

Passed by both Houses



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2002

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2002*



New South Wales

Building and Construction Industry Security of Payment Amendment Bill 2002

Act No , 2002

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.

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.

Chairman of Committees of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Building and Construction Industry Security of Payment Amendment Act 2002*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Building and Construction Industry Security of Payment Act 1999 No 46

The *Building and Construction Industry Security of Payment Act 1999* is amended as set out in Schedule 1.

4 Amendment of Contractors Debts Act 1997 No 110

The *Contractors Debts Act 1997* is amended as set out in Schedule 2.

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

(Section 3)

[1] Section 3 Object of Act

Omit section 3 (1). Insert instead:

- (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.

[2] Section 3 (2)

Omit “in circumstances where the relevant construction contract fails to do so”.

Insert instead “regardless of whether the relevant construction contract makes provision for progress payments”.

[3] Section 3 (3) (d)

Omit “setting aside of money as security for”.

[4] Section 3 (4)

Omit the subsection. Insert instead:

- (4) It is intended that this Act does not limit:
 - (a) any other entitlement that a claimant may have under a construction contract, or
 - (b) any other remedy that a claimant may have for recovering any such other entitlement.

[5] Section 4 Definitions

Insert in alphabetical order:

adjudication certificate means a certificate provided by an authorised nominating authority under section 24.

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

[6] Section 4, definitions of “designated trust account” and “public authority”

Omit the definitions.

[7] Section 4, definition of “progress payment”

Omit the definition. Insert instead:

progress payment means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

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

[8] Section 5 Definition of “construction work”

Omit “any building or structure” wherever occurring from section 5 (1) (c), (e) (iv) and (f).

Insert instead “any building, structure or works”.

[9] Section 5 (1) (d)

Omit “buildings and structures”.

Insert instead “buildings, structures and works”.

[10] Section 6 Definition of “related goods and services”

Insert after section 6 (2):

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

[11] Section 8 Rights to progress payments

Omit “under this Act, calculated by reference to that date” from section 8 (1).

[12] Section 8 (2)

Omit the subsection. Insert instead:

- (2) In this section, *reference date*, in relation to a construction contract, means:
- (a) a date determined by or in accordance with the terms of the contract as 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
 - (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.

[13] Section 9 Amount of progress payment

Insert “or undertaken to be carried out” after “carried out” in section 9 (b).

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[14] Section 9 (b)

Insert “or undertaken to be supplied” after “supplied”.

[15] Section 10 Valuation of construction work and related goods and services

Insert “or undertaken to be carried out” after “carried out” in section 10 (1).

[16] Section 10 (2)

Insert “or undertaken to be supplied” after “supplied”.

[17] Section 11 Due date for payment

Omit “2 weeks” from section 11 (b). Insert instead “10 business days”.

[18] Section 11 (2)–(5)

Insert at the end of section 11:

- (2) 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 Act 1970* in respect of unpaid judgments of the Supreme Court, or
 - (b) specified under the construction contract,whichever is the greater.
- (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.
- (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).
- (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.

[19] Section 12 Effect of “pay when paid” provisions

Omit “(or for related goods and services supplied)” from section 12 (1).
Insert instead “or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied)”.

[20] Section 12 (2)

Omit “(or for related goods and services supplied)” from the definition of *money owing*.
Insert instead “or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied)”.

[21] Section 12 (2), definition of “pay when paid provision”

Insert at the end of the definition:

- , 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.

[22] Section 13 Payment claims

Omit section 13 (1). Insert instead:

- (1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

[23] Section 13 (2) (b)

Omit the paragraph. Insert instead:

- (b) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*), and

[24] Section 13 (3)–(6)

Insert after section 13 (2):

- (3) The claimed amount may include any amount:
 - (a) that the respondent is liable to pay the claimant under section 27 (2A), or
 - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be served only within:
 - (a) the period determined by or in accordance with the terms of the construction contract, or
 - (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),whichever is the later.
- (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

[25] Section 15 Consequences of not paying claimant where no payment schedule

Omit section 15 (2) (a). Insert instead:

- (a) may:
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
 - (ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and

[26] Section 15 (4)

Omit the subsection. Insert instead:

- (4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:
 - (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
 - (b) the respondent is not, in those proceedings, entitled:
 - (i) to bring any cross-claim against the claimant, or
 - (ii) to raise any defence in relation to matters arising under the construction contract.

[27] Section 16 Consequences of not paying claimant in accordance with payment schedule

Omit section 16 (2) (a). Insert instead:

- (a) may:
 - (i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
 - (ii) make an adjudication application under section 17 (1) (a) (ii) in relation to the payment claim, and

[28] Section 16 (4)

Omit the subsection. Insert instead:

- (4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the scheduled amount from the respondent as a debt:
 - (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
 - (b) the respondent is not, in those proceedings, entitled:
 - (i) to bring any cross-claim against the claimant, or

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

[29] Section 17

Omit the section. Insert instead:

17 Adjudication applications

- (1) A claimant may apply for adjudication of a payment claim (an *adjudication application*) if:
 - (a) the respondent provides a payment schedule under Division 1 but:
 - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
 - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or
 - (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1) (b) applies cannot be made unless:
 - (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
 - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.
- (3) An adjudication application:
 - (a) must be in writing, and
 - (b) must be made to an authorised nominating authority chosen by the claimant, and

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- (c) in the case of an application under subsection (1) (a) (i)—must be made within 10 business days after the claimant receives the payment schedule, and
 - (d) in the case of an application under subsection (1) (a) (ii)—must be made within 20 business days after the due date for payment, and
 - (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
 - (f) must identify the payment claim and the payment schedule (if any) to which it relates, and
 - (g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and
 - (h) may contain such submissions relevant to the application as the claimant chooses to include.
- (4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.
 - (5) A copy of an adjudication application must be served on the respondent concerned.
 - (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.

[30] Section 19 Appointment of adjudicator

Omit section 19 (1). Insert instead:

- (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.

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[31] Section 20 Adjudication responses

Omit “The” from section 20 (1).

Insert instead “Subject to subsection (2A), the”.

[32] Section 20 (2A) and (2B)

Insert after section 20 (2):

(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).

(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.

[33] Section 21 Adjudication procedures

Insert after section 21 (4):

(4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.

[34] Section 22 Adjudicator’s determination

Insert at the end of section 22 (1) (b):

, and

(c) the rate of interest payable on any such amount.

[35] Section 22 (2) (d)

Insert “(if any)” after “payment schedule”.

[36] Section 22 (3)–(5)

Omit section 22 (3). Insert instead:

(3) The adjudicator’s determination must:

(a) be in writing, and

- (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).
- (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined:
 - (a) the value of any construction work carried out under a construction contract, or
 - (b) the value of any related goods and services supplied under a construction contract,

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

- (5) If the adjudicator's determination contains:
 - (a) a clerical mistake, or
 - (b) an error arising from an accidental slip or omission, or
 - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or
 - (d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

[37] Sections 23 and 24

Omit the sections. Insert instead:

23 Respondent required to pay adjudicated amount

- (1) In this section:
relevant date means:

- (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.

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[39] Section 26 Claimant may make new application in certain circumstances

Omit “(3) (b)” from section 26 (3). Insert instead “(3) (c), (d) and (e)”.

[40] Section 27 Claimant may suspend work

Omit “or 25” from section 27 (1). Insert instead “or 24”.

[41] Section 27 (2) and (2A)

Omit section 27 (2). Insert instead:

- (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).
- (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.

[42] Section 28 Nominating authorities

Insert after section 28 (1):

- (1A) The Minister may:
 - (a) limit the number of persons who may, for the time being, be authorised under this section, and
 - (b) refuse an application under subsection (1) if authorising the applicant would result in any such number being exceeded.

[43] Section 28 (2) (a)

Insert “(otherwise than on the ground referred to in subsection (1A) (b))” after “refused”.

[44] Section 28 (3)–(5)

Insert after section 28 (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.
- (4) The claimant and respondent are:
 - (a) jointly and severally liable to pay any such fee, and
 - (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.
- (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).

[45] Section 29 Adjudicator's fees

Omit section 29 (3). Insert instead:

- (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.

[46] Section 30

Omit the section. Insert instead:

30 Protection from liability for adjudicators and authorised nominating authorities

- (1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:
 - (a) in exercising the adjudicator's functions under this Act, or

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- (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.
- (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:
 - (a) in exercising the nominating authority's functions under this Act, or
 - (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.

[47] Section 31 Service of notices

Insert at the end of section 31 (1) (d):

- , or
- (e) in such other manner as may be provided under the construction contract concerned.

[48] Section 34

Omit the section. Insert instead:

34 No contracting out

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

[49] Section 38 Review of Act

Insert after section 38 (3):

- (4) A further review of this Act (as amended by the *Building and Construction Industry Security of Payment Amendment Act 2002*) is to be undertaken by the Minister as soon as possible after the period of 12 months from the commencement of Schedule 1 [29] to that Act.
- (5) A report on the outcome of the further review is to be tabled in each House of Parliament within 3 months after the end of that period of 12 months.

[50] Schedule 2 Saving and transitional provisions

Insert at the end of clause 1 (1):

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[51] Schedule 2, Part 3

Insert after Part 2:

**Part 3 Provisions consequent on enactment of
Building and Construction Industry Security
of Payment Amendment Act 2002**

3 Application of amendments

An amendment made to this Act by the *Building and Construction Industry Security of Payment Amendment Act 2002* 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.

Schedule 2 Amendment of Contractors Debts Act 1997

(Section 4)

[1] Section 3 Definitions

Insert after section 3 (2):

- (3) A reference in this Act:
 - (a) to the carrying out of work includes a reference to construction work (within the meaning of the *Building and Construction Industry Security of Payment Act 1999*) carried out or undertaken to be carried out under a construction contract within the meaning of that Act, and
 - (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.

[2] Section 7 Certification of debt by court

Insert after section 7 (1):

- (1A) If an adjudication certificate within the meaning of the *Building and Construction Industry Security of Payment Act 1999* 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.