

# Resolving construction disputes in the Northern Territory

This guide sets out how the Department of the Attorney-General and Justice considers the *Construction Contracts (Security of Payments) Act* and the *Construction Contracts (Security of Payments) Regulations* operate. It has been developed in consultation with other Agencies and the members of the Construction Industry Reference Group. However, the contents should not be taken as being formal legal advice on any particular issue.

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## 1. INTRODUCTORY INFORMATION

### What is the general nature of the legislation?

The main provisions of the Act are:

- a series of provisions that make certain contractual clauses illegal – see question 11 and 12;
- if a contract does not have written provisions dealing with certain types of contractual matters it will be deemed to have the relevant provisions as set out in the Schedule to the Act – see question 13; and
- provisions dealing with adjudication of disputes – see questions 15 to 25.

### 2. What comprises the legislation?

The legislation is comprised of:

- the *Construction Contracts (Security of Payments) Act* (“the Act”);
- the *Construction Contracts (Security of Payments) Regulations* (“the Regulations”); and
- Part 4 of the *Community Justice Centre Act*.

### 3. When did the legislation commence operation?

All but one section of the Act commenced on 1 July 2005.

The provision in the Act that repealed the *Workmen’s Liens Act* did not commence until 1 August 2006.<sup>1</sup>

The date of commencement of the *Community Justice Centre Act 2005* was 22 February 2006.

### 4. Who administers the legislation?

Agency: The Department of the Attorney-General and Justice, Policy Division, Legal Services

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<sup>1</sup> See section 66

Registrar: Ms Erin McAuley

Ms McAuley can be contacted on:

Tel: 08 8935 7764

Email: [agdpolicyconstruction.contracts@nt.gov.au](mailto:agdpolicyconstruction.contracts@nt.gov.au)

## **5. Can the legislation be avoided?**

Section 10 of the Act prohibits any attempt to exclude, modify or restrict the operation of the provisions of the Act dealing with the adjudication of disputes.

It does not operate so as to prohibit the inclusion of contractual provisions which seek to displace the contract conditions contained in the Schedule which might be implied in a contract by sections 16 - 24 of the Act (see question 13).

If a claim is made under the Act, it cannot be avoided by the recipient of the claim. However, the claimant is not compelled to make their claim under the Act. They are free to bring their claim in a Court.<sup>2</sup> Similarly, any party dissatisfied with a determination made under the Act, can still reargue the claim in Court, but pending the outcome of any Court hearing, determinations made under the Act ordering that monies be paid, are not affected and can be enforced in the same way as a judgement of a Court.<sup>3</sup>

## **6. Does the Act bind the Crown?**

Yes, the Act binds the Northern Territory Crown and all Northern Territory agencies established by or under Northern Territory legislation.

The Act also attempts to apply to all other emanations of the Crown (e.g. State Government agencies and Commonwealth Government agencies). However, whether or not such other agencies of the Crown are in fact bound will depend, in many cases, on the nature of their activities and the legislation under which they operate.

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<sup>2</sup> See section 47

<sup>3</sup> See section 45(1)

## 2. QUESTIONS ABOUT CONTRACTUAL MATTERS

### 7. What kinds of contracts are subject to the legislation?

The legislation regulates “construction contracts”.

A construction contract is an agreement (whether or not in writing) relating to the carrying out of construction work.

The main construction work covered is that relating to building construction and civil works,<sup>4</sup> but it also includes other works such as reclaiming land, installing and removing equipment, various preparatory works and other works as may be set out in the Regulations.

In addition to agreements relating to “construction work”, a “construction contract” may also cover the supply of goods and services to a construction site including professional services such as those of architects, engineers, quantity surveyors, surveyors and project managers.<sup>5</sup>

### 8. Does the legislation apply to the provision of legal, accounting and or financial services?

No.<sup>6</sup>

### 9. Does the legislation apply to residential construction works?

Yes.

### 10. Does the legislation mean that construction contracts must be in writing?

No, but if there is no written agreement, or a written agreement is inadequate, the legislation will imply provisions as being applicable to the parties to the construction contract (see question 13). The main effect of this will be that parties will no longer be able to make oral contracts that do not comply with the matters prescribed in the Act.

### 11. What are the prohibited clauses?

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<sup>4</sup> Section 6(1)(c)

<sup>5</sup> For the full list see section 7

<sup>6</sup> Section 7(2)(a)

Two types of clauses are prohibited. They are clauses dealing with:

- “paid if pay and pay when paid” provisions; and
- payments after 50 days.

Regulations may be made providing for other illegal provisions, but currently, no such Regulations are proposed.

## **12. What is the effect of this ban on prohibited clauses?**

The main intended effect is that the prohibited clauses have no effect. That is, the parties cannot rely on them. Ideally, contracts should not contain such clauses.

## **13. What are the implied clauses?**

The legislation seeks to ensure that all new construction arrangements are subject to a comprehensive set of contractual provisions.

To achieve that objective, that the Act prescribes some implied contractual provisions. These will only apply if there is no written provision in a construction contract that covers the subject area.<sup>7</sup>

If there is written contractual coverage of one or more of the subject areas, the implied terms for that subject area do not apply.

The implied conditions deal with:

- contract variations;
- the contractor’s entitlement to be paid;
- claims for progress payments;
- claims for payment;
- responses to payment claims;
- interest on outstanding payments;

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<sup>7</sup> See sections 16-25 and the Schedule to the Act

- ownership of goods supplied by the contractor;
- what happens to 'unfixed goods' if the principal becomes insolvent; and
- retention money.

#### **14. How can an 'implied term' be displaced?**

By including a written term covering the same subject matter as the implied term.

### **3. QUESTIONS DEALING WITH DISPUTES**

#### **15. What is the general nature of the dispute resolution provisions?**

The aim of the legislation is to provide speedy dispute resolution by competent adjudicators.

Tight deadlines for lodging applications and responses, and for decision making, ensure that applications will be quickly dealt with.

The function of an adjudicator is to make a decision based on the materials provided by the parties to the dispute. It is not their role to try and resolve disputes by engaging in other alternate dispute resolution mechanisms such as mediation or conciliation.

Adjudicators can call for reports from experts and conduct site inspections, but the time constraints and concerns about affording natural justice to all parties, means that this rarely happens. Most adjudicators make their determinations upon the application for adjudication, the response and supporting paperwork, without conducting site inspections, obtaining expert reports, or interviewing the parties and other witnesses.

The main elements of this process are:

- provide any party to a contract the right to apply to have a dispute adjudicated;
- provide that the right to apply must be exercised within a set time (90 days) of the dispute arising;
- provide for a third party to appoint the adjudicator if the parties do not agree;
- an adjudication;
- for parallel (or subsequent) legal proceedings;

- for the enforcement, through the Courts, of the outcomes of adjudications;
- for the role of the Courts to be limited to actions based on formal litigation. That is, a party not happy with an adjudicator's decision may commence litigation;
- however, this litigation is not part of the adjudication process under the Act, nor can it interfere with the adjudication process and the enforcement of outcomes from it; and
- what litigation may do, at the end of the day, is to provide for a different set of outcomes as between the parties. However, this may occur long after the construction works required under the contract are completed.

## 16. What are the critical timelines?

- Once a dispute arises, the claimant has 90 days from the date of the dispute to apply for adjudication.<sup>8</sup>
- The respondent then has 10 working days to serve a written response.<sup>9</sup>
- If the application is served upon a prescribed appointer, that appointer has 5 working days to appoint an adjudicator.<sup>10</sup>
- The adjudicator has 10 working days to make a decision. This period runs from the earlier of the day the adjudicator receives a response, or 10 working days from the final day upon which a response could have been received.<sup>11</sup>
- Once the adjudication process is finalised and if a party refuses to pay the determined amount, the other party may serve notice three days in advance that the serving party's obligations under the contract are suspended.<sup>12</sup> This provision only applies where the contractor is the party in whose favour a determination has been made.

## 17. Can the parties to a dispute agree to the dispute being resolved in a longer time than that which is set out in the legislation?

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<sup>8</sup> See section 28(1)

<sup>9</sup> See section 29(1)

<sup>10</sup> See section 30(1)

<sup>11</sup> See section 33(1) and the definition of *prescribed time* in section 33(3)

<sup>12</sup> See section 44



The legislation imposes a series of time obligations. Except for the time within which a determination just be made, there is no formal power for the parties to agree to waive time lines, or for any adjudicator to agree to any waiver. Accordingly, it is critical that there be compliance with the time limits.

If there is a failure to comply with a time limit, parties will need to carefully consider the implications. In this general **Question & Answer guide** it is not possible to explore all of the possible factual situations and provide general information or advice.

However, one common practical situation will be that where the best qualified adjudicator is simply unavailable at a particular point in time. In that case, and similar kinds of matters, the adjudicator may, with the consent of the Registrar, extend the time by which a determination can be made by the adjudicator.<sup>13</sup>

## 18. Who can be a party to a dispute?

Any party to construction contract can apply to have a “payment dispute” adjudicated under the legislation.<sup>14</sup>

## 19. What kinds of disputes are covered by the Act – i.e. what is a “payment dispute”?

A dispute can only be adjudicated under the Act if it is a “payment dispute”.<sup>15</sup>

The following are the payment disputes covered by the Act:

- first, disputes over amounts claimed in a “payment claim”;<sup>16</sup>
- A payment claim may be made by a contractor to a principal in relation to the performance by the contractor of the contractor’s obligations under the contract;<sup>17</sup> and
- A “payment claim” may be made by a principal concerning the performance or non-performance by the contractor of the contractor’s obligations under the Act;<sup>18</sup>

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<sup>13</sup> See sections 33(1) and 34(3)(a)

<sup>14</sup> Section 28(1)

<sup>15</sup> See section 8 which contains the definition of *payment dispute*.

<sup>16</sup> See section 8(a)

<sup>17</sup> Section 4, definition of *payment claim*, paragraph (a)

<sup>18</sup> Section 4, definition of *payment claim*, paragraph (b)

- second, disputes over amounts retained under the contract by one or other of the parties;<sup>19</sup> and
- third, disputes over the return or non-return of a security.<sup>20</sup>

## 20. Can claims be made for damages?

Adjudication proceedings are not limited to claims by contractors or subcontractors for outstanding amounts due for construction work. A principal can also seek payment for non-performance by a contractor.<sup>21</sup>

The Act is worded so that it could cover a claim for damages in circumstances where the contract contemplates such a claim.

## 21. How does the adjudicator make decisions on the facts?

The adjudicator will rely on evidence presented by the parties to the dispute.

The adjudicator can carry out personal inspections, arrange for expert advice or call on the parties to provide further evidence but time constraints usually mean that this does not happen.<sup>22</sup>

## 22. Does the Act allow recovery of payment for defective work?

If a principal refuses to pay a payment claim on the basis that the work was defective, that will give rise to a payment dispute and an adjudicator will have to determine what if any money is due in respect of the works the principal claims to be defective.

A refusal by a contractor to pay a payment claim made under a building contract by a principal or head contractor to recover the cost of rectifying defective work will also give rise to a payment dispute that can be determined by an adjudicator.

## 23. What should a person do if they wish to make an application for adjudication?

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<sup>19</sup> Section 8(b)

<sup>20</sup> Section 8(c)

<sup>21</sup> See definition of *payment claim* in section 4

<sup>22</sup> See section 34(2)

Section 28(2)(a) provides that the contents of an application for adjudication are to be prescribed. The Regulations provide that the application needs to contain the names and contact details of the adjudicator, the applicant and the respondent.<sup>23</sup>

The application must also comply with section 28(2)(b) of the Act.

#### **24. What should a person do if they wish to respond to an application for adjudication?**

Section 29(2)(a) of the Act provides that the contents of a response to an application for adjudication must be in accordance with the requirements set out in the Regulations. The information must be that:

- required by section 29(2)(a) of the Act ;
- the name of the adjudicator or the prescribed appointer;
- the name and contact details<sup>24</sup> of the applicant; and
- the name and contact details of each other party to the contract.

#### **25 Can an application for adjudication be withdrawn before a determination has been made?**

Yes

If an adjudicator has not been appointed the applicant has to give notice of the withdrawal to the prescribed appointer and the other party (or parties) to the contract.<sup>25</sup>

If an adjudicator has been appointed, notice has to be given to the adjudicator and each other party to the contract, and the adjudicator may refuse the withdrawal if the other party objects to the withdrawal, and the adjudicator believes that they have a legitimate interest in obtaining a determination of the dispute.

Once an application has been withdrawn, the parties to the contract cannot reapply to have the same payment dispute determined by an adjudicator.<sup>26</sup>

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<sup>23</sup> See regulation 6

<sup>24</sup> For contact detail requirements see Regulation 4

<sup>25</sup> See section 28A(1)

<sup>26</sup> See section 27(a) and *Gwelo Developments Pty Ltd v Brierty Limited* [2014] NTSC 44 and *Brierty Limited v Gwelo Developments Pty Ltd* [2014] NTCA 7

## 4. QUESTIONS ABOUT PRESCRIBED APPOINTERS

### 26. What are the functions of the 'Prescribed appointers'?

Prescribed appointers are persons or organisations with the role of determining which 'registered adjudicator' is to be appointed to adjudicate any particular dispute.

In order for a person or organisation to be a prescribed appointer, they must be identified as such in the Regulations.<sup>27</sup> See question 28 about who are the current prescribed appointers.

The role of the prescribed appointer is to appoint an adjudicator under section 30 of the Act.

A prescribed appointer will have this role in any of the following situations:

- when the parties to the contract have together appointed the prescribed appointer to perform this role;<sup>28</sup> or
- if there is no agreement, on the application or any one of the parties.<sup>29</sup>

It is anticipated that in fulfilling this role, the appointer will identify the issues raised by the application and choose an adjudicator with the appropriate professional qualification and expertise. The appointer will need to ascertain if the adjudicator chosen is available to take on the adjudication, and whether they may have a conflict of interest.

The hourly rate charged by adjudicators is also likely to be a factor taken into account by an appointer when making an appointment.

### 27. Must a prescribed appointer make an appointment of an adjudicator?

No.

The legislation empowers the prescribed appointer to appoint registered adjudicators. However, it imposes no duty on them to make such an appointment.

Whether or not, in any particular case, the prescribed appointer takes on the role will be a matter for the prescribed appointer. The decision will be affected by issues such as:

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<sup>27</sup> See section 4 for the definition of *prescribed appointer*

<sup>28</sup> See section 28(1)(c)(ii)

<sup>29</sup> See section 28(1)(c)(iii)

- payment (prescribed appointers may charge fees for their services); and
- the scope of role (e.g. the dispute in question may be outside the scope of expertise of the prescribed appointer such that they may not feel that they have the skill or experience to make an appropriate appointment).

Any party to a contract intending to include a prescribed appointer clause in a contract should contact the proposed prescribed appointer for the purpose of making sure that the prescribed appointer is willing to perform the various functions set out in the Act.

## **28. What persons and organisation are ‘prescribed appointers’?**

The Regulations prescribe bodies as ‘prescribed appointers’.

The following bodies are currently prescribed appointers:

- The Royal Australian Institute of Architects;
- Housing Industry Association Limited;
- Contractor Accreditation Limited;
- Law Society Northern Territory;
- The Institute of Arbitrators & Mediators of Australia;
- Australian Institute of Quantity Surveyors
- RICS Dispute Resolution Service; and
- Territory Construction Association Limited.

## **29. How does the Act operate where a contract does not provide for “prescribed appointers”?**

In this case, the person applying to have the dispute adjudicated can choose a prescribed appointer.<sup>30</sup>

## **30. Is it mandatory that a prescribed appointer appoint one of its own members to be the registered adjudicator?**

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<sup>30</sup>See section 28(1)(c)

No. Ideally they will not limit their appointments to their own members.

A prescribed appointer, in making a decision to appoint an adjudicator, should take account of the nature of a dispute and appoint a person best suited to the dispute.

The list of registered adjudicators is a public document and is available to all prescribed appointers.<sup>31</sup>

## 5. QUESTIONS ABOUT REGISTERED ADJUDICATORS

### 31. What are the functions of registered adjudicators?

A registered adjudicator has the function of adjudicating disputes. The strong focus of the role is coming to a fast, competently made, decision on the merits of the case. The adjudicator will not have the time, or the role, of engaging in other alternate dispute resolution mechanisms such as conciliation and mediation.

### 32. Do registered adjudicators enjoy a monopoly in respect of dispute resolution involving construction contracts?

No.

This is because the Act only provides a mechanism for dispute resolutions. The parties could agree to some other mechanism (such as formal arbitration, the Courts, mediation or conciliation).

However, within the boundaries of the legislation, only registered adjudicators can make decisions that are effective for the purposes of the enforcement mechanisms in place under the legislation.

### 33. Can a registered adjudicator refuse to consider an application?

Yes. An adjudicator may dismiss an application. This can occur:

- if it is not a construction contract;
- if it is out of time or the proper procedures have not been followed;

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<sup>31</sup> See section 52(6)

- if a Court or arbitrator has made a judgment, order or other finding about the dispute before the adjudicator; or
- if the adjudicator is satisfied it is not possible to fairly make a determination because of the complexity of the matter or because the time allowed, or any extension of it, is insufficient for any other reason.

### **34. How does a person become a registered adjudicator?**

A person who wishes to become a registered adjudicator needs to apply to the Registrar for registration under s.52 of the Act. See:

- question 4 for the Registrar's contact details; and
- question 35 for the requirements for registration.

There is no prescribed application form. However, the Registrar has provided a form that must be completed in order for the Registrar to be able to make a decision concerning registration.

Anyone registered as an adjudicator in Western Australia or Queensland (or any other State or Territory that introduces a system of registration for construction contract dispute adjudicators) is entitled to seek to registration as an adjudicator in the Territory under mutual recognition principles.

### **35. What are the qualifications for being a registered adjudicator?**

The qualifications, requirements and restrictions concerning registration are as follows:

#### *Legal Status*

Only a natural person may be registered. The application can be made by that person or by a nominating body;

#### *Fee*

A fee of 115 revenue units must be paid;<sup>32</sup>

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<sup>32</sup> See <http://www.treasury.nt.gov.au/TaxesRoyaltiesAndGrants/AboutTerritoryRevenueOffice/Pages/Revenue-Units.aspx> for calculation of revenue units

### *Criminal history check*

Applicants must authorise the Commissioner of Police to release to the Registrar the applicant's criminal history (if any);<sup>33</sup>

### *Formal qualifications*

An applicant must have one or other of the following:

- a degree from a university or other tertiary institution in Australia in any of the courses of architecture, building, building surveying, construction, engineering, law, project management or quantity surveying; or
- have an equivalent qualification for a place outside of Australia; or
- be eligible for membership of one or other of The Royal Australian Institute of Architects, The Institution of Engineers, Australia (known as "Engineers Australia), Law Society Northern Territory, The Institute of Arbitrators & Mediators of Australia; Australian Institute of Quantity Surveyors; Australian Institute of Building, Australian Institute of Building Surveyors, Australian Institute of Project Management; or
- be registered under the *Building Act* in the category of building contractor.

### *Experience qualifications*

In addition to the formal qualifications an applicant must also:

- have successfully completed a course that, in the opinion of the Registrar, qualifies the applicant to be an adjudicator; and
- have five years' experience in one or other of the following:
  - (i) construction contract administration; or
  - (ii) dispute resolution relating to construction contracts.

### *Fit and proper qualities*

A person is disqualified from being registered if they are one or other of the following:

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<sup>33</sup> See regulation 12(b)



- an undischarged bankrupt;
- a person who has applied to take the benefit of the law for the relief of bankruptcy or insolvency;
- a person who has compounded with creditors or made an assignment of remuneration for the benefit of creditors;
- a person who is disqualified<sup>34</sup> under a law of a State or Territory from following one other of the professions referred to in regulation 11(3)(a);<sup>35</sup> or
- the subject of a criminal history check that reveals information that may cause the Registrar to consider that the applicant is unsuitable to conduct adjudications.

Additionally, it is noted that the *Mutual Recognition Act* operates so that individuals licensed or registered under an equivalent interstate scheme are entitled to be registered in the Northern Territory.<sup>36</sup>

**36. Is a registration decision of the Registrar subject to review or appeal?**

Yes, the Local Court may review the decision of the Registrar.<sup>37</sup>

**37. Are there controls on the fees that may be charged by adjudicators?**

No.

Sections 46(1)(a)(i) and 55(3) of the Act provide that the Regulations can set a maximum remuneration rate for adjudicators. The parties to a dispute are free to agree to a rate of remuneration for the adjudicator but that rate must not exceed a maximum rate prescribed in the Regulations. No such maximum fees have been prescribed.

**38. Is there a fee for registration of adjudicators?**

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<sup>34</sup> “disqualified” would include persons suspended

<sup>35</sup> that is, the professions of architecture, building, building surveying, construction, engineering, law, project management or quantity surveying

<sup>36</sup> See Part 3 *Mutual Recognition Act 1992* (Cwth)

<sup>37</sup> See section 53

Yes, a once off fee of 115 revenue units is payable – see question 35.<sup>38</sup>

**39. How long does registration last?**

At present, there is no period fixed. The Registrar may, however, cancel an adjudicator's registration if they cease to be eligible or if they demonstrate that they are incompetent or unsuitable to conduct adjudications.

**40. Is there a mandatory practice and procedure to be followed by appointed adjudicators?**

No.

Section 34(6) of the Act provides that Regulations may be made dealing with the procedures to be followed by adjudicators, but so far that has not happened, and in the absence of such Regulations, each adjudicator can determine his or her own procedure.

## 6. DECISIONS OF ADJUDICATORS

**41. What information will be contained in an adjudicator's determination?**

Section 38(1)(b) of the Act provides that the information required in an adjudicator's determination must accord with the requirements of the Regulations.

The determination must contain the names and contact details of the appointed adjudicator, the applicant and the respondent, and must:

- be in writing;
- state the amount to be paid or security to be returned;
- the dates for either of these requirements;
- the reasons for the decision; and

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<sup>38</sup> See s. 52(3), regulation 13. See also

<http://www.treasury.nt.gov.au/TaxesRoyaltiesAndGrants/AboutTerritoryRevenueOffice/Pages/Revenue-Units.aspx> for the current revenue unit value

- identify any information that must not be published by the Registrar in accordance with section 54 of the Act.

**42. What are the requirements for publication of the decisions of an adjudicator?**

- On making the written decision in the form required by section 38 of the Act, the adjudicator must provide a copy of the decision to the parties and to the Registrar.<sup>39</sup>
- The Registrar must make available for public inspection at no charge the result or a report of the decisions of the registered adjudicators.
- The documents made available for public inspection must not include the identities of the parties or any other information that owing to its confidential nature is not suitable for publication.<sup>40</sup> Before publishing decisions made by adjudicators, the Registrar removes any identifying details and other confidential information.

## 7. ENFORCEMENT OF DECISIONS MADE BY REGISTERED ADJUDICATORS

**43. What is the general nature of the enforcement regime?**

In general terms, decisions of adjudicators will operate in much the same way as judgments of a Court. At the end of the day, if a party does not comply with a decision, action will need to be taken through the Courts.

The successful party to an adjudication application needs to have an original copy of their determination certified by the Registrar and then file that copy in the Court.<sup>41</sup> They can then proceed to enforce the determination as though it was a judgment of that Court

**44. Is interest payable on outstanding amounts?**

Yes.

If the contract does not provide for interest on outstanding payment claims, interest is payable at the provide for the Regulations to set an interest rate both in respect of monies

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<sup>39</sup> See section 38(2)

<sup>40</sup> See section 54(2)

<sup>41</sup> See section 45

claimed for the period up to a determination, and in respect of determination amounts where they are not paid on or before the date fixed in the determination.

The Regulations provide that the interest rate (for these various provisions) is that which is from time to time prescribed in the *Supreme Court Rules* for the purposes of section 85 of the *Supreme Court Act*.<sup>42</sup>

Currently that interest rate is 8%.<sup>43</sup> See also question 45.

**45. How does the obligation to pay interest under the Act interact with the obligation to pay interest under the contract?**

The answer to this will depend on the contract. However, interest cannot be paid on interest.<sup>44</sup> Thus, if the contract permits interest to be paid and the adjudicator makes a determination as to amount payable then additional interest will not be payable on that amount. The interest specified in the regulations (question 44) is really only of relevance if for some reason the contract does not provide for interest.

**46. In what circumstances can work be suspended by a contractor under the legislation?**

A contractor may, if a principal does pay an amount determined by an adjudicator as being payable, suspend the performance of the contractor's work.<sup>45</sup>

This suspension cannot occur until after the contractor has given, at least three days prior to the proposed suspension, the prescribed notice to the principal.

The information that must be provided in the notice is that required by section 44 of the Act and includes the name of the adjudicator, the name and contact details of the principal, the contractor, the name and identification of the determination, the amount (if any) to be paid and the date by which such an amount must be paid.<sup>46</sup>

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<sup>42</sup> See sections 35(1)(b) and 41(2) and clause 7 of the Schedule (containing the implied provisions), and regulation 9.

<sup>43</sup> By Supreme Court Regulations 61/02 s7 gazetted on 18.12.02 – interest rate now at the rate per annum specified in rule 35.08 of the Federal Court Rules as in force from time to time. <http://www.fedcourt.gov.au/forms-and-fees/interest-rates>

<sup>44</sup> See section 35(2)

<sup>45</sup> See section 44

<sup>46</sup> See regulation 10

## 8. COSTS

### 47. Who is responsible for the costs payable to the adjudicator?

Except on the case of small claims brought under Part 4 of the *Community Justice Centre Act* (see question 48), as adjudicator's fees are payable by the parties to the adjudication.

The general principles are:

- the parties involved in a dispute are jointly and severally liable to pay the costs of an adjudication.<sup>47</sup> This means that if one party becomes unable to pay its share of the costs (e.g. on becoming bankrupt), then the other party may be liable for all of the adjudicator's costs;
- as between themselves the parties are liable to pay the costs in equal shares;<sup>48</sup> and
- however, an adjudicator may order a party to pay costs of adjudication that are incurred because the party is frivolous or vexatious or has made unfounded submissions.<sup>49</sup>

In general terms it is expected that the registered adjudicator will reach agreement with parties before commencing the adjudication. The adjudicator may require that the parties provide security for costs.<sup>50</sup> However, as with the provision of all professional services, adjudicators may need to make their own judgments about the capacity of parties to pay prior to accepting an adjudication role.

### 48. How are the adjudicator's costs determined?

Adjudicators are required to publish their maximum rates of remuneration.<sup>51</sup>

In the absence of agreement between an adjudicator and the applicant for adjudication, the amount payable to the adjudicator will be determined in accordance with the published rate.

The rates are published with the [adjudicator profiles](#) on the Department of the Attorney-General and Justice website.<sup>52</sup>

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<sup>47</sup> see s. 46(4)

<sup>48</sup> see s. 46(5)

<sup>49</sup> see s. 36(2)

<sup>50</sup> See sections 28(1)(d) and 46(7)

<sup>51</sup> See section 55

<sup>52</sup> <http://www.nt.gov.au/justice/policycoord/construction/adjudicator.shtml>

If the payment dispute is for an amount less than \$10,000 and the application is brought under Part 4 of the *Community Justice Centre Act*, there is a fixed fee of \$500 which is payable in equal shares by the parties to the dispute.<sup>53</sup>

**49. Can costs be awarded in respect of the legal and other expenses incurred by the parties?**

Ordinarily, the parties to a payment dispute bear their own costs in relation to the adjudication of the dispute,<sup>54</sup> but if the adjudicator finds that one party to the dispute incurred costs associated with the adjudication because of the conduct of the other party to the dispute, or because that party's submissions to the adjudicator were unfounded, the adjudicator can order that the party at fault pay some or all of the other party's costs.<sup>55</sup>

## 9. THE ROLE OF THE COURTS

**50. What are the roles of the Courts?**

The Local Court has the following roles:

- it may hear appeals against a decision of the Registrar under section 31 of the Act, to make or not make a decision about the disqualification of an appointed adjudicator;<sup>56</sup>
- it may review decisions of the Registrar under section 52 of the Act to refuse to register a person as adjudicator or to cancel a person's registration;<sup>57</sup> and
- it may review a decision of an adjudicator under section 33(1)(a) of the Act to dismiss an application without making a determination of its merits.<sup>58</sup>

The Supreme Court may also review an adjudicator's determination or a decision to dismiss an application without making a determination.

**51. Can the Local Court or the Supreme Court be used to delay the adjudication process?**

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<sup>53</sup> See s.21(1) Community Justice Centre Act

<sup>54</sup> See section 36(1)

<sup>55</sup> See s.36(2)

<sup>56</sup> See section 32

<sup>57</sup> See section 53

<sup>58</sup> See section 48

Once an issue is before the Court, the Court may order that any decision of the adjudicator not operate. Such an order should be made to the extent necessary for the Court to effectively hear and decide the application.

Where there is a valid argument over the validity of an application, the Court might also make a ruling to prevent the matter from being determined by an adjudicator. Some respondents named in adjudication applications chose to pre-empt the decision of the appointed adjudicator as to whether he or she has the power to make a determination, by seeking a court order to rule that the adjudicator does not have the jurisdiction to hear a matter. In that situation the adjudicator will agree to await the verdict of the court and seek any necessary extension of time to determine the application should the Court rule that he or she does have the jurisdiction to make a determination.

## 10. MISCELLANEOUS QUESTIONS

**52. Is there to be a requirement that monies paid in respect of a subcontractors work (e.g. by the client) be held in trust pending the completion of the work?**

No.

**53. Will the parties be able to solve disputes between themselves without invoking the Act?**

Yes.

**54. Does the legislation provide any protection if a principal becomes bankrupt?**

No.

The Northern Territory cannot legislate for a preference to subcontractors in the event of a bankruptcy. The Act seeks to give subcontractors an opportunity to secure payment for work done when it is done, but, if the principal or contractor making the payment goes into liquidation or bankruptcy within 6 months of making the payment, that payment will almost certainly be treated as a preferential payment, and the subcontractor will be obliged to repay the money to the liquidator or trustee in bankruptcy and will then have to lodge a claim as an unsecured creditor.

**55. Does the legislation prevent a party going straight to Court?**

No.

Conversely, a party to litigation involving a payment dispute can seek to have that dispute adjudicated under the legislation at any time before the Court decides the matter. However, once a court has made a decision, the same dispute cannot be determined by an adjudicator.<sup>59</sup>

## 11. PRECEDENTS FOR THE OPERATION OF THE LEGISLATION

### 56. Is their similar legislation in force elsewhere in Australia?

Legislative provisions along the lines of the Northern Territory legislation have been enacted in all other States and the ACT.

Similar adjudication schemes are also in place in the UK,<sup>60</sup> NZ,<sup>61</sup> the Isle of Man,<sup>62</sup> Singapore,<sup>63</sup> Malaysia<sup>64</sup> and Ireland.<sup>65</sup>

The Northern Territory legislation is closely modelled on the Western Australian *Construction Contracts Act 2004* and *Construction Contracts Regulations*.

Details of the interstate Acts are as follows:

#### ***New South Wales***

**Name of the Act:** *Building and Construction Industry Security of Payment Act 1999*

**Name of the Administering Agency:** Department of Finance, Services and Innovation – Fair Trading

**Web address:**

[http://www.fairtrading.nsw.gov.au/ftw/Tradespeople/Building\\_industry\\_essentials/Security\\_of\\_payment.page](http://www.fairtrading.nsw.gov.au/ftw/Tradespeople/Building_industry_essentials/Security_of_payment.page)

#### ***Victoria***

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<sup>59</sup> See section 33(1)(a)(iii)

<sup>60</sup> See the *Housing Grants Construction & Regeneration Act 1996*

<sup>61</sup> See the *Construction Contracts Act 2002*

<sup>62</sup> See the *Construction Contracts Act 2004*

<sup>63</sup> See the *Building and Construction Industry Security of Payment Act 2004*

<sup>64</sup> See the *Construction Industry Payment and Adjudication Act 2012*

<sup>65</sup> See the *Construction Contracts Act 2013*



**Name of the Act:** *Building and Construction Industry Security of Payment Act 2002*

**Name of the Administering Agency:** Victorian Building Authority

**Web address:** <http://www.vba.vic.gov.au/practitioners/security-of-payment-sop>

#### **Queensland**

**Name of the Act:** *Building and Construction Industry Payments Act 2004*

**Name of the Administering Agency:** Building and Construction Industry Payments Agency

**Web address:** <http://www.qbcc.qld.gov.au/get-help-getting-paid-bcipa/overview>

#### **Western Australia**

**Name of the Act:** *Construction Contracts Act 2004*

**Name of the Administering Agency:** Department of Commerce - Building Commission

**Web address:** <http://www.commerce.wa.gov.au/building-commission/payment-disputes-and-construction-contracts-act>

#### **South Australia**

**Name of the Act:** *Building and Construction Industry Security of Payment Act 2009*

**Name of the Administering Agency:** Small Business Commissioner

**Web address:** [http://www.sasbc.sa.gov.au/security\\_of\\_payment](http://www.sasbc.sa.gov.au/security_of_payment)

#### **Tasmania**

**Name of the Act:** *Building and Construction Industry Security of Payment Act 2009*

**Name of the Administering Agency:** Department of Justice

**Web address:** [http://www.justice.tas.gov.au/building/security\\_of\\_payment](http://www.justice.tas.gov.au/building/security_of_payment)

#### **Australian Capital Territory**

**Name of the Act:** *Building and Construction Industry (Security of Payment) Act 2009*

**Name of the Administering Agency:** Environment and Planning Directorate - Planning

**Web address:**

[http://www.planning.act.gov.au/topics/design\\_build/construction/resolving\\_payment\\_dispute](http://www.planning.act.gov.au/topics/design_build/construction/resolving_payment_dispute)

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