

Building and Construction Industry Security of Payment Act 2009 and Regulations 2011

Background

The objective of the *Building and Construction Industry Security of Payment Act 2009* (the *Act*) is to ensure that any party that contracts to carry out construction work, or supply related goods or services, is entitled to promptly recover progress payments for work done and goods or services supplied.

The *Act* does not apply to domestic building work to residential premises occupied by the party that is contracting the work, nor does it apply to construction contracts forming part of a loan agreement, a contract of guarantee or a contract of insurance.

The *Act* applies to all contracts entered into after 10 December 2011. It does not apply to any construction contract entered into before this date.

The *Act* is based on security of payment legislation that has been in operation in other States for several years (predominantly NSW).

This guide note summarises the *Act* into the following sections.

- Entitlement to Progress Payments
- Procedure for Recovering Progress Payments
- Adjudication of Disputes
- General Information
- Definitions from the *Act*.

Entitlement to Progress Payments

The *Act* entitles a person who does construction work, or supplies related goods or services to construction work, to recover progress payments for work done and goods and services supplied. For explanation of the terms 'construction work' and 'related goods and services' refer heading 'Definitions from the *Act*'.

The amount of the progress payment is to be calculated in accordance with the terms of the contract or based on the value of construction work carried out.

A progress payment becomes due and payable on the date nominated in the construction contract or if the contract is silent on this, 15 business days after a payment claim is made under the *Act*.

Interest is payable on the unpaid amount of a payment at the rate prescribed under the *Supreme Court Act 1935* in respect of judgement debts of the Supreme Court or as specified under the construction contract, whichever is the greater.

Procedure for Recovering Progress Payments

Payment Claims

A person who does construction work, or supplies goods or services for construction work under a construction contract can ask for a progress payment by making a payment claim. The payment claim must:

- identify the construction work (or related goods and services) to which the progress payment relates
- indicate the claimed amount
- state that the claim is made under the *Act*
- be served on the Principal.

The claimed amount may include an amount:

- for loss or expenses associated with work being suspended, or
- held under the construction contract by the respondent and that the claimant claims is due for release.

A payment claim may be served only within:

- the period determined by or in accordance with the terms of the construction contract, or
- the period of six (6) 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.

A claimant **cannot serve more than one (1) payment claim** in respect of each reference date under the construction contract. However, the claimant can include a payment claim that has been the subject of a previous payment claim.

Payment Schedule (RCTI and Payment Certificate)

The Minister for Transport and Infrastructure, as Principal, represented by the Department of Planning, Transport and Infrastructure (DPTI), as respondent, may reply to a payment claim by providing a payment schedule to the claimant. The payment schedule must identify the payment claim to which it relates and must include the amount of the payment, if any, which DPTI proposes to make (the scheduled amount). If the scheduled amount is less than the claimed amount, the schedule must indicate the reasons for withholding part payment.

If DPTI does not provide a payment schedule to the claimant:

- within the time required by the relevant construction contract, or
- within 15 business days after the payment claim is served

(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.

If DPTI does not respond with a payment schedule within the required time the whole amount becomes payable and an application can be made to have the claimed amount become a judgement debt.

Payment Schedule Proforma's are available for download from the Building Project Information Management System ([BPIMS](#)) Project Library:

- AS 2124 RCTI Payment Certificate including SoP Schedule (340)
- AS 4300 RCTI Payment Certificate including SoP Schedule (341)
- GC21 RCTI Payment Certificate including SoP Schedule (342)
- WDM-12 RCTI Payment Certificate including SoP Schedule (167)
- MW396 RCTI Progress Certificate including SoP Schedule (239)

Adjudication of Disputes

A claimant may make an adjudication application if DPTI:

- provides a payment schedule but the scheduled amount is less than the claimed amount
- fails to pay the whole of the scheduled amount by the due date for payment
- fails to provide a payment schedule to the claimant and fails to pay the claimed amount by the due date.

The claimant must notify DPTI within 20 days immediately following the due date for payment of its intention to apply for adjudication. DPTI will then have five (5) business days to provide a payment schedule. The claimant can choose whether to accept the amount DPTI proposes to pay and DPTI's reasons or choose to have the matter adjudicated.

An adjudication application must:

- be in writing
- be made by to an authorised nominating authority chosen by the claimant
- be made within regulated time limits
- identify the payment claim and payment schedule (if any) to which it relates
- include the relevant application fee
- contain such submissions as the claimant chooses to include.

Adjudication Responses

DPTI may lodge an adjudication response with the adjudicator within:

- five (5) business days after receiving a copy of the application, or
- two (2) business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later.

The adjudication response:

- must be in writing and identify the adjudication application to which it relates
- may contain any submissions relevant to the response that DPTI chooses to include
- cannot include reasons for withholding payment **unless those reasons have already been included in the payment schedule** provided by the claimant.

A copy of the adjudication response must be served on the claimant.

Adjudication Procedures

An adjudicator is to determine an adjudication application within **10 business days** after an adjudication response is lodged with the adjudicator or within any further time that the claimant and DPTI may agree.

After the Authorised Nominating Authority (ANA) has appointed the adjudicator and all relevant documentation has been received, the adjudicator will assess the information. The adjudicator may choose to hold a conference between the parties, carry out an inspection or ask for further documentation.

To determine an adjudication application, an adjudicator:

- may request further written submissions from either party and must give the other party an opportunity to comment on those submissions

- may set deadlines for further submissions and comments by the parties
- may call a conference of the parties. The conference is to be conducted informally and the parties are not entitled to legal representation
- may carry out an inspection of any matter to which the claim relates.

Adjudicator's Determination

The adjudicator's determination must:

- be in writing
- include the reasons for the determination – unless the claimant and DPTI have both requested the reasons not be included.

Respondent required to pay Adjudicated Amount

An adjudication amount is due to be paid to the claimant within five (5) business days after the adjudicator's determination is served on DPTI or a later date that the adjudicator may determine.

Non-payment of Adjudicated Amount

Should the respondent fail to pay the whole or part of the adjudicated amount the claimant may:

- request the ANA to provide an adjudication certificate which may be filed as a judgement for a debt in a court of competent jurisdiction
- serve notice on DPTI of the claimant's intention to suspend carrying out construction work (or to suspend supplying goods and services) under the construction contract.

Claimant's Right to Suspend Construction Work

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 two (2) business days have passed since the claimant has caused a notice of intention to do so to be given to DPTI. The claimant is not liable for loss or damage suffered by DPTI as a consequence of the claimant not carrying out that work (or supplying those goods and services) during the period of suspension.

General Information

Authorised Nominating Authority (ANA)

The Minister for Business Services and Consumers is responsible for authorising nominating authorities.

The Minister may:

- on application, authorise the applicant to nominate adjudicators for the purposes of the *Act*
- withdraw an authorisation to nominate adjudicators
- limit the number of persons who may be authorised.

An ANA must provide the Minister with such information as may be requested by the Minister in relation to the activities of the ANA under the *Act* (including information as to the fees charged by the ANA under the *Act*).

The claimant and respondent are liable to pay the fee in equal proportions or in such proportions as the adjudicator may determine.

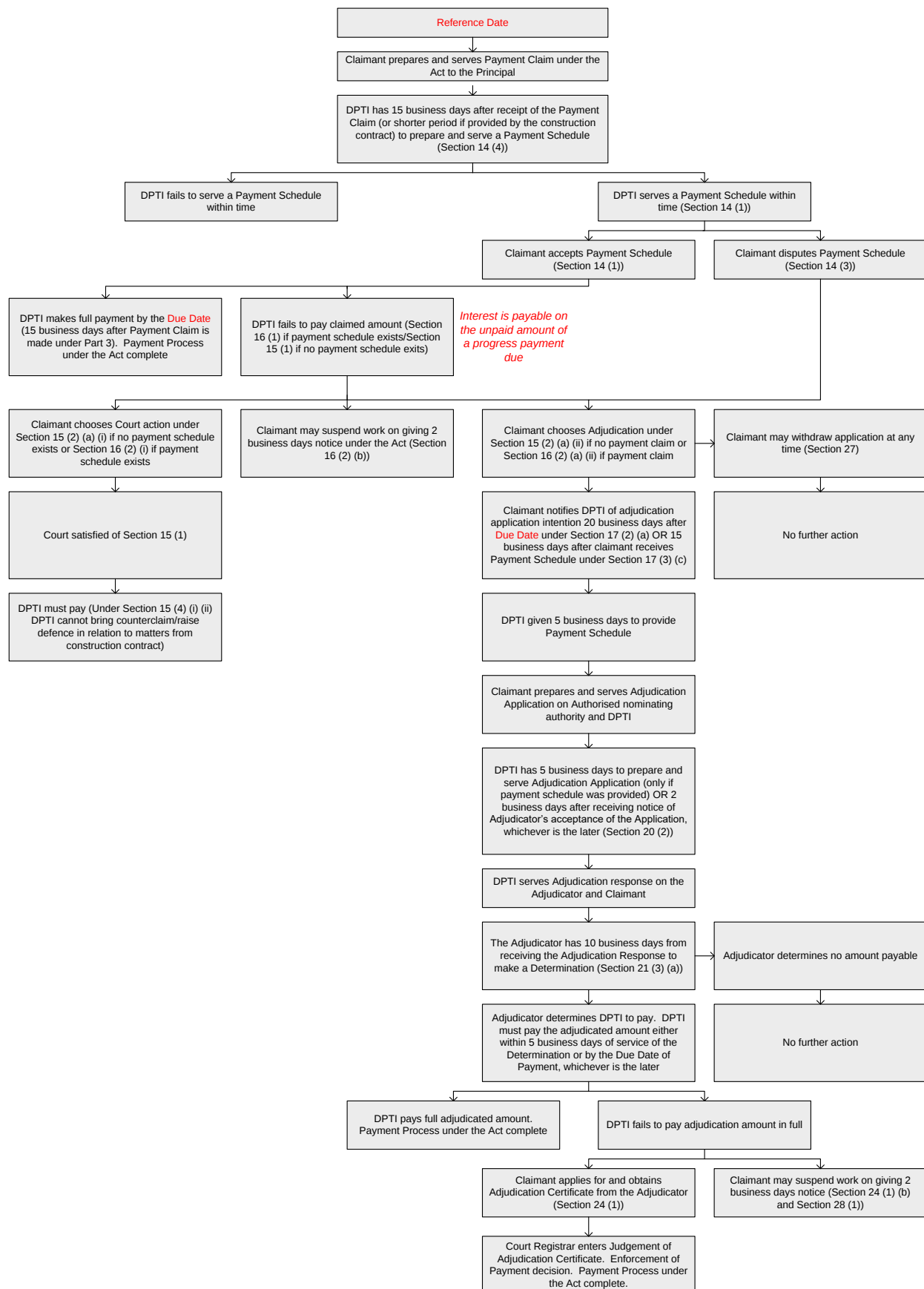
No Contracting Out

The provisions of the *Act* have effect despite any provision to the contrary in any contract.

Review of the *Act*

The *Act* will be reviewed three (3) years after it comes into operation.

DPTI Flowchart for the Building and Construction Industry Security of Payment Act 2009



Definitions from the *Act*

Adjudicated amount	The amount of a progress payment that an adjudicator determines to be payable.
Adjudication certificate	A certificate provided by an authorised nominating authority.
Adjudication fees	Fees or expenses charged by an authorised nominating authority, or by an adjudicator, under the <i>Act</i> .
Adjudicator	The person appointed in accordance with the <i>Act</i> to determine the application.
Authorised Nominating Authority	A person authorised by the Minister to nominate persons to determine adjudication applications.
Business day	Any day other than— • a Saturday, Sunday or public holiday; or • 27, 28, 29, 30 or 31 December; or • any other day on which there is a Statewide shut-down of the operations of the building and construction industry.
Claimant	Person by whom a payment claim is served.
Claimed amount	An amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied.
Construction contract	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	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 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 purposes of land drainage or coast protection; c) the installation in any building, structure or works 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 that 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, structure or works, 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) other work of a kind prescribed by the regulations. Construction work does not include 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) other work of a kind prescribed by the regulations.
Due date	In relation to progress payment, means the due date for the progress payment.
Progress payment	A payment to which a person is entitled and includes – a) the final payment for construction work carried out (or for related goods and services supplied) under the contract; and b) a single one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract; and c) a payment that is based on an event or date (known in the building and construction industry as a “milestone payment”).
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	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; Goods and services of a kind prescribed by the regulations for the purposes of this subsection.
Respondent	A person on whom a payment claim is served.
Scheduled amount	The amount of a progress payment that is proposed to be made under a payment schedule.

Further Information

Refer to www.legislation.sa.gov.au to obtain a copy of the *Building and Construction Industry Security of Payment Act 2009* and associated Regulations.

Contact

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