

PARLIAMENT OF VICTORIA

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**Building and Construction Industry Security of  
Payment (Amendment) Act 2006**

**Act No.**

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## PARLIAMENT OF VICTORIA

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Initiated in Assembly 7 February 2006  
As amended by Assembly 13 June 2006

# A BILL

to amend the **Building and Construction Industry Security of Payment Act 2002** to make further provision with respect to payments for construction work and for the supply of related goods and services under construction contracts and for other purposes.

## **Building and Construction Industry Security of Payment (Amendment) Act 2006**

**The Parliament of Victoria enacts as follows:**

*Building and Construction Industry Security of Payment  
(Amendment) Act 2006*

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**1. Purpose**

The main purpose of this Act is to amend the **Building and Construction Industry Security of Payment Act 2002** to make further provision with respect to payments for construction work and for the supply of related goods and services under construction contracts.

**2. Commencement**

- (1) This section and sections 1, 3, 38, 39 and 41 come into operation on the day after the day on which this Act receives the Royal Assent.
- (2) The remaining provisions of this Act come into operation on a day or days to be proclaimed.
- (3) If a provision referred to in sub-section (2) does not come into operation before 30 March 2007, it comes into operation on that day.

**3. Principal Act**

In this Act, the **Building and Construction Industry Security of Payment Act 2002** is called the Principal Act.

See:  
Act No.  
15/2002.  
LawToday:  
www.dms.  
dpc.vic.  
gov.au

**4. Object of Act**

- (1) In section 3 of the Principal Act—
  - (a) in sub-section (1)—
    - (i) for "carries out construction work or who supplies" **substitute** "undertakes to carry out construction work or who undertakes to supply";
    - (ii) **omit** "specified";

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(b) in sub-section (2), for "circumstances where the relevant construction contract fails to do so" **substitute** "accordance with this Act";

(c) in sub-section (3)(d) **omit** "or the setting aside of money as security for payment of the progress payment".

(2) For section 3(4) of the Principal Act **substitute**—

"(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 that other entitlement."

## **5. Definitions**

In section 4 of the Principal Act—

(a) **insert** the following definitions—

"**adjudication certificate**" means a certificate provided by an authorised nominating authority under section 28Q;

"**adjudication determination**" means a determination made by an adjudicator under section 23;

"**adjudication fees**" means any fees or expenses charged by an authorised nominating authority or by an adjudicator or review adjudicator under this Act;

"**adjudication review**" means a review of an adjudication determination under Division 2A of Part 3;

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**"adjudication review application"** means  
an application under section 28B  
or 28C;

**"claimable variation"** has the meaning  
given in section 10A;

**"excluded amount"** has the meaning given  
in section 10B;

**"review adjudicator"** in relation to an  
adjudication review application, means  
the adjudicator appointed in accordance  
with this Act to determine the  
application;

**"review determination"** means the  
determination made by a review  
adjudicator under section 28I in respect  
of an adjudication review application;

**"variation"** in relation to a construction  
contract, means a change in the scope  
of the construction work to be carried  
out, or the related goods and services to  
be supplied, under the contract.;

(b) in the definition of "designated trust  
account" **omit** "adjudicated";

(c) for the definition of "progress payment",  
**substitute—**

**"progress payment"** means a payment to  
which a person is entitled under  
section 9, and includes (without  
affecting that entitlement)—

(a) the final payment for—

(i) construction work carried out  
under a construction  
contract; or

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(ii) related goods and services  
supplied under the contract;  
or

(b) a single or one-off payment for—

(i) construction work carried out  
under a construction  
contract; or

(ii) related goods and services  
supplied under the contract;  
or

(c) a payment that is based on an  
event or date (known in the  
building and construction industry  
as a "milestone payment");

Note: The amount of a progress payment is  
calculated in accordance with  
sections 10, 10A, 10B and 11.;

(d) in the definition of "scheduled amount, for  
"section 15." **substitute** "section 15;"

**6. Definition of "construction work"**

In section 5(1) of the Principal Act—

(a) in paragraphs (c), (e)(iv) and (f), for "or  
structure" **substitute** ", structure or works";

(b) in paragraph (d), for "and structures"  
**substitute** ", structures or works".

**7. Definition of "related goods and services"**

After section 6(2) of the Principal Act **insert**—

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



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**8. Application of Act**

For section 7(2)(b) of the Principal Act  
**substitute—**

- 5                   "(b) a construction contract which is a domestic  
building contract within the meaning of the  
**Domestic Building Contracts Act 1995**  
between a builder and a building owner  
(within the meaning of that Act), for the  
10                   carrying out of domestic building work  
(within the meaning of that Act), other than a  
contract where the building owner is in the  
business of building residences and the  
contract is entered into in the course of, or in  
connection with, that business; or
- 15                   (ba) a construction contract for the carrying out of  
any work of a kind referred to in section 6 of  
the **Domestic Building Contracts Act 1995**  
relating to a residence other than—
- 20                   (i) a contract where the person for whom  
the work is, or is to be, carried out is a  
person who is in the business of  
building residences and the contract is  
entered into in the course of, or in  
connection with, that business; or
- 25                   (ii) a contract where the work carried out,  
or to be carried out, under the contract  
is, or is part of or is incidental to work  
to be carried out under another  
construction contract; or".

**9. Rights to progress payments**

In section 9(2) of the Principal Act—

(a) in paragraph (a)—

- (i) for "work" **substitute** "a specific item of construction work";
- (ii) for "related goods and services" **substitute** "a specific item of related goods and services";

(b) in paragraph (b)—

- (i) before "if the contract" **insert** "subject to paragraphs (c) and (d),";
- (ii) for "supplied under the contract." **substitute** "supplied under the contract; or";

(c) after paragraph (b) **insert**—

(c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that—

- (i) construction work was last carried out under the contract; or
- (ii) related goods and services were last supplied under the contract; or

(d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following—

- (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related

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goods and services supplied under the contract, unless sub-paragraph (ii) applies; or

(ii) the issue under the contract of a certificate specifying the final amount payable under the contract **"a final certificate"**; or

(iii) if neither sub-paragraph (i) nor sub-paragraph (ii) applies, the day that—

(A) construction work was last carried out under the contract; or

(B) related goods and services were last supplied under the contract.<sup>1</sup>

**10. Amount of progress payment**

(1) In section 10(b) of the Principal Act—

(a) in sub-paragraph (i), after "carried out" **insert** "or undertaken to be carried out";

(b) in sub-paragraph (ii), after "supplied" **insert** "or undertaken to be supplied".

(2) At the end of section 10 of the Principal Act **insert**—

"(2) Despite sub-section (1) and anything to the contrary in the construction contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

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- 5 (3) Despite sub-section (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract."

**11. Insertion of sections 10A and 10B**

After section 10 of the Principal Act **insert**—

10 **'10A. Claimable variations**

- 15 (1) This section sets out the classes of variation to a construction contract (the "**claimable variations**") that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.
- (2) The first class of variation is a variation where the parties to the construction contract agree—
- 20 (a) that work has been carried out or goods and services have been supplied; and
- (b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and
- 25 (c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and
- 30 (d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and

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- (e) as to the value of that amount or the method of valuing that amount; and
- (f) as to the time for payment of that amount.
- 5 (3) The second class of variation is a variation where—
- (a) the work has been carried out or the goods and services have been supplied under the construction contract; and
- 10 (b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of
- 15 the work or the supply of the goods and services; and
- (c) the parties to the construction contract do not agree as to one or more of the following—
- 20 (i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;
- 25 (ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount
- 30 in respect of the work or the goods and services;
- (iii) the value of the amount payable in respect of the work or the goods and services;

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(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to sub-section (4), the consideration under the construction contract at the time the contract is entered into—

(i) is \$5 000 000 or less; or

(ii) exceeds \$5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, sub-section (3)(d) applies in relation to that construction contract as if any reference to "\$5 000 000" were a reference to "\$150 000".

**Example**

A building contractor enters into a construction contract. The consideration (**contract sum**) under the contract at the time the contract is entered into is \$3 million. The contract contains a dispute resolution clause. The contractor undertakes work at the direction of the other party. The contractor claims (the **new claim**) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (**disputed variation**). The contractor has already made a

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number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to \$350 000. This amount exceeds 10% of the contract sum. As the contract sum exceeds \$150 000 and the contract contains a dispute resolution clause, the disputed variation in the new claim and all subsequent disputed variations under the contract will not be claimable variations under this Act.

**10B. Excluded amounts**

(1) This section sets out the classes of amounts ("**excluded amounts**") that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.

(2) The excluded amounts are—

(a) any amount that relates to a variation of the construction contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to—

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

- (d) any amount in relation to a claim arising at law other than under the construction contract;
- (e) any amount of a class prescribed by the regulations as an excluded amount.'

**12. Valuation of construction work and related goods and services**

In section 11 of the Principal Act—

(a) in sub-section (1)—

(i) after "carried out" **insert** "or undertaken to be carried out";

(ii) for paragraph (b)(iii) **substitute**—

"(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and";

(b) in sub-section (2)—

(i) after "supplied" **insert** "or undertaken to be supplied";

(ii) for paragraph (b)(iii) **substitute**—

"(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and".

**13. Interest payable on overdue progress payment**

At the end of section 12 of the Principal Act **insert**—

"(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with sub-section (1) at the greater of the following rates—



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- (a) the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983**; or
- (b) the rate specified under the construction contract."

**14. Insertion of section 12A**

After section 12 of the Principal Act **insert—**

**"12A. Lien in respect of unpaid progress payment**

- (1) If a progress payment under a construction contract 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.
- (2) The claimant must serve a notice in the prescribed form on the respondent before exercising a lien under sub-section (1).
- (3) A lien under sub-section (1) is extinguished on the claimant receiving the progress payment.
- (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 sub-section (1).
- (5) Sub-section (1) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials."

**15. Effect of "pay when paid" provisions**

(1) In section 13(1) of the Principal Act—

(a) in paragraph (a), after "carried out" **insert**  
"or undertaken to be carried out";

(b) in paragraph (b), after "supplied" **insert**  
"or undertaken to be supplied".

(2) In section 13(2) of the Principal Act, in the  
definition of "pay when paid provision"—

(a) in paragraph (b), for "third party." **substitute**  
"third party; or";

(b) after paragraph (b) **insert**—

"(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."

**16. Substitution of section 14**

For section 14 of the Principal Act **substitute**—

**'14. Payment claims**

(1) A person referred to in section 9(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.

(2) A payment claim—

(a) must be in the relevant prescribed form  
(if any); and

(b) must contain the prescribed information  
(if any); and

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- (c) must identify the construction work or related goods and services to which the progress payment relates; and
  - (d) must indicate the amount of the progress payment that the claimant claims to be due (the "**claimed amount**"); and
  - (e) must state that it is made under this Act.
- 10
- (3) The claimed amount—
- (a) may include any amount that the respondent is liable to pay the claimant under section 29(4);
  - (b) must not include any excluded amount.
- 15
- Note: Section 10(3) provides that a progress payment must not include an excluded amount.
- (4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—
- 20
- (a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or
  - (b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—
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- whichever is the later.

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- (5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within—
    - (a) the period determined by or in accordance with the terms of the construction contract; or
    - (b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.
  - (6) Subject to sub-section (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.
  - (7) Nothing in sub-section (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served under this Act in respect of a construction contract if—
    - (a) a claim for the payment of that amount has been made in respect of that payment under the contract; and
    - (b) that amount was not paid by the due date under the contract for the payment to which the claim relates.
  - (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
  - (9) However, sub-section (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.'.

**17. Payment schedules**

(1) In section 15(2)(b) of the Principal Act for  
'(the "**scheduled amount**")' **substitute**  
'(the "**scheduled amount**")'; and'.

(2) After section 15(2)(b) of the Principal Act  
**insert—**

"(c) must identify any amount of the claim that  
the respondent alleges is an excluded  
amount; and

(d) must be in the relevant prescribed form  
(if any); and

(e) must contain the prescribed information  
(if any)."

**18. Consequences of not paying claimant where no  
payment schedule**

(1) For section 16(2)(a) of the Principal Act  
**substitute—**

"(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 18(1)(b) in relation to the  
payment claim; and"

(2) For section 16(4) of the Principal Act  
**substitute—**

"(4) If the claimant commences proceedings  
under sub-section (2)(a)(i) to recover the  
unpaid portion of the claimed amount from  
the respondent as a debt—

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- 5
- (a) judgment in favour of the claimant is not to be given unless the court is satisfied—
- (i) of the existence of the circumstances referred to in sub-section (1); and
- (ii) that the claimed amount does not include any excluded amount; and
- 10
- (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."
- 15

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

- 20
- (1) For section 17(2)(a) of the Principal Act **substitute**—
- "(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
- 25
- (ii) make an adjudication application under section 18(1)(a)(ii) in relation to the payment claim; and"
- (2) For section 17(4) of the Principal Act **substitute**—
- 30
- "(4) If the claimant commences proceedings under sub-section (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt—

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(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—

10

(i) to bring any cross-claim against the claimant; or

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

**20. Adjudication applications**

15

(1) For sections 18(1) to 18(4) of the Principal Act **substitute—**

'(1) A claimant may apply for adjudication of a payment claim (an "**adjudication application**") if—

20

(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

25

(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

30

(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.

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(2) An adjudication application to which sub-section (1)(b) applies cannot be made unless—

- 5 (a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
- 10 (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

15 (3) An adjudication application—

- (a) must be in writing; and
- (b) subject to sub-section (4), must be made to an authorised nominating authority chosen by the claimant; and
- 20 (c) in the case of an application under sub-section (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule; and
- 25 (d) in the case of an application under sub-section (1)(a)(ii), must be made within 10 business days after the due date for payment; and
- 30 (e) in the case of an application under sub-section (1)(b), must be made within 5 business days after the end of the 2 day period referred to in sub-section (2)(b); and
- 35 (f) must identify the payment claim and the payment schedule (if any) to which it relates; and



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(g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and

(h) may contain any submissions relevant to the application that the claimant chooses to include.

(4) If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.'

(2) Section 18(6) of the Principal Act is **repealed**.

(3) In section 18(8) of the Principal Act **omit** "chosen by agreement between the claimant and the respondent or".

**21. Adjudication responses**

(1) In section 21 of the Principal Act—

(a) in sub-section (1), for "The respondent" **substitute** "Subject to sub-section (2A), the respondent";

(b) for sub-section (2)(c) **substitute**—

"(c) must include the name and address of any relevant principal of the respondent and any other person who the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application; and

(ca) must identify any amount of the payment claim that the respondent alleges is an excluded amount; and";

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(2) After section 21(2) of the Principal Act **insert**—

"(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 15(4) or 18(2)(b).

(2B) If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant—

(a) setting out those reasons; and

(b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator."

(3) In section 21(4) of the Principal Act, after "entered into a contract" **insert** "(that is not a construction contract exempted from this Act under section 7(2)(b) or 7(2)(ba))".

**22. Adjudication procedures**

(1) For section 22(2) of the Principal Act **substitute**—

"(2) An adjudicator must serve a written notice—

(a) on any relevant principal and any other person who is included in the adjudication response under section 21(2)(c); and

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(b) on any other person who the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial or contractual interest in the matters that are the subject of the adjudication application."

10

(2) For section 22(4)(b) of the Principal Act **substitute**—

"(b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees."

15

(3) After section 22(4) of the Principal Act **insert**—

"(4A) A claimant must not unreasonably withhold their agreement under sub-section (4)(b)."

20

(4) After section 22(5) of the Principal Act **insert**—

"(5A) Any conference called under sub-section (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator."

**23. Adjudicator's determination**

25

(1) In section 23 of the Principal Act—

(a) in sub-section (1)(b), for "payable." **substitute** "payable; and";

(b) after sub-section (1)(b) **insert**—

"(c) the rate of interest payable on that amount in accordance with section 12(2).";

30

(c) in the note to sub-section (1), for "section 45(7)" **substitute** "section 45(8)";

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- 5
- (d) in sub-section (2) for "is to consider the following matters only" **substitute** "must consider the following matters and those matters only";
- (e) in sub-section (2)(b), for "the provisions" **substitute** "subject to this Act, the provisions";
- (f) in sub-section (2)(d), after "payment schedule" **insert** "(if any)".
- 10
- (2) After section 23(2) of the Principal Act **insert**—
- "(2A) In determining an adjudication application, the adjudicator must not take into account—
- (a) any part of the claimed amount that is an excluded amount; or
- 15
- (b) any other matter that is prohibited by this Act from being taken into account.
- (2B) An adjudicator's determination is void—
- (a) to the extent that it has been made in contravention of sub-section (2);
- 20
- (b) if it takes into account any amount or matter referred to in sub-section (2A), to the extent that the determination is based on that amount or matter."
- (3) For sections 23(3) and 23(4) of the Principal Act **substitute**—
- 25
- "(3) The adjudicator's determination must be in writing and must include—
- (a) the reasons for the determination; and
- 30
- (b) the basis on which any amount or date has been decided.

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(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, 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."

**24. Section 23A inserted**

After section 23 of the Principal Act **insert**—

**"23A. Adjudication determination to be given to parties and Building Commission**

The authorised nominating authority to whom the adjudication application was made must give a copy of the adjudication determination—

(a) to the claimant and the respondent, as soon as practicable after it is made; and

(b) to the Building Commission within 5 business days after it is made."

**25. Correcting mistakes in determinations**

After section 24(2) of the Principal Act **insert**—

5           "(3) If a correction is made to a determination  
under this section, the authorised nominating  
authority to whom the adjudication  
application was made must give a copy of  
the corrected determination to the claimant  
and the respondent and the Building  
Commission as soon as practicable after the  
10           correction is made.

          (4) An adjudicator cannot make a correction of a  
determination under this section if an  
application has been made under  
15           Division 2A for a review of the  
determination."

**26. Repeal of sections 25 to 27**

Sections 25 to 27 of the Principal Act are  
**repealed.**

**27. Claimant may make new application if previous  
application refused or not determined**

20           In section 28(3) of the Principal Act, for  
"section 18(3)(b)" **substitute** "sections 18(3)(c),  
18(3)(d) and 18(3)(e)".

**28. New Divisions 2A and 2B inserted in Part 3**

25           After section 28 of the Principal Act **insert**—

**'Division 2A—Review of Adjudication**

**28A. Threshold for review**

30           This Division applies in respect of an  
adjudication determination if the adjudicated  
amount exceeds the higher of—

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- (a) \$100 000; or
- (b) the amount prescribed for the purposes of this section.

**28B. Application for review by respondent**

- 5 (1) Subject to this section, a respondent may apply for a review of an adjudication determination (an "**adjudication review**").
- 10 (2) An application under this section may only be made if the respondent provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2).
- 15 (3) An application under this section may only be made on the ground that the adjudicated amount included an excluded amount.
- 20 (4) An application under this section may only be made if the respondent has identified that amount as an excluded amount in the payment schedule or the adjudication response.
- 25 (5) An application under this section may only be made if the respondent has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts.
- 30 (6) An application under this section may only be made if the respondent has paid the alleged excluded amounts into a designated trust account.

**28C. Application for review by claimant**

- 30 (1) Subject to this section, a claimant may apply for a review of an adjudication determination (an "**adjudication review**").

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- 5 (2) An application under this section may only be made on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount.

**28D. Procedure for making application**

- 10 (1) An adjudication review application must be made to the authorised nominating authority to which the adjudication application was made.
- 15 (2) An adjudication review application must be made within 5 business days after the respondent or claimant (as the case requires) receives a copy of the adjudication determination.
- (3) An adjudication review application—
- 20 (a) must be in writing in the prescribed form (if any); and
- (b) must contain the prescribed information (if any); and
- (c) must be accompanied by the application fee (if any) determined by the authorised nominating authority.
- 25 (4) The applicant must give a copy of the adjudication review application to the other party to the adjudication review within one business day after the application is made.
- 30 (5) The authorised nominating authority must as soon as practicable after receiving an adjudication review application give a copy of the application to—



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- (a) the adjudicator who made the adjudication determination that is the subject of the adjudication review; and
- (b) the Building Commission.

5

**28E. Right to make submissions**

A party to an adjudication review may make a submission to the authorised nominating authority in response to the application for review within 3 business days after being given a copy of the adjudication review application.

10

**28F. Designated trust account**

(1) On paying money into a designated trust account in accordance with section 28B, the respondent must give the claimant notice of that payment together with particulars identifying the account and the recognised financial institution with which the account is kept.

15

(2) Subject to sub-section (3), money held in a designated trust account (including any interest accruing to that money) is taken to be held on the following trusts—

20

(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;

25

(b) 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.

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(3) If the respondent withdraws the adjudication review application in accordance with section 28K, any money held in a designated trust account (including any interest accruing to that money) is to be paid to the claimant.

10

(4) Subject to sub-sections (2) and (3), the regulations may make provision for or with respect to the establishment and operation of designated trust accounts.

15

(5) 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 under a review determination.

**28G. Appointment of review adjudicator**

20

(1) The authorised nominating authority must, within 5 business days after receiving an application for review, appoint a review adjudicator in accordance with this section (the "**review adjudicator**") to conduct the review.

25

(2) A review adjudicator must be a person who is eligible to be an adjudicator as referred to in section 19.

30

(3) The authorised nominating authority may not appoint an adjudicator who has been involved directly or indirectly with the adjudication determination that is the subject of the adjudication review.

35

(4) The authorised nominating authority must give each party to the review and the Building Commission written notice of the appointment of a review adjudicator.

(5) The notice under sub-section (4) must include the date of the appointment.

**28H. Adjudication review procedures**

- 5
- (1) The adjudication review commences upon acceptance by the review adjudicator of his or her appointment as the review adjudicator.
- (2) The authorised nominating authority must provide the following information to the review adjudicator as soon as practicable after the appointment of the review adjudicator—
- 10
- (a) a copy of the adjudication review application; and
- (b) a copy of any submission made by a party to the adjudication review in accordance with section 28E; and
- 15
- (c) a copy of the adjudication determination that is the subject of the adjudication review; and
- (d) a copy of the payment claim that relates to that adjudication determination; and
- 20
- (e) a copy of each submission considered by the adjudicator who made that adjudication determination; and
- (f) a copy of the payment schedule (if any) considered by the adjudicator who made that adjudication determination; and
- 25
- (g) any other information that the adjudicator who made the adjudication determination considered in making that determination.
- 30

**28I. Adjudication review determination**

5

(1) A review adjudicator is not to determine an adjudication application until after the end of the period within which any party to the adjudication review may make a submission in accordance with section 28E.

10

(2) In determining an adjudication review application, the review adjudicator must consider the following matters and those matters only—

15

(a) the provisions of this Act and any regulations made under this Act; and

(b) the provisions of the construction contract from which the application arose; and

(c) the information provided by the authorised nominating authority under section 28H.

20

(3) In determining an adjudication review application, the review adjudicator must not take into account—

(a) any excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

25

(4) A review adjudicator's determination is void—

(a) to the extent that it has been made in contravention of sub-section (2); or

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(b) if it takes into account any amount or matter referred to in sub-section (3), to the extent that the determination is based on that amount or matter.

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- (5) After conducting an adjudication review, a review adjudicator may—
    - (a) substitute a new adjudication determination (the "**review determination**") for the determination that is the subject of the adjudication review; or
    - (b) confirm the determination that is the subject of the adjudication review.
  - (6) In determining an adjudication review, the review adjudicator must—
    - (a) specify if the review determination varies the adjudication determination and how it varies the adjudication determination; and
    - (b) specify any amounts paid to the claimant by the respondent in respect of the adjudication determination; and
    - (c) determine any further amount that is to be paid by the respondent to the claimant; and
    - (d) determine any amount that is to be repaid by the claimant to the respondent; and
    - (e) determine any interest payable in accordance with section 12(2) on an amount referred to in paragraph (c); and
    - (f) specify the date on which an amount under paragraph (c), (d) or (e) becomes payable.

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- (7) A review determination must be in writing and set out the reasons for the review determination in that determination.
  - (8) A review adjudicator who makes a review determination may, if he or she thinks it appropriate, include a statement in the review determination that in his or her opinion the application for the adjudication review was not made in good faith.
  - (9) The date for payment referred to in subsection (6)(f) must be 5 business days after the respondent or claimant (as the case requires) is given a copy of the review determination.
  - (10) The review adjudicator must complete the adjudication review and provide a copy of the review determination to the authorised nominating authority that appointed him or her—
    - (a) within 5 business days after his or her appointment; or
    - (b) within any further time, not exceeding 10 business days after that appointment, to which the applicant for the adjudication review agrees.
  - (11) An applicant must not unreasonably withhold their agreement under subsection (10)(b).

**28J. Authorised nominating authority must notify persons of review determination**

The authorised nominating authority must, as soon as practicable, provide a copy of the review determination to—

- (a) each party to the adjudication review; and
- (b) the adjudicator who made the adjudication determination that is the subject of the adjudication review; and
- (c) the Building Commission.

**28K. Withdrawal of adjudication review application**

An applicant may withdraw an adjudication review application at any time before the review adjudicator has made a review determination under section 28I by serving a notice of withdrawal on—

- (a) the review adjudicator; and
- (b) the authorised nominating authority that appointed the review adjudicator; and
- (c) the other party to the adjudication review.

**28L. Correcting mistakes in review determinations**

Section 24 applies to review determinations as if a reference in that section—

- (a) to an adjudicator were a reference to a review adjudicator; and
- (b) to a determination made by an adjudicator were a reference to a review determination.

**Division 2B—Payment and Recovery of  
Adjudicated Amounts**

**28M. Respondent required to pay adjudicated  
amount**

5

(1) Subject to sections 28B and 28N, 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.

10

(2) In this section "**relevant date**" means—

(a) the date that is 5 business days after the date on which a copy of the adjudication determination is given to the respondent under section 23A; or

15

(b) if the adjudicator determines a later date under section 23(1)(b), that later date.

**28N. Payment after review determination**

20

(1) If the respondent is required by a review determination to pay an amount to the claimant, the respondent must pay that amount on or before the date for that payment determined by the review adjudicator under section 28I(6)(f).

25

(2) If the claimant is required by a review determination to pay an amount to the respondent, the claimant must pay that amount on or before the date for that payment determined by the review adjudicator under section 28I(6)(f).

30



**28O. Consequences of respondent not paying adjudicated amount**

- 5 (1) If the respondent fails to pay the whole or any part of an adjudicated amount in accordance with section 28M or 28N, the claimant may—
- 10 (a) request the authorised nominating authority to whom the adjudication application or the adjudication review application was made to provide an adjudication certificate under section 28Q; and
- 15 (b) serve notice on the respondent of the claimant's intention—
- 20 (i) to suspend carrying out construction work under the construction contract; or
- (ii) to suspend supplying related goods and services under the construction contract.
- 25 (2) A notice under sub-section (1)(b) must state that it is made under section 28O(1) of this Act.
- 30 (3) A notice cannot be served under sub-section (1) in respect of a failure to pay the whole or any part of an adjudicated amount in accordance with section 28M until after the end of the period allowed for making an adjudication review application under section 28D.

5 (4) If the claimant has made an adjudication review application in respect of any part of the adjudicated amount, the claimant may not give a notice under sub-section (1)(b) in respect of a failure to pay that adjudicated amount in accordance with section 28M until that adjudication review is completed.

10 (5) In this section "**adjudicated amount**" includes any amount payable by the respondent under a review determination.

**28P. Consequences of claimant not paying adjudicated amount**

15 If the claimant fails to pay the whole or part of the amount payable by the claimant under a review determination in accordance with section 28N, the respondent may request the authorised nominating authority to which the adjudication review application was made to provide an adjudication certificate under section 28Q.

**28Q. Adjudication certificates**

25 (1) An adjudication certificate provided by an authorised nominating authority on a request under this Division must state that it is made under this Act and specify the following matters—

- 30 (a) the name of the person requesting the certificate;
- (b) the name of the person who is liable to pay the adjudicated amount;
- (c) the amount payable under section 28M or 28N;
- 35 (d) the date on which payment of that amount was due to be paid to the person requesting the certificate.

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- (2) If any amount of interest that is due and payable on the amount payable under section 28M or 28N is not paid by the respondent, the person requesting the adjudication certificate may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate.
- 10
- (3) If an amount of interest is specified in the adjudication certificate to be paid by the respondent, the amount is to be added to, and becomes part of, the adjudicated amount.
- 15
- (4) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication or the adjudication review fees in relation to any adjudication review (as the case requires) 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.
- 20
- (5) If the respondent has paid the claimant's share of the adjudication review fees in relation to any adjudication review but has not been reimbursed by the claimant for that amount, the respondent may request the authorised nominating authority to specify that share of the fees in the adjudication certificate.
- 25
- (6) If the unpaid share is specified in the adjudication certificate it is to be added to, and becomes part of, the adjudicated amount.
- 30
- (7) In this section "**adjudicated amount**" includes an amount payable by the respondent or the claimant under a review determination.
- 35

**28R. Proceedings to recover amount payable under section 28M or 28N**

5

(1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.

10

(2) A proceeding referred to in sub-section (1) cannot be brought unless the person provided with the adjudication certificate files in the court—

15

(a) the adjudication certificate; and

(b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.

20

(3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.

25

(4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.

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- (5) If a person commences proceedings to have the judgment set aside, that person—
    - (a) subject to sub-section (6), is not, in those proceedings, entitled—
      - (i) to bring any cross-claim against the person who brought the proceedings under sub-section (1); or
      - (ii) to raise any defence in relation to matters arising under the construction contract; or
      - (iii) to challenge an adjudication determination or a review determination; and
    - (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.
  - (6) Sub-section (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.
  - (7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.
  - (8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.'
-

**29. Claimant may suspend work**

(1) In section 29(1) of the Principal Act—

(a) for "2 business days" **substitute** "3 business days";

(b) for "or 27" **substitute** "or 28O".

(2) For section 29(2) of the Principal Act **substitute**—

"(2) The right conferred by sub-section (1) exists until—

(a) if the construction contract provides for a period of at least 1 business day for a return to work after the claimant receives payment from the respondent of an amount referred to in section 16(1), 17(1), 28M or 28N, the end of that period; or

(b) in any other case, the end of the period of 3 business days immediately following the date on which the claimant receives payment from the respondent of an amount referred to in section 16(1), 17(1), 28M or 28N."

(3) After section 29(3) of the Principal Act **insert**—

"(4) 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.

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5 (5) A claimant who suspends construction work  
or the supply of related goods and services in  
accordance with the right conferred by sub-  
section (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 the work or not supplying those  
10 goods and services during the period of  
suspension."

**30. New section 29A inserted**

In Division 4 of Part 3 of the Principal Act, before  
section 30 **insert**—

**'29A. Definitions**

15 In this Division—

**"adjudicated amount"** includes an amount  
payable under a review determination;

**"adjudication determination"** includes a  
review determination.'

20 **31. Recovery from principal**

(1) For section 30(a) of the Principal Act  
**substitute**—

25 "(a) an adjudicator or a review adjudicator has  
determined that an adjudicated amount or  
part of an adjudicated amount is payable by a  
respondent to a claimant in respect of a  
construction contract; and"

(2) For section 30(b) of the Principal Act  
**substitute**—

30 "(b) the respondent fails to pay the whole or any  
part of the adjudicated amount to the  
claimant in accordance with section 28M  
or 28N; and"

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(3) In section 31(1) of the Principal Act, for  
"construction contract" **substitute** "contract".

(4) After section 31(2) of the Principal Act **insert**—

"(3) Sub-section (1) does not apply to allow the  
claimant to obtain payment from a person  
who has engaged the respondent to carry out  
construction work or to supply goods and  
services under a construction contract  
exempted from this Act under section 7(2)(b)  
or 7(2)(ba)".

**32. Substitution of Division heading**

For the heading to Division 5 of Part 3 of the  
Principal Act **substitute**—

**"Division 5—Authorised Nominating  
Authorities, Adjudicators and Review  
Adjudicators"**.

**33. Insertion of sections 43A, 43B and 43C**

After section 43 of the Principal Act **insert**—

**'43A. Functions of an authorised nominating  
authority**

The functions of an authorised nominating  
authority are—

- (a) to nominate adjudicators for the  
purposes of this Act; and
- (b) to receive and refer adjudication  
applications to adjudicators; and
- (c) to receive adjudication review  
applications and submissions in  
response to those applications and to  
appoint review adjudicators; and



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- (d) to serve copies of adjudication determinations, adjudication review applications and review determinations on certain persons; and
  - (e) to provide information to review adjudicators; and
  - (f) to provide adjudication certificates; and
  - (g) to provide information to the Building Commission in accordance with this Division; and
  - (h) to generally carry out any other function or duty given to an authority, or imposed on an authority, by this Act.

15

**43B. Authorised nominating authority to provide information**

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- 30
- (1) An authorised nominating authority must provide the Building Commission with such non-identifying information as may be reasonably requested by the Commission in relation to the activities of the authority under this Act.
  - (2) Information requested under sub-section (1) may include information regarding—
    - (a) the nomination of adjudicators and appointment of review adjudicators; and
    - (b) the assessment of the eligibility of persons to be adjudicators; and
    - (c) the fees charged by the authorised nominating authority; and
    - (d) the fees charged by adjudicators.

(3) In this section "**non-identifying information**" means information—

- 5
- (a) that does not identify any person or disclose their address or location; or
  - (b) from which any person's identity, address or location cannot reasonably be determined.

#### **43C. Authorised nominating authority fees**

10 (1) An authorised nominating authority may charge a fee for any service provided by the authority in connection with an adjudication application or an adjudication review application made to the authority.

15 (2) In deciding on a fee under sub-section (1), an authorised nominating authority must have regard to the guidelines regarding such fees issued by the Minister under section 44.1.

#### **34. Ministerial guidelines**

20 For section 44(1) of the Principal Act  
**substitute—**

"(1) The Minister may from time to time issue guidelines relating to—

- 25
- (a) the giving, variation or withdrawal of authorities under this Division; and
  - (b) appropriate fees that may be charged by an authorised nominating authority, an adjudicator or a review adjudicator."

**35. Substitution of section 45**

For section 45 of the Principal Act **substitute—**

**'45. Adjudicator's and review adjudicator's fees**

(1) In this section—

**"adjudicator"** includes a review adjudicator;

**"adjudication application"** includes an adjudication review application.

(2) An adjudicator is entitled to be paid for determining an adjudication application—

(a) the amount, by way of fees and expenses, that is agreed between the adjudicator and the parties to the adjudication; or

(b) if no amount is agreed, the amount, by way of fees and expenses, that is reasonable having regard to the work done and expenses incurred by the adjudicator.

(3) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.

(4) As between themselves, the claimant and respondent are each liable to contribute to the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.

(5) An adjudicator is not entitled to be paid any fees or expenses in connection with the determination of an 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

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claimant and respondent is resolved) within the time allowed by section 22(4) or 28I(10) (as the case requires).

(6) Sub-section (5) does not apply—

5 (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

10 (b) in such other circumstances as may be prescribed for the purposes of this section.

15 (7) If a party refuses to pay his or her required contribution to the amount of the fees and expenses that are payable to the adjudicator, the other party may elect to pay both parties' contribution to the adjudicator.

20 (8) If a party elects under sub-section (7) to pay the other party's contribution to the adjudicator, the adjudicator, as the case requires—

25 (a) must determine that that amount is to be added to the adjudicated amount determined under section 23 and the total of those amounts is then to be taken to be the adjudicated amount for the purposes of this Act; or

30 (b) must determine that that amount is to be added to the amount payable (if any) by the other party under the review determination and the total of those amounts is then to be taken to be the amount payable by the other party under the review determination for the purposes of this Act.'.

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**36. Liability of adjudicator**

In section 46 of the Principal Act, after  
"adjudicator" **insert** "(including a review  
adjudicator)".

**37. Insertion of new Part 3A**

After Part 3 of the Principal Act **insert**—

**"PART 3A—ADMINISTRATION**

**47A. Functions of the Building Commission**

The functions of the Building Commission  
under this Act are—

- (a) to keep under regular review the  
administration and effectiveness of this  
Act and the regulations; and
- (b) to keep a register of authorised  
nominating authorities in accordance  
with section 47B; and
- (c) to keep records of adjudication  
determinations and review  
determinations in accordance with  
section 47C; and
- (d) to publish adjudication determinations  
and review determinations in  
accordance with section 47C; and
- (e) generally to carry out any other  
function or duty given to it, or imposed  
on it, by this Act.

**47B. Register of authorised nominating  
authorities**

- (1) The Building Commission must keep a  
register containing details of authorised  
nominating authorities including the names  
of the principals and the contact details of  
those authorities.

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- 5 (2) The Building Commission must make the register available for inspection without charge to any person at the business address of the Building Commission during normal business hours.

**47C. Recording and publishing of determinations**

- 10 (1) The Building Commission must keep a record of any adjudication determinations or review determinations that it receives.
- (2) The Building Commission may publish information in a determination received under section 23A or 28J if—

- 15 (a) the information does not identify any person or body referred to in the determination or disclose the address or location of that person or body; and
- 20 (b) the identity, address or location of any person or body referred to in the determination cannot reasonably be determined from the information."

**38. Substitution of sections 48 and 49**

For sections 48 and 49 of the Principal Act  
**substitute—**

25 **"48. 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—
- 30 (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

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- (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act—

is void.

**49. Confidentiality**

The Building Commission, the Commissioner (within the meaning of the **Building Act 1993**) and any member of staff of the Building Commission must not use or disclose any information received by the Building Commission under this Act except to the extent necessary for the performance of any functions or duties or the exercise of any powers of the Building Commission under this Act."

**39. Service of notices**

In section 50(1) of the Principal Act—

- (a) in paragraph (d), for "section." **substitute** "section; or";

- (b) after paragraph (d) **insert**—

"(e) in any other manner specified in the relevant construction contract."

**40. Supreme Court—limitation of jurisdiction**

At the end of section 51 of the Principal Act **insert**—

- "(2) It is the intention of section 28R to alter or vary section 85 of the **Constitution Act 1975**."

**41. Insertion of additional regulation-making powers**

For sections 52(1) and 52(2) of the Principal Act **substitute—**

"(1) The Governor in Council may make regulations for or with respect to—

- (a) prescribing forms for any purpose of this Act;
- (b) prescribing information to be provided under this Act;
- (c) any other matter or thing required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.

(2) Regulations made under this Act—

- (a) may provide in a specified case or class of cases for the exemption of persons or things or a class of persons or things from any of the provisions of this Act whether unconditionally or on specified conditions and either wholly or to such an extent as is specified; and
- (b) may differ according to differences in time, place and circumstance."

**42. Substitution of section 53**

For section 53 of the Principal Act **substitute—**

**'53. Transitional provision—Building and Construction Industry Security of Payment (Amendment) Act 2006**

This Act as amended by the **Building and Construction Industry Security of Payment (Amendment) Act 2006** ("the **2006 Act**") does not apply to or in respect of a payment claim for a progress payment to which a person is entitled under a



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construction contract entered into before the commencement of section 42 of the 2006 Act and any such payment claim is to be dealt with in accordance with this Act as if the 2006 Act had not been enacted.'

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**43. Repeal of section 54**

Section 54 of the Principal Act is **repealed**.

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**Endnotes**

**ENDNOTES**

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