



Government of Western Australia
Department of Mines, Industry Regulation and Safety



Explanatory Statement

Draft Building and Construction Industry
(Security of Payment) Regulations 2022
and associated matters



November 2021

Produced by:

The Department of Mines, Industry Regulation and Safety

Building and Energy Division (Building and Energy)

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Disclaimer:

The document is an explanatory statement for the draft Building and Construction Industry (Security of Payment) Regulations 2022 and Building Services (Registration) Amendment Regulations 2022. The purpose of this document is to support public consultation on the draft regulations.

Every care has been taken to ensure accuracy in the preparation of this document. The contents do not constitute legal advice, or legal information. This document should not be used as a substitute for a related Act or professional advice.

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Contents

Terminology	4
Introduction	5
How to have your say	5
Making a submission.....	5
Closing date.....	6
How your input will be used	6
Public information sessions	6
Background	7
Key elements of the Draft Regulations.....	8
Value for certain contracts to be in writing - \$20,000	8
Homeowner’s notice	8
Limitations on submissions for adjudication applications – payment claims \$50,000 and below	9
Threshold value for review of adjudication determinations	10
Maximum fees and expenses for adjudication applications– payment claims \$50,000 and below....	10
Minimum credit rating for compliant performance bonds - AA.....	11
Threshold for retention money trust scheme – \$1 million for phase 1 and \$20,000 for phase 2.....	11
Excluding small scale residential contracts from retention trust scheme.....	12
Withdrawal of interest earned from retention trust accounts.....	13
Redaction of other beneficiary information from retention trust records.....	14
Code of practice for authorised nominating authorities	14
Qualifications for registration as adjudicator or review adjudicator	15
Experience for registration as adjudicator or review adjudicator	15
Adjudicator grades.....	16
Code of practice for adjudicators and review adjudicators	16
Electronic lock box - service of documents	17
Time of service of documents.....	17
Other policy matters	18
Definition of construction work and related goods and services	18
Model forms of construction contracts.....	18
Prohibited terms.....	19
BSR Amendment Regulations.....	20

Terminology

The following terms and acronyms are frequently referred to in this document. The definitions listed apply unless otherwise indicated.

Act	<i>Building and Construction Industry (Security of Payment) Act 2021 (WA).</i>
adjudicator	has the meaning given in section 4 of the Act.
authorised nominating authority	has the meaning given in section 4 of the Act.
Board	the Building Services Board, established under section 65 of the BSR Act.
BSR Act	<i>Building Services (Registration) Act 2011 (WA).</i>
BSR Amendment Regulations	<i>Building Services (Registration) Amendment Regulations 2022 (WA)</i>
BSR Regulations	<i>Building Services (Registration) Regulations 2012 (WA).</i>
Building Commissioner	The statutory office created under section 85 of the CRA Act.
corresponding security of payment law	has the meaning given in section 4 of the Act, being a law of the Commonwealth or of another State or Territory that corresponds substantially with the Act.
CRA Act	<i>Building Services (Complaint Resolution and Administration) Act 2011 (WA).</i>
DMIRS	Department of Mines, Industry Regulation and Safety.
Draft Regulations	<i>Building and Construction Industry (Security of Payment) Regulations 2022</i>
Government	Government of Western Australia
Minister	Minister for Commerce
review adjudicator	has the meaning given in section 4 of the Act.
WA	Western Australia
WA Act	<i>Construction Contracts Act 2004 (WA).</i>

Introduction

On 25 June 2021, the McGowan Government enacted its signature *Building and Construction Industry (Security of Payment) Act 2021* (the Act) to improve payment protections for contractors working the WA building and construction industry.

Before all sections of the Act (aside from sections 1, 2 and 98) can be proclaimed to commence operation, a number of administrative and technical matters must be prescribed by regulations.

These regulations will support the proper functioning of the Act and ensure the Government's overarching policy objective – of ensuring all those who contract to carry out construction work can get paid – is achieved.

The Minister has approved the release of a Consultation Draft of the *Building and Construction Industry (Security of Payment) Regulations 2022* (Draft Regulations) and the *Building Services (Registration) Amendment Regulations 2022* (BSR Amendment Regulations) for a period of public comment and consideration.

This document has been prepared to assist the reader of both documents to understand the policy intent of relevant regulations and to provide feedback on their operation and other ancillary policy matters.

This document should be read in conjunction with the Draft Regulations, BSR Amendment Regulations and the Act.

How to have your say

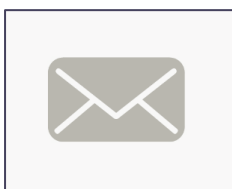
Making a submission

A number of questions are included in this document. These questions are aimed at making it easier to provide comment.

It is not expected that submissions will consider all questions. Please feel free to focus on the areas that are most important to you.

There is no specified format for submissions or comments. You are welcome to write a letter or email outlining your views and responses to the various questions in this document.

Written submissions or letters must be emailed to SoPReform@dmirs.wa.gov.au or posted in hard copy to:



Attn: Security of Payment Implementation Team

Policy and Legislation Branch

Building and Energy

Department of Mines, Industry Regulation and Safety

Locked bag 100

East Perth WA 6892

Please note that as this is a public consultation process, the comments and responses in your submission may appear in future publications. If you would prefer for your name to remain confidential, please indicate this in your submission. As all submissions received can be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become available.

Closing date

Comment on the Draft Regulations and BSR Amendment Regulations closes at **5pm (AWST) on 21 January 2022**.

Comments and submissions received after this date will not be considered.

How your input will be used

DMIRS will carefully consider all the information gathered during this process, but no responses to individual submission will be provided.

Changes may be made between the Draft Regulations and BSR Amendment Regulations and the final versions published in the *Government Gazette*. These changes will not be subject to any additional period of comment.

A copy of the final regulations will be available for download from the Parliamentary Counsel's website once made at:

<https://www.legislation.wa.gov.au/>

Public information sessions

DMIRS will be providing public briefing sessions on the Draft Regulations and BSR Amendment Regulations. These session will also provide an opportunity to provide feedback on the regulations.

If you wish attend one of these sessions, please go to the DMIRS website to find out more details and book your place.

Background

The Act introduces industry wide laws to promote cash flow in the building and construction industry in WA by providing a number of protections for contractors and mechanisms for the recovery of payments.

The Act encompasses four broad areas of law reform, including:

- ⇒ new security of payment laws that are more consistent with those in the rest of Australia, and that create more structure to payment rights under contracts and a more effective means for contractors to recover payments owed;
- ⇒ a retention trust scheme designed to better protect subcontractor retention money in the event of insolvency;
- ⇒ expanding the powers of the Building Services Board (Board) to take action and better manage builders and other providers who fail to pay certain debts to subcontractors and to remove those with a history of financial failure; and
- ⇒ fairer contracting practices to rebalance the allocating of contractual risk in the industry.

The Act was passed by the Parliament on 22 June 2021 and received Royal Assent on 25 June 2021.

To assist the industry in transitioning to the new requirements, the commencement of the Act will occur in 3 stages commencing from 1 August 2022.

Further information about the commencement of the Act can be found on the DMIRS website at:

<https://www.commerce.wa.gov.au/publications/security-payment-action-plan>

Parts of the Draft Regulations and BSR Amendment Regulations will commence operation at the corresponding time to the relevant sections of the Act:

- ⇒ Parts 1, 2, 3 (except regulation 9), 5 and 6 of the Draft Regulations will commence operation from 1 August 2022;
- ⇒ Part 4 of the Draft Regulation and the BSR Amendment Regulations will commence operation from 1 February 2023;
- ⇒ Part 3 regulation 9 of the Draft Regulations will commence operation from 1 February 2024; and
- ⇒ Regulations 3-to-6 of the BSR Amendment Regulations will commence operation on 1 February 2023.

Key elements of the Draft Regulations

Value for certain contracts to be in writing - \$20,000

Under section 13 of the Act, certain construction contracts involving registered building service contractors are required to be put in writing and meet minimum standards where the value of the contract is above the prescribed amount.

The intent is to improve contracting practices in the building industry, by ensuring contracts for works (or supply of goods and services) of a reasonable value are in writing and meet certain requirements.

While verbal contracts are an acceptable way for commercial parties to transact, they also create a risk of uncertainty as to each party's rights and obligations, which can increase the risk of a dispute arising as to payment.

Regulation 4 prescribes a value of \$20,000 (including GST). Construction contracts involving registered building service contractors over the value of \$20,000 will be required to be put in writing and meet minimum standards.

This value aligns with recommendations from various reviews and is consistent with other requirements affecting building service contractors under the *Building Act 2011* (WA).

To assist industry participants adapt to this requirement, the Building Commissioner will publish and promote suggested model form contracts in accordance with section 12 of the Act.



Questions for consultation

1. Do you agree with the \$20,000 (including GST) threshold in regulation 4?
2. Should the value be higher (if so, please provide reasons)?

Homeowner's notice

Under section 24(2) of the Act, a payment claim given to a principle (who does not fall within any of the exceptions) for home building work over \$500,000 (including GST), must include a 'homeowners notice'.

Homeowners are typically not regular participants in the contraction industry, and are often at a disadvantage when it comes to understanding the requirements of the Act.

Regulation 5 and Schedule 1 prescribe the form a homeowner's notice must take. A payment claim that does not include a homeowner's notice in the prescribed form will be invalid.

A template homeowner's notice will be made available for download on the Building and Energy website once section 24 of the Act commences operation. Parties are able to use their own homeowner's notice, provided it includes all of the information prescribed in Schedule 1.



Question for consultation

3. Does the homeowner's notice in Schedule 1 contain sufficient information to inform the receiver? If not, what other information should be included?

Limitations on submissions for adjudication applications – payment claims \$50,000 and below

Section 38(3)(c) of the Act provides that in determining an adjudication application, the adjudicator cannot consider submissions made by the claimant or respondent that contravene a limitation prescribed by regulations.

The purpose of this section is to limit the volume of submissions an adjudicator needs to consider in respect to low-value payment claims. This will support the proper operation of section 50(1) of the Act which can place a maximum cap on the adjudication fees and expenses that can be charged (see discussion on regulation 8 below).

Regulation 6 places limitations on the length of adjudication applications and responses in respect to payment claims of \$50,000 (including GST) or less.

No limitations will apply for applications and responses in respect to payment claims above \$50,000, although parties are best advised to keep their submissions clear and concise to assist the adjudicator in performing their functions under the Act and potentially reduce the associated costs.

Adjudication applications and responses for payment claims \$50,000 or less must not exceed 10 pages in length (back and front), excluding any cover page dealing with the names and details of the relevant parties. If pages are typed, it must have a minimum font size of 10 points and page margins of 2.54cm.

Adjudication applications and responses can be accompanied by the following supplementary documents (which are excluded from the calculation of the limitation):

- ⇒ the payment claim (and homeowner’s notice if required);
- ⇒ the relevant construction contract or provisions;
- ⇒ the payment schedule (if any) given in response to the payment claim;
- ⇒ any document that accompanied the payment claim or payment schedule;
- ⇒ a notice (if any) of the claimant’s intention to apply for adjudication;
- ⇒ a document given in connection with the construction contract, such as correspondence agreeing to a variation under the contract or time for completion (e.g. superintendent’s directions or written approvals);
- ⇒ an expert report obtained by the parties in respect to matters in the payment claim or payment schedule (e.g. a delay analysis report);
- ⇒ the draft compliant performance bond if the payment claim is under section 59; and
- ⇒ a statutory declaration about a matter to which the payment claim relates.



Questions for consultation

4. Do you agree with the page limits in regulation 6? If not, why not?
5. Do you agree with the value threshold of payment claims up to \$50,000 to which the limitations on submissions will apply? If not, why not?

Threshold value for review of adjudication determinations

Section 39 of the Act introduces a review adjudication mechanism that provides an aggrieved party a limited right to adjudication review by a senior adjudicator that meet the required threshold value set out in regulations.

The purpose of this section is to provide a review mechanism for payment disputes of a significant value. Review adjudicators can only consider the documents supplied by the parties as part of the original determination, the construction contract, the original determination and the requirements of the Act.

Regulation 7 prescribes the following values inclusive of GST:

- ⇒ a minimum threshold of \$200,000 for the difference between the claimed amount and the lesser adjudicated amount for the claimant;
- ⇒ a minimum threshold of \$200,000 for the difference between the scheduled amount and the greater adjudicated amount for the respondent; and
- ⇒ a minimum threshold of \$50,000 for the claimed amount for the claimant that the adjudicator decided they did not have jurisdiction to determine.

A respondent cannot apply for review adjudication if they did not give a payment schedule within the required timeframe.

Respondents or claimants may still litigate in a court of competent jurisdiction if the threshold values are not met, or if they choose not to apply for review adjudication.



Question for consultation

6. Do you agree with the thresholds for adjudication review in regulation 7?
If not, why?

Maximum fees and expenses for adjudication applications– payment claims \$50,000 and below

Section 50(1) of the Act provides that an adjudicator is entitled to be paid their fees and expenses for adjudicating an application. Section 50(2) and (3) provide a 'cap' or maximum amount of fees and expenses that can be charged by the adjudicator and different caps may apply depending on the payment claim or other factors.

The purpose of these sections is to provide some regulatory control over the fees and expenses charged for low value payment claims to ensure the Act achieves its objectives of being informal, inexpensive and quick, particularly for small business subcontractors.

Regulation 8 places limits on the amount an adjudicator may charge for payment claims of \$50,000 or less (including GST). Adjudication fees and expenses (inclusive of GST) must not exceed:

- ⇒ \$825, if the payment claim is for not more than \$5,000;
- ⇒ \$1,300, if the payment claim is for more than \$5,000 but not more than \$15,000;
- ⇒ \$2,300, if the payment claim is for more than \$15,000 but not more than \$20,000;

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- ⇒ \$2,800, if the payment claim is for more than \$20,000 but not more than \$25,000;
 - ⇒ \$4,300, if the payment claim is for more than \$25,000 but not more than \$40,000; and
 - ⇒ \$5,300, if the payment claim is for more than \$40,000 but not more than \$50,000.

These maximums are broadly consistent with requirements in other jurisdictions and the fee structures recommended by some authorised nominating authorities.

The maximums do not apply to expenses incurred by an adjudicator in arranging for a test or engaging an expert to investigate and report on any matter, or in respect to payment claims above \$50,000 (including GST).

The maximum adjudication fees set in regulation 8 will be subject to a regular review to ensure they adequately meet any changing costs.



Question for consultation

7. Do you agree with the limitations placed on adjudication fees and expenses for payment claims \$50,000 and below? If not, why, and what values would you propose?

Minimum credit rating for compliant performance bonds - AA

Section 59 of the Act creates a right to substitute a 'compliant performance bond' for retention money. Including among the criterion in section 60(1) for a compliant performance bond is the credit rating of the issuing institution satisfies the prescribed minimum.

The intent is to provide a claimant with the ability to access retention money as a liquid asset in exchange for a compliant performance bond, whilst protecting the contracting party's rights to the funds.

Regulation 9 provides a minimum credit rating of AA under the Standard and Poor's Long-Term Issuer Credit Ratings. This rating is considered to provide the balance between the right to substitute and the adequacy of the performance bond being provided.

This regulation will come into operation on the day which section 70 of the Act comes into operation and may be updated from time-to-time to accommodate substantial fluctuations in the credit markets.



Question for consultation

8. Do you agree with the minimum credit rating of AA under the Standard and Poor's Long Term Issuer Credit Ratings? If not, why not? Should another rating apply?

Threshold for retention money trust scheme – \$1 million for phase 1 and \$20,000 for phase 2

The Act establishes a scheme whereby retention money (money withheld) under construction contracts as performance security is taken (or deemed) to be held on trust (Part 4).

The retention money must be held in a retention trust account and may only be used for the limited purposes described in section 76(2) of the Act.

The purpose of Part 4 of the Act is to protect retention money withheld under a construction contract in the event of the contracting party becoming insolvent. Monies held in trust will not be available for distribution to general creditors as property of the company or the bankrupt.

Given the obligations imposed by Part 4 of the Act and the serious consequences that can flow from a breach of trust, section 70(1)(b) of the Act provides that the scheme does not apply if the value of the contract does not exceed the prescribed retention money threshold.

To assist industry participants transition to the new requirements, the retention money trust scheme will be implemented over two phases based on the value of the contract.

Regulation 10 prescribes a threshold value of \$1 million (including GST) for phase 1 and \$20,000 (including GST) for phase 2.

Phase 1 will commence from 1 February 2023. Construction contracts valued over \$1 million entered into after this date will be required to hold retention monies in a retention trust account.

Phase 2 of the retention trust scheme will commence on 1 February 2024. Construction contracts valued over \$20,000 entered into after this date will be required to hold retention monies in a retention trust account.

As per Section 74(2) of the Act, construction contracts that are entered into after the commencement of the regulations that subsequently exceed the relevant threshold will be required to establish a retention trust account.

The threshold values align with recommendations from various reviews. A cost benefit analysis was also conducted by Deloitte Access Economics for DMIRS, which concluded that the greatest benefit for subcontractors from the scheme is achieved the further down the supply chain it applies.

The Building Commissioner will promote educational material and guidelines for industry participants prior to the commencement of Phase 1 of the retention trust scheme. Trust accounting guideline will also be provided on the Building and Energy website prior to the commencement of Phase 1.



Question for consultation

9. Do you agree with the retention money thresholds prescribed in regulation 10 and the commencement dates? If not, why not?

Excluding small scale residential contracts from retention trust scheme

Under section 70 of the Act, certain prescribed construction contracts may be excluded from the operation of the retention trust scheme.

Given the number of small and micro businesses that operate in the residential housing industry, Regulation 11 excludes certain small scale residential contracts from the operation of the scheme.

These exclusions align with section 70(2)(a) and (b) of the Act, which already excludes contracts for home building works directly with individual homeowners.

Regulation 11 defines a small scale residential to be a contract for:

- ⇒ a single dwelling between a head contractor and a subcontractor or between 2 subcontractors; or
- ⇒ an associated structure connected to, or on the same lot as, an existing or proposed single dwelling; or
- ⇒ an associated structure on common property under the *Community Titles Act 2018* or the *Strata Titles Act 1985* if the principal is an individual.

It is intended that a strata corporation (or owner's corporation) entering into construction contract for an associated structure on common property will be captured by the scheme as they are considered a regular participant in the industry with the required knowledge and capabilities to understand the requirements of the Act.



Questions for consultation

10. Do you agree with the exclusion for small scale residential contracts from the retention money trust scheme? If not, why not?
11. Do you agree with the definition of a small scale residential contract used in regulation 11? If not, why not?

Withdrawal of interest earned from retention trust accounts

Section 76(2) of the Act describes the reasons when money may be lawfully withdrawn from retention money trust accounts, including any reason prescribed in regulation.

The Act provides that the party who establishes and operates the retention money trust account (the trustee) is entitled to any interest on the money contained therein. As retention money may be held in the retention trust account for a significant period of time (e.g. up to 3 years), it is considered reasonable that the trustee be entitled to withdraw interest earned before the date the money is due to be released under the construction contract.

Regulation 12 prescribes that the trustee may withdraw amounts, in part or in whole, equal to the total interest earned. Withdrawals may be made every 6 months or at any time after the retention trust end date.

This regulation provides the trustee with the rights and flexibility to withdraw interest to which they are entitled.



Question for consultation

12. Do you agree with the ability to withdraw interest once every 6 months? If not, why not?

Redaction of other beneficiary information from retention trust records

Section 79 of the Act sets out requirements in relation to the record keeping for retention money trust accounts. Under the Act, a beneficiary of a retention trust account has the right to request access to accounting records in respect to retention money held in that account.

In most cases, the accounting record will include a bank statement (or similar record) identifying the amounts held, and, if it is one retention money trust account operated for 2 or more beneficiaries, the name and amount held in respect to each beneficiary.

Regulation 13 provides the power to redact the name and other information that identifies another beneficiary to the account if records are provided to a party. The amounts of money held in the retention trust account is not permitted to be redacted.

This regulation will prevent the potential release of commercially sensitive information that may allow a party to determine the total value of a construction contract awarded to another beneficiary.



Questions for consultation

13. Do you agree with the name and information identifying other beneficiaries being redacted from information given to a beneficiary?
14. Are there other forms of confidential information that should also be prescribed?

Code of practice for authorised nominating authorities

Section 97(1) of the Act provides that the regulations may prescribe a Code of Practice that authorised nominating authorities are required to comply with.

Regulation 16 and Schedule 2 prescribes the Code of Practice for authorised nominating authorities.

The Code of Practice clarifies the expectations, responsibilities and obligations of authorised nominating authorities when undertaking their functions under the Act.

The Code of Practice is broadly similar to codes that apply under corresponding security of payment laws, such as the *Building and Construction Industry Security of Payment – Authorised Nominating Authorities (Code of Practice) Order 2020* (NSW) and *Authorised Nominating Authorities – Conditions of Authorisation* (Vic).

Contravention of the Code of Practice may result in the revocation of authorisation by the Building Commissioner or the imposition of conditions.



Questions for consultation

15. Do you agree with the provisions in the Code of Practice for ANAs? If not, why not?
16. Are there provisions that should be removed in the Code of Practice for ANAs, or included, as the case may be?

Qualifications for registration as adjudicator or review adjudicator

Sections 102(1)(a) and (2)(b) of the Act provide that an individual is eligible to be registered as an adjudicator or review adjudicator if they have the qualifications, expertise and experience requirements prescribed in the regulations.

Regulation 17(1) and (2) prescribe the minimum qualification requirements that are considered to be necessary for the role. Regulation 17(3) provides the required matters to be included in a course for approval.

This section ensures all applicants have the competency and capability to perform their functions. The minimum qualifications required for an application as an adjudicator or review adjudicator include a tertiary degree in one or more of the listed subjects, or completion of an equivalent path to becoming an Australian lawyer, and completion of a course approved by the Building Commissioner.

A tertiary qualification is necessary due to the importance of the adjudication function. Adjudicators are required to be familiar with the building and construction industry and/or contracting practices.

A Building Commissioner approved course will ensure an understanding of legislative requirements, and the role and functions of an adjudicator/review adjudicator in WA. It is important to ensure registered adjudicators and review adjudicators have the necessary skills and expertise to determine payment claims under the Act.



Question for consultation

17. Do you agree with the prescribed qualification requirements for adjudicators and review adjudicators? If not, why not?

Experience for registration as adjudicator or review adjudicator

In addition to minimum qualification requirements, section 102(1)(a) and (2)(b) of the Act provides that an individual is eligible to be registered as an adjudicator or review adjudicator provided they have the experience requirements prescribed in the Regulations.

Regulation 18 prescribes the minimum experience requirements for applicants as an adjudicator and review adjudicator.

An adjudicator will need to provide evidence they have met the requirements of having experience in the management and administration of construction contracts or resolution of disputes; or experience as a as a judicial officer; or experience as an adjudicator registered under the WA Act or corresponding security of payment law, for the relevant number of years.

The prescribed number of years are represented as full time equivalents.



Question for consultation

18. Do you agree with the prescribed experience requirements for adjudicators and review adjudicators? If not, why not?

Adjudicator grades

Under section 101(4) of the Act, regulations may provide for different grades of adjudicators in which an individual may be registered.

The purpose of this section is to allow for a graduated system to apply for adjudicators ensuring that more senior adjudicators are appointed to determine more complex payment claims.

Regulation 19 prescribes two grades of adjudicators:

- ⇒ Grade 1; and
- ⇒ Grade 2 adjudicators.

An individual registered as a Grade 1 adjudicator will have a condition imposed on their registration that they cannot accept appointments where the payment claim the subject of the adjudication application is greater than \$100,000 (including GST).

For Grade 2 adjudicators there are no restrictions on payment claim values. Classification as a Grade 2 adjudicator will require adjudicators to have met the experience requirements as provided in regulations. This relates to having adjudicated at least 10 adjudication applications, 5 of which relating to payment claims over \$50,000 (including GST).

Grade 1 adjudicators may apply to the Building Commissioner for a review of their grade of registration after the adjudicator has been registered for at least 12 month. A review of the grade by the Building Commissioner is at no cost to the applicant.



Question for consultation

19. Do you agree with the grades for adjudicators in regulation 19? If not, why not?

Code of practice for adjudicators and review adjudicators

Section 109 of the Act provides that the regulations may prescribe a Code of Practice for adjudicators and review adjudicators.

The purpose of the Code of Practice is to ensure adjudicators and review adjudicators carry out their functions under the Act properly, and observe certain standards of conduct to ensure integrity and confidence in both the adjudication and adjudication review process.

Regulation 20 and Schedule 3 prescribes the Code of Practice for adjudicators and review adjudicators.

Contravention of the code of practice may result in the revocation of registration by the Building Commissioner or the imposition of a condition.



Questions for consultation

20. Do you agree with the provisions in the Code of Practice? If not, why not?
21. Are there provisions that should be removed in the Code of Practice, or included, as the case may be?

Electronic lock box - service of documents

Section 113 of the Act sets out the requirements for the service of any document that is authorised, or required to be served under the Act including a payment claim, payment schedule, adjudication application and adjudication response (together with an adjudication review application/response). The Act also provides that other methods of service may be prescribed in regulation.

Regulation 21 provides that where an authorised nominating authority has provided a cloud-based or other electronic medium for accepting the electronic delivery of documents ('lock-box'), the authorised nominating authority is deemed to have been given the documents upon them being uploaded to the 'lock-box'.

The use of such technology (for example 'Dropbox', 'Google Docs' and 'Onedrive') facilitates the service of adjudication documentation on an authorised nominating authority, particularly in circumstances where physical, paper-based service is not practical or documents are otherwise too large to be served via email.

Additional methods of service may be prescribed in the regulations at a future date to cater for changes in technology.



Questions for consultation

22. Do you agree with the methods of service to authorised nominating authorities? If not, why not?
23. Are there alternative methods of service you would like to see prescribed in regulation 21? If so, please provide details.

Time of service of documents

Section 113(4) of the Act provides that the regulations may prescribe the time at which a document that is given in a particular manner is taken to have been given for the purposes of the Act.

The time in which documentation is given, plays a critical role as it 'starts the clock' on strict timeframes for providing notices or responses under the Act.

For the avoidance of doubt, regulation 22 prescribes a number of default rules that provides when a document is taken to be given depending on the method used, unless the contrary is proved.

These rules are to apply irrespective of whether the document is given in accordance with section 113(2)(a), the manner prescribed in the contract, or (b), the default rules in section 113(3).

Service through the mail, and through electronic mail are taken to be received in accordance with the *Interpretation Act 1984* and *Electronic Transactions Act 2011* respectively.



Questions for consultation

24. Do you agree with the time for service for the various methods used prescribed in regulation 22? If not, why not?
25. Do you think there will be any unintended consequences from the times prescribed in regulation 22? If so, please provide details.

Other policy matters

The Draft Regulations do not cover all matters that may be prescribed under the Act. Feedback is sought on other ancillary policy matters below, to determine if further regulations are required.

Definition of construction work and related goods and services

Sections 6 and 7 of the Act define the terms 'construction work' and 'related goods and services'. The definitions in sections 6 and 7 are designed to be as broad as possible to ensure the protections afforded by the Act apply to the wide variety of contracted works and services performed in the building and construction industry. The definitions also closely align with the same terms used in corresponding security of payment laws.

In addition to the various types of work and supply already listed, sections 6 and 7 of the Act allow for regulations to prescribe other types of work or supply to be included, or not included (as the case may be), within in the definitions.

The effect of these provisions would be to extend the protections afforded by the Act to works or supply not expressly listed, but which are usually performed in the building and construction industry, or alternatively, to exclude specific types of specialist work or supply that may not be considered 'typical' building and construction work but are nonetheless captured by the express words of sections 6 and 7.

The Government has made clear the policy intent of the Act is to afford payment protections to as many contractors who carry out construction work or related goods and services as possible. There must therefore be clear and logical reasons for any exclusions proposed under sections 6 and 7 of the Act to apply.



Question for consultation

26. Do you support the existing definitions of construction work and related goods and services in the Act? Are there other types of work or supply that should be included, or excluded, by regulations (please specify and provide reasons)?

Model forms of construction contracts

Section 12 of the Act empowers the Building Commissioner to assist industry participants to improve their contracting practices by preparing and publishing simple recommended forms of construction contracts that can be used. It is envisaged that at a minimum, such forms will meet the requirements of section 13 of the Act (which requires written contracts that contain certain mandatory information), include standard industry terms, and be prepared on a risk neutral basis.



Questions for consultation

27. Do you support the preparation and publishing of simple form construction contracts? If so, are there certain types of works or value thresholds that these contracts should target?
28. What types of terms would you like to see included in these contracts? Please specify and provide reasons.

Prohibited terms

Section 15 of the Act provides that regulations may prohibit certain types of terms in construction contracts, or in certain classes of construction contracts. The effect of this prohibition is to render the term void and unenforceable.

The purpose of section 15 of the Act is to deal with certain types of terms that may operate to limit the rights under the Act, or are otherwise considered unfair, particularly where the contracted party is a small business subcontractor. Often these businesses have little choice but to accept the contractual terms presented to them by the contracting party.

Examples of the types of terms that could be prohibited by regulation, include:

- ⇒ termination for convenience;
- ⇒ uncapped liquidated damages, or where the amount of liquidated damages exceeds the value of the contract;
- ⇒ obligations for compulsory dispute resolution before the making of a payment claim under the Act; and
- ⇒ limits on a contracted party's right to register security interests over unfixed plant and materials under the *Personal Property Securities Act 2009* (Cth).



Questions for consultation

29. Are there certain types of contractual terms that should be prohibited by regulation? If so, please provide examples and reasons.
30. Should the prohibition only apply to certain classes of contract (i.e. contracts for building works, or where the contract value is below a certain monetary threshold)?

BSR Amendment Regulations

Section 128 of the Act inserts a new section 32A in the BSR Act requiring a registered building service contractor that is a body to notify the Board in writing of the appointment of any new director.

This section supports the operation of the new Part 5A of the BSR Act (to be inserted by the Act) by alerting the Board of any appointments of a new director that may warrant consideration of a show cause notice. Written notice is required within 7 days after the date of the appointment of a new director and include information to be prescribed in the *Building Services (Registration) Regulation 2012* (BSR Regulations).

The BSR Amendment Regulations will insert a new regulation 10A that prescribes the types of information that must be provided in the notice given to the Board.

Specifically, this includes:

- ⇒ a copy of an ASIC historical company extract for the body – extracted within previous 30 days;
- ⇒ the new director's Director Identification Number (if applicable);
- ⇒ whether the new director is (or has been) a bankrupt or a person whose affairs are under insolvency laws;
- ⇒ whether the new director has not paid a building service debt of a kind referred to in section 53(4) that the new director has incurred; and
- ⇒ whether the new director is (or has been) an officer of a corporation or non-corporate body that became an insolvent on at least once occasion, but only if the period of 3 years has not elapsed since the insolvency event that resulted in the last insolvency.

Schedule 5 of the BSR Regulations is also amended to prescribe a modified penalty for failing to notify the Board of a new director.



Question for consultation

31. Do you agree with the list of information required under new regulation 10A?
If not, why not?

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