



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



Public Briefing Session

Security of Payment Regulations

Wednesday 1 December 2021 – Parmelia Hilton Perth





Presenters

- **Dan Kearney**, General Manager Policy and Legislation – Building and Energy
- **Angeline Ong**, Senior Policy Officer – Building and Energy

Acknowledgement



I wish to acknowledge the traditional custodians of the land we are meeting on, the Whadjuk people. I wish to acknowledge and respect their continuing culture and the contribution they make to the life of this city.

I acknowledge the Traditional Owners of country throughout Australia and recognise their continuing connection to land, waters and community. We pay our respects to them and their cultures; and to elders both past and present.



General Housekeeping

- **Intermittent Pulse Alarm** - a brief announcement advising you to stand by for further action.
- **Continuous Siren Sound** – dependent on the Hotel Emergency Response Team investigating the source, a decision will be made whether or not to evacuate.
- Upon hearing the second continuous alarm, you must proceed to the nearest fire exit.
- **Toilet facilities** are located of the main foyer outside the meeting room doors
- **Break for tea and coffee** part way through the session, which will be available at the back of the room/foyer
- **Copies of documents** are available at the back of the room.

Why are we here?



- *Building and Construction Industry (Security of Payment) Act 2021* - 25 June 2021
- Administrative and technical matters need to be prescribed by regulation:
 - *Building and Construction Industry (Security of Payment) Regulations 2022*
 - *Building Services (Registration) Amendment Regulations 2022*
- The regulations have been released for public comment in order to gain useful feedback on the technical requirements. Consistent with approach we have taken to much of this major law reform.
- The purpose of today's briefing session is to provide information on the draft Regulations. The information covered will be similar to that already described in the Explanatory Statement that was released along with the Regulations.
- However, in today's session there will be an opportunity to provide initial or final feedback through the interactive polling

How you can provide feedback?



- Two ways that feedback can be provided on the Regulations:
 1. Today, using the interactive polling; and/or
 2. Formal written submission by COB 21 January 2022 to:
SoPReform@dmirs.wa.gov.au
- If you do not wish to participate in the interactive polling today, then that is completely fine. Alternatively, you may wish to use the polling as a opportunity to provide preliminary feedback and then provide more formal feedback in writing.

**Consultation closes:
5pm (AWST) 21 January 2022**

Today's session



- Introduction
 - Key reform (1-10)
 - Questions and poll
- Break – tea and coffee in the foyer
 - Key reform (11-19)
 - Questions and poll
- Conclusion

Security of Payment Act



1. New security of payment laws
2. Retention Trust Scheme
3. Expanded powers of the Building Services Board
4. Fairer contracting practices

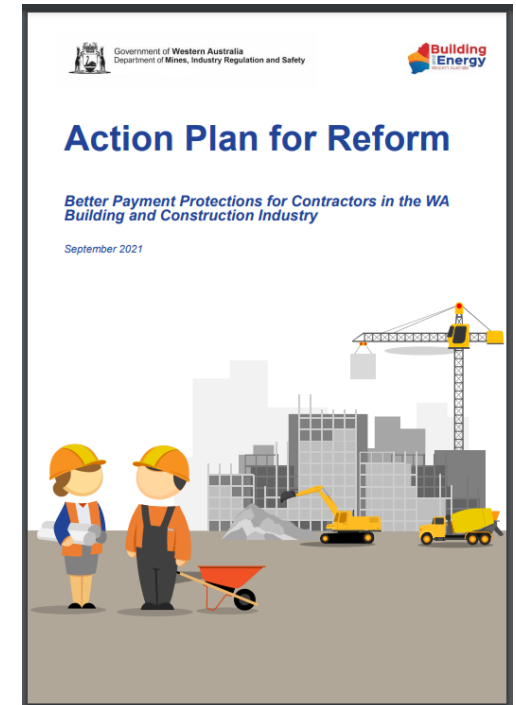
Will start applying to contracts entered into for construction work of the supply of related goods and services in WA after **1 August 2022**.

Implementation



Action plan released by the Minister of Commerce in September 2021

- **Stage 1 (1 August 2022)** - new security of payment laws:
Parts 1, 2, 3 (except s.57, 59, 60, 61 and 65), 5, 6 , 7 (Division 3 and 4 only) of Act
- **Stage 2 (1 February 2023)** - first phase of the retention trust scheme and the new Regulator powers.
Parts 4, 3 (s. 65 only) and remainder of Part 7 of the Act
- **Stage 3 (1 February 2024)** - second phase of the retention trust scheme and fairer contracting practices.
Parts 4 (Phase 2), 3 (s. 57, 59, 60 and 61) and mandatory CPD



<https://www.commerce.wa.gov.au/building-and-energy/security-payment>

How the Regulations work?



- Act provides a 'head of power' to prescribe a number of detailed matters by regulation.
- The Draft Regulations do not propose enlivening all heads of power at this stage, rather only those considered strictly necessary for the Act to commence operation from 1 August 2022.
- Feedback is also being sought on whether additional heads of power should be used to prescribe matters in these regulations.
- Table below indicates which heads of power are being used.
- Separate Amending Regulations will be made at a later date to cover CPD for adjudicators.

Act (relevant section)	Corresponding regulation	Act (relevant section)	Corresponding regulation
s.6(1)(f)	- (feedback sought)	s.88(2)(b), s.100(3)(b), s.100(3)(c)	r.14
s.6(3)(f)	- (feedback sought)	s.97	r. 16 and Schedule 2
s.7(1)(c)	- (feedback sought)	s.102(1)(a) and (2)(b)	r.17 and r.18
s.7(2)	- (feedback sought)	s.101(4)	r.19
s.13(2)(d)	r. 4	s.109	r.20 and Schedule 3
s.15	- (feedback sought)	s.113(3)(e)	r.21
s.24(2)	r.5 and Schedule 1	s.113(4)	r.22
s. 38(3)(c)	r.6	s.13(3) and (4) offences	r.23, r.24, r.25, Schedule 4 and 5
s.39(2)(b)(i)	r.7(1)		
s.39(2)(b)(ii)	r.7(2)		
s.39(3)(c)	r.7(3)		
s.50(2)	r.8		
s.60(1)(i)	r.9		
s.70(1)(b)	r.10		
s.70(1)(d)	r.11		
s.76(2)(h)	r.12		
s.79(4)	r.13		

Value for certain contracts to be in writing [s.13]



Regulation 4 prescribes a value of **\$20,000 (including GST)**.

Construction contracts involving building service contracts over the value of \$20,000 will be required to be put in writing and meet minimum standards.

Minimum standards:

- Names of the parties to the construction contract;
- Registration number of the Building Service Contractor;
- General description of work or goods and services; and
- Amount to be paid.

Commences: Stage 1 (1 Aug 2022)

Homeowner's notice [s.24(2)]



The Act requires a homeowner's notice to accompany payment claims made to the principle of home building work over \$500,000 (including GST), where the principle is an individual.

Regulation 5 and Schedule 1 prescribes 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.

The notice informs the Principal of obligations and requirements from receiving an endorsed payment claim.

Commences: Stage 1 (1 Aug 2022)

Limitations on submissions for adjudication applications [s.38(3)(c)]



The Act allows limitations to be placed on the submissions by a claimant or respondent made to an adjudicator.

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

Limitations:

- maximum 10 pages back and front;
- at least 10 point font size; and
- page margins of 2.54cm.

Commences: Stage 1 (1 Aug 2022)

Excluded from the page limits:

- 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.



Submissions over the limitation cannot be considered.

Threshold value for review of adjudication determinations [s.39]



The Act introduces a limited review adjudication mechanism. Review adjudication can only consider the original documents supplied.

Regulation 7 prescribes a minimum threshold of:

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

Commences: Stage 1 (1 Aug 2022)

Maximum fees and expenses for adjudication applications [s.50(1)]



The Act permits a maximum amount of fees and expenses that can be charged.

Regulation 8 places limits on the amount an adjudicator may charge for payment claims of \$50,000 or less (including GST).

- ⇒ \$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;
- ⇒ \$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.

Commences: Stage 1 (1 Aug 2022)

Minimum credit rating for compliant performance bonds [s.59]



The Act creates a right to substitute a 'compliant performance bond' for retention money.

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.

Commences: Stage 3 (1 Feb 2024)

Threshold for retention money trust scheme [s.70(1)(b)]



The Act establishes a scheme where retention money under construction contracts (over the threshold) as performance security is required to be held on trust.

Retention money held on trust may only be used for limited purposes.

To assist in the transition, the new requirements will be implemented over two phases.

Regulation 10 prescribes a threshold value of **\$1 million for phase 1** (1 February 2023) and **\$20,000 for phase 2** (1 February 2024) for construction contracts.

Commences: Stage 2 (1 Feb 2023) & Stage 3 (1 Feb 2024)

Excluding small scale residential contracts from scheme [s.70(1)(d)]



Under the Act, certain prescribed construction contracts are excluded from the retention trust scheme.

Regulation 11 excludes certain small scale residential contracts from the operation of the scheme.

Small scale residential contract:

- a single dwelling between a head contractor and a subcontractor or between 2 subcontractors; or
- an associated structure connected an existing or proposed single dwelling or same lot; 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.
- **Remember:** Construction contracts directly with homeowners for works over \$500,000 are already excluded under s.70(2) of the Act

Commences: Stage 2 (1 Feb 2023)

Withdrawal of interest earned from retention trust accounts [s.76(2)]



The trustee is entitled to interest earned on the retention trust account.

Retention money can only be withdrawn out of the trust account under certain circumstances.

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.

Commences: Stage 2 (1 Feb 2023)

Redaction of other beneficiary information from retention trust records [s.79]



The Act requires trustees to provide accounting records to the beneficiary if requested within a reasonable time.

Retention trust accounts can hold monies for more than one 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.

Commences: Stage 2 (1 Feb 2023)



Tea / Coffee break

15 minutes



Code of practice for authorised nominating authorities [s.97]



The Act provides that 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.

Contraventions of the Code may result in the revocation of authorisation or the imposition of conditions.

Commences: Stage 1 (1 Aug 2022)

Code of practice for authorised nominating authorities



Contents:

- Standards of business conduct;
- Conflicts of interest;
- Professional management arrangements;
- Complaints and internal disputes resolution;
- Adjudication applications;
- Adjudication review applications;
- Fees and expenses;
- Reports and information to the Building Commissioner; and
- Miscellaneous.

Commences: Stage 1 (1 Aug 2022)

Qualifications for registration as adjudicator or review adjudicator [s.102]



An individual is eligible to be registered as an adjudicator or review adjudicator if they have the qualifications, expertise and experience. This ensures all applicants have the competency and capability to perform their functions.

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.

Commences: Stage 1 (1 Aug 2022)

Qualifications for registration

Tertiary qualification in:

- architecture;
- engineering;
- quantity surveying;
- building and construction;
- construction management;
- built environments; and
- law.

Or if applicant is an Australian Lawyer.

Completion of a course approved by the Building Commissioner.



Commences: Stage 1 (1 Aug 2022)

Experience for registration as adjudicator or review adjudicator [s.102]



The Act provides that an individual is eligible to be registered as an adjudicator or review adjudicator provided they have the experience requirements.

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

Commences: Stage 1 (1 Aug 2022)

Experience requirements:



	Experience
Adjudicator	At least 5 years' experience in the management and administration of construction contracts or in resolution of disputes in connection with construction contracts; or
	At least 3 years' experience in the management and administration of construction contracts or in resolution of disputes in the connection with construction contracts, AND completion of an adjudicator mentoring program approved by the Building Commissioner; or
	Experience as a judicial officer ; or
	Experience as an adjudicator registered under the <i>Construction Contracts Act 2004</i> or a corresponding security of payment law.
Review Adjudicator	At least 10 years' experience in the management and administration of construction contracts or in the resolution of disputes in connection with construction contracts; and Experience as an adjudicator in the determination of at least 10 Adjudication applications , at least 5 of them being determinations related to payment claims/disputes for more than \$100,000 ; or
	Experience as a judicial officer .

Adjudicator grades [s.101(4)]



Adjudicator grades will provide a graduated system where more senior adjudicators are appointed to determine more complex payment claims.

Regulation 19 prescribes two grades of adjudicators- Grade 1 and Grade 2.

Grade 1 adjudicators cannot accept appointments where the payment claim the subject of the adjudication application is greater than \$100,000 (including GST).

Grade 2 adjudicators there are no restrictions on payment claim values.

Commences: Stage 1 (1 Aug 2022)

Grade requirements:



	Experience
Grade 1	Everyone registered as an adjudicator, except a Grade 2 adjudicator
Grade 2	At least 10 adjudication applications under the Act, 5 of which > \$50,000 ; or At least 10 adjudication applications under CCA or corresponding security of payment law, 5 of which > \$50,000; or Satisfy the Building Commissioner that applicants have equivalent experience in dealing with payment disputes (e.g. juridical officer, barrister with substantial construction practice or partner with substantial construction practice).

Code of practice for adjudicators and review adjudicators [s.109]



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.

Commences: Stage 1 (1 Aug 2022)

Code of practice for adjudicators and review adjudicators



Contents:

- Professional conduct;
- Conflicts of interest;
- Conduct of adjudications and adjudication reviews;
- Making determinations;
- Adjudication fees and expenses; and
- Miscellaneous.

Commences: Stage 1 (1 Aug 2022)

Electronic lock box - service of documents [s.113]



Certain documents must be served using methods prescribed in the Act or provided in the construction contract.

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'.

Examples include: Dropbox, Google Docs, and Onedrive.

Commences: Stage 1 (1 Aug 2022)

Time of service of documents [s.113(4)]



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.

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.

- Delivered personally – when it is accepted by that person;
- Left at the person’s ordinary place of business – left on premises with a person who appears to work there;
- Post – when the letter would have been delivered in the ordinary course of post;
- Email – when the electronic communication is taken to be received by the person;
- Lock-box – when the document is uploaded to the lock-box.

Commences: Stage 1 (1 Aug 2022)

Building Services (Registration) Amendment Regulations 2022



The Act amends the Building Services (Registration) Act to require a registered building service contractor that is a body to notify the Board in writing of the appointment of any new director.

Regulation 10A prescribes certain information to be provided to the Board:

- 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.

Other Policy Matters



- Definition of construction work and related goods and services [s.6, 7]
- Model forms of construction contracts [s.12]
- Prohibited terms [s.15]

Written Submissions



Email:

- SoPReform@dmirs.wa.gov.au

Post:

- **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

NOTE: EMAIL PREFERRED

Consultation closes: 5pm (AWST) 21 January 2022



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



Thank you!