



Queensland

*Building Industry Fairness (Security of Payment) Act 2017*

# **Building Industry Fairness (Security of Payment) Regulation 2018**

**Current as at 17 December 2018—revised version**

**Reprint note**

This version includes retrospective amendments from 2019 SL No. 252.

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Queensland

# Building Industry Fairness (Security of Payment) Regulation 2018

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# Building Industry Fairness (Security of Payment) Regulation 2018

## Part 1 Introduction

### 1 Short title

This regulation may be cited as the *Building Industry Fairness (Security of Payment) Regulation 2018*.

### 2 Commencement

This regulation commences on 1 March 2018.

### 3 Definitions

The dictionary in schedule 3 defines particular words used in this regulation.

## Part 2 Project bank accounts

### 4 Work included as building work—Act, s 8

- (1) This section prescribes particular work as building work for the Act, section 8, definition *building work*, paragraph (b).
- (2) The following work is building work—
  - (a) the erection, management and removal of scaffolding if the scaffolding is or was used for carrying out other building work;
  - (b) work that is a building certifying function within the meaning of the *Building Act 1975*, section 10;
  - (c) the assessment of the energy efficiency of a building under the Building Code of Australia or the Queensland Development Code.

[s 5]

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- (3) Also, work performed by any of the following professionals as part of their professional practice is building work but only to the extent the work relates to other building work—
- (a) an architect under the *Architects Act 2002*, schedule 2;
  - (b) a registered professional engineer under the *Professional Engineers Act 2002*, schedule 2;
  - (c) a surveyor under the *Surveyors Act 2003*, schedule 3.
- (4) In this section—

***Building Code of Australia*** see the *Building Act 1975*, section 12.

***Queensland Development Code*** see the *Building Act 1975*, section 13.

## 5 Work that is not building work—Act, s 8

- (1) For the Act, section 8, definition *building work*, paragraph (c), the following work is prescribed—
- (a) the construction, maintenance or repair of a busway, road or railway;
  - (b) the construction, maintenance or repair of a tunnel for a busway, road or railway;
  - (c) an authorised activity for a resource authority.
- (2) In this section—

***authorised activity*** see the *Mineral and Energy Resources (Common Provisions) Act 2014*, schedule 2.

***busway***—

- (a) means a route especially designed and constructed for, and dedicated to, the priority movement of buses for passenger transport; and
- (b) includes—
  - (i) places for the taking on and letting off of passengers of buses using the busway; and

- 
- (ii) a causeway or culvert in, on, or under a busway that is associated with the busway; and
  - (iii) another structure that supports a busway or has the purpose of ensuring the safe or efficient use of a busway.

*Examples for subparagraph (iii)—*

bridge, fence, gate, pedestrian overpass, pillar, sign

***driveway*** means—

- (a) a surface constructed—
  - (i) on a private property; and
  - (ii) for the purpose of driving or riding of motor vehicles to or from the property and a road; and
  - (iii) for which the right to use the surface is restricted to persons with an interest in the property and their invitees; or
- (b) a surface constructed—
  - (i) between the boundary of a private property and that part of a road used for the driving or riding of motor vehicles; and
  - (ii) for the purpose of driving or riding of motor vehicles to or from the property and the road.

***private property*** includes a separate or distinct parcel of land for which an interest is recorded in a register under the *Land Act 1994*.

***railway***—

- (a) means a guided system designed for the movement of rolling stock having the capability of transporting passengers, livestock or freight on a track with a gauge of 600mm or more; and
- (b) includes a railway station or platform.

***resource authority*** see the *Mineral and Energy Resources (Common Provisions) Act 2014*, section 10.

***road***—

- (a) means an area of land—
  - (i) whether surveyed or unsurveyed, dedicated, notified or declared to be a road for public use; or
  - (ii) whether surveyed or unsurveyed, taken under an Act, for the purpose of a road for public use; or
  - (iii) developed, or to be developed, for the public use of driving or riding of motor vehicles; and
- (b) includes—
  - (i) a street, esplanade, highway, pathway, thoroughfare, toll road, track or stock route; and
  - (ii) a causeway or culvert in, on, or under a road that is associated with the road; and
  - (iii) a structure in, on, or under a road that is associated with the road; and
- (c) does not include a driveway.

***rolling stock*** means a vehicle that operates on or uses a railway, including, for example, a carriage, locomotive, rail car, tram or trolley.

## **6 Residence—Act, 16**

- (1) This section prescribes particular types of buildings and structures for the Act, section 16(4), definition *residence*.
- (2) Each of the following structures is a residence if fixed to land and designed to be used for residential purposes—
  - (a) a single detached dwelling;
  - (b) 1 or more attached dwellings that are separated by a common wall;

*Examples—*

duplex, row house, terrace house, townhouse, villa unit

- (c) a building, of not more than 3 storeys, containing 2 or more separate residential units.

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- (3) Part of a structure mentioned in subsection (2) is also a residence if the part is designed to be used for residential purposes.
  - (4) A manufactured home fixed, or intended to be fixed, to land in a residential park is also a residence.
  - (5) However, the following things are not a residence—
    - (a) a boat, caravan, motor vehicle, tent, trailer or train; or
    - (b) a building designed as a temporary or movable building, other than a manufactured home as mentioned in subsection (4).
  - (6) For subsection (2)(c), the number of storeys of a building is calculated by excluding 1 storey of the building if more than 50% of the floor area of at least 1 storey of the building is designed to accommodate motor vehicles.

*Example—*

If a building has 3 storeys containing residential units and another storey where more than 50% of the floor area of the storey is designed to accommodate motor vehicles, the number of storeys of the building is 3.

- (7) In this section—

***manufactured home*** see the *Manufactured Homes (Residential Parks) Act 2003*, section 10.

***residential park*** see the *Manufactured Homes (Residential Parks) Act 2003*, section 12.

***residential unit*** means a part of a building designed for separate occupation as a residence.

***storey*** means a space within a building which is situated between one floor level and the next floor level, or if there is no floor above, the ceiling or roof above, but is not a mezzanine or space that contains only—

- (a) a lift, shaft, stairway or meter room; or
- (b) a bathroom, shower room, laundry, water closet or other sanitary compartment; or

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- (c) accommodation intended for not more than 3 vehicles;  
or
- (d) any combination of a thing mentioned in paragraphs (a) to (c).

## **7 Dispute resolution process—Act, s 34B**

- (1) This section prescribes processes for the Act, section 34B, definition *dispute resolution process*.
- (2) The following processes are prescribed—
  - (a) a proceeding in a court or tribunal;
  - (b) an adjudication of a payment claim.
- (3) Also, arbitration as required by a subcontract is prescribed for that subcontract.

## **8 Prescribed information about subcontracts—Act, s 50**

For the Act, section 50(2), the following information is prescribed in relation to a project bank account—

- (a) the name of each subcontractor beneficiary for the project bank account;
- (b) the name of the account for each of the subcontractor beneficiaries;
- (c) the name of the financial institution for each of the subcontractor beneficiaries;
- (d) the identifying number of the financial institution;

*Note—*

The identifying number is commonly referred to as the bank state branch number (BSB).

- (e) the account number for each of the subcontractor beneficiaries.

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**9 Prescribed information for payment instruction—Acts 51**

- (1) For the Act, section 51(3), the copy of information contained in a payment instruction that is prescribed to be given to a principal is—
- (a) the name of each person to be paid an amount under the payment instruction; and
  - (b) details of each of the following amounts—
    - (i) the amount to be paid to a subcontractor beneficiary under the payment instruction;
    - (ii) the amount, if any, to be paid under the payment instruction to the retention account, to be held as a retention amount for a subcontract with a subcontractor beneficiary;
    - (iii) the amount, if any, to be paid under the payment instruction to the disputed funds account, as an amount subject to a payment dispute involving a subcontractor beneficiary; and
  - (c) the date an amount mentioned in paragraph (b) is to be paid under the payment instruction; and
  - (d) the name of the account into which an amount mentioned in paragraph (b)(i) is to be deposited under the payment instruction; and
  - (e) the name of the financial institution into which an amount mentioned in paragraph (b)(i) is to be deposited under the payment instruction; and
  - (f) the identifying number of the financial institution; and
- Note—*
- The identifying number is commonly referred to as the bank state branch number (BSB).
- (g) the account number into which an amount mentioned in paragraph (b)(i) is to be deposited under the payment instruction.

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- (2) For the Act, section 51(3), the copy of information contained in a payment instruction that is prescribed to be given to a subcontractor beneficiary is—
- (a) details of each of the following amounts—
    - (i) the amount to be paid to the subcontractor beneficiary under the payment instruction;
    - (ii) the amount, if any, to be paid under the payment instruction to the retention account to be held as a retention amount for a subcontract with the subcontractor beneficiary;
    - (iii) the amount, if any, to be paid under the payment instruction to the disputed funds account as an amount subject to a payment dispute involving the subcontractor beneficiary; and
  - (b) the date an amount mentioned in paragraph (a) is to be paid under the payment instruction; and
  - (c) the name of the account into which an amount mentioned in paragraph (a)(i) is to be deposited under the payment instruction; and
  - (d) the name of the financial institution into which an amount mentioned in paragraph (a)(i) is to be deposited under the payment instruction; and
  - (e) the identifying number of the financial institution; and

*Note—*

The identifying number is commonly referred to as the bank state branch number (BSB).

- (f) the account number into which an amount mentioned in paragraph (a)(i) is to be deposited under the payment instruction.

## **10 Circumstances enabling principal to step in as trustee— Act, s 54**

A building contract being terminated for any reason is a circumstance prescribed for the Act, section 54(1)(d).

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## **Part 3 Registrar's policy and code of conduct for adjudicators**

### **11 Approval of registrar's policy—Act, s 155**

For section 155(2) of the Act, version 1 of the document called 'Adjudicator referral policy' and published on the commission's website is approved as a policy about administering chapter 3 of the Act.

### **12 Approval of code of conduct—Act, s 181**

For section 181(2) of the Act, version 1 of the document called 'Code of conduct for adjudicators' and published on the commission's website is approved.

## **Part 4 Adjudication applications**

### **13 Conflicts of interest—Act, s 80**

- (1) For section 80(b) of the Act, an adjudicator has a conflict of interest if—
  - (a) the adjudicator or a family member of the adjudicator—
    - (i) is, or is contracted to be, employed or otherwise engaged by the claimant or respondent for the adjudication application; or
    - (ii) is an owner of a building, structure or land in relation to which construction work or the supply of related goods and services to which the adjudication application relates is being carried out; or
    - (iii) is carrying out construction work or the supply of related goods and services in relation to a building, structure or land to which the adjudication application relates; or

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- (iv) has a direct or indirect pecuniary or other interest in a matter to be considered during the adjudication that could conflict with the proper performance of the adjudicator in adjudicating the adjudication application; or
  - (b) the claimant or respondent for the adjudication application is a family member of the adjudicator.
- (2) For subsection (1), a person is a *family member* of the adjudicator if the person is—
  - (a) the adjudicator’s spouse; or
  - (b) a grandparent, parent, uncle, aunt, brother, sister, cousin, child, nephew, niece or grandchild of—
    - (i) the adjudicator; or
    - (ii) the adjudicator’s spouse; or
  - (c) a spouse of a person mentioned in paragraph (b).
- (3) In this section—
  - freehold land* see the *Land Act 1994*, schedule 6.
  - owner*—
    - (a) of a building or structure, means the owner of the building or structure under the *Building Act 1975*; or
    - (b) of land, means the following—
      - (i) if the land is freehold land—the registered owner of the land;
      - (ii) if the land is the subject of a lease registered under the *Land Title Act 1994*—the lessee of the land;
      - (iii) if the land is the subject of a lease registered under the *Land Act 1994*—the lessee of the land;
      - (iv) if the land is a reserve—the trustee of the reserve;
      - (v) if a person has occupation rights in relation to the land under a licence or permit—the licensee or permittee.

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*reserve* see the *Land Act 1994*, schedule 6.

#### **14 Maximum fees and expenses for particular adjudication applications—Act, s 95**

- (1) This section prescribes, for section 95(2) of the Act, the maximum amount for fees and expenses an adjudicator is entitled to be paid for adjudicating an adjudication application relating to a payment claim for a progress payment of not more than \$25,000.
- (2) The maximum amount is—
  - (a) if the progress payment is not more than \$5,000—\$620; or
  - (b) if the progress payment is more than \$5,000 but not more than \$15,000—\$930; or
  - (c) if the progress payment is more than \$15,000 but not more than \$20,000—\$1,860; or
  - (d) if the progress payment is more than \$20,000 but not more than \$25,000—\$2,070.
- (3) To remove any doubt, it is declared that a maximum amount mentioned in subsection (2) includes both fees and expenses.

#### **15 Time for lodgement—Act, s 201**

- (1) For section 201(2)(f)(i) of the Act, an adjudication application must be lodged with the registrar no later than 5p.m. on a business day.
- (2) An application lodged after 5p.m. is taken to be lodged on the next business day.

#### **16 Procedures for processing adjudication applications—Act, s 201**

- (1) This section prescribes, for section 201(2)(f)(ii) of the Act, the procedure for the processing of adjudication applications by the registrar.

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- (2) The registrar must refer an adjudication application to a grade 2 adjudicator for decision if—
  - (a) the payment claim to be adjudicated is for a progress payment of more than \$150,000; or
  - (b) the registrar considers the complexity of the application requires that it be decided by a grade 2 adjudicator.
- (3) The registrar must refer an adjudication application relating to a payment claim for a progress payment of more than \$25,000 but not more than \$150,000 to—
  - (a) a grade 2 adjudicator; or
  - (b) a grade 1 adjudicator who has decided at least 3 adjudication applications relating to payment claims for progress payments of not more than \$25,000.
- (4) The registrar must refer an adjudication application relating to a payment claim for a progress payment of not more than \$25,000 to a grade 1 adjudicator or a grade 2 adjudicator.

## **17 Limitations on submissions and accompanying documents for particular adjudication applications—Act, s 201**

- (1) This section prescribes, for section 201(2)(g) of the Act, limitations on submissions and accompanying documents for—
  - (a) adjudication applications relating to payment claims for progress payments of not more than \$25,000; and
  - (b) adjudication responses to adjudication applications mentioned in paragraph (a).
- (2) The submissions—
  - (a) must not exceed 10 pages in total; and
  - (b) if typed—
    - (i) must be set out in a document the margins of which are at least 2.54cm; and

- (ii) must be written in a font size of at least 10 point; and
- (c) may only be accompanied by the following documents or copies of the documents—
  - (i) the payment claim to which the adjudication application relates;
  - (ii) the construction contract to which the payment claim relates;
  - (iii) a payment schedule given in response to the payment claim;
  - (iv) if a party to the application gave the other party a document in support of the payment claim or the payment schedule at the time the claim or schedule was given to the other party—the supporting document;
  - (v) if a party to the application gave the other party a document relating to the construction contract—the related document;

*Examples—*

- correspondence agreeing to a variation of a construction contract or an extension of time
- a program of work
- (vi) an expert report about a matter to which the payment claim relates;
- (vii) a statutory declaration about a matter to which the payment claim relates.

- (3) In this section—

***expert report*** means a report made by a person dealing entirely or mainly with the issues the person is qualified to give expert evidence about.

## **Part 5                      Adjudicators**

### **Division 1                      Adjudication qualification**

#### **18                      Adjudication qualification—Act, s 201**

The following matters are prescribed, for section 201(2)(b) of the Act, for an adjudication qualification—

- (a) the name of the qualification is Certificate in Adjudication;
- (b) a body mentioned in schedule 1, part 1 may issue the qualification;
- (c) the adjudication competency to be achieved is completion of the course called ‘Building Industry Fairness (Security of Payment) Adjudication’;
- (d) the elements that must be successfully completed are the elements mentioned in schedule 1, part 2.

### **Division 2                      Grading**

#### **19                      Application of division—Act, s 201**

This division prescribes the grading of adjudicators for section 201(2)(c) of the Act.

#### **20                      Eligibility to be grade 2 adjudicator**

A person is eligible to be a grade 2 adjudicator if—

- (a) both of the following apply—
  - (i) the person has, as an adjudicator, decided at least 10 adjudication applications;

- (ii) at least 5 of the applications related to a payment claim for a progress payment of more than \$25,000; or
- (b) the registrar considers the person's experience is equivalent to meeting the requirements of paragraph (a).

## **21 Grade of adjudicator on initial registration**

- (1) On the day an adjudicator's registration first becomes effective, the adjudicator is a grade 1 adjudicator.
- (2) However, if the adjudicator is eligible to be a grade 2 adjudicator under section 20, the registrar must give the adjudicator written notice stating the registrar proposes to grade the adjudicator as a grade 2 adjudicator.

## **22 Review of grade 1 adjudicators**

- (1) The registrar must review the grade of each grade 1 adjudicator at least once every 12 months.
- (2) The registrar must, after conducting the review, give the adjudicator written notice stating—
  - (a) if the adjudicator is eligible to be a grade 2 adjudicator under section 20—the registrar proposes to grade the adjudicator as a grade 2 adjudicator; or
  - (b) otherwise—the adjudicator continues to be a grade 1 adjudicator.

## **23 Adjudicator may decline proposed grading**

An adjudicator may, within 14 days after being given a written notice under section 21(2) or 22(2)(a), decline the proposed grading by written notice to the registrar.

## **24 Grading**

- (1) The registrar must grade a grade 1 adjudicator as a grade 2 adjudicator if—

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- (a) the registrar has given the adjudicator a written notice under section 21(2) or 22(2)(a); and
  - (b) the adjudicator does not decline the proposed grading mentioned in the notice under section 23.
- (2) The registrar must confirm the grading of a grade 1 adjudicator remains unchanged if—
- (a) the registrar gives the adjudicator a written notice under section 22(2)(b); or
  - (b) the adjudicator declines a proposed grading under section 23.
- (3) The registrar must give the adjudicator written notice of the grading or confirmation.

## **25 Change of grade by agreement**

The registrar may, with a grade 2 adjudicator's agreement, grade the adjudicator as a grade 1 adjudicator at any time.

# **Part 6 Miscellaneous**

## **38 Review of Act—Act, s 200A**

*The Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017* is prescribed for the Act, section 200A(6), definition *2017 suite of building and construction reforms*, paragraph (c).

## **39 Fees—Act, s 201**

For section 201(2)(h) of the Act, the fees payable under the Act are stated in schedule 2.

## **Part 7**

# **Transitional provisions for Building Industry Fairness (Security of Payment) and Other Legislation Amendment Regulation 2018**

### **40 Definition for part**

In this part—

*previous*, in relation to a section, means as in force immediately before the commencement.

### **41 Existing prescribed payments for deposits to project bank accounts for Act, s 28**

- (1) This section applies if, immediately before the commencement, a payment—
  - (a) was to be made because of an adjudication of a payment claim mentioned in previous section 6(1); and
  - (b) had not been made.
- (2) The payment is prescribed as a payment for section 28(e) of the Act.

### **42 Existing prescribed payments for withdrawals from project bank accounts for Act, s 31**

- (1) This section applies if, immediately before the commencement, a payment—
  - (a) was to be made because of an adjudication of a payment claim mentioned in previous section 7(1); and
  - (b) had not been made.
- (2) The payment is prescribed as a payment for section 31(1)(e) of the Act.

**43 Existing prescribed dispute resolution process for Act, s 34B**

- (1) This section applies if, immediately before the commencement, an application for adjudication of a payment claim under the *Building and Construction Industry Payments Act 2004* had been made but not decided.
- (2) The adjudication is prescribed as a dispute resolution process for the Act, section 34B, definition *dispute resolution process*.

**44 Grading of existing adjudicators**

- (1) This section applies to a person whose registration as an adjudicator is continued under section 204 of the Act.
- (2) The person is taken to be—
  - (a) if section 20(a) or (b) applies in relation to the adjudicator—a grade 2 adjudicator; or
  - (b) otherwise—a grade 1 adjudicator.

**45 Mandatory training for existing adjudicators—Act, s 165**

- (1) This section prescribes, for section 165(1)(c) of the Act, the prescribed mandatory training for an adjudicator mentioned in section 44(1).
- (2) The mandatory training is completion, by 1 April 2019, of the training course called ‘Transitionary training for registered adjudicators’, approved by the commission and published on the commission’s website.

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## **Schedule 1      Adjudication qualification**

section 18(b) and (d)

### **Part 1                      Body that may issue    qualification**

Contract Administration Group Pty Limited ACN 052 986  
544

### **Part 2                      Elements to be completed to    achieve competency**

- 1    Role and functions of an adjudicator
- 2    Role and functions of the adjudication registry
- 3    Analysis of the *Building Industry Fairness (Security of Payment) Act 2017*
- 4    Practical aspects of adjudication
- 5    Ethics, natural justice and good faith
- 6    Decision making and decision writing
- 7    Legal concepts for adjudicators
- 8    Technical concepts for adjudicators
- 9    Assessment—Examination
- 10  Assessment 2—Assignment: Mock adjudication decision

## Schedule 2 Fees

section 39

	\$
1 Adjudication application fee (Act, s 79(2)(d))—	
(a) for a payment claim for a progress payment of not more than \$10,000	57.35
(b) for a payment claim for a progress payment of more than \$10,000 but not more than \$50,000	172.10
(c) for a payment claim for a progress payment of more than \$50,000 but not more than \$100,000	286.85
(d) for a payment claim for a progress payment of more than \$100,000 but not more than \$250,000	401.65
(e) for a payment claim for a progress payment of more than \$250,000 but not more than \$500,000	516.35
(f) for a payment claim for a progress payment of more than \$500,000 but not more than \$750,000	631.10
(g) for a payment claim for a progress payment of more than \$750,000 but not more than \$1,065,600	745.85
(h) for a payment claim for a progress payment of more than \$1,065,600	0.07% of the progress payment amount, up to a maximum of 5,737.60
2 Registration, or renewal of registration, as an adjudicator (Act, ss 159(2)(a)(iii) and 167(2)(c))	796.80

## Schedule 3      Dictionary

### section 3

*grade 1 adjudicator* means an adjudicator other than a grade 2 adjudicator.

*grade 2 adjudicator* means an adjudicator who is graded as a grade 2 adjudicator under part 5, division 2.