Authorised Version No. 012

Building and Construction Industry Security of Payment Act 2002

No. 15 of 2002

Authorised Version incorporating amendments as at 1 July 2013

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Authorised Version No. 012

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The Parliament of Victoria enacts as follows:

PART 1—PRELIMINARY

1 Purpose

The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.

2 Commencement

(1) Subject to subsection (2), this Act comes into operation on a day to be proclaimed.

(2) If this Act does not come into operation before 31 January 2003, it comes into operation on that day.

3 Object of Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

S. 3(1) amended by No. 42/2006 s. 4(1)(a)(i)(ii).

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.

S. 3(2) amended by No. 42/2006 s. 4(1)(b).

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—

(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

S. 3(3)(d) amended by No. 42/2006 s. 4(1)(c).

(d) the payment of the amount of the progress payment determined by the adjudicator; and

(e) the recovery of the progress payment in the event of a failure to pay.

S. 3(4) substituted by No. 42/2006 s. 4(2).

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

(a) any other entitlement that a claimant may have under a construction contract; or

(b) any other remedy that a claimant may have for recovering that other entitlement.

4 Definitions

In this Act—

adjudicated amount means the amount of a progress payment that an adjudicator determines to be payable as referred to in section 23 together with any amount added to that amount under section 45(7);

adjudication application means an application referred to in section 18;

S. 4 def. of *adjudication certificate* inserted by No. 42/2006 s. 5(a).

adjudication certificate means a certificate provided by an authorised nominating authority under section 28Q;

adjudication determination means a determination made by an adjudicator under section 23;

S. 4 def. of *adjudication determination* inserted by No. 42/2006 s. 5(a).

adjudication fees means any fees or expenses charged by an authorised nominating authority or by an adjudicator or review adjudicator under this Act;

S. 4 def. of *adjudication fees* inserted by No. 42/2006 s. 5(a).

adjudication response means a response referred to in section 21;

adjudication review means a review of an adjudication determination under Division 2A of Part 3;

S. 4 def. of *adjudication review* inserted by No. 42/2006 s. 5(a).

adjudication review application means an application under section 28B or 28C;

S. 4 def. of *adjudication review application* inserted by No. 42/2006 s. 5(a).

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

authorised nominating authority means a person authorised by the Authority under section 42 to nominate persons to determine adjudication applications;

S. 4 def. of *authorised nominating authority* amended by No. 34/2013 s. 35(Sch. 2 item 1.1(a)).

Authority means the Victorian Building Authority established under the **Building Act 1993**;

S. 4 def. of *Authority* amended by No. 34/2013 s. 35(Sch. 2 item 1.1(b)).

S. 4 def. of *Building Commission* repealed by No. 34/2013 s. 35(Sch. 2 item 1.1(c)).

* * * * *

business day means a day that is not—

(a) a Saturday or Sunday; or

(b) a day that is wholly or partly observed as a public holiday throughout Victoria;

certified debt in relation to a claimant, means the amount specified in a debt certificate as being owed to the claimant;

S. 4 def. of *claimable variation* inserted by No. 42/2006 s. 5(a).

claimable variation has the meaning given in section 10A;

claimant means a person who serves a payment claim under section 14;

claimed amount means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 14;

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

construction work has the meaning given in section 5;

debt certificate means a certificate issued under section 33;

designated trust account means an account kept with a recognised financial institution (whether in the name of the respondent or otherwise) for the purpose of holding amounts payable to claimants under this Act;

S. 4 def. of *designated trust account* amended by No. 42/2006 s. 5(b).

discharge notice means a notice referred to in section 40;

due date, in relation to a progress payment, means the due date for the progress payment, as referred to in section 12;

excluded amount has the meaning given in section 10B;

S. 4 def. of *excluded amount* inserted by No. 42/2006 s. 5(a).

exercise in relation to a function, includes perform a duty;

function includes power, authority or duty;

judgment includes order;

notice of claim means a notice referred to in section 32;

payment claim means a claim referred to in section 14;

payment schedule means a schedule referred to in section 15;

principal means a principal referred to in section 31;

progress payment means a payment to which a person is entitled under section 9, and includes (without affecting that entitlement)—

S. 4 def. of *progress payment* substituted by No. 42/2006 s. 5(c).

(a) the final payment for—

(i) construction work carried out under a construction contract; or

(ii) related goods and services supplied under the contract; or

(b) a single or one-off payment for—

(i) construction work carried out under a construction contract; or

(ii) related goods and services supplied under the contract; or

(c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment");

Note

The amount of a progress payment is calculated in accordance with sections 10, 10A, 10B and 11.

recognised financial institution means an authorised deposit-taking institution within the meaning of the Banking Act 1959 of the Commonwealth;

related goods and services has the meaning given in section 6;

respondent means a person on whom a payment claim is served under section 14;

S. 4 def. of *review adjudicator* inserted by No. 42/2006 s. 5(a).

review adjudicator in relation to an adjudication review application, means the adjudicator appointed in accordance with this Act to determine the application;

S. 4 def. of *review determination* inserted by No. 42/2006 s. 5(a).

review determination means the determination made by a review adjudicator under section 28I in respect of an adjudication review application;

scheduled amount means the amount of a progress payment that is proposed to be made under a payment schedule, as referred to in section 15;

S. 4 def. of *scheduled amount* amended by No. 42/2006 s. 5(d).

variation in relation to a construction contract, means a change in the scope of the construction work to be carried out, or the related goods and services to be supplied, under the contract.

S. 4 def. of *variation* inserted by No. 42/2006 s. 5(a).

5 Definition of *construction work*

(1) In this Act, ***construction work*** means any of the following work—

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not);

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purposes of land drainage or coast protection;

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;

S. 5(1)(c) amended by No. 42/2006 s. 6(a).

S. 5(1)(d) amended by No. 42/2006 s. 6(b).

(d) the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;

(e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including—

(i) site clearance, earth-moving, excavation, tunnelling and boring; and

(ii) the laying of foundations; and

(iii) the erection, maintenance or dismantling of scaffolding; and

S. 5(1)(e)(iv) amended by No. 42/2006 s. 6(a).

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and

(v) site restoration, landscaping and the provision of roadways and other access works;

S. 5(1)(f) amended by No. 42/2006 s. 6(a).

(f) the painting or decorating of the internal or external surfaces of any building, structure or works;

(g) any other work of a kind prescribed for the purposes of this subsection.

(2) Despite subsection (1), ***construction work*** does not include any of the following work—

(a) the drilling for, or extraction of, oil or natural gas;

(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;

(c) any other work of a kind prescribed for the purposes of this subsection.

6 Definition of *related goods and services*

(1) In this Act, ***related goods and services***, in relation to construction work, means any of the following goods and services—

(a) goods of the following kind—

(i) materials and components to form part of any building, structure or work arising from construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind—

(i) the provision of labour to carry out construction work;

(ii) architectural, design, surveying or quantity surveying services in relation to construction work;

(iii) building, engineering, interior or exterior decoration or landscape advisory or technical services in relation to construction work;

(c) goods and services of a kind prescribed for the purposes of this subsection.

(2) Despite subsection (1), ***related goods and services*** does not include any goods or services of a kind prescribed for the purposes of this subsection.

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

S. 6(3) inserted by No. 42/2006 s. 7.

7 Application of Act

(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than Victoria.

(2) This Act does not apply to—

(a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes—

(i) to lend money or to repay money lent; or

(ii) to guarantee payment of money owing or repayment of money lent; or

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

S. 7(2)(b) substituted by No. 42/2006 s. 8.

(b) a construction contract which is a domestic building contract within the meaning of the **Domestic Building Contracts Act 1995** between a builder and a building owner (within the meaning of that Act), for the carrying out of domestic building work (within the meaning of that Act), other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business; or

S. 7(2)(ba) inserted by No. 42/2006 s. 8.

(ba) a construction contract for the carrying out of any work of a kind referred to in section 6 of the **Domestic Building Contracts Act 1995** relating to a residence other than—

(i) a contract where the person for whom the work is, or is to be, carried out is a person who is in the business of building residences and the contract is entered into in the course of, or in connection with, that business; or

(ii) a contract where the work carried out, or to be carried out, under the contract is, or is part of or is incidental to work to be carried out under another construction contract; or

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

(3) This Act does not apply to a construction contract to the extent to which it contains—

(a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or

(b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution; or

(c) provisions under which a party undertakes—

(i) to lend money or to repay money lent; or

(ii) to guarantee payment of money owing or repayment of money lent; or

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

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

(a) construction work carried out outside Victoria; and

(b) related goods and services supplied in respect of construction work carried out outside Victoria.

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

(6) This Act does not apply to a construction contract entered into before the commencement of this section.

8 Act binds the Crown

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

PART 2—RIGHTS TO PROGRESS PAYMENTS

9 Rights to progress payments

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

(a) who has undertaken to carry out construction work under the contract; or

(b) who has undertaken to supply related goods and services under the contract—

is entitled to a progress payment under this Act, calculated by reference to that date.

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

(a) a date determined by or in accordance with the terms of the contract as—

S. 9(2)(a) amended by No. 42/2006 s. 9(a)(i)(ii).

(i) a date on which a claim for a progress payment may be made; or

(ii) a date by reference to which the amount of a progress payment is to be calculated—

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or

(b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after—

S. 9(2)(b) amended by No. 42/2006 s. 9(b)(i).

(i) construction work was first carried out under the contract; or

S. 9(2)(b)(ii) amended by No. 42/2006 s. 9(b)(ii).

(ii) related goods and services were first supplied under the contract; or

S. 9(2)(c) inserted by No. 42/2006 s. 9(c).

(c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that—

(i) construction work was last carried out under the contract; or

(ii) related goods and services were last supplied under the contract; or

S. 9(2)(d) inserted by No. 42/2006 s. 9(c).

(d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following—

(i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or

(ii) the issue under the contract of a certificate specifying the final amount payable under the contract ***a final certificate***; or

(iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that—

(A) construction work was last carried out under the contract; or

(B) related goods and services were last supplied under the contract.

10 Amount of progress payment

S. 10 amended by No. 42/2006 s. 10(2) (ILA s. 39B(1)).

(1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—

(i) construction work carried out or undertaken to be carried out by the person under the contract; or

S. 10(b)(i) amended by No. 42/2006 s. 10(1)(a).

(ii) related goods and services supplied or undertaken to be supplied by the person under the contract—

S. 10(b)(ii) amended by No. 42/2006 s. 10(1)(b).

as the case requires.

(2) Despite subsection (1) and anything to the contrary in the construction contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

S. 10(2) inserted by No. 42/2006 s. 10(2).

(3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

S. 10(3) inserted by No. 42/2006 s. 10(2).

10A Claimable variations

S. 10A inserted by No. 42/2006 s. 11.

(1) This section sets out the classes of variation to a construction contract (the ***claimable variations***) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(2) The first class of variation is a variation where the parties to the construction contract agree—

(a) that work has been carried out or goods and services have been supplied; and

(b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and

(c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and

(d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and

(e) as to the value of that amount or the method of valuing that amount; and

(f) as to the time for payment of that amount.

(3) The second class of variation is a variation where—

(a) the work has been carried out or the goods and services have been supplied under the construction contract; and

(b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the construction contract do not agree as to one or more of the following—

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iii) the value of the amount payable in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into—

(i) is $5 000 000 or less; or

(ii) exceeds $5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to "$5 000 000" were a reference to "$150 000".

Example

A building contractor enters into a construction contract. The consideration (***contract sum***) under the contract at the time the contract is entered into is $3 million. The contract contains a dispute resolution clause. The contractor

undertakes work at the direction of the other party. The contractor claims (the ***new claim***) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (***disputed variation***). The contractor has already made a number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to $350 000. This amount exceeds 10% of the contract sum. As the contract sum exceeds $150 000 and the contract contains a dispute resolution clause, the disputed variation in the new claim and all subsequent disputed variations under the contract will not be claimable variations under this Act.

S. 10B inserted by No. 42/2006 s. 11.

10B Excluded amounts

(1) This section sets out the classes of amounts (***excluded amounts***) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.

(2) The excluded amounts are—

(a) any amount that relates to a variation of the construction contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to—

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the construction contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

11 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued—

S. 11(1) amended by No. 42/2006 s. 12(a)(i).

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to—

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract; and

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

S. 11(1)(b)(iii) substituted by No. 42/2006 s. 12(a)(ii).

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued—

S. 11(2) amended by No. 42/2006 s. 12(b)(i).

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to—

(i) the contract price for the goods and services; and

(ii) any other rates or prices set out in the contract; and

S. 11(2)(b)(iii) substituted by No. 42/2006 s. 12(b)(ii).

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if any goods are defective, the estimated cost of rectifying the defect.

(3) For the purposes of subsection (2)(b), the valuation of materials and components that are to form part of any building, structure or work arising from construction work is to be on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

S. 12 amended by No. 42/2006 s. 13 (ILA s. 39B(1)).

12 Due date for payment

(1) A progress payment under a construction contract becomes due and payable—

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with subsection (1) at the greater of the following rates—

S. 12(2) inserted by No. 42/2006 s. 13.

(a) the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983**; or

(b) the rate specified under the construction contract.

12A Lien in respect of unpaid progress payment

S. 12A inserted by No. 42/2006 s. 14.

(1) If a progress payment under a construction contract becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.

(2) The claimant must serve a notice in the prescribed form on the respondent before exercising a lien under subsection (1).

(3) A lien under subsection (1) is extinguished on the claimant receiving the progress payment.

(4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (1).

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

13 Effect of *pay when paid* provisions

(1) A pay when paid provision of a construction contract has no effect in relation to any payment for—

S. 13(1)(a) amended by No. 42/2006 s. 15(1)(a).

(a) construction work carried out or undertaken to be carried out under the contract; or

S. 13(1)(b) amended by No. 42/2006 s. 15(1)(b).

(b) related goods and services supplied or undertaken to be supplied under the contract.

(2) In this section—

money owing, in relation to a construction contract, means money owing for—

(a) construction work carried out under the contract; or

(b) related goods and services supplied under the contract;

S. 13(2) def. of *pay when paid provision* amended by No. 42/2006 s. 15(2)(a)(b).

pay when paid provision of a construction contract means a provision of the contract—

(a) that makes the liability of one party (the ***first party***) to pay money owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or any part of that money; or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

PART 3—PROCEDURE FOR RECOVERING PROGRESS PAYMENTS

Division 1—Payment claims and payment schedules

S. 14 substituted by No. 42/2006 s. 16.

14 Payment claims

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim—

(a) must be in the relevant prescribed form (if any); and

(b) must contain the prescribed information (if any); and

(c) must identify the construction work or related goods and services to which the progress payment relates; and

(d) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***); and

(e) must state that it is made under this Act.

(3) The claimed amount—

(a) may include any amount that the respondent is liable to pay the claimant under section 29(4);

(b) must not include any excluded amount.

Note

Section 10(3) provides that a progress payment must not include an excluded amount.

(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or

(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—

whichever is the later.

(5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract; or

(b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

(6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.

(7) Nothing in subsection (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served under this Act in respect of a construction contract if—

(a) a claim for the payment of that amount has been made in respect of that payment under the contract; and

(b) that amount was not paid by the due date under the contract for the payment to which the claim relates.

(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

15 Payment schedules

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

(2) A payment schedule—

(a) must identify the payment claim to which it relates; and

S. 15(2)(b) amended by No. 42/2006 s. 17(1).

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***); and

S. 15(2)(c) inserted by No. 42/2006 s. 17(2).

(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and

S. 15(2)(d) inserted by No. 42/2006 s. 17(2).

(d) must be in the relevant prescribed form (if any); and

S. 15(2)(e) inserted by No. 42/2006 s. 17(2).

(e) must contain the prescribed information (if any).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not provide a payment schedule to the claimant—

(i) within the time required by the relevant construction contract; or

(ii) within 10 business days after the payment claim is served;

whichever time expires earlier—

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

16 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

S. 16(2)(a) substituted by No. 42/2006 s. 18(1).

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention—

(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

S. 16(4) substituted by No. 42/2006 s. 18(2).

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied—

(i) of the existence of the circumstances referred to in subsection (1); and

(ii) that the claimed amount does not include any excluded amount; and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

17 Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent provides a payment schedule to the claimant—

(i) within the time required by the relevant construction contract; or

(ii) within 10 business days after the payment claim is served—

whichever time expires earlier; and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant; and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

(a) may—

S. 17(2)(a) substituted by No. 42/2006 s. 19(1).

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(a)(ii) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend—

(i) carrying out construction work under the construction contract; or

(ii) supplying related goods and services under the construction contract.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

S. 17(4) substituted by No. 42/2006 s. 19(2).

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant; or

(ii) to raise any defence in relation to matters arising under the construction contract.

Division 2—Adjudication of disputes

18 Adjudication applications

S. 18(1) substituted by No. 42/2006 s. 20(1).

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

(a) the respondent provides a payment schedule under Division 1 but—

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

S. 18(2) substituted by No. 42/2006 s. 20(1).

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless—

(a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

S. 18(3) substituted by No. 42/2006 s. 20(1).

(3) An adjudication application—

(a) must be in writing; and

(b) subject to subsection (4), must be made to an authorised nominating authority chosen by the claimant; and

(c) in the case of an application under subsection (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule; and

(d) in the case of an application under subsection (1)(a)(ii), must be made within 10 business days after the due date for payment; and

(e) in the case of an application under subsection (1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b); and

(f) must identify the payment claim and the payment schedule (if any) to which it relates; and

(g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and

(h) may contain any submissions relevant to the application that the claimant chooses to include.

S. 18(4) substituted by No. 42/2006 s. 20(1).

(4) If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.

(5) A copy of the adjudication application must be served on the respondent.

S. 18(6) repealed by No. 42/2006 s. 20(2).

* * * * *

(7) It is the duty of an authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator as soon as practicable.

(8) An adjudicator to whom an application is referred under subsection (7) must be a person who is eligible to be an adjudicator as referred to in section 19.

S. 18(8) amended by No. 42/2006 s. 20(3).

19 Eligibility criteria for adjudicators

(1) A person is eligible to be an adjudicator in relation to a construction contract—

(a) if the person is a natural person; and

(b) if the person has any qualifications, expertise and experience that may be prescribed for the purposes of this section.

(2) A person is not eligible to be an adjudicator in relation to a particular construction contract—

(a) if the person is a party to the contract; or

(b) if the person is an employee of a party to the contract; or

(c) in the circumstances that are prescribed for the purposes of this section; or

(d) if the person is in a class of person that is prescribed for the purposes of this section.

20 Appointment of adjudicator

(1) An adjudicator accepts an adjudication application by causing notice of acceptance to be served on the claimant and the respondent.

(2) The acceptance takes effect when the last of the notices is served under subsection (1).

(3) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

S. 20(4) amended by No. 34/2013 s. 35(Sch. 2 item 1.2).

(4) An adjudicator must give a copy of a notice of acceptance under subsection (1) to the Authority within 10 business days after accepting an adjudication application under subsection (1).

21 Adjudication responses

S. 21(1) amended by No. 42/2006 s. 21(1)(a).

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) at any time within—

(a) 5 business days after receiving a copy of the application; or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application—

whichever time expires later.

(2) The adjudication response—

(a) must be in writing; and

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

S. 21(2)(c) substituted by No. 42/2006 s. 21(1)(b).

(c) must include the name and address of any relevant principal of the respondent and any other person who the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application; and

S. 21(2)(ca) inserted by No. 42/2006 s. 21(1)(b).

(ca) must identify any amount of the payment claim that the respondent alleges is an excluded amount; and

(d) may contain any submissions relevant to the response that the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).

S. 21(2A) inserted by No. 42/2006 s. 21(2).

(2B) If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant—

S. 21(2B) inserted by No. 42/2006 s. 21(2).

(a) setting out those reasons; and

(b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.

(3) A copy of the adjudication response must be served on the claimant.

(4) In this section ***relevant principal*** in relation to the respondent, means any person with whom the respondent has entered into a contract (that is not a construction contract exempted from this Act under section 7(2)(b) or 7(2)(ba)) for the provision by the respondent of construction work or goods and services if the construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the first-mentioned person engaged the respondent to carry out or supply.

S. 21(4) amended by No. 42/2006 s. 21(3).

22 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

S. 22(2) substituted by No. 42/2006 s. 22(1).

(2) An adjudicator must serve a written notice—

(a) on any relevant principal and any other person who is included in the adjudication response under section 21(2)(c); and

(b) on any other person who the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial or contractual interest in the matters that are the subject of the adjudication application.

(3) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.

(4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—

(a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or

S. 22(4)(b) substituted by No. 42/2006 s. 22(2).

(b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.

S. 22(4A) inserted by No. 42/2006 s. 22(3).

(4A) A claimant must not unreasonably withhold their agreement under subsection (4)(b).

(5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator—

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and

(b) may set deadlines for further submissions and comments by the parties; and

(c) may call a conference of the parties; and

(d) may carry out an inspection of any matter to which the claim relates.

(5A) Any conference called under subsection (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator.

S. 22(5A) inserted by No. 42/2006 s. 22(4).

(6) The adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission or comment within the time or to comply with the adjudicator's call for a conference of the parties.

23 Adjudicator's determination

(1) An adjudicator is to determine—

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the date on which that amount became or becomes payable; and

S. 23(1)(b) amended by No. 42/2006 s. 23(1)(a).

(c) the rate of interest payable on that amount in accordance with section 12(2).

S. 23(1)(c) inserted by No. 42/2006 s. 23(1)(b).

Note

The adjudicated amount may be added to under section 45(8).

Note to s. 23(1) amended by No. 42/2006 s. 23(1)(c).

S. 23(2) amended by No. 42/2006 s. 23(1)(d).

(2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only—

(a) the provisions of this Act and any regulations made under this Act;

S. 23(2)(b) amended by No. 42/2006 s. 23(1)(e).

(b) subject to this Act, the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;

S. 23(2)(d) amended by No. 42/2006 s. 23(1)(f).

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

S. 23(2A) inserted by No. 42/2006 s. 23(2).

(2A) In determining an adjudication application, the adjudicator must not take into account—

(a) any part of the claimed amount that is an excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

S. 23(2B) inserted by No. 42/2006 s. 23(2).

(2B) An adjudicator's determination is void—

(a) to the extent that it has been made in contravention of subsection (2);

(b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

(3) The adjudicator's determination must be in writing and must include—

S. 23(3) substituted by No. 42/2006 s. 23(3).

(a) the reasons for the determination; and

(b) the basis on which any amount or date has been decided.

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined—

S. 23(4) substituted by No. 42/2006 s. 23(3).

(a) the value of any construction work carried out under a construction contract; or

(b) the value of any related goods and services supplied under a construction contract—

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

23A Adjudication determination to be given to parties and Authority

S. 23A (Heading) amended by No. 34/2013 s. 35(Sch. 2 item 1.3).

S. 23A inserted by No. 42/2006 s. 24.

The authorised nominating authority to whom the adjudication application was made must give a copy of the adjudication determination—

(a) to the claimant and the respondent, as soon as practicable after it is made; and

(b) to the Authority within 5 business days after it is made.

S. 23A(b) amended by No. 34/2013 s. 35(Sch. 2 item 1.4).

24 Correcting mistakes in determinations

(1) An adjudicator may correct a determination made by him or her if the determination contains—

(a) a clerical mistake; or

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

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

(d) a defect of form.

(2) The correction may be made—

(a) on the adjudicator's own initiative; or

(b) on the application of the claimant or the respondent.

S. 24(3) inserted by No. 42/2006 s. 25, amended by No. 34/2013 s. 35(Sch. 2 item 1.5).

(3) If a correction is made to a determination under this section, the authorised nominating authority to whom the adjudication application was made must give a copy of the corrected determination to the claimant and the respondent and the Authority as soon as practicable after the correction is made.

S. 24(4) inserted by No. 42/2006 s. 25.

(4) An adjudicator cannot make a correction of a determination under this section if an application has been made under Division 2A for a review of the determination.

Ss 25–27 repealed by No. 42/2006 s. 26.

* * * * *

28 Claimant may make new application if previous application refused or not determined

(1) This section applies if—

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or

(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 22(4).

(2) In either of those circumstances, the claimant—

(a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 18.

(3) Despite sections 18(3)(c), 18(3)(d) and 18(3)(e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

S. 28(3) amended by No. 42/2006 s. 27.

(4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 18.

Division 2A—Review of adjudication

Pt 3 Div. 2A (Heading and ss 28A–28L) inserted by No. 42/2006 s. 28.

28A Threshold for review

S. 28A inserted by No. 42/2006 s. 28.

This Division applies in respect of an adjudication determination if the adjudicated amount exceeds the higher of—

(a) $100 000; or

(b) the amount prescribed for the purposes of this section.

S. 28B inserted by No. 42/2006 s. 28.

28B Application for review by respondent

(1) Subject to this section, a respondent may apply for a review of an adjudication determination (an ***adjudication review***).

(2) An application under this section may only be made if the respondent provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2).

(3) An application under this section may only be made on the ground that the adjudicated amount included an excluded amount.

(4) An application under this section may only be made if the respondent has identified that amount as an excluded amount in the payment schedule or the adjudication response.

(5) An application under this section may only be made if the respondent has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts.

(6) An application under this section may only be made if the respondent has paid the alleged excluded amounts into a designated trust account.

S. 28C inserted by No. 42/2006 s. 28.

28C Application for review by claimant

(1) Subject to this section, a claimant may apply for a review of an adjudication determination (an ***adjudication review***).

(2) An application under this section may only be made on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount.

28D Procedure for making application

S. 28D inserted by No. 42/2006 s. 28.

(1) An adjudication review application must be made to the authorised nominating authority to which the adjudication application was made.

(2) An adjudication review application must be made within 5 business days after the respondent or claimant (as the case requires) receives a copy of the adjudication determination.

(3) An adjudication review application—

(a) must be in writing in the prescribed form (if any); and

(b) must contain the prescribed information (if any); and

(c) must be accompanied by the application fee (if any) determined by the authorised nominating authority.

(4) The applicant must give a copy of the adjudication review application to the other party to the adjudication review within one business day after the application is made.

(5) The authorised nominating authority must as soon as practicable after receiving an adjudication review application give a copy of the application to—

(a) the adjudicator who made the adjudication determination that is the subject of the adjudication review; and

(b) the Authority.

S. 28D(5)(b) amended by No. 34/2013 s. 35(Sch. 2 item 1.6).

S. 28E inserted by No. 42/2006 s. 28.

28E Right to make submissions

A party to an adjudication review may make a submission to the authorised nominating authority in response to the application for review within 3 business days after being given a copy of the adjudication review application.

S. 28F inserted by No. 42/2006 s. 28.

28F Designated trust account

(1) On paying money into a designated trust account in accordance with section 28B, the respondent must give the claimant notice of that payment together with particulars identifying the account and the recognised financial institution with which the account is kept.

(2) Subject to subsection (3), money held in a designated trust account (including any interest accruing to that money) is taken to be held on the following trusts—

(a) to the extent to which the money is required to satisfy the claimant's entitlements, the money is to be applied in satisfaction of those entitlements;

(b) to the extent to which any of the money remains in the account after the claimant's entitlements have been fully satisfied, the money is to be paid to the respondent.

(3) If the respondent withdraws the adjudication review application in accordance with section 28K, any money held in a designated trust account (including any interest accruing to that money) is to be paid to the claimant.

(4) Subject to subsections (2) and (3), the regulations may make provision for or with respect to the establishment and operation of designated trust accounts.

(5) In this section, ***claimant's entitlements***, in relation to money held in a designated trust account, means the amount (if any) to which the claimant becomes entitled under a review determination.

28G Appointment of review adjudicator

S. 28G inserted by No. 42/2006 s. 28.

(1) The authorised nominating authority must, within 5 business days after receiving an application for review, appoint a review adjudicator in accordance with this section (the ***review adjudicator***) to conduct the review.

(2) A review adjudicator must be a person who is eligible to be an adjudicator as referred to in section 19.

(3) The authorised nominating authority may not appoint an adjudicator who has been involved directly or indirectly with the adjudication determination that is the subject of the adjudication review.

(4) The authorised nominating authority must give each party to the review and the Authority written notice of the appointment of a review adjudicator.

S. 28G(4) amended by No. 34/2013 s. 35(Sch. 2 item 1.7).

(5) The notice under subsection (4) must include the date of the appointment.

28H Adjudication review procedures

S. 28H inserted by No. 42/2006 s. 28.

(1) The adjudication review commences upon acceptance by the review adjudicator of his or her appointment as the review adjudicator.

(2) The authorised nominating authority must provide the following information to the review adjudicator as soon as practicable after the appointment of the review adjudicator—

(a) a copy of the adjudication review application; and

(b) a copy of any submission made by a party to the adjudication review in accordance with section 28E; and

(c) a copy of the adjudication determination that is the subject of the adjudication review; and

(d) a copy of the payment claim that relates to that adjudication determination; and

(e) a copy of each submission considered by the adjudicator who made that adjudication determination; and

(f) a copy of the payment schedule (if any) considered by the adjudicator who made that adjudication determination; and

(g) any other information that the adjudicator who made the adjudication determination considered in making that determination.

S. 28I inserted by No. 42/2006 s. 28.

28I Adjudication review determination

(1) A review adjudicator is not to determine an adjudication application until after the end of the period within which any party to the adjudication review may make a submission in accordance with section 28E.

(2) In determining an adjudication review application, the review adjudicator must consider the following matters and those matters only—

(a) the provisions of this Act and any regulations made under this Act; and

(b) the provisions of the construction contract from which the application arose; and

(c) the information provided by the authorised nominating authority under section 28H.

(3) In determining an adjudication review application, the review adjudicator must not take into account—

(a) any excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

(4) A review adjudicator's determination is void—

(a) to the extent that it has been made in contravention of subsection (2); or

(b) if it takes into account any amount or matter referred to in subsection (3), to the extent that the determination is based on that amount or matter.

(5) After conducting an adjudication review, a review adjudicator may—

(a) substitute a new adjudication determination (the ***review determination***) for the determination that is the subject of the adjudication review; or

(b) confirm the determination that is the subject of the adjudication review.

(6) In determining an adjudication review, the review adjudicator must—

(a) specify if the review determination varies the adjudication determination and how it varies the adjudication determination; and

(b) specify any amounts paid to the claimant by the respondent in respect of the adjudication determination; and

(c) determine any further amount that is to be paid by the respondent to the claimant; and

(d) determine any amount that is to be repaid by the claimant to the respondent; and

(e) determine any interest payable in accordance with section 12(2) on an amount referred to in paragraph (c); and

(f) specify the date on which an amount under paragraph (c), (d) or (e) becomes payable.

(7) A review determination must be in writing and set out the reasons for the review determination in that determination.

(8) A review adjudicator who makes a review determination may, if he or she thinks it appropriate, include a statement in the review determination that in his or her opinion the application for the adjudication review was not made in good faith.

(9) The date for payment referred to in subsection (6)(f) must be 5 business days after the respondent or claimant (as the case requires) is given a copy of the review determination.

(10) The review adjudicator must complete the adjudication review and provide a copy of the review determination to the authorised nominating authority that appointed him or her—

(a) within 5 business days after his or her appointment; or

(b) within any further time, not exceeding 10 business days after that appointment, to which the applicant for the adjudication review agrees.

(11) An applicant must not unreasonably withhold their agreement under subsection (10)(b).

28J Authorised nominating authority must notify persons of review determination

S. 28J inserted by No. 42/2006 s. 28.

The authorised nominating authority must, as soon as practicable, provide a copy of the review determination to—

(a) each party to the adjudication review; and

(b) the adjudicator who made the adjudication determination that is the subject of the adjudication review; and

(c) the Authority.

S. 28J(c) amended by No. 34/2013 s. 35(Sch. 2 item 1.8).

28K Withdrawal of adjudication review application

S. 28K inserted by No. 42/2006 s. 28.

An applicant may withdraw an adjudication review application at any time before the review adjudicator has made a review determination under section 28I by serving a notice of withdrawal on—

(a) the review adjudicator; and

(b) the authorised nominating authority that appointed the review adjudicator; and

(c) the other party to the adjudication review.

28L Correcting mistakes in review determinations

S. 28L inserted by No. 42/2006 s. 28.

Section 24 applies to review determinations as if a reference in that section—

(a) to an adjudicator were a reference to a review adjudicator; and

(b) to a determination made by an adjudicator were a reference to a review determination.

Pt 3 Div. 2B (Heading and ss 28M–28R) inserted by No. 42/2006 s. 28.

Division 2B—Payment and recovery of adjudicated amounts

S. 28M inserted by No. 42/2006 s. 28.

28M Respondent required to pay adjudicated amount

(1) Subject to sections 28B and 28N, if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

(2) In this section ***relevant date*** means—

(a) the date that is 5 business days after the date on which a copy of the adjudication determination is given to the respondent under section 23A; or

(b) if the adjudicator determines a later date under section 23(1)(b), that later date.

S. 28N inserted by No. 42/2006 s. 28.

28N Payment after review determination

(1) If the respondent is required by a review determination to pay an amount to the claimant, the respondent must pay that amount on or before the date for that payment determined by the review adjudicator under section 28I(6)(f).

(2) If the claimant is required by a review determination to pay an amount to the respondent, the claimant must pay that amount on or before the date for that payment determined by the review adjudicator under section 28I(6)(f).

28O Consequences of respondent not paying adjudicated amount

S. 28O inserted by No. 42/2006 s. 28.

(1) If the respondent fails to pay the whole or any part of an adjudicated amount in accordance with section 28M or 28N, the claimant may—

(a) request the authorised nominating authority to whom the adjudication application or the adjudication review application was made to provide an adjudication certificate under section 28Q; and

(b) serve notice on the respondent of the claimant's intention—

(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

(2) A notice under subsection (1)(b) must state that it is made under section 28O(1) of this Act.

(3) A notice cannot be served under subsection (1) in respect of a failure to pay the whole or any part of an adjudicated amount in accordance with section 28M until after the end of the period allowed for making an adjudication review application under section 28D.

(4) If the claimant has made an adjudication review application in respect of any part of the adjudicated amount, the claimant may not give a notice under subsection (1)(b) in respect of a failure to pay that adjudicated amount in accordance with section 28M until that adjudication review is completed.

(5) In this section ***adjudicated amount*** includes any amount payable by the respondent under a review determination.

S. 28P inserted by No. 42/2006 s. 28.

28P Consequences of claimant not paying adjudicated amount

If the claimant fails to pay the whole or part of the amount payable by the claimant under a review determination in accordance with section 28N, the respondent may request the authorised nominating authority to which the adjudication review application was made to provide an adjudication certificate under section 28Q.

S. 28Q inserted by No. 42/2006 s. 28.

28Q Adjudication certificates

(1) An adjudication certificate provided by an authorised nominating authority on a request under this Division must state that it is made under this Act and specify the following matters—

(a) the name of the person requesting the certificate;

(b) the name of the person who is liable to pay the adjudicated amount;

(c) the amount payable under section 28M or 28N;

(d) the date on which payment of that amount was due to be paid to the person requesting the certificate.

(2) If any amount of interest that is due and payable on the amount payable under section 28M or 28N is not paid by the respondent, the person requesting the adjudication certificate may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate.

(3) If an amount of interest is specified in the adjudication certificate to be paid by the respondent, the amount is to be added to, and becomes part of, the adjudicated amount.

(4) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication or the adjudication review fees in relation to any adjudication review (as the case requires) but has not been reimbursed by the respondent for that amount (the ***unpaid share***), the claimant may request the authorised nominating authority to specify the unpaid share in the adjudication certificate.

(5) If the respondent has paid the claimant's share of the adjudication review fees in relation to any adjudication review but has not been reimbursed by the claimant for that amount, the respondent may request the authorised nominating authority to specify that share of the fees in the adjudication certificate.

(6) If the unpaid share is specified in the adjudication certificate it is to be added to, and becomes part of, the adjudicated amount.

(7) In this section ***adjudicated amount*** includes an amount payable by the respondent or the claimant under a review determination.

28R Proceedings to recover amount payable under section 28M or 28N

S. 28R inserted by No. 42/2006 s. 28.

(1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.

(2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court—

(a) the adjudication certificate; and

(b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.

(4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.

(5) If a person commences proceedings to have the judgment set aside, that person—

(a) subject to subsection (6), is not, in those proceedings, entitled—

(i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or

(ii) to raise any defence in relation to matters arising under the construction contract; or

(iii) to challenge an adjudication determination or a review determination; and

(b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.

(6) Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.

(7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.

(8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

Division 3—Claimant's right to suspend construction work

29 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work or the supply of related goods and services under a construction contract if at least 3 business days have passed since the claimant has caused a notice of intention to do so to be given to the respondent under section 16, 17 or 28O.

S. 29(1) amended by No. 42/2006 s. 29(1)(a)(b).

(2) The right conferred by subsection (1) exists until—

S. 29(2) substituted by No. 42/2006 s. 29(2).

(a) if the construction contract provides for a period of at least 1 business day for a return to work after the claimant receives payment from the respondent of an amount referred to in section 16(1), 17(1), 28M or 28N, the end of that period; or

(b) in any other case, the end of the period of 3 business days immediately following the date on which the claimant receives payment from the respondent of an amount referred to in section 16(1), 17(1), 28M or 28N.

(3) The suspension in accordance with this section by a claimant of the carrying out of construction work or the supply of goods and services under a construction contract does not constitute a breach by the claimant of that contract.

S. 29(4) inserted by No. 42/2006 s. 29(3).

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

S. 29(5) inserted by No. 42/2006 s. 29(3).

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

Division 4—Recovery from principal

S. 29A inserted by No. 42/2006 s. 30.

29A Definitions

In this Division—

adjudicated amount includes an amount payable under a review determination;

adjudication determination includes a review determination.

30 Application

This Division applies if—

(a) an adjudicator or a review adjudicator has determined that an adjudicated amount or part of an adjudicated amount is payable by a respondent to a claimant in respect of a construction contract; and

S. 30(a) substituted by No. 42/2006 s. 31(1).

(b) the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 28M or 28N; and

S. 30(b) substituted by No. 42/2006 s. 31(2).

(c) the claimant has obtained judgment for the adjudicated amount or part of the adjudicated amount as a debt in a court of competent jurisdiction.

31 Recovery from principal

(1) If the circumstances set out in section 30 apply, the claimant may obtain payment of the adjudicated amount or part of that amount in accordance with this Division out of money that is payable or becomes payable to the respondent by some other person (the ***principal***) for construction work or goods and services that the principal engaged the respondent to carry out or supply under a contract.

S. 31(1) amended by No. 42/2006 s. 31(3).

(2) However, the claimant can obtain payment from the principal under this Division only if the construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the principal engaged the respondent to carry out or supply.

S. 31(3) inserted by No. 42/2006 s. 31(4).

(3) Subsection (1) does not apply to allow the claimant to obtain payment from a person who has engaged the respondent to carry out construction work or to supply goods and services under a construction contract exempted from this Act under section 7(2)(b) or 7(2)(ba).

32 Procedure for obtaining payment

(1) The following procedure must be followed to obtain payment of the money owed—

(a) firstly, a debt certificate must have been issued for the money owed (as provided by section 33); and

(b) secondly, the claimant must serve a notice of claim on the principal.

(2) A notice of claim is a notice in the prescribed form together with a copy of the debt certificate.

33 Certification of debt by court

(1) When judgment is given or entered in proceedings for the recovery of an adjudicated amount as a debt, the court may, by order made on the application of the claimant, issue a certificate (a ***debt certificate***) in respect of the debt under this section.

(2) A debt certificate is to be in a prescribed form.

(3) In this section, ***judgment*** includes a default judgment.

34 Notice of claim operates as assignment of debt

(1) The service of a notice of claim on the principal operates to assign to the claimant the obligation of the principal to pay the money owed under the contract to the respondent.

(2) The assignment is limited to the claimant's certified debt.

(3) The assignment is subject to any prior assignment under this Division that is binding on the principal and the respondent.

35 Payment of respondent's debt by principal

(1) After a notice of claim is served on a principal in accordance with this Division, the principal must pay to the claimant the money that the principal owes to the respondent under the contract with the respondent.

(2) The principal must make the payments to the claimant as they become payable under the contract with the respondent until whichever of the following first occurs—

(a) the principal receives a discharge notice or discharge notices, indicating that the certified debt has been fully discharged; or

(b) the payments are no longer payable under the contract between the principal and the respondent.

36 Priority of assignments

(1) The priority of assignments under this Division is to be determined by the order of service of notices of claim on the principal.

(2) All notices of claim in respect of debts owed by the same respondent that are served on the principal within the period of 7 days after the first notice of claim in respect of the respondent is served on the principal are taken to be served at the same time and, accordingly, take equal priority.

(3) Despite section 35, the principal is not to make any payment to a claimant who serves a notice of claim until that 7 day period has elapsed.

(4) If assignments take equal priority, the principal is to make the payments by distributing the money payable between the claimants who have equal priority pro rata in proportion to the amount of their respective certified debts.

(5) The principal must continue to make those payments to each claimant until whichever of the following first occurs—

(a) the principal receives a discharge notice, or discharge notices, indicating that each certified debt has been fully discharged; or

(b) the payments are no longer payable under the contract.

37 Stay of payments

(1) If—

(a) a notice of claim is served on a principal under this Division in relation to the payment of money owed to a respondent under a contract; and

(b) before the notice was served, the principal had commenced proceedings in a court against the respondent in relation to that contract—

the principal may apply to the court for a stay of payments under this Division in respect of the notice of claim.

(2) The court may grant a stay applied for under subsection (1) and make any ancillary orders it considers necessary.

(3) Despite anything to the contrary in this Division, if a stay is granted under this section the principal is not required to make payments under this Division for the period of the stay.

38 Right of recovery if principal fails to pay

(1) An assignment effected by operation of this Division is valid at law.

(2) Accordingly, if the principal fails to make any payment required to be made by this Division, the claimant may sue for and recover the debt assigned to the claimant, in the claimant's own name.

(3) Proceedings for recovery of the debt may be taken in any manner in which the respondent might have taken them if there had been no assignment.

(4) A claimant's right of recovery under this section is subject to any defence that the principal would have had against recovery of the debt by the respondent had there been no assignment, other than a defence based on something done by the principal after the notice of claim was served by the claimant.

Example

If the principal continues to make contract payments to the respondent, rather than the claimant, after having been served with a notice of claim, the claimant is still entitled to recover the money from the principal.

39 When assignment ceases to operate

(1) If a certified debt is discharged, or the judgment that resulted in a debt certificate being issued in respect of the certified debt is set aside by a court, any assignment effected by operation of this Division in connection with that debt ceases to operate.

(2) If only part of the certified debt is discharged, the assignment effected in respect of that part of the certified debt ceases to operate.

(3) This section does not affect any payment or dealing that is made by a principal in good faith before the principal receives notice, and sufficient evidence of, the discharge or setting aside of the debt. To the extent necessary to give effect to that payment or dealing, the assignment effected by operation of this Division is taken to continue in force.

Note

If a principal makes a payment to a claimant (as required by section 35), instead of paying the respondent, without knowing that the debt owed to the claimant has been discharged by the respondent, this section protects the principal from being required by the respondent to make payment to the respondent.

40 Claimant to provide discharge notice

(1) If a principal or the respondent makes a payment to the claimant in partial or full discharge of a certified debt, the claimant must, on the request of the person making the payment, give the person a discharge notice in respect of the payment.

(2) A discharge notice must—

(a) be in the prescribed form; and

(b) acknowledge the payment of the amount paid; and

(c) be signed by the claimant.

(3) If the claimant does not give the notice within 7 days of the payment and request, the claimant is to forfeit and pay to the person who made the payment a sum equal to the amount paid.

(4) The person who made the payment may recover the forfeited amount in any court of competent jurisdiction as a debt due to the person.

41 Respondent to give information about principal

(1) If an adjudication determination has been made under this Part in respect of a construction contract, the respondent must, on the demand of the claimant, supply to the claimant a notice in the prescribed form that sets out the name of any person from whom the claimant may be able to recover the adjudicated amount or part of the adjudicated amount under this Division.

(2) A person who gives or purports to give a person a notice under this section knowing that it is false or misleading in a material particular is guilty of an offence and liable to a penalty of up to 60 penalty units.

Division 5—Authorised nominating authorities, adjudicators and review adjudicators

Pt 3 Div. 5 (Heading) substituted by No. 42/2006 s. 32.

42 Authorised nominating authorities

(1) The Authority—

S. 42(1) amended by No. 34/2013 s. 35(Sch. 2 item 1.9).

(a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act; and

(b) may withdraw any authority so given.

(2) Before giving an authority under this section, the Authority must have regard to any guidelines issued by the Minister under section 44.

S. 42(2) amended by No. 34/2013 s. 35(Sch. 2 item 1.9).

Note

An applicant can appeal to the Building Appeals Board under section 144A of the **Building Act 1993** against a decision of the Authority to refuse an application or withdraw an authority under section 42.

Note to s. 42 amended by No. 34/2013 s. 35(Sch. 2 item 1.9).

S. 43 (Heading) amended by No. 34/2013 s. 35(Sch. 2 item 1.10).

S. 43 amended by No. 34/2013 s. 35(Sch. 2 item 1.11).

43 The Authority may impose conditions

The Authority may, in accordance with the guidelines issued by the Minister under section 44—

(a) impose conditions on an authority given under section 42; and

(b) at any time, vary or revoke any conditions previously imposed on that authority.

Note

An applicant can appeal to the Building Appeals Board under section 144A of the **Building Act 1993** against the imposition or variation of a condition under section 43.

S. 43A inserted by No. 42/2006 s. 33.

43A Functions of an authorised nominating authority

The functions of an authorised nominating authority are—

(a) to nominate adjudicators for the purposes of this Act; and

(b) to receive and refer adjudication applications to adjudicators; and

(c) to receive adjudication review applications and submissions in response to those applications and to appoint review adjudicators; and

(d) to serve copies of adjudication determinations, adjudication review applications and review determinations on certain persons; and

(e) to provide information to review adjudicators; and

(f) to provide adjudication certificates; and

S. 43A(g) amended by No. 34/2013 s. 35(Sch. 2 item 1.12).

(g) to provide information to the Authority in accordance with this Division; and

(h) to generally carry out any other function or duty given to an authority, or imposed on an authority, by this Act.

43B Authorised nominating authority to provide information

S. 43B inserted by No. 42/2006 s. 33.

(1) An authorised nominating authority must provide the Authority with such non-identifying information as may be reasonably requested by the Authority in relation to the activities of the authority under this Act.

S. 43B(1) amended by No. 34/2013 s. 35(Sch. 2 item 1.13).

(2) Information requested under subsection (1) may include information regarding—

(a) the nomination of adjudicators and appointment of review adjudicators; and

(b) the assessment of the eligibility of persons to be adjudicators; and

(c) the fees charged by the authorised nominating authority; and

(d) the fees charged by adjudicators.

(3) In this section ***non-identifying information*** means information—

(a) that does not identify any person or disclose their address or location; or

(b) from which any person's identity, address or location cannot reasonably be determined.

43C Authorised nominating authority fees

S. 43C inserted by No. 42/2006 s. 33.

(1) An authorised nominating authority may charge a fee for any service provided by the authority in connection with an adjudication application or an adjudication review application made to the authority.

(2) In deciding on a fee under subsection (1), an authorised nominating authority must have regard to the guidelines regarding such fees issued by the Minister under section 44.

44 Ministerial guidelines

S. 44(1) substituted by No. 42/2006 s. 34.

(1) The Minister may from time to time issue guidelines relating to—

(a) the giving, variation or withdrawal of authorities under this Division; and

(b) appropriate fees that may be charged by an authorised nominating authority, an adjudicator or a review adjudicator.

(2) The guidelines may provide for—

(a) the procedures for making applications;

(b) the information to be provided with applications;

(c) the qualifications and experience that are relevant to the carrying out of the functions of an authorised nominating authority;

(d) the financial resources necessary for carrying out the functions of an authorised nominating authority;

(e) any other matters relating to the capacity of applicants to carry out the functions of an authorised nominating authority;

(f) the conditions that may be imposed on an authority, including conditions relating to the processes to be followed by an authorised nominating authority in nominating adjudicators for the purposes of this Act.

(3) Any guidelines issued by the Minister under subsection (1) must be published in the Government Gazette.

45 Adjudicator's and review adjudicator's fees

S. 45 substituted by No. 42/2006 s. 35.

(1) In this section—

adjudicator includes a review adjudicator;

adjudication application includes an adjudication review application.

(2) An adjudicator is entitled to be paid for determining an adjudication application—

(a) the amount, by way of fees and expenses, that is agreed between the adjudicator and the parties to the adjudication; or

(b) if no amount is agreed, the amount, by way of fees and expenses, that is reasonable having regard to the work done and expenses incurred by the adjudicator.

(3) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

(4) As between themselves, the claimant and respondent are each liable to contribute to the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.

(5) An adjudicator is not entitled to be paid any fees or expenses in connection with the determination of an application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 22(4) or 28I(10) (as the case requires).

(6) Subsection (5) does not apply—

(a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid; or

(b) in such other circumstances as may be prescribed for the purposes of this section.

(7) If a party refuses to pay his or her required contribution to the amount of the fees and expenses that are payable to the adjudicator, the other party may elect to pay both parties' contribution to the adjudicator.

(8) If a party elects under subsection (7) to pay the other party's contribution to the adjudicator, the adjudicator, as the case requires—

(a) must determine that that amount is to be added to the adjudicated amount determined under section 23 and the total of those amounts is then to be taken to be the adjudicated amount for the purposes of this Act; or

(b) must determine that that amount is to be added to the amount payable (if any) by the other party under the review determination and the total of those amounts is then to be taken to be the amount payable by the other party under the review determination for the purposes of this Act.

S. 46 amended by No. 42/2006 s. 36.

46 Liability of adjudicator

An adjudicator (including a review adjudicator) is not personally liable for anything done or omitted to be done in good faith—

(a) in the exercise of a power or the discharge of a duty under this Act or the regulations; or

(b) in the reasonable belief that the act or omission was in the exercise of a power or the discharge of a duty under this Act or the regulations.

Division 6—Effect of Part on civil proceedings

47 Effect of Part on civil proceedings

(1) Subject to section 48, nothing in this Part affects any right that a party to a construction contract—

(a) may have under the contract; or

(b) may have under Part 2 in respect of the contract; or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any proceedings arising under a construction contract (including any arbitration proceedings or other dispute resolution proceedings), whether under this Part or otherwise, except as provided by subsections (3) and (4).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order, determination or award it makes in those proceedings; and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

(4) In any arbitration proceedings or other dispute resolution proceedings under the construction contract, the person determining the arbitration or dispute must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or determination or award the person makes in those proceedings.

(5) Nothing in this Part affects any right that a principal may have under any contract except as expressly provided for in this Act.

PART 3A—ADMINISTRATION

Pt 3A (Heading and ss 47A–47C) inserted by No. 42/2006 s. 37.

47A Functions of the Authority

S. 47A (Heading) amended by No. 34/2013 s. 35(Sch. 2 item 1.14).

S. 47A inserted by No. 42/2006 s. 37, amended by No. 34/2013 s. 35(Sch. 2 item 1.15).

The functions of the Authority under this Act are—

(a) to keep under regular review the administration and effectiveness of this Act and the regulations; and

(b) to keep a register of authorised nominating authorities in accordance with section 47B; and

(c) to keep records of adjudication determinations and review determinations in accordance with section 47C; and

(d) to publish adjudication determinations and review determinations in accordance with section 47C; and

(e) generally to carry out any other function or duty given to it, or imposed on it, by this Act.

47B Register of authorised nominating authorities

S. 47B inserted by No. 42/2006 s. 37.

(1) The Authority must keep a register containing details of authorised nominating authorities including the names of the principals and the contact details of those authorities.

S. 47B(1) amended by No. 34/2013 s. 35(Sch. 2 item 1.16).

(2) The Authority must make the register available for inspection without charge to any person at the business address of the Authority during normal business hours.

S. 47B(2) amended by No. 34/2013 s. 35(Sch. 2 item 1.16).

S. 47C inserted by No. 42/2006 s. 37.

47C Recording and publishing of determinations

S. 47C(1) amended by No. 34/2013 s. 35(Sch. 2 item 1.17).

(1) The Authority must keep a record of any adjudication determinations or review determinations that it receives.

S. 47C(2) amended by No. 34/2013 s. 35(Sch. 2 item 1.17).

(2) The Authority may publish information in a determination received under section 23A or 28J if—

(a) the information does not identify any person or body referred to in the determination or disclose the address or location of that person or body; and

(b) the identity, address or location of any person or body referred to in the determination cannot reasonably be determined from the information.

PART 4—MISCELLANEOUS

48 No contracting out

S. 48 substituted by No. 42/2006 s. 38.

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement, whether in writing or not—

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act—

is void.

49 Confidentiality

S. 49 substituted by No. 42/2006 s. 38, amended by No. 34/2013 s. 35(Sch. 2 item 1.18).

The Authority, a Commissioner (within the meaning of the **Building Act 1993**), the chief executive officer of the Authority and any member of staff of the Authority must not use or disclose any information received by the Authority under this Act except to the extent necessary for the performance of any functions or duties or the exercise of any powers of the Authority under this Act.

50 Service of notices

(1) Any notice or document that by or under this Act is authorised or required to be given to or served on a person may be given to or served on the person—

(a) by delivering it to the person personally; or

(b) by lodging it during normal office hours at the person's ordinary place of business; or

(c) by sending it by post or facsimile addressed to the person's ordinary place of business; or

S. 50(1)(d) amended by No. 42/2006 s. 39(a).

(d) in such manner as may be prescribed for the purposes of this section; or

S. 50(1)(e) inserted by No. 42/2006 s. 39(b).

(e) in any other manner specified in the relevant construction contract.

(2) The giving of, or service of, a notice or document that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected—

(a) in the case of posting—2 business days after the day on which the notice or document was posted;

(b) in the case of a facsimile—at the time the facsimile is received.

(3) If a facsimile is received after 4.00 p.m. on any day, it must be taken to have been received on the next business day.

S. 51 amended by No. 42/2006 s. 40 (ILA s. 39B(1)).

51 Supreme Court—limitation of jurisdiction

(1) It is the intention of section 46 to alter or vary section 85 of the **Constitution Act 1975**.

S. 51(2) inserted by No. 42/2006 s. 40.

(2) It is the intention of section 28R to alter or vary section 85 of the **Constitution Act 1975**.

52 Regulations

S. 52(1) substituted by No. 42/2006 s. 41.

(1) The Governor in Council may make regulations for or with respect to—

(a) prescribing forms for any purpose of this Act;

(b) prescribing information to be provided under this Act;

(c) any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.

(2) Regulations made under this Act—

S. 52(2) substituted by No. 42/2006 s. 41.

(a) may provide in a specified case or class of cases for the exemption of persons or things or a class of persons or things from any of the provisions of this Act whether unconditionally or on specified conditions and either wholly or to such an extent as is specified; and

(b) may differ according to differences in time, place and circumstance.

(3) The commencement of a regulation referred to in section 5, 6 or 7 does not affect the operation of this Act with respect to construction work carried out, or related goods and services supplied, under a construction contract entered into before that commencement.

53 Transitional provision—Building and Construction Industry Security of Payment (Amendment) Act 2006

S. 53 substituted by No. 42/2006 s. 42.

This Act as amended by the **Building and Construction Industry Security of Payment (Amendment) Act 2006** (***the 2006 Act***) does not apply to or in respect of a payment claim for a progress payment to which a person is entitled under a construction contract entered into before the commencement of section 42 of the 2006 Act and any such payment claim is to be dealt with in accordance with this Act as if the 2006 Act had not been enacted.

s. 54

S. 54 repealed by No. 42/2006 s. 43.

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ENDNOTES

1. General Information

Minister's second reading speech—

Legislative Assembly: 21 March 2002

Legislative Council: 24 April 2002

The long title for the Bill for this Act was "A Bill to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts and for other purposes."

Constitution Act 1975:

Section 85(5) statement:

Legislative Assembly: 21 March 2002

Legislative Council: 24 April 2002

Absolute majorities:

Legislative Assembly: 24 April 2002

Legislative Council: 7 May 2002

The **Building and Construction Industry Security of Payment Act 2002** was assented to on 14 May 2002 and came into operation on 31 January 2003: section 2(2).

2. Table of Amendments

This Version incorporates amendments made to the **Building and Construction Industry Security of Payment Act 2002** by Acts and subordinate instruments.

Building and Construction Industry Security of Payment (Amendment) Act 2006, No. 42/2006

Assent Date:	25.7.06
Commencement Date:	Ss 38, 39, 41 on 26.7.06: s. 2(1); ss 4–37, 40, 42, 43 on 30.3.07: s. 2(3)
Current State:	This information relates only to the provision/s amending the **Building and Construction Industry Security of Payment Act 2002**

Building and Planning Legislation Amendment (Governance and Other Matters) Act 2013, No. 34/2013

Assent Date:	18.6.13
Commencement Date:	S. 35(Sch. 2 item 1) on 1.7.13: s. 2
Current State:	This information relates only to the provision/s amending the **Building and Construction Industry Security of Payment Act 2002**

3. Explanatory Details

No entries at date of publication.