

South Australia

Building and Construction Industry Security of Payment Bill 2007

A BILL FOR

An Act to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts; and to make a related amendment to the *Commercial Arbitration and Industrial Referral Agreements Act 1986*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Object of Act
- 4 Interpretation
- 5 Definition of construction work
- 6 Definition of related goods and services
- 7 Application of Act
- 8 Act binds Crown

Part 2—Rights to progress payments

- 9 Rights to progress payments
- 10 Amount of progress payment
- 11 Valuation of construction work and related goods and services
- 12 Due date for payment
- 13 Effect of "pay when paid" provisions

Part 3—Procedure for recovering progress payments

Division 1—Payment claims and payment schedules

- 14 Payment claims
- 15 Payment schedules
- 16 Consequences of not paying claimant where no payment schedule
- 17 Consequences of not paying claimant in accordance with payment schedule

Division 2—Adjudication of disputes

- 18 Adjudication applications
- 19 Eligibility criteria for adjudicators
- 20 Appointment of adjudicator
- 21 Adjudication responses
- 22 Adjudication procedures
- 23 Adjudicator's determination
- 24 Review of adjudicator's determination
- 25 Respondent's obligations following adjudicator's determination
- 26 Consequences of not paying claimant adjudicated amount
- 27 Filing of adjudication certificate or costs certificate as judgment debt
- 28 Costs of parties to adjudication
- 29 Claimant may make new application in certain circumstances

Division 3—Claimant's right to suspend construction work

- 30 Claimant may suspend work

Division 4—General provisions relating to adjudicators

- 31 Nominating authorities
- 32 Adjudicator's fees
- 33 Protection from liability for adjudicators and authorised nominating authorities
- 34 Service of notices
- 35 Effect of Part on civil proceedings

Part 4—Miscellaneous

- 36 Register of adjudicators and authorised nominating authorities
- 37 No contracting out
- 38 Regulations
- 39 Review of Act

Schedule 1—Related amendment and transitional provision

Part 1—Preliminary

- 1 Amendment provisions

Part 2—Amendment of *Commercial Arbitration and Industrial Referral Agreements Act 1986*

- 2 Amendment of section 3—Application provisions

Part 3—Transitional provision

- 3 Transitional provision
-

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Building and Construction Industry Security of Payment Act 2007*.

5 **2—Commencement**

This Act will come into operation on a day to be fixed by proclamation.

3—Object of Act

- 10 (1) The object of this Act is to ensure that a 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 that work and the supplying of those 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 that payment in circumstances where the relevant construction contract fails to do so.
- 15 (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
 - 20 (c) the referral of any disputed claim to an adjudicator for determination; and

- (d) the payment of the amount of the progress payment determined by the adjudicator; and
- (e) the recovery of the progress payment in the event of a failure to pay.
- (4) It is intended 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 that other entitlement.

4—Interpretation

In this Act, unless the contrary intention appears—

adjudicated amount means the amount of a progress payment that an adjudicator determines to be payable as referred to in section 23;

adjudication application means an application referred to in section 18;

adjudication certificate means a certificate provided by an authorised nominating authority under section 26;

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

adjudication response means a response referred to in section 21;

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 31 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 14;

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 14;

construction contract means a contract or other arrangement under which 1 party undertakes to carry out construction work, or to supply related goods and services, for another party;

construction work—see section 5;

costs certificate means a certificate provided by an adjudicator under section 28;

due date, in relation to a progress payment, means the due date for the progress payment, as referred to in section 12;

exercise a function includes perform a duty;

function includes power, authority or duty;

payment claim means a claim referred to in section 14;

payment schedule means a schedule referred to in section 15;

progress payment means a payment to which a person is entitled under section 9 and includes (without affecting any such entitlement)—

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

recognised financial institution means a bank or any other person or body prescribed by the regulations for the purposes of this definition;

reference date, in relation to a construction contract, means—

- (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract; or
- (b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month;

related goods and services—see section 6;

respondent means a person on whom a payment claim is served under section 14;

scheduled amount means the amount of a progress payment that is proposed to be made under a payment schedule, as referred to in section 15.

5— Definition of construction work

- (1) In this Act—

construction work means any of the following work:

- (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);
- (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, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purposes of land drainage or coast protection;
- (c) the installation in any building or structure of fittings forming, or to form, part of land, including heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
- (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;

- (e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including—
- (i) site clearance, earth moving, excavation, tunnelling and boring; and
 - (ii) the laying of foundations; and
 - (iii) the erection, maintenance or dismantling of fences or scaffolding; and
 - (iv) the prefabrication of components to form part of any building or structure, whether carried out on site or off site; and
 - (v) site restoration, landscaping and the provision of roadways and other access works;
- (f) the painting or decorating of the internal or external surfaces of any building, structure or works;
- (g) any other work of a kind prescribed by the regulations for the purposes of this subsection.
- (2) Despite subsection (1), **construction work** does not include any of the following work:
- (a) the drilling for, or extraction of, oil or natural gas;
 - (b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;
 - (c) any other work of a kind prescribed by the regulations for the purposes of this subsection.

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 or technical 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 for the purposes of this subsection.
- (3) In this Act, a reference to related goods and services includes a reference to related goods or services.

5 **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 South Australia.

(2) This Act does not apply to—

- 10 (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;
- 15 or
- (iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract; or
- (b) a construction contract for the carrying out of domestic building work (within the meaning of the *Building Work Contractors Act 1995*) on such part of any premises that the party for whom the work is carried out resides in or proposes to reside in; or
- 20 (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.
- 25

(3) This Act does not apply to a construction contract to the extent to which it contains—

- 30 (a) provisions under which a party undertakes to carry out construction work, or supply related goods and services, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or
- (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
- 35 (c) provisions under which a party undertakes—
- (i) to lend money or to repay money lent; or
- (ii) to guarantee payment of money owing or repayment of money lent; or
- 40 (iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

- (4) This Act does not apply to a construction contract to the extent to which it deals with—
- (a) construction work carried out outside this State; and
 - (b) related goods and services supplied in respect of construction work carried out outside this State.
- (5) This Act does not apply to any construction contract, or class of construction contracts, prescribed for the purposes of this section.

8—Act binds Crown

This Act binds the Crown in right of this State and also, so far as the legislative power of the State extends, the Crown in all its other capacities, but not so as to impose any criminal liability on the Crown.

Part 2—Rights to progress payments

9—Rights to progress payments

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.

10—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 or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

11—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—

5 (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

10 (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.

12—Due date for payment

(1) A progress payment under a construction contract becomes due and payable—

20 (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 10 business days after a payment claim is made under Part 3 in relation to the payment.

25 (2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate—

(a) prescribed under the *Supreme Court Act 1935* in respect of judgment debts of the Supreme Court; or

(b) specified under the construction contract,

whichever is the greater.

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

35 (4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (3).

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

13—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 undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract.

5 (2) In this section—

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

10 *pay when paid provision* of a construction contract means a provision of the contract—

- (a) that makes the liability of 1 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
- 15 (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; or
- (c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

20 Part 3—Procedure for recovering progress payments

Division 1—Payment claims and payment schedules

14—Payment claims

25 (1) A person referred to in section 9 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 contract concerned, is or may be liable to make the payment.

(2) A payment claim—

- (a) must identify the construction work (or related goods and services) to which the progress payment relates; and
- 30 (b) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*); and
- (c) must state that it is made under this Act.

(3) The claimed amount may include any amount—

- (a) that the respondent is liable to pay the claimant under section 30(3); or
- 35 (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within—

- (a) the period determined by or in accordance with the terms of the construction contract; or

- (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

- 5 (5) A claimant cannot serve more than 1 payment claim in respect of each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

15—Payment schedules

- 10 (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.

- (2) A payment schedule—

- (a) must identify the payment claim to which it relates; and

- (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the *scheduled amount*).

- (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.

- 20 (4) If—

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

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

- (i) within the time required by the relevant construction contract; or

- (ii) within 10 business days after the payment claim is served,

25 whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

16—Consequences of not paying claimant where no payment schedule

- (1) This section applies if the respondent—

- 30 (a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and

- (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

- 35 (2) In those circumstances, the claimant—

- (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

(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.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

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

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and

(b) the respondent is not, in those proceedings, entitled—

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

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

17—Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if—

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

(b) the respondent provides a payment schedule to the claimant—

(i) within the time required by the relevant construction contract; or

(ii) within 10 business days after the payment claim is served, whichever time expires earlier; and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant; and

(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.

(2) In those circumstances, the claimant—

(a) may—

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or

(ii) make an adjudication application under section 18(1)(a)(ii) in relation to the payment claim; and

(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.

(3) A notice referred to in subsection (2)(b) must state that it is made under this Act.

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

Division 2—Adjudication of disputes

18—Adjudication applications

- (1) A claimant may apply for adjudication of a payment claim (an *adjudication application*) if—
- (a) the respondent provides a payment schedule under Division 1 but—
- (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or
- (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or
- (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1) applies cannot be made unless—
- (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
- (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.
- (3) An adjudication application—
- (a) must be in writing; and
- (b) must be made to an authorised nominating authority chosen by the claimant; and
- (c) in the case of an application under subsection (1)(a)(i)—must be made within 10 business days after the claimant receives the payment schedule; and
- (d) in the case of an application under subsection (1)(a)(ii)—must be made within 20 business days after the due date for payment; and
- (e) in the case of an application under subsection (1)(b)—must be made within 10 business days after the end of the 5 day period referred to in subsection (2)(b); and
- (f) must identify the payment claim and the payment schedule (if any) to which it relates; and

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

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

- 5 (4) The amount of any such application fee must not exceed the amount prescribed, or determined according to the method prescribed, by regulation.
- (5) Before a regulation is made under subsection (4), the Minister must engage in consultation with relevant industry bodies, as the Minister thinks fit.
- (6) A copy of the adjudication application must be served on the respondent concerned.
- 10 (7) It is the duty of an authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 19) as soon as practicable.
- (8) If, before referring an adjudication application to an adjudicator, an authorised nominating authority is advised by both the claimant and the respondent that they have
15 agreed to the nomination of a particular adjudicator, the authorised nominating authority must refer the adjudication application to that adjudicator.

19—Eligibility criteria for adjudicators

- (1) A person is eligible to be an adjudicator in relation to a construction contract—
- 20 (a) if the person is a natural person; and
- (b) if the person has undertaken the training, and has the qualifications, expertise or experience, prescribed by the regulations for the purposes of this section; and
- 25 (c) if the person has been nominated as being suitable for appointment as an adjudicator by a building and construction industry body prescribed by regulation for the purposes of this section.
- (2) A person is not eligible to be an adjudicator in relation to a particular construction contract—
- (a) if the person is a party to the contract; or
- 30 (b) in such circumstances as may be prescribed by regulation for the purposes of this section.

20—Appointment of adjudicator

- (1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of acceptance to be served on the claimant and the respondent.
- 35 (2) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

21—Adjudication responses

- (1) Subject to subsection (3), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the *adjudication response*) at any time within—
- 5 (a) 5 business days after receiving a copy of the application; or
- (b) 2 business days after receiving notice of an adjudicator's acceptance of the application,
- whichever time expires later.
- (2) The adjudication response—
- 10 (a) must be in writing; and
- (b) must identify the adjudication application to which it relates; and
- (c) may contain any submissions relevant to the response that the respondent chooses to include.
- (3) The respondent may lodge an adjudication response only if the respondent has
- 15 provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).
- (4) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.
- 20 (5) A copy of the adjudication response must be served on the claimant.

22—Adjudication procedures

- (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.
- 25 (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 the response.
- (3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—
- 30 (a) within 15 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 any further time that the claimant and the respondent may agree.
- (4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator—
- 35 (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) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.

- (6) The adjudicator's power to determine an 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.

23—Adjudicator's determination

- 5 (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; and
 - (c) the rate of interest payable on any such amount.
- 10 (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;
 - 15 (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 (if any) 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;
 - 20 (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) The adjudicator's determination must—
- (a) be in writing; and
 - 25 (b) include the reasons for the determination (unless the claimant and respondent have both requested the adjudicator not to include those reasons in the determination).
- (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined—
- 30 (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 those goods and services, to give the work (or the goods and services) the same value as that
- 35 previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.
- (5) If the adjudicator's determination contains—
- 40 (a) a clerical mistake; or

- (b) an error arising from an accidental slip or omission; or
- (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination; or
- (d) a defect of form,

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

24—Review of adjudicator's determination

- (1) The claimant or respondent in relation to an adjudication application may apply to the District Court for a declaration that the adjudicator's determination, or purported determination, is beyond the power conferred on the adjudicator by or under this Act.
- (2) Except as provided in subsection (1), an adjudicator's determination is not subject to appeal or review under this Act or any other law.

25—Respondent's obligations following adjudicator's determination

- (1) In this section—
15 *relevant date* means—
 - (a) the date occurring 5 business days after the date on which the adjudicator's determination is served on the respondent concerned; or
 - (b) if the adjudicator determines a later date under section 23(1)(b)—that later date.
- (2) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

26—Consequences of not paying claimant adjudicated amount

- (1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 25, the claimant may—
25
 - (a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section; and
 - (b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (2) A notice under subsection (1)(b) must state that it is made under this Act.
- (3) An adjudication certificate must—
30
 - (a) state that it is made under this Act; and
 - (b) specify the adjudicated amount; and
 - (c) include any other details required by the regulations.

- (4) If an amount of interest that is due and payable on the adjudicated amount is not paid by the respondent—
- (a) the claimant may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate; and
 - (b) the amount so specified is to be added to (and becomes part of) the adjudicated amount.

27—Filing of adjudication certificate or costs certificate as judgment debt

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

28—Costs of parties to adjudication

- (1) Subject to subsection (2), parties to an adjudication bear their own costs in relation to the adjudication.
- (2) If an adjudicator is satisfied that a party to an adjudication (the *first party*) incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party (the *second party*), the adjudicator may decide that the second party must pay some or all of those costs.
- (3) If an adjudicator makes a decision under subsection (2), the adjudicator must—
- (a) decide the amount of the costs and the date on which the amount is payable; and
 - (b) give reasons for the decision; and
 - (c) communicate the decision and reasons in writing to the parties; and
 - (d) provide a costs certificate to the first party.
- (4) A costs certificate must—
- (a) state that it is made under this Act; and
 - (b) specify the adjudicated amount; and

(c) include any other details required by the regulations.

5 (5) If the second party fails to pay the amount by the date specified by the adjudicator under subsection (3)(a), the costs certificate may be filed by the first party as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(6) A costs certificate cannot be filed under this section unless it is accompanied by an affidavit by the first party stating that the whole or any part of the costs has not been paid at the time the certificate is filed.

10 (7) If the affidavit indicates that part of the costs has been paid, the judgment is for the unpaid part of that amount only.

(8) If the second party commences proceedings to have the judgment set aside, the second party—

(a) is not, in those proceedings, entitled—

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

15 (ii) to challenge the adjudicator's determination; and

(b) is required to pay into the court as security the unpaid portion of the costs pending the final determination of those proceedings.

29—Claimant may make new application in certain circumstances

(1) This section applies if—

20 (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 22(3).

25 (2) In either of those circumstances, the claimant—

(a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 18.

30 (3) Despite section 18(3)(c), (d) and (e), 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 18.

35 Division 3—Claimant's right to suspend construction work

30—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 a notice of intention to do so to be given to the respondent under section 16, 17 or 26.

40

- (2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 16, 17 or 25(2).
- 5 (3) 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.
- 10 (4) 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.

Division 4—General provisions relating to adjudicators

31—Nominating authorities

- 15 (1) Subject to the regulations, the Minister—
- (a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act; and
 - (b) may withdraw any authority so given.
- (2) The Minister may—
- 20 (a) limit the number of persons who may, for the time being, be authorised under this section; and
- (b) refuse an application under subsection (1) if authorising the applicant would result in any such number being exceeded.
- (3) A person—
- 25 (a) whose application for authority to nominate adjudicators for the purposes of this Act is refused (otherwise than on the ground referred to in subsection (2)(b)); or
- (b) whose authority to nominate adjudicators is withdrawn,
- 30 may apply to the Administrative and Disciplinary Division of the District Court for a review of the Minister's decision to take that action.
- (4) An authorised nominating authority may charge a fee for any service provided by the authority in connection with an adjudication application made to the authority.
- (5) The amount that may be charged for any such service must not exceed the amount (if any) determined by the Minister.
- 35 (6) The claimant and respondent are—
- (a) jointly and severally liable to pay any such fee; and
 - (b) each liable to contribute to the payment of any such fee in equal proportions or in such proportions as the adjudicator to whom the adjudication application is referred may determine.

- (7) An authorised nominating authority must provide the Minister with such information as may be requested by the Minister in relation to the activities of the authority under this Act (including information as to the fees charged by the authority under this Act).

32—Adjudicator's fees

- 5 (1) An adjudicator is entitled to be paid for adjudicating an adjudication application—
- (a) the amount that is agreed between the adjudicator and the parties to the adjudication; or
 - (b) if no such amount is agreed—the hourly rate prescribed by regulation.
- 10 (2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.
- (3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses—
- (a) in such proportions as the adjudicator may determine; or
 - (b) if no such determination is made—in equal proportions.
- 15 (4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication 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 claimant and respondent is resolved) within the time allowed by section 22(3).
- (5) Subsection (4) does not apply—
- 20 (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
 - (b) in such other circumstances as may be prescribed for the purposes of this section.
- 25 (6) If the respondent refuses to pay his or her required contribution to the amount of the fees and expenses that are payable to the adjudicator, the claimant may elect to pay both the respondent's contribution and the claimant's contribution to the adjudicator.
- (7) If a claimant elects under subsection (6) to pay the respondent's contribution to the adjudicator, the adjudicator 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
- 30 to be taken to be the adjudicated amount for the purposes of this Act.

33—Protection from liability for adjudicators and authorised nominating authorities

- 35 (1) An adjudicator is not personally liable for anything done or omitted to be done in good faith—
- (a) in exercising the adjudicator's functions under this Act; or
 - (b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.

(2) No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith—

(a) in exercising the nominating authority’s functions under this Act; or

(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority’s functions under this Act.

34—Service of notices

(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—

(a) by delivering it to the person personally; or

(b) by lodging it during normal office hours at the person’s ordinary place of business; or

(c) by sending it by post or facsimile addressed to the person’s ordinary place of business; or

(d) in such other manner as may be prescribed by the regulations for the purposes of this section; or

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

(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.

(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.

35—Effect of Part on civil proceedings

(1) Subject to section 37, nothing in this Part affects any right that a party to a construction contract—

(a) may have under the contract; or

(b) may have under Part 2 in respect of the contract; or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any proceedings arising under a construction contract (including any arbitration proceedings or other dispute resolution proceedings), whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—

(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

(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.

Part 4—Miscellaneous

36—Register of adjudicators and authorised nominating authorities

- (1) The Minister must maintain a public register of adjudicators and authorised nominating authorities.
- 5 (2) The Minister must assign a suitable person to administer the register.
- (3) The register must include information that is prescribed by regulation.

37—No contracting out

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

38—Regulations

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- 20 (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) Regulations under this Act may—
 - 25 (a) be of general application or limited application; or
 - (b) make different provision according to the matters or circumstances to which they are expressed to apply.
- (4) 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
30 and services supplied, under a construction contract entered into before that commencement.

39—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
35 those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the date on which this Act comes into operation.

- (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.

Schedule 1—Related amendment and transitional provision

Part 1—Preliminary

5 **1—Amendment provisions**

In this Schedule, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Commercial Arbitration and Industrial Referral Agreements Act 1986*

10 **2—Amendment of section 3—Application provisions**

Section 3—after subsection (9) insert:

- (9a) Nothing in this Act affects the operation of Part 3 of the *Building and Construction Industry Security of Payment Act 2007*.

Part 3—Transitional provision

15 **3—Transitional provision**

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