



Action Plan for Reform

Better Payment Protections for Contractors in the WA Building and Construction Industry

September 2021



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Background

The McGowan Government is committed to ensuring subcontractors and suppliers in Western Australia's (WA) building and construction industry get paid for the work they do.

The *Building and Construction Industry (Security of Payment) Act 2021 (Act)* introduces industry wide laws to enhance payment protections for subcontractors and deliver the McGowan Government's commitments.



The Act will introduce reform in four areas



New security of payment laws that are more consistent with those in the rest of Australia to create more structure and transparency to payment rights under contracts and a more effective means for contractors to recover payments owed;



A retention trust scheme to better protect subcontractor retention money in the event of insolvency on a project;



Expanding the powers of the Building Services Board (BSB) to take action against builders and other providers who fail to pay debts to subcontractors and to remove those with a history of financial failure; and



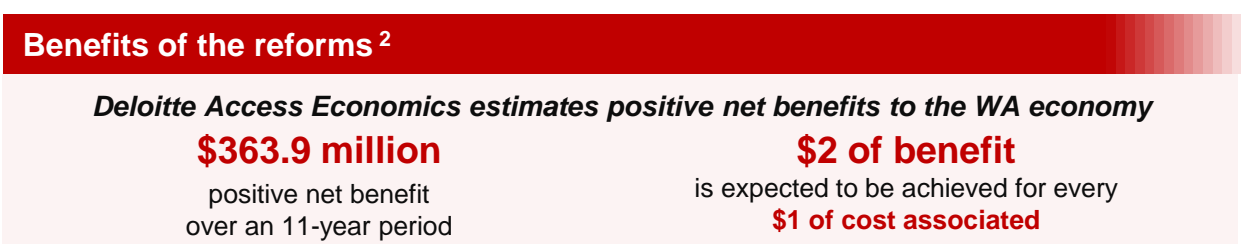
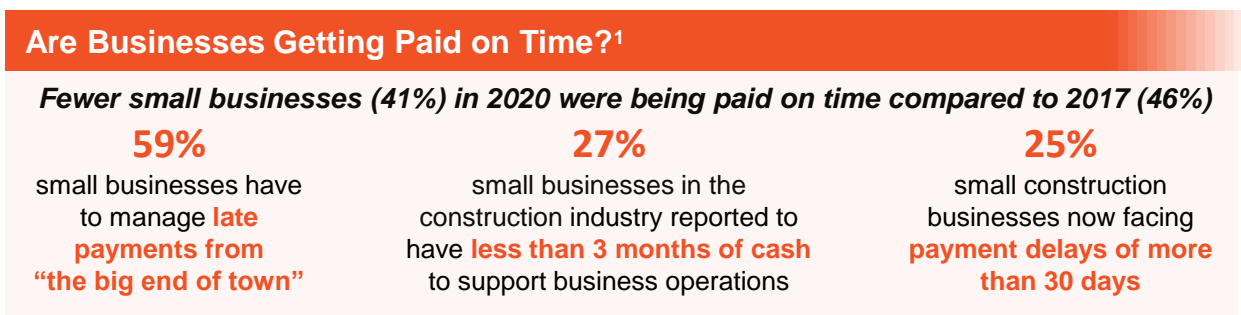
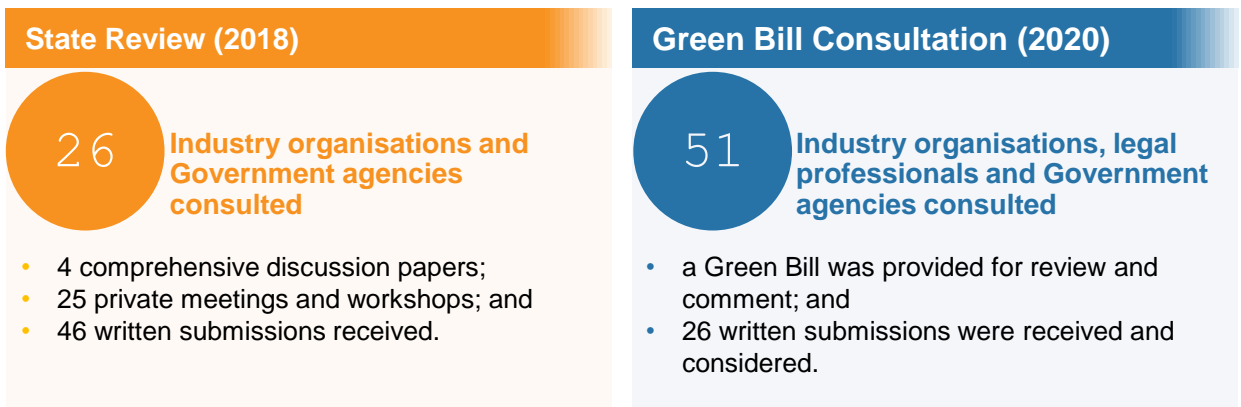
Fairer contracting practices to rebalance the allocating of contractual risk in the industry.

Preparation and Consultation

The payment reforms have been informed by the recommendations of two significant reviews:

- a national review by the Commonwealth Government; and
- a State review by John Fiocco and the Hon. Matthew Swinbourn MLC.

Industry and community consultation also took place on a Green Bill.



Next Steps

The Act received Royal Assent on 25 June 2021. This document sets out how the important payment reforms will be implemented.

¹ Bankwest Curtin Economics Centre – “BACK IN BUSINESS? WA small businesses and the impact of COVID-19 - Focus on Western Australia Report Series”, No. 14 February 2021

² Deloitte Cost Benefit Analysis of Security of Payment Reform for the Building and Construction Industry Department of Mines, Industry Regulation and Safety, July 2020

Overview

How the Act will Apply

The Act will apply to a 'construction contract' whether entered into in WA or elsewhere after the date of commencement. WA's existing security of payment laws, the *Construction Contracts Act 2004*, will continue to apply to contracts entered into prior to the date of commencement.

A construction contract is a contract for 'construction work' and/or the supply of 'related goods and services', carried out in WA. These terms are defined broadly to ensure the laws apply to most contracts entered into in the industry, irrespective of whether they are in writing, verbal or a combination of both.

Some minor exclusions apply to:

- A. contracts between residential homeowners and contractors for 'home building works' valued less than \$500,000;
- B. contracts between employers and employees for construction work or related goods and services;
- C. construction loan contracts, guarantees or indemnities which give separate rights to claim payment; and
- D. contracts for mining operation activities, such as for drilling or the construction of shafts or quarries.



Objectives of the Reforms

The Act will provide better payment protections to all contractors working in WA's building and construction industry to ensure they get paid on time, every time. The reforms will:

- A. Speed up payment times on construction projects and provide a more robust rapid dispute resolution process.
- B. Better protect subcontractor retention money in the event of insolvency on a project.
- C. Give powers to the building industry regulator to take action against builders who fail to pay court and adjudication debts, and to exclude those with a history of financial failure.
- D. Rebalance contractual risk allocation to ensure a 'fair go' for subcontractors.

Overview

Payment Reforms

New Security of Payment Laws

Persons who carry out construction work or supply related goods and services will have a statutory right to receive payment (for the first time in WA), and an effective process to recover delayed payments owed under construction contracts.

Where a payment claim is made under the Act, payment timeframes will be shortened to:

- 20 business days for the head contractor on a project;
- 25 business days for subcontractors (including all subcontractors and suppliers on a project); and
- 10 business days for certain types of home building works.

The risk of payment disputes between registered building contractors and their subcontractors will be reduced by requiring contracts (above a certain threshold) to be in writing and contain mandatory information. This will remove any uncertainty about each party's rights and obligations.

Retention Trust Scheme

Retention money will be protected from being misappropriated or lost altogether in the event of insolvency in the contracting chain.

Retention money held or withheld under a construction contract (above a certain threshold) will be held on trust for the benefit of the party who provided the money.

The retention money must be deposited into a retention money trust account established with a recognised financial institution.

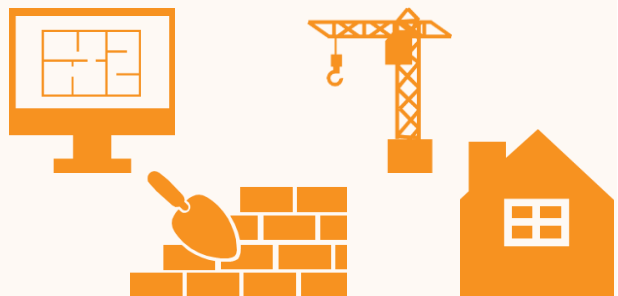
Retention money will often represent a large proportion (if not all) of the profit on a project. The scheme will help to keep businesses in business where there is an entity upstream on the project that becomes insolvent.

Fairer Contracting Practices

Contracting practices in the industry will become fairer.

The Act rebalances risk allocation by empowering contractors with new legal rights to challenge unfair time bars and providing a broader prohibition on 'pay when paid' provisions which set unfair preconditions to payment.

A party that has provided or arranged for the provision of performance security, or from whose progress payment retention money is to be withheld, will have the opportunity to receive notice before recourse is had to the performance security.



Commercial Behaviour

The Act will bring about cultural change within the industry by ensuring that poor practices and commercial behaviour are properly addressed, e.g.:

- Persons with a history of financial failure can be removed from the registered building contractor market by the building industry regulators. This will protect both the industry and the wider community from unwittingly contracting with incompetent and predatory operators.
- Building contractors will be subject to disciplinary action for not paying court-ordered or adjudication debts.
- Persons who threaten or intimidate a person for or from exercising their rights under the Act will face prosecution.

Action Plan Roadmap

The payment reforms are long overdue, but construction businesses will need time to adapt to the changes. The Act and supporting regulations will commence operation in 3 stages to ensure a smooth transition.

Each stage will be supported by industry education initiatives to assist businesses to understand the changes. Further consultation will also occur as part of the development of new supporting regulations in Stage 1.

This timeline provides an overview of the reforms that will commence operation by the end of each stage.



Stage 1

New Security of Payment Laws

Proclamation of priority parts of the Act and Regulations



Major Changes

The introduction of new security of payment laws (almost all of Parts 1, 2, 3, 5 and 6 of the Act).

Who is impacted?

- All parties who enter into a construction contract where the Act applies (see page 5 for where minor exclusions apply).
- Building contractors in respect to written subcontracts.

What does it mean to my business?

Cash flow for contractors will speed up significantly where a payment claim is made under the Act. The payment timeframes in the Act are intended to ensure payment flows through the contracting chain with minimum disruption.

What should my business consider?

All contractors will need to be aware of their new payment rights. Head Contractors and Principals will need to adjust their internal contract management processes including variation management to ensure payment claims are responded to within the time required. A failure to adequately respond to payment claims can result in the full or partial amount of the payment claim becoming owed to the claimant.



Further Public Consultation

Draft supporting regulations for the Act will be released for industry comment prior to the commencement of Stage 1.

Example: Progress Payment

WA Property Development (WA PD) has signed a \$100k contract with Handy Builders to construct an extension to a commercial building. Handy Builders, who engages a number of subcontractors, have been submitting progress claims as per WA PD's standard contractual terms but has experienced payment delays due to deliberation over variations and is concerned with its current cash position.

Handy Builders presents their next \$20k progress payment (including variations) as a payment claim stated to be made under the Act. WA PD has 20 business days to pay the claim in full, or to pay the undisputed portion of the claim in full and to provide detailed justification for their position on the variation claim and proposed payment schedule.

If WA PD does not provide full payment within 20 days or a payment schedule to the satisfaction of Handy Builders, then Handy Builders may apply for adjudication of the claim, or seek to recover the full payment claimed as a debt through the courts.

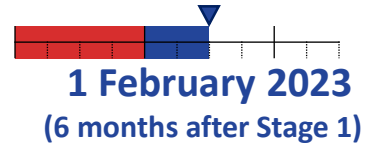
Other important changes

- Voiding unfair time bars and other contractual clauses (including 'pay when paid').
- New limited adjudication review process for high value claims.
- Registered building contractors will need to ensure that agreements with subcontractors for building services are put in writing where the value of the works is \$20,000 or greater.

Stage 2

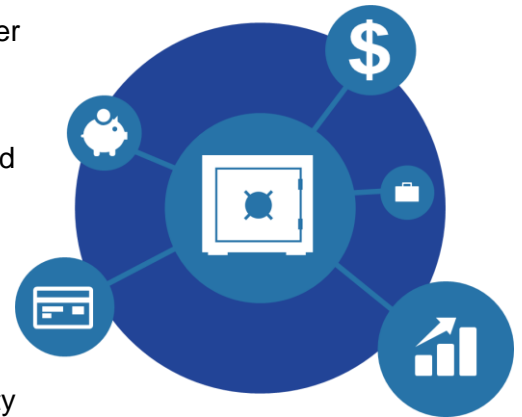
Retention Trust Scheme

Retention Trust Scheme (Phase 1) and new Regulator powers



Major Changes

- Retention trusts to apply to construction contracts over \$1 million (Part 4 of the Act), except:
 - contracts for residential work between builders and homeowners;
 - small residential subcontracts (by regulation); and
 - contracts directly with government principals.
- Higher standards of commercial behaviour required within the building industry (Part 7 of the Act).



Who is impacted?

- Parties who withhold retention money or cash security (in the case of the retention trust scheme).
- Building contractors (in the case of the new Regulator powers).

What does it mean to my business?

- A party withholding retention money or cash security under a construction contract will be required to hold the money on trust and be required to deposit it into a separate account to ensure the funds are quarantined.
- Persons with a history of financial failure can be excluded from starting or continuing a building business.
- Building contractors who fail to pay court and adjudication debts to subcontractors can be subject to disciplinary action or denied registration.

What should my business consider?

A party withholding retention money to which Phase 1 of the scheme applies will only be entitled to withdraw the money from the retention trust account to the extent they have a contractual entitlement to do so (e.g. to fix defects). The money cannot be withdrawn to cover the other debts of the business or be invested.

Building businesses will need to ensure that they pay subcontractors and manage their finances appropriately.

Example: Construction contract under which retention money is withheld

Owner A and Builder B enter into a construction contract for the supply of certain construction work valued at \$1,500,000 (inclusive of GST). The contract allows for retention of 10% of each progress claim up to a sum of 5% of the overall contract value. The contract provides that 2.5% may be held until the works are completed, and the other 2.5% until the end of the 12 months defects liability period.

Owner A (as a trustee) is obliged to open a retention money trust account and deposit the retention trust money into this separate account for each progress claim. Half the retention money held in the account must be returned to Builder B once the works are complete and the other half at the end of the defects liability period, unless Owner A is entitled under the contract to otherwise apply the funds. Owner A is entitled to any interest earned on the retention money while in the account.

Stage 3

Further Improvements

Retention Trust Scheme (Phase 2) and fairer contracting practices



Major Changes

- The contract value for the retention trust scheme will be lowered to \$20,000 (by regulations).
- Right to substitute performance security for a compliant performance bond (remaining sections in Part 3 of the Act).
- Mandatory CPD for adjudicators and review adjudicators.
- Offences for persons who contravene certain administrative requirements of the retention trust scheme (remaining section in Part 4 of the Act).



Who is impacted?

- Parties who withhold retention money or cash security.
- Adjudicators and review adjudicators.

What does it mean to my business?

Almost all construction contracts where the Act applies and that have a retention requirement will be required to comply with the retention trust scheme. Residential contracts and those directly with government principals will continue to be excluded.

Persons who contravene certain requirements of the retention trust scheme may be prosecuted and made to pay substantial fines.

Parties will have a right to substitute a performance bond (e.g. a bank guarantee) for retention money. This ensures a claimant will have the ability at any time to access retention money (as a liquid asset in cash) in exchange for a compliant performance bond.

Adjudicators and review adjudicators will be required to undertake mandatory CPD to maintain registration.

What should my business consider?

A party withholding retention money to which Phase 2 of the scheme applies will need to comply with the requirements of the retention trust scheme.

Adjudicators and review adjudicators will need to prepare to undertake CPD requirements as part of new registration or following renewal.

Stages 1, 2 & 3

Industry Education Program Overview

Building and Energy will support businesses to adjust to the reforms through a range of education initiatives.

Education



Awareness

- Advertising of the changes in industry publications.
- 'Security of payment roadshow' involving face-to-face information sessions across the State on the new laws and how they operate.

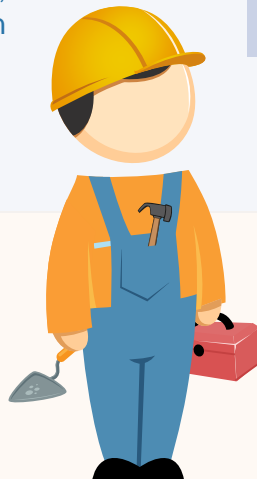
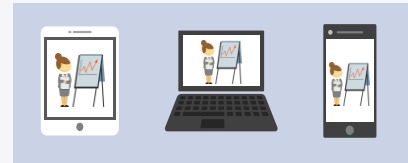
Training and information sources

- New educational videos and website content.
- Training for Adjudicators and Review Adjudicators.
- Suggested forms for payment claims, payment schedules, and adjudication applications and responses.



Information Sources

- Online information sessions, webinars and videos.



Tools

Guidelines

- Retention trust accounting guidelines.
- Model form contracts.