

TASMANIA

**BUILDING AND CONSTRUCTION INDUSTRY
SECURITY OF PAYMENT BILL 2009**

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SCHEDULE 1 – LEGISLATION REPEALED

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BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT BILL 2009

*(Brought in by the Minister for Workplace Relations, the
Honourable Lisa Maria Singh)*

A BILL FOR

An Act to provide for progress payments to be made in a timely fashion under building or construction contracts or contracts for the supply of goods and services relating to building or construction, for disputes in relation to such payments to be adjudicated in a timely and informal way, to repeal the *Contractors' Debts Act 1939*, and for related purposes

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Building and Construction Industry Security of Payment Act 2009*.

2. Commencement

This Act commences on the day on which this Act receives the Royal Assent.

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3. Interpretation

In this Act, unless the contrary intention appears –

“adjudicated amount” means the amount of a progress payment that an adjudicator determines to be payable under section 25;

“adjudication application” means an application made under section 20;

“adjudication certificate” means an adjudication certificate issued under section 26;

“adjudication fees” means fees or expenses charged by a nominating authority under section 32 or by an adjudicator under section 36;

“adjudication response” means a response lodged with an adjudicator under section 22;

“adjudicator” means a person who has accepted a referral of an adjudication application under section 21;

“building” includes a proposed building or part of a building and a building that is able to be relocated;

“building or construction contract” means a contract, or other arrangement, under

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which one party undertakes to carry out building work or construction work for, or to supply building or construction-related goods and services to, another party;

“building or construction-related goods and services” has the meaning it has in section 5;

“building work or construction work” has the meaning it has in section 4;

“claimant” means a person by whom a payment claim is served under section 16;

“claimed amount” means –

(a) an amount of a progress payment claimed, in accordance with section 16, in a payment claim, to be due for building work or construction work carried out or for building or construction-related goods and services supplied; or

(b) any other amount specified in the payment claim in accordance with section 16(5);

“due date”, in relation to a progress payment, means the due date determined in accordance with section 13;

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“fire safety system” includes any one or more of the following:

- (a) booster assemblies;
- (b) fire mains, hydrants and hose reels;
- (c) sprinklers;
- (d) fire and smoke alarms;
- (e) fire control centres;
- (f) provisions for special fire hazard buildings;
- (g) stairwell pressurisation;
- (h) air-handling systems;
- (i) smoke and heat vents;

“nominating authority” means a person who is appointed to be a nominating authority under section 31(2);

“payment claim” means a claim made under section 16;

“payment schedule” means a payment schedule provided to a claimant under section 17;

“plumbing installation” means –

- (a) a system of water supply; or

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- (b) a system of sewage or sullage drainage or disposal; or
- (c) a system of stormwater drainage, roof drainage or trade waste; or
- (d) an on-site waste water management system;

“progress payment” means a progress payment to which a person is entitled under section 11 and includes –

- (a) the final payment for building work or construction work carried out, or for building or construction-related goods and services supplied, under a building or construction contract; and
- (b) a single or one-off payment for carrying out building work or construction work, or supplying building or construction-related goods and services, under a building or construction contract; and
- (c) a payment that is based on an event or date;

“recognised financial institution” means –

- (a) an authorised deposit-taking institution; or

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- (b) a “body regulated by APRA” within the meaning of the *Australian Prudential Regulation Authority Act 1998* of the Commonwealth; or
- (c) a prescribed person or body, or a member of a prescribed type of persons or bodies;

“reference date”, in relation to a building or construction contract, means –

- (a) a date determined by, or in accordance with, the terms of the contract as the date on which a claim for a progress payment may be made in relation to –
 - (i) work carried out, or undertaken to be carried out, under the contract; or
 - (ii) building or construction-related goods and services supplied, or undertaken to be supplied, under the contract; or
- (b) if the contract does not expressly provide for such a date, the last day of each month in which –
 - (i) building work or construction work is

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carried out under the contract; or

- (ii) building or construction-related goods and services are supplied under the contract;

“respondent” means a person on whom a payment claim is served under section 16;

“road infrastructure” means –

- (a) any land that is to be used as a road (whether public or private); or

- (b) any land that is to be used as a footpath, bike path or public thoroughfare for pedestrians or vehicles; or

- (c) any structures or works that are associated with, or co-located with, such a road, path or thoroughfare, including, but not limited to including –

- (i) kerbing, guttering, roundabouts, median strips and barriers; and

- (ii) parking places or facilities; and

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(iii) bridges, viaducts and tunnels; and

(iv) other works carried out in, on, under or over a road, path or thoroughfare;

“scheduled amount” means the amount of a progress payment that is proposed to be made under a payment schedule;

“Security of Payments Official” means the person who, in accordance with section 30, is the Security of Payments Official;

“structure” includes a proposed structure, part of a structure and a temporary structure;

“temporary structure” includes any –

- (a) booth, tent or other temporary enclosure, whether or not a part of the booth, tent or enclosure is permanent; and
- (b) temporary seating structure; and
- (c) stage, platform, or tower, that is temporary; and
- (d) temporary bridge; and
- (e) structure that does not form part of the land and is temporary; and

- (f) structure of a prescribed type.

4. Meaning of “building work or construction work”

- (1) For the purposes of this Act, “building work or construction work” means any of the following:

- (a) the construction, erection, re-erection, alteration, repair, restoration, maintenance, extension, adding to, underpinning, removal, demolition, or dismantling, of –

(i) buildings; or

(ii) structures that form, or are to form, part of land;

- (b) the construction, alteration, repair, restoration, maintenance, extension, removal, demolition or dismantling of works that form, or are to form, part of land, including –

(i) walls; and

(ii) road infrastructure; and

(iii) energy infrastructure and telecommunications facilities; and

(iv) aviation landing facilities and railway infrastructure; and

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- (v) marine infrastructure, water and sewerage infrastructure, drainage infrastructure, dams and canals and installations for the purposes of irrigation, land drainage or coast or river protection; and
 - (vi) structures, such as poles, wires and netting, erected to support or protect agricultural, horticultural or forestry products; and
 - (vii) structures (other than underground structures constructed to enable access to minerals) to enable persons to gain access to places on which agricultural, horticultural, forestry, tourist or mining activities are being, or are to be, carried out;
- (c) the installation or alteration in, or removal from, any building, structure or works, of systems, and services, that form, or are to form, part of land, including –
- (i) heating, ventilation, air-conditioning and cooling systems; and
 - (ii) power supply, lighting and communication systems; and

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- (iii) passenger lifts and goods lifts;
and
 - (iv) plumbing installations; and
 - (v) fire safety systems and security systems;
- (d) any operation that forms an integral part of, is preparatory to or completes work referred to in paragraph (a), (b) or (c), including, but not limited to including –
- (i) site clearance, earth-moving, excavation, tunnelling, boring and filling; and
 - (ii) the preparation of foundations; and
 - (iii) the erection, maintenance or dismantling of plant and equipment; and
 - (iv) the prefabrication of components to form part of any building, structure or works, whether the prefabrication is carried out on-site or off-site; and
 - (v) site restoration, landscaping and the provision of road infrastructure and other works to enable access to land or a part of land;

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- (e) the internal or external cleaning of buildings, structures, or works, that is carried out in the course of the construction, alteration, repair, restoration, maintenance, extension, removal, demolition or dismantling of the buildings, structure or works;
 - (f) the painting or decoration of the internal or external surfaces of any building, structure or works;
 - (g) other work of a type prescribed by regulations to be a type of building work or construction work for the purposes of this Act.
- (2) Despite subsection (1), the following work is not building work or construction work for the purposes of this Act:
- (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 the construction of underground works for the purpose of such extraction;
 - (c) other work of a type prescribed by regulations to not be building work or construction work for the purposes of this Act.

5. Meaning of “building or construction-related goods and services”

(1) For the purposes of this Act, “building or construction-related goods and services”, in relation to building work or construction work, means any of the following:

(a) goods of the following kind:

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

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

(b) services of the following kind:

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

(ii) architectural, design, land surveying, quantity surveying, engineering, building surveying or project management services in relation to building work or construction work;

(iii) inspection, reporting, or advisory, services provided in respect of

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buildings, building systems and services, energy and sustainability systems and services, geotechnical, engineering, interior decoration, exterior decoration or landscape services provided in relation to building work or construction work;

(c) goods and services of a type prescribed by regulations to be a type of building or construction-related goods and services.

(2) Despite subsection (1), “building or construction-related goods and services” does not include goods or services of a type that is prescribed by regulations to not be building or construction-related goods and services.

(3) A reference in this Act to building or construction-related goods and services is to be taken to be a reference to building or construction-related goods, building or construction-related services, or both.

**PART 2 – APPLICATION AND EFFECT OF ACT IN
RELATION TO OTHER ACTS, CONTRACTS &C.**

6. Application of Act

- (1) This Act applies to any building or construction contract, whether the contract –
- (a) is written or oral; or
 - (b) is partly written and partly oral; or
 - (c) is expressed to be governed by the law of a jurisdiction other than Tasmania.
- (2) Despite subsection (1), this Act does not apply to a building or construction contract –
- (a) that forms part of a loan agreement, a contract of guarantee or a contract of insurance, if the agreement or contract is an agreement or contract 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 respect of building work or construction work carried out, or building or construction-related

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goods and services supplied,
under the building or construction
contract; or

(b) under which it is agreed that the consideration payable for building work or construction work carried out under the contract, or for building or construction-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 building or construction contract to the extent to which it contains provisions under which a party –

(a) undertakes to carry out building work or construction work; or

(b) undertakes to supply building or construction-related goods and services –

as an employee of the party for whom the work is to be carried out or the goods and services are to be supplied, or as a condition of a loan agreement with a recognised financial institution.

(4) This Act does not apply to a building or construction contract to the extent to which it contains provisions under which a party undertakes –

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- (a) to lend money or to repay money lent; or
 - (b) to guarantee payment of money owing or repayment of money lent; or
 - (c) to provide an indemnity in respect of building work or construction work carried out, or building or construction-related goods and services supplied, under the building or construction contract.
- (5) This Act does not apply to a building or construction contract to the extent to which it relates to –
- (a) building work or construction work carried out outside this State; and
 - (b) building or construction-related goods and services supplied in respect of building work or construction work carried out outside this State.
- (6) This Act does not apply to a building or construction contract, or a class of building or construction contracts, prescribed by the regulations to be a contract or class of contracts to which this Act does not apply.

7. Act binds Crown

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

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8. Act does not limit other entitlements or remedies

This Act does not limit –

- (a) any other entitlement that a claimant may have under a building or construction contract; or
- (b) any other remedy that a claimant may have for recovering any such other entitlement.

9. Effect on civil proceedings

(1) Subject to section 10, nothing in Part 4, 5, 6 or 7 affects any right that a party to a building or construction contract –

- (a) may have under the contract; or
- (b) may have under Part 3 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 Part 4, 5, 6 or 7 affects any civil proceedings arising under a building or construction contract, whether under Part 4, 5, 6 or 7, except as provided by subsection (3).

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- (3) In proceedings before a court or tribunal in relation to a matter arising under a building or construction contract, the court or tribunal –
- (a) must allow for an amount to be paid to a party to the contract, under or for the purposes of Part 4, 5, 6 or 7, in any award or order it makes in those proceedings; and
 - (b) may make the orders that it considers appropriate for the restitution of any amount so paid, and any other orders it thinks appropriate, having regard to its decision in those proceedings.

10. Parties cannot contract out of Act

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
- (2) A provision of a contract or other agreement, whether in writing or not, is void if it is a provision –
 - (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.

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Part 3 – Rights to Progress Payments

PART 3 – RIGHTS TO PROGRESS PAYMENTS

11. Rights to progress payments

(1) A person –

- (a) who has undertaken to carry out building work or construction work under a building or construction contract; or
- (b) who has undertaken to supply building or construction-related goods and services under a building or construction contract –

is entitled, on and from each reference date, to a progress payment.

(2) The amount of the progress payment is to be the amount calculated in accordance with the terms of the contract.

(3) However, if the contract does not expressly provide for the calculation of the amount of the progress payment, the amount of the progress payment is to be –

- (a) the amount calculated on the basis of the value of the building work or construction work –
 - (i) carried out before the reference date by the person under the contract; or

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- (ii) undertaken to be carried out before the reference date by the person under the contract –

whichever is the higher amount; or

- (b) the amount calculated on the basis of the value of the building or construction-related goods and services –

- (i) supplied by the person under the contract before the reference date; or

- (ii) undertaken to be supplied by the person under the contract before the reference date –

whichever is the higher amount.

12. How value of building work or construction work &c. to be determined

- (1) The value of building work or construction work carried out under a building or construction contract is to be determined in accordance with the terms of the contract.

- (2) However, if a building or construction contract does not expressly determine the value of building work or construction work, or specify how the value of building work or construction work is to be determined, the value of the building work or construction work is to be determined having regard to –

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- (a) the contract price for the work, including any GST that may be payable in relation to the work; and
 - (b) any other rates or prices set out in the contract; and
 - (c) 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
 - (d) if any of the work is defective, the estimated cost of rectifying the defect.
- (3) The value of building or construction-related goods and services supplied, or undertaken to be supplied, under a building or construction contract is to be determined in accordance with the terms of the contract.
- (4) However, if a building or construction contract does not expressly determine the value of building or construction-related goods and services, or specify how the value of building or construction-related goods and services is to be determined, their value is to be determined having regard to –
- (a) the contract price for the building or construction-related goods and services; and

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- (b) any other rates or prices set out in the contract; and
 - (c) 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
 - (d) if any of the goods are defective, the estimated cost of rectifying the defect.
- (5) If building or construction-related goods and services consist of materials and components that are to form part of any building, structure, or work, arising from building work or 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 building work or construction work is being carried out.

13. Due date for payment

- (1) A progress payment under a building or construction contract becomes due and payable on the date on which the payment becomes due and payable in accordance with the terms of the contract.
- (2) However, if the contract does not expressly provide for when a progress payment becomes due and payable, the payment becomes due and payable on the date 10 business days after a

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payment claim is made under section 16 in relation to the payment.

- (3) Interest is payable, on the unpaid amount of a progress payment that has become due and payable, at the rate –
- (a) prescribed under the *Supreme Court Civil Procedure Act 1932* in respect of a judgment for money payable to a person; or
 - (b) specified in the building or construction contract –

whichever is greater.

14. Liens over unpaid amounts

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

- (b) that existed before the date on which the progress payment becomes due or payable –

takes priority over a lien under subsection (1).

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

15. “Pay-when-paid” provisions of no effect

- (1) In this section –

“money owing”, in relation to a building or construction contract, means money owing for –

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

“pay-when-paid provision”, of a building or 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

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on payment to the first party by a further party (“the third party”) of the whole or a 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 a 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.

(2) A pay-when-paid provision of a building or construction contract has no effect in relation to any payment for –

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

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

PART 4 – PAYMENT CLAIMS AND PAYMENT SCHEDULES

16. Claims for payment may be made

- (1) A person (in this Act referred to as a “claimant”) who is, or who claims to be, entitled to a progress payment under section 11 in respect of a building or construction contract may serve a payment claim on the person who is, or may be, liable under the contract to make the payment.
- (2) A payment claim is to be in the form approved by the Security of Payments Official.
- (3) Despite subsection (2), a payment claim made in a form containing the information it is required by this section to contain is to be taken to comply with that subsection, provided that any deviation in that form from the approved form is not calculated to mislead or prejudice the respondent or any other person.
- (4) A payment claim must –
 - (a) identify the building work or construction work, or building or construction-related goods and services, to which the progress payment relates; and
 - (b) indicate the amount of the progress payment that the claimant claims is due; and

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- (c) state that the claim is made under this Act; and
 - (d) contain any other information that is specified in the form approved under subsection (2) as being required to be contained in a payment claim.
- (5) A payment claim may also include an amount –
- (a) that the respondent is liable to pay the claimant under section 29(3); or
 - (b) that is held under the building or construction contract by the respondent and that the claimant claims is due for release.
- (6) A payment claim may be served only within whichever of the following periods occurs later:
- (a) the period determined by or in accordance with the terms of the building or construction contract;
 - (b) the period of 12 months after –
 - (i) the building work or construction work to which the claim relates was last carried out; or
 - (ii) the building or construction-related goods and services to which the claim relates were last supplied.

- (7) A claimant must not serve more than one payment claim in respect of each reference date under the building or construction contract.
- (8) However, subsection (7) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

17. Schedules for payment may be provided to claimant

- (1) A person (in this Act referred to as the “respondent”) on whom a payment claim is served by a claimant may provide to the claimant a payment schedule in relation to the claim.
- (2) A payment schedule –
 - (a) must identify the payment claim to which the schedule relates; and
 - (b) must indicate the amount of the payment, if any, that the respondent proposes to make (in this Act referred to as the “scheduled amount”).
- (3) If the scheduled amount is less than the claimed amount, the schedule must specify why the amount is less.
- (4) If the amount is less because the respondent is withholding payment of the claim for any reason, the schedule must specify the respondent’s reasons for withholding the payment.

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Part 4 – Payment claims and payment schedules

18. Consequences of failing to provide payment schedule within relevant period

(1) If –

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

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

(i) within the period in which the payment is required to be made under the building or construction contract under which the payment is to be made; or

(ii) within the period of 10 business days after the payment claim is served –

whichever period 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.

(2) Subsection (3) applies to a claimant if the respondent –

(a) becomes liable under subsection (1) to pay to the claimant the claimed amount; and

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- (b) does not pay all of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (3) If this subsection applies to a claimant, he or she –
- (a) may –
- (i) apply to a court of competent jurisdiction to recover from the respondent the unpaid part of the claimed amount, as a debt due to the claimant; or
- (ii) make an adjudication application under section 20 in relation to the payment claim; and
- (b) may serve notice on the respondent of the claimant's intention to suspend carrying out building work or construction work, or supplying goods and services, under the building or construction contract.
- (4) A notice served under subsection (3)(b) must specify that the notice is made under this Act.
- (5) If an application is made by a claimant to a court in accordance with subsection (3)(a)(i) to recover from the respondent, as a debt, the unpaid part of the claimed amount specified in a payment claim, the court may give judgment entitling the claimant to recover the unpaid part as a debt due and payable, if the court is satisfied that the respondent –

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- (a) is liable under subsection (1) to pay to the claimant the claimed amount; and
 - (b) has not paid all of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (6) A respondent in proceedings under this section in a court of competent jurisdiction is not entitled in those proceedings –
- (a) to bring a cross-claim against the claimant; or
 - (b) to raise a defence in relation to matters arising under the building or construction contract.

19. Consequences of not paying claimant in accordance with payment schedule

- (1) Subsection (2) applies to a claimant if –
- (a) the claimant serves a payment claim on a respondent; and
 - (b) the respondent provides a payment schedule to the claimant –
 - (i) within the period in which the payment is required to be made under the building or construction

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contract under which the payment is to be made; or

- (ii) within the period of 10 business days after the payment claim is served –

whichever period expires earlier; and

- (c) the payment schedule specifies a scheduled amount that the respondent proposes to pay to the claimant; and
- (d) the respondent does not pay to the claimant all of the scheduled amount on or before the due date for the progress payment to which the payment claim relates.

- (2) If this subsection applies to a claimant, the claimant –

- (a) may –

- (i) apply to a court of competent jurisdiction to recover from the respondent the unpaid part of the scheduled amount, as a debt due to the claimant; or
 - (ii) make an adjudication application under section 20 in relation to the payment claim; and
- (b) may serve notice on the respondent of the claimant's intention to suspend carrying out building work or construction work,

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or supplying goods and services, under the building or construction contract.

- (3) A notice served under subsection (2)(b) must specify that the notice is made under this Act.
- (4) If an application is made by a claimant to a court in accordance with subsection (2)(a)(i) to recover from the respondent, as a debt, the unpaid part of the scheduled amount specified in a payment claim, the court may give judgment entitling the claimant to recover the unpaid part as a debt due and payable, if the court is satisfied that –
 - (a) subsection (2) applies to the claimant; and
 - (b) the respondent has not paid all of the scheduled amount on or before the due date for the progress payment to which the payment claim relates.
- (5) A respondent in proceedings under this section in a court of competent jurisdiction is not entitled in those proceedings –
 - (a) to bring a cross-claim against the claimant; or
 - (b) to raise a defence in relation to matters arising under the building or construction contract.

PART 5 – ADJUDICATION OF DISPUTES

20. Applications for adjudication

- (1) A claimant may, in writing, apply to a nominating authority, chosen by the claimant, to have a payment claim adjudicated.
- (2) A claimant may only make an application under subsection (1) if –
 - (a) the respondent provided a payment schedule under section 17 but the scheduled amount specified in the schedule is less than the claimed amount specified in the payment claim; or
 - (b) the respondent provided a payment schedule under section 17 but did not pay to the claimant all of the scheduled amount by the due date for payment of the amount; or
 - (c) the respondent failed to provide a payment schedule to the claimant under section 17 and did not pay all of the claimed amount by the due date for payment of the amount.
- (3) An application made under subsection (1) pursuant to –
 - (a) subsection (2)(a) must be made within 10 business days after the claimant receives the payment schedule; or

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- (b) subsection (2)(b), must be made within 20 business days after the due date for payment.
- (4) A claimant may only make an application under subsection (1) pursuant to subsection (2)(c) if –
 - (a) the claimant has notified the respondent, within 20 business days after the due date for payment, that –
 - (i) the claimant intends to make the application; and
 - (ii) the respondent may provide a payment schedule to the claimant within 5 business days after the notice is given; and
 - (b) the respondent has not provided a payment schedule within the period of 5 business days since the notice was given to the respondent; and
 - (c) the application is made within 10 business days after the end of the 5-day period referred to in paragraph (b).
- (5) An application made under subsection (1) –
 - (a) must identify the payment claim and the payment schedule, if any, to which it relates; and

- (b) must be accompanied by the application fee, if any, that the nominated authority may have determined; and
 - (c) may contain any submissions relating to the application that the applicant thinks fit.
- (6) The application fee may not be greater than an amount, if any, determined by the Minister, by notice published in the *Gazette*, to be the maximum amount of the application fee.
 - (7) The claimant must serve on the respondent a copy of an application made under subsection (1).
 - (8) A claimant may withdraw an application made under subsection (1) by notice served on the adjudicator and the respondent.
 - (9) A claimant who withdraws an application under subsection (8) is liable to pay any fees and expenses to which an adjudicator is entitled under section 36 in relation to the application.

21. Appointment of adjudicator

- (1) A nominating authority to which an adjudication application is made in relation to a building or construction contract is to refer the matter as soon as practicable to a person who is a qualified adjudicator.
- (2) A person is a qualified adjudicator if the person is a natural person with the qualifications,

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expertise and experience, if any, determined by the Security of Payments Official to be required.

- (3) A nominating authority to which an adjudication application is made in relation to a building or construction contract may not refer the matter to a qualified adjudicator if –
- (a) the adjudicator is a party to the building or construction contract; or
 - (b) the adjudicator is a member of a class of adjudicators, prescribed by the regulations, to whom an adjudication application may not be made in respect of a class of contracts, prescribed by the regulations, of which the building or construction contract is a member.
- (4) A qualified adjudicator may accept an adjudication application referred to the adjudicator under subsection (1) by serving notice of acceptance on the claimant and the respondent in relation to the application.

22. Response by respondent to adjudication application

- (1) A respondent who has provided a payment schedule to the claimant within the time specified in section 18(1)(b) or section 20(4)(b) may lodge with the adjudicator a response to the claimant’s adjudication application.

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- (2) An adjudication response may be lodged under subsection (1) within –
- (a) 10 business days after receiving a copy of the adjudication application; or
 - (b) 5 business days after receiving notice of an adjudicator’s acceptance of the application –
- whichever period expires later.
- (3) An adjudication response –
- (a) must be in writing; and
 - (b) must identify the adjudication application to which it relates; and
 - (c) may contain any submissions relevant to the response that the respondent thinks fit.
- (4) A respondent may not include in an adjudication response reasons for withholding payment, unless those reasons have already been included in the payment schedule provided to the claimant.
- (5) The respondent must serve on the claimant a copy of the adjudication response.

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23. Time in which adjudication is to occur

- (1) An adjudicator is to determine an adjudication application as soon as practicable and, in any case, within –
 - (a) 15 business days after the date on which the adjudicator notified the claimant and respondent under section 21(4) that the adjudicator accepted the application; or
 - (b) a further period, if any, agreed to by the claimant and the respondent.
- (2) Despite subsection (1), an adjudicator is not to determine an adjudication application until after the end of the period under section 22(2) in which the respondent may lodge an adjudication response.
- (3) Despite subsection (1), an adjudicator may only consider an adjudication response if it was made before the end of the period under section 22(2) in which the respondent may lodge an adjudication response.

24. Adjudication proceedings

- (1) In adjudication proceedings –
 - (a) an adjudicator may request further written submissions from a party to the proceedings; and

- (b) if an adjudicator requests a party to make further written submissions, the adjudicator must give the other party an opportunity to comment on the submissions.
- (2) An adjudicator may specify periods in which submissions and comments may be made by parties to the adjudication proceedings.
- (3) An adjudicator may call a conference of the parties to adjudication proceedings.
- (4) A conference is to be conducted informally and may not be attended by a legal representative of any party.
- (5) An adjudicator may carry out an inspection of any matter that relates to a payment claim to which the adjudication proceedings relate.

25. Determination of adjudication application

- (1) An adjudicator is to determine an adjudication application –
 - (a) by determining whether or not all or part of a progress payment is to be paid by the respondent to the claimant; and
 - (b) if the adjudicator determines that all or part of a progress payment is to be paid by the respondent to the claimant, by determining –
 - (i) the amount of the payment; and

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- (ii) the date on which the payment became or becomes payable; and
 - (iii) the rate of interest payable on the amount.
- (2) In determining an adjudication application, an adjudicator is to consider only the following matters:
 - (a) the provisions of this Act;
 - (b) the provisions of the building or construction contract to which the application relates;
 - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been made by the claimant in support of the claim;
 - (d) the payment schedule, if any, to which the application relates, together with all submissions (including relevant documentation) that have been 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) An adjudicator may determine an adjudication application even if –

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- (a) a party fails to make a submission or comment within the period specified by the adjudicator; or
 - (b) a party fails to attend a conference called by the adjudicator.
- (4) The adjudicator's determination –
- (a) must be in writing; and
 - (b) must include the reasons for the determination, unless the claimant and the respondent have both requested the adjudicator not to include the reasons in the determination.
- (5) If an adjudicator, in determining an adjudication application, has determined in accordance with section 12 the value of building work or construction work carried out, or of building or construction-related goods and services supplied, under a building or construction contract, the same value is to be determined for that work or those goods and services in any determination of a subsequent adjudication application in relation to the contract.
- (6) However, a different value may be determined if a party to the subsequent adjudication application satisfies the adjudicator of that application that the value of the works or services has changed since the value was first determined.

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- (7) An adjudicator may, on his or her own initiative or on the application of a claimant or respondent, correct –
- (a) a clerical mistake in a determination under this section; or
 - (b) an error arising from an accidental slip or omission in a determination under this section; or
 - (c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter referred to in a determination under this section; or
 - (d) a defect of form in a determination under this section.

26. Respondent must pay amount determined by adjudicator

- (1) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant before –
- (a) the end of the period 5 business days immediately after the date on which the adjudicator’s determination is served on the respondent; or
 - (b) a later date, if any, determined under section 25(1)(b)(ii).

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- (2) If a respondent does not pay to the claimant all of the adjudicated amount in accordance with subsection (1), the claimant may do either or both of the following:
- (a) request the nominating authority to which the adjudication application was made to issue an adjudication certificate under this section;
 - (b) serve notice on the respondent of the claimant's intention to suspend carrying out building work or construction work, or supplying building or construction-related goods and services, under the building or construction contract.
- (3) A notice under subsection (2)(b) must specify that it is made under this Act.
- (4) An adjudication certificate issued under this section must specify that it is made under this Act and specify the following matters:
- (a) the name of the claimant;
 - (b) the name of the respondent who is liable to pay the adjudicated amount;
 - (c) the adjudicated amount;
 - (d) the date on which payment of the adjudicated amount was due to be paid to the claimant.

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- (5) If an amount of interest that is due and payable on the adjudicated amount is not paid by the respondent –
- (a) the claimant may request the nominating authority to specify in the adjudication certificate the amount of interest payable; and
 - (b) the amount so specified is added to, and becomes part of, the adjudicated amount.
- (6) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication but has not been reimbursed by the respondent for that amount –
- (a) the claimant may request the nominating authority to specify in the adjudication certificate that amount; and
 - (b) the amount so specified is added to, and becomes part of, the adjudicated amount.

27. Adjudication certificate may be filed as judgment for debt

- (1) An adjudication certificate may be filed as a judgment for a debt in a court of competent jurisdiction.
- (2) An adjudication certificate that is filed as a judgment for a debt in a court of competent

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jurisdiction is enforceable as a judgment for a debt.

- (3) An adjudication certificate may only be filed under this section if it is accompanied by an affidavit by the claimant stating that a part of the adjudicated amount has not been paid at the time the certificate is filed.
- (4) If the affidavit specifies that part of the adjudicated amount has not been paid, the judgment is only for that part of that amount.
- (5) If the respondent commences proceedings to have the judgment set aside, the respondent –
 - (a) is not, in those proceedings, entitled –
 - (i) to bring a cross-claim against the claimant; or
 - (ii) to raise a defence in relation to matters arising under the building or construction contract; or
 - (iii) to challenge the adjudicator’s determination; and
 - (b) must pay into the court as security the unpaid part of the adjudicated amount, pending the final determination of those proceedings.

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28. When claimant may make new adjudication application

- (1) Subsection (2) applies to a claimant if –
 - (a) a claimant fails to receive, within 4 business days after the claimant makes an adjudication application, an adjudicator's notice of acceptance of the application; or
 - (b) an adjudicator who accepts an adjudication application from the claimant fails to determine the application within the time allowed by section 23.
- (2) If this subsection applies to a claimant, the claimant –
 - (a) may withdraw the adjudication application made to the adjudicator, by serving notice in writing on the adjudicator or the nominating authority to whom the application was made; and
 - (b) may make a new adjudication application under section 20.
- (3) Despite section 20(3), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous application under subsection (2).

**PART 6 – CLAIMANT’S RIGHT TO SUSPEND
BUILDING WORK OR CONSTRUCTION WORK OR
SUPPLY**

29. Claimant may suspend work or supply

- (1) A claimant may suspend the carrying out of building work or construction work, or the supply of building or construction-related goods and services, under a building or construction contract, if at least 2 business days have passed since the claimant served notice on the respondent under section 18, 19 or 26 of the claimant’s intention to do so.
- (2) A claimant may not suspend the carrying out of building work or construction work, or the supply of building or construction-related goods and services, under a building or construction contract, after the end of the period of 3 business days immediately after the date on which the claimant receives payment for the amount payable by the respondent under section 18, 19 or 26.
- (3) If a claimant –
 - (a) in accordance with this section, suspends the carrying out of building work or construction work, or the supply of building or construction-related goods and services, under a building or construction contract; and

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(b) incurs loss or expenses as a result of the removal, by the respondent, from a contract, of a part of the work or supply –

the respondent is liable to pay the claimant the amount of the loss or expense.

(4) A claimant who, in accordance with this section, suspends the carrying out of building work or construction work, or the supply of building or construction-related goods and services, under a building or construction contract, is not liable for loss or damage suffered by the respondent, or a person claiming through a respondent, as a consequence of the claimant not carrying out the work, or supplying the services, during the period of suspension.

PART 7 – ADMINISTRATION

Division 1 – Security of Payments Official

30. Security of Payments Official

- (1) The Security of Payments Official for the purposes of this Act is to be –
 - (a) the Director of Building Control within the meaning of the *Building Act 2000*; or
 - (b) if the Minister appoints another person under subsection (2), that person.
- (2) The Minister may appoint a person to be the Security of Payments Official for the purposes of this Act.

Division 2 – Nominating authorities

31. Nominating authorities

- (1) A person may apply to the Security of Payments Official to be appointed as a nominating authority.
- (2) The Security of Payments Official may, if he or she receives an application under subsection (1), appoint as a nominating authority a person specified in the application.
- (3) A person who is appointed as a nominating authority is so appointed for a period of 3 years

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from the date of the appointment, but may be reappointed.

- (4) The Security of Payments Official may –
- (a) specify a maximum number of persons who may be appointed to be nominating authorities; and
 - (b) refuse to appoint a person to be a nominating authority if the maximum number of persons have been appointed to be nominating authorities; and
 - (c) revoke the appointment of a nominating authority if the Security of Payments Official is satisfied that the authority has failed to comply with a direction given to the authority under section 33 or has otherwise failed to comply with a requirement of this Act.

32. Nominating authorities may charge fees

- (1) A nominating authority may charge an amount for any service provided by the authority in connection with an adjudication application made to the authority.
- (2) An amount that may be charged by a nominating authority for a service must not be more than the amount, if any, determined by the Minister by notice published in the *Gazette*.

- (3) The claimant and respondent are –
- (a) jointly and severally liable to pay an amount that is charged by a nominating authority in connection with an adjudication application made to the authority by the claimant; and
 - (b) each liable to contribute to the payment of the amount in equal proportions or, if the adjudicator appointed in relation to the application determines different proportions, in the proportions so determined.

33. Nominating authorities to provide information

- (1) The Security of Payments Official may request a nominating authority to provide to him or her information in relation to the activities of the authority under this Act, including information about any amounts charged by the authority under this Act.
- (2) A nominating authority must comply with a request of the Security of Payments Official under subsection (1).

34. Nominating authority to advise Security of Payments Official if certain legal processes begin

A nominating authority must notify the Security of Payments Official if the authority becomes aware that an application has been made to a

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court in relation to a building or construction contract in relation to which an adjudication application has been made to the authority.

Division 3 – Adjudicators

35. Disqualification of adjudicator for interest

- (1) An adjudicator in relation to an adjudication application is disqualified from adjudicating the application if he or she has a material personal interest in a building or construction contract, dispute, or party to the contract, to which the application relates.
- (2) As soon as practicable after becoming aware that he or she is disqualified from adjudicating an application, an adjudicator must –
 - (a) cease to deal with the application; and
 - (b) serve notice in writing on the claimant and the respondent, specifying that the adjudicator is disqualified from adjudicating the application.
- (3) An adjudicator who gives notice under subsection (2) in relation to an application must give notice in writing of the disqualification to the nominating authority that referred the application to him or her.
- (4) A party to an adjudication application may, by notice in writing to the adjudicator, request the

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adjudicator to take the actions specified in subsection (2), because, in the party's opinion, the adjudicator is disqualified from adjudicating the application.

- (5) If, after receiving a notice under subsection (4), an adjudicator fails to take the actions specified in subsection (2), a party to the application may apply to the Magistrates Court (Administrative Appeals Division) for a review of the decision of the adjudicator not to take those actions.
- (6) Any decision of an adjudicator, in relation to an adjudication application, who is disqualified from adjudicating the application is void.
- (7) Despite section 36(3), the adjudicator is entitled to any fees or charges to which he or she would, but for that subsection, be entitled, in relation to the adjudication application, in respect of the services provided by him or her before he or she ought to have been aware that he or she was disqualified under this section.
- (8) As soon as practicable after a nominating authority becomes aware that an adjudicator has ceased to deal with an adjudication application because he or she is disqualified from adjudicating the application, the nominating authority must refer the application to another adjudicator under section 21.

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36. 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 between the adjudicator and the parties to the adjudication, the amount, by way of fees and expenses, that is reasonable having regard to the work done and the expenses incurred by the adjudicator.
- (2) The claimant and respondent are –
 - (a) jointly and severally liable to pay an amount that is charged by an adjudicator under this section; and
 - (b) each liable to contribute to the payment of the amount in equal proportions or, if the adjudicator appointed in relation to the application determines different proportions, in the proportions so determined.
- (3) An adjudicator is not entitled to be paid fees or expenses in connection with the adjudication of an adjudication application if he or she fails, within the time allowed by section 23, to determine the application (other than because the application is withdrawn or the dispute between

the claimant and respondent is otherwise resolved).

- (4) Subsection (3) does not apply –
- (a) if the adjudicator refuses to notify the parties of his or her determination until his or her fees or expenses are paid; or
 - (b) in other circumstances that are prescribed in the regulations for the purposes of this paragraph.

37. Information in relation to determinations of adjudication applications

- (1) An adjudicator is to provide a copy of his or her determination of an adjudication application under section 25 to the nominating authority that referred the application to the adjudicator.
- (2) A nominating authority to which a determination is provided under subsection (1) must forward a copy of the determination to the Security of Payments Official in the manner and form required by the Official.
- (3) The Security of Payments Official may publish, in the manner he or she thinks fit, any determination provided to him or her under this section.
- (4) The Security of Payments Official is, by 1 March in a year, to submit to the Building Regulation Advisory Committee established

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under the *Building Act 2000* an annual report consisting of –

- (a) a report in respect of the operation of the Act in the previous calendar year; and
- (b) the recommendations, if any, of the Official, as to how this Act, or operations under this Act, could be improved.

Division 4 – Protection from liability

38. Protection from liability

- (1) No action lies against the Security of Payments Official or any other person in relation to anything done or omitted to be done by a nominating authority in good faith –
 - (a) in performing the functions of the Security of Payments Official, or exercising the powers of the Security of Payments Official, under this Act; or
 - (b) in the reasonable belief that the thing was done or omitted to be done in the performance of the functions, or the exercise of the powers, of the Security of Payments Official under this Act.
- (2) No action lies against a nominating authority or any other person in relation to anything done or omitted to be done by the nominating authority in good faith –

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- (a) in performing the functions of the authority, or exercising the powers of the authority, under this Act; or
 - (b) in the reasonable belief that the thing was done or omitted to be done in the performance of the functions, or the exercise of the powers, of the nominating authority under this Act.
- (3) An adjudicator is not personally liable for anything done or omitted to be done in good faith –
- (a) in performing his or her functions, or exercising his or her powers, under this Act; or
 - (b) in the reasonable belief that the thing was done or omitted to be done in the performance of the adjudicator's functions, or the exercise of the adjudicator's powers, under this Act.

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Part 8 – Miscellaneous

PART 8 – MISCELLANEOUS

39. Service of notices

A notice or other document is effectively served under this Act if –

- (a) in the case of a natural person, it is –
 - (i) given to the person; or
 - (ii) left at, or sent by post to, the person's postal or residential address or place or address of business or employment last known to the server of the notice or other document; or
 - (iii) faxed to the person's fax number; or
 - (iv) emailed to the person's email address, if the person has agreed to service by email; and
- (b) in the case of any other person, it is –
 - (i) left at, or sent by post to, the person's principal or registered office or principal place of business; or
 - (ii) faxed to the person's fax number; or

- (iii) emailed to the person's email address, if the person has agreed to service by email.

40. Regulations

- (1) The Governor may make regulations for the purposes of this Act.
- (2) The regulations may be made so as to apply differently according to the factors specified in the regulations.
- (3) The regulations may –
 - (a) provide that a contravention of any of the regulations is an offence; and
 - (b) in respect of such an offence, provide for the imposition of a fine not exceeding 50 penalty units and, in the case of a continuing offence, a further fine not exceeding 10 penalty units for each day during which the offence continues.

41. Status of notices

A notice under this Act is not a statutory rule for the purposes of the *Rules Publication Act 1953*.

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42. Administration of Act

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Minister for Workplace Relations; and
- (b) the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.

43. Transitional matters

Despite the repeal of the *Contractors' Debts Act 1939* by section 44, that Act continues to apply in respect of any attachment notice that is issued by a court before the day on which that section commences and to any payment into court of money pursuant to such a notice.

44. Legislation repealed

The legislation specified in Schedule 1 is repealed.

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SCHEDULE 1 – LEGISLATION REPEALED

Section 44

Contractors' Debts Act 1939 (No. 49 of 1939)

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