



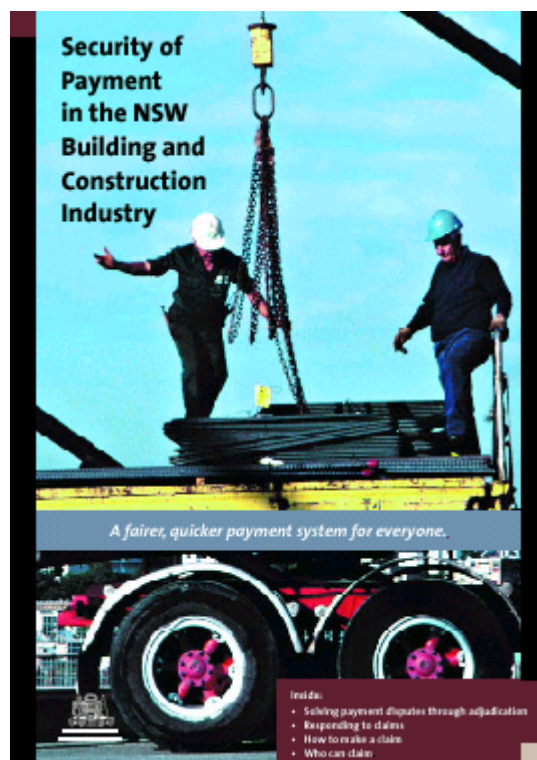
NSW DEPARTMENT
OF PUBLIC WORKS
AND SERVICES

REVIEW DISCUSSION PAPER

OPTIONS FOR ENHANCING

THE

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999



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PURPOSE OF DISCUSSION PAPER

The Building and Construction Industry Security of Payment Act commenced on 26 March 2000. Since that date the Department of Public Works and Services (DPWS) has been monitoring the Act's operation on behalf of the Minister responsible for the Act, the Hon Morris Iemma MP, Minister for Public Works and Services, Minister for Sport and Recreation and Minister Assisting the Premier on Citizenship.

Issues have arisen in regard to the Act which warrant consideration at this time. In addition, the Act is to be reviewed by the Minister by the end of 2002. Section 38 of the Act states:

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.*
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act. [Date of assent 5 October 1999]*
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 3 months after the end of the period of 3 years.*

This Discussion Paper has been prepared to advise industry of the actions proposed by Government to address issues that have arisen to date in relation to the Act and to provide the opportunity for comment on these actions. In addition, there may be further issues that warrant consideration in this package of proposed enhancements.

It is anticipated this Discussion Paper and the responses to it, will form the basis of the Minister's review of the Act and his proposals for enhancements to it.

Comments should be forwarded to:

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This Discussion Paper is available on the Construction Policy Steering Committee's website page www.cpsc.nsw.gov.au/sop. A copy of the *Building and Construction Industry Security of Payment Act 1999* can also be accessed from that website page.

Any enquiries in relation to this matter can be directed to Mr Facey, by phone 93728811, or Mr Phil Armessen, phone 93728854.

Comments are invited by 30 September 2002.

BACKGROUND

The Building and Construction Industry Security of Payment Act has as its object:

.....to ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and supplying of such goods and services. [Section 3(1)]

In the second reading of the Bill on 8 September 1999, the Minister for Public Works and Services stated:

With regard to the background to this bill I remind the House that on 15 February the Premier announced the Government's intention to stamp out the un-Australian practice of not paying contractors for work they undertake on construction. It is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families.

The Government is determined to rid the construction industry of such totally unacceptable practices.

The Minister went on to say:

The main thrust of this bill is to reform payment behaviour in the construction industry. The bill creates fair and balanced payment standards for construction contracts. The standards include use of progress payments, quick adjudication of disputes over progress payment amounts and provision of security for disputed payments while a dispute is being resolved. The bill will speed up payments by removing incentives to delay.

In broad terms the Act applies to all contracts (written or oral) for building and construction work, or for the supply of related goods or services, within NSW, with the exemption of contracts directly with homeowners. It affects all parties who contract for work in the industry, including developers, owners (except homeowners), contractors, subcontractors, consultants and suppliers. The Act:

- provides rights to progress payments, through the serving of payment claims for completed work;
- requires early notice to be given of any disputed payment claim, by way of payment schedules;
- imposes default provisions where a construction contract is silent on payment terms;
- provides for prompt adjudication of disputes over progress payments;
- allows for security to be given for disputed amounts following adjudication; and
- allows suspension of work for non-payment or failure to provide security after adjudication.

FEEDBACK TO DATE

In monitoring the Act, DPWS has received feedback from all sectors of the industry, including individual operators, representative organisations, legal practitioners and the ten organisations authorised by the Minister to nominate adjudicators for the purposes of the Act.

In September 2001, the Minister invited industry organisations to a Forum to provide the opportunity for them to offer proposals on how the Act could be improved. At the Forum, the organisations were asked to rate their satisfaction with the Act to date. Of the 16 that responded:

- 2 were “very satisfied”
- 10 were “satisfied”
- 4 were “dissatisfied”.

Those that were dissatisfied were in fact not dissatisfied with the operation of the Act itself, but were seeking further action by government to address security of payment problems. Specifically, the inclusion of homeowners under the Act was sought, as was the introduction of an industry registration scheme and compulsory insolvency insurance.

The matter of homeowners is covered under Issue 3 later in this Paper. The cost - benefits of an industry registration scheme and insolvency insurance are currently being examined separately by Government.

Whilst it can be said there is general satisfaction with the Act, a number of proposals have nevertheless been made for its improvement. These proposals are incorporated in the Issues discussed later in the Paper.

With regard to the terms of the legislative review of the Act required under section 38, there are essentially two matters to be considered:

- are the policy objectives of the Act still valid; and
- are the terms of the Act appropriate for securing these objectives?

On the first matter, there is no doubt the objectives of the Act remain valid. Non-payments and slow payments continue to be problems within the industry, necessitating the statutory entitlements provided by this Act. Other States have recognised a similar need within their jurisdictions, with Victoria enacting its own Building and Construction Industry Security of Payment Act 2002 (closely based on the NSW Act) on 14 May 2002, and Western Australia and Queensland planning to do likewise by the end of the year.

As to whether the terms of the Act remain appropriate, the general satisfaction being expressed with the Act would indicate that they are. Improvements, however, can be made. Possible improvements already noted by DPWS are discussed in the next section of this Paper.

ISSUES

Based on feedback provided by industry representatives at the Forum in September 2001, and on DPWS' on-going monitoring of the Act, 44 Issues are identified and discussed in this Paper.

A list of DPWS' proposed actions for these Issues is provided in TABLE 1. An explanation of the Issues and discussions on each is provided in TABLE 2. For convenience, references are generally only made to the carrying out of construction work. The matters discussed will equally apply to contracts for the supply of related goods and services.

In most instances where enhancements to the Act are proposed, these could be categorised as "fine-tuning". There are however some major enhancements and additional features being proposed:

- To address the problem of claimants being discriminated against if they use the Act, the proposal is claimants be provided an entitlement under the Act to recover damages from respondents for this discriminatory conduct. [Issue 13].
- To remove the compulsion to take court action for payment where no payment schedule is received, the claimant will have the option of seeking an adjudication instead. [Issue 15].
- If a debt arises under the Act, the subsequent payment of that debt will require payment of interest on the amount owing. [Issue 17].
- The option of providing security as an alternative to payment after an adjudication has meant some claimants have received little practical benefit from the adjudication process. The proposal is to remove the security option. [Issue 27].
- If no payment or security is received by the claimant following an adjudication, the claimant must commence an often lengthy court process to recover the adjudicated amount. The proposal is that the adjudicator's determination be immediately enforceable similar to a judgment of the court. [Issue 32].
- To deal with contract clauses that clearly seek to deter claimants from using the Act, it is proposed the Act render void any contractual provision that places a claimant in a worse position than the claimant would have been had rights under the Act not been pursued. [Issue 42].
- It is proposed a claimant have a lien over unfixed plant or materials for the unpaid portion of the plant or materials. [Issue 43].
- It is proposed to amend the *Contractors Debts Act 1997* so that it covers all debts arising under the *Building and Construction Industry Security of Payment Act*. The *Contractors Debts Act* provides procedures for seeking payments directly from principals in instances of non-payment by respondents. [Issue 44].

A question that has been raised but is not separately dealt with in the following issues is the extent to which there are existing remedies open to the claimant to obtain payment from the respondent following a judgment of the court. The Act provides that when the respondent

- fails to provide a payment schedule and then fails to pay by the due date the amount of the payment claim under the Act; or
- fails to pay the scheduled amount by the due date; or
- fails to pay the adjudicated amount decided by an adjudicator,

the claimant may recover the amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction (sections 15, 16 and 25). The court grants judgment for the debt. Then, if the debt is not paid within whatever time the court allows, State and Commonwealth laws provide the claimant with a number of remedies for pursuing the respondent. These include:

- If the respondent owns goods such as computers, cars or construction plant, the claimant can obtain a court order enabling the sheriff to seize and auction the goods and pay the claimant out of the proceeds.
- If the respondent owns land, the court can order that the land be sold at auction to pay the debt.
- If the respondent is owed money by a third party, the claimant can obtain an order from the court directed to the third party ordering the third party to pay directly out of the money due to the respondent, the amount of the judgment debt and interest.
- The claimant may also apply to bankrupt the respondent or, in the case of a corporation, have the respondent wound up.

If the claimant does not know what assets the respondent has, the claimant can obtain an order that the respondent disclose to the court the respondent's assets and submit to cross-examination.

If the claimant can satisfy the court that the respondent intends to take steps to dispose of assets so that they cannot be taken to satisfy the debt, for example, if the respondent is about to sell assets and flee the jurisdiction with the proceeds, the claimant can obtain an order from the court (an injunction) directing the respondent not to dispose of the assets. Failure to comply with the injunction can be punished by gaol. If the respondent has disposed of assets to a third party, eg. the respondent's wife, the bankruptcy court may order the third party to return the assets or their value.

Sometimes the problem is that the respondent does not have any assets. Where the respondent is completely insolvent, the claimant will be left without a remedy against the respondent but not necessarily without a remedy against a third party. Sometimes the claimant may see that the building upon which the claimant has carried out work (and not been paid) is owned by a third party. The claimant may consider that the third party (the current owner) should meet the respondent's liability. If the third party has been party to any scheme to defraud the claimant of payment for the work, then the claimant would be entitled to bring proceedings directly against the third party. Even in the absence of fraud, if without a legitimate legal basis in law, the third party has received a windfall at the expense of the claimant, then the law recognises a claim for return of an unjust enrichment.

It is clear there are a number of remedies for pursuing a respondent once judgment has been entered. However, it is recognised improvements may be possible in the procedures for obtaining these judgments, making them more expeditious and therefore less costly. This Paper includes a number of proposals directed to that end.

TABLE 1: SUMMARY OF PROPOSED ACTIONS

Issue No.	Section of Act	Proposed Action
1.	3	<p><u>APPLICATION OF THE ACT</u> Redraft Object 2 to clarify that the Act also applies to construction contracts that provide for progress payments.</p>
2.	5	<p><u>CONSTRUCTION WORK DEFINITION</u> Amend the definition of 'construction work' in s5 to also provide for the carrying out of activities under s5(1)(c) to (f) on works forming part of land.</p>
3.	7	<p><u>EXEMPTION OF HOMEOWNERS</u> The inclusion of homeowners under the Act is not proposed at this time.</p>
4.	8	<p><u>SINGLE PAYMENT CONTRACTS</u> Provide within s8(2)(b) that where construction work is completed earlier than 4 weeks after it commenced, an additional reference date for an entitlement to a progress payment will be the date upon which the construction work is completed.</p>
5.	9	<p><u>CLAIMING FOR RELEASE OF SECURITY OR RETENTION MONEY</u> Amend the Act to provide that a payment claim under the Act can be for or can include the amount of retention moneys or security held by the respondent in the form of cash. Then, if the respondent considers that the respondent has grounds for not releasing the moneys, the respondent must state the grounds in the respondent’s payment schedule and the grounds can be tested in adjudication.</p>
6.	11	<p><u>DEFAULT TIME FOR PAYMENT</u> Amend s11(b) to state that the default date for payment will be the date occurring 10 business days after the payment claim, rather than 2 weeks as stated at present.</p>
7.	12	<p><u>PAY WHEN PAID DEFINITION</u> Amend s12(2) to include as a definition of a 'pay when paid' provision, words to the effect: <i>a provision of a contract that makes the liability or due date for payment dependent upon the issue of a certificate or the occurrence of any event or activity under another contract.</i></p>

Issue No.	Section of Act	Proposed Action
8.	13	<p><u>ENTITLEMENT TO CLAIM UNDER THE ACT</u></p> <p>Clarify under s13 that a payment claim may be made by a person referred to in s.8 (ie. a person who has undertaken to carry out construction work or who has supplied related goods or services) claiming to be entitled to a progress payment under the construction contract or the Act.</p>
9.	13	<p><u>FINAL CLAIMS AND PAYMENT CLAIMS</u></p> <p>Clarify the definition of ‘payment claim’ to provide that a payment claim which is stated to be a payment claim made under the Act will, for the purposes of the Act, be regarded as a claim for a progress payment even though the payment claim includes the words ‘final claim’ or purports to be a final claim.</p>
10.	13	<p><u>MILESTONE PAYMENT CLAIMS</u></p> <p>No action is considered necessary to clarify that milestone payments are covered by the Act.</p>
11.	13	<p><u>TIME LIMIT FOR MAKING CLAIMS</u></p> <p>Amend the Act to state that, unless a greater time is expressly specified in the construction contract, a claimant cannot include in a payment claim the value of work carried out more than 12 months before the date of the payment claim.</p>
12.	13	<p><u>REPEAT CLAIMS</u></p> <p>Amend the Act to provide that the claimant may only serve one payment claim under the Act in respect of each reference date.</p>
13.	13	<p><u>ENDORISING THAT A CLAIM IS MADE UNDER THE ACT</u></p> <p>No change is proposed to the requirement that payment claims state they are made under the Act.</p> <p>To deter discrimination against claimants who make claims under the Act, provide that if a respondent to a construction contract discriminates against a claimant who pursues a right under the Act, the claimant will be entitled to recover from the respondent any damages caused by the discriminatory conduct of the respondent.</p>
14.	14	<p><u>TIME FRAME FOR PAYMENT SCHEDULES</u></p> <p>No change is proposed to the requirement for payment schedules to be served within 10 business days.</p>

Issue No.	Section of Act	Proposed Action
15.	15	<p><u>OPTIONAL ADJUDICATIONS</u></p> <p>Amend the Act to:</p> <ol style="list-style-type: none"> 1. provide the claimant with the option to seek adjudication in those instances where the claimant received neither a payment schedule nor full payment for a claim made under the Act; 2. qualify that no decision or agreement by the claimant prior to the due date for the payment schedule will have any effect in relation to the claimant’s decision to proceed to adjudication; 3. provide that the claimant must advise the respondent of the decision to seek adjudication no later than 20 business days after the due date for payment. This advice will include an invitation to submit a payment schedule; 4. provide that following the invitation to submit a payment schedule, the respondent will have 5 business days to serve the schedule on the claimant; and 5. provide that the adjudication will then proceed in accordance with ss17-26 of the Act, even if the respondent fails to serve a payment schedule as per 4 above. If there is no payment schedule, the adjudication application must be made within 5 business days of the due date of the schedule (or 10 days if the proposal at Issue 18 is adopted), and the respondent will be precluded from making any submission to the adjudicator. The adjudicator’s determination will then be based solely on the payment claim, the adjudication application and the contract terms.
16.	15,16&25	<p><u>DEFENCES IN COURT ACTIONS</u></p> <p>Expand ss15, 16 and 25 to clarify that defences which could have been raised in a payment schedule and cross claims are inadmissible in recovery action for a statutory debt created by the Act.</p> <p>The Government’s information kit on the Act will include a statement detailing the nature of defences available to the respondent in court actions under the Act. The possibility of the claimant including this statement in the Statement of Liquidated Claim when commencing court action will be explored.</p>

Issue No.	Section of Act	Proposed Action
17.	15,16&25	<p><u>INTEREST ON OVERDUE PAYMENTS</u></p> <p>Include in the Act a provision to the effect that if the respondent fails to pay the claimant the full amount of a progress payment to which the claimant is entitled under the Act, the respondent must pay interest on the unpaid portion from the due date to the date of payment or judgment, at the greater of:</p> <p>(a) the rate of interest, if any, provided in the construction contract in respect of late payment of moneys due to the claimant; and</p> <p>(b) the rate applicable under the Supreme Court Rules on judgment debts.</p> <p>Claimants may then include in a subsequent payment claim, any unpaid interest due under the Act.</p>
18.	17	<p><u>TIMEFRAME FOR ADJUDICATION APPLICATIONS</u></p> <p>Extend the timeframe in s17(3)(b) for claimants to make adjudication applications from 5 to 10 business days.</p>
19.	17	<p><u>REPEAT ADJUDICATIONS</u></p> <p>Amend the Act to provide that if the value of an element of work has been determined by an adjudicator then in any subsequent adjudication, that element of work will be taken to have the value determined in the previous adjudication unless the claimant or respondent satisfies the adjudicator that the value has changed since the previous adjudication.</p>
20.	17	<p><u>SELECTION OF AN ADJUDICATOR</u></p> <p>Amend s17(3) to provide that an adjudication application may only be made to an authorised nominating authority, chosen at the discretion of the claimant.</p>
21.	17	<p><u>NOMINATION OF AN ANA PRIOR TO A DISPUTE</u></p> <p>If the proposal under Issue 20 to provide that an adjudication application may only be made to an authorised nominating authority chosen by the claimant is not adopted, include in s17 that any agreement between the parties on the choice of an authorised nominating authority is void if made before receipt of the payment schedule.</p>
22.	17 & 20	<p><u>QUALITY OF ADJUDICATION SUBMISSIONS</u></p> <p>The Government’s information kit be expanded to include detailed guidelines to assist in the preparation of adjudication applications and adjudication responses.</p>

Issue No.	Section of Act	Proposed Action
23.	18	<p><u>QUALITY OF ADJUDICATORS</u></p> <p>Liaison will occur with industry organisations on suitable minimum qualifications for adjudicators. These will then be prescribed by regulation if the need is confirmed.</p>
24.	20	<p><u>DETAILS IN ADJUDICATION RESPONSES</u></p> <p>Expand s20 to clarify the respondent is not entitled to include in the adjudication response reasons for withholding payment that were not identified in the payment schedule.</p>
25.	22	<p><u>MINOR ERRORS IN ADJUDICATION DETERMINATIONS</u></p> <p>Extend the slip rule to adjudication determinations so that an adjudicator or a court can correct an accidental slip or omission.</p>
26.	22	<p><u>REASONS FOR ADJUDICATOR’S DETERMINATION</u></p> <p>Remove the requirement under s22(3) for a party to request the inclusion of reasons in the adjudicator’s determination and that provision of reasons become mandatory.</p>
27.	23	<p><u>SECURITY OPTION</u></p> <p>Remove the option under s23(1)(b) of the respondent giving the claimant security for payment of the adjudicated amount.</p>
28.	23	<p><u>FORM OF SECURITY</u></p> <p>If the security option under s23(1)(b) is removed as proposed under Issue 27, no action is required. Otherwise, amend s23 to provide that only agreements reached following receipt of the payment schedule will have effect on the form of security that can be given.</p>
29.	24	<p><u>TRUST ACCOUNTS</u></p> <p>If the security option under s23(1)(b) is removed as proposed under Issue 27, no action is required. Otherwise, amend the Act or introduce a regulation to ensure claimants are better informed on the security being held in trust accounts.</p>
30.	25	<p><u>DUE DATE FOR PAYMENT OR PROVISION OF SECURITY AFTER ADJUDICATION</u></p> <p>Clarify under s25(5)(a) that the relevant date for the respondent to provide security or make payment following an adjudication is calculated from the date upon which a copy of the adjudicator's determination is served on the respondent.</p>

Issue No.	Section of Act	Proposed Action
31.	25	<p><u>TIME FOR PAYMENT OR PROVISION OF SECURITY AFTER ADJUDICATION</u></p> <p>Under s25(5)(a) increase the time for payment or provision of security after an adjudication from 2 to 5 business days.</p>
32.	25	<p><u>COURT RECOVERY AFTER ADJUDICATIONS</u></p> <p>Amend the Act to provide:</p> <ol style="list-style-type: none"> 1. for an adjudicator’s determination to be enforceable similar to a judgment of the court; and 2. that all adjudications must be arranged through authorised nominating authorities.
33.	27	<p><u>RESUMPTION OF WORK AFTER SUSPENSION</u></p> <p>Amend s27(2) to provide that the claimant must resume work “as soon as practicable” after the respondent complies with its obligations under the Act.</p>
34.	28	<p><u>NUMBER OF ANAS</u></p> <p>If necessary, provide under the Act that the Minister is entitled to limit the number of authorised nominating authorities.</p>
35.	28	<p><u>AUTHORISING OF ANAS</u></p> <p>No action is required to ensure authorised nominating authorities are properly authorised under the Act to nominate adjudicators.</p>
36.	29	<p><u>FEES FOR ANAS</u></p> <p>Amend the Act:</p> <ol style="list-style-type: none"> 1. To allow authorised nominating authorities to charge fees to claimants; 2. To make provision so that maximum fees could be set by regulation; 3. If Issue 20 does not proceed, to make void any agreement between a claimant and respondent in relation to the choice of an authorised nominating authority before receipt of the payment schedule; and 4. To require authorised nominating authorities to provide such reports to the Minister as may be requested by the Minister from time to time.
37.	29	<p><u>APPORTIONING OF ADJUDICATOR’S FEES</u></p> <p>Amend s29(3) so that the claimant and respondent are equally liable for the adjudicator’s fee and the fee, if any, paid by the claimant to the ANA upon lodgement of the adjudication application, unless the adjudicator determines a different proportioning of the fee is warranted. The part, if any, of the ANA fee paid by the claimant, which must be paid by the respondent, should be included in the adjudicated amount.</p>

Issue No.	Section of Act	Proposed Action
38.	29	<p><u>NON-PAYMENT OF ADJUDICATOR’S FEE BY RESPONDENT</u></p> <p>Provide for an authorised nominating authority to certify if the claimant has paid the respondent’s share of the adjudicator’s fees. The claimant may then rely on this certification to have judgment for the amount paid to be entered by the registrar of the court.</p>
39.	30	<p><u>LIABILITY OF ADJUDICATORS</u></p> <p>Expand s30 to provide adjudicators an exemption from liability where the adjudicator also acts in the “reasonable belief” that the adjudicator is exercising a function under the Act.</p>
40.	-	<p><u>LIABILITY OF ANAS</u></p> <p>Amend the Act to provide that while performing their functions in good faith, authorised nominating authorities would have a similar exclusion from liability as proposed under s30 for adjudicators.</p>
41.	31	<p><u>SERVICE OF NOTICES</u></p> <p>Amend the Act so that where a construction contract expressly provides for service of notices on the respondent or the claimant, then in addition to methods of service already permitted by the Act (s31), notices under the Act may be served in the manner, upon the person and at the place nominated in the construction contract.</p>
42.	34	<p><u>CIRCUMVENTION OF THE ACT</u></p> <p>Amend the Act to render void any contractual provision that places a claimant pursuing its rights under the Act in a worse position than the claimant would have been had the claimant not pursued its rights.</p>
43.	-	<p><u>OWNERSHIP OF UNFIXED MATERIALS</u></p> <p>Include a provision in the Act that, notwithstanding a contrary provision in a construction contract, a claimant will have a lien over unfixed plant or materials (supplied by the claimant to the respondent) for the unpaid portion of the price payable by the respondent for the plant or materials.</p>
44.	-	<p><u>CLAIMS ON PRINCIPALS</u></p> <ol style="list-style-type: none"> 1. Amend the <i>Contractors Debts Act 1997</i> so that it covers all debts due under the <i>Building and Construction Industry Security of Payment Act</i>. 2. Identify in the <i>Building and Construction Industry Security of Payment Act</i> the option of using the <i>Contractors Debts Act</i> to recover from the principal, money owed by a defaulting respondent. 3. Include in the Government’s information kit on the <i>Building and Construction Industry Security of Payment Act</i> an explanation of the operation of the <i>Contractors Debts Act</i>.

TABLE 2: DISCUSSION OF ISSUES

Issue No.	Section of Act	Issue
1.	3	<p><u>APPLICATION OF THE ACT</u></p> <p>The Issue It has been contended that Object 2 of the Act can be interpreted to mean the Act does not apply to contracts that already provide for progress payments.</p> <p>Discussion Object 2 states: <i>The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment in circumstances where the relevant construction contract fails to do so.</i></p> <p>There was no intention that the Act would only be applicable to contracts that made no provision for progress payments.</p> <p>Proposed Action Redraft Object 2 to clarify that the Act also applies to construction contracts that provide for progress payments.</p>
2.	5	<p><u>CONSTRUCTION WORK DEFINITION</u></p> <p>The Issue The definition of construction work under s5(1)(c) to (f) includes certain related activities only if they are undertaken on buildings or structures.</p> <p>Discussion Construction work as defined in s5(1) of the Act involves work on: (a) buildings or structures; or (b) works forming part of land.</p> <p>Listed under (b) are roadworks, power lines, telecommunication apparatus, harbours, pipelines, reservoirs, industrial plant, etc. The drafting implies these may be works, which are not <i>buildings or structures</i>.</p> <p>s5(1)(c) defines installation of fittings in any <i>building or structure</i> as 'construction work'.</p> <p>s5(1)(d) refers to cleaning of <i>buildings or structures</i>.</p> <p>s5(1)(e) refers to prefabrication of components for any <i>building or structure</i>.</p> <p>s5(1)(f) refers to painting of any surface of any <i>building or structure</i>.</p> <p>These activities should be 'construction work' even when they relate to works, which are arguably not <i>buildings or structures</i>. For example, prefabrication of pipes for a pipeline, cleaning and painting of the pipeline should be 'construction work' even if the pipeline is to be underground and would not be a <i>building or structure</i>.</p>

Issue No.	Section of Act	Issue
		<p>Proposed Action Amend the definition of 'construction work' in s5 to also provide for the carrying out of activities under s5(1)(c) to (f) on works forming part of land.</p>
3.	7	<p><u>EXEMPTION OF HOMEOWNERS</u></p> <p>The Issue There have been a number of requests that contracts with homeowners be incorporated into the Act.</p> <p>Discussion At present the Act does not apply to a construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in [s7(2)(b)].</p> <p>Where the homeowner has the benefit of a policy of insurance under the Home Building Act 1989, the homeowner has a measure of protection in the event that a contractor fails to complete the work. Notwithstanding this some homeowners wrongfully withhold progress payments to which the contractor is legitimately entitled. This purportedly leads to many disputes.</p> <p>An important reason for the exemption provided by s7(2)(b) was the fact that homeowners rarely contract for building work and that under s15 the failure of a homeowner to serve on the contractor a payment schedule within 10 business days would mean that the homeowner was automatically indebted to the contractor for the <i>claimed amount</i> even though it may considerably exceed the <i>correct amount</i>. This was considered to be too great an obligation and subsequent risk to impose on a person who in most cases is not involved in contracting in the building industry.</p> <p>Additionally the then Fair Trading Tribunal (now the Consumer, Trader and Tenancy Tribunal) was considered the appropriate mechanism to manage disputes between homeowners and builders.</p> <p>If homeowners were to be included, one option would be to only have the Act apply to contracts with homeowners over a certain amount, eg contracts greater than say \$20,000. This would reduce the risk to larger projects, and not affect many smaller home renovation projects.</p> <p>Another option is to provide that in the case of disputes with homeowners following a failure of the homeowner to submit a valid payment schedule, the claimant must have an adjudicator determine the claimant's entitlement before the claimant can recover the debt. This would provide the homeowner with a measure of protection, which does not presently exist, against unreasonable claims. With this protection, and the benefit of insurance, it could be argued that the exemption [in s7(2)(b)] should not apply to a construction contract where the contractor has taken out a policy of insurance required under the Home Building Act 1989. The Act would still not apply to the small contracts</p>

Issue No.	Section of Act	Issue
		<p>for which insurance is not required (under \$12,000) and contracts where the contractor has failed to take out insurance.</p> <p>Irrespective of these options the situation could still arise where a homeowner is either forced into paying an unreasonable amount or forced into an adjudication process with its tight timeframes and process requirements, simply because the homeowner inadvertently neglected to make a timely response to an ambit claim. These scenarios were considered in the original drafting of the Act and were rejected at that time as being inappropriate for persons who rarely contract for building work.</p> <p>There remain provisions under the <i>Home Building Act</i> and through the Consumer, Trader and Tenancy Tribunal for disputes with homeowners to be managed. The Tribunal has recently been restructured to be a more effective dispute resolution mechanism, both financially and operationally.</p> <p>On balance, circumstances have not changed to an extent that the inclusion of homeowners within the Act is warranted at this stage. In fact the restructure of the Tribunal is likely to now make that decision even more relevant.</p> <p>Proposed Action The inclusion of homeowners under the Act is not proposed at this time.</p>
4.	8	<p><u>SINGLE PAYMENT CONTRACTS</u></p> <p>The Issue If a contract specifies that payment will be by way of a single payment at completion of the work, does this satisfy the Act’s objective that there be a right to progress payments?</p> <p>Discussion s3(1) states: <i>The object of this Act is to ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services.</i></p> <p>In addition, s8(1) states that a person who undertakes construction work or who supplies related goods and services, is entitled to a progress payment under the Act.</p> <p>Accordingly, advice to DPWS is that if a contract specifies that payment will be by way of a single payment at completion of the work, the Act imposes a statutory entitlement to progress payments. The default dates for calculating these payments are at 4 weeks intervals, commencing 4 weeks after construction work was first carried out [s8(2)(b)]. Claims may therefore be made every 4 weeks, with payments becoming due 2 weeks after making the claims, in accordance with s11(b).</p>

Issue No.	Section of Act	Issue
		<p>A large amount of construction work is undertaken under a single payment arrangement, with the work frequently being completed within 4 weeks. Under the above interpretation, a payment claim under the Act can only be made 4 weeks after commencement of work because that is when the Act specifies the first entitlement to a progress payment occurs [s8(2)(b)]. To enable a claim under the Act to be made on completion if completion occurs within 4 weeks of work commencing, an earlier reference date occurring on completion of work is proposed.</p> <p>This reference date would be in addition to the first reference date already nominated under s8(2)(b) and be independent of the subsequent reference dates. This is to avoid the default dates for claiming being caught up in disputes over completion dates. So if there remains an unresolved dispute over the completion date, this will not prevent a claimant serving a payment claim 4 weeks after work commenced and at 4 weeks intervals thereafter.</p> <p>Proposed Action Provide within s8(2)(b) that where construction work is completed earlier than 4 weeks after it was commenced, an additional reference date for an entitlement to a progress payment will be the date upon which the construction work is completed.</p>
5.	9	<p><u>CLAIMING FOR RELEASE OF SECURITY OR RETENTION MONEY</u></p> <p>The Issue Disputes over payment under construction contracts frequently arise when the respondent refuses to release to the claimant security or retention moneys.</p> <p>Discussion It is common in construction contracts to find a provision that the party performing the work must provide security for performance or that the other party is entitled to retain a percentage of the amount of progress payments as retention moneys. Retention moneys are another form of security. Sometimes security is in cash. Sometimes it is initially in another form and is subsequently converted to cash.</p> <p>The conditions contained in some contracts enable the claimant to include in progress claims the amount of retention moneys or cash security that the respondent holds and which the claimant says is due for release. However, many construction contracts don't.</p> <p>The dispute usually turns on issues such as whether the time for release has arrived, whether work has been omitted or is defective or the value of unfinished or defective work. These are the kind of issues which adjudicators have to deal with in adjudications. Sometimes the respondent simply fails to provide any reason for refusing to release retention moneys or security. It is desirable that the respondent should provide reasons and that the reasons should be able to be tested in adjudication. At present, without going to court or arbitration, there is no mechanism for compelling the respondent to disclose the</p>

Issue No.	Section of Act	Issue
		<p>respondent’s reasons for not releasing retention money or security or, if the respondent does provide reasons, for testing those reasons.</p> <p>Security can be in many forms other than cash. An unconditional undertaking by a bank (a “bank guarantee”) is the most common form. While there continue to be issues between the parties yet to be finally decided, it does not seem unreasonable that the respondent should be able to retain a bank guarantee until a court or arbitrator decides that it must be released. But if the respondent converts the security to cash then there is a risk that by the time the claimant obtains an award, the cash will no longer be available. Moreover, the financial consequences for the claimant when the respondent cashes a bank guarantee or other security can be severe. There seems to be no reason for treating security in the form of cash differently from retention moneys.</p> <p>Proposed Action Amend the Act to provide that a payment claim under the Act can be for or can include the amount of retention moneys or security held by the respondent in the form of cash. Then, if the respondent considers that the respondent has grounds for not releasing the moneys, the respondent must state the grounds in the respondent’s payment schedule and the grounds can be tested in adjudication.</p>
6.	11	<p><u>DEFAULT TIME FOR PAYMENT</u></p> <p>The Issue In weeks where there are non-business days other than Saturday and Sunday, the default date for payment under s11(b) occurs prior to the date for serving the payment schedule.</p> <p>Discussion Under s11(b), when a construction contract makes no express provision for when a progress payment becomes due, it becomes due 2 weeks after the progress claim is made. The payment schedule must be served within 10 business days after the progress claim is made (s14.4). The consequence is the payment may become due before the payment schedule has to be served.</p> <p>It is proposed (in this instance only) to make the time when the progress payment becomes due the same as the time when the payment schedule must be served (10 business days).</p> <p>Proposed Action Amend s11(b) to state that the default date for payment will be the date occurring 10 business days after the payment claim, rather than 2 weeks as stated at present.</p>

Issue No.	Section of Act	Issue
7.	12	<p><u>PAY WHEN PAID DEFINITION</u></p> <p>The Issue While pay when paid provisions have been rendered void by s12 of the Act, there is nothing to stop the timing or quantum of a payment being linked to the timing or quantum of a certification under another contract.</p> <p>Discussion A subcontract could provide that the amount of a progress payment to a subcontractor shall be the amount certified by the principal's superintendent under the head contract and the date for payment will be 7 days after the date for payment by the principal under the head contract. It could be argued such a clause is not rendered void by s12 although it effectively denies the subcontractor an entitlement to payment for work done by the subcontractor until the head contractor is entitled to payment by the principal for that work.</p> <p>Proposed Action Amend s12(2) to include as a definition of a 'pay when paid' provision, words to the effect: <i>a provision of a contract that makes the liability or due date for payment dependent upon the issue of a certificate or the occurrence of any event or activity under another contract.</i></p>
8.	13	<p><u>ENTITLEMENT TO CLAIM UNDER THE ACT</u></p> <p>The Issue There have been arguments that the right to serve a payment claim under the Act is dependent on an entitlement to a progress payment under the contract.</p> <p>Discussion This matter is linked to the discussion under Issue 4 on the entitlement of a claimant to receive progress payments. s8(1) provides that a person who undertakes construction work or who supplies related goods and services, is entitled to a progress payment <u>under the Act</u>. However, s13(1) states: <i>A person who is entitled to a progress payment under a construction contract (the Claimant) may serve a payment claim on the person who under the contract is liable to make the payment.</i></p> <p>On the basis of s13(1), it has been argued that a payment claim under the Act can only be made if there is an entitlement at that time to a progress payment <u>under the contract</u>. Where there is no such entitlement, the argument is the claim cannot be validly made under the Act, and there is therefore no need to serve a payment schedule in response.</p> <p>There is a second aspect. It is the question of whether, if there is no entitlement to an amount (either under the Act or the contract), a claim can be made. Is the</p>

Issue No.	Section of Act	Issue
		<p>entitlement to make a claim dependant upon the existence of an entitlement to a progress payment of some amount, no matter how small? For example, if, because work is defective, there is no amount due to the claimant, can the claimant make a valid payment claim? Just as a claimant can validly institute legal proceedings claiming a payment, even though it may ultimately be proved that the claim was not justified, so too a claimant should be able to make a valid payment claim under the Act even though it may ultimately be proved that no payment is due. If a valid claim could only be made if an amount was due, then the purpose of adjudication would be defeated. An adjudicator would have no jurisdiction unless an amount was due.</p> <p>The scheme of the Act though is to provide a statutory entitlement to progress payments where the contract fails to do so (s3(2)), and to provide that these payments are recoverable by making a payment claim (s3(3)). The intention is that provided a payment claim states it is made under the Act (s13(2)), it will, for the purposes of the Act, be regarded as a proper claim for a progress payment and must be responded to by way of a payment schedule. In response to such a claim, the schedule may simply give reasons why under the contract no payment is due, but these reasons must be given if the full amount of the claim is not to be recoverable under s15.</p> <p>It is appropriate that this matter be clarified in the Act.</p> <p>Proposed Action Clarify under s13 that a payment claim may be made by a person referred to in s.8 (ie. a person who has undertaken to carry out construction work or who has supplied related goods or services) claiming to be entitled to a progress payment under the construction contract or the Act.</p>
9.	13	<p><u>FINAL CLAIMS AND PAYMENT CLAIMS</u></p> <p>The Issue There is some confusion as to whether a final claim under a contract can be a payment claim under the Act.</p> <p>Discussion This issue is similar to that discussed under Issue 8 – Entitlement to Claim under the Act. The intention was that if a payment claim bears the endorsement that it is made under the Act, this is notice it is a valid claim under the Act and must be dealt with accordingly. The fact it also includes the endorsement “final claim” is immaterial. The respondent should provide a payment schedule, and value the claim in accordance with the terms of the contract.</p> <p>Proposed Action Clarify the definition of ‘payment claim’ to provide that a payment claim which is stated to be a payment claim made under the Act will, for the purposes of the Act, be regarded as a claim for a progress payment even though the payment claim includes the words ‘final claim’ or purports to be a final claim.</p>

Issue No.	Section of Act	Issue
10.	13	<p><u>MILESTONE PAYMENT CLAIMS</u></p> <p>The Issue Are payment claims based on milestones covered under the Act?</p> <p>Discussion It has been proposed that the Act exempts contracts in which payments are made on a milestone basis. The debate centres on the interpretation of :</p> <ul style="list-style-type: none"> • s7.2c under which it is argued the Act provides exemption because the amount to be paid under a milestone may not necessarily match the value of work to date; and • s8.2 where it is questioned whether a milestone, based on a stage of the work can be taken as a "reference date". If not, then payments have to be claimed on a 4 weekly basis which defeats the intent of the milestones. <p>s9 of the Act, which provides that the progress payment entitlement is either the amount calculated in accordance with the contract or the amount calculated on the basis of value of work done, clearly provides for payment by milestones.</p> <p>Additionally, s7(2)(c), which exempts “a construction contract under which it is agreed that the consideration payable.....is to be calculated otherwise than by reference to the value of the work carried out...”, is referring to payments for the total contract, not separate progress payments.</p> <p>It is agreed that if the contract is not drafted tightly enough to provide an “express date” for the milestone, the default provisions for claims and payments could be argued to apply. For example, “completion of slab” may not be sufficient because of the lack of definition of “completion”.</p> <p>Proposed Action No action is considered necessary to clarify that milestone payments are covered by the Act.</p>
11.	13	<p><u>TIME LIMIT FOR MAKING CLAIMS</u></p> <p>The Issue There is no cap on when a claimant can submit a Payment Claim under the Act.</p> <p>Discussion It is conceivable that even years after completion of construction work a claimant may serve a payment claim on the respondent. If the respondent does not provide a payment schedule within 10 business days, the respondent then becomes liable to pay the full amount of the claim.</p> <p>Clearly such a situation is open to abuse by claimants and calls for a cap on when a claim can be validly made under the Act. 12 months after completion of that part of the work that is subject to the claim is considered reasonable.</p> <p>Proposed Action Amend the Act to state that, unless a greater time is expressly specified in the construction contract, a claimant cannot include in a payment claim the value of work carried out more than 12 months before the date of the payment claim.</p>

Issue No.	Section of Act	Issue
12.	13	<p><u>REPEAT CLAIMS</u></p> <p>The Issue At present there is no limit on how many payment claims can be made under the Act for any particular construction work.</p> <p>Discussion A vexatious claimant may serve the same payment claim repeatedly over a period of time, with the hope that the respondent will eventually fail to serve a payment schedule. The claimant could then recover the full amount of the claim through the court under s15 of the Act. Clearly it was not intended that the Act be applied in this manner.</p> <p>Rather than set an arbitrary number of times a claim can be made, the claims may be linked to the reference dates for claiming with the claimant only able to serve one payment claim in respect of each reference date. In conjunction with this, Issue 11 separately suggests that there be a time cap within which a claimant can submit a payment claim under the Act.</p> <p>Proposed Action Amend the Act to provide that the claimant may only serve one payment claim under the Act in respect of each reference date.</p>
13.	13	<p><u>ENDORISING THAT A CLAIM IS MADE UNDER THE ACT</u></p> <p>The Issue Claimants have been delayed in being able to use the Act to resolve payment disputes because their initial invoices did not state they were made under the Act as is the current requirement.</p> <p>Subcontractors have also alleged to being threatened with no further work if they claim under the Act.</p> <p>Discussion Under s13(2)(c), to obtain the benefit of the Act, a claimant must include on the payment claim words to the effect , "This payment claim is made under the Building and Construction Industry Security of Payment Act 1999". It was decided to include this warning for the respondent because failure by the respondent to serve a payment schedule within time automatically results in the respondent being indebted to the claimant for the whole amount of the payment claim. Failure to serve a payment schedule also detracts from a key objective of the Act, in that it denies the claimant early notification of reasons for non-payment.</p> <p>It has been proposed that the requirement for such endorsement on the payment claim be removed and it be deemed that all payment claims are subject to the Act. The argument then is that if a dispute arises and in order to seek remedies under the Act, this will remove the need for claimants to issue a new payment claim with the endorsement when the original claim was not made under the</p>

Issue No.	Section of Act	Issue
		<p>Act. Additionally, this would also remove the opportunity for contractors to threaten subcontractors with no further work if they persist in claiming under the Act.</p> <p>The feedback to DPWS is that there is still a considerable lack of awareness of the Act within the industry. The argument for requiring the endorsement could then be said to be just as valid today as it was when the Act was initially drafted. Further, without a clear warning, a real danger exists that even the best organised and informed respondent may miss the relevance of a document which is a payment claim, but on first analysis may not look like a claim.</p> <p>The requirement to state the claim is made under the Act can be of benefit to the claimant also. If no endorsement is required, consider a claimant who is unfamiliar with the Act and a respondent who is familiar with the Act. The respondent will return the payment schedule within time, but the claimant may be unaware that it has only 5 days to apply for adjudication. The claimant, through lack of knowledge of the Act, in all probability will miss the opportunity to use the Act to resolve its payment dispute. The requirement for the endorsement can be argued to be an educational prompt and warning for both parties.</p> <p>With regard to the issue of threats, it is questionable whether deeming all claims to be under the Act will solve this matter. Unscrupulous respondents will simply threaten to offer no further work if the claimant seeks to apply the Act at the next phase, for example if the claimant applies for adjudication or if the claimant seeks to recover a debt under the Act through the courts. The possibility of threats will exist whenever a claimant seeks to pursue its rights under the Act.</p> <p>An option to deter discrimination against claimants who pursue rights under the Act, is to provide a claimant with the right to recover from the respondent any damages caused by discriminatory conduct of the respondent. Discrimination would include discrimination in respect of opportunities for the claimant to enter future contracts with the respondent. Linked to this issue is the separate proposal under Issue 42 to render void any contractual provision that places a claimant pursuing its rights under the Act in a worse position than the claimant would have been had the claimant not pursued its rights.</p> <p>Proposed Action</p> <p>No change is proposed to the requirement that payment claims state they are made under the Act.</p> <p>To deter discrimination against claimants who make claims under the Act, provide that if a respondent to a construction contract discriminates against a claimant who pursues a right under the Act, the claimant will be entitled to recover from the respondent any damages caused by the discriminatory conduct of the respondent.</p>

Issue No.	Section of Act	Issue
14.	14	<p><u>TIME FRAME FOR PAYMENT SCHEDULES</u></p> <p>The Issue It has been contended that the 10 day period for the respondent to provide a payment schedule is too short.</p> <p>Discussion This is an issue that was debated at length during the initial drafting of the Act. The arguments are essentially based on a desire to incorporate sufficient time to obtain the client’s approval prior to agreeing to pay the claimant a scheduled amount.</p> <p>The Act quite specifically deals with matters on a contract by contract basis, requiring contracting parties to take responsibility for their own obligations under the contract. There is no restriction though on timeframes for making progress claims to be structured in such a way to facilitate better integration between contracts.</p> <p>It is also noted that most standard form contracts provide for certificates, detailing the amounts to be paid, to be served within 10 business days of a claim. In many cases, failure to serve such certificates makes the amount of the claim payable in terms of the contract.</p> <p>Proposed Action No change is proposed to the requirement for payment schedules to be served within 10 business days.</p>
15.	15	<p><u>OPTIONAL ADJUDICATIONS</u></p> <p>The Issue If a claimant does not receive a payment schedule and is not paid, the only recourse available to the claimant under the Act is to seek recovery of the claimed amount through a court of competent jurisdiction (s15). The claimant may prefer to have the matter adjudicated rather than take court action.</p> <p>Discussion A major reported benefit of the Act is that it forces the respondent to advise the claimant within 10 business days if the respondent disputes the amount claimed. In most cases the parties are then getting together and resolving their dispute in a timely fashion. Any watering down of the necessity for the respondent’s payment schedule within 10 business days will correspondingly water down this benefit of the Act and must be avoided.</p> <p>There may however, be merit in providing a mechanism to avoid court actions that can be lengthy, costly and discouraging for many claimants.</p> <p>The claimant may be provided with the <u>option</u> of having an adjudicator determine the amount payable if both a payment schedule and payment in the amount of the claim are not received from the respondent on the due date. In this circumstance the claimant may choose to either:</p>

Issue No.	Section of Act	Issue
		<p>1. proceed directly to court to recover the claimed amount (s15); or</p> <p>2. proceed to adjudication for resolution of the matter.</p> <p>If the proposals under Issues 27 and 32 in this Paper proceed, the option of proceeding to adjudication will be even more attractive than at present. Under Issue 27 consideration is being given to removing a respondent’s option of giving security for the amount of the adjudicator’s determination. Payment of the determination will be required. If payment is not made, under Issue 32 it is proposed that the adjudicator’s determination will be immediately enforceable similar to a judgment of the court. A court hearing will therefore not be necessary before recovery action against the claimant can be commenced.</p> <p>The result will be that adjudication may be the quicker and more cost effective mechanism for recovering debts under the Act.</p> <p>It is not intended that the adjudication process or consequences be different to those currently provided by the Act, to avoid introducing added complexities.</p> <p>Proposed Action Amend the Act to:</p> <ol style="list-style-type: none"> 1. provide the claimant with the option to seek adjudication in those instances where the claimant received neither a payment schedule nor full payment for a claim made under the Act; 2. qualify that no decision or agreement by the claimant prior to the due date for the payment schedule will have any effect in relation to the claimant’s decision to proceed to adjudication; 3. provide that the claimant must advise the respondent of the decision to seek adjudication no later than 20 business days after the due date for payment. This advice will include an invitation to submit a payment schedule; 4. provide that following the invitation to submit a payment schedule, the respondent will have 5 business days to serve the schedule on the claimant; and 5. provide that the adjudication will then proceed in accordance with ss17-26 of the Act, even if the respondent fails to serve a payment schedule as per 4 above. If there is no payment schedule, the adjudication application must be made within 5 business days of the due date of the schedule (or 10 days if the proposal at Issue 18 is adopted), and the respondent will be precluded from making any submission to the adjudicator. The adjudicator’s determination will then be based solely on the payment claim, the adjudication application and the contract terms.

Issue No.	Section of Act	Issue
16.	15,16&25	<p><u>DEFENCES IN COURT ACTIONS</u></p> <p>The Issue It is not abundantly clear in the Act that when an action is commenced in court to recover a debt arising from the Act, the defences available to the respondent are limited. Cross-claims under the contract, for example, are inadmissible.</p> <p>Discussion When a claimant commences court proceedings to obtain a judgment for the statutory debt owed by a respondent under s15, s16 or s25 of the Act, the respondent is entitled to lodge a defence. However this defence should be limited to matters pertaining to the operation of the Act, rather than matters arising from the contract.</p> <p>The scheme of the Act is that if the respondent wishes to resist payment of a progress claim, the respondent must state the grounds for this resistance in a payment schedule served upon the claimant within 10 business days after the respondent is served with the payment claim. Thereafter, the respondent is not entitled to raise contractual issues. However, there have been instances in court actions of respondents attempting to do so by filing a cross-claim disputing the progress value or alleging defective work or some right of set off.</p> <p>Even though the claimant can apply to the court to have the defence or cross-claim struck out, this takes time and delays judgment upon the debt, which the Act has created. A defence which could have been raised in the payment schedule (had there been one) and a cross-claim are contrary to the scheme of the Act, which is that disputes over the progress claim under the Act should be decided by an adjudicator under the Act.</p> <p>A court should not refuse the claimant judgment for the debt under the Act or delay judgment or summary judgment on the ground that the respondent has a cross claim or a possible defence if the defence is one which could have been raised in a payment schedule.</p> <p>The Act does not prevent a respondent from commencing separate proceedings to challenge the claimant's final entitlement, as distinct from the entitlement to a progress payment, on account, which is given by the Act.</p> <p>Proposed Action Expand ss15, 16 and 25 to clarify that defences which could have been raised in a payment schedule and cross claims are inadmissible in recovery action for a statutory debt created by the Act.</p> <p>The Government’s information kit on the Act will include a statement detailing the nature of defences available to the respondent in court actions under the Act. The possibility of the claimant including this statement in the Statement of Liquidated Claim when commencing court action will be explored.</p>

Issue No.	Section of Act	Issue
17.	15,16&25	<p><u>INTEREST ON OVERDUE PAYMENTS</u></p> <p>The Issue If a debt arises under the Act, the subsequent payment of that debt should include payment of interest on the amount owing.</p> <p>Discussion A debt arises under the Act when a respondent fails to pay the claimant as identified in ss15, 16 and 25. In an endeavour to discourage this late payment, the Act might provide for the payment of interest on the overdue amount.</p> <p>Many contracts already provide for the payment of such interest. Interest payable would then be at the greater of the rate in the contract or the rate under Supreme Court Rules on judgment debts. Calculation of interest would be from the due date for payment under the Act, which in most cases will be the due date under the contract, to the date of payment or the date of judgment, whichever is the earlier.</p> <p>To avoid a claimant having to sue separately for unpaid interest, a provision will be included in the Act that claimants can include in a payment claim interest due under the Act but not paid in respect of a debt which became payable in connection with a previous payment claim.</p> <p>If the respondent is entitled under section 127(5) of the Industrial Relations Act 1996 to withhold payment on account of the failure of the claimant to provide a written statement under section 127 that all remuneration to relevant employees has been paid, then interest will not accrue during the period for which the respondent exercises the right under section 127(5).</p> <p>Proposed Action Include in the Act a provision to the effect that if the respondent fails to pay the claimant the full amount of a progress payment to which the claimant is entitled under the Act, the respondent must pay interest on the unpaid portion from the due date to the date of payment or judgment, at the greater of:</p> <ul style="list-style-type: none"> a) the rate of interest, if any, provided in the construction contract in respect of late payment of moneys due to the claimant; and b) the rate applicable under the Supreme Court Rules on judgment debts. <p>Claimants may then include in a subsequent payment claim, any unpaid interest due under the Act.</p>
18.	17	<p><u>TIMEFRAME FOR ADJUDICATION APPLICATIONS</u></p> <p>The Issue 5 business days is a short timeframe for preparing and submitting an adjudication application.</p> <p>Discussion Under s17(3)(b) a claimant must make an adjudication application within 5 business days after receiving the payment schedule. In most instances the</p>

Issue No.	Section of Act	Issue
		<p>payment schedule is the first indication the claimant has that there is a dispute over the amount claimed. 5 days is then a very tight period within which to give proper consideration to the respondent's reasons for withholding payment, prepare responses and supporting evidence, select an authorised nominating authority, and submit the adjudication application.</p> <p>Against this, the respondent has at least 10 days to prepare its adjudication response (5 days while the claimant is preparing the application, and 5 days after receipt of a copy of the application). This is in addition to the 10 days during preparation of the payment schedule.</p> <p>10 business days is a more reasonable period for applying for adjudication. This would enable more considered applications, which in turn may simplify the adjudicator's task and lead to quicker and cheaper adjudications. The longer period would also provide an increased opportunity for the parties to settle the matters in dispute without recourse to adjudication.</p> <p>The 10 days would be an upper limit only, enabling the claimant to apply sooner if it wishes and thereby expediting the adjudication process.</p> <p>Proposed Action Extend the timeframe in s17(3)(b) for claimants to make adjudication applications from 5 to 10 business days.</p>
19.	17	<p><u>REPEAT ADJUDICATIONS</u></p> <p>The Issue If a claimant is not satisfied with an adjudicator's determination, the claimant can at present serve a new payment claim and seek a second adjudication on the same dispute.</p> <p>Discussion A claimant can make a payment claim in respect of work, which has previously been valued in adjudication under the Act. Even though the value of the work has not changed, the claimant may claim in a subsequent adjudication that the work has a different value to that determined in the previous adjudication. A claimant may have repeated adjudications in anticipation that one adjudicator will arrive at a greater value. This is commonly called 'adjudicator shopping' and is contrary to the intention that an adjudication is available to provide a quick interim decision, whilst normal contractual or civil rights can be pursued if necessary to finally resolve the dispute.</p> <p>To avoid repeat adjudications, it is proposed that when the value of work (or related goods or services) has been determined by an adjudicator, then in any subsequent adjudication, the adjudicator will give the work the same value, unless the claimant or respondent can convince the adjudicator that the value of the work has changed between the time of one payment claim and the next.</p>

Issue No.	Section of Act	Issue
		<p>Proposed Action Amend the Act to provide that if the value of an element of work has been determined by an adjudicator then in any subsequent adjudication, that element of work will be taken to have the value determined in the previous adjudication unless the claimant or respondent satisfies the adjudicator that the value has changed since the previous adjudication.</p>
20.	17	<p><u>SELECTION OF AN ADJUDICATOR</u></p> <p>The Issue It has been contended that before a claimant can go to an authorised nominating authority (ANA) of its choosing, s17(3) requires the claimant to first seek agreement with the respondent on an adjudicator, and if agreement is not reached, then seek agreement on an ANA.</p> <p>Discussion s17(3) states: <i>an adjudication application:</i> (a) <i>must be made:</i> (i) <i>to an adjudicator chosen by agreement between the claimant and the respondent (being a person who is eligible to be an adjudicator as referred to in s18), or</i> (ii) <i>if no adjudicator is agreed on, to an authorised nominating authority chosen by agreement between the claimant and the respondent, or</i> (iii) <i>if no nominating authority is agreed on, to an authorised nominating authority chosen by the claimant, and</i> (b) <i>must be made within 5 business days after the clamant receives the payment schedule.</i></p> <p>The intention of this subsection was not that a claimant must first seek agreement with the respondent on an adjudicator, then agreement on an ANA and only then proceed to an ANA of its choosing if no agreement is reached on either an adjudicator or ANA. Most adjudications have occurred as a result of the claimant proceeding directly to option (iii). Within the short timeframe available for the claimant to make the adjudication application, it would be unusual for the claimant to do otherwise.</p> <p>Irrespective of the correct interpretation, there are separate proposals in this Paper that if adopted will result in the redrafting of this subsection. Under Issue 32, it is proposed that all adjudications be arranged through ANAs, and under Issue 21 any agreement on the choice of an ANA must be made after receipt of the payment schedule.</p> <p>In view of these proposed improvements, and taking into account the short timeframe and the procedures followed by claimants to date in selecting adjudicators, it would seem appropriate to amend the Act to provide that adjudication applications may only be made to an ANA, chosen at the discretion of the claimant.</p>

Issue No.	Section of Act	Issue
		<p>Proposed Action Amend s17(3) to provide that an adjudication application may only be made to an authorised nominating authority, chosen at the discretion of the claimant.</p>
21.	17	<p><u>NOMINATION OF AN ANA PRIOR TO A DISPUTE</u></p> <p>The Issue A concern has been expressed that adjudicators nominated by some Authorised Nominating Authorities (ANAs) may have higher fees than from others. The contention is that respondents can deter claimants from mounting adjudications by specifying particular ANAs who use more expensive adjudicators, in their contracts.</p> <p>Discussion Information available on the limited number of adjudications to date does not support this contention. Nevertheless, it would be contrary to the intent of the Act if claimants are deterred from mounting adjudications. Of relevance also is a separate proposal in this Paper (Issue 36) that ANAs be permitted to charge claimants direct for services provided. It may then become apparent some ANAs charge higher fees than others.</p> <p>s17(4) voids any agreement between a claimant and respondent in relation to the choice of an adjudicator made before receipt of the payment schedule. A similar provision in relation to the choice of an ANA may also be appropriate.</p> <p>Proposed Action If the proposal under Issue 20 to provide that an adjudication application may only be made to an authorised nominating authority chosen by the claimant is not adopted, include in s17 that any agreement between the parties on the choice of an authorised nominating authority is void if made before receipt of the payment schedule.</p>
22.	17 & 20	<p><u>QUALITY OF ADJUDICATION SUBMISSIONS</u></p> <p>The Issue Authorised nominating authorities (ANAs) and adjudicators have reported that claimants’ adjudication applications and respondents’ adjudication responses are frequently of a poor standard.</p> <p>Discussion Poor quality adjudication submissions make it difficult for adjudicators to clearly identify the issues in dispute and to make a fair determination on those issues within the limited time available. This in turn can adversely impact on the cost of the adjudication.</p> <p>Examples include adjudicators having to consider numerous lever-arch folders of material. In other instances adjudicators have almost no details to consider.</p> <p>Requiring submissions to adhere to prescribed forms would be unnecessarily restrictive. However, claimants and respondents would benefit if more detailed guidelines were available for the preparation of adjudication submissions. At</p>

Issue No.	Section of Act	Issue
		<p>least one ANA has prepared detailed guidelines for adjudication applications to assist claimants in this regard.</p> <p>Proposed Action</p> <p>The Government’s information kit be expanded to include detailed guidelines to assist in the preparation of adjudication applications and adjudication responses.</p>
23.	18	<p><u>QUALITY OF ADJUDICATORS</u></p> <p>The Issue</p> <p>There are no minimum qualifications, expertise or experience specified for adjudicators.</p> <p>Discussion</p> <p>To date, the Government has relied on the authorised nominating authorities to ensure that only appropriately qualified adjudicators are nominated. Whilst there have been few complaints to date regarding adjudications or the quality of adjudicators, representations have been received on the need for adjudicators to have adequate technical knowledge of the type of work being adjudicated.</p> <p>The preferred course at this stage is to continue to monitor the situation and liaise with industry organisations on suitable qualifications for adjudicators. If the need is confirmed, minimum qualifications can then be prescribed through a regulation as provided for under s18(1)(b).</p> <p>Proposed Action</p> <p>Liaison will occur with industry organisations on suitable minimum qualifications for adjudicators. These will then be prescribed by regulation if the need is confirmed.</p>
24.	20	<p><u>DETAILS IN ADJUDICATION RESPONSES</u></p> <p>The Issue</p> <p>It is not abundantly clear under s20 that adjudication responses cannot introduce reasons for withholding payment that were not included in the payment schedule.</p> <p>Discussion</p> <p>The scheme of the Act is that a respondent must provide in the payment schedule all reasons for withholding payment.</p> <p>These reasons are the basis upon which the claimant decides whether or not to proceed to adjudication. These reasons also form the basis of the claimant’s submissions in the adjudication application.</p> <p>The value of the payment schedule and the integrity of the process are compromised if the respondent can introduce new reasons in the adjudication response.</p> <p>Proposed Action</p> <p>Expand s20 to clarify that the respondent is not entitled to include in the adjudication response reasons for withholding payment that were not identified in the payment schedule.</p>

Issue No.	Section of Act	Issue
25.	22	<p><u>MINOR ERRORS IN ADJUDICATION DETERMINATIONS</u></p> <p>The Issue There is no provision to enable an adjudicator or court to correct a clerical mistake or similar obvious error in an adjudication determination.</p> <p>Discussion The Act makes no provision for an adjudicator to correct minor errors in a determination. The “slip rule” enables courts to correct clerical errors in judgments or errors arising from an accidental slip or omission. For example if, in error, the adjudicator inserted 'respondent' where clearly the adjudicator intended to insert 'claimant', it is desirable that the adjudicator should be empowered to correct the error even after the time for making the determination has expired.</p> <p>The Issue could be solved by including in the Act a provision along the lines of NSW Supreme Court Rules 1970 Pt.20 r.10 which provides:</p> <p style="padding-left: 40px;"><i>Where there is a clerical mistake, or an error arising from an accidental slip or omission, in a minute of a judgment or order, or in a certificate, the Court, on the application of any party or of its own motion, may, at any time correct the mistake or error.</i></p> <p>This would not create any right of appeal or right to change a decision as distinct from simply correcting an obvious slip.</p> <p>Proposed Action Extend the slip rule to adjudication determinations so that an adjudicator or a court can correct an accidental slip or omission.</p>
26.	22	<p><u>REASONS FOR ADJUDICATOR’S DETERMINATION</u></p> <p>The Issue The adjudicator need only provide reasons in the determination if requested to do so by either the claimant or respondent (s22(3)).</p> <p>Discussion Claimants and respondents need to know why the adjudicator reached a particular decision. Only then will they know whether further action is warranted and whether lessons can be learnt for future contracts. Adjudicators recognise this and are providing their reasons as a matter of course.</p> <p>The providing of reasons adds minimal if any costs to the adjudicator’s fee.</p> <p>Proposed Action Remove the requirement under s22(3) for a party to request the inclusion of reasons in the adjudicator’s determination and that provision of reasons become mandatory.</p>

Issue No.	Section of Act	Issue
27.	23	<p><u>SECURITY OPTION</u></p> <p>The Issue The giving of security is of little practical value to a claimant who has entered the adjudication process in the expectation of receiving a prompt and fair payment for work carried out, based on the adjudicator’s decision.</p> <p>Discussion</p> <p>Under s23(1) if an adjudicator determines a respondent must pay an amount to the claimant, the respondent must either pay that amount when payment falls due, or give security for payment of the amount pending the final resolution of the matters in dispute. The expectation when drafting the Act was that if security were provided, the respondent would see benefits in taking action as quickly as possible to resolve the dispute. This has not proven to be the case.</p> <p>Instances have occurred where respondents, particularly large “cashed up” organisations, have simply provided security and taken no further action. Claimants have then been left with initiating further action, whether under the contract or in the courts, to resolve the dispute under the contract. These further actions have always been available to the claimant. The Act has therefore simply resulted in the claimant having to spend time and money in adjudication for no practical outcome. The fact that security is given is of little comfort if cash flow to the claimant has dried up. The likelihood of there being sufficient funds in the trust account if the respondent goes into liquidation has also been questioned.</p> <p>If the quick adjudication process provided by the Act is to be of real benefit, adjudicators’ decisions must be supported as representing reasonable assessments of the amount payable, and must be made payable under the Act.</p> <p>Victoria has taken an intermediate position in its recently passed Security of Payment legislation by providing that “The respondent may only give security if the respondent has commenced proceedings (including arbitration proceedings and other dispute resolution proceedings) against the claimant in relation to the dispute under the construction contract.” Whilst there is merit in this approach in principle, the difficulty is that “commenced proceedings” has not been defined and is unlikely to be able to be defined with sufficient certainty to ensure the respondent continues to work at bringing the dispute to finality as expeditiously as possible.</p> <p>Proposed Action Remove the option under s23(1)(b) of the respondent giving the claimant security for payment of the adjudicated amount.</p>

Issue No.	Section of Act	Issue
28.	23	<p><u>FORM OF SECURITY</u></p> <p>The Issue The Respondent may specify in its contract documents the form of security it will give following an adjudication.</p> <p>Discussion s23(2)(c) states that following an adjudication, the respondent may give security in “<i>such other form as may be agreed between the claimant and the respondent</i>”. There is nothing to preclude this agreement being reached by way of it being stated within the contract documents. Pressure may then be on the claimant to accept a clearly inadequate form of security or risk not being awarded the contract.</p> <p>A separate proposal in this paper is to remove the option of providing security after an adjudication (Issue 27). If that proposal does not proceed, a provision could be included to require that any agreement on the form of security must be reached only after receipt of the payment schedule, similar to s17(4) covering agreements in relation to the choice of an adjudicator.</p> <p>Proposed Action If the security option under s23(1)(b) is removed as proposed under Issue 27, no action is required. Otherwise, amend s23 to provide that only agreements reached following receipt of the payment schedule will have effect on the form of security that can be given.</p>
29.	24	<p><u>TRUST ACCOUNTS</u></p> <p>The Issue Financial Institutions have declined to provide claimants with details of security lodged in trust accounts.</p> <p>Discussion This matter will only remain an issue if the option of providing security under s23 is not removed in this package of enhancements to the Act (refer Issue 27). Following an adjudication, the respondent may pay the determined amount into a designated trust account. If the respondent chooses this option, it must give the claimant particulars, identifying the account and the recognised financial institution with which the account is kept (s24(1)). There is no provision for the claimant to independently confirm the security was in fact paid into the account by the due date required by the Act or to confirm the money is in fact retained in the account at any point in time.</p> <p>The Act provides under s24(3) for regulations making “provision for or with respect to the establishment and operation of designated trust accounts.” This matter can therefore be dealt with by a regulation enabling claimants to receive the necessary evidence of the lodging of security, evidence of other monies held in the account, and confirmation as required that the full amount of security remains in the account at any particular time.</p>

Issue No.	Section of Act	Issue
		<p>Proposed Action If the security option under s23(1)(b) is removed as proposed under Issue 27, no action is required. Otherwise, amend the Act or introduce a regulation to ensure claimants are better informed on the security being held in trust accounts.</p>
30.	25	<p><u>DUE DATE FOR PAYMENT OR PROVISION OF SECURITY AFTER ADJUDICATION</u></p> <p>The Issue Clarification is required of the definition of <i>relevant date</i> for the payment of the adjudicated amount or the giving of security for payment.</p> <p>Discussion Under s22 of the Act, an adjudicator determines the date upon which the adjudicated amount became or becomes payable. In relation to determining the time for compliance with the adjudicator’s decision, s25(5) states:</p> <p style="padding-left: 40px;"><i>In this section, relevant date means:</i></p> <ul style="list-style-type: none"> (a) <i>the date occurring 2 business days after the date on which the relevant determination is made under s22, or</i> (b) <i>if the adjudicator determines a later date under section 22(1)(b), that later date.</i> <p>The question has been asked, under s25(5)(a), when is the determination “made”? Is it when the adjudicator has completed the adjudication (normally within the 10 business days timeframe under s21(3)(a)), or is it when the parties receive the determination?</p> <p>Frequently a determination is not communicated to the parties on the same day it is signed by the adjudicator. It would be unworkable then to require the respondent to take action within the very short timeframe if that timeframe is measured from the signing of the determination. The intention is and must be that the timeframe be from the date the respondent receives the determination.</p> <p>Proposed Action Clarify under s25(5)(a) that the relevant date for the respondent to make payment following an adjudication or provide security for payment is calculated from the date upon which a copy of the adjudicator's determination is served on the respondent.</p>
31.	25	<p><u>TIME FOR PAYMENT OR PROVISION OF SECURITY AFTER ADJUDICATION</u></p> <p>The Issue 2 business days is a very short timeframe for the respondent to make payment or provide security after an adjudication.</p> <p>Discussion Under s25, the time for the respondent to make payment of the adjudicated amount (or provide security in lieu) is 2 business days after the adjudication determination is made or a later date if so determined by the adjudicator.</p> <p>Two business days will frequently be too short a time in which to effect payment, or obtain a bank guarantee, or open a trust account and deposit in it</p>

Issue No.	Section of Act	Issue
		<p>the adjudicated amount. For example, before the respondent's bank will provide a bank guarantee, the respondent may have to enter into an agreement with the bank and provide security to the bank. Five (5) business days is a more reasonable timeframe.</p> <p>Proposed Action</p> <p>Under s25(5)(a) increase the time for payment or provision of security after an adjudication from 2 to 5 business days.</p>
32.	25	<p><u>COURT RECOVERY AFTER ADJUDICATIONS</u></p> <p>The Issue</p> <p>After an adjudication, the claimant may still be confronted with commencing lengthy court proceedings if the respondent neither pays the adjudicated amount nor provides security for that amount.</p> <p>Discussion</p> <p>Whilst the Act creates an entitlement to a progress payment, enforcing payment of the entitlement involves commencing legal proceedings. The process is that the claimant issues a statement of liquidated claim in a court of competent jurisdiction. The respondent has 28 days to lodge a defence and, assuming that a defence is lodged, the matter is set down in the court list. It may be months or even longer before the matter reaches a hearing. This process must be followed even after an adjudication, which in itself can be a four weeks process.</p> <p>The ultimate objective of the Act is to facilitate and expedite the flow of payments down the contracting chain. It is then reasonable to hold that if an adjudicator's decision is ignored, it should be immediately enforceable, similar to a judgment of the court. The involvement of a third party adjudicator provides the necessary comfort that the amount to be paid has undergone independent scrutiny and is reasonable.</p> <p>The proposed procedure to overcome the delays and difficulties of enforcing payment of an adjudicated amount, is that as soon as an adjudicator has determined the amount of the progress payment due to the claimant and the due date for payment has passed without the respondent paying the adjudicated amount, the claimant should be immediately entitled to judgment (from a court of appropriate jurisdiction) for any unpaid portion of the adjudicated amount.</p> <p>The court would have to be satisfied:</p> <ol style="list-style-type: none"> 1. that there has been an adjudication; and 2. of the adjudicated amount; and 3. of the due date for payment; and 4. of the unpaid portion of the adjudicated amount. <p>To facilitate proof, so that judgment may be speedily entered by the registrar of the court, the authorised nominating authority (being a Government appointed body) that nominates the adjudicator could be empowered to issue a certificate attesting to 1, 2 and 3. That certificate should be prima facie evidence of those matters. The claimant would file an affidavit as to 4.</p>

Issue No.	Section of Act	Issue
		<p>A condition of any application to have the judgment set aside would be that the respondent pays into court as security, the amount of the judgment. The grounds upon which the respondent could apply to have the judgment set aside would however be restricted. The respondent :</p> <ol style="list-style-type: none"> a. would not be entitled to raise any cross claim or to challenge the validity of the adjudication on the grounds of an error of the adjudicator. b. would not be entitled to challenge the amount determined by the adjudicator or the due date for payment decided by the adjudicator; c. would only be entitled to contend that there had been no adjudication or that the adjudicator lacked jurisdiction or that security had been lodged in accordance with the Act (if that is still an option). <p>Nothing in this proposal affects a party’s right to have the dispute finally resolved under the contract or through a separate court action, as provided for in s32.</p> <p>Associated with this issue is the matter of selection of adjudicators. ANAs will only be able to provide the necessary certification if they select the adjudicator and have access to the relevant information. It would therefore be necessary to either remove the option under s17(3)(a)(i) of parties agreeing on an adjudicator between themselves or bar the determinations of such adjudicators from being enforceable as proposed under this Issue. The latter option is likely to cause difficulties for claimants and is not supported.</p> <p>Proposed Action Amend the Act to provide:</p> <ol style="list-style-type: none"> 1. for an adjudicator’s determination to be enforceable similar to a judgment of the court; and 2. that all adjudications must be arranged through authorised nominating authorities.
33.	27	<p><u>RESUMPTION OF WORK AFTER SUSPENSION</u></p> <p>The Issue s27(2) states that the claimant’s right to suspension exists only for so long as the respondent fails to comply with the requirements in s15, s16 or s25. The consequence is that the claimant is liable to resume work immediately the respondent satisfies its obligations. This may not be possible in practice.</p> <p>Discussion A reasonable timeframe should be provided for recommencement of work after suspension, and will vary depending on the nature of the work and perhaps the duration of suspension. The proposal is therefore that resumption occur “as soon as practicable”.</p> <p>Proposed Action Amend s27(2) to provide that the claimant must resume work “as soon as practicable” after the respondent complies with its obligations under the Act.</p>

Issue No.	Section of Act	Issue
34.	28	<p><u>NUMBER OF ANAS</u></p> <p>The Issue The suggestion has been made that the Act does not entitle the Minister to limit the number of authorised nominating authorities (ANAs) under the Act.</p> <p>Discussion ANAs are expected to put considerable effort into familiarising themselves with the Act, establishing administrative procedures to deal with adjudication applications, training and accrediting adjudicators, and reporting to the Minister on their operations. 10 ANAs were initially authorised under the Act and yet in just over 2 years there have been in the order of only 40 adjudications through these ANAs. It is in the interest of all parties that the number of ANAs be commensurate with the number of adjudications taking place.</p> <p>Proposed Action If necessary, provide under the Act that the Minister is entitled to limit the number of authorised nominating authorities.</p>
35.	28	<p><u>AUTHORISING OF ANAS</u></p> <p>The Issue It has been argued that in the absence of regulations covering the matter, authorised nominating authorities are not properly authorised under the Act to nominate adjudicators.</p> <p>Discussion s28(1) says in part: <i>Subject to the regulations, the Minister:</i> <i>(a) may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act,</i></p> <p>It is not agreed this subsection requires regulations to be in place. Rather, it is saying that if there are regulations, the Minister’s actions will then be subject to them.</p> <p>Proposed Action No action is required to ensure authorised nominating authorities are properly authorised under the Act to nominate adjudicators.</p>
36.	29	<p><u>FEES FOR ANAS</u></p> <p>The Issue Authorised nominating authorities (ANAs) are able to recover fees only through adjudicators, and yet they undertake other activities in support of the Act and may be required to fulfil additional roles under proposed enhancements to the Act.</p> <p>Discussion At present ANAs are financed by fees they charge adjudicators and by their</p>

Issue No.	Section of Act	Issue
		<p>other operations unrelated to the Act. s17(7) of the Act provides that it is the duty of an ANA to which an adjudication application is made to refer the application to an adjudicator. An ANA cannot charge a fee on claimants for performing this statutory duty.</p> <p>Sometimes a claimant may make an adjudication application to an ANA and then not proceed with it or the parties may settle the matter before the adjudication is completed or before paying the adjudicator. The lodging of an adjudication application can, in itself, serve a purpose without there being an adjudication. Sometimes, on being served with a copy of an adjudication application, a respondent will pay or settle the claim to avoid the cost of adjudication.</p> <p>From the moment an adjudication application is lodged with an ANA, the ANA incurs expenses. The claimant however pays no fee for lodging the application.</p> <p>ANAs are also providing a significant advisory and educational role in that they are often the first contact a claimant makes when questioning how to proceed under the Act. There is no scope for ANAs to recover the cost of providing this service. This is particularly the case when there are so few matters going to adjudication.</p> <p>Of relevance also is a separate proposal in this Paper (Issue 32) for ANAs to provide certificates following an adjudication.</p> <p>It is reasonable then that there be no restriction upon an ANA charging a fee when an adjudication application is lodged or for any other service provided by the ANA relating to the Act, including the provision of certificates. At this time it is not proposed to set maximum fees, although provision could be made for maximum fees to be set by regulation. There are 10 ANAs. This should provide sufficient competition to ensure that individual ANAs set fees at a reasonable level. It will also take some experience and time to determine what these reasonable levels are.</p> <p>Associated with any right of ANAs to charge fees is a need to provide that a contract cannot bind a party to use a particular ANA. This will avoid a respondent attempting to deter the claimant from commencing an adjudication by specifying in the contract an ANA with artificially high fees. This could operate similar to s17(4) which voids any agreement between a claimant and respondent in relation to the choice of an adjudicator before receipt of the payment schedule. This will only need to be a consideration if the proposal at Issue 18 that an adjudication application may only be made to an ANA chosen at the discretion of the claimant, does not proceed.</p> <p>The Act could also require an ANA to provide the Minister with such information as may be requested by the Minister about the ANA’s activities, fees and adjudications. ANAs are already providing the Minister with annual reports on their operations and individual reports on adjudications.</p>

Issue No.	Section of Act	Issue
		<p>Proposed Action</p> <p>Amend the Act:</p> <ol style="list-style-type: none"> 1. To allow authorised nominating authorities to charge fees to claimants; 2. To make provision so that maximum fees could be set by regulation; 3. If Issue 20 does not proceed, to make void any agreement between a claimant and respondent in relation to the choice of an authorised nominating authority before receipt of the payment schedule; and 4. To require authorised nominating authorities to provide such reports to the Minister as may be requested by the Minister from time to time.
37.	29	<p><u>APPORTIONING OF ADJUDICATOR’S FEES</u></p> <p>The Issue The adjudicator’s fees can only be allocated in other than equal proportions between the claimant and respondent if the adjudicator determines that the adjudication application or the adjudication response was “wholly unfounded” (s29(3)).</p> <p>Discussion It would be extremely rare for an adjudication application or an adjudication response to be wholly unfounded. There may be instances though where they are substantially unfounded or poorly prepared and may warrant an apportioning of fees on other than a 50/50 basis.</p> <p>An example would be where one party might simply present the adjudicator with folders of material to consider, whilst the other party might submit a concise, well structured document. If the adjudicator’s fee is increased due to the time spent on unravelling the significance of the folder material, there is an argument the party responsible should be liable for a higher proportion of the fee than the party who put effort into preparing the well structured document.</p> <p>If the proposal to enable an ANA to charge a fee upon an adjudication application is adopted (Issue 36) then it seems that it would be reasonable that the adjudicator should be empowered to decide which party should bear what proportion of that fee. The adjudicator could then include in the adjudicated amount the part, if any, of the ANA’s fee that the adjudicator decides should be payable by the respondent.</p> <p>Proposed Action Amend s29(3) so that the claimant and respondent are equally liable for the adjudicator’s fee and the fee, if any, paid by the claimant to the ANA upon lodgement of the adjudication application, unless the adjudicator determines a different proportioning of the fee is warranted. The part, if any, of the ANA fee paid by the claimant, which must be paid by the respondent, should be included in the adjudicated amount.</p>

Issue No.	Section of Act	Issue
38.	29	<p><u>NON-PAYMENT OF ADJUDICATOR’S FEE BY RESPONDENT</u></p> <p>The Issue</p> <p>Instances have occurred where claimants have had to pay the full amount of the adjudicator’s fee to obtain a decision because the respondent has refused to pay its share. The claimant is then obliged to take court action to recover the respondent’s share.</p> <p>Discussion</p> <p>s29(2) provides that the claimant and respondent are jointly and severally liable to pay the adjudicator’s fees and expenses. These fees and expenses can be significant sums for claimants who are already financially stretched due to the withholding of payments by respondents.</p> <p>If a claimant has to pay the respondent’s share of the adjudicator’s fees in order to obtain an adjudicator’s decision, a mechanism might be provided to enable this payment to be speedily recovered. Under Issue 32, consideration may be given to providing for an adjudicator’s determination to be enforceable similar to a judgment of the court. This would be effected through the authorised nominating authority (ANA) certifying the amount due and the registrar of the court entering a judgment for this amount. In conjunction with this proposal, all adjudications would have to be arranged through ANAs.</p> <p>The matter of payment of the adjudicator’s fee could similarly be dealt with through ANAs. If the claimant has paid the respondent’s share of the adjudicator’s fee, the ANA would provide the necessary certification as evidence for judgment to be speedily entered by the registrar of the court.</p> <p>In this way, the claimant will be able to take immediate action to recover the payment without the delays associated with normal court processes.</p> <p>Proposed Action</p> <p>Provide for an authorised nominating authority to certify if the claimant has paid the respondent’s share of the adjudicator’s fees. The claimant may then rely on this certification to have judgment for the amount paid to be entered by the registrar of the court.</p>
39.	30	<p><u>LIABILITY OF ADJUDICATORS</u></p> <p>The Issue</p> <p>Adjudicators may not be exempt from liability if there is a flaw in the adjudicator’s appointment.</p> <p>Discussion</p> <p>s30 provides an adjudicator an exemption from liability when acting in good faith “in the exercise of the adjudicator’s functions under this Act”.</p> <p>There is an argument this may not cover the instance where, unbeknown to the adjudicator, there is a flaw in the adjudicator’s appointment or the adjudicator has inadvertently exceeded the limited powers given to adjudicators under the Act. It is reasonable to cover these instances also in the exemption.</p>

Issue No.	Section of Act	Issue
		<p>Proposed Action Expand s30 to provide adjudicators an exemption from liability where the adjudicator also acts in the “reasonable belief” that the adjudicator is exercising a function under the Act.</p>
40.	-	<p><u>LIABILITY OF ANAS</u></p> <p>The Issue Authorised nominating authorities (ANAs) frequently provide information and advice to parties concerning the Act, but have no exemption from any liability that may arise in doing so.</p> <p>Discussion Under s30 of the Act, an adjudicator is exempt from liability for anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions under the Act. However, an ANA and the management, employees and agents of an ANA, have no similar exemption from liability.</p> <p>Frequently enquiries are made to an ANA concerning adjudications, and the staff of the ANA are called upon to give general advice concerning the operation of the Act. It would be most undesirable if ANAs refuse to answer any questions whatsoever or refuse to have any communication with claimants and respondents. Such an approach would not serve the objectives of the Act.</p> <p>ANAs train, accredit and select adjudicators and often act as agent of an adjudicator for the purpose of dealings with the parties in dispute. In the course of doing so, they could conceivably incur a liability.</p> <p>If separate amendment proposals in this Paper under Issues 32 and 38 proceed, ANAs will also be providing certifications which could be argued will also incur a liability.</p> <p>The exemption could extend to the management, employees and agents of an ANA and would cover anything done or omitted to be done by the ANA in good faith in the exercise of the functions of an ANA under the Act, including those broader roles referred to above. Under Issue 39, consideration may be given to extend the exemption from liability of adjudicators to also cover them when acting in the “reasonable belief” of exercising a function under the Act. If adopted, a similar exemption could operate for ANAs.</p> <p>Proposed Action Amend the Act to provide that while performing their functions in good faith, authorised nominating authorities would have a similar exclusion from liability as proposed under s30 for adjudicators.</p>

Issue No.	Section of Act	Issue
41.	31	<p><u>SERVICE OF NOTICES</u></p> <p>The Issue</p> <p>The Act does not provide for the service of notices in accordance with the contract.</p> <p>Discussion</p> <p>Many construction contracts provide expressly for the manner of service of notices. Where a construction contract provides that progress claims or other notices are to be served on the superintendent administering the contract, the fact that payment claims under the Act have to be served on the principal not the superintendent has caused uncertainty.</p> <p>The Act could provide that a notice may also be served on the representative of the respondent if the representative is nominated in the contract. Similarly the Act could provide for the serving of notices on the claimant in accordance with the contractual terms.</p> <p>Proposed Action</p> <p>Amend the Act so that where a construction contract expressly provides for service of notices on the respondent or the claimant, then in addition to methods of service already permitted by the Act (s31), notices under the Act may be served in the manner, upon the person and at the place nominated in the construction contract.</p>
42.	34	<p><u>CIRCUMVENTION OF THE ACT</u></p> <p>The Issue</p> <p>Contract clauses are appearing which are arguably not void under the Act, but which are clearly aimed at deterring claimants from using the Act.</p> <p>Discussion</p> <p>An example of a contract clause that has arisen and is clearly intended to deter the application of the Act is one which states that the claimant shall indemnify the respondent against its costs (legal and non legal) arising from the claimant making an adjudication application. This includes costs incurred in any court proceedings relating to the application.</p> <p>Such a clause is arguably not captured by s34 of the Act (No contracting out) which renders void any agreement “which has the effect of excluding, modifying or restricting the operation of this Act”. It is nevertheless a strong disincentive for a claimant proceeding with an adjudication application.</p> <p>s34 could be expanded to also render void any contractual provision that could be construed as an attempt to place a claimant in any worse position than the claimant would have been had the claimant not pursued rights under the Act.</p>

Issue No.	Section of Act	Issue
		<p>Proposed Action</p> <p>Amend the Act to render void any contractual provision that places a claimant pursuing its rights under the Act in a worse position than the claimant would have been had the claimant not pursued its rights.</p>
43.	-	<p><u>OWNERSHIP OF UNFIXED MATERIALS</u></p> <p>The Issue</p> <p>Some construction contracts provide that ownership of unfixed plant or materials will pass to the respondent before the respondent has paid for them in full. The consequence can be that the respondent can pass ownership to a third party or a receiver or liquidator of the respondent can seize the plant or materials and the claimant can lose all rights with respect thereto without receiving any payment or payment in full.</p> <p>Discussion</p> <p>It has been proposed that the Act be amended to provide that any provision of a construction contract that would have the effect that ownership of unfixed plant or materials will pass to the respondent before the respondent has paid for them in full will be ineffective.</p> <p>That could have the consequence that even though a respondent has paid the claimant 90% of the value the unfixed plant or materials, the plant or materials would still belong to the claimant. If the claimant then became insolvent, the receiver or liquidator of the claimant could seize the plant or materials and the respondent would be simply an unsecured creditor in the liquidation of the claimant. The respondent may end up paying twice for the items. That would be unfair.</p> <p>The solution might be to provide that the claimant will have a lien over the unfixed plant or materials for the unpaid portion of the price payable by the respondent for the plant or materials. The consequence would be that the respondent (or the receiver or liquidator of the respondent) could not pass ownership of the plant or materials to a third party without paying the claimant the amount of the lien (the unpaid portion of the price).</p> <p>The lien would not prevent ownership passing when the plant or materials become a fixture and would not affect the retention of title clauses which manufacturers and suppliers often include in supply contracts.</p> <p>Proposed Action</p> <p>Include a provision in the Act that, notwithstanding a contrary provision in a construction contract, a claimant will have a lien over unfixed plant or materials (supplied by the claimant to the respondent) for the unpaid portion of the price payable by the respondent for the plant or materials.</p>

Issue No.	Section of Act	Issue
44.	-	<p><u>CLAIMS ON PRINCIPALS</u></p> <p>The Issue Sometimes the only asset or the only readily available asset of a respondent contractor is money owed by the principal to the contractor. The NSW <i>Contractors Debts Act 1997</i> provides an unpaid person with a procedure for recovering from the principal, money owed by the defaulting contractor. This procedure is similar to having a garnishee order issued to obtain money from a third party (whether a principal or not). It would be beneficial if all claimants under the <i>Building and Construction Industry Security of Payment Act</i> had access to this additional debt recovery procedure available under the <i>Contractors Debts Act</i>.</p> <p>Discussion Section 6 of the <i>Contractors Debts Act</i> sets out the procedure for obtaining payment of a debt, requiring that: (a) a debt certificate be issued for the money owed, and (b) the unpaid person must serve a notice of claim on the principal.</p> <p>The debt certificate is issued by the court, on application of the unpaid person following a judgment of the court in favour of the unpaid person against the defaulting contractor. The debt certificate and service of the notice of claim operate as an assignment of debt to enable the unpaid person to obtain from the principal the amount of the debt that would be otherwise owed by the principal to the defaulting contractor.</p> <p>The proposal is that all claimants under the <i>Building and Construction Industry Security of Payment Act</i> have this procedure available, enabling them to “leap-frog” the respondent if necessary and obtain payment from the respondent’s principal. This requires that there is a principal and there is money owing or to be owed from the principal to the respondent. The <i>Contractors Debts Act</i> does not embrace all that is covered by the definitions of construction work and related goods or services under the <i>Building and Construction Industry Security of Payment Act</i>. The result is that there are some debts under the Security of Payment Act that at present could not be pursued under the <i>Contractors Debts Act</i>. It is proposed to amend the <i>Contractors Debts Act</i> so that it embraces all debts due under the Security of Payment Act.</p> <p>The <i>Contractors Debts Act</i> has a further procedure whereby the unpaid person can freeze in the hands of the principal the amount in dispute with the contractor until a judgment of the court is obtained. The procedure is that the claimant (the unpaid person) commences court proceedings and makes application to the court for an attachment order. If the claimant can satisfy the court that the respondent contractor owes the claimant money for work carried out or materials supplied by the claimant in respect of a construction contract between the respondent and the principal, the court can issue an attachment order directed to the principal. On service of the order, the principal must</p>

Issue No.	Section of Act	Issue
		<p>withhold payment to the respondent of the amount specified in the order. Subsequently, if the claimant obtains judgment against the respondent, the court can issue the debt certificate assigning to the claimant the amount of the judgment debt. The principal must then pay the claimant that amount out of moneys owed by the principal to the respondent.</p> <p>A claimant may apply for an attachment order under the <i>Contractors Debts Act</i> whenever court proceedings are commenced for debt recovery. This step though will no longer be necessary after an adjudication if the proposal at Issue 32 is adopted. Issue 32 proposes that an adjudicator’s determination be immediately enforceable as a judgment of the court. Delays associated with court hearings will thereby be removed and any need to freeze money with the principal pending a judgment will also be removed. The judgment will be immediately available, enabling direct passage to the procedure of debt certificate and notice of claim on the principal.</p> <p>Proposed Action</p> <ol style="list-style-type: none"> 1. Amend the <i>Contractors Debts Act 1997</i> so that it covers all debts due under the <i>Building and Construction Industry Security of Payment Act</i>. 2. Identify in the <i>Building and Construction Industry Security of Payment Act</i> the option of using the <i>Contractors Debts Act</i> to recover from the principal, money owed by a defaulting respondent. 3. Include in the Government’s information kit on the <i>Building and Construction Industry Security of Payment Act</i> an explanation of the operation of the <i>Contractors Debts Act</i>.