

Version No. 002
**Building and Construction Industry Security
of Payment Act 2002**

Act No. 15/2002

Version incorporating amendments as at 26 July 2006

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**Building and Construction Industry Security
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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 sub-section (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 carries out construction work or who supplies related goods and services under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of that work and the supplying of those goods and services.

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- (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 circumstances where the relevant construction contract fails to do so.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—
- (a) the making of a payment claim by the person claiming payment; and
 - (b) the provision of a payment schedule by the person by whom the payment is payable; and
 - (c) the referral of any disputed claim to an adjudicator for determination; and
 - (d) the payment of the amount of the progress payment determined by the adjudicator or the setting aside of money as security for payment of the progress payment; and
 - (e) the recovery of the progress payment in the event of a failure to pay.
- (4) It is intended—
- (a) that this Act does not limit any other entitlement that a person may have under a construction contract, or any other remedy that a person may have for recovering that other entitlement; and
 - (b) in particular—
 - (i) that the payment of the amount of the progress payment determined by the adjudicator or the setting aside of money as security does not prejudice any claim, counter-claim or defence that may be raised in proceedings (including arbitration proceedings or other dispute resolution proceedings)
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concerning the work or the supply of goods and services to which the payment claim relates; and

- (ii) that the payment of the amount of the progress payment determined by the adjudicator is allowed for in any proceedings (including arbitration proceedings or other dispute resolution proceedings) brought under the construction contract concerning the work or the supply of goods and services to which the payment claim relates.

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;

"adjudication response" means a response referred to in section 21;

"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 Building Commission under section 42 to nominate persons to determine adjudication applications;

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"Building Commission" means the Building Commission established under the **Building Act 1993**;

"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;

"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 adjudicated amounts payable to claimants under this Act;

"discharge notice" means a notice referred to in section 40;

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

"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;

"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;

"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.

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 or structure of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
 - (d) the external or internal cleaning of buildings and structures, 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
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- (iii) the erection, maintenance or dismantling of scaffolding; and
 - (iv) the prefabrication of components to form part of any building or structure, whether carried out on-site or off-site; and
 - (v) site restoration, landscaping and the provision of roadways and other access works;
 - (f) the painting or decorating of the internal or external surfaces of any building or structure;
 - (g) any other work of a kind prescribed for the purposes of this sub-section.
- (2) Despite sub-section (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 sub-section.

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;

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

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

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- (ii) to guarantee payment of money owing or repayment of money lent; or
 - (iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract; or
- (b) a construction contract 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) the whole of which is carried out on any part of a premises that the building owner resides in or proposes to reside in; or
- (c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.
- (3) This Act does not apply to a construction contract to the extent to which it contains—
- (a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or
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- (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.

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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—
 - (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 work carried out or to be carried out or related goods and services supplied or to be supplied under the contract; or

- (b) 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—
 - (i) construction work was first carried out under the contract; or
 - (ii) related goods and services were first supplied under the contract.
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10. Amount of progress payment

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

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

as the case requires.

11. Valuation of construction work and related goods and services

- (1) Construction work carried out under a construction contract is to be valued—
 - (a) in accordance with the terms of the contract; or
 - (b) if the contract makes no express provision with respect to the matter, having regard to—
 - (i) the contract price for the work; and
 - (ii) any other rates or prices set out in the contract; and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.

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- (2) Related goods and services supplied under a construction contract are to be valued—
- (a) in accordance with the terms of the contract;
or
 - (b) if the contract makes no express provision with respect to the matter, having regard to—
 - (i) the contract price for the goods and services; and
 - (ii) any other rates or prices set out in the contract; and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount; and
 - (iv) if any goods are defective, the estimated cost of rectifying the defect.
- (3) For the purposes of sub-section (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.

12. Due date for payment

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

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- (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.

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—
 - (a) construction work carried out under the contract; or
 - (b) related goods and services 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;
 - "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

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- (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.
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**PART 3—PROCEDURE FOR RECOVERING PROGRESS
PAYMENTS**

Division 1—Payment Claims and Payment Schedules

14. Payment claims

- (1) A person who is entitled to a progress payment under a construction contract (the "**claimant**") may serve a payment claim on the person who under the contract is liable to make the payment.
- (2) A claimant may serve only one payment claim in respect of a specific progress payment.
- (3) A payment claim—
 - (a) must identify the construction work or related goods and services to which the progress payment relates; and
 - (b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done or related goods and services supplied to which the payment relates (the "**claimed amount**"); and
 - (c) must state that it is made under this Act.

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
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the "**scheduled amount**").

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(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.

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- (2) In those circumstances, the claimant—
- (a) may recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; 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 sub-section (2)(b) must state that it is made under this Act.
- (4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in sub-section (1).

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

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- (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 recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; 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 sub-section (2)(b) must state that it is made under this Act.
- (4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in sub-section (1).

Division 2—Adjudication of Disputes

18. Adjudication applications

- (1) If the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim, the claimant may apply for adjudication of the progress payment to be made (an "**adjudication application**").

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- (2) An adjudication application—
 - (a) must be in writing; and
 - (b) must state that the adjudication application is made under this Act; and
 - (c) must identify the payment claim and the payment schedule to which it relates; and
 - (d) may contain any submissions relevant to the application that the claimant chooses to include.
 - (3) An adjudication application—
 - (a) must be made—
 - (i) to an adjudicator chosen by agreement between the claimant and the respondent; or
 - (ii) if no adjudicator is agreed on, to an authorised nominating authority chosen by agreement between the claimant and the respondent; or
 - (iii) if no nominating authority is agreed on, to an authorised nominating authority chosen by the claimant; and
 - (b) must be made within 5 business days after the claimant receives the payment schedule.
 - (4) No agreement between the claimant and the respondent that was made before the claimant received the payment schedule has any effect in relation to the choice of an adjudicator under subsection (3)(a)(i).
 - (5) A copy of the adjudication application must be served on the respondent.
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- (6) This section does not limit the operation of any provision of the construction contract in relation to the resolution of disputes between the claimant and the respondent.
 - (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 chosen by agreement between the claimant and the respondent or to whom an application is referred under sub-section (7) must be a person who is eligible to be an adjudicator as referred to in section 19.

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.

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- (2) The acceptance takes effect when the last of the notices is served under sub-section (1).
 - (3) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.
 - (4) An adjudicator must give a copy of a notice of acceptance under sub-section (1) to the Building Commission within 10 business days after accepting an adjudication application under sub-section (1).

21. Adjudication responses

- (1) The respondent may lodge with the adjudicator a response to the claimant's adjudication application (the "**adjudication response**") at any time within—
 - (a) 5 business days after receiving a copy of the application; or
 - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application—whichever time expires later.
 - (2) The adjudication response—
 - (a) must be in writing; and
 - (b) must identify the adjudication application to which it relates; and
 - (c) must include the name and address of any relevant principal of the respondent; and
 - (d) may contain any submissions relevant to the response that the respondent chooses to include.
 - (3) A copy of the adjudication response must be served on the claimant.
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- (4) In this section "**relevant principal**" in relation to the respondent, means any person with whom the respondent has entered into a contract 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.

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.
- (2) An adjudicator must serve a written notice on any person who is included as a relevant principal in the adjudication response advising that the adjudicator has commenced to determine an 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 sub-sections (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
 - (b) within any further time that the claimant and the respondent may agree.

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- (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.
- (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.

Note: The adjudicated amount may be added to under section 45(7).

- (2) In determining an adjudication application, the adjudicator is to consider the following matters only—
- (a) the provisions of this Act and any regulations made under this Act;
 - (b) the provisions of the construction contract from which the application arose;

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- (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
 - (d) the payment schedule to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) The adjudicator's determination must be in writing and must include—
- (a) the reasons for the determination; and
 - (b) the basis on which any amount or date has been decided—
- if, before the making of the determination, either the claimant or the respondent requests the adjudicator to include those matters in the determination.
- (4) An adjudicator must give a copy of any determination that he or she makes to the Building Commission within 5 business days of making that determination.

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

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(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.

25. Respondent's obligations following adjudicator's determination

(1) If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent—

(a) must pay that amount to the claimant; or

(b) must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them.

(2) The respondent may only give security under subsection (1)(b), if the respondent has commenced proceedings (including arbitration proceedings or other dispute resolution proceedings) against the claimant in relation to a dispute under the construction contract.

(3) The security given by a respondent may be in any of the following forms—

(a) a written unconditional undertaking by a recognised financial institution to pay the claimant, on demand, the adjudicated amount;

(b) payment of the adjudicated amount into a designated trust account;

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- (c) any other form that may be agreed between the claimant and the respondent.
- (4) If the respondent is the Crown or a public authority representing the Crown, the security may be in the form of a written statement by the Department Head of the relevant Government Department or by the public authority to the effect that sufficient money will be legally available for payment of any amount up to the adjudicated amount if and when that amount becomes payable.
- (5) Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least 2 business days after any matters in dispute between them in connection with the progress payment to which the security relates have been finally determined.
- (6) For the purposes of sub-section (5), a determination becomes final—
- (a) in the case of a determination from which there is no right of appeal or review, when the determination is made; or
 - (b) in the case of a determination from which there is a right of appeal or review—
 - (i) when the right of appeal or review expires; or
 - (ii) if the determination becomes subject to appeal or review proceedings, when those proceedings have been finally disposed of.
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26. Designated trust accounts

- (1) On paying money into a designated trust account as referred to in section 25(3)(b), 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) 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) the claimant's entitlements in respect of an earlier progress claim are to be satisfied before the claimant's entitlements in respect of a later progress claim;
 - (c) 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) Subject to sub-section (2), the regulations may make provision for or with respect to the establishment and operation of designated trust accounts.
- (4) 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 after any matters in dispute between the claimant and the respondent in connection with the progress payment to which the money relates have been finally determined.

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- (5) For the purposes of sub-section (4), a determination becomes final—
- (a) in the case of a determination from which there is no right of appeal or review, when the determination is made; or
 - (b) in the case of a determination from which there is a right of appeal or review—
 - (i) when the right of appeal or review expires; or
 - (ii) if the determination becomes subject to appeal or review proceedings, when those proceedings have been finally disposed of.

27. Consequences of not complying with adjudicator's determination

- (1) This section applies if, on or before the relevant date, a respondent fails to do one or other of the following—
- (a) to pay the whole or any part of the adjudicated amount to a claimant;
 - (b) to give security for payment of the whole or any part of the adjudicated amount to a claimant.
- (2) In those circumstances, the claimant—
- (a) may recover from the respondent, as a debt due to the claimant, in any court of competent jurisdiction—
 - (i) the unpaid, or unsecured, portion of the adjudicated amount; and
 - (ii) interest at the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983** on the adjudicated amount calculated from the
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relevant date until judgment is entered in respect of the debt; 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 sub-section (2)(b) must state that it is made under this Act.
- (4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in sub-section (1).
- (5) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.
- (6) In this section, "**relevant date**" means—
 - (a) the date occurring 4 business days after the date in which the relevant determination is made under section 23; or
 - (b) if the adjudicator determines a later date under section 23(1)(b), that later date.

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

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- (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 section 18(3)(b), 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 sub-section (2).
 - (4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 18.

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 2 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 27.
- (2) The right conferred by sub-section (1) exists for so long as the respondent fails to comply with the requirements referred to in section 16(1), 17(1) or 27(1), as the case may be.

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- (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.

Division 4—Recovery from Principal

30. Application

This Division applies if—

- (a) an adjudicator has determined that an adjudicated amount is payable by a respondent to a claimant in respect of a construction contract; and
- (b) on or before the relevant date, the respondent fails to do one or other of the following—
 - (i) to pay the whole or any part of the adjudicated amount to the claimant;
 - (ii) to give security for payment of the whole or any part of the adjudicated amount to the claimant; and
- (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 construction contract.

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- (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.

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.

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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

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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.

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- (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.

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- (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—General Provisions Relating to Adjudicators

42. Authorised nominating authorities

- (1) The Building Commission—
 - (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.

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

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

43. The Building Commission may impose conditions

The Building Commission 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.

44. Ministerial guidelines

- (1) The Minister may from time to time issue guidelines relating to the giving, variation or withdrawal of authorities under this Division.
- (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;

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- (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 fees

- (1) An adjudicator is entitled to be paid for adjudicating 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.
- (2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.
- (3) As between themselves, the claimant and respondent are each liable to contribute to the adjudicator's fees and expenses in equal proportions or, if the adjudicator determines that the adjudication application or the adjudication response was wholly unfounded, in such proportions as the adjudicator may determine.
- (4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an application if he or she fails to make a decision on the application (otherwise than because the

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application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 22(4).

- (5) Sub-section (4) does not apply—
- (a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid; or
 - (b) in such other circumstances as may be prescribed for the purposes of this section.
- (6) If a respondent refuses to pay his or her required contribution to the amount of the fees and expenses that are payable to the adjudicator, the claimant may elect to pay both the respondent's contribution and the claimant's contribution to the adjudicator.
- (7) If a claimant elects under sub-section (6) to pay the respondent's contribution to the adjudicator, the adjudicator 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.

46. Liability of adjudicator

An 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.

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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 sub-sections (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.

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- (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.
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PART 4—MISCELLANEOUS

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

48. No contracting out

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

is void.

S. 49
substituted by
No. 42/2006
s. 38.

49. Confidentiality

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

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- (c) by sending it by post or facsimile addressed to the person's ordinary place of business; or
- (d) in such manner as may be prescribed for the purposes of this section; or
- (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 sub-section (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. 50(1)(d)
amended by
No. 42/2006
s. 39(a).

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

51. Supreme Court—limitation of jurisdiction

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

52. Regulations

- (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;

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

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

- (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—
 - (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. Amendment of Building Act 1993—New section 144A inserted

After section 144 of the **Building Act 1993** insert—

"144A. Appeals—Building and Construction Industry Security of Payment Act 2002

- (1) A person may appeal to the Building Appeals Board against a decision of the Building Commission under section 42 of the **Building and Construction Industry Security of Payment Act 2002**—
 - (a) to refuse an application by the person for an authority to nominate adjudicators for the purposes of that Act; or

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- (b) to withdraw the person's authority to nominate adjudicators for the purposes of that Act.
- (2) A person may appeal to the Building Appeals Board against a decision of the Building Commission under section 43 of the **Building and Construction Industry Security of Payment Act 2002**—
- (a) to impose a condition on the person's authority to nominate adjudicators for the purposes of that Act; or
- (b) to vary a condition of the person's authority to nominate adjudicators for the purposes of that Act."

54. Amendment of Commercial Arbitration Act 1984

After section 3(7) of the **Commercial Arbitration Act 1984** insert—

- "(8) Nothing in this Act affects the operation of Part 3 of the **Building and Construction Industry Security of Payment Act 2002**."
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Endnotes

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."

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).

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Endnotes

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

<i>Assent Date:</i>	25.7.06
<i>Commencement Date:</i>	Ss 38, 39, 41 on 26.7.06: s. 2(1)
<i>Current State:</i>	This information relates only to the provision/s amending the Building and Construction Industry Security of Payment Act 2002

*Building and Construction Industry Security of Payment Act
2002
Act No. 15/2002*

Endnotes

3. Explanatory Details

No entries at date of publication.