



New South Wales

Building and Construction Industry Security of Payment Bill 1999 (No 2)

Explanatory note

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

Overview of Bill

The objects of this Bill are:

- (a) to entitle certain persons who carry out construction work (or who supply related goods and services) to timely payment for the work they carry out and the goods and services they supply, and
- (b) to provide a procedure for securing payments to which persons become entitled under this Act, and
- (c) to make consequential amendments to the *Commercial Arbitration Act 1984*, and
- (d) to enact provisions of a savings or transitional nature.

Outline of provisions

Part 1 Preliminary

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 sets out the object of the proposed Act.

Clause 4 defines certain words and expressions that are used in the proposed Act. These include the core concepts of *construction contract* (which means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party), *construction work* (which is defined in clause 5) and *related goods and services* (which is defined in clause 6).

Clause 5 defines the expression *construction work* for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.

Clause 6 defines the expression *related goods and services* for the purposes of the proposed Act. The definition can be widened or narrowed by regulations under the proposed Act.

Clause 7 provides for the application of the proposed Act to all construction contracts, whether written or oral, or partly written and partly oral. Certain classes of contract are excluded from the proposed Act, as are certain classes of contractual provisions. Other classes of construction contract can be excluded from the proposed Act by regulations under the proposed Act.

Part 2 Rights to progress payments

Clause 8 provides that on and from each reference date, a person who has undertaken to carry out construction work, or to supply related goods and services, becomes entitled to a progress payment. A *reference date* is a date ascertained in accordance with the terms of the construction contract as a date for making a claim for a progress payment or as a date by reference to which the amount of a progress payment is to be calculated or, if the contract contains no such terms, a date occurring at 4-weekly intervals from the commencement of construction work, or the supply of related goods and services, under the contract.

Clause 9 provides for the amount of a progress payment to be ascertained in accordance with the terms of the construction contract or, if the contract contains no such terms, according to the value of construction work carried out, or related goods and services supplied, under the contract.

Clause 10 provides for the manner in which the value of construction work carried out, or related goods and services supplied, under a construction contract is to be valued.

Clause 11 provides that a progress payment becomes due and payable in accordance with the terms of the construction contract or, if the contract contains no such terms, at the end of 2 weeks after a progress claim is made in relation to that payment under Part 3 of the proposed Act.

Clause 12 provides that a “pay when paid” provision of a contract has no effect in relation to construction work carried out, or related goods and services supplied, under a construction contract. A “pay when paid” provision is a provision that makes one person’s payment dependent on another person’s payment.

Part 3 Procedure for recovering progress payments

Division 1 Payment claims and payment schedules

Clause 13 enables a person who is entitled to a progress payment under proposed Part 2 (the *claimant*) to serve a payment claim on the person who is liable to make the payment. The claim will set out the amount to which the claimant claims entitlement.

Clause 14 enables a person on whom a payment claim is made (the *respondent*) to reply to the claim by providing a payment schedule to the claimant. The schedule will set out how much the respondent proposes to pay the claimant and when.

Clause 15 provides that a claimant will be able to recover the whole amount of his or her claim as a debt, and to suspend carrying out construction work, or supplying related goods and services, if the respondent fails to provide a payment schedule within the time allowed under clause 14.

Clause 16 provides that a claimant will be able to recover the amount set out in the respondent’s payment schedule, and to suspend carrying out construction work, or supplying related goods and services, where the respondent provides the payment schedule within the time allowed under clause 14 but fails to pay that amount by the due date referred to in clause 11.

Division 2 Adjudication of disputes

Clause 17 enables a claimant to apply for adjudication of the amount of a progress payment payable in the event that the amount set out in the respondent's payment schedule is less than the amount set out in the claimant's payment claim. The application will have to be made within 5 days after the claimant receives the payment schedule, and will be able to be made directly to an adjudicator agreed between the claimant and respondent or to an authority authorised to nominate adjudicators for the purposes of the proposed Act.

Clause 18 requires an adjudicator to be a natural person and to have such qualifications, expertise and experience as are prescribed by the regulations, and prohibits a person from being an adjudicator in relation to a particular construction contract if the person is a party to the contract or in such circumstances as are prescribed by the regulations.

Clause 19 provides that the appointment of an adjudicator is effected by the adjudicator causing notice of his or her acceptance of the adjudication application to be served on the claimant.

Clause 20 enables the respondent to lodge with an adjudicator the respondent's response to the claimant's adjudication application.

Clause 21 sets out the manner in which, and the time within which, an adjudicator is to determine an adjudication application.

Clause 22 provides that the adjudicator is to determine an adjudication application by determining the amount of the progress payment to be paid and the date on or before which it must be paid.

Clause 23 provides that if the adjudicator determines an amount that the respondent must pay as a progress payment, the respondent must pay that amount to the claimant or give the claimant security for payment of that amount. Acceptable security will consist of a guarantee from a recognised financial institution, a deposit into a designated trust account or any other security agreed between the claimant and the respondent.

Clause 24 deals with the establishment and operation of trust accounts that are used for the purposes of giving security as referred to in clause 23.

Clause 25 provides that a claimant will be able to recover the adjudicated amount as a debt, and to suspend carrying out construction work, or supplying related goods and services, while the amount remains unpaid.

Clause 26 enables a claimant to make a new adjudication application in the event that a previous application is not accepted by an adjudicator within 4 business days after it is made or if an adjudicator fails to determine the application within the time allowed under clause 21.

Division 3 Claimant's right to suspend construction work

Clause 27 entitles a claimant to suspend the carrying out of construction work (or the supply of related goods and services) if at least 2 business days have passed since notice of intention to do so has been given as referred to in clause 15, 16 or 25. A claimant who suspends the carrying out of construction work (or the supply of related goods and services) under the proposed section will be immune from civil liability as a consequence of doing so.

Division 4 General

Clause 28 enables the Minister administering the proposed Act to authorise persons as nominating authorities (to nominate adjudicators for the purposes of the proposed Act) and to withdraw any authority so given. The Minister's decisions in this regard will be reviewable by the Administrative Decisions Tribunal.

Clause 29 provides for the fees payable to an adjudicator in relation to his or her adjudication of an adjudication application under proposed Division 2 of Part 3. In particular, an adjudicator will not be entitled to be paid any fees if he or she fails to determine such an application within the time allowed under clause 21.

Clause 30 ensures that no action will lie against an adjudicator or any other person for anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions under the proposed Act.

Clause 31 deals with the service of notices under the proposed Act.

Clause 32 ensures that nothing done under the proposed Act will affect any civil proceedings arising under a construction contract, except that a court will be required to make appropriate set-offs and any orders necessary to provide for the restitution of money paid as a consequence of its decision in the proceedings.

Part 4 Miscellaneous

Clause 33 provides that the proposed Act is to bind the Crown.

Clause 34 avoids any provision of an agreement that purports to exclude, modify or restrict the operation of the proposed Act.

Clause 35 enables the Governor to make regulations for the purposes of the proposed Act. The clause also ensures that any regulation that affects the definition of *construction work* in clause 5 or *related goods and services* in clause 6, or that varies the application of the proposed Act under clause 7, will not apply to construction contracts entered into before the regulation takes effect.

Clause 36 is a formal provision that gives effect to Schedule 1 (Amendment of other Acts).

Clause 37 is a formal provision that gives effect to Schedule 2 (Savings and transitional provisions).

Clause 38 requires the Minister administering the proposed Act to review the Act at the end of 3 years after its date of assent and to report to Parliament on the outcome of the review.

Schedules

Schedule 1 amends the *Commercial Arbitration Act 1984* so as to ensure that nothing in that Act affects the operation of Part 3 of the proposed Act.

Schedule 2 contains savings and transitional provisions, of which:

- (a) clause 1 is a provision that enables the regulations to make provision of a savings or transitional nature as a consequence of the enactment of the proposed Act, and
- (b) clause 2 ensures that the proposed Act does not apply to construction contracts entered into before its commencement.



New South Wales

Building and Construction Industry Security of Payment Bill 1999 (No 2)

Contents

	Page
Part 1 Preliminary	
1 Name of Act	2
2 Commencement	2
3 Object	2
4 Definitions	3
5 Definition of "construction work"	4
6 Definition of "related goods and services"	6
7 Application of Act	6
Part 2 Rights to progress payments	
8 Rights to progress payments	8
9 Amount of progress payment	8
10 Valuation of construction work and related goods and services	9
11 Due date for payment	10
12 Effect of "pay when paid" provisions	10

	Page
 Part 3 Procedure for recovering progress payments	
Division 1 Payment claims and payment schedules	
13 Payment claims	11
14 Payment schedules	11
15 Consequences of not paying claimant where no payment schedule	12
16 Consequences of not paying claimant in accordance with payment schedule	12
 Division 2 Adjudication of disputes	
17 Adjudication applications	13
18 Eligibility criteria for adjudicators	14
19 Appointment of adjudicator	15
20 Adjudication responses	15
21 Adjudication procedures	15
22 Adjudicator's determination	16
23 Respondent's obligations following adjudicator's determination	17
24 Designated trust accounts	18
25 Consequences of not complying with adjudicator's determination	19
26 Claimant may make new application if previous application refused or not determined	20
 Division 3 Claimant's right to suspend construction work	
27 Claimant may suspend work	20
 Division 4 General	
28 Nominating authorities	21
29 Adjudicator's fees	21

Building and Construction Industry Security of Payment Bill 1999 (No 2)

Contents

	Page
30 Exclusion of liability for adjudicator's acts and omissions	22
31 Service of notices	22
32 Effect of Part on civil proceedings	23
Part 4 Miscellaneous	
33 Act binds Crown	24
34 No contracting out	24
35 Regulations	24
36 Amendment of Commercial Arbitration Act 1984 No 160	24
37 Savings and transitional provisions	24
38 Review of Act	25
Schedules	
1 Amendment of Commercial Arbitration Act 1984	26
2 Savings and transitional provisions	27



New South Wales

Building and Construction Industry Security of Payment Bill 1999 (No 2)

No , 1999

A Bill for

An Act with respect to payments for construction work carried out, and related goods and services supplied, under construction contracts; and for other purposes.

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Building and Construction Industry Security of Payment Act 1999*.

2 Commencement

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

3 Object

- (1) The object of this Act is to ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services.
- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment in circumstances where the relevant construction contract fails to do so.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
 - (a) the making of a payment claim by the person claiming payment, and
 - (b) the provision of a payment schedule by the person by whom the payment is payable, and
 - (c) the referral of any disputed claim to an adjudicator for determination, and
 - (d) the setting aside of money as security for payment of the progress payment so determined.
- (4) It is intended:
 - (a) that this Act does not limit any other entitlement that a person may have under a construction contract, or any other remedy that a person may have for recovering any such other entitlement, and

- (b) in particular, that the setting aside of money as security does not prejudice any claim, counter-claim or defence that may be raised in civil proceedings concerning the work to which a payment claim relates, but merely ensures that money will be available to satisfy those entitlements when they are finally determined.

4 Definitions

In this Act:

adjudicated amount means the amount of a progress payment that an adjudicator determines to be payable, as referred to in section 22.

adjudication application means an application referred to in section 17.

adjudication response means a response referred to in section 20.

adjudicator, in relation to an adjudication application, means the person appointed in accordance with this Act to determine the application.

authorised nominating authority means a person authorised by the Minister under section 28 to nominate persons to determine adjudication applications.

business day means any day other than:

- (a) a Saturday, Sunday or public holiday, or
(b) 27, 28, 29, 30 or 31 December.

claimant means a person by whom a payment claim is served under section 13.

claimed amount means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 13.

construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

construction work is defined in section 5.

designated trust account means an account kept with a recognised financial institution (whether in the name of the respondent or otherwise) for the purpose of holding adjudicated amounts payable to claimants under this Act.

<i>due date</i> , in relation to a progress payment, means the due date for the progress payment, as referred to in section 11.	1 2
<i>exercise</i> a function includes perform a duty.	3
<i>function</i> includes a power, authority or duty.	4
<i>payment claim</i> means a claim referred to in section 13.	5
<i>payment schedule</i> means a schedule referred to in section 14.	6
<i>progress payment</i> means a payment to which a person is entitled under section 8.	7 8
<i>public authority</i> means:	9
(a) a public or local authority constituted by or under an Act, or	10
(b) a Government Department, or	11
(c) a statutory body representing the Crown, or	12
(d) a statutory State owned corporation (and its subsidiaries) within the meaning of the <i>State Owned Corporations Act 1989</i> ,	13 14
and includes any person exercising functions on behalf of any such authority, Department, body or corporation.	15 16
<i>recognised financial institution</i> means a bank or any other person or body prescribed by the regulations for the purposes of this definition.	17 18
<i>related goods and services</i> is defined in section 6.	19
<i>respondent</i> means a person on whom a payment claim is served under section 13.	20 21
<i>scheduled amount</i> means the amount of a progress payment that is proposed to be made under a payment schedule, as referred to in section 14.	22 23 24

5 Definition of “construction work”	25
(1) In this Act, <i>construction work</i> means any of the following work:	26
(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),	27 28 29
(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines,	30 31 32

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| telecommunication apparatus, aircraft runways, docks and | 1 |
| harbours, railways, inland waterways, pipelines, reservoirs, | 2 |
| water mains, wells, sewers, industrial plant and installations for | 3 |
| purposes of land drainage or coast protection, | 4 |
| (c) the installation in any building or structure of fittings forming, | 5 |
| or to form, part of land, including heating, lighting, | 6 |
| air-conditioning, ventilation, power supply, drainage, sanitation, | 7 |
| water supply, fire protection, security and communications | 8 |
| systems, | 9 |
| (d) the external or internal cleaning of buildings and structures, so | 10 |
| far as it is carried out in the course of their construction, | 11 |
| alteration, repair, restoration, maintenance or extension, | 12 |
| (e) any operation which forms an integral part of, or is preparatory | 13 |
| to or is for rendering complete, work of the kind referred to in | 14 |
| paragraph (a), (b) or (c), including: | 15 |
| (i) site clearance, earth-moving, excavation, tunnelling and | 16 |
| boring, and | 17 |
| (ii) the laying of foundations, and | 18 |
| (iii) the erection, maintenance or dismantling of scaffolding, | 19 |
| and | 20 |
| (iv) the prefabrication of components to form part of any | 21 |
| building or structure, whether carried out on-site or off- | 22 |
| site, and | 23 |
| (v) site restoration, landscaping and the provision of | 24 |
| roadways and other access works, | 25 |
| (f) the painting or decorating of the internal or external surfaces of | 26 |
| any building or structure, | 27 |
| (g) any other work of a kind prescribed by the regulations for the | 28 |
| purposes of this subsection. | 29 |
| (2) Despite subsection (1), construction work does not include any of the | 30 |
| following work: | 31 |
| (a) the drilling for, or extraction of, oil or natural gas, | 32 |
| (b) the extraction (whether by underground or surface working) of | 33 |
| minerals, including tunnelling or boring, or constructing | 34 |
| underground works, for that purpose, | 35 |
| (c) any other work of a kind prescribed by the regulations for the | 36 |
| purposes of this subsection. | 37 |
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6 Definition of “related goods and services”

- (1) In this Act, *related goods and services*, in relation to construction work, means any of the following goods and services:
- (a) goods of the following kind:
 - (i) materials and components to form part of any building, structure or work arising from construction work,
 - (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,
 - (b) services of the following kind:
 - (i) the provision of labour to carry out construction work,
 - (ii) architectural, design, surveying or quantity surveying services in relation to construction work,
 - (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,
 - (c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.
- (2) Despite subsection (1), *related goods and services* does not include any goods or services of a kind prescribed by the regulations for the purposes of this subsection.

7 Application of Act

- (1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.
- (2) This Act does not apply to:
- (a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes:
 - (i) to lend money or to repay money lent, or
 - (ii) to guarantee payment of money owing or repayment of money lent, or
 - (iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract, or

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| (b) | a construction contract for the carrying out of residential building work (within the meaning of the <i>Home Building Act 1989</i>) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in, or | 1
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| (c) | a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied. | 5
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| (3) | This Act does not apply to a construction contract to the extent to which it contains: | 11
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| (a) | provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee (within the meaning of the <i>Industrial Relations Act 1996</i>) of the party for whom the work is to be carried out or the related goods and services are to be supplied, or | 13
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| (b) | provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution, or | 18
19
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21 |
| (c) | provisions under which a party undertakes: | 22 |
| (i) | to lend money or to repay money lent, or | 23 |
| (ii) | to guarantee payment of money owing or repayment of money lent, or | 24
25 |
| (iii) | to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract. | 26
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| (4) | This Act does not apply to a construction contract to the extent to which it deals with: | 29
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| (a) | construction work carried out outside New South Wales, and | 31 |
| (b) | related goods and services supplied in respect of construction work carried out outside New South Wales. | 32
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| (5) | This Act does not apply to any construction contract, or class of construction contracts, prescribed by the regulations for the purposes of this section. | 34
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Part 2 Rights to progress payments

8 Rights to progress payments

(1) On and from each reference date under a construction contract, a person:

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

is entitled to a progress payment under this Act, calculated by reference to that date.

(2) In this section, *reference date*, in relation to a construction contract, means:

- (a) a date determined by or in accordance with the terms of the contract as:
 - (i) a date on which a claim for a progress payment may be made, or
 - (ii) a date by reference to which the amount of a progress payment is to be calculated,

in relation to work carried out or to be carried out (or related goods and services supplied or to be supplied) under the contract, or

- (b) if the contract makes no express provision with respect to the matter, the date occurring 4 weeks after the previous reference date or (in the case of the first reference date) the date occurring 4 weeks after construction work was first carried out (or related goods and services were first supplied) under the contract.

9 Amount of progress payment

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

- (a) the amount calculated in accordance with the terms of the contract, or

- (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out by the person (or of related goods and services supplied by the person) under the contract.

10 Valuation of construction work and related goods and services

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

and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

11 Due date for payment

A progress payment under a construction contract becomes due and payable:

- (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or
- (b) if the contract makes no express provision with respect to the matter, on the date occurring 2 weeks after a payment claim is made under Part 3 in relation to the payment.

12 Effect of “pay when paid” provisions

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

- (2) In this section:

money owing, in relation to a construction contract, means money owing for construction work carried out (or for related goods and services supplied) under the contract.

pay when paid provision of a construction contract means a provision of the contract:

- (a) that makes the liability of one party (the **first party**) to pay money owing to another party (the **second party**) contingent on payment to the first party by a further party (the **third party**) of the whole or any part of that money, or
- (b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party.

Part 3 Procedure for recovering progress payments

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Division 1 Payment claims and payment schedules

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13 Payment claims

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- (1) A person who is entitled to a progress payment under a construction contract (the *claimant*) may serve a payment claim on the person who under the contract is liable to make the payment. 4
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- (2) A payment claim: 7
 - (a) must identify the construction work (or related goods and services) to which the progress payment relates, and 8
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 - (b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done (or related goods and services supplied) to which the payment relates (the *claimed amount*), and 10
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 - (c) must state that it is made under this Act. 14

14 Payment schedules

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- (1) A person on whom a payment claim is served (the *respondent*) may reply to the claim by providing a payment schedule to the claimant. 16
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- (2) A payment schedule: 18
 - (a) must identify the payment claim to which it relates, and 19
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the *scheduled amount*). 20
21
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment. 22
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- (4) If: 26
 - (a) a claimant serves a payment claim on a respondent, and 27
 - (b) the respondent does not provide a payment schedule to the claimant: 28
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 - (i) within the time required by the relevant construction contract, or 30
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- (ii) within 10 business days after the payment claim is served, 1
 - whichever time expires earlier, and 2
- (c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and 3
- (d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates. 4
- (2) In those circumstances, the claimant: 5
- (a) may recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, and 6
 - (b) may 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. 7
- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act. 8
- (4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1). 9

Division 2 Adjudication of disputes

17 Adjudication applications

- (1) If the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim, the claimant may apply for adjudication of the progress payment to be made (an *adjudication application*). 23
- (2) An adjudication application: 24
- (a) must be in writing, and 25
 - (b) must identify the payment claim and the payment schedule to which it relates, and 26
 - (c) may contain such submissions relevant to the application as the claimant chooses to include. 27

- (3) An adjudication application: 1
- (a) must be made: 2
- (i) to an adjudicator chosen by agreement between the 3
 claimant and the respondent (being a person who is 4
 eligible to be an adjudicator as referred to in section 18), 5
 or 6
- (ii) if no adjudicator is agreed on, to an authorised 7
 nominating authority chosen by agreement between the 8
 claimant and the respondent, or 9
- (iii) if no nominating authority is agreed on, to an authorised 10
 nominating authority chosen by the claimant, and 11
- (b) must be made within 5 business days after the claimant receives 12
 the payment schedule. 13
- (4) No agreement between the claimant and the respondent that was made 14
 before the claimant received the payment schedule has any effect in 15
 relation to the choice of an adjudicator under subsection (3) (a) (i). 16
- (5) A copy of the adjudication application must be served on the 17
 respondent. 18
- (6) This section does not limit the operation of any provision of the 19
 construction contract in relation to the resolution of disputes between 20
 the claimant and the respondent. 21
- (7) It is the duty of an authorised nominating authority to which an 22
 adjudication application is made to refer the application to an 23
 adjudicator (being a person who is eligible to be an adjudicator as 24
 referred to in section 18) as soon as practicable. 25
- 18 Eligibility criteria for adjudicators 26**
- (1) A person is eligible to be an adjudicator in relation to a construction 27
 contract: 28
- (a) if the person is a natural person, and 29
- (b) if the person has such qualifications, expertise and experience 30
 as may be prescribed by the regulations for the purposes of this 31
 section. 32

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- (2) A person is not eligible to be an adjudicator in relation to a particular construction contract: 1
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- (a) if the person is a party to the contract, or 3
- (b) in such circumstances as may be prescribed by the regulations for the purposes of this section. 4
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- 19 Appointment of adjudicator** 6
- (1) An adjudicator accepts an adjudication application by causing notice of acceptance to be served on the claimant and the respondent. 7
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- (2) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application. 9
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- 20 Adjudication responses** 11
- (1) The respondent may lodge with the adjudicator a response to the claimant's adjudication application (the *adjudication response*) at any time within: 12
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- (a) 5 business days after receiving a copy of the application, or 15
- (b) 2 business days after receiving notice of an adjudicator's acceptance of the application, 16
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- whichever time expires later. 18
- (2) The adjudication response: 19
- (a) must be in writing, and 20
- (b) must identify the adjudication application to which it relates, and 21
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- (c) may contain such submissions relevant to the response as the respondent chooses to include. 23
24
- (3) A copy of the adjudication response must be served on the claimant. 25
- 21 Adjudication procedures** 26
- (1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response. 27
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- (2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response. 30
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Clause 21 Building and Construction Industry Security of Payment Bill 1999 (No 2)

Part 3 Procedure for recovering progress payments

Division 2 Adjudication of disputes

- (3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:
- (a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or
- (b) within such further time as the claimant and the respondent may agree.
- (4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:
- (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and
- (b) may set deadlines for further submissions and comments by the parties, and
- (c) may call a conference of the parties, and
- (d) may carry out an inspection of any matter to which the claim relates.
- (5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.
- 22 Adjudicator's determination**
- (1) An adjudicator is to determine:
- (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the *adjudicated amount*), and
- (b) the date on which any such amount became or becomes payable.
- (2) In determining an adjudication application, the adjudicator is to consider the following matters only:
- (a) the provisions of this Act,
- (b) the provisions of the construction contract from which the application arose,
- (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

- (d) the payment schedule to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule, 1
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates. 2
 - (3) The adjudicator's determination must be in writing and must include: 3
 - (a) the reasons for the determination, and 4
 - (b) the basis on which any amount or date has been decided, 5
 - if, before the making of the determination, either the claimant or the respondent requests the adjudicator to include those matters in the determination. 6
- 23 Respondent's obligations following adjudicator's determination 7
- (1) If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent: 8
 - (a) must pay that amount to the claimant, or 9
 - (b) must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them. 10
 - (2) The security given by a respondent may be in any of the following forms: 11
 - (a) an unconditional promise by a recognised financial institution to pay to the claimant, on demand, the adjudicated amount, or 12
 - (b) payment of the adjudicated amount into a designated trust account, or 13
 - (c) such other form as may be agreed between the claimant and the respondent. 14
 - (3) If the respondent is a public authority, the security may be in the form of a certificate by the authority to the effect that sufficient money will be legally available for payment of any amount up to the adjudicated amount if and when any such amount becomes payable. 15

Clause 23 Building and Construction Industry Security of Payment Bill 1999 (No 2)

Part 3 Procedure for recovering progress payments

Division 2 Adjudication of disputes

- (4) Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least 2 business days after any matters in dispute between them in connection with the progress payment to which the security relates have been finally determined. 1
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- (5) For the purposes of subsection (4), a determination becomes final: 6
- (a) in the case of a determination from which there is no right of appeal or review, when the determination is made, or 7
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- (b) in the case of a determination from which there is a right of appeal or review, when the right of appeal or review expires or (if the determination becomes subject to appeal or review proceedings) when those proceedings have been finally disposed of. 9
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24 Designated trust accounts

- (1) On paying money into a designated trust account as referred to in section 23 (2) (b), the respondent is to cause notice of that fact, together with particulars identifying the account and the recognised financial institution with which the account is kept, to be given to the claimant. 14
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- (2) Money held in a designated trust account (including any interest accruing to such money) is taken to be held on the following trusts: 20
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- (a) to the extent to which the money is required to satisfy the claimant's entitlements, the money is to be applied in satisfaction of those entitlements, 22
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- (b) the claimant's entitlements in respect of an earlier progress claim are to be satisfied before the claimant's entitlements in respect of a later progress claim, 25
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- (c) to the extent to which any of the money remains in the account after the claimant's entitlements have been fully satisfied, the money is to be paid to the respondent. 28
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- (3) Subject to subsection (2), the regulations may make provision for or with respect to the establishment and operation of designated trust accounts. 31
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- (4) In this section, *claimant's entitlements*, in relation to money held in a designated trust account, means the amount (if any) to which the claimant becomes entitled after any matters in dispute between them in connection with the progress payment to which the money relates have been finally determined. 1
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- (5) For the purposes of subsection (4), a determination becomes final: 6
- (a) in the case of a determination from which there is no right of appeal or review, when the determination is made, or 7
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- (b) in the case of a determination from which there is a right of appeal or review, when the right of appeal or review expires or (if the determination becomes subject to appeal or review proceedings) when those proceedings have been finally disposed of. 9
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- 25 Consequences of not complying with adjudicator's determination** 14
- (1) This section applies if, on or before the relevant date, a respondent fails to do one or other of the following: 15
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- (a) to pay the whole or any part of the adjudicated amount to a claimant, 17
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- (b) to give security for payment of the whole or any part of the adjudicated amount to a claimant. 19
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- (2) In those circumstances, the claimant: 21
- (a) may recover the unpaid, or unsecured, portion of the adjudicated amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, and 22
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- (b) may 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. 25
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- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act. 29
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- (4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1). 31
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Clause 25 Building and Construction Industry Security of Payment Bill 1999 (No 2)

Part 3 Procedure for recovering progress payments

Division 2 Adjudication of disputes

- (5) In this section, *relevant date* means:
- (a) the date occurring 2 business days after the date on which the relevant determination is made under section 22, or
 - (b) if the adjudicator determines a later date under section 22 (1) (b), that later date.

26 Claimant may make new application if previous application refused or not determined

- (1) This section applies if:
- (a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made, or
 - (b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 21 (3).
- (2) In either of those circumstances, the claimant:
- (a) may withdraw the application, by notice in writing served on the adjudicator or authorised nominating authority to whom the application was made, and
 - (b) may make a new adjudication application under section 17.
- (3) Despite section 17 (3) (b), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).
- (4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 17.

Division 3 Claimant's right to suspend construction work

27 Claimant may suspend work

- (1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 25.

- (2) The right conferred by subsection (1) exists only for so long as the respondent fails to comply with the requirements referred to in section 15 (1), 16 (1) or 25 (1), as the case may be. 1
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- (3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension. 4
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Division 4 General 10

28 Nominating authorities 11

- (1) Subject to the regulations, the Minister: 12
 - (a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act, and 13
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 - (b) may withdraw any authority so given. 16
- (2) A person: 17
 - (a) whose application for authority to nominate adjudicators for the purposes of this Act is refused, or 18
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 - (b) whose authority to nominate adjudicators is withdrawn, 20
may apply to the Administrative Decisions Tribunal for a review of the Minister's decision to take that action. 21
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29 Adjudicator's fees 23

- (1) An adjudicator is entitled to be paid for adjudicating an adjudication application: 24
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 - (a) such amount, by way of fees and expenses, as is agreed between the adjudicator and the parties to the adjudication, or 26
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 - (b) if no such amount is agreed, such amount, by way of fees and expenses, as is reasonable having regard to the work done and expenses incurred by the adjudicator. 28
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- (2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses. 31
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- (3) As between themselves, the claimant and respondent are each liable to contribute to the adjudicator's fees and expenses in equal proportions or, if the adjudicator determines that the adjudication application or the adjudication response was wholly unfounded, in such proportions as the adjudicator may determine. 1
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- (4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21 (3). 6
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- (5) Subsection (4) does not apply: 12
- (a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid, or 13
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- (b) in such other circumstances as may be prescribed by the regulations for the purposes of this section. 16
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- 30 Exclusion of liability for adjudicator's acts and omissions 18**
- No action lies against an adjudicator or any other person with respect to anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions under this Act. 19
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- 31 Service of notices 22**
- (1) Any notice that by or under this Act is authorised or required to be served on a person may be served on the person: 23
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- (a) by delivering it to the person personally, or 25
- (b) by lodging it during normal office hours at the person's ordinary place of business, or 26
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- (c) by sending it by post or facsimile addressed to the person's ordinary place of business, or 28
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- (d) in such other manner as may be prescribed by the regulations for the purposes of this section. 30
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- (2) Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1) (c), is taken to have been effected when the notice is received at that place. 32
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- (3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices. 1
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32 Effect of Part on civil proceedings 4

- (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract: 5
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- (a) may have under the contract, or 7
 - (b) may have under Part 2 in respect of the contract, or 8
 - (c) may have apart from this Act in respect of anything done or omitted to be done under the contract. 9
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- (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3). 11
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- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal: 14
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- (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and 16
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 - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings. 19
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Part 4 Miscellaneous

33 Act binds Crown

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

34 No contracting out

A provision of any agreement (whether in writing or not) under which the operation of this Act is excluded, modified or restricted, or which has the effect of excluding, modifying or restricting the operation of this Act, is void.

35 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) The regulations may, either unconditionally or subject to conditions, exempt:
 - (a) any specified person or class of persons, or
 - (b) any specified matter or class of matters,from the operation of this Act or of any specified provision of this Act.
- (3) The commencement of a regulation referred to in section 5, 6 or 7 does not affect the operation of this Act with respect to construction work carried out, or related goods and services supplied, under a construction contract entered into before that commencement.

36 Amendment of Commercial Arbitration Act 1984 No 160

The *Commercial Arbitration Act 1984* is amended as set out in Schedule 1.

37 Savings and transitional provisions

Schedule 2 has effect.

38 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 3 months after the end of the period of 3 years.

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Schedule 1	Amendment of Commercial Arbitration Act	1
	1984	2
	(Section 36)	3
Section 3	Repeal, transitional and application provisions	4
Insert after section 3 (7):		5
(8)	Nothing in this Act affects the operation of Part 3 of the	6
	<i>Building and Construction Industry Security of Payment Act</i>	7
	<i>1999.</i>	8

Schedule 2 Savings and transitional provisions

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(Section 37)

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Part 1 Preliminary

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1 Savings and transitional regulations

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- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

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Building and Construction Industry Security of Payment Act 1999

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- (2) Such a provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.

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- (3) To the extent to which such a provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

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- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of that publication, or

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- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of that publication.

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Part 2 Provisions consequent on enactment of Building and Construction Industry Security of Payment Act 1999

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2 Certain construction contracts not affected

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A provision of this Act does not apply to a construction contract entered into before the commencement of that provision.

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