



Changes to the building services legislation to enhance powers to target phoenixing and other commercial conduct

On 1 February 2023, changes to the *Building Services (Registration) Act 2011* (BSR Act) will enhance the powers of the Building Services Board (the Board), to manage the commercial conduct and behaviour of building service providers.

Unpaid building service debts

From 1 February 2023, the non-payment of a 'building service debt', being an unsatisfied court judgement or adjudication determination, will become an important matter in the registration and regulation of building service providers under the BSR Act.

What will be the consequences of having an unpaid building service debt?



The failure by a registered building service provider to pay a 'building service debt' that it has incurred will be a disciplinary matter for which the Board may take appropriate action. This may lead to the provider being fined, or in more serious cases - their registration being suspended or cancelled.

An applicant for the grant or renewal of registration as a building service contractor will also need to demonstrate to the satisfaction of the Board that they do not, at the time of making the application, have a building service debt. The Board cannot register or renew the registration of a person as a building service contractor if they have an unpaid building service debt.



If you are a building service provider that has a judgement debt or an adjudicated amount against you, but you do not intend to pay the full amount, you will need to take prompt action to avoid it becoming a building service debt.

This includes commencing proceedings to review or set aside the debt, or entering into a payment arrangement or commercial settlement with the other party.

Within
28
days
of the date
of the order

How will I know when a debt is payable?

The date for payment of a judgement debt will usually be stated in the relevant court order. If a date is not provided, the judgement debt will become a building service debt if it has not been paid within 28 days of the date of the order.

In the case of an amount determined by an adjudicator or review adjudicator, the date for payment will usually be stated in the determination. The amount must be paid within a minimum of 5 business days of the date on which the adjudicator or review adjudicator gives you a copy of their determination, or any such longer period as stated in the determination, otherwise it will become a building service debt.

Excluded contractor laws – targeting phoenixing behaviour

From 1 February 2023, the Board will have the power to exclude persons (including individuals, partnerships and corporations) from registration as a building service contractor where an “insolvency event” has occurred on or after that date and certain other circumstances apply.

These powers will enable the Board to target problematic ‘phoenixing’ behaviour brought to its attention, by targeting directly the individual officers of a failed construction business.

The powers may be exercised by the Board:



At the point in time of an application for the grant or renewal of registration as a building service contractor;

or



In the case of where a building service contractor is currently registered, at any time during the term of the registration.

The duration of an exclusion may either be temporary (three years) or permanent, in the case of repeated insolvency events. Where it exercises the power, the Board will first issue a ‘show cause notice’ to provide the contractor with an opportunity to demonstrate to the Board’s satisfaction why they should not be excluded.

Each case will be considered on its own merits, and in reaching its decision the Board may have regard to a number of considerations including the level of control the particular officer had in the occurrence of the insolvency event, and the evidence provided in response to the show cause notice.

A contractor may also avoid a temporary or permanent exclusion by clearly demonstrating to the Board that the officer concerned has been removed from the business and is not or will not be in any position of influence.





It is important to be aware that the Board's powers to target officers of failed construction businesses extends beyond designated office holders and includes influential persons or a 'shadow/straw director'.

Notification of the appointment of new directors

From 1 February 2023, a registered building service contractor which is a body corporate will be required to notify the Board in writing of any new director of the building service contractor.

The notification must be given within no later than seven days after the day on which the new director is appointed.

A failure to provide the notification may lead to a fine penalty of up to \$5,000.

What are the requirements for the new director notification?

The written notice must contain certain prescribed information:



- a copy of an Australian Securities and Investments Commission current and historical company extract for the body that was extracted within the previous 30 days;
- the new director's Director Identification Number (DIN) if the new director is required to have one;
- whether the new director is (or has been) bankrupt;
- whether the new director has not paid a building service debt incurred by them;
- whether the new director is (or has been) an officer of a corporation or a non-corporate body (e.g. an unincorporated association or partnership) that has become insolvent on at least one occasion within the past three years.

If the Board has concerns as to the financial history of the new director, it may choose to exercise its powers described above to require the building service contractor to show cause as to why the director should still remain an officer of the contractor.



More information about how to submit the new director notification will be available on the Building and Energy website.



Further information

You can find further information about when the BSR Act applies and how it operates in practice on the Building and Energy website.

Important terminology	
Act	the <i>Building and Construction Industry (Security of Payment) Act 2021</i> .
Adjudicator	is an individual registered under the Act as an Adjudicator.
Building service contractor	a person who is registered as a building service contractor under the BSR Act.
Building service provider	a person who is registered as a building service practitioner or building service contractor (or both) under the BSR Act.
Give	means to give a document under the Act (for example a payment claim, payment schedule, application or response) either in accordance with the method stipulated in the construction contract, or, if the contract is silent (or there is no contract), the document can be given by either: <ul style="list-style-type: none">• delivering it personally to the person who is to receive the document (for example the claimant, respondent, adjudicator, etc.);• leaving the document at the person's ordinary place of business;• sending the document by post to the person's ordinary place of business;• emailing the document to an address specified by the person; or• if an authorised nominating authority allows for the use of an electronic lock-box, submitting documents via that facility.
Review Adjudicator	is an individual registered under the Act as a Review Adjudicator.

Disclaimer – The information contained in this fact sheet is provided as general information and a guide only. It should not be relied upon as legal advice or as an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations, you should obtain independent legal advice.

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