and the amount of that difference exceeds the minimum amount prescribed by the regulations for the purposes of this paragraph.
- (4) A decision that the adjudicator had jurisdiction to determine an adjudication application cannot be challenged by the respondent in an adjudication review application.
- (5) An adjudication review application must be made within 5 business days after the claimant or respondent making the application is given the adjudicator's determination.

**40. Adjudicated amount in dispute to be paid into trust account before respondent may make adjudication review application**

(1) The respondent cannot make an adjudication review application unless —

- (a) the respondent has paid any part of the adjudicated amount that is not disputed by the respondent to the claimant; and
  - (b) the respondent has paid the adjudicated amount (or part) that is disputed by the respondent into a trust account with a recognised financial institution —
    - (i) established by the respondent; or
    - (ii) established by the authorised nominating authority to which the application was made;
- and
- (c) the respondent has given the claimant written notice of the payment into the trust account, together with information that identifies the trust account.

(2) Money held in a trust account under this section (including any accrued interest) is taken to be held by the respondent or the authorised nominating authority (as the case requires) on trust for the benefit of the claimant until the adjudication review application is determined or withdrawn and all money required to be paid to the claimant as a result of that determination or withdrawal has been paid.

(3) After all that money has been paid to the claimant —

- (a) in the case of a trust account established by the respondent — the respondent is entitled to any money remaining in the trust account; and
- (b) in the case of a trust account established by an authorised nominating authority — the authority is entitled to any money remaining in the trust account that is equal to the amount of accrued interest to the date of

1 payment to the claimant and the respondent is entitled to  
2 any remainder.

3 (4) The regulations may make provision for or with respect to trust  
4 accounts under this section and payments from the accounts,  
5 including by applying provisions of Part 4, with or without  
6 modification.

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

8 An adjudication review application must be made to the  
9 authorised nominating authority chosen by the claimant or  
10 respondent making the application.

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

12 (1) An adjudication review application —

13 (a) must be made in writing and be in the approved form (if  
14 any); and

15 (b) must be accompanied by a copy of the following —

16 (i) the construction contract or the relevant  
17 provisions of the construction contract;

18 (ii) the payment claim;

19 (iii) the payment schedule (if any);

20 (iv) the adjudication application;

21 (v) the adjudication response (if any);

22 (vi) any submissions made to the adjudicator by the  
23 claimant or respondent (including accompanying  
24 documents);

25 (vii) the adjudicator's determination;

26 and

27 (c) must be accompanied by the application fee (if any)  
28 determined by the authorised nominating authority to  
29 which the adjudication review application is made; and

1           (d) may contain submissions relevant to the application that  
2           the claimant or respondent making the application  
3           chooses to include.

4           (2) The claimant or respondent cannot include any reasons for a  
5           matter in the adjudication review application unless those  
6           reasons were raised in the original adjudication being reviewed.

7           (3) The claimant or respondent making the adjudication review  
8           application must give a copy of the application (and of any  
9           accompanying documents) to the other party within 1 business  
10          day after the application is made.

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

15          Note for this section:

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

#### 19      **43.      Withdrawal of adjudication review application**

20          An adjudication review application may be withdrawn by the  
21          claimant or respondent who made the application at any time  
22          before the application is determined by giving written notice of  
23          the withdrawal —

- 24                  (a) to the other party to the adjudication review; and  
25                  (b) to the review adjudicator appointed to determine the  
26                  application or the authorised nominating authority to  
27                  which the application was made.

#### 28      **44.      Appointment of review adjudicator**

29          (1) If an adjudication review application is made to an authorised  
30          nominating authority —

- 31                  (a) the authority must appoint a review adjudicator; and

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



- 1       (7) Section 33 applies to a conflict of interest of a review  
2       adjudicator in relation to an adjudication review application in  
3       the same way as it applies to a conflict of interest of an  
4       adjudicator in relation to an adjudication application.
- 5       (8) The adjudicator who made the determination that is the subject  
6       of the adjudication review application cannot be appointed as  
7       the review adjudicator.

8       **45. Adjudication review response**

- 9       (1) The respondent (if an adjudication review application is made  
10      by the claimant) or the claimant (if an adjudication review  
11      application is made by the respondent) may give the review  
12      adjudicator a response to the adjudication review application  
13      (the **adjudication review response**) within 10 business days  
14      after receiving a copy of the adjudication review application.
- 15      (2) The adjudication review response —  
16          (a) must be given in writing and be in the approved form (if  
17          any); and  
18          (b) must identify the adjudication review application to  
19          which it relates; and  
20          (c) may contain submissions relevant to the response that  
21          the respondent or claimant chooses to include.
- 22      (3) The respondent or claimant cannot include any reasons for a  
23      matter in the adjudication review response unless those reasons  
24      were raised in the original adjudication being reviewed.
- 25      (4) The party giving the adjudication review response must give a  
26      copy of the response to the other party to the adjudication  
27      review within 1 business day after the response is given to the  
28      review adjudicator.

1     **46.     Adjudication review procedures**

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

**47. Time allowed for review adjudicator to determine adjudication review application**

- (1) The review adjudicator must not determine the adjudication review application until after the adjudication review response is given or, if not given, until after the last date on which the response could have been given.
- (2) The review adjudicator must determine an adjudication review application within 10 business days after —

  - (a) the date on which the adjudication review response is given; or
  - (b) if an adjudication review response is not given within the time allowed under this Division — the last date on which the response could have been given.
- (3) However, the claimant and the respondent may agree to extend the time by which the review adjudicator must determine the adjudication review application under this section, but only if the total period of all extensions does not exceed 10 business days.
- (4) A review adjudicator's determination is not invalid merely because it is made after the time allowed by this section for determining the adjudication review application.
- (5) If the review adjudicator fails to determine an adjudication review application within the time required by this section —

  - (a) the claimant or respondent who made the application may withdraw the application by giving written notice of the withdrawal to the review adjudicator and the other party to the adjudication review; and
  - (b) the claimant or respondent may make another adjudication review application within 5 business days after the withdrawal despite the expiry of the time otherwise allowed for making adjudication review applications.

1 Notes for this section:

- 2 1. Under Division 4 the review adjudicator may, when determining the  
3 proportion of adjudication fees and expenses payable by each party,  
4 have regard to any unreasonable withholding of consent by a party to  
5 extending the period for determining an adjudication review  
6 application.
- 7 2. Under Division 4 the review adjudicator is not entitled to adjudication  
8 fees and expenses if the review adjudicator fails to determine an  
9 adjudication review application within the time allowed by this section.

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

11 (1) The review adjudicator must —

- 12 (a) confirm the determination of the adjudicator that is the  
13 subject of the adjudication review application; or
- 14 (b) quash that determination and make a determination  
15 under this section.

16 (2) If that determination is quashed, the review adjudicator must  
17 determine —

- 18 (a) the amount of the progress payment, if any, to be paid  
19 by the respondent to the claimant (the *adjudicated*  
20 *amount*); and
- 21 (b) the due date for the payment of that amount under  
22 section 20; and
- 23 (c) the rate of interest payable on that amount under  
24 section 21; and
- 25 (d) if no amount of progress payment is required to be  
26 paid — that no amount is payable.

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

- 29 (a) the amount is taken to have been paid by the respondent  
30 under the determination of the review adjudicator; and
- 31 (b) if the amount exceeds the amount payable under the  
32 determination of the review adjudicator — the claimant  
33 must repay that excess amount to the respondent and  
34 pay interest on that excess amount at the same rate as

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

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

2    **49.       Terms used**

3                    In this Division —

4                    *adjudicating* means accepting, considering and determining an  
5                    adjudication application or adjudication review application;

6                    *adjudication fees and expenses* means the amount, by way of  
7                    fees and expenses, payable to an adjudicator or review  
8                    adjudicator under this Division for adjudicating an adjudication  
9                    application or adjudication review application.

10   **50.       Adjudication fees and expenses**

11                (1) An adjudicator or review adjudicator is entitled to be paid by  
12                way of fees and expenses for adjudicating an adjudication  
13                application or adjudication review application —

14                    (a) the amount agreed between the adjudicator or review  
15                    adjudicator and the parties to the adjudication or  
16                    adjudication review; or

17                    (b) if the amount is not agreed — the amount determined at  
18                    the rates approved and published by the Building  
19                    Commissioner.

20                (2) However, the amount of adjudication fees and expenses cannot  
21                exceed any maximum amount prescribed by the regulations for  
22                the purposes of this section.

23                (3) The regulations may prescribe different maximum amounts of  
24                adjudication fees and expenses depending on the amount of the  
25                payment claim or on other specified factors.

26                (4) The parties to an adjudication or adjudication review are —

27                    (a) jointly and severally liable for the payment of  
28                    adjudication fees and expenses; and

29                    (b) each liable to contribute to the payment of adjudication  
30                    fees and expenses in equal proportions or in any other

- 1 proportions determined by the adjudicator or review  
2 adjudicator.
- 3 (5) The adjudicator or review adjudicator may have regard to the  
4 following matters in determining the proportion of adjudication  
5 fees and expenses that each party is liable to pay —
- 6 (a) the conduct of the parties and whether either party acted  
7 unreasonably before or during the adjudication or  
8 adjudication review;
- 9 (b) the reasons given by a party (or the failure to give  
10 reasons) for not making the progress payment  
11 concerned;
- 12 (c) any attempt by the respondent to raise new reasons in  
13 relation to the application that were not included in the  
14 respondent's payment schedule;
- 15 (d) the relative success of the parties in relation to the  
16 application;
- 17 (e) whether a party made, or acted in relation to, the  
18 application —
- 19 (i) for an improper purpose; or  
20 (ii) vexatiously or frivolously; or  
21 (iii) without reasonable prospects of success;
- 22 (f) the services provided by the adjudicator or review  
23 adjudicator (including the time taken to consider  
24 different aspects of the application);
- 25 (g) any other matter the adjudicator or review adjudicator  
26 considers relevant.
- 27 (6) The determination of an adjudication application or adjudication  
28 review application under this Part must include —
- 29 (a) the amount of adjudication fees and expenses payable to  
30 the adjudicator or review adjudicator; and  
31 (b) the proportion of that amount that each party is liable to  
32 pay.

- 1 (7) Apart from liability for the payment of adjudication fees and  
2 expenses, the parties to an adjudication or adjudication review  
3 are liable for their own costs and cannot recover those costs  
4 from each other.
- 5 (8) An adjudicator or review adjudicator is not entitled to  
6 adjudication fees and expenses if the adjudicator or review  
7 adjudicator fails to determine the adjudication application or  
8 adjudication review application within the time allowed under  
9 this Part.
- 10 (9) If an adjudication application or adjudication review application  
11 is withdrawn, the adjudicator or review adjudicator is only  
12 entitled to adjudication fees and expenses up to the time of the  
13 withdrawal.
- 14 (10) If the adjudicator determines that no amount is payable by the  
15 respondent because the adjudication application was frivolous  
16 or vexatious, the adjudication fees and expense are payable by  
17 the claimant.
- 18 **51. Miscellaneous provisions relating to adjudication fees and**  
19 **expenses**
- 20 (1) An adjudicator or review adjudicator may withhold giving the  
21 determination of the adjudication application or adjudication  
22 review application to the parties until the adjudication fees and  
23 expenses are paid if the adjudicator or review adjudicator has  
24 given the parties an invoice for the adjudication fees and  
25 expenses before the time allowed for determining the  
26 application.
- 27 (2) The time allowed for determining the adjudication application  
28 or adjudication review application is extended until the time that  
29 the adjudication fees and expenses are paid to the adjudicator or  
30 review adjudicator.
- 31 (3) The authorised nominating authority to whom an adjudication  
32 application or adjudication review application is made may  
33 require the applicant to provide a reasonable deposit or security



(7) The conditions that may be imposed on the authorisation of a nominating authority under Part 5 include the maximum amount that the authority may charge an adjudicator or review adjudicator for performing administrative duties for the adjudicator or review adjudicator.

(a) the date that is 5 business days after the date on which the adjudicator or review adjudicator gives a copy of the determination to the respondent; or

- 1 (b) if the adjudicator or review adjudicator has determined  
2 that the amount becomes payable to the claimant on a  
3 later date — that later date.
- 4 (2) The requirement under subsection (1) that the respondent pay  
5 the amount determined by an adjudicator to the claimant is  
6 subject to section 40.
- 7 (3) If a review adjudicator determines that the claimant must repay  
8 an excess amount of payment, the claimant must pay that excess  
9 amount to the respondent on or before —
- 10 (a) the date that is 5 business days after the date on which  
11 the review adjudicator gives a copy of the determination  
12 to the claimant; or
- 13 (b) if the review adjudicator has determined that the amount  
14 becomes payable to the respondent on a later date —  
15 that later date.
- 16 (4) If any interest payable on the adjudicated amount or the excess  
17 amount is not paid by the due date, the amount of the unpaid  
18 interest is added to (and becomes part of) the adjudicated  
19 amount payable, or the excess amount repayable, under this  
20 section.
- 21 (5) If a party to an adjudication or adjudication review has paid the  
22 other party's share of the adjudication fees and expenses but has  
23 not been reimbursed by the other party, the adjudicator or  
24 review adjudicator may, at the request of the party who paid that  
25 share, adjust the determination of the adjudication or  
26 adjudication review so that the amount of that share becomes  
27 part of the adjudicated amount or other amount payable under  
28 the determination to the party who paid that share.
- 29 **53. Certification of determination if adjudicated amount not**  
30 **paid or excess amount not repaid**
- 31 (1) If the respondent fails to pay the adjudicated amount in full as  
32 required by section 52, the claimant may request the Building  
33 Commissioner to provide a certified copy of the determination

1 of the adjudicator or review adjudicator to enable enforcement  
2 of the adjudicated amount as a monetary judgment of a court of  
3 competent jurisdiction.

4 Note for this subsection:

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

8 (2) If the claimant fails to repay the excess amount in full as  
9 required by section 52, the respondent may request the Building  
10 Commissioner to provide a certified copy of the determination  
11 of the review adjudicator to enable enforcement of the excess  
12 amount as a monetary judgment of a court of competent  
13 jurisdiction.

14 (3) A certified copy of a determination is a copy of the  
15 determination that the Building Commissioner certifies is a true  
16 and accurate copy of the determination.

17 (4) The Building Commissioner may charge a reasonable fee for  
18 providing a certified copy of a determination under this section.

19 **54. Certified copy of determination enforceable as monetary**  
20 **judgment**

21 (1) In this section —

22 *monetary judgment* has the meaning given in the *Civil*  
23 *Judgments Enforcement Act 2004* section 3.

24 (2) A certified copy of a determination provided by the Building  
25 Commissioner is taken to be a monetary judgment of a court of  
26 competent jurisdiction.

27 (3) A certified copy of a determination cannot be enforced under  
28 the *Civil Judgments Enforcement Act 2004* Part 4 unless the  
29 application for an enforcement order under that Part is  
30 accompanied by an affidavit of the applicant that the  
31 adjudicated amount or excess amount (as the case requires) has  
32 not been paid in full at the time the application is 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 to a party to the  
6           contract under or for the purposes of this Part; and
- 7           (b) may make any orders it considers appropriate for the  
8           restitution of any amount so paid, and any other orders it  
9           considers appropriate, having regard to its decision in  
10          those proceedings.
- 11       (4) Evidence of anything lawfully said or done in the course of an  
12       adjudication or adjudication review under this Part is not  
13       admissible before a court, arbitrator or other person or body,  
14       unless the parties to the adjudication or adjudication review  
15       consent to the admission of the evidence.
- 16       (5) This section does not affect —
- 17           (a) the operation of section 111; or
- 18           (b) proceedings referred to in section 27(3) or 54(5); or
- 19           (c) an entitlement conferred by Division 7 or 9 or anything  
20           arising from the exercise of that entitlement.

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

23       **56. Terms used**

24       In this Division —

25       *authorised issuing institution* means —

- 26           (a) a recognised financial institution; or
- 27           (b) a person authorised under the *Insurance Act 1973*  
28           (Commonwealth) to carry on insurance business in  
29           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 (***party A***) an amount of money  
8            up to a specified limit on demand by party A, as security for the  
9            performance of obligations under the contract of another party  
10          to the contract (***party B***);
- 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) Notice of intention to have recourse to the performance security  
27          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 for the substitution of performance security  
5           must, in addition to the requirements of Division 1 —
- 6                   (a) identify the construction contract for which the  
7                   substitution is proposed; and
- 8                   (b) indicate the amount of retention money to be released;  
9                   and
- 10                  (c) state that it is made under this Act; and
- 11                  (d) be accompanied by a draft of the compliant performance  
12                  bond, or of each compliant performance bond, that the  
13                  claimant proposes to provide in substitution for the  
14                  release of the retention money (being a draft in final  
15                  form except for its execution by the authorised issuing  
16                  institution); and
- 17                  (e) include any other information required by the  
18                  regulations.
- 19           (5) The determination of an adjudicator or review adjudicator may  
20           require the substitution of performance security that is proposed  
21           in a payment claim.
- 22           (6) An adjudication application or adjudication review application  
23           that seeks the substitution of performance security proposed in a  
24           payment claim must be accompanied by a compliant  
25           performance bond executed by the authorised issuing institution  
26           that is in the same form, or substantially in the same form, as the  
27           draft performance bond that accompanied the payment claim.
- 28           (7) The respondent may, in an adjudication response or adjudication  
29           review response, dispute —
- 30                   (a) the authenticity of an executed performance bond (or the  
31                   lack of reference or other information that would enable  
32                   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  
33 the retention money to be released as the only person

- 1 who may demand and receive payment under the bond  
2 (unless the relevant construction contract or a  
3 subsequent agreement between the parties to the  
4 contract provides that another person may demand and  
5 receive payments under the bond);
- 6 (g) the performance bond identifies an authorised issuing  
7 institution as the institution issuing the bond (including  
8 its Australian Business Number and its Australian  
9 Company Number or Registered Body Number);
- 10 (h) the times for release of performance security under the  
11 construction contract are maintained by the performance  
12 bond;
- 13 (i) the credit rating of the authorised issuing institution  
14 issuing the performance bond satisfies any minimum  
15 credit rating requirement that is prescribed by the  
16 regulations;
- 17 (j) the performance bond satisfies any other requirements  
18 prescribed by the regulations for the purposes of this  
19 section.
- 20 (2) If a performance bond that is not a complaint performance bond  
21 is included in multiple performance bonds sought to be  
22 substituted at the same time for retention money, the right to  
23 substitute performance security is not affected if the remaining  
24 bonds are compliant performance bonds that satisfy the  
25 requirements of this section for the substitution of performance  
26 security.
- 27 **61. Application of Division where third parties involved in**  
28 **performance securities**
- 29 (1) Section 57 extends to recourse to performance security that is  
30 held by or provided to a third party and accordingly a reference  
31 in that section to a party to the construction contract who has  
32 recourse to performance security includes a reference to that  
33 third party.

- 1       (2) If a party to a construction contract has recourse to performance  
2       security in contravention of section 57 and the performance  
3       security is secured over the property of a third party, a claim for  
4       damages that the third party may have against the other party to  
5       the contract may be made directly against the party that  
6       contravened section 57 as if the third party were a party to the  
7       contract.
- 8       (3) Section 58 extends to the release of performance security that is  
9       held by or provided to a third party.
- 10      (4) A performance bond cannot be substituted for retention money  
11      under section 59 if —
- 12              (a) the retention money is held by a third party; or  
13              (b) the performance bond is provided by a third party.

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

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

- 17      (1) A claimant may suspend carrying out construction work, or  
18      supplying related goods and services, under a construction  
19      contract if the claimant makes a payment claim for a progress  
20      payment and —
- 21              (a) the respondent does not pay the claimed or scheduled  
22              amount owed (as defined to in section 27(1)) to the  
23              claimant in full on or before the due date for the  
24              progress payment; or
- 25              (b) the respondent does not pay the adjudicated amount in  
26              full as required by section 52; or
- 27              (c) the respondent fails to pay any retention money relating  
28              to the progress payment into a retention money trust  
29              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, to enforce payment of an  
26 adjudicated amount or to require payment of retention money  
27 into a retention money trust account.
- 28 **63. Provisions relating to suspension of work or supply**
- 29 (1) In this section —  
30 *loss* includes expense and damage.

- 1       (2) If a claimant, in exercising a right under this Division to  
2       suspend carrying out construction work or supplying related  
3       goods and services, incurs a loss because the respondent  
4       removes any part of the work or supply from the construction  
5       contract (whether pursuant to a right conferred by the contract  
6       or otherwise), the respondent is liable to pay the claimant the  
7       amount of the loss.
- 8       (3) A payment claim may be made for the amount of that loss as if  
9       it were an amount owing to the claimant by the respondent  
10      under the construction contract, and this Part applies  
11      accordingly with any necessary modifications.
- 12      (4) A claimant who suspends construction work or the supply of  
13      related goods and services under a construction contract in  
14      accordance with a right under this Division is not liable for any  
15      loss suffered by the respondent (or any person claiming through  
16      the respondent) because the claimant did not carry out the work  
17      or supply the goods and services during the period of  
18      suspension.
- 19      (5) The protection from liability for loss under subsection (4) is not  
20      affected if a court finds that a thing done or arising under this  
21      Act that was relied on by the claimant in good faith to suspend  
22      work or supply was invalid.

23                                   **Division 8 — Claimant's right to lien**

24      **64.      Lien over unfixed plant and materials in respect of unpaid**  
25      **progress payments**

- 26      (1) If a progress payment becomes payable, the claimant is entitled  
27      to exercise a lien in relation to the unpaid amount over any  
28      unfixed plant or materials supplied by the claimant for use in  
29      connection with the carrying out of construction work for the  
30      respondent.

- 1       (2) Any lien or charge over the unfixed plant or materials existing  
2       before the date on which the progress payment becomes payable  
3       takes priority over a lien under this section.
- 4       (3) This section does not confer on a claimant any right against a  
5       third party who is the owner of the unfixed plant or materials.
- 6       (4) Except as provided by this section, the law applying to the  
7       determination of priorities between different interests in  
8       personal property applies to the determination of priorities  
9       between a lien under this section over any unfixed plant or  
10      materials and any other interest in the unfixed plant or materials.
- 11      (5) The *Personal Property Securities Act 2009* (Commonwealth)  
12      section 73(2) is declared to apply to liens under this section.

13       **Division 9 — Miscellaneous provisions relating to payment**  
14       **claims**

15      **65. Offence: threatening or intimidating claimants**

- 16      (1) In this section —  
17      ***claimant*** includes a person who is entitled to make a payment  
18      claim.
- 19      (2) A person must not directly or indirectly threaten or intimidate,  
20      or attempt to threaten or intimidate, a claimant in relation to the  
21      claimant's entitlement to, or claim for, a progress payment or to  
22      the claimant's exercise of any other rights under this Part.
- 23      Penalty for this subsection:
- 24          (a) in the case of an individual — a fine of \$50 000;  
25          (b) in the case of a body corporate — a fine of \$250 000.

26      **66. Jurisdictional error in determination of adjudicator or**  
27      **review adjudicator**

- 28      (1) This section applies to any proceedings before the Supreme  
29      Court relating to any matter arising under a construction  
30      contract in which the Court makes a finding that a jurisdictional

1 error has occurred in relation to the determination of an  
2 adjudicator or review adjudicator under this Part.

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

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

9 **67. No appeal or review of determination of adjudicator or**  
10 **review adjudicator except under this Part**

11 Except as provided by section 66 and Division 3, a decision or  
12 determination of an adjudicator on an adjudication application,  
13 or of a review adjudicator on an adjudication review  
14 application, is not subject to appeal or review.

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

16 (1) A corporation in liquidation cannot —  
17 (a) make a payment claim under this Part; or  
18 (b) take any action under this Part to enforce a payment  
19 claim (including by making an adjudication application  
20 or adjudication review application or by taking recovery  
21 proceedings referred to in section 27(3)); or  
22 (c) take any action under this Part to enforce the  
23 determination of an adjudicator or review adjudicator.

24 (2) If a corporation in liquidation has made an adjudication  
25 application or adjudication review application that is not finally  
26 determined immediately before the day on which it commenced  
27 to be in liquidation, the application is taken to have been  
28 withdrawn on that day.

**Part 4 — Retention money trusts**

**69. Terms used**

(1) In this Part —

**government party** —

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

(b) includes the following —

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

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

**retention money** means money (inclusive of GST) —

(a) retained by a party to a construction contract (**party A**) out of money payable under the contract by party A to another party to the contract (**party B**); or

(b) paid to a party to a construction contract (**party A**) by or on behalf of another party to the contract (**party B**),



as security for the performance of obligations of party B under the contract in relation to the carrying out of construction work, or the supply of related goods and services, by party B;

Notes for this definition:

1. Retention money held by a third party is not retention money to which this Part applies.
2. Retention money is also referred to in the building and construction industry as a “hold-back”.

***retention money trust commencement date***, for any retention money, means —

- (a) in the case of money retained by party A to a construction contract as referred to in paragraph (a) of the definition of ***retention money*** — the date on which the money first becomes payable to party B for carrying out construction work, or supplying related goods and services, under the contract (but for the right of party A to retain the money); or
- (b) in the case of money paid to party A to a construction contract as referred to in paragraph (b) of the definition of ***retention money*** — the date of payment;

***retention money trust end date***, for any retention money, means the earlier of the following —

- (a) the date on which the money is paid to party B for carrying out construction work, or supplying related goods and services, under the construction contract;
- (b) the date on which party B gives written notice to party A who retains the retention money that party B will not make a claim under Part 3 or the construction contract for the release of the retention money;
- (c) the date on which party A becomes entitled under the construction contract to recourse to the retention money;
- (d) the date that the money is no longer required to be held as security under the construction contract following a determination of an adjudicator or review adjudicator

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- 1                   under Part 3, a decision of an arbitrator under the  
2                   construction contract or an order of a court or 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 party A to a construction  
8               contract as referred to in paragraph (b) of the definition  
9               of *retention money* in subsection (1) if it is paid into an  
10              account of, or under the control of, party A; and
- 11          (b)   money that is paid (or taken to be paid) to party A to a  
12               construction contract as so referred to is taken to be  
13               retained by party A.
- 14   (3)   For the purposes of this Part, money payable for construction  
15           work carried out, or for related goods and services supplied,  
16           under a construction contract is taken to be retained by party A  
17           for whom the work was carried out or the goods and services  
18           were supplied, so long as the amount of the money can be  
19           determined at that time, even if —
- 20          (a)   party A has not yet set the money aside nor paid it into a  
21               retention money trust account; or
- 22          (b)   party B who carried out the work or supplied the goods  
23               and services has not yet made a claim for payment under  
24               this Act or the contract in relation to the work or supply.

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

- 26   (1)   This Part applies to a construction contract to which this Act  
27           applies, except —
- 28          (a)   if the party to the contract for whom construction work  
29               is to be carried out, or to whom related goods and  
30               services are to be supplied, under the contract is a  
31               government party; or
- 32          (b)   if the value of the contract at the time it is first entered  
33               into, and at any later time following any variation of the

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

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1 value does not exceed the prescribed retention money threshold  
2 at a later time.

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

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

9 (2) Until retention money held on trust under this Part is paid into a  
10 retention money trust account, the trust applies to the property  
11 of the party who retains the money, but only to the extent of the  
12 amount of the retention money.

13 (3) While retention money under a construction contract is held on  
14 trust under this Part —

15 (a) it is not available for payment to a third-party creditor of  
16 any of the parties to the contract; and

17 (b) it is not liable to be attached or taken in execution for  
18 satisfying a monetary judgment entered in favour of a  
19 third-party creditor of any of the parties to the contract.

20 (4) For the purposes of subsection (3), a third-party creditor of a  
21 party to a construction contract is any creditor of the party, other  
22 than the other party to the contract, in connection with a liability  
23 arising under the contract.

24 (5) If a court replaces a party to a construction contract as trustee of  
25 the trust created by this section in the exercise of its jurisdiction  
26 to supervise the administration of the trust —

27 (a) the relevant retention money is then held on trust by the  
28 replacement trustee; and

29 (b) the replacement trustee has the functions under this Part  
30 of that party.

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

- (1) Retention money held on trust under this Part is held on trust for —
  - (a) the party to the construction contract who retains the retention money and who is entitled to have recourse to it in accordance with the contract; and
  - (b) the party to the construction contract who carries out construction work, or supplies related goods and services, under the contract and who is entitled to the release, in accordance with the contract, of the retention money remaining after any recourse to that money by the other party.
- (2) The party to a construction contract who holds retention money on trust under this Part is not entitled to set off, against any retention money to be released to the other party to the contract, any liability of the other party under another contract.
- (3) If the party to a construction contract who holds retention money on trust under this Part assigns any entitlement to recourse to the retention money, the retention money continues to be held on trust under this Part and the beneficial interests in that trust of any other party to the contract are not affected by the assignment.

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

- (1) This section applies to a party to a construction contract (*party A*) who —
  - (a) pays the other party to the contract (*party B*) for construction work carried out, or related goods and services supplied, under the contract; and

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- 1 (b) is then entitled under the contract to retain other money  
2 payable to party B; and
- 3 (c) does not have sufficient money to pay the retention  
4 money into a retention money trust account.
- 5 (2) Party A must draw down any available debt facility (or access  
6 any other available source of money) to pay the retention money  
7 into a retention money trust account.
- 8 (3) If party A fails to pay the retention money into a retention  
9 money trust account within 3 business days after the entitlement  
10 to the retention money first arises, a court of competent  
11 jurisdiction may, on application by party B, order party A to  
12 draw down an available debt facility or access any other  
13 available source of money for payment into the retention money  
14 trust account.
- 15 (4) For the purposes of subsection (3), a court of competent  
16 jurisdiction is a court with jurisdiction to deal with a claim for  
17 the recovery of a debt of the same amount as the amount of  
18 retention money concerned.
- 19 Note for this section:
- 20 Part 3 Division 7 enables the claimant to suspend work or supply if  
21 retention money under a construction contract is not paid into a  
22 retention money trust account as required by this Part.

23 **74. Establishment of retention money trust accounts and**  
24 **payments into trust accounts**

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

1           which this Part applies after it is entered into, within 20 business  
2           days after it becomes a construction contract.

3           (3) However, if the retention money will not be money retained  
4           from money otherwise payable but money separately paid as  
5           security, the retention money trust account must be established  
6           before the money is paid as security under the contract.

7           (4) Retention money trust accounts may be established as —

8                   (a) separate trust accounts in respect of each person who  
9                   may become entitled to the release of the retention  
10                  money (whether under one or more construction  
11                  contracts); or

12                  (b) a single trust account for all retention money under 2 or  
13                  more construction contracts in respect of different  
14                  persons who may become entitled to the release of the  
15                  retention money.

16           (5) If a single retention money trust account is established for  
17           multiple construction contracts, the trust account records must  
18           identify the contract in respect of which each payment into and  
19           out of the account is made.

20       **75. Requirements relating to establishment of retention money**  
21       **trust accounts**

22           (1) The following requirements apply to any retention money trust  
23           account —

24                   (a) the account must be a deposit or transaction account of  
25                   the recognised financial institution;

26                   (b) the name of the account and the description of the  
27                   account in the records of the party who established the  
28                   account must include the words “trust account”;

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

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

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

- (a) an adjudicator or review adjudicator in any determination under Part 3 of an adjudication application or adjudication review application relating to the relevant construction contract; or
- (b) a court or tribunal in any order relating to the relevant construction contract; or
- (c) an arbitrator in any arbitration under the relevant construction contract; or
- (d) an expert appointed by the parties in any determination of a matter under the relevant construction contract.

**78. Trust account interest and fees**

- (1) Interest earned on any money held in a retention money trust account is payable to the party who established and operates the account unless it relates to any period after the money is required to be released to the other party to the construction contract.
- (2) Interest earned on any money held in a retention money trust account that relates to any period after it is required to be so released to that other party is payable to that other party, but must be offset against any liability to pay interest to that other party for late payment of that money.
- (3) Except for the receipt of interest on money held in a retention money trust account, the party who established and operates the account cannot invest the money in any other form of 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 subsection.
- 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 subsection.
- 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.

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

- (1) The interests of the parties to a construction contract in money held on trust under this Part have priority over any other security interests (as defined in the *Personal Property Securities Act 2009* (Commonwealth) section 12) in that money.
- (2) The *Personal Property Securities Act 2009* (Commonwealth) section 73(2) is declared to apply to interests in money held on trust under this Part.
- (3) This section applies whether or not money held on trust under this Part has been paid into a retention money trust account.

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

- (1) A trust created by this Part, and the beneficial interests prescribed by this Part in that trust, have effect despite anything to the contrary in a construction contract or any other contract.
- (2) Subsection (1) does not limit the operation of section 111 in relation to this Part.

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

- (1) Nothing in this Part affects a court's inherent jurisdiction to supervise the administration of a trust created by this Part.
- (2) The Supreme Court may, on the application of the trustee, give directions about —
  - (a) any money or entitlement held in trust under this Part; or
  - (b) the performance of any function of the trustee or other matter relating to the administration of the trust.
- (3) A copy of any application under subsection (2) must be given to any other beneficiary of the trust unless otherwise directed by 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         (1) The trustees of trusts created by this Part do not have the right to  
22         indemnify themselves from the trust for their expenses in  
23         administering the trust except as provided by this section.

24         (2) Subsection (1) does not apply to a trustee in the following  
25         circumstances —

26             (a) the trustee has been appointed by a court to replace the  
27             existing trustee in the exercise of its jurisdiction to  
28             supervise the administration of the trust;

29             (b) the trustee is a corporation in liquidation;

30             (c) the affairs of the trustee are being administered by a  
31             trustee in bankruptcy.

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

3       A party to a construction contract who retains retention money  
4       commits an offence if the party fails to comply with any of the  
5       following requirements without reasonable excuse —

- 6           (a)   the requirement under section 74 to ensure that the  
7                 retention money is paid into a retention money trust  
8                 account established by that party;
- 9           (b)   the requirement under section 79(3) to allow the other  
10                party to the construction contract to inspect and take  
11                copies of accounting records relating to the retention  
12                money.

13       Penalty:

- 14           (a)   in the case of an individual — a fine of \$50 000;
- 15           (b)   in the case of a body corporate — a fine of \$250 000.

## Division 1 — Authorisation of nominating authorities

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

- (2) An application must —
  - (a) be made in writing and be in the approved form (if any); and
  - (b) be accompanied by the fee (if any) prescribed by the regulations; and
  - (c) provide information or documents as to the eligibility of the applicant to be authorised.
- (3) The Building Commissioner may require the applicant to provide further information or documents and may refuse the application if the further information or documents are not provided by the time specified by the Building Commissioner.

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

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

- (a) has duly applied for an authorisation; and
- (b) is eligible to be authorised under this 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 under a corresponding security of  
4 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

- 1 (e) in the case of an individual — has become a bankrupt  
2 since the grant of the authorisation; or
- 3 (f) 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.

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

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

- (a) the names of the parties to an adjudication application or adjudication review application made to the authority, the amount of the disputed payment claim and any other information about the application as the Building Commissioner requires the authority to provide;
- (b) the name of the adjudicator or review adjudicator appointed by the authority to determine the application and the date of the appointment;
- (c) a copy of any policy document of the authority that describes how adjudicators or review adjudicators are appointed (including any policy document relating to their grading);
- (d) the rates of fees generally charged by the authority and the adjudicators or review adjudicators it appoints;
- (e) any other information relating to the performance of the functions of the authority under this Act that the Building Commissioner requires the authority to provide.

Note for this section:

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

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

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

- 1           (b) be accompanied by the fee (if any) prescribed by the  
2           regulations; and
- 3           (c) 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 if  
6       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.

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 prescribed by the regulations for registration  
6                     as 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 payments law is not  
13                     suspended or has not previously been cancelled  
14                     (otherwise than at 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  
25                     prescribed 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 subsection;  
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 subsection.
- 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 or  
11          cancelled, the Building Commissioner must update the register  
12          and may include in the register details about the refusal of any  
13          application for renewal or about any suspension or cancellation  
14          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                      section; 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 an adjudicator, review adjudicator or authorised nominating authority or the Building Commissioner; or
- (e) a person who was a person referred to in paragraphs (a) to (d).

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1       (2) No civil liability is incurred by a protected person for anything  
2       the person has done or omitted to do, in good faith, in the  
3       performance or purported performance of a function under this  
4       Act.

5       (3) The protection given by subsection (2) applies even though the  
6       thing done as described in that subsection may have been  
7       capable of being done whether or not this Act or any other  
8       written law had been enacted.

9       (4) Despite subsection (2), the State is not relieved of any liability  
10      that it might have for another person having done or omitted to  
11      do anything described in that subsection.

12   **113. Service of documents**

13      (1) In this section —  
14      *document* includes any written notice, claim, response or  
15      determination;

16      *give* includes serve, send or otherwise provide.

17      (2) Any document that by or under this Act is authorised or  
18      required to be given by a party to a construction contract to  
19      another party to the contract in relation to matters arising under  
20      the contract —

21          (a) must be given in the manner (if any) provided in the  
22          contract if it is reasonably practicable to do so; or

23          (b) in any other case — must be given in a manner provided  
24          by subsection (3).

25      (3) Any document that by or under this Act is authorised or  
26      required to be given to a person may, subject to subsection (2),  
27      be given to the person —

28          (a) by delivering the document to the person personally; or

29          (b) by leaving the document for the person at the person's  
30          ordinary place of business; or

- 1 (c) by sending the document by post to the person's  
2 ordinary place of business; or
- 3 (d) by email to an email address specified by the person for  
4 giving documents of that kind to the person; or
- 5 (e) by any other method authorised by the regulations for  
6 giving documents of that kind to the person.
- 7 (4) A document sent by post to a person's ordinary place of  
8 business is taken to have been given when the document is  
9 received at that place.
- 10 (5) A document given or received under this Act by the agent of a  
11 person is taken for the purposes of this Act to have been given  
12 or received by that person.

**114. Approved forms**

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

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

- 26 (1) Without limiting the *Financial Management Act 2006*  
27 section 61, the annual report for a financial year prepared under  
28 that section by the accountable authority for the department of  
29 the Public Service principally assisting in the administration of  
30 this Act must contain (or must be accompanied by a separate  
31 report that contains) information about the operation of this Act.

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

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

- 5           (1)   In this section —  
6               ***confidential information*** means information that is the subject  
7               of a duty of confidentiality or secrecy or that is of a  
8               commercially sensitive nature;

9               ***relevant officer*** means the following —

- 10           (a)   the Building Commissioner or other public official or  
11               employee engaged in the administration of this Act;  
12           (b)   an authorised nominating authority;  
13           (c)   an adjudicator or a review adjudicator;  
14           (d)   a person who was a person referred to in paragraphs (a)  
15               to (c).

- 16           (2)   A relevant officer must not, directly or indirectly, use or  
17               disclose any confidential information obtained by the relevant  
18               officer under or for the purposes of this Act.

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

- 20           (3)   A person does not commit an offence under subsection (2) in  
21               relation to the use or disclosure of confidential information that  
22               is already in the public domain or that is authorised under  
23               subsection (4) or (5).

- 24           (4)   The use or disclosure of information is authorised for the  
25               purposes of this section if the information is used or disclosed in  
26               good faith in any of the following circumstances —

- 27           (a)   for the purposes of performing a function under (or  
28               complying with) this Act or another written law;  
29           (b)   with the consent of each person to whom the  
30               confidential information relates;



- 1 (c) to a court or other person or body acting judicially in the
- 2 course of proceedings before the court, person or body;
- 3 (d) under an order of a court or other person or body acting
- 4 judicially;
- 5 (e) as otherwise required by law.
- 6 (5) The Building Commissioner may authorise the disclosure of
- 7 confidential information obtained under or for the purposes of
- 8 this Act to any of the following persons or bodies if, in the
- 9 opinion of the Building Commissioner, the information is or is
- 10 likely to be relevant to the person or body —
- 11 (a) the Small Business Commissioner referred to in the
- 12 *Small Business Development Corporation Act 1983*
- 13 section 13;
- 14 (b) the Department CEO as defined in the *Procurement*
- 15 *Act 2020* section 4(1) in connection with the functions
- 16 of the Department CEO under Part 7 of that Act;
- 17 (c) a person or body prescribed by the regulations for the
- 18 purposes of this subsection.

19 **117. Criminal proceedings generally**

- 20 (1) A prosecution for an offence against this Act may be
- 21 commenced by, and only by, the Building Commissioner or a
- 22 person authorised to do so by the Building Commissioner.
- 23 (2) Subsection (1) does not limit the functions of the Director of
- 24 Public Prosecutions under the *Director of Public Prosecutions*
- 25 *Act 1991* section 11.
- 26 (3) In the absence of evidence to the contrary, proof is not required
- 27 in any proceedings for an offence against this Act —
- 28 (a) that the prosecutor is authorised to commence the
- 29 prosecution; or
- 30 (b) that a signature on a prosecution notice alleging the
- 31 offence is the signature of a person authorised to
- 32 commence the prosecution.

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- 1       (4) A prosecution for an offence against this Act must be  
2       commenced within 3 years after the day on which the offence is  
3       alleged to have been committed.
- 4       (5) Despite subsection (4), if a prosecution notice alleging an  
5       offence against this Act specifies the day on which evidence of  
6       the alleged offence first came to the attention of a person who  
7       has authority to commence the prosecution —
- 8           (a) the prosecution may be commenced within 3 years after  
9           that day; and
- 10          (b) the prosecution notice need not contain particulars of the  
11          day on which the offence is alleged to have been  
12          committed.
- 13       (6) The day on which evidence first came to the attention of a  
14       person who has authority to commence the prosecution is, in the  
15       absence of proof to the contrary, the day specified in the  
16       prosecution notice.
- 17       **118. Liability of directors and others for offences by bodies**  
18       **corporate**
- 19       (1) In this section —
- 20           *officer*, in relation to a body corporate, has the meaning given in  
21           the *Corporations Act 2001* (Commonwealth) section 9.
- 22       (2) This section applies to an offence under section 65 or 87.
- 23       (3) If a body corporate is guilty of an offence to which this section  
24       applies, an officer of the body corporate is also guilty of the  
25       offence if the officer failed to take all reasonable steps to  
26       prevent the commission of the offence by the body corporate.
- 27       (4) In determining whether things done or omitted to be done by the  
28       officer constitute reasonable steps, a court must have regard  
29       to —
- 30           (a) whether the officer knew, or ought to have known, about  
31           the commission of the offence by the body corporate;  
32           and

- 1           (b) whether the officer was in a position to influence the  
2           conduct of the body corporate in relation to the  
3           commission of the offence; and  
4           (c) any other relevant matter.
- 5       (5) This section does not affect the liability of a body corporate for  
6       any offence.
- 7       (6) An officer of a body corporate may be charged with, and  
8       convicted of, an offence in accordance with this section whether  
9       or not the body corporate is charged with, or convicted of, the  
10      principal offence committed by the body corporate.
- 11      (7) If an officer of a body corporate charged with an offence in  
12      accordance with this section claims that the body corporate  
13      would have a defence if it were charged with the offence —  
14          (a) the onus of proving the defence is on the officer; and  
15          (b) the standard of proof required is the standard that would  
16          apply to the body corporate in relation to the defence.
- 17      (8) Subsection (7) does not limit any other defence available to the  
18      officer.

19   **119. Regulations**

- 20      (1) The Governor may make regulations prescribing matters —  
21          (a) required or permitted by this Act to be prescribed; or  
22          (b) necessary or convenient to be prescribed for giving  
23          effect to this Act.
- 24      (2) The regulations may provide that contravention of a regulation  
25      is an offence, and provide, for an offence against the  
26      regulations, for a penalty not exceeding a fine of \$2 000.

27   **120. Review of Act**

- 28      (1) The Minister must review the operation and effectiveness of this  
29      Act (other than Part 7), and prepare a report based on the

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- 1 review, as soon as practicable after the 5<sup>th</sup> anniversary of the  
2 day on which this section comes into operation.
- 3 (2) The Minister must cause the report to be laid before each House  
4 of Parliament as soon as practicable after it is prepared, but not  
5 later than 12 months after the 5<sup>th</sup> anniversary.
- 6 (3) If, in the Minister's opinion, a House of Parliament will not sit  
7 during a period of 21 days after the finalisation of the report, the  
8 Minister must send the report to the Clerk of the House.
- 9 (4) When the report is sent to the Clerk of the House it is taken to  
10 have been laid before the House.
- 11 (5) The laying of the report that is taken to have occurred under  
12 subsection (4) must be recorded in the Minutes, or Votes and  
13 Proceedings, of the House on the first sitting day of the House  
14 after the Clerk receives the report.

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 2020*;

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 2001* (Commonwealth) section 9.

24 (2) A body that is a registered building service contractor  
25 must give the Board written notice of the appointment  
26 of any new 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           relating to the new director prescribed by the  
5           regulations.  
6

7   **129. Section 53 amended**

- 8           (1) In section 53(1):  
9           (a) in paragraph (a)(ii) after “the *Building Act 2011*,” insert:  
10  
11                 the *Building and Construction Industry (Security of*  
12                 *Payment) Act 2020*,  
13  
14           (b) in paragraph (m) delete “contractor.” and insert:  
15  
16                 contractor;  
17  
18           (c) after paragraph (m) insert:  
19  
20                 (n) that the registered building service provider has  
21                 not paid a building service debt of a kind  
22                 referred to in subsection (4) that the registered  
23                 building service provider has incurred.  
24  
25           (2) After section 53(3) insert:  
26  
27           (4) A building service debt of a registered building service  
28           provider is any of the following —  
29           (a) a debt for which judgment has been entered in a  
30           court of competent jurisdiction after the  
31           commencement of the *Building and*  
32           *Construction Industry (Security of Payment)*  
33           *Act 2020* 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 2020* 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 2020* section 129, is payable by the  
14 provider under the *Construction Contracts*  
15 *(Former Provisions) Act 2004* section 36.
- 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
- 32 (ii) any proceedings so instituted do not  
33 result in the judgment debt being  
34 quashed or set aside and the debt has not



- 1                                   been paid in full within 5 days after the  
2                                   termination of the proceedings.
- 3           (6)   An adjudicated amount is a building service debt under  
4                   subsection (4) only if —
- 5                   (a)   the amount is not paid in full by the due date  
6                           for payment of the adjudicated amount (or  
7                           within any longer period for payment allowed  
8                           by the adjudicator or review adjudicator); and
- 9                   (b)   either —
- 10                           (i)   an adjudication review or judicial  
11                               review has not been instituted within the  
12                               time allowed for doing so; or
- 13                           (ii)   any review so instituted does not result  
14                               in the adjudicated amount being  
15                               quashed or set aside and the amount has  
16                               not been paid in full within 5 days after  
17                               the termination of the review.
- 18           (7)   For the purposes of subsection (4), it does not matter  
19                   that the judgment debt or adjudication determination  
20                   resulted from matters arising before the  
21                   commencement of the *Building and Construction*  
22                   *Industry (Security of Payment) Act 2020* section 129.  
23

24   **130.   Section 57 amended**

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

26

27           section, unless the power is exercised only in relation to a  
28           disciplinary matter referred to in section 53(1)(n).  
29

1   **131.   Section 58 amended**

2           After section 58(3) insert:

3

- 4           (4) If the State Administrative Tribunal orders the  
5           cancellation of the registration of a person as a building  
6           service contractor, it may, for the purposes of Part 5A,  
7           certify that the person is unable to meet the person's  
8           financial obligations as and when they fall due if the  
9           Tribunal made its order wholly or partly on that basis.

10

11   **132.   Part 5A inserted**

12           After section 63 insert:

13

14                   **Part 5A — Insolvency of building service**  
15                   **contractors**

16   **63A.   Terms used**

17           (1) In this Part —

18           *construction company* means a corporation or  
19           non-corporate body that directly or indirectly —

20           (a) carries out construction work in this State or in  
21           any other State or a Territory; or

22           (b) carried out construction work in this State or in  
23           any other State or a Territory during the period  
24           of 2 years immediately before becoming an  
25           insolvent;

26           *construction work* has the meaning given in the  
27           *Building and Construction Industry (Security of*  
28           *Payment) Act 2020* section 6;

29           *excluded contractor* means a temporarily excluded  
30           contractor or a permanently excluded contractor;

***influential person***, for a corporation, construction company or non-corporate body —

(a) means an individual who controls or substantially influences the conduct of the corporation, company or non-corporate body; but

(b) does not include —

(i) a lawyer, accountant, business consultant or other professional who provides professional advice to the corporation, company or body and who influences the conduct of the corporation, company or body only because of the provision of that professional advice; or

(ii) an individual who regulates or otherwise influences the conduct of the corporation, company or body in the exercise of public functions under a written law;

***insolvency event*** means any event occurring after the commencement of the *Building and Construction Industry (Security of Payment) Act 2020* section 132 that results in an individual, corporation, non-corporate body or construction company becoming an insolvent;

***insolvent*** means —

(a) in the case of an individual or officer of a non-corporate body — a person who is, according to the *Interpretation Act 1984* section 13D, a bankrupt or a person whose affairs are under insolvency laws; or

(b) in the case of a corporation — a corporation that has a liquidator, provisional liquidator, administrator (including an administrator of a deed of company arrangement) or receiver

- 1 appointed, or that is otherwise being wound up,  
2 under the Corporations Act; or
- 3 (c) in any case — a person whose registration as a  
4 building service contractor is cancelled by  
5 order of the State Administrative Tribunal if the  
6 Tribunal certifies under section 58(4) that the  
7 person was unable to meet the person's  
8 financial obligations as and when they fall due;
- 9 ***non-corporate body*** means a partnership or  
10 unincorporated body;
- 11 ***officer***, of a corporation —
- 12 (a) means an officer of the corporation as defined  
13 in the Corporations Act section 9; and
- 14 (b) includes an influential person for the  
15 corporation; and
- 16 (c) does not include an administrator, receiver or  
17 liquidator appointed under the Corporations  
18 Act;
- 19 ***officer***, of a non-corporate body —
- 20 (a) means an officer of an entity that is neither an  
21 individual nor a corporation as defined in the  
22 Corporations Act section 9; and
- 23 (b) includes an influential person for the body;
- 24 ***permanently excluded contractor*** has the meaning  
25 given in section 63C(3)(b);
- 26 ***registration*** means registration under Part 3 as a  
27 building service contractor;
- 28 ***temporarily excluded contractor*** has the meaning  
29 given in section 63C(3)(a).
- 30 (2) A reference in this Part to a person becoming an  
31 insolvent is a reference to the person becoming an  
32 insolvent after the commencement of the *Building and*

1                    *Construction Industry (Security of Payment) Act 2020*  
2                    section 132.

3                    (3) A reference in this Part to a non-corporate body  
4                    becoming an insolvent is a reference to an officer of  
5                    the body becoming an insolvent after the  
6                    commencement of the *Building and Construction*  
7                    *Industry (Security of Payment) Act 2020* section 132.

8                    **63B. Excluded contractors not to be registered**

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

14                    **63C. Declaration of excluded contractors**

- 15                    (1) This section applies to a person (being an individual,  
16                    corporation or non-corporate body) who is an applicant  
17                    for registration or renewal of registration as a building  
18                    service contractor or who is registered as a building  
19                    service contractor.
- 20                    (2) The Board may declare that the person is excluded  
21                    from being registered as a building service contractor  
22                    because of an insolvency event.
- 23                    (3) A declaration of the Board may exclude the person  
24                    from being registered —  
25                    (a) for the period prescribed by subsection (4) (a  
26                    *temporarily excluded contractor*); or  
27                    (b) on a permanent basis (a *permanently excluded*  
28                    *contractor*).
- 29                    (4) The period of exclusion from registration of a  
30                    temporarily excluded contractor is the period ending  
31                    3 years after the date of the last insolvency event

- 1 (specified by the Board) on which the declaration of  
2 the Board is based.
- 3 (5) The Board may at any time revoke a declaration under  
4 this section.
- 5 **63D. When individual or non-corporate body may be**  
6 **declared excluded contractor**
- 7 (1) An individual or non-corporate body may be declared  
8 to be a temporarily excluded contractor if —
- 9 (a) the individual or an officer of the non-corporate  
10 body became an insolvent on at least one  
11 occasion; and
- 12 (b) the period of 3 years has not elapsed since the  
13 insolvency event that resulted in the insolvency.
- 14 (2) An individual or non-corporate body may be declared  
15 to be a permanently excluded contractor if —
- 16 (a) the individual or an officer of the non-corporate  
17 body became an insolvent on 2 separate  
18 occasions; and
- 19 (b) the insolvency event that resulted in the second  
20 insolvency occurred within 5 years after the  
21 insolvency event that resulted in the first  
22 insolvency.
- 23 (3) The declaration of an individual or non-corporate body  
24 as an excluded contractor is subject to section 63F.
- 25 **63E. When corporation may be declared excluded**  
26 **contractor**
- 27 (1) A corporation may be declared to be a temporarily  
28 excluded contractor if —
- 29 (a) the corporation became an insolvent on at least  
30 one occasion; and

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

20 **63F. Procedure for declaring excluded contractor**

- 21 (1) The Board must not declare a person to be an excluded  
22 contractor unless —
- 23 (a) the Board has given the person a written notice  
24 of its intention to consider making the  
25 declaration (a *show cause notice*); and
- 26 (b) the show cause notice identifies the insolvency  
27 event or events on which the declaration would  
28 be based; and
- 29 (c) the Board has given the person the opportunity  
30 to make a submission to the Board on the  
31 matter within 28 days or any longer period that  
32 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 insolvency may include (but are not  
17          limited to) the following —
- 18               (a) keeping proper accounting records;
- 19               (b) obtaining appropriate financial or legal advice  
20               before entering into significant business  
21               arrangements;
- 22               (c) reporting fraud or theft in relation to the  
23               business;
- 24               (d) putting in place appropriate credit arrangements  
25               and taking reasonable steps to recover  
26               outstanding money owed;
- 27               (e) making adequate provision for Commonwealth  
28               and State taxes and employee entitlements;
- 29               (f) ensuring there are sufficient assets to meet  
30               guarantees.
- 31          (5) Reasonable steps for the purposes of this section do not  
32          require a person to contribute additional equity to a  
33          business to prevent insolvency.

- 1           (6) Reasonable steps for the purposes of this section  
2           require consideration of the circumstances existing  
3           before an insolvency that were known to the  
4           individuals who could have prevented the insolvency  
5           and whether the individuals were in a position to  
6           control the circumstances that caused the insolvency.
- 7           (7) For the purposes of this section, sufficient  
8           arrangements to ensure that a person's construction  
9           work business will be managed in a competent and  
10          proficient manner may include (but are not limited to)  
11          the following —
- 12               (a) the appointment of additional company  
13               directors or business managers;
- 14               (b) the engagement of financial or legal advisors on  
15               an ongoing basis;
- 16               (c) the provision of sufficient working capital and  
17               equity;
- 18               (d) credit management arrangements and other  
19               appropriate business plans.
- 20          **63G. When declaration of excluded contractor takes**  
21          **effect**
- 22          The declaration of an excluded contractor does not take  
23          effect —
- 24               (a) until the expiration of the period of 28 days  
25               after written notice of the decision of the Board  
26               to make the declaration has been given to the  
27               person concerned; or
- 28               (b) if the person concerned duly applies within that  
29               period to the State Administrative Tribunal for  
30               a review of the decision under Part 6 — unless  
31               the application is withdrawn or the decision is  
32               confirmed following the review.  
33

1     **133.     Section 64 amended**

2           (1)   In section 64(1) in the definition of ***reviewable decision*** after  
3           paragraph (d) insert:

4  
5                   (da)   to declare that a person is excluded from being  
6                   registered as a building service contractor  
7                   because of an insolvency event under  
8                   section 63C(2); or

9  
10          (2)   After section 64(2) insert:

11  
12               (3)   A decision to refuse to grant or renew registration as a  
13               building service contractor, or to cancel the registration  
14               of a building service contractor, is not subject to review  
15               under this Part if it was made only on the basis of a  
16               declaration under section 63C that has been reviewed  
17               and confirmed by the Tribunal or that was not the  
18               subject of an application for review by the Tribunal.

19  
20           **Division 3 — *Construction Contracts Act 2004* amended**

21     **134.     Act amended**

22           This Division amends the *Construction Contracts Act 2004*.

23     **135.     Section 1 amended**

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

26  
27           is the *Construction Contracts (Former Provisions) Act 2004*.

28

1   **136.   Section 7 amended**

2           Delete section 7(1) and insert:

3

4           (1)   This Act applies to a construction contract entered into  
5               after this Act came into operation on 1 January 2005  
6               and before the *Building and Construction Industry*  
7               (*Security of Payment*) Act 2020 Part 3 comes into  
8               operation.

9

10   **137.   Section 48 amended**

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

12

13          (2A)   The Building Commissioner must not register an  
14               individual as a registered adjudicator after the *Building*  
15               and *Construction Industry (Security of Payment)*  
16               Act 2020 Part 5 Division 2 comes into operation.

17

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

19

20          (5A)   The registration of an individual as a registered  
21               adjudicator is cancelled if the individual's registration  
22               as an adjudicator or review adjudicator under the  
23               *Building and Construction Industry (Security of*  
24               *Payment)* Act 2020 Part 5 Division 2 is cancelled.

25

26   **138.   Section 52 deleted**

27           Delete section 52.

28

## Defined terms

*[This is a list of terms defined and the provisions where they are defined.  
The list is not part of the law.]*

<b>Defined term</b>	<b>Provision(s)</b>
adjudicated amount .....	4, 38(1), 48(2)
adjudicating.....	49
adjudication application .....	4, 28(1)
adjudication fees and expenses .....	49
adjudication response.....	4, 34(1)
adjudication review application .....	4, 39(1)
adjudication review response .....	4, 45(1)
adjudicator .....	4
administrative duties .....	4
amount owing .....	14(1)
approved form.....	4
assent day .....	2
authorised issuing institution .....	56
authorised nominating authority .....	4
Building Commissioner .....	4
business day .....	4
civil works .....	6(2)
claimant.....	4, 22(1), 65(1)
claimed amount.....	4, 24(1)
claimed or scheduled amount owed .....	27(1)
compliant performance bond .....	56
confidential information.....	116(1)
construction contract.....	4, 5
construction work .....	4, 6(1) and (3)
corporation in liquidation.....	4
corresponding security of payment law .....	4
court of competent jurisdiction .....	4
defects liability period.....	23(6)
document.....	113(1)
due date .....	4
final payment .....	23(1)
first party.....	14(1)
give .....	113(1)
government party .....	69(1)
head contractor.....	4
home building work .....	4
loss .....	63(1)
main contract.....	4
monetary judgment .....	54(1)
multiple dwellings.....	4

Defined terms

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named month.....	4
notice.....	16(1)
notice-based time bar provision .....	16(1)
officer.....	118(1)
party A .....	56, 69(1), 73(1)
party B .....	56, 69(1), 73(1)
pay when paid provision .....	14(1)
payment claim.....	4
payment schedule.....	4
performance bond .....	4, 56
performance security.....	4, 56
practical completion.....	23(6)
prescribed retention money threshold .....	70(1)
principal .....	4
progress payment .....	4, 17(1)
protected person.....	112(1)
provisional registration .....	110(1)
recognised financial institution .....	4
recourse.....	4
related goods and services .....	4, 7(1) and (2)
related person.....	91(1)
release .....	4
relevant construction contract .....	33(1)
relevant officer.....	116(1)
respondent.....	4, 22(1)
retention money .....	4, 69(1)
retention money trust account .....	4, 74(1)
retention money trust commencement date.....	69(1)
retention money trust end date .....	69(1)
review adjudicator.....	4
scheduled amount .....	4, 25(2)
second party .....	14(1)
serious offence .....	4
subcontractor.....	4
substitution of performance security .....	56
third party.....	14(1)
value.....	4, 8(1)