



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2002

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The *Building and Construction Industry Security of Payment Act 1999* entitles certain persons who carry out construction work (or who supply related goods and services) under construction contracts to timely payment for the work they carry out and the goods and services they supply. The Act also provides a procedure for securing the payments to which persons are, under the Act, entitled.

The object of this Bill is to amend the Act as follows:

- (a) to provide that progress payments to which persons are entitled under the Act include final payments and single or one-off payments,
- (b) to provide for interest to be payable on unpaid progress payments,

- (c) to provide claimants with the option of having their payment claims adjudicated under the Act rather than having to take court action to recover the amount owing,
- (d) to provide that an adjudicator's determination of a payment claim may be set out in an adjudication certificate which may then be filed as a judgment for a debt in any court of competent jurisdiction,
- (e) to make a number of other miscellaneous amendments for the purposes of enhancing the effect and operation of the Act,
- (f) to make a number of other amendments of a minor or consequential nature.

Later references in this explanatory note to the carrying out of construction work under a construction contract are taken to include references to the supplying of related goods and services under such a contract.

The Bill also amends the *Contractors Debts Act 1997* to provide that a claimant who has filed an adjudication certificate may be issued with a debt certificate under section 7 of that Act in order to obtain payment of a debt under that Act from the defaulting contractor's principal.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Building and Construction Industry Security of Payment Act 1999* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Contractors Debts Act 1997* set out in Schedule 2.

Schedule 1 Amendment of Building and Construction Industry Security of Payment Act 1999

Amendments relating to rights to progress payments

Schedule 1 [1] restates the object of the Act. At present, the Act is meant to ensure that a person who carries out construction work under a construction contract is entitled to receive and recover specified progress payments. The proposed amendment makes it clear that the object of the Act is to ensure that the entitlement

to progress payments relates to work that is undertaken to be carried out under a construction contract. **Schedule 1 [13]–[16], [19] and [20]** also make amendments to clarify that the Act extends to construction work that is undertaken to be carried out.

Schedule 1 [2] makes it clear that the Act creates a statutory entitlement to a progress payment regardless of whether the construction contract under which the work is undertaken to be carried out makes provision for progress payments.

Schedule 1 [7] amends the definition of *progress payment* to make it clear that the Act creates an entitlement not only to payments that are in the nature of instalments, but also to final payments and to single or one-off payments.

Schedule 1 [12] provides that the entitlement to a progress payment arises (in those cases where the construction contract does not expressly provide for the matter) at the end of the month in which the construction work was first carried out and at the end of each subsequent month. **Schedule 1 [11]** is a consequential amendment.

Schedule 1 [17] provides that a progress payment becomes due and payable (in those cases where the construction contract does not expressly provide for the matter) within 10 business days (rather than 2 weeks) after the payment claim is made in relation to the progress payment.

Schedule 1 [18] provides for interest to be payable on the unpaid amount of a progress payment. The amendment also provides that, if a progress payment becomes due and payable, the claimant will be able to exercise a lien over any unfixed plant or materials supplied by the claimant in connection with the work.

Schedule 1 [21] extends the meaning of a *pay when paid provision* of a construction contract (such provisions currently have no effect in relation to any payment for construction work) so that the term will also cover those provisions of a contract that purport to make the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

Amendments relating to payment claims

Schedule 1 [22] makes it clear that a payment claim may be made by a person who claims to be entitled to a progress payment.

Schedule 1 [23] requires the payment claim to indicate the amount of the progress payment the claimant claims to be due.

Schedule 1 [24] allows certain amounts to be included in a payment claim (eg money held under the construction contract that is due for release). The amendment also provides that a payment claim can only be served within 12 months from when the construction work to which the claim relates was last carried out.

Amendments relating to the recovery of payment claims and adjudication of disputes

Schedule 1 [25] provides that, if the respondent does not provide a payment schedule in response to a payment claim and fails to pay the claimed amount on time, the claimant may either take legal action in a court to recover the claimed amount or make an adjudication application in relation to the payment claim.

Schedule 1 [26] makes it clear that, if the claimant commences proceedings to recover the claimed amount in a court, the respondent cannot bring a cross-claim against the claimant or raise defences in relation to matters arising under the construction contract. However, it is to be noted that the Act does not preclude a respondent from raising any defence (or from taking action) in other civil proceedings in respect of a construction contract (see existing section 32 of the Act).

Schedule 1 [27] provides that, if the respondent provided a payment schedule in response to a payment claim but fails to pay the scheduled amount on time, the claimant may either take legal action in a court to recover the scheduled amount or make an adjudication application in relation to the payment claim. **Schedule 1 [28]** makes a similar amendment to that made by **Schedule 1 [26]**.

Schedule 1 [29] replaces section 17 of the Act with a new section that specifies the additional circumstances in which adjudication applications may be made as an alternative to taking court action. The new section provides that, if the respondent has not provided a payment schedule, the claimant can only make an adjudication application if the respondent is given a further opportunity to provide a payment schedule. An adjudication application must be made to an authorised nominating authority and the authority may charge an application fee. The authorised nominating authority is required to refer an adjudication application to an adjudicator. **Schedule 1 [30] and [39]** are consequential amendments.

Schedule 1 [32] provides that the respondent may lodge an adjudication response in relation to an adjudication application served on the respondent only if the respondent has provided a payment schedule to the claimant. The amendment also limits what the respondent can include in an adjudication response. **Schedule 1 [31]** is a consequential amendment.

Schedule 1 [33] makes it clear that any conference conducted by an adjudicator in determining an adjudication application must be informal and be conducted without legal representation.

Schedule 1 [34] enables an adjudicator to determine, along with the adjudicated amount and the due date for paying that amount, the rate of interest payable on the adjudicated amount. **Schedule 1 [35]** recognises that an adjudicator cannot, when determining an adjudication application, consider the payment schedule if the respondent has not provided one to the claimant.

Schedule 1 [36] inserts additional provisions in relation to adjudicators' determinations. In particular, clerical mistakes, minor errors and miscalculations in adjudicators' determinations may be corrected.

Schedule 1 [37] replaces sections 23 and 24 of the Act (which currently provide that the respondent must pay the adjudicated amount to the claimant or give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them as well as providing for the security to be held in a designated trust account). **Schedule 1 [3], [4], [6] and [40]** are consequential on the repeal of those sections.

The proposed new sections 23 and 24 provide that the respondent must pay the adjudicated amount as determined by the adjudicator on or before the relevant date referred to in section 23. If the respondent fails to pay the adjudicated amount on time, the claimant may request the authorised nominating authority to provide an adjudication certificate. The claimant may also serve notice on the respondent of the claimant's intention to suspend construction work under the contract. An adjudication certificate must specify the adjudicated amount (which may also include the amount of interest payable on the adjudicated amount as well as the respondent's share of any adjudication fees).

Schedule 1 [38] provides that the filing of an adjudication certificate will have the same effect as a judgment for a debt in a court of competent jurisdiction. The claimant will be required to file an affidavit with the adjudication certificate stating that the adjudicated amount has not been paid. If the respondent seeks to set the judgment aside, the respondent will be prevented from bringing any cross-claim against the claimant or from raising defences under the construction contract.

Schedule 1 [41] provides that the right of a claimant to suspend work under a construction contract exists up until 3 business days after the date the claimant receives payment for the amount that is payable by the respondent under the Act. The amendment also provides that if the claimant, in exercising the right to suspend

work, incurs any loss or expenses as the result of the respondent removing work from the contract, the respondent will be liable to pay for the amount of any such loss or expenses as a part of a subsequent payment claim.

Amendments relating to authorised nominating authorities and adjudicators

Schedule 1 [42] provides that the Minister may restrict the number of authorised nominating authorities who may nominate adjudicators for the purposes of the Act.

Schedule 1 [43] provides that the refusal of a person's application for authority to nominate adjudicators is not reviewable by the Administrative Decisions Tribunal if the refusal is on the ground that the application would result in the maximum number of authorised nominating authorities being exceeded.

Schedule 1 [44] enables an authorised nominating authority to charge fees for services provided by the authority in connection with adjudication applications made to the authority. The amendment also provides that an authorised nominating authority must provide the Minister with information relating to the authority's activities under the Act if requested by the Minister to do so.

Schedule 1 [45] provides that the claimant and respondent are each liable to contribute to an adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine regardless of the circumstances.

Schedule 1 [46] restates the provision that excludes an adjudicator from liability for things done or omitted to be done in good faith in exercising functions under the Act. The new provision will extend the exclusion from liability to authorised nominating authorities and will apply to things done in the reasonable belief that they were done in exercising the adjudicator's or authority's functions under the Act.

Miscellaneous amendments

Schedule 1 [5] inserts consequential definitions.

Schedule 1 [8] and [9] amend the definition of *construction work* to make it clear that the carrying out of certain activities in relation to "works" that form part of land (eg power-lines, pipelines, industrial plant) are covered by the definition.

Schedule 1 [10] makes it clear that the term "related goods and services" in the Act can include either goods or services.

Schedule 1 [47] provides that notices served under the Act may be served in a manner provided under the relevant construction contract.

Schedule 1 [48] restates the provision of the Act that prevents persons from contractually avoiding the Act. Under the new provision, a provision of any agreement that may be construed as an attempt to deter a person from taking action under the Act will be void.

Schedule 1 [49] enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [50] provides that the amendments made by the proposed Act do not apply to or in respect of existing payment claims.

Schedule 2 Amendment of Contractors Debts Act 1997

The *Contractors Debts Act 1997* establishes an alternate debt recovery procedure that allows a person (eg tradespersons or suppliers) to whom money is owed by a defaulting contractor to recover from the contractor's principal in the situation where the principal owes money to the contractor. In order for the unpaid person to obtain payment of the money owed, a debt certificate must be issued under section 7 of the Act and the unpaid person must then serve a notice of claim on the principal (which operates as an assignment of the debt owed by the principal to the defaulting contractor).

Schedule 2 [2] amends section 7 of the Act to provide that a claimant who has filed an adjudication certificate that becomes a judgment for a debt under proposed section 25 of the *Building and Construction Industry Security of Payment Act 1999* (see Schedule 1 [38]) may be issued by the court with a debt certificate under section 7 in respect of the money owed by the defaulting contractor to the claimant. This will enable the claimant to obtain payment from the principal concerned.

Schedule 2 [1] makes it clear that references in the Act to work and materials extend to construction work and related goods and services within the meaning of the *Building and Construction Industry Security of Payment Act 1999*.



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2002

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Building and Construction Industry Security of Payment Act 1999 No 46	2
4 Amendment of Contractors Debts Act 1997 No 110	2
Schedules	
1 Amendment of Building and Construction Industry Security of Payment Act 1999	3
2 Amendment of Contractors Debts Act 1997	20



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2002

No. , 2002

A Bill for

An Act to amend the *Building and Construction Industry Security of Payment Act 1999* to make further provision with respect to payments for construction work and for related goods and services under construction contracts; to amend the *Contractors Debts Act 1997*; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Building and Construction Industry Security of Payment Amendment Act 2002</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6 7
3 Amendment of Building and Construction Industry Security of Payment Act 1999 No 46	8 9
The <i>Building and Construction Industry Security of Payment Act 1999</i> is amended as set out in Schedule 1.	10 11
4 Amendment of Contractors Debts Act 1997 No 110	12
The <i>Contractors Debts Act 1997</i> is amended as set out in Schedule 2.	13

Schedule 1	Amendment of Building and Construction Industry Security of Payment Act 1999	1
		2
	(Section 3)	3
[1]	Section 3 Object of Act	4
	Omit section 3 (1). Insert instead:	5
	(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.	6 7 8 9 10 11
[2]	Section 3 (2)	12
	Omit “in circumstances where the relevant construction contract fails to do so”.	13 14
	Insert instead “regardless of whether the relevant construction contract makes provision for progress payments”.	15 16
[3]	Section 3 (3) (d)	17
	Omit “setting aside of money as security for”.	18
[4]	Section 3 (4)	19
	Omit the subsection. Insert instead:	20
	(4) It is intended that this Act does not limit:	21
	(a) any other entitlement that a claimant may have under a construction contract, or	22 23
	(b) any other remedy that a claimant may have for recovering any such other entitlement.	24 25

Building and Construction Industry Security of Payment Amendment
Bill 2002

Schedule 1 Amendment of Building and Construction Industry Security of Payment
Act 1999

[5] Section 4 Definitions	1
Insert in alphabetical order:	2
<i>adjudication certificate</i> means a certificate provided by an authorised nominating authority under section 24.	3 4
<i>adjudication fees</i> means any fees or expenses charged by an authorised nominating authority, or by an adjudicator, under this Act.	5 6 7
[6] Section 4, definitions of “designated trust account” and “public authority”	8 9
Omit the definitions.	10
[7] Section 4, definition of “progress payment”	11
Omit the definition. Insert instead:	12
<i>progress payment</i> means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):	13 14 15
(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or	16 17 18
(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or	19 20 21
(c) a payment that is based on an event or date (known in the building and construction industry as a “milestone payment”).	22 23 24
[8] Section 5 Definition of “construction work”	25
Omit “any building or structure” wherever occurring from section 5 (1) (c), (e) (iv) and (f).	26 27
Insert instead “any building, structure or works”.	28

[9] Section 5 (1) (d)	1
Omit “buildings and structures”.	2
Insert instead “buildings, structures and works”.	3
[10] Section 6 Definition of “related goods and services”	4
Insert after section 6 (2):	5
(3) In this Act, a reference to related goods and services includes a reference to related goods or services.	6 7
[11] Section 8 Rights to progress payments	8
Omit “under this Act, calculated by reference to that date” from section 8 (1).	9 10
[12] Section 8 (2)	11
Omit the subsection. Insert instead:	12
(2) In this section, <i>reference date</i> , in relation to a construction contract, means:	13 14
(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 work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or	15 16 17 18 19 20
(b) if the contract makes no express provision with respect to the matter—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 the last day of each subsequent named month.	21 22 23 24 25 26
[13] Section 9 Amount of progress payment	27
Insert “or undertaken to be carried out” after “carried out” in section 9 (b).	28

Building and Construction Industry Security of Payment Amendment
Bill 2002

Schedule 1 Amendment of Building and Construction Industry Security of Payment
Act 1999

[14] Section 9 (b)	1
Insert “or undertaken to be supplied” after “supplied”.	2
[15] Section 10 Valuation of construction work and related goods and services	3
	4
Insert “or undertaken to be carried out” after “carried out” in section 10 (1).	5
[16] Section 10 (2)	6
Insert “or undertaken to be supplied” after “supplied”.	7
[17] Section 11 Due date for payment	8
Omit “2 weeks” from section 11 (b). Insert instead “10 business days”.	9
[18] Section 11 (2)–(5)	10
Insert at the end of section 11:	11
(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate:	12
(a) prescribed under the <i>Supreme Court Act 1970</i> in respect of unpaid judgments of the Supreme Court, or	13
(b) specified under the construction contract,	14
whichever is the greater.	15
(3) 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 construction work for the respondent.	16
(4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (3).	17
(5) Subsection (3) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials.	18
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[19] Section 12 Effect of “pay when paid” provisions	1
Omit “(or for related goods and services supplied)” from section 12 (1).	2
Insert instead “or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied)”.	3 4
[20] Section 12 (2)	5
Omit “(or for related goods and services supplied)” from the definition of <i>money owing</i> .	6 7
Insert instead “or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied)”.	8 9
[21] Section 12 (2), definition of “pay when paid provision”	10
Insert at the end of the definition:	11
, or	12
(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.	13 14 15
[22] Section 13 Payment claims	16
Omit section 13 (1). Insert instead:	17
(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the <i>claimant</i>) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.	18 19 20 21
[23] Section 13 (2) (b)	22
Omit the paragraph. Insert instead:	23
(b) must indicate the amount of the progress payment that the claimant claims to be due (the <i>claimed amount</i>), and	24 25 26

Building and Construction Industry Security of Payment Amendment
Bill 2002

Schedule 1 Amendment of Building and Construction Industry Security of Payment
Act 1999

[24] Section 13 (3)–(6)	1
Insert after section 13 (2):	2
(3) The claimed amount may include any amount:	3
(a) that the respondent is liable to pay the claimant under section 27 (2A), or	4
(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.	5
(4) A payment claim may be served only within:	6
(a) the period determined by or in accordance with the terms of the construction contract, or	7
(b) 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),	8
whichever is the later.	9
(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.	10
(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.	11
[25] Section 15 Consequences of not paying claimant where no payment schedule	12
Omit section 15 (2) (a). Insert instead:	13
(a) may:	14
(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,	15
or	16
(ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and	17
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[26] Section 15 (4)	1
Omit the subsection. Insert instead:	2
(4) If the claimant commences proceedings under subsection	3
(2) (a) (i) to recover the unpaid portion of the claimed amount	4
from the respondent as a debt:	5
(a) judgment in favour of the claimant is not to be given	6
unless the court is satisfied of the existence of the	7
circumstances referred to in subsection (1), and	8
(b) the respondent is not, in those proceedings, entitled:	9
(i) to bring any cross-claim against the claimant, or	10
(ii) to raise any defence in relation to matters arising	11
under the construction contract.	12
[27] Section 16 Consequences of not paying claimant in accordance with	13
payment schedule	14
Omit section 16 (2) (a). Insert instead:	15
(a) may:	16
(i) recover the unpaid portion of the scheduled	17
amount from the respondent, as a debt due to the	18
claimant, in any court of competent jurisdiction,	19
or	20
(ii) make an adjudication application under	21
section 17 (1) (a) (ii) in relation to the payment	22
claim, and	23
[28] Section 16 (4)	24
Omit the subsection. Insert instead:	25
(4) If the claimant commences proceedings under subsection (2)	26
(a) (i) to recover the unpaid portion of the scheduled amount	27
from the respondent as a debt:	28
(a) judgment in favour of the claimant is not to be given	29
unless the court is satisfied of the existence of the	30
circumstances referred to in subsection (1), and	31
(b) the respondent is not, in those proceedings, entitled:	32
(i) to bring any cross-claim against the claimant, or	33

- (ii) to raise any defence in relation to matters arising under the construction contract. 1
2

[29] Section 17 3

Omit the section. Insert instead: 4

17 Adjudication applications 5

(1) A claimant may apply for adjudication of a payment claim (an *adjudication application*) if: 6
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(a) the respondent provides a payment schedule under Division 1 but: 8
9

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or 10
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(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 12
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(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount. 16
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(2) An adjudication application to which subsection (1) (b) applies cannot be made unless: 20
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(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and 22
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(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice. 26
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(3) An adjudication application: 29

(a) must be in writing, and 30

(b) must be made to an authorised nominating authority chosen by the claimant, and 31
32

(c)	in the case of an application under subsection (1) (a) (i)—must be made within 10 business days after the claimant receives the payment schedule, and	1 2 3
(d)	in the case of an application under subsection (1) (a) (ii)—must be made within 20 business days after the due date for payment, and	4 5 6
(e)	in the case of an application under subsection (1) (b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and	7 8 9 10
(f)	must identify the payment claim and the payment schedule (if any) to which it relates, and	11 12
(g)	must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and	13 14 15
(h)	may contain such submissions relevant to the application as the claimant chooses to include.	16 17
(4)	The amount of any such application fee must not exceed the amount (if any) determined by the Minister.	18 19
(5)	A copy of an adjudication application must be served on the respondent concerned.	20 21
(6)	It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.	22 23 24 25
[30]	Section 19 Appointment of adjudicator	26
	Omit section 19 (1). Insert instead:	27
(1)	If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent.	28 29 30 31

Building and Construction Industry Security of Payment Amendment
Bill 2002

Schedule 1 Amendment of Building and Construction Industry Security of Payment
Act 1999

[31] Section 20 Adjudication responses	1
Omit “The” from section 20 (1).	2
Insert instead “Subject to subsection (2A), the”.	3
[32] Section 20 (2A) and (2B)	4
Insert after section 20 (2):	5
(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14 (4) or 17 (2) (b).	6 7 8
(2B) The respondent cannot 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.	9 10 11 12
[33] Section 21 Adjudication procedures	13
Insert after section 21 (4):	14
(4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.	15 16
[34] Section 22 Adjudicator’s determination	17
Insert at the end of section 22 (1) (b):	18
, and	19
(c) the rate of interest payable on any such amount.	20
[35] Section 22 (2) (d)	21
Insert “(if any)” after “payment schedule”.	22
[36] Section 22 (3)–(5)	23
Omit section 22 (3). Insert instead:	24
(3) The adjudicator’s determination must:	25
(a) be in writing, and	26

(b)	include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).	1 2 3 4
(4)	If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:	5 6
(a)	the value of any construction work carried out under a construction contract, or	7 8
(b)	the value of any related goods and services supplied under a construction contract,	9 10
	the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.	11 12 13 14 15 16 17 18
(5)	If the adjudicator's determination contains:	19
(a)	a clerical mistake, or	20
(b)	an error arising from an accidental slip or omission, or	21
(c)	a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or	22 23 24
(d)	a defect of form,	25
	the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.	26 27 28
[37]	Sections 23 and 24	29
	Omit the sections. Insert instead:	30
	23 Respondent required to pay adjudicated amount	31
(1)	In this section:	32
	<i>relevant date</i> means:	33

Building and Construction Industry Security of Payment Amendment
Bill 2002

Schedule 1 Amendment of Building and Construction Industry Security of Payment
Act 1999

- (a) the date occurring 5 business days after the date on which the adjudicator's determination is served on the respondent concerned, or
 - (b) if the adjudicator determines a later date under section 22 (1) (b)—that later date.
 - (2) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.
- 24 Consequences of not paying claimant adjudicated amount**
- (1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may:
 - (a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and
 - (b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
 - (2) A notice under subsection (1) (b) must state that it is made under this Act.
 - (3) An adjudication certificate must state 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.
 - (4) If any amount of interest that is due and payable on the adjudicated amount is not paid by the respondent, the claimant may request the authorised nominating authority to specify the

amount of interest payable in the adjudication certificate. If it
is specified in the adjudication certificate, any such amount is
to be added to (and becomes part of) the adjudicated amount.

- (5) 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 (the *unpaid
share*), the claimant may request the authorised nominating
authority to specify the unpaid share in the adjudication
certificate. If it is specified in the adjudication certificate, any
such unpaid share is to be added to (and becomes part of) the
adjudicated amount.

[38] Section 25

Omit the section. Insert instead:

25 Filing of adjudication certificate as judgment debt

- (1) An adjudication certificate may be filed as a judgment for a
debt in any court of competent jurisdiction and is enforceable
accordingly.
- (2) An adjudication certificate cannot be filed under this section
unless it is accompanied by an affidavit by the claimant stating
that the whole or any part of the adjudicated amount has not
been paid at the time the certificate is filed.
- (3) If the affidavit indicates that part of the adjudicated amount has
been paid, the judgment is for the unpaid part of that amount
only.
- (4) If the respondent commences proceedings to have the judgment
set aside, the respondent:
- (a) is not, in those proceedings, entitled:
- (i) to bring any cross-claim against the claimant, or
- (ii) to raise any defence in relation to matters arising
under the construction contract, or
- (iii) to challenge the adjudicator's determination, and
- (b) is required to pay into the court as security the unpaid
portion of the adjudicated amount pending the final
determination of those proceedings.

Building and Construction Industry Security of Payment Amendment
Bill 2002

Schedule 1 Amendment of Building and Construction Industry Security of Payment
Act 1999

[39] Section 26 Claimant may make new application in certain circumstances	1
Omit “(3) (b)” from section 26 (3). Insert instead “(3) (c), (d) and (e)”.	2
[40] Section 27 Claimant may suspend work	3
Omit “or 25” from section 27 (1). Insert instead “or 24”.	4
[41] Section 27 (2) and (2A)	5
Omit section 27 (2). Insert instead:	6
(2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 15 (1), 16 (1) or 23 (2).	7 8 9 10 11
(2A) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses.	12 13 14 15 16 17
[42] Section 28 Nominating authorities	18
Insert after section 28 (1):	19
(1A) The Minister may:	20
(a) limit the number of persons who may, for the time being, be authorised under this section, and	21 22
(b) refuse an application under subsection (1) if authorising the applicant would result in any such number being exceeded.	23 24 25
[43] Section 28 (2) (a)	26
Insert “(otherwise than on the ground referred to in subsection (1A) (b))” after “refused”.	27 28

[44] Section 28 (3)–(5)	1
Insert after section 28 (2):	2
(3) An authorised nominating authority may charge a fee for any service provided by the authority in connection with an adjudication application made to the authority. The amount that may be charged for any such service must not exceed the amount (if any) determined by the Minister.	3 4 5 6 7
(4) The claimant and respondent are:	8
(a) jointly and severally liable to pay any such fee, and	9
(b) each liable to contribute to the payment of any such fee in equal proportions or in such proportions as the adjudicator to whom the adjudication application is referred may determine.	10 11 12 13
(5) An authorised nominating authority must provide the Minister with such information as may be requested by the Minister in relation to the activities of the authority under this Act (including information as to the fees charged by the authority under this Act).	14 15 16 17 18
[45] Section 29 Adjudicator’s fees	19
Omit section 29 (3). Insert instead:	20
(3) The claimant and respondent are each liable to contribute to the payment of the adjudicator’s fees and expenses in equal proportions or in such proportions as the adjudicator may determine.	21 22 23 24
[46] Section 30	25
Omit the section. Insert instead:	26
30 Protection from liability for adjudicators and authorised nominating authorities	27 28
(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:	29 30
(a) in exercising the adjudicator’s functions under this Act, or	31 32

Building and Construction Industry Security of Payment Amendment
Bill 2002

Schedule 1 Amendment of Building and Construction Industry Security of Payment
Act 1999

(b)	in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.	1 2 3
(2)	No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith:	4 5 6
(a)	in exercising the nominating authority's functions under this Act, or	7 8
(b)	in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority's functions under this Act.	9 10 11
[47]	Section 31 Service of notices	12
	Insert at the end of section 31 (1) (d):	13
	, or	14
(e)	in such other manner as may be provided under the construction contract concerned.	15 16
[48]	Section 34	17
	Omit the section. Insert instead:	18
34	No contracting out	19
(1)	The provisions of this Act have effect despite any provision to the contrary in any contract.	20 21
(2)	A provision of any agreement (whether in writing or not):	22
(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	23 24 25 26
(b)	that may reasonably be construed as an attempt to deter a person from taking action under this Act,	27 28
	is void.	29

[49] Schedule 2 Saving and transitional provisions	1
Insert at the end of clause 1 (1):	2
<i>Building and Construction Industry Security of Payment Amendment Act 2002</i>	3 4
[50] Schedule 2, Part 3	5
Insert after Part 2:	6
Part 3 Provisions consequent on enactment of Building and Construction Industry Security of Payment Amendment Act 2002	7 8 9
3 Application of amendments	10
An amendment made to this Act by the <i>Building and Construction Industry Security of Payment Amendment Act 2002</i> does not apply to or in respect of a payment claim served before the commencement of the amendment and any such payment claim is to be dealt with in accordance with this Act as if the amendment had not been made.	11 12 13 14 15 16

Schedule 2	Amendment of Contractors Debts Act 1997	1
	(Section 4)	2
[1]	Section 3 Definitions	3
	Insert after section 3 (2):	4
	(3) A reference in this Act:	5
	(a) to the carrying out of work includes a reference to construction work (within the meaning of the <i>Building and Construction Industry Security of Payment Act 1999</i>) carried out or undertaken to be carried out under a construction contract within the meaning of that Act, and	6 7 8 9 10 11
	(b) to the supply of materials includes a reference to related goods and services (within the meaning of that Act) supplied or undertaken to be supplied under any such contract.	12 13 14 15
[2]	Section 7 Certification of debt by court	16
	Insert after section 7 (1):	17
	(1A) If an adjudication certificate within the meaning of the <i>Building and Construction Industry Security of Payment Act 1999</i> has been filed as a judgment for a debt in accordance with section 25 of that Act, the court may, by order made on the application by the person who filed the adjudication certificate, issue a debt certificate in respect of the debt under this section.	18 19 20 21 22 23