



Australian Capital Territory

Building and Construction Industry (Security of Payment) Act 2009

A2009-50

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Australian Capital Territory

Building and Construction Industry (Security of Payment) Act 2009

A2009-50

An Act to facilitate recovery of payments under construction contracts in the building and construction industry, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

Part 1 Preliminary

1 Name of Act

This Act is the *Building and Construction Industry (Security of Payment) Act 2009*.

2 Commencement

This Act commences on 1 July 2010.

Note The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

3 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere in this Act.

For example, the signpost definition '*adjudicated amount*—see section 24' means that the term 'adjudicated amount' is defined in that section.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

4 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

5 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

6 Object of Act

- (1) The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person—
 - (a) undertakes to carry out construction work under certain construction contracts; or
 - (b) undertakes to supply related goods and services under certain construction contracts.
- (2) In particular, this Act—
 - (a) grants an entitlement to a progress payment for construction work, whether or not a construction contract provides for progress payments; and
 - (b) establishes a recovery procedure for construction work progress payments.

Part 2 Important concepts

Division 2.1 Meaning of terms

7 Meaning of *construction work*

(1) In this Act:

construction work—

- (a) includes the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land; and
- (b) includes 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 purposes of land drainage or coast protection; and
- (c) includes 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; and
- (d) includes the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension; and

- (e) includes any operation which forms an integral part of, or is preparatory to or is for rendering complete, work mentioned in paragraph (a), (b) or (c); and

Examples

- 1 site clearance, earth-moving, excavation, tunnelling and boring
- 2 laying foundations
- 3 erecting, maintaining or dismantling scaffolding
- 4 prefabricating components to form part of any building, structure or works, whether carried out on-site or off-site
- 5 site restoration, landscaping and providing roadways and other access works

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (f) includes painting or decorating the internal or external surfaces of any building, structure or works; and
- (g) includes building work within the meaning of the *Building Act 2004*; but
- (h) does not include—
- (i) drilling for, or extraction of, oil or natural gas; or
 - (ii) extracting (whether by underground or surface working) minerals, including tunnelling or boring, or constructing underground works, for that purpose.
- (2) A regulation may provide that work is, or is not, construction work for this Act.

8 Meaning of *related goods and services*

- (1) In this Act:
- related goods and services* for construction work—
- (a) includes 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 carrying out construction work; and
- (b) includes 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 services in relation to construction work.
- (2) A regulation may provide that goods and services are, or are not, related goods and services for this Act.
- (3) In this Act, a reference to related goods and services includes a reference to related goods or services.

Division 2.2 Application of Act

9 Application of Act

- (1) This Act applies to a construction contract—
- (a) whether written or oral, or partly written and partly oral; and
 - (b) whether expressed to be governed by a law of the Territory or a law of another jurisdiction.

- (2) This Act does not apply to any of the following:
- (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 in relation to construction work carried out, or related goods and services supplied, under the construction contract;
 - (b) a construction contract for carrying out residential building work if a resident owner is a party to the contract, to the extent that the contract relates to a building or part of a building where the resident owner lives or intends to live;
 - (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 worked out 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 the ACT; or
 - (b) related goods and services supplied in respect of construction work carried out outside the ACT.
- (5) This Act does not apply to a construction contract prescribed by regulation.
- (6) To avoid doubt, this Act does not apply to a construction contract entered into before the commencement of this part.
- (7) In this section:

residential building work—see the *Building Act 2004*, dictionary.

resident owner, in relation to a construction contract for carrying out residential building work, does not include a person who is or should be licensed as an owner-builder under the *Construction Occupations (Licensing) Act 2004*.

Part 3 Right to progress payments

10 Right to progress payments

- (1) On and from each reference date under a construction contract, a person is entitled to a payment (a *progress payment*) if the person has undertaken, under the contract, to—
 - (a) carry out construction work; or
 - (b) supply related goods and services.
- (2) A progress payment may include—
 - (a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or
 - (b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or
 - (c) a milestone payment.
- (3) In this section—

milestone payment means a payment that is based on an event or date.

reference date, for a construction contract, means—

- (a) a date stated in, or worked out under, the contract as the date when a claim for a progress payment is to be made in relation to work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or

- (b) if the contract does not provide a date mentioned in paragraph (a)—
 - (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
 - (ii) the last day of each subsequent named month.

11 Amount of progress payment

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

- (a) the amount worked out under the contract; or
- (b) if the contract does not provide for an amount, the amount worked out 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
 - (ii) related goods and services supplied or undertaken to be supplied by the person under the contract.

12 Valuation of construction work and related goods and services

- (1) Construction work carried out or undertaken to be carried out under a construction contract must be—
 - (a) valued under the contract; or
 - (b) if the contract does not provide for valuation—valued having regard to each of the following:
 - (i) the contract price for the work;
 - (ii) any other rates or prices set out in the contract;

- (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 stated amount;
 - (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 must be—
 - (a) valued under the contract; or
 - (b) if the contract does not provide for valuation—valued having regard to each of the following:
 - (i) the contract price for the goods and services;
 - (ii) any other rates or prices set out in the contract;
 - (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 stated amount;
 - (iv) if any of the goods are defective, the estimated cost of rectifying the defect.
- (3) For subsection (2) (b), for materials and components that are to form part of any building, structure or work arising from construction work, 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 the construction work is being carried out.

13 Due date for payment

- (1) A progress payment under a construction contract is payable—
 - (a) on the day when the payment becomes payable under the contract; or

- (b) if the contract does not set a day—10 business days after a payment claim is made under part 4 in relation to the payment.
- (2) Interest is payable on the unpaid amount of a progress payment that is payable under subsection (1) at the greater of the following:
 - (a) the rate of interest applying from time to time under the *Court Procedures Rules 2006*, schedule 2, part 2.2 (Interest after judgment);
 - (b) the rate stated under the construction contract.
- (3) If a progress payment is payable under subsection (1), the claimant is entitled to exercise a lien in relation to the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with carrying out construction work for the respondent.

Note 1 Claimant—see s 15.

Note 2 Respondent—see s 15.

- (4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes payable takes priority over a lien under subsection (3).
- (5) Subsection (3) does not create any right against a third party who is the owner of the unfixed plant or materials.

14 Effect of pay when paid provision

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

(2) In this section:

money owing, to a person under a construction contract, means money owing for—

- (a) construction work carried out or undertaken to be carried out by the person under the contract; or
- (b) related goods and services supplied or undertaken to be supplied by the person under the contract.

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

- (a) that makes the liability of 1 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 4 Procedure for recovering progress payment

Division 4.1 Payment claim and payment schedule

15 Payment claim

- (1) A person who is or who claims to be entitled to a progress payment under section 10 (1) (the *claimant*) may give a payment claim to the person who, under the construction contract concerned, is or may be liable to make the payment (the *respondent*).

Note 1 If a form is approved under s 47 for a payment claim, the form must be used.

Note 2 For how documents may be served, see the Legislation Act, pt 19.5.

- (2) A payment claim must—
- (a) identify the construction work or related goods and services to which the progress payment relates; and
 - (b) state the amount of the progress payment that the claimant claims is payable (the *claimed amount*); and
 - (c) state that it is made under this Act.
- (3) The claimed amount may include any amount—
- (a) that the respondent is liable to pay the claimant under section 29 (3); or
 - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be given only before the later of—
- (a) the end of the period worked out under the construction contract; and

- (b) the end of the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.
- (5) A claimant must not give more than 1 payment claim for each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

16 Payment schedule

- (1) A respondent who is given a payment claim under section 15 may reply to the claim by giving a payment schedule to the claimant.

Note 1 If a form is approved under s 47 for a payment schedule, the form must be used.

Note 2 For how documents may be served, see the Legislation Act, pt 19.5.

- (2) A payment schedule must—
 - (a) identify the payment claim to which it relates; and
 - (b) state the amount of the payment, if any, that the respondent proposes to make (the *scheduled amount*).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate—
 - (a) why the scheduled amount is less; and
 - (b) if the scheduled amount is less because the respondent is withholding payment for any reason—the respondent's reasons for withholding payment.

- (4) 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 if—
- (a) the claimant gives a payment claim to the respondent; and
 - (b) the respondent does not provide a payment schedule to the claimant within the earlier of—
 - (i) the time required by the relevant construction contract; or
 - (ii) 10 business days after the payment claim is given to the respondent.

17 Consequences of not paying claimant—no payment schedule

- (1) This section applies if a respondent—
- (a) becomes liable to pay a claimed amount to a claimant because the respondent failed to provide a payment schedule to the claimant within the time allowed under section 16 (4); 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) The claimant—
- (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 19 (1) (b) in relation to the payment claim; and

- (b) may give notice to the respondent of the claimant's intention, under section 29, to suspend;
 - (i) carrying out construction work under the construction contract; or
 - (ii) supplying related goods and services under the construction contract.

Note If a form is approved under s 47 for a notice, the form must be used.

- (3) If the claimant starts a proceeding under subsection (2) (a) (i)—
 - (a) the court must not enter judgment in favour of the claimant unless the court is satisfied the circumstances mentioned in subsection (1) exist; and
 - (b) the respondent is not entitled—
 - (i) to bring a cross-claim against the claimant; or
 - (ii) to raise a defence in relation to matters arising under the construction contract.

18 Consequences of not paying claimant in accordance with payment schedule

- (1) This section applies if—
 - (a) a claimant gives a payment claim to a respondent; and
 - (b) the respondent provides a payment schedule to the claimant within the earlier of—
 - (i) the time required by the relevant construction contract; or
 - (ii) 10 business days after the payment claim is given to the respondent; and
 - (c) the payment schedule states 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) The claimant—
- (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 19 (1) (b) in relation to the payment claim; and
 - (b) may serve notice on the respondent of the claimant's intention, under section 29, to suspend—
 - (i) carrying out construction work under the construction contract; or
 - (ii) supplying related goods and services under the construction contract.
- (3) The notice must state that it is made under this Act.
- Note* If a form is approved under s 47 for a notice, the form must be used.
- (4) If the claimant starts a proceeding under subsection (2) (a) (i)—
- (a) the court must not enter judgment in favour of the claimant unless the court is satisfied the circumstances mentioned in subsection (1) exist; and
 - (b) the respondent is not 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 4.2 Adjudication of disputes

19 Adjudication applications

- (1) A claimant may apply to an authorised nominating authority, chosen by the claimant, for adjudication of a payment claim (an *adjudication application*) if—
- (a) the respondent provides a payment schedule under this part, 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—
 - (i) to provide a payment schedule under this part within the time allowed by section 16 (4); and
 - (ii) to pay the whole, or any part of, the claimed amount to the claimant by the due date.
- Note* If a form is approved under s 47 for an adjudication application, the form must be used.
- (2) An adjudication application to which subsection (1) (b) applies must not be made unless—
- (a) the claimant has within 20 business days immediately following the due date for payment, notified the respondent of the claimant's intention to apply for adjudication of the payment claim; and

- (b) the respondent had an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.
- (3) An adjudication application—
- (a) must be in writing; and
 - (b) if the application is made under subsection (1) (a) (i)—must be made within 10 business days after the claimant receives the payment schedule; and
 - (c) if the application is made under subsection (1) (a) (ii)—must be made within 20 business days after the due date for payment; and
 - (d) if the application is made under subsection (1) (b)—must be made within 10 business days after the earlier of—
 - (i) the end of the 5-day period mentioned in subsection (2) (b); and
 - (ii) the day the claimant receives the payment schedule; and
 - (e) if the authorised nominating authority has set an application fee—must be accompanied by the application fee; and
 - (f) must identify the payment claim and any payment schedule to which it relates; and
 - (g) may contain the submissions relevant to the application that the claimant chooses to include.
- (4) The authorised nominating authority must refer the application to an eligible adjudicator as soon as practicable.

Note For eligibility for adjudicators, see s 20.

20 Eligibility—adjudicators

- (1) A person is eligible to be an adjudicator for an adjudication application if the person—
 - (a) is an individual; and
 - (b) has the qualifications, expertise and experience to perform adjudications; and
 - (c) has successfully completed a relevant training course.
- (2) A person is not eligible to be an adjudicator for a construction contract—
 - (a) if the person is a party to the contract; or
 - (b) if the person is employed by, or represents a building and construction industry organisation; or
 - (c) in circumstances prescribed by regulation.

Examples—building and construction industry organisation

- 1 Housing Industry Association Limited (ACN 004 631 752)
- 2 Master Builders Australia Incorporated (ABN 701 134 221 001)

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

21 Adjudicator for application

- (1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may give a notice of acceptance to the claimant and the respondent.

Note If a form is approved under s 47 for a notice of acceptance, the form must be used.
- (2) If an adjudicator gives a notice of acceptance under subsection (1), the adjudicator must give the respondent a copy of the adjudication application.

- (3) If an adjudicator gives a notice of acceptance under subsection (1), the adjudicator is taken to be appointed as the adjudicator for the adjudication application from the later of—
 - (a) the day the claimant receives the notice of acceptance; and
 - (b) the day the respondent receives the notice of acceptance.

22 Adjudication responses

- (1) A respondent may give an adjudicator a response to a claimant's adjudication application (the *adjudication response*) at any time before the later of—
 - (a) 7 business days after the respondent receives a copy of the application; or
 - (b) 5 business days after receiving notice of the adjudicator's acceptance of the application.

Note If a form is approved under s 47 for a response, the form must be used.

- (2) The adjudication response—
 - (a) must be in writing; and
 - (b) must identify the adjudication application to which it relates; and
 - (c) may contain submissions relevant to the response.
- (3) The respondent may give an adjudication response only if the respondent has provided a payment schedule to the claimant within the time mentioned in section 16 (4) or section 19 (2) (b).
- (4) The respondent must not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

- (5) A copy of the adjudication response must be given to the claimant not later than 2 days after the response is given to the adjudicator.

Note For how documents may be served, see the Legislation Act, pt 19.5.

23 Adjudication procedures

- (1) The adjudicator for an adjudication application must not decide the application until after the end of the period within which the respondent may give an adjudication response.
- (2) The adjudicator must not consider an adjudication response unless the respondent gives the response to the adjudicator within the time required by section 22.
- (3) The adjudicator must decide an adjudication application as soon as possible but not later than—
- (a) if the respondent is entitled to give an adjudication response under section 22—10 business days after the earlier of—
 - (i) the date on which the adjudicator receives the adjudication response; and
 - (ii) the date on which the adjudication response is required to be given to the adjudicator under section 22; or
 - (b) if the respondent is not entitled to give an adjudication response under section 22—10 business days after the respondent receives a copy of the adjudication application; or
 - (c) if a further time is agreed between the claimant and the respondent—the further time.
- (4) In a proceeding to decide an adjudication application, an adjudicator—
- (a) may ask for further written submissions from either party; and
 - (b) if a further submission is lodged by a party—must allow the other party to comment on the submission; and

- (c) may set deadlines for further submissions and comments by the parties; and
 - (d) may call a conference of the parties; and
 - (e) may carry out an inspection of any matter related to the claim.
- (5) If the adjudicator calls a conference—
- (a) the conference must be conducted informally; and
 - (b) the parties are not entitled to legal representation at the conference.
- (6) The adjudicator’s power to decide an adjudication application is not affected by the failure of a party—
- (a) to make a submission within time; or
 - (b) to comment on a submission within time; or
 - (c) to comply with the adjudicator’s call for a conference.

24 Adjudicator’s decision

- (1) The adjudicator for an adjudication application must decide—
- (a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the *adjudicated amount*); and
 - (b) the day on which the amount became or becomes payable; and
 - (c) the rate of interest payable on the amount.
- (2) In deciding an adjudication application, the adjudicator must only consider the following:
- (a) this Act;
 - (b) the construction contract to which the application relates;

- (c) the payment claim to which the application relates, together with any submission, including relevant documentation, properly made by the claimant in support of the claim;
 - (d) the adjudication application;
 - (e) the payment schedule, if any, to which the application relates, together with any submission, including relevant documentation, properly made by the respondent in support of the schedule;
 - (f) the adjudication response, if any;
 - (g) the result of any inspection by the adjudicator of any matter related to the claim.
- (3) The adjudicator's decision must—
- (a) be in writing; and
 - (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.
- (4) If the adjudicator values construction work or related goods and services under section 12, the adjudicator and any other adjudicator must give the work, or the goods and services—
- (a) in a later adjudication involving the valuation of the work or of the goods and services—the same value as the value decided by the adjudicator; or
 - (b) if the claimant or respondent satisfies the adjudicator that the value of the work, or the goods and services, has changed since the valuation—a different value to the value decided by the adjudicator.

- (5) The adjudicator may, on his or her own initiative or on the application of the claimant or the respondent, correct a decision for—
- (a) a clerical mistake or defect of form; or
 - (b) a material miscalculation of figures or a material mistake in the description of any person, thing or matter mentioned in the decision.

25 Respondent must pay adjudicated amount

If an adjudicator decides that a respondent must pay an adjudicated amount to a claimant, the respondent must pay the amount to the claimant on or before—

- (a) the day 5 business days after the day the adjudicator's decision is given to the respondent; or
- (b) if the adjudicator decides a later day under section 24 (1) (b)—the later day.

26 Failure to pay adjudicated amount

- (1) This section applies if—
- (a) an adjudicator decides that a respondent must pay an adjudicated amount to a claimant; and
 - (b) a respondent fails to pay the whole, or any part of, an adjudicated amount to the claimant under section 25.
- (2) The claimant may—
- (a) ask the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate; and

- (b) give the respondent notice of the claimant's intention to suspend carrying out construction work, or to suspend supplying related goods and services, under the construction contract.

Note If a form is approved under s 47 for this provision, the form must be used.

- (3) An adjudication certificate must state the following:
 - (a) the name of the claimant;
 - (b) the name of the respondent;
 - (c) the adjudicated amount;
 - (d) the day when payment of the adjudicated amount was required to be paid to the claimant;
 - (e) if part of an adjudicated amount has been paid—the amount of the part payment.

Note If a form is approved under s 47 for this provision, the form must be used.

- (4) If an amount of interest payable on the adjudicated amount is not paid by the respondent, the claimant may ask the authorised nominating authority to state the amount of interest payable in the adjudication certificate.
- (5) An amount of interest stated in the adjudication certificate is added to, and becomes part of, the adjudicated amount.
- (6) If the claimant has paid the respondent's share of the adjudication fees for the adjudication but has not been reimbursed by the respondent for that amount (the *unpaid share*), the claimant may request the authorised nominating authority to state the unpaid share in the adjudication certificate.
- (7) If an unpaid share is stated in the adjudication certificate, the unpaid share is added to, and becomes part of, the adjudicated amount.

27 Filing of adjudication certificate as judgment debt

- (1) An adjudication certificate may be filed as a judgment for a debt, and may be enforced, in any court of competent jurisdiction.
- (2) The adjudication certificate must be accompanied by an affidavit by the claimant stating the amount of the adjudicated amount that has not been paid at the time the certificate is filed.
- (3) If the affidavit states that part of the adjudicated amount has been paid, the amount to be recovered is the unpaid part of the adjudicated amount.
- (4) If the respondent starts a proceeding to have the judgment set aside, the respondent—
 - (a) is not, in the proceeding, 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; or
 - (iii) to challenge the adjudicator’s decision; and
 - (b) is required to pay into the court as security the unpaid part of the adjudicated amount pending the final decision of the proceeding.

28 Claimant may make new application in certain circumstances

- (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 decide the application within the time allowed by section 23 (3).

- (2) The claimant may—
 - (a) withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made; and
 - (b) make a new adjudication application under section 19.
- (3) Despite section 19 (3) (c), (d) and (e), a new adjudication application may be made at any time within 5 business days after the day the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).
- (4) This part applies to a new application mentioned in this section as if the application were an application under section 19.

Division 4.3 Claimant's right to suspend construction work

29 Claimant may suspend work

- (1) This section applies if a claimant gives notice to a respondent under section 17, section 18 or section 26.
- (2) The claimant may suspend carrying out construction work or supplying related goods and services under a construction contract during the period—
 - (a) starting 2 business days after the day the claimant gives the notice to the respondent; and
 - (b) ending 3 business days after the day the claimant receives the amount payable by the respondent under section 17 (1), section 18 (1) or section 25 (1).

- (3) If the claimant, in exercising the right to suspend carrying out construction work or supplying related goods and services, incurs a loss or expense because the respondent removes any part of the work or supply from the contract, the respondent is liable to pay the claimant the amount of the loss or expense.
- (4) A claimant who suspends construction work or the supply of related goods and services under this section is not liable for loss or damage suffered by the respondent, or by any person claiming through the respondent, because the claimant did not carry out that work or supply the goods and services, during the period of suspension.

Division 4.4 Authorised nominating authorities and adjudicators

30 Maximum number of nominating authorities

- (1) The Minister may decide the maximum number of people that may be authorised as a nominating authority.
- (2) A decision under subsection (1) is a notifiable instrument

Note A notifiable instrument must be notified under the Legislation Act.

31 Application for nominating authority

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

Note 1 If a form is approved under s 47 for an application, the form must be used.

Note 2 A fee may be determined under s 46 for this provision.

- (2) On an application for authorisation the Minister must—
 - (a) authorise the applicant as a nominating authority if—
 - (i) the applicant is suitable under section 32; and

- (ii) the maximum number of people have not been authorised;
or
- (b) refuse to authorise the applicant as a nominating authority if—
 - (i) the applicant is not suitable under section 32; or
 - (ii) the maximum number of people have been authorised.

Note A decision to refuse an application under s 31 (2) (b) (i) is a reviewable decision (see pt 5).

32 Nominating authority—suitability

In deciding whether an applicant is suitable the Minister must have regard to the following:

- (a) whether the applicant, or a person engaged or employed by the applicant, has been convicted, or found guilty, in the 5 years before the application is made, whether in the ACT or elsewhere, of an offence—
 - (i) involving fraud or dishonesty; or
 - (ii) punishable by imprisonment for at least 1 year;
- (b) whether the applicant is bankrupt or personally insolvent;
- (c) whether the applicant, or a person engaged or employed by the applicant, at any time in the 5 years before the application is made, was involved in the management of a corporation when—
 - (i) the corporation became the subject of a winding-up order;
or
 - (ii) a controller or administrator was appointed;

- (d) whether the applicant at any time in the 1 year before the application is made had—
 - (i) an authorisation to be a nominating authority cancelled, suspended or withdrawn under this Act or under a corresponding law; or
 - (ii) been refused authorisation to be a nominating authority under this Act or under a corresponding law;
- (e) if the applicant represents the interests of a particular section of the building and construction industry—whether the applicant’s representation makes the applicant unsuitable to appoint adjudicators.

33 Term of authorisation

- (1) An authorisation under this division is effective for 3 years starting on the day the Minister gives the authorisation.
- (2) An authorised nominating authority may apply for renewal of the authorisation.

34 Costs and expenses—authorised nominating authority

- (1) The Minister may determine the maximum amount that an authorised nominating authority may charge for costs and expenses for any service provided by the authority in relation to an adjudication application.
- (2) An authorised nominating authority may charge costs and expenses—
 - (a) if the Minister has made a determination under subsection (1)—up to the maximum amount for any service provided by the authority in relation to an adjudication application; or

- (b) if the Minister has not made a determination under subsection (1)—up to a reasonable amount having regard to the work done and expenses incurred by the authorised nominating authority.
- (3) The claimant and respondent are—
 - (a) each liable to pay any costs and expenses charged by an authorised nominating authority; and
 - (b) each liable to contribute to the payment of any such costs and expenses—
 - (i) in equal proportions; or
 - (ii) if the adjudicator decides a different proportion—the proportion decided.

35 Report—authorised nominating authority

- (1) An authorised nominating authority must provide a report to the Minister on request.
- (2) A report must include information about—
 - (a) the activities of the authorised nominating authority under the Act; and
 - (b) costs and expenses charged by the authority for any service provided by the authority in relation to an adjudication application made to the authority.

36 Costs and expenses—adjudicator

- (1) An adjudicator is entitled to be paid for adjudicating an adjudication application—
 - (a) if an amount of costs and expenses is agreed between the adjudicator and the parties to the adjudication—the agreed amount; or

- (b) if an amount of costs and expenses is not agreed—a reasonable amount having regard to the work done and expenses incurred by the adjudicator.
- (2) The claimant and respondent are each liable to pay the adjudicator's costs and expenses.
- (3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's costs and expenses—
 - (a) in equal proportions; or
 - (b) if the adjudicator decides a different proportion—the proportion decided.
- (4) An adjudicator is not entitled to be paid costs or expenses in relation to the adjudication of an adjudication application if he or she fails to make a decision on the application within the time allowed by section 23 (3).
- (5) However, subsection (4) does not apply—
 - (a) if the failure to make a decision is because the application is withdrawn or the dispute between the claimant and respondent is resolved; or
 - (b) if an adjudicator refuses to communicate the decision on an adjudication application until the fees and expenses are paid; or
 - (c) in circumstances prescribed by regulation.

37 Protection from liability—adjudicators and authorised nominating authorities

- (1) An adjudicator is not personally liable for anything done or omitted to be done honestly and without recklessness—
 - (a) in exercising a function under this Act; or
 - (b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.

- (2) An authorised nominating authority, and a person exercising a function relating to the business affairs of an authorised nominating authority under this Act, are not personally liable for anything done or omitted to be done honestly and without recklessness—
- (a) in exercising a function under this Act; or
 - (b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.

Division 4.5 General

38 Effect of part on civil proceedings

- (1) 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 3 (Right to progress payments) in relation to the contract; or
 - (c) may have apart from this Act for anything done or omitted to be done under the contract.
- (2) Nothing done under this part affects any civil proceeding arising under a construction contract, whether under this part or otherwise, except as provided by subsection (3).
- (3) In any proceeding before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
- (a) must in any order or award it makes in the proceeding, take into account any amount paid to a party to the contract under or for the purposes of this part; and
 - (b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceeding.

Part 5 Notification and review of decisions

39 Meaning of *reviewable decision*—pt 5

In this part:

reviewable decision means a decision mentioned in schedule 1, column 3 under a provision of this Act mentioned in column 2 in relation to the decision.

40 Reviewable decision notices

If a person makes a reviewable decision, the person must give a reviewable decision notice to each entity mentioned in schedule 1, column 4 in relation to the decision.

Note 1 The person must also take reasonable steps to give a reviewable decision notice to any other person whose interests are affected by the decision (see *ACT Civil and Administrative Tribunal Act 2008*, s 67A).

Note 2 The requirements for reviewable decision notices are prescribed under the *ACT Civil and Administrative Tribunal Act 2008*.

41 Applications for review

The following may apply to the ACAT for review of a reviewable decision:

- (a) an entity mentioned in schedule 1, column 4 in relation to the decision;
- (b) any other person whose interests are affected by the decision.

Note If a form is approved under the *ACT Civil and Administrative Tribunal Act 2008* for the application, the form must be used.

Part 6 Miscellaneous

42 No contracting out

- (1) This Act has effect despite any provision in any contract, agreement or arrangement.
- (2) A provision of any contract, agreement or arrangement, whether in writing or not, is void to the extent that it—
 - (a) is inconsistent with this Act; and
 - (b) purports to, or has the effect of excluding, modifying or restricting the operation of this Act; and
 - (c) may reasonably be construed as an attempt to deter a person from taking action under this Act.

43 Judicial review of adjudication decision

- (1) Except as provided for in this part, a court does not have jurisdiction to set aside or remit an adjudication decision on the ground of error of fact or law on the face of the decision.
- (2) An appeal may be made to the Supreme Court on any question of law arising out of an adjudication decision.
- (3) An appeal under subsection (2) may be brought by any of the parties to an adjudication decision—
 - (a) with the consent of the parties to the decision; or
 - (b) with the leave of the Supreme Court.

- (4) The Supreme Court must not grant leave under subsection (3) (b) unless it considers that—
- (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more parties to the adjudication decision; and
 - (b) there is—
 - (i) a manifest error of law on the face of the adjudication decision; or
 - (ii) strong evidence that the adjudicator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of the law.
- (5) The Supreme Court may make any leave which it grants under subsection (3) (b) subject to the applicant complying with any conditions it considers appropriate.
- (6) On the determination of an appeal under subsection (2) the Supreme Court may by order—
- (a) confirm, amend or set aside the adjudication decision; or
 - (b) remit the adjudication decision, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to—
 - (i) the adjudicator for reconsideration; or
 - (ii) if a new adjudicator is appointed by the Supreme Court— to that adjudicator for consideration.
- (7) If an adjudication decision is remitted under subsection (6) (b) the adjudicator must make the new adjudication decision—
- (a) within 10 business days after the day the decision was remitted; or

(b) within the time directed by the Supreme Court.

- (8) If the adjudication decision of an adjudicator is amended on an appeal under subsection (2), the adjudication decision as amended has effect as if it were the adjudication decision of the adjudicator.

44 Determination of question of law by Supreme Court

- (1) The Supreme Court has jurisdiction to determine any question of law arising in an application to the court made by any of the parties to an adjudication decision—
- (a) with the consent of the adjudicator who made the decision; or
 - (b) with the consent of the parties to the decision.
- (2) The Supreme Court must not consider a question of law under subsection (1) (a) unless it is satisfied that—
- (a) the determination of the question might produce substantial savings in costs to the parties; and
 - (b) the question of law is one in respect of which leave to appeal would be likely to be granted under section 43 (4).

45 Review of Act

- (1) The Minister must review the operation of this Act as soon as possible after 1 July 2012.
- (2) A report on the outcome of the review must be presented to the Legislative Assembly by 1 July 2013.

46 Determination of fees

- (1) The Minister may, in writing, determine fees for this Act.

Note The Legislation Act contains provisions about the making of determinations and regulations relating to fees (see pt 6.3).

- (2) A determination is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

47 Approved forms

- (1) The chief executive may, in writing, approve forms for this Act.

- (2) If the chief executive approves a form for a particular purpose, the approved form must be used for that purpose.

Note For other provisions about forms, see the Legislation Act, s 255.

- (3) An approved form is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

48 Regulation-making power

- (1) The Executive may make regulations for this Act.

Note A regulation must be notified, and presented to the Legislative Assembly, under the Legislation Act.

- (2) A regulation may prescribe offences for contraventions of a regulation and prescribe maximum penalties of not more than 20 penalty units.

49 Legislation repealed

The *Contractors Debts Act 1897* (A1897-29) is repealed.

50 Legislation Act 2001, schedule 1, part 1.1, item 10

omit

Schedule 1 Reviewable decisions

(see pt 5)

column 1 item	column 2 section	column 3 decision	column 4 entity
1	31	refuse to authorise nominating authority	applicant for authorisation as nominating authority

Dictionary

(see s 3)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 For example, the Legislation Act, dict, pt 1, defines the following terms:

- business day
- exercise
- function
- law, of the Territory.

adjudicated amount—see section 24.

adjudication application—see section 19 (1).

adjudication certificate means a certificate provided by an authorised nominating authority under section 26.

adjudication response—see section 22 (1).

authorised nominating authority means a nominating authority authorised by the Minister under section 31.

business day does not include 27, 28, 29, 30 or 31 December.

claimant—see section 15.

claimed amount—see section 15.

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—see section 7.

corresponding law means a law of the Commonwealth or another State that provides for security of payments in the building and construction industry.

due date, for a progress payment, means the day the progress payment is payable under section 13.

payment claim means a payment claim under section 15.

payment schedule means a payment schedule under section 16.

progress payment—see section 10 (1).

recognised financial institution means a bank or any other person or body prescribed by regulation for this definition.

related goods and services—see section 8.

respondent—see section 15.

reviewable decision, for part 5 (Notification and review of decisions)—see section 39.

scheduled amount—see section 16 (2).

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 15 October 2009.

2 Notification

Notified under the Legislation Act on 26 November 2009.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

I certify that the above is a true copy of the Building and Construction Industry (Security of Payment) Bill 2009, which was passed by the Legislative Assembly on 19 November 2009.

Clerk of the Legislative Assembly

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