

House of Assembly—No 139

As laid on the table and read a first time, 26 May 2021

South Australia

**Building and Construction Industry Security of
Payment (Review Recommendations) Amendment
Bill 2021**

A BILL FOR

An Act to amend the *Building and Construction Industry Security of Payment Act 2009* and to make related amendments to the *Building Work Contractors Act 1995* and the *Plumbers, Gas Fitters and Electricians Act 1995*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

- 5 This Act may be cited as the *Building and Construction Industry Security of Payment (Review Recommendations) Amendment Act 2021*.

2—Commencement

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

3—Amendment provisions

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

Part 2—Amendment of *Building and Construction Industry Security of Payment Act 2009*

4—Amendment of section 4—Interpretation

- (1) Section 4, definition of *adjudicator*—delete the definition and substitute:

adjudicator means—

- (a) in relation to an adjudication application—the person appointed in accordance with this Act to determine the application; and
- (b) in any other case—a person registered as an adjudicator under Part 3 Division 3A;

- (2) Section 4, definition of *business day*—delete the definition and substitute:

business day means any day except—

- (a) Saturday, Sunday or a public holiday; or
- (b) any other day which falls between 22 December in any year and 10 January in the following year (inclusive);

- (3) Section 4—after the definition of *claimed amount* insert:

Commissioner means the person holding or acting in the office of Small Business Commissioner;

- (4) Section 4—after the definition of *construction work* insert:

defects liability period, for a construction contract, means the period, if any, worked out under the contract as being the period—

- (a) starting on the day the construction work is practically or substantially completed, or the related goods and services are supplied, under the contract; and
- (b) ending on the last day any omission or defect in the construction contract or related goods or services may be required or directed to be rectified under the contract;

- (5) Section 4—after the definition of *payment schedule* insert:

principal means the person for whom construction work is to be carried out or related goods and services supplied under a construction contract (the *main contract*) and who is not themselves engaged under a construction contract to carry out construction work or supply related goods and services as part of or incidental to the work or goods and services carried out or supplied under the main contract;

- (6) Section 4, definition of *reference date*—delete the definition

5—Amendment of section 7—Application of Act

Section 7(2)(b)—delete paragraph (b)

6—Insertion of sections 7A and 7B

After section 7 insert:

5 **7A—Administration of Act**

The Commissioner is responsible for the administration of this Act.

7B—Commissioner's functions

The Commissioner has the following functions under this Act:

- 10 (a) investigating and monitoring compliance with this Act;
- (b) enforcing the requirements of this Act by taking appropriate
 action;
- (c) investigating and researching matters affecting the interests
 of parties to construction contracts;
- 15 (d) publishing reports and information on subjects of interest to
 the parties to construction contracts;
- (e) giving advice (to an appropriate extent) on the provisions of
 this Act and other subjects of interest to the parties to
 construction contracts;
- 20 (f) providing information and facilitating or conducting
 education programs relating to the provisions of this Act for
 the benefit of participants in the building and construction
 industry;
- (g) making reports to the Minister on questions referred to the
 Commissioner by the Minister and other questions of
25 importance affecting the administration of this Act;
- (h) any other functions conferred on the Commissioner by this
 Act.

7—Substitution of section 8

Section 8—delete the section and substitute:

30 **8—Persons entitled to progress payments**

- (1) This section applies to a person who has undertaken to carry out
construction work, or to supply goods and services, under a
construction contract, but does not apply to such a person who—
- 35 (a) was not, at the time of entering into the contract, an
 authorised person; or
- (b) is a company in liquidation.

- (2) Subject to this section, a person to whom this section applies is entitled to a progress payment—
- (a) on 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
 - (b) on the last day of each subsequent named month; and
 - (c) in the case of a final payment under the construction contract—on the day immediately following—
 - (i) the issue under the contract of an invoice specifying the final amount payable under the contract; or
 - (ii) if subparagraph (i) does not apply—the expiry of the defects liability period under the contract; or
 - (iii) if neither subparagraph (i) nor subparagraph (ii) applies—the day that construction work was last carried out, or related goods and services were last supplied, under the contract.
- (3) Subsection (2) does not apply if the construction contract makes express provision with respect to more frequent progress payments or a final payment, in which case a person to whom this section applies is entitled to progress payments or a final payment on a day or days as determined by or in accordance with the terms of that contract.
- (4) If only a single or one-off payment is required under a construction contract, a person to whom this section applies is, unless the contract otherwise provides, entitled to a progress payment on the day immediately following the day that construction work was last carried out, or related goods and services were last supplied, under the contract.
- (5) If a construction contract is terminated, a person to whom this section applies is, unless the contract provides otherwise, entitled to a progress payment on the day on which the contract is terminated.
- (6) In this section—
- authorised person** means—
- (a) a person who is authorised under the *Building Work Contractors Act 1995* or the *Plumbers, Gas Fitters and Electricians Act 1995* to perform construction work of the kind to which the undertaking relates; or
 - (b) a person of a class prescribed by the regulations for the purposes of this definition.

8—Amendment of section 11—Due date for payment

- (1) Section 11(1)(a)—delete paragraph (a) and substitute:
- (a) if the contract makes express provision with respect to the matter—

- (i) subject to subparagraph (ii), on the date on which the payment becomes due and payable in accordance with the terms of the contract; or
- (ii) if the date referred to in subparagraph (i) falls more than 25 business days after the payment claim is made under Part 3 in relation to the payment—on the date occurring 25 business days after the payment claim is made; or

(2) Section 11(1)(b)—delete "15" and substitute:

10

9—Insertion of section 12A

After section 12 insert:

12A—Return of retention money

- (1) If the parties to a construction contract are unable to reach agreement about—
 - (a) the payment of retention money by a party to the contract; or
 - (b) any other matter arising in connection with the return of any form of security held by a party to the contract for the performance of obligations under the contract,the dispute may be referred to an adjudicator in accordance with the regulations.
- (2) An adjudicator to whom a dispute is referred under this section may—
 - (a) in the case of a dispute about retention money—make a determination as to whether some or all of the retention money is to be paid and, if so, the date on or before which the money is to be paid and to whom; or
 - (b) in the case of a dispute about some other kind of security—make a determination as to whether a specified party to the construction contract is required to pay an amount to another party to the contract in order to resolve the dispute and, if so, the date on or before which the amount is to be paid.
- (3) If a party to a construction contract fails to pay retention money or some other amount to another party to the contract in accordance with a determination of an adjudicator under this section, the other party may recover the unpaid portion, as a debt due to them, in a court of competent jurisdiction.
- (4) The regulations may make further provision in relation to procedures to be followed in connection with the referral and determination of disputes under this section.

(5) In this section—

retention money means money retained by 1 party (the *first party*) to a construction contract out of money payable by the first party to another party (the *second party*) under a construction contract, as security for the performance of obligations of the second party under the contract.

10—Amendment of section 13—Payment claims

(1) Section 13(2)—delete paragraph (c) and substitute:

(c) must contain a breakdown of the items to which the claimed amount relates, including—

- (i) a description of each item; and
- (ii) quantification of each item; and
- (iii) calculations showing how the claimed amount has been assessed in respect of each item; and

(d) must specify the period for which a payment schedule is to be provided by the respondent to the claimant; and

(e) must set out a statement approved by the Commissioner outlining the potential consequences of failing to provide a payment schedule in response to the claim; and

(f) must state that it is made under this Act; and

(g) must be in a form approved by the Commissioner.

(2) Section 13—after subsection (2) insert:

(2a) If—

- (a) the payment claim relates to construction work carried out on residential land; and
- (b) the person liable to make the payment is the owner of the land,

the claim must be accompanied by a written notice, in a form approved by the Commissioner—

- (c) setting out how the respondent can reply to the claim; and
- (d) specifying the period within which the reply must be given.

(2b) A failure of a party to provide the information required by subsection (2)(c) will not invalidate a payment claim that otherwise complies with the requirements of this section.

(3) Section 13—after subsection (4) insert:

(4a) However, if the payment claim relates to a final payment, the claim may only be served within—

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

(b) if the contract makes no express provision with respect to the matter, the period ending—

(i) 20 business days after the end of the defects liability period; or

(ii) 6 months after the completion of all construction work to be carried out, or the supply of all related goods and services, under the construction contract,

whichever is the later.

(4) Section 13(5)—delete "reference date" and substitute:

day on which the claimant is entitled to a progress payment under section 8

(5) Section 13—after subsection (6) insert:

(7) A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.

Maximum penalty:

(a) in the case of a natural person—\$20 000;

(b) in the case of a body corporate—\$110 000.

(8) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.

Maximum penalty:

(a) in the case of a natural person—\$20 000 or imprisonment for 1 year;

(b) in the case of a body corporate—\$110 000.

(9) A head contractor must, not more than 5 business days after serving a payment claim on the principal, provide a copy of the supporting statement that accompanied the payment claim to each subcontractor engaged directly by the head contractor (if any) for whom an amount became due and payable in relation to the construction work concerned.

Maximum penalty: \$20 000.

(10) If a body corporate is guilty of an offence against subsection (7) or (8), a person who is—

(a) a director of the body corporate; or

(b) an individual who is involved in the management of the body corporate and who is in a position to influence the conduct of the body corporate in relation to the commission of the offence,

is guilty of an offence if the person—

(c) knows that the offence (or an offence of the same type) would be or is being committed or is recklessly indifferent as to whether it would be or is being committed; and

(d) fails to take reasonable steps to prevent or stop the commission of that offence.

Maximum penalty: \$20 000.

(11) A failure of a head contractor to comply with a requirement under subsection (7), (8) or (9) will not invalidate the payment claim or the service of the payment claim to which the supporting statement relates.

(12) In this section—

head contractor means the person who is to carry out construction work or supply related goods and services for the principal under a construction contract (the **main contract**) and for whom construction work is to be carried out or related goods and services supplied under a construction contract as part of or incidental to the work or goods and services carried out or supplied under the main contract;

owner of land means—

(a) if the land is unalienated from the Crown—the Crown; or

(b) if the land is alienated from the Crown by grant in fee simple—the owner (at law or in equity) of the estate in fee simple; or

(c) if the land is held from the Crown by lease or licence—the lessee or licensee; or

(d) if the land is held from the Crown under an agreement to purchase—the person who has the right to purchase;

subcontractor means a person who is to carry out construction work or supply related goods and services under a construction contract otherwise than as head contractor;

supporting statement means a statement in a form approved by the Commissioner that includes (without limitation)—

(a) a statement of all payment amounts that are in dispute; and

(b) a declaration to the effect that all subcontractors engaged directly by the head contractor (if any) have been paid all amounts that have become due and payable in relation to the construction work concerned that are not in dispute.

11—Amendment of section 14—Payment schedules

(1) Section 14(2)—before paragraph (a) insert:

(a1) must be in a form approved by the Commissioner; and

(2) Section 14(2)—after paragraph (b) insert:

and

(c) must include any other information required by the Commissioner.

(3) Section 14(4)(b)(ii)—delete "15" and substitute:

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5 **12—Amendment of section 16—Consequences of not paying claimant in
accordance with payment schedule**

Section 16(1)(b)(ii)—delete "15" and substitute:

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13—Amendment of section 17—Adjudication applications

(1) Section 17(3)(c)—delete "15" and substitute:

10 10

(2) Section 17(3)(e)—delete "15" and substitute:

10

(3) Section 17(5)—delete subsection (5) and substitute:

15 (5) A claimant must, as soon as practicable after making an adjudication
application under this section, serve a copy on the respondent.

(4) Section 17(6)—delete subsection (6) and substitute:

20 (6) An authorised nominating authority must, within 2 business days of
receiving an adjudication application, refer the application to the
Commissioner by notice in writing to the Commissioner (an
adjudication referral).

(7) An adjudication referral must—

- 25 (a) be in a form approved by the Commissioner; and
(b) unless the Commissioner determines that it is unreasonable
to do so in a particular case—be accompanied by the
relevant adjudication application; and
(c) contain such other information as determined by the
Commissioner and notified to the authorised nominating
authority.

30 (8) An authorised nominating authority must, when referring an
adjudication application to the Commissioner, nominate at least
3 adjudicators named in the adjudication referral who, in the opinion
of the authorised nominating authority, are suitable for appointment
to determine the adjudication application.

35 (9) An authorised nominating authority must not nominate an
adjudicator who—

- (a) is not eligible under section 18 to be an adjudicator in
relation to the construction contract to which the application
relates; or

(b) has been found by a court to have made a technical error in an adjudication unless the authorised nominating authority is satisfied that the error will not be repeated.

5 (10) The Commissioner must, within 2 business days of receiving an adjudication referral, refer the application to an adjudicator nominated by the authorised nominating authority.

(11) However, if the Commissioner considers that none of the adjudicators nominated by the authorised nominating authority should be appointed to determine the adjudication application—

10 (a) the Commissioner must, within 2 business days of receiving an adjudication referral, request the authorised nominating authority to nominate additional adjudicators; and

15 (b) the authorised nominating authority must, within 2 business days of receiving a request from the Commissioner under paragraph (a), nominate additional adjudicators; and

(c) the Commissioner must, within 2 business days of receiving the authorised nominating authority's additional nominations, refer the adjudication application to an adjudicator.

20 (12) A failure of an authorised nominating authority or the Commissioner to make a request or refer a matter within the time specified in this section does not affect the validity of an adjudication application.

(13) The Commissioner must, on referring an adjudication application to an adjudicator under subsection (10) or (11)(c)—

25 (a) provide the adjudication application to the adjudicator to whom the application is referred; or

30 (b) if an adjudication application is not provided to the Commissioner under subsection (7)— require the relevant authorised nominating authority to provide the adjudication application to the adjudicator to whom the application is referred.

14—Amendment of section 18—Eligibility criteria for adjudicators

Section 18(1)—delete subsection (1)

15—Amendment of section 19—Appointment of adjudicator

35 (1) Section 19—delete subsection (1) and substitute:

(1) If the Commissioner refers an adjudication application to an adjudicator under section 17(10) or (11)(c), the adjudicator may accept the adjudication application by causing a notice of acceptance to be served, within 2 business days from the day on which the adjudication application was referred by the Commissioner, on each of the following persons:

40 (a) the Commissioner;

- (b) the authorised nominating authority who nominated the adjudicator;
- (c) the claimant;
- (d) the respondent.

5 (2) Section 19—after subsection (2) insert:

- (3) An adjudicator may not delegate the function of determining an adjudication application.

16—Amendment of section 20—Adjudication responses

(1) Section 20(1)—delete subsection (1) and substitute:

10 (1) Subject to subsection (3), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the *adjudication response*)—

(a) at any time within—

15 (i) 5 business days after receiving a copy of the application; or

(ii) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever period expires later; or

20 (b) if the adjudicator has granted the respondent an extension of time for lodging an adjudication response—at any time within the period for which the extension has been granted (which must not exceed 10 business days from the final day on which the respondent would otherwise have been permitted to lodge the response).

25 (1a) An adjudicator may grant an extension of time for lodging an adjudication response only if the adjudicator has, within 2 business days of the respondent having received notice of an adjudicator's acceptance of the application, received a written application for the extension setting out the respondent's reasons for seeking the extension.

30

(2) Section 20(5)—delete subsection (5) and substitute:

- (5) A respondent must, as soon as practicable after lodging an adjudication response under this section, serve a copy on the claimant.

17—Amendment of section 21—Adjudication procedures

35

(1) Section 21(1)—delete "until after the end of the period within which the respondent may lodge an adjudication response." and substitute:

before—

40 (a) the period within which the respondent may lodge an adjudication response has expired; and

(b) the adjudicator has made a determination as to whether the adjudicator has jurisdiction to determine the application.

(2) Section 21—after subsection (1) insert:

(1a) A determination by an adjudicator under subsection (1)(b) that they have jurisdiction to determine an application will form part of the determination of that application.

(3) Section 21(3)(a)(iii)—delete "the respondent receives a copy of the adjudication application" and substitute:

the adjudicator accepts the adjudication application under section 19(1)

18—Amendment of section 26—Claimant may make new application in certain circumstances

(1) Section 26(1)(a)—delete "4" and substitute:

10

(2) Section 26(2)(a)—delete "the adjudicator or the authorised nominating authority to whom the application was made" and substitute:

each of the following persons:

(i) the adjudicator;

(ii) the respondent;

(iii) the Commissioner;

(iv) the authorised nominating authority who nominated the adjudicator.

19—Substitution of section 27

Section 27—delete the section and substitute:

27—Claimant may withdraw from adjudication

(1) A claimant may withdraw from an adjudication by notifying the following persons in writing that the adjudication application is withdrawn:

(a) the adjudicator;

(b) the respondent;

(c) the Commissioner;

(d) the authorised nominating authority who nominated the adjudicator.

(2) If a respondent to an adjudication application has, before the adjudicator has decided the application, paid the claimed amount stated in the payment claim the subject of the application—

(a) the application is taken to have been withdrawn; and

(b) the claimant must, as soon as practicable, notify the following persons in writing that the adjudication application has been withdrawn because of the payment:

- (i) the adjudicator;
- (ii) the Commissioner;
- (iii) the authorised nominating authority who nominated the adjudicator.

5 **20—Insertion of Part 3 Division 3A**

Part 3—after Division 3 insert:

Division 3A—Adjudicators

Subdivision 1—Registration

28A—Application for registration

- 10 (1) A natural person may apply to the Commissioner for registration as an adjudicator.
- (2) The application must—
- (a) be in a form approved by the Commissioner; and
 - (b) be signed by or on behalf of the applicant; and
 - 15 (c) be accompanied by the prescribed fee; and
 - (d) set out—
 - (i) the experience and qualifications of the applicant, relevant to deciding adjudication applications; and
 - 20 (ii) other details, required in the approved form, to enable the Commissioner to decide whether the applicant is a suitable person to be registered as an adjudicator.

28B—Determination of application for registration

- 25 (1) The Commissioner must consider an application for registration as an adjudicator and either grant, or refuse to grant, the application.
- (2) The Commissioner may grant the application only if the Commissioner is satisfied the applicant is a suitable person to be registered as an adjudicator.
- 30 (3) A person is not a suitable person to be registered as an adjudicator unless the person has—
- (a) such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section; or
 - 35 (b) another qualification that the Commissioner considers to be equivalent to a qualification prescribed under paragraph (a).

(4) In deciding whether an applicant is a suitable person to be registered as an adjudicator, the Commissioner may have regard to the following matters:

- 5
- (a) whether the person has been found guilty or convicted of an offence, or an offence of a class, prescribed by the regulations, other than a spent conviction;
- (b) whether the person—
- 10
- (i) held a registration under this Division, or a licence or registration under a corresponding law, that was suspended or cancelled; or
- (ii) has been refused registration under this Division or a licence or registration under a corresponding law;
- (c) the experience and qualifications of the person;
- (d) the matters stated in the application for registration;
- 15
- (e) any other matter relevant to the person's ability to carry out the functions of an adjudicator.

(5) In this section—

corresponding law means a law of another State declared by regulation to be a law corresponding to this Act;

20

State includes the Australian Capital Territory and the Northern Territory.

28C—Inquiries into applications for registration

- (1) Before deciding an application for registration as an adjudicator, the Commissioner may—
- 25
- (a) make inquiries for the purpose of assessing the suitability of the applicant for registration; and
- (b) by notice given to the applicant, require the applicant to provide to the Commissioner, within a reasonable period specified in the notice of not less than 28 days, further information or a document the Commissioner reasonably requires to decide the application.
- 30
- (2) If an applicant does not respond to a notice under subsection (1)(b) within the specified period, the applicant will be taken to have withdrawn the application.
- 35
- (3) A notice under subsection (1)(b) must be given to the applicant within 28 days of the day on which the Commissioner receives the application.
- 40
- (4) The Commissioner may include a requirement in a notice under subsection (1)(b) for any information or documents provided under the notice to be verified by statutory declaration.

28D—Decision on application for registration

- 5
- (1) If the Commissioner decides to grant an application for registration as an adjudicator, the Commissioner must issue a certificate of registration to the applicant.
- (2) A certificate of registration must contain the prescribed information.
- (3) If the Commissioner decides to—
- (a) impose conditions on an applicant's registration as an adjudicator; or
- (b) refuse an application for registration as an adjudicator,
- 10 the Commissioner must, as soon as reasonably practicable, give the applicant written notice of the decision and the applicant's right to appeal against the decision.

28E—Failure to decide application for registration

- 15
- (1) If the Commissioner fails to decide an application for registration as an adjudicator within—
- (a) 28 days after receipt of the application; or
- (b) where the Commissioner has, under section 28C(1)(b), required the applicant to give the Commissioner further information or a document—28 days after the
- 20 Commissioner receives the further information or document, the failure is taken to be a decision by the Commissioner to refuse to grant the application.
- (2) If the Commissioner is taken to have made a decision to refuse to grant an application under this section, the applicant is entitled to be given written notice of the applicant's right to appeal against the decision.
- 25

28F—Term of registration

30 A registration becomes effective on the day the certificate of registration is issued or on the day of the registration's renewal and ends either—

- (a) 3 years after that day; or
- (b) on an earlier day stated by the Commissioner in the certificate of registration.

28G—Conditions of registration

- 35
- (1) A registration is subject to the following conditions:
- (a) the adjudicator must comply with this Act;

(b) if the adjudicator becomes aware that an adjudication determination undertaken by them has been overturned by a court, the adjudicator must, as soon as reasonably practicable, give the following to the Commissioner and the authorised nominating authority who nominated the adjudicator—

(i) written notice of the court's decision setting out the grounds on which the determination was overturned; and

(ii) a copy of the court's decision;

(c) other conditions the Commissioner considers reasonably appropriate to give effect to this Act and that are stated in the certificate of registration.

(2) Conditions may be imposed under subsection (1)(c)—

(a) when registration first occurs or is renewed or amended; or

(b) at another time if the Commissioner considers it is necessary to impose conditions to ensure that an adjudicator effectively performs the adjudicator's functions under this Act.

(3) If the Commissioner decides to impose conditions on the registration under subsection (2)(b)—

(a) the Commissioner must give the adjudicator written notice of the decision and the adjudicator's right to appeal against the decision; and

(b) the conditions take effect when the notice is received by the adjudicator or on a day stated in the notice.

28H—Registration required to perform functions of adjudicator

A person must not accept or decide an adjudication application unless the person is an adjudicator.

Maximum penalty: \$20 000.

Subdivision 2—Renewal of registration

28I—Application for renewal of registration

(1) A person registered as an adjudicator may apply to the Commissioner for renewal of the registration.

(2) An application under subsection (1) must—

(a) be made at least 1 month before the registration ends; and

(b) be in a form approved by the Commissioner; and

(c) be accompanied by the prescribed fee.

(3) The Commissioner must consider the application and either renew, or refuse to renew, the registration.

(4) In deciding whether to grant the application, the Commissioner may have regard to the matters to which the Commissioner may have regard in deciding whether an applicant for registration is a suitable person to be registered under section 28B(4).

(5) If the Commissioner decides to—

- (a) refuse to renew the registration; or
- (b) impose conditions on the registration,

the Commissioner must, as soon as reasonably practicable, give the applicant written notice of the decision and the applicant's right to appeal against the decision.

(6) Registration may be renewed by—

- (a) endorsing the existing certificate of registration; or
- (b) cancelling the existing certificate and issuing another certificate.

28J—Inquiries into application for renewal of registration

(1) Before deciding an application for renewal of registration, the Commissioner may, by notice given to the applicant, require the applicant to give the Commissioner, within a reasonable period specified in the notice of not less than 28 days, further information or a document the Commissioner reasonably requires to decide the application.

(2) If an applicant does not respond to a notice under subsection (1) within the specified period, the applicant will be taken to have withdrawn the application.

28K—Registration taken to be in force while application for renewal is considered

(1) If an application is made under section 28I, the applicant's registration is taken to continue in force from the day that it would, apart from this section, have ended until the application is decided or is taken to have been withdrawn.

(2) However, if the application is refused, the registration continues in force until the applicant is given written notice of the applicant's right to appeal against the decision.

(3) Subsection (1) does not apply if the registration is earlier suspended or cancelled.

Subdivision 3—Amendment of registration

28L—Application for amendment of registration

(1) A person registered as an adjudicator may apply to the Commissioner for an amendment of the registration, including any conditions imposed by the Commissioner.

- 5
- (2) The application must—
- (a) be in a form approved by the Commissioner; and
 - (b) be accompanied by the prescribed fee.
- (3) The Commissioner must consider the application and either amend, or refuse to amend, the registration.
- 10
- (4) If the Commissioner decides to refuse to amend the registration, or to impose a condition on the amended registration, the Commissioner must, as soon as reasonably practicable, give the applicant written notice of the decision and the applicant's right to appeal against the decision.
- (5) A registration may be amended by—
- (a) endorsing the existing registration with details of the amendment; or
 - (b) cancelling the existing registration and issuing another registration containing the amendment.
- 15

28M—Inquiries into application for amendment

- 20
- (1) Before deciding an application for amendment of registration, the Commissioner may, by notice given to the applicant, require the applicant to give the Commissioner, within a reasonable period specified in the notice of not less than 28 days, further information or a document the Commissioner reasonably requires to decide the application.
- (2) If an applicant does not respond to a notice under subsection (1) within the specified period, the applicant will be taken to have withdrawn the application.
- 25

Subdivision 4—Suspension or cancellation of registration

28N—Grounds for suspension or cancellation

- 30
- (1) Each of the following is a ground for suspending or cancelling the registration of an adjudicator:
- (a) the adjudicator is not, or is no longer, a suitable person to hold the registration;
 - (b) the adjudicator has contravened a condition of the registration;
 - (c) the registration was issued because of a materially false or misleading representation or declaration.
- 35
- (2) The Commissioner may, for the purposes of considering whether an adjudicator is a suitable person to hold registration, have regard to the matters to which the Commissioner may have regard in deciding whether a person applying for registration as an adjudicator is a suitable person to hold the registration under section 28B(4).
- 40

28O—Show cause notice

- 5
- (1) If the Commissioner believes that a ground exists to suspend or cancel the registration of a person as an adjudicator, the Commissioner must give the person a notice under this section (a *show cause notice*).
- (2) The show cause notice must state—
- 10
- (a) the action (the *proposed action*) the Commissioner proposes to take under this Subdivision; and
- (b) the grounds for the proposed action; and
- (c) an outline of the facts and circumstances forming the basis for the grounds; and
- (d) if the proposed action is suspension of the registration—the proposed suspension period; and
- 15
- (e) an invitation to the adjudicator to show within a stated period (the *show cause period*) why the proposed action should not be taken.
- (3) The show cause period must be a period ending not less than 21 days after the show cause notice is given to the person.

28P—Representations

- 20
- (1) An adjudicator who has been given a show cause notice may make written representations about the show cause notice to the Commissioner in the show cause period.
- (2) The Commissioner must consider all representations made under subsection (1).

28Q—Ending show cause process without further action

If, after considering an adjudicator's written representations in response to a show cause notice, the Commissioner no longer believes that a ground exists for suspending or cancelling the adjudicator's registration, the Commissioner—

- 30
- (a) may not take any further action in relation to the show cause notice; and
- (b) must notify the adjudicator in writing that no further action is to be taken in relation to the show cause notice.

28R—Suspension or cancellation

- 35
- (1) This section applies if—
- (a) an adjudicator has provided written representations in response to a show cause notice and, after considering the representations, the Commissioner still believes a ground exists to suspend or cancel the adjudicator's registration; or
- 40
- (b) there are no written representations in response to a show cause notice.

- 5
- (2) If the Commissioner believes suspension or cancellation of the registration is warranted, the Commissioner may—
- (a) if the proposed action stated in the show cause notice was to suspend the registration for a stated period—suspend the registration for not longer than the stated period; or
 - (b) if the proposed action stated in the show cause notice was to cancel the registration—either cancel the registration or suspend it for a period.
- 10
- (3) The Commissioner must, as soon as possible after deciding to suspend or cancel an adjudicator's registration, give the adjudicator written notice of the decision and the adjudicator's right to appeal against the decision.
- (4) A decision to suspend or cancel an adjudicator's registration takes effect on the later of the following days:
- (a) the day the written notice is given to the adjudicator;
 - (b) the day stated in the written notice for that purpose.

28S—Immediate suspension of registration

- 20
- (1) The Commissioner may suspend the registration of an adjudicator at any time if the Commissioner believes—
- (a) that a ground exists to suspend or cancel the registration; and
 - (b) it is necessary to suspend the registration because there is an immediate and serious risk of harm to the effectiveness of the adjudication of payment claims under this Act.
- 25
- (2) The suspension—
- (a) takes effect when the adjudicator is given—
 - (i) a show cause notice; and
 - (ii) written notice of the Commissioner's decision to suspend the registration; and
 - (b) continues to operate until—
 - (i) the Commissioner cancels the remaining period of the suspension; or
 - (ii) the show cause notice is finally dealt with; or
 - (iii) 28 days have passed since the notices were given to the adjudicator,whichever occurs first.
- 30
- (3) If—
- (a) a suspension under this section ceases because—
 - (i) the Commissioner cancels the remaining period of the suspension; or
- 35
- 40

(ii) the show cause notice is finally dealt with by a decision being made not to cancel or suspend the registration; or

(iii) 28 days have passed since the notices mentioned in subsection (2)(a) were given to the adjudicator; and

(b) the adjudicator has returned the certificate of registration to the Commissioner under section 28T,

the Commissioner must, as soon as practicable, give the certificate of registration to the adjudicator.

28T—Return of cancelled or suspended registration

If the Commissioner has cancelled or suspended the registration of an adjudicator and given the adjudicator written notice of the cancellation or suspension, the adjudicator must, unless the adjudicator has a reasonable excuse, return the certificate of registration to the Commissioner within 7 days after receiving the notice.

Maximum penalty: \$10 000.

28U—Effect of suspension or cancellation of registration

(1) If—

(a) the registration of an adjudicator is suspended or cancelled or otherwise ends; and

(b) an adjudication application has been referred to the adjudicator for an adjudication of a payment claim; and

(c) the adjudicator has not made a decision under section 22 in relation to the adjudication application,

the adjudication application is taken to have been withdrawn by the claimant and the claimant may make a new adjudication application under section 17.

(2) Despite section 17(3), a new adjudication application may be made at any time within 5 days after the claimant becomes aware that the registration has ended.

(3) Part 3 Division 2 applies to a new application mentioned in this section in the same way as it applies to an application under section 17.

(4) The adjudicator is not entitled to any fees or expenses in relation to the adjudication application taken to have been withdrawn under this section.

Subdivision 5—Appeal

28V—Appeals

- (1) A person who is dissatisfied with a decision of the Commissioner to—
- 5 (a) refuse to grant an application for registration as an adjudicator; or
- (b) impose conditions on a person's registration (including amended registration) as an adjudicator; or
- (c) refuse to renew a person's registration as an adjudicator; or
- 10 (d) refuse to amend a person's registration as an adjudicator; or
- (e) suspend or cancel a person's registration as an adjudicator,
- may appeal to the Administrative and Disciplinary Division of the District Court against the decision.
- (2) Subject to subsection (4), an appeal must be instituted within
- 15 1 month of the making of the decision appealed against.
- (3) The Commissioner must, if so required by the applicant, state in writing the reasons for the Commissioner's decision.
- (4) If the reasons of the Commissioner are not given in writing at the
- 20 time of making the decision and the applicant (within 1 month of the making of the decision) requires the Commissioner to state the reasons in writing, the time for instituting an appeal runs from the time at which the applicant receives the written statement of those reasons.

Subdivision 6—Miscellaneous

28W—Grading of adjudicators

- (1) The Commissioner must, as soon as possible after the commencement of this section—
- (a) develop guidelines for the grading of adjudicators; and
- (b) publish the guidelines in the Gazette and on the
- 30 Commissioner's website.
- (2) The guidelines may be amended by the Commissioner at any time.
- (3) The Commissioner must grade all adjudicators in accordance with the guidelines and may review an adjudicator's grade at any time.
- (4) The Commissioner must maintain a list of all adjudicators, including
- 35 each adjudicator's current grade, on the Commissioner's website.

28X—Adjudicator to provide information

A person registered as an adjudicator must provide the Commissioner with such information as may be requested by the Commissioner in relation to the activities of the adjudicator under this Act (including information as to the fees charged by the adjudicator under this Act).

Maximum penalty: \$10 000.

21—Amendment of section 29—Authorised nominating authorities

(1) Section 29(1) to (3) (inclusive)—delete subsections (1) to (3) and substitute:

(1) Subject to this section and the regulations, the Minister may, on application made by any person, grant the applicant an authority to nominate adjudicators for the purposes of this Act.

(2) An authority under subsection (1) may be granted for a term (not exceeding 5 years) determined by the Minister.

(3) An authority under subsection (1) may be renewed by the Minister from time to time, for a term (not exceeding 5 years) determined by the Minister, on application by the authorised nominating authority.

(3a) An application for the grant or renewal of an authority under this section must be accompanied by the prescribed fee.

(3b) The Minister may—

(a) impose conditions on an authority under subsection (1) on granting or renewing the authority; and

(b) vary or revoke a condition of an authority under subsection (1), or impose further conditions on an authority, at any time by notice in writing to the authorised nominating authority.

(3c) The Minister may—

(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.

(3d) The Minister may revoke or refuse to grant or renew an authority under subsection (1) if the Minister is satisfied that the authorised nominating authority has breached or failed to comply with—

(a) a requirement of this Act; or

(b) a condition of the authority.

(3e) If the Minister—

(a) refuses to grant or renew an authority under this section (otherwise than on the ground referred to in subsection (3c)(b)); or

(b) imposes or varies conditions on an authority; or

(c) revokes an authority,

the applicant or authorised nominating authority (as the case may be) may appeal to the Administrative and Disciplinary Division of the District Court against the decision to take that action.

5 (3f) The functions of an authorised nominating authority are—

(a) to nominate adjudicators for the purposes of this Act; and

(b) to receive adjudication applications and refer them to the Commissioner; and

(c) to provide adjudication certificates; and

10 (d) to provide information to the Minister or the Commissioner in accordance with this section; and

(e) to generally carry out any other function or duty given to an authority, or imposed on an authority, by this Act.

(2) Section 29(5)—delete "amount (if any) determined by the Minister" and substitute:
15 prescribed amount

(3) Section 29—delete subsection (7) and substitute:

(7) An authorised nominating authority must, at the times specified by the Commissioner, provide the Commissioner with—

20 (a) a copy of any determination of an adjudicator appointed to determine an adjudication application on referral of the Commissioner; and

25 (b) any other information specified by the Commissioner relating to the activities of the authority under this Act (including information as to the fees charged by the authority under this Act).

(8) An authorised nominating authority required to provide a determination of an adjudicator or other information under this section must provide the determination or information within the time specified by the Commissioner.

30 Maximum penalty: \$20 000.

(9) An authorised nominating authority cannot be compelled to give information under this section if the information might tend to incriminate the authority of an offence or is privileged on the ground of legal professional privilege.

35 **22—Insertion of section 29A**

After section 29 insert:

29A—Code of conduct

(1) The Governor may, by regulation, prescribe a code of conduct to be observed by authorised nominating authorities and adjudicators.

(2) The provisions in a code of conduct may specify whether a contravention of, or failure to comply with, a specified provision of the code is an offence or an expiable offence for the purposes of subsection (3).

(3) An authorised nominating authority or adjudicator must not contravene or fail to comply with a provision of a code of conduct specified for the purposes of this subsection.

Maximum penalty: \$5 000.

Expiation fee: \$210.

23—Amendment of section 30—Adjudicator's fees

(1) Section 30(1)(a), (b) and (c)—delete paragraphs (a), (b) and (c) and substitute:

(a) if the amount of the payment claim that is the subject of the adjudication application is \$25 000 or less—the prescribed hourly rate in addition to reasonable expenses; and

(b) if the amount of the payment claim that is the subject of the adjudication application is more than \$25 000—

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

(ii) if no such amount is agreed—an amount charged at a rate that does not exceed the prescribed hourly rate, in addition to reasonable expenses; or

(iii) if no such amount is agreed and no hourly rate is prescribed—such amount, by way of fees and expenses, as is reasonable having regard to the work done and expenses incurred by the adjudicator.

(2) Section 30—after subsection (5) insert:

(6) If a person who is liable to pay fees and expenses to an adjudicator under this section fails to pay such fees and expenses, the adjudicator may apply to a court of competent jurisdiction for an order that an amount specified in the order is payable to the adjudicator named in the order by the claimant and the respondent in such proportions as are specified in the order.

24—Insertion of section 31A

After section 31 insert:

31A—Recording and publishing of adjudication determinations

(1) The Commissioner must keep a record of all determinations made by an adjudicator in relation to adjudication applications referred to the Commissioner.

- 5
- (2) The Commissioner may publish a determination made by an adjudicator in relation to an adjudication application if—
- (a) the information does not identify a person referred to in the determination or disclose the address or location of that person; and
 - (b) the identity, address or location of a person referred to in an adjudication determination cannot reasonably be determined from the information.
- 10
- (3) Neither the Commissioner nor the Crown incurs any liability for the publication by the Commissioner in good faith in accordance with this section of a determination of an adjudicator in relation to an adjudication application.

25—Insertion of sections 32L and 32M

Before section 33 insert:

15

32L—Offence relating to assault etc in relation to progress payments

20

A person must not directly or indirectly assault, threaten or intimidate, or attempt to assault, threaten or intimidate, a person in relation to an entitlement to, or claim for, a progress payment under this Act.

Maximum penalty:

- (a) in the case of a natural person—\$50 000;
- (b) in the case of a body corporate—\$250 000.

32M—Imputing conduct to bodies corporate

- 25
- (1) For the purposes of proceedings for an offence against this Act, the conduct and state of mind of an officer, employee or agent of a body corporate acting within the scope of their actual, usual or ostensible authority will be imputed to the body corporate.
- 30
- (2) For the purposes of this section, a reference to *conduct* or *acting* includes a reference to failure to act.

26—Amendment of section 33—Certain contract provisions void

Section 33—after subsection (2) insert:

- 35
- (3) A provision of an agreement that makes, or purports to make, a right to claim or receive a payment in accordance with this Act, or a right to claim an extension of time in relation to a matter under this Act, conditional on giving notice is void if compliance with the requirement to give notice would—
- (a) not be reasonably possible; or
 - (b) be unreasonably onerous; or
 - (c) serve no commercial purpose.
- 40

27—Amendment of section 34—Service of notices

Section 34(1)—delete subsection (1) and substitute:

- (1) A notice or document authorised or required by or under this Act to be given or served on a person may be served on the person—
- 5 (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 posting it by registered post in an envelope addressed to the person—
- 10 (i) at the person's ordinary place of business; or
- (ii) if the person has an address for correspondence or service—at that address; or
- (d) by email or fax to an email address or fax number provided by the person (in which case the notice or document will be taken to have been given or served at the time of sending);
- 15 or
- (e) be served in such other manner—
- (i) as may be provided under the relevant construction contract; or
- 20 (ii) as may be prescribed by the regulations.

28—Insertion of section 34A

After section 34 insert:

34A—Annual report

- 25 (1) The Commissioner must, on or before 30 September in each year, present a report to the Minister on the operation and effectiveness of this Act during the previous financial year.
- (2) The Minister must, within 12 sitting days after receipt of a report under this section, cause copies of the report to be laid before each House of Parliament.

29—Amendment of section 35—Regulations

Section 35—after subsection (4) insert:

- 30 (5) The regulations may make provisions of a saving or transitional nature consequent on the enactment of any amendments to this Act or on the commencement of specified provisions of this Act or on the
- 35 making of regulations under this Act.

30—Amendment of section 36—Review of Act

Section 36—after subsection (3) insert:

- 5 (4) A further review of this Act (as amended by the *Building and Construction Industry Security of Payment (Review Recommendations) Amendment Act 2021*) is to be undertaken by the Minister as soon as possible after the period of 5 years from the commencement of this subsection.
- 10 (5) A report on the outcome of the further review is to be tabled in each House of Parliament within 3 months after the end of that period of 5 years.

Schedule 1—Related amendments

Part 1—Amendment of *Building Work Contractors Act 1995*

1—Amendment of section 11—Duration of licence and periodic fee and return etc

- 15 (1) Section 11(2)(a)—delete "fee fixed by regulation" and substitute:
prescribed fee (which must be sufficient to enable payment to be made under subsection (2a))
- (2) Section 11—after subsection (2) insert:
- 20 (2a) The Commissioner must, in each year, pay to the Small Business Commissioner a prescribed proportion of the fee payable under subsection (2)(a) which must be applied by the Small Business Commissioner towards the administrative and regulatory costs associated with carrying out their functions under the *Building and Construction Industry Security of Payment Act 2009*.
- 25 (3) Section 11(7)—after the definition of *licensed building work contractor* insert:
Small Business Commissioner means the person holding or acting in the office of Small Business Commissioner under the *Small Business Commissioner Act 2011*.

Part 2—Amendment of *Plumbers, Gas Fitters and Electricians Act 1995*

2—Amendment of section 11—Duration of licence and periodic fee and return etc

- 35 (1) Section 11(2)(a)—delete "fee fixed by regulation" and substitute:
prescribed fee (which must be sufficient to enable payment to be made under subsection (2a))

(2) Section 11—after subsection (2) insert:

(2a) The Commissioner must, in each year, pay to the Small Business Commissioner a prescribed proportion of the fee payable under subsection (2)(a) which must be applied by the Small Business Commissioner towards the administrative and regulatory costs associated with carrying out their functions under the *Building and Construction Industry Security of Payment Act 2009*.

(3) Section 11(7)—after the definition of *licensed contractor* insert:

Small Business Commissioner means the person holding or acting in the office of Small Business Commissioner under the *Small Business Commissioner Act 2011*.

Schedule 2—Transitional provisions

1—Interpretation

(1) In this Schedule—

principal Act means the *Building and Construction Industry Security of Payment Act 2009*.

(2) Unless the contrary intention appears, a term used in this Schedule and also in the principal Act has the same meaning as it has in that Act.

2—Transitional provisions

(1) Subject to this Schedule, the principal Act as in force immediately before the commencement of this Act continues to apply in relation to a construction contract entered into before that commencement.

(2) If an adjudication is commenced but not completed before the commencement of this Act, the adjudication may be determined in accordance with the principal Act as in force immediately before that commencement.

(3) An adjudicator who is, under section 18 of the principal Act as in force immediately before the commencement of this Act, eligible to be an adjudicator in relation to a construction contract will, despite that commencement, for a period of 6 months after that commencement, remain eligible to be an adjudicator in relation to a construction contract and the adjudicator need not, during that period, comply with any requirement that they be registered as an adjudicator under Part 3 Division 3A of the principal Act.

(4) An authorised nominating authority who is, under section 29 of the principal Act as in force immediately before the commencement of section 21 of this Act, authorised to nominate adjudicators for the purposes of the principal Act, will on that commencement—

(a) be taken to be authorised to nominate adjudicators under section 29 of the principal Act as amended by this Act; and

(b) be so authorised for a term of 2 years from that commencement, or such other period as notified to the authorised nominating authority by the Minister within 3 months after that commencement; and

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Schedule 2—Transitional provisions

- (c) be eligible to apply for a renewal of the authority under section 29 of the principal Act in accordance with that section.