

Commencement of the South Australian Act

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The *Building and Construction Industry Security of Payment Act 2009* (SA) commences on 10 December 2011. It applies only to construction contracts entered on or after that date. The Act follows very closely the equivalent NSW Act. Below is a table showing the differences.

The *Building and Construction Industry Security of Payment Regulations 2011* (SA) also commences on that date. Regulation 4 prescribes that a body regulated under the *Australian Prudential Regulation Authority Act 1998* of the Commonwealth is prescribed for the purposes of the definition of *recognised financial institution* in section 4 of the *Building and Construction Industry Security of Payment Act 2009*. New South Wales has the same regulation.

Regulation 5 expands upon the list of services which are ‘related goods and services’ and should serve to remove some ambiguity. It provides:

Services of the following kind are prescribed for the purposes of section 6(1) of the Act:

- (a) project management services in relation to construction work;
- (b) contract management services in relation to construction work;
- (c) consultancy services in relation to construction work.

Regulation 6 prescribes the eligibility criteria for adjudicators. It provides:

Pursuant to section 18(1)(b) of the Act, a natural person is eligible to be an adjudicator in relation to a construction contract if—

- (a) the person has successfully completed a formal course of training of at least 2 days duration in adjudication of payment disputes in the building and construction industry that required the person to pass a written examination;
and
- (b) the person—
 - (i) holds a degree, diploma or other qualification in—
 - (A) architecture; or
 - (B) building surveying; or
 - (C) building; or
 - (D) construction; or
 - (E) law; or
 - (F) project management; or
 - (G) quantity surveying,
from a university; **or**
 - (ii) is, or is eligible to be, a member (other than a student member) of any 1 or more of the following professional bodies:
 - (A) The Royal Australian Institute of Architects;
 - (B) Engineers Australia;

Commencement of the South Australian Act

- (C) Australian Institute of Building Surveyors;
- (D) The Institute of Arbitrators and Mediators Australia;
- (E) The Australian Institute of Building;
- (F) Australian Institute of Project Management; **or**
- (iii) holds registration as a building work supervisor under the *Building Work Contractors Act 1995* that authorises the person to supervise construction work of a kind carried out, or to be carried out, under the construction contract.

Regulation 6 is not found in the legislation of the other jurisdictions which have adopted the Australian Model for security of payment.

Following is a comparison of the *Building and Construction Industry Security of Payment Act 1999* NSW and the *Building and Construction Industry Security of Payment Act 2009* South Australia. The absence of a comment means that there appears to be no material difference between the South Australian and NSW provisions.

Subject	NSW	SA	Comment
Name of Act	s 1	s 1	
Commencement	26/3/00 s 2	10/12/11 s 2	Acts do not apply to contracts entered before this date – SA Sched 1.4.
Object of Act	s 3	s 3	
Other entitlements not limited	s 3(4)	s 3(4)	
Definitions <i>business day</i> <i>reference date</i>	s 4 s 8(2)	s 4 s 4	In SA a business day also excludes 'any other day on which there is a State-wide shut-down of the operations of the building and construction industry'.
Construction work defined	s 5	s 5	
Related goods and services defined	s 6	s 6	In SA Act note the addition of 'technical' before 'services' in s 6(1)(b)(iii) and the expanded definition of 'services' in regulation 5 of the <i>Building and Construction Industry Security of Payment Regulations 2011</i> (SA).
Residential work [NSW], Domestic building work [SA]	s 7 s7(2)(b)	s 7 s7(2)(b)	The same except: <i>Building Work Contractors Act 1995</i> (SA).
Right to progress payment	s 8	s 8	

Commencement of the South Australian Act

Subject	NSW	SA	Comment
Amount of progress payment	s 9	s 9	
Valuation	s 10	s 10	
Due date	s 11(1)	s 11(1)	10 business days in NSW 15 business days in SA
Interest rate	s 11(2)	s 11(2)	Rate under the <i>Supreme Court Act 1935</i> (SA) in respect of judgment debts of the Supreme Court.
Lien	s 11(3)	s 11(3)	
Pay when paid	s 12	s 12	
Payment claim	s 13	s 13	Section 13(4) 6 months in SA, 12 months in NSW
Payment schedule	s 14	s 14	10 business days in NSW 15 business days in SA
No payment schedule	s 15	s 15	
Payment schedule but payment in full not made	s 16	s 16	
Adjudication application	s 17	s 17	
Where there is a payment schedule	s 17 (3)(c)	s 17(3)(c)	10 business days in NSW 15 business days in SA
After s 17(2) notice	s 17(3)(e)	s 17(3)(e)	10 business days in NSW 15 business days in SA
Eligibility of adjudicators	s 18	s 18	In SA a person is not eligible to be an adjudicator if either party has nominated the person to be an adjudicator in relation to the contract. Also, the eligibility criteria are in regulation 6 of the <i>Building and Construction Industry Security of Payment Regulations 2011</i> (SA)
Appointment	s 19	s 19	
Adjudication response	s 20	s 20	Subsection numbers are different.
Adjudication procedures	s 21	s 21	In SA the adjudicator's 10 business days runs from the date when the adjudication response is lodged or should have been lodged but if the respondent has no right to lodge a response, the 10 business days runs from the date upon which the respondent receives the adjudication application.
Adjudicator's determination	s 22	s 22	

Commencement of the South Australian Act

Subject	NSW	SA	Comment
Payment of adjudicated amount-relevant date	s 23	s 23	
Adjudication certificates	s 24	s 24	
Certificate filed as judgment	s 25	s 25	
New application Claimant may discontinue	s 26	s 26 s 27	SA also provides that if the adjudicator withdraws from the adjudication, the claimant may make a new application within 5 business days. In SA only, a claimant may withdraw an adjudication application at any time before the application is determined. [Note that the respondent is still liable for 50% of adjudicator's fees unless the adjudicator determines otherwise].
Suspension of work	s 27	s 28	
ANAs	s 28	s 29	
Adjudicators' fees	s 29	s 30	In SA an hourly rate may prescribed by regulation but has not been prescribed.
Protection from liability	s 30	s 31	
Effect on civil proceedings	s 32	s 32	
No contracting out	s 34	s 33	
Service of notices	s 31	s 34	
Binds Crown	s 33		Acts Interpretation Act 1915 SA s 20
Regulations	s 35	s 35	
Review of Act	s 38	s 36	
Commercial arbitration	s 36	Sched 1.3	
Payment withholding request	s 26A		No equivalent in SA

See also *Acts Interpretation Act 1915 (SA)*, s 33 – service by post [in the ordinary course of post] and s 36 – power to appoint includes power to remove.