



# Building and Construction Industry (Security of Payment) Act 2021: A Guide for Those Entering into a Construction Contract for Home Building Work

## Who should read this guide?

This guide is for all homeowners, owner builders, builders, contractors and suppliers working in the residential building industry.



The guide describes when the *Building and Construction Industry (Security of Payment) Act 2021* (the Act) may apply to your construction contract and what you need to know. It also includes a decision tree to help you decide whether the Act applies or not.

You should also refer to other factsheets and educational videos available on the Building and Energy website for detailed information about the Act. This guide is complementary to those resources.

The Act generally applies to construction contracts entered into for construction work or related goods and services in Western Australia (WA) after **1 August 2022**. Some exclusions apply (refer to the Building and Energy website for details).

## When does the Act apply in the residential building industry?



If and how the Act applies to your construction contract depends on whether it is a contract for 'home building work' and certain other circumstances are satisfied. Generally speaking, the Act will apply to construction contracts for home building work valued at \$500,000 (including GST) or more. Further details when the Act will and will not apply to home building work are set out in the table below.

Home building work is defined broadly in the *Home Building Contracts Act 1991* (WA) to mean the total or partial construction or re-construction of a 'dwelling', the placement of a dwelling on land, or the construction or carrying out of any associated works or work connected to an existing dwelling.

It also includes altering, improving, repairing or replacing an existing dwelling, strata titled dwelling or community title dwelling. A dwelling is defined to be a building occupied or intended for occupation solely or mainly as a place of residence.



Examples of home building work can include (but are not limited to):

- constructing a new home or making additions to an existing home;
- installing a swimming pool;
- cabinetry or tiling work for a kitchen or bathroom;
- constructing a garage, shed, pergola or patio connected to a dwelling;
- carpentry, brickwork, flooring, plastering, painting, decorating, plumbing, electrical, gas, heating, lighting and any other finishing trades for a dwelling;
- performing landscaping work; and
- associated works, such as the supply of materials, ground and slab works and drainage.

This means that if you contract for works on or for a residential dwelling (including strata and community title dwellings), it will be for home building work, irrespective of whether you are the owner, builder, contractor, supplier or the type of contract entered into (for example, cost-plus or trade management contract).

When your construction contract is for home building work, the Act will apply where the value of the contract is over \$500,000 (including GST). However, if the value of the contract is less than \$500,000 (including GST), the Act will have no application to the contract unless certain circumstances exist. The table below describes some of the circumstances where the Act does or does not apply to a construction contract for home building work.

### CONSTRUCTION CONTRACTS FOR HOME BUILDING WORKS (entered into after 1 August 2022)

#### The Act applies if:

- The total value of home building work under the contract is **more** than \$500,000 (including GST) and the client is a natural person (for example, individual or couple).
- The home building work is for 2 or more dwellings on different lots, or 3 or more dwellings on the same lot.
- The client (or principal) is carrying out the home building works for their residential development or business purpose.
- The client (or principal) is a body corporate/company (for example, strata corporation) or trustee.
- The contract is between a builder and subcontractor (for example, tradesperson), or subcontractor and supplier.

#### The Act DOES NOT apply if:

- The total value of the home building works under the contract is \$500,000 **or less** (including GST) and the client (or principal) is a natural person (for example, individual or couple).
- The home building works\* is for 1 or 2 dwellings (detached or attached) on the same lot of land (for example, a house, house and granny flat) or a strata titled unit, villa or town house, and the client (or principal) is a natural person (for example, individual or couple).

\*Note the total value of the works under the contract will also need to be less than \$500,000 (including GST).

## Are there other factors that will affect whether or not the Act will apply to a contract?



Yes.

Even if the contract is for home building work and the Act applies, you will not be able to make a payment claim and recover outstanding payments using the Act if:

- the particular work under the contract requires you to hold a registration under the *Building Services (Registration) Act 2011 (WA)* (Registration Act); and
- you do not hold the requisite registration for that work or supply.

The Registration Act requires a registration where the work is 'builder work', 'building surveying work' or 'painter work' within the defined meaning.

Builder work is building work for which a building permit is required under the *Building Act 2011 (WA)* (such as the builder named on a building permit) and the value of the building work is \$20,000 or more and the work is carried out in an area of WA listed in Schedule 3 of the associated regulations.

Building surveying work involves assessing and certifying that the design for a building or incidental structure demonstrates how the building work, if built, will meet the applicable building standards and, when inspecting building work during and post construction, certifying that the building work meets applicable standards and any conditions on the applicable building permit.

Painting work includes painting or applying wallpaper (or similar materials) to a building or fixture.



Remember, that even when you are performing painting work or building surveying work for a builder/contractor (such as a subcontractor) on any project (not just a residential project), you will not be entitled to make a payment claim under the Act if you do not hold the required registration.

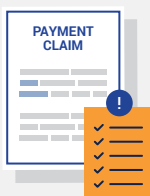


Further details about work that requires a registration is available on the Building and Energy website.



## What happens when the Act applies?

If the Act applies to a construction contract for home building work, it means that the person who carries out the work (the claimant) can make claims for payment under the Act and use the adjudication or court processes (as the case may be) to resolve disputed payments or recover outstanding debts.



To use the Act to recover payments or resolve disputes, a number of steps must be followed by the claimant. Further information on each of these steps can be found in the specific factsheets available on the Building and Energy website.

Depending on the circumstances, where a claimant makes a payment claim under the Act it must include (or have attached to it) a homeowner's notice in the correct form.

## What is a 'homeowner's notice' and when must it be given?

Where the Act applies to a construction contract for home building work, then in certain circumstances the claimant is also required to give the respondent a homeowner's notice (in the prescribed form) with a payment claim.



The purpose of the homeowner's notice is to inform the respondent what they need to do with the payment claim made under the Act. If you receive a homeowner's notice with a payment claim, you should read it carefully to understand what is required.

If a homeowner's notice is not given in the circumstances where it is required, the payment claim will not be valid, and the claimant will not be able to enforce their rights under the Act in relation to that claim. **(Please note:** A claimant is not prevented from attaching a homeowner's notice to a payment claim given under the Act even if one is not required)

The table below describes circumstances where a homeowner's notice is/is not required to be given with a payment claim made under the Act.

CONSTRUCTION CONTRACTS FOR HOME BUILDING WORKS (entered into after 1 August 2022 AND to which the Act applies (see table above))	
A homeowner's notice IS REQUIRED if:	A homeowner's notice is NOT REQUIRED if:
<ul style="list-style-type: none"> <li>The total value of the home building works under the contract is <b>more</b> than \$500,000 (including GST) and the client (or principal) is a natural person (for example, individual or couple).</li> <li>The home building works* is for 1 or 2 dwellings (detached or attached) on the same lot of land (for example, a house, house and granny flat) or a strata titled unit, villa or town house, and the client (or principal) is a natural person (for example, individual or couple).</li> </ul> <p><small>*Note the total value of the works under the contract will also need to be greater than \$500,000 (incl. GST) in order for the Act to apply.</small></p>	<ul style="list-style-type: none"> <li>The client (or principal) is a body corporate/company (for example, strata corporation) or trustee.</li> <li>The home building work* is for 2 or more dwellings on different lots of land, or 3 or more dwellings on the same lot of land.</li> </ul> <p><small>*Note the total value of the works under the contract will also need to be greater than \$500,000 (incl. GST) in order for the Act to apply.</small></p> <ul style="list-style-type: none"> <li>The client (or principal) is carrying out the home building works for their residential development or business purpose. For example, the client intends to take the land and/or dwellings, develops or improves it, and then sells or rents it out to third parties, either on their own behalf or for other people for the purposes of deriving as profit.</li> <li>The contract is between a builder and subcontractor (for example, tradesperson), or subcontractor and supplier.</li> </ul>



Where a homeowner's notice is required to be given with the payment claim, then it must be given in the prescribed form. A copy of the prescribed form can be downloaded from the Building and Energy website.



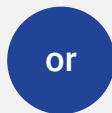
Remember, if the Act does not apply to your contract for home building work, no homeowner's notice is necessary.

## What are the times for payment of a claim under the Act?

Where the Act applies to a construction contract for home building work, the due date for payment of a claim made under the Act is either:

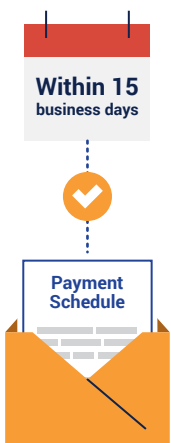


The date provided in the contract (for example 7, 14 or 30 days from making the claim)



If no date is provided, 10 business days from when the claim is given to the respondent

If there is no date for payment provided in the contract (the default 10 business days will apply), then it is important to be aware that a payment schedule may be given after the due date for payment. A payment schedule is a document provided by the respondent to the claimant indicating the amount, if any, that the respondent intends to pay in response to the claim.



The Act provides that a payment schedule must be given within 15 business days (or earlier date in the contract) of receiving the payment claim. If no payment is received within the 10 business days, the claimant will need to wait until the time for giving a payment schedule has expired before they get a choice to recover the full amount through adjudication or the courts (if no payment schedule was received) or adjudication (if a payment schedule was received). However, interest under the Act will start applying to the outstanding amount of the payment claim after the 10 business days and should be sought as part of the adjudication or court process.

The Act provides that the interest on outstanding payment claims is the amount stipulated in the contract, or, if there is no rate, the default rate under the *Civil Judgments Enforcement Act 2004* (WA) (currently 6% per annum).

## Examples of when the Act applies (or does not apply) and what to do

### Example 1: Contract with homeowner valued more than \$500,000

Mr Smith and Best Builders (BB) enter into a construction contract for the building of a new home on a single lot of land. The total value of the contract is \$600,000 (inclusive of GST). The contract provides that progress claims made to Mr Smith are due within 30 business days of receipt.

BB presents their next \$40,000 progress payment as a payment claim stated to be made under the Act, and which attaches the required homeowner's notice. Mr Smith has 30 business days to pay the claim in full, or to pay the undisputed portion of the claim in full and provide a detailed justification for their position in a payment schedule. Mr Smith's payment schedule must be given to BB within 15 business days (or earlier date in the contract) of receiving the payment claim.

If Mr Smith does not provide full payment within 30 business days or a payment schedule to BB, then BB may apply for adjudication of the claim (provided certain conditions are met), or seek to recover the full payment claimed as a debt through the courts.

If BB did not attach the required homeowner's notice to the payment claim, they will not have made a valid payment claim under the Act and risk invalidating any subsequent adjudication application or judgement debt enforcement proceedings under the Act through the courts. BB's failure to attach a homeowner's notice does not affect Mr Smith's liability to pay the claim, however the claim cannot be brought under the process determined by the Act without the homeowner notice.

### Example 2: Contract with homeowner valued less than \$500,000

Mrs Tone and Fantastic Builders (FB) enter into a construction contract for the building of a new home on a single lot of land. The total value of the contract is \$450,000 (inclusive of GST). The contract provides that progress claims made to Mrs Smith are due within 30 business days of receipt.

FB seeks to claim their next \$30,000 progress payment from Mrs Tone. While FB can make a claim under their construction contract, as the value of the contract is under \$500,000 FB cannot make a payment claim under the Act because this contract is excluded from the application of the Act.

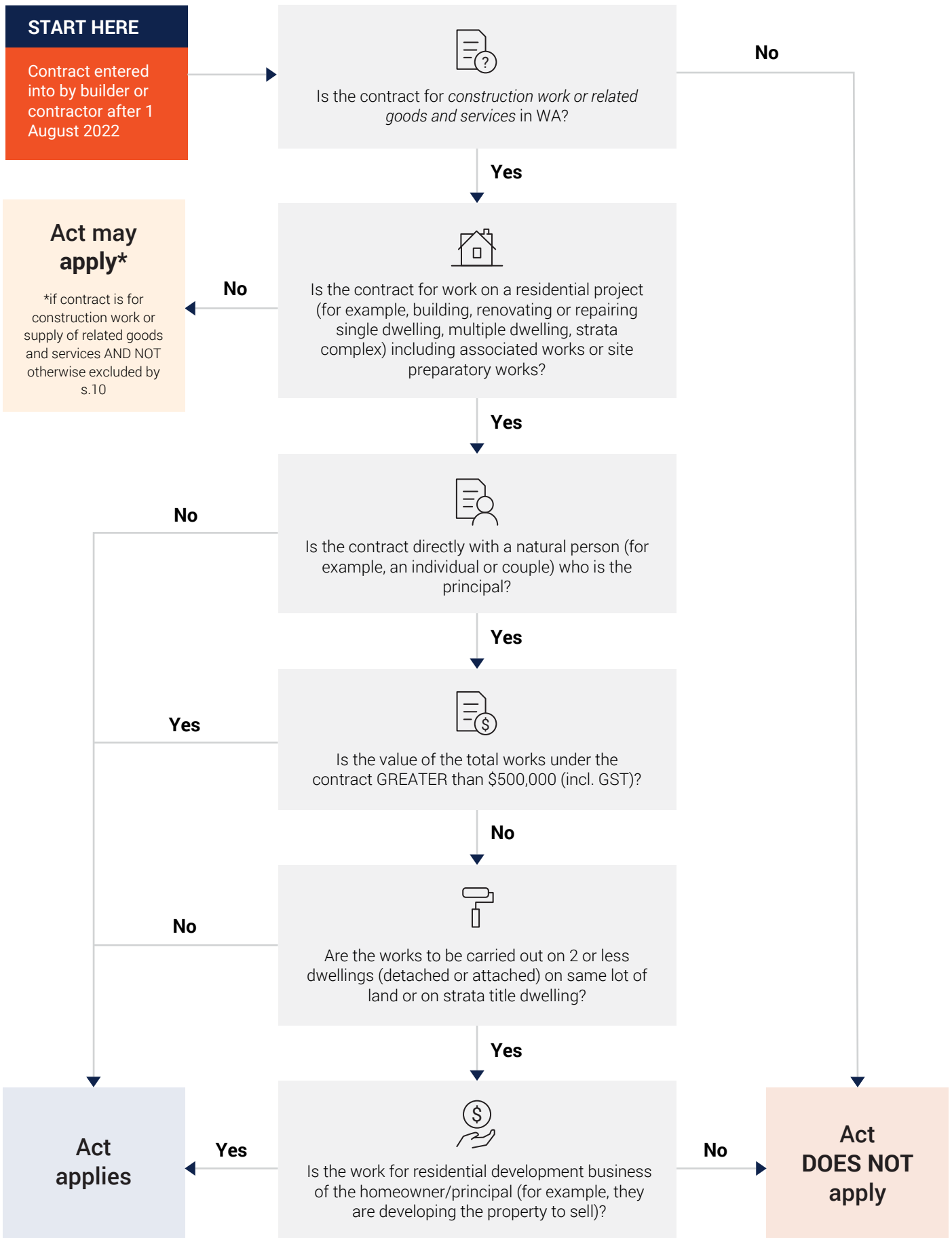
### Example 3: Contract between subcontractor and head contractor

In the meantime, Excellent Subcontractors (ES) has completed tiling work at the new home and seeks to make a payment claim for \$10,000 to FB. ES has a written contract with FB, however the contract does not set out a date for payment of invoices. ES can still make a payment claim under the Act to FB and does not need to include a homeowner's notice.

FB has 10 business days to pay the claim in full, or to pay the undisputed portion of the claim in full and provide a detailed justification for their position in a payment schedule. If FB does not provide full payment within 10 business days or a payment schedule to ES within the time required, then ES may apply for adjudication of the claim, or seek to recover the full payment claimed as a debt through the courts.

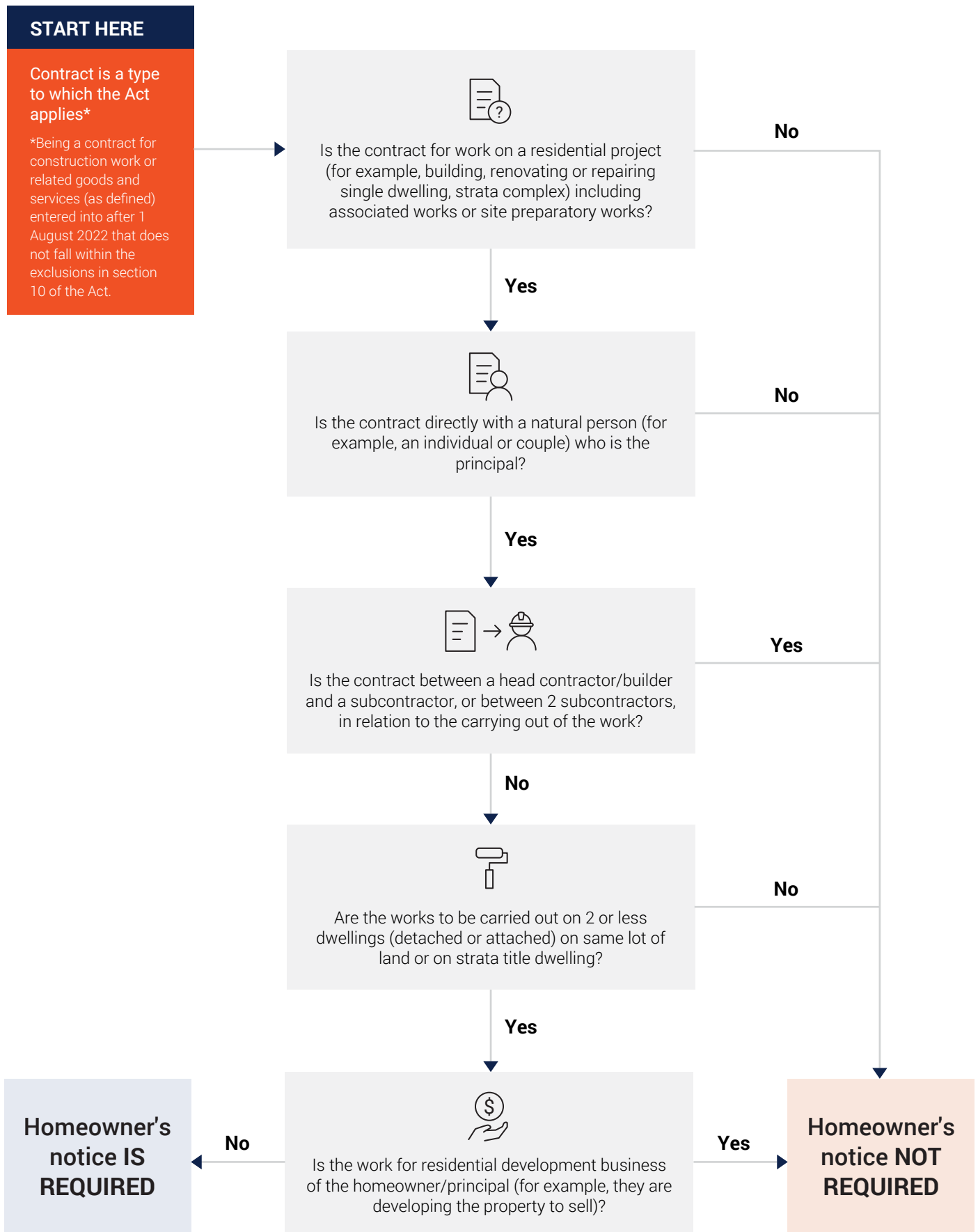
# Decision Tree – Does the Act apply to my contract?

The Decision Tree can help identify if the Act may apply to your construction contract.



# Decision Tree – Do I need to give a homeowner's notice with a payment claim?

The Decision Tree can help identify if a homeowner's notice should be given with a payment claim under the Act.





## Further information

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

### Important terminology

<b>Business day</b>	is any day other than a Saturday, Sunday or public holiday or day between 22 December and 10 January inclusive.
<b>Claimant</b>	is the person who is or who claims to be entitled to a progress payment and who makes a payment claim.
<b>Give</b>	<p>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:</p> <ul style="list-style-type: none"><li>• delivering it personally to the person who is to receive the document (for example the claimant, respondent, adjudicator, etc.);</li><li>• leaving the document at the person's ordinary place of business;</li><li>• sending the document by post to the person's ordinary place of business;</li><li>• emailing the document to an address specified by the person; or</li><li>• if an authorised nominating authority allows for the use of an electronic lock-box, submitting documents via that facility.</li></ul> <p>The adjudicator or authorised nominating authority will often stipulate how documents are to be given to them and should be given in this manner.</p>
<b>Respondent</b>	is the person who has been given the payment claim.

**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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