

# IN WITH THE NEW - BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) BILL 2021 (WA) BECOMES LAW

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Legal Briefings

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The *Building and Construction Industry (Security of Payment) Act 2021 (WA)* (**Act**) passed both houses of WA Parliament on 25 May 2021 and received assent on 25 June 2021.

The Act is the most significant reform to WA's security of payment regime since the introduction of the *Construction Contracts Act 2004 (WA)* (**CCA**). It heralds a radical shift in the balance in bargaining power between principals and contractors in Western Australia and brings the regime closer to the model adopted in other States.

The Act aims to provide an effective and fair process for securing payments to persons who undertake to carry out construction work, or to supply related goods and services, in the building and construction industry.

## WHAT HAPPENS NOW?|

### *Implementation of the Act*

The Act will have a staged implementation over the next 12-18 months to allow for the industry to adapt to the reforms.

As enacted on 25 June, only the object and commencement provisions have come into effect. The remainder of the Act will come into force on days fixed by proclamation, with allowance for different provisions to come into operation on different days.

The staged implementation of the Act will allow for the finalisation of the supporting regulations and the development of the administrative framework to support the operation of the new regime.

The Government has indicated a detailed implementation plan will shortly be released, and has allocated \$9.8 million in funding for the Act's implementation as well as industry education and compliance over the next 4 years.

During the initial implementation and industry education phases, some ambiguity will no doubt remain as to the operation of the Act and its transition away from the CCA.

### ***Application of the Act***

The Act will apply to construction contracts entered into after the provisions of the Act come into operation (through proclamation).

In essence, the Act applies to construction contracts to the extent they deal with construction work carried out within Western Australia and construction contracts to the extent they deal with related goods and services supplied for construction work carried out within Western Australia. There are a number of exceptions to this provided for in the Act.

Like the CCA, the Act applies to construction contracts whether they are written, oral, or a combination of the two.

The Act's definitions of 'construction work', 'civil works' and 'related goods and services' do not significantly modify the broad definitions under the CCA, and maintain the CCA's exclusion of works in respect of resources extraction.<sup>[1]</sup>

However, the Act is has a much narrower exception for resources extraction. Only drilling for the purposes of discovering oil and natural gas, or constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral or other substance is specifically excluded.

Other differences include (amongst others) certain contracts for residential homes, and where the work is not for monetary consideration, is a condition of a loan, or forms part of certain loans, guarantees or insurance agreements.<sup>[2]</sup>

## **BACKGROUND TO THE ACT**

The McGowan Government first introduced the *Building and Construction Industry (Security of Payment) Bill* to State Parliament in September 2020. Progress was stalled due to the March 2021 State Election, and the bill was reintroduced in May 2021.

The Act implements many of the reforms proposed by the *Review of Security of Payment Laws: Building Trust and Harmony* (December 2017) (Murray Review) and the *Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry* (October 2018) (**Fiocco Review**).

The Act increases the protection of downstream contractors and suppliers of goods and services by:

- a. increasing “fairness” in contracting;
- b. implementing a statutory right to monthly payment claims;
- c. amending the adjudication procedure to increase speed and improve review mechanisms;
- d. providing for greater security in the form of retention money trust accounts, claimants’ rights to liens and suspension; and
- e. increasing the powers of the Building Services Board regarding building service providers with history of insolvency or who fail to pay debts.\

## **WHAT IS THE NEW REGIME?**

### ***Increased focus on ‘fairness’***

The Act expands on the CCA’s prohibition of “pay when paid” provisions in construction contracts to include:

- a. provisions that make the due date for payment dependent on the date the paying party is paid by a third party; and
- b. where:

- liability;
- due dates for payment;
- the making of a claim; and
- the release of retention money or a performance bond,
- are contingent or dependent on the operation of another contract.<sup>[3]</sup>

The Act also provides that notice-based time bars may be declared unfair in particular instances. Provisions which makes an entitlement to payment contingent on the provision of notice, and certain provisions making extensions of time contingent on the provision of notice, can be notice-based time bars.

A provision may be declared unfair if compliance would not be reasonably possible or would be unreasonably onerous. Once declared unfair, the notice-based time bar has no effect in the circumstances in which it was determined to be unfair.<sup>[4]</sup>

The Act introduces certain mandatory requirements for contracts valued over \$20,000<sup>[5]</sup> that require those contracts to be in writing and include certain information. The Act imposes a penalty of \$2,000 for breaching these requirements.<sup>[6]</sup>

Finally, the Act provides for the Building Commission to prepare and publish model forms of construction contracts. However, it will not be mandatory to use the model forms.<sup>[7]</sup>

### ***Payment Claims***

The Act introduces a new statutory right to payment, more closely aligning WA's payment claim regime to the Eastern States.

The CCA has operated by implying certain terms where contracts were silent, such as terms entitling a contractor to claim progress payments and governing the timeframe for claims.<sup>[8]</sup> By contrast, the Act creates a statutory right to receive payment for a party who has undertaken to carry out construction work or supply related goods and services.

The statutory right to progress payments created in the Act is a separate right to any right to payment in the contract. While these payments are termed "progress payments", parties can make claims in respect of final payments, single or one-off payments, or milestone payments.<sup>[9]</sup>

A progress claim must be made within 6 months of the work being carried out (or by the date which is 28 days after the end of the last defects liability period in the case of final payment) unless the contract specifies a later date.

Pursuant to the statutory right, a progress payment becomes payable after:

- unless the contract specifies an earlier date:
  - 20 business days – where the payment is by a principal to a head contractor; or
  - 25 business days – where the payment is to a subcontractor; or
- unless the contract specifies otherwise, 10 business days – for home building work.

Once a payment claim is made, the respondent must pay the claim in full or provide a payment schedule with reasons why payment has been withheld within 15 business days (or earlier, if the contract specifies a shorter timeframe). If the respondent does not pay the claimed amount, or the amount in the payment schedule is less than the claimed amount, the claimant may elect to proceed to adjudication or seek to recover the amount as a debt in court.<sup>[10]</sup>

If no payment schedule is given by the respondent within the time allowed, then the respondent is liable to pay the entirety of the claimed amount. Further, the Act provides that where a payment schedule is not given, or a payment schedule accepting that an amount is to be paid is given, and payment is subsequently not made in time, the claimant can (subject to certain conditions):<sup>[11]</sup>

- seek to recover the relevant amount as a debt due in a court of competent jurisdiction;  
or
- make an adjudication application in relation to the payment claim.

### ***Adjudication process***

The Act makes several key changes to the adjudication process under the CCA, including:

- increasing the pace of adjudication by requiring adjudication applications to be made within 20 business days of a payment dispute arising, rather than the 90 business days provided for under the CCA;<sup>[12]</sup>
- prohibits a respondent from raising new reasons in an adjudication response that were not included in the payment schedule. There is no such prohibition under the CCA;<sup>[13]</sup>
- introduces an adjudication review mechanism that is available when the difference between the adjudicated and claimed amount or payment schedule exceeds the amount prescribed by the regulations, or if the adjudicator determined that no amount was payable;<sup>[14]</sup>
- removes the right of review to the State Administrative Tribunal that existed under the CCA; and
- empowers the Supreme Court to sever any part of an adjudication determination affected by jurisdictional error.<sup>[15]</sup>

## PROTECTIONS AGAINST INSOLVENCY

### *Retention money trusts*

The risk to contractors from immediate upstream insolvency is tackled in the Act by the introduction of a deemed trust scheme. Under the CCA, contractors had the protection of an implied term that retention monies were held on trust. The new regime is far more extensive.

The Act requires retention money to be held in a dedicated trust account with a recognised financial institution for the benefit of both parties. Failure to comply with the obligations regarding retention money trusts is an offence, with penalties of \$50,000 for individuals or \$250,000 for corporations.<sup>[16]</sup>

This measure, while a significant departure from the CCA, does not protect contractors as fully as some alternatives. The Fiocco Review recommended a “cascading trust” scheme, whereby parties who receive payments under a construction contract on account of work performed by another party are deemed to hold the payments on trust for the benefit of the party who performed the work.

During Parliamentary debate on the Act, consideration was given to a cascading trust alternative. Despite the greater protection such a regime would provide to contractors it was not adopted due to the administrative burden on the industry and extent of change required to the legislation. It is possible that this issue will be revisited once the industry has adjusted to the changes made by the Act.

## ***Additional claimants' rights***

The Act also:

- protects subcontractors against insolvency by introducing new rights for claimants to suspend work for non-payment;<sup>[17]</sup> and
- creates an entitlement for claimants to exercise a lien over unfixed plant or materials supplied by the claimant in relation to unpaid progress payments.<sup>[18]</sup>

## **POWERS OF THE BUILDING SERVICES BOARD**

In addition to reforming and supplementing the regimes under the CCA, the Act amends the *Building Services (Registration) Act 2011 (WA)* to insert new powers to exclude contractors with a history of insolvency or unpaid judgment debts from registration.

The effect of these amendments will be that building contractors who are considered less likely to meet their financial obligations will be precluded from obtaining registration and downstream contractors will be less at risk of requiring payment from contractors who are unable or unwilling to pay.

## **CONCLUSION**

As indicated above, the Act represents a radical change to the legislative framework for the construction industry in WA. While it is indeed “in with the new”, quite how the predicted repositioning of bargaining power in the industry plays out will remain to be seen.

There is certainly food for thought for both principals and contractors arising from the reform. While there is a transition period for the operative provisions of the Act, industry players must plan now to ensure contracts are both compliant, as well as robust. Reviews of construction contracts should be well underway.

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[1] Section 6(3) of the Act.

[2] Section 10 of the Act.

[3] Section 14 of the Act.

[4] Section 16 of the Act.

[5] This is the value that has been proposed as initially prescribed by the regulations.

[6] Section 13 of the Act.

[7] Section 12 of the Act.

[8] CCA, section 15 and sections 3 and 4 of Schedule 1 Division 3.

[9] Section 17 of the Act.

[10] Sections 25 - 27 of the Act.

[11] Sections 27 and 28 of the Act.

[12] Section 28 of the Act.

[13] Section 34(3) of the Act.

[14] Section 39 of the Act.

[15] Section 66 of the Act.

[16] Part 4 of the Act.

[17] Section 62 of the Act.

[18] Section 64 of the Act.



# KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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