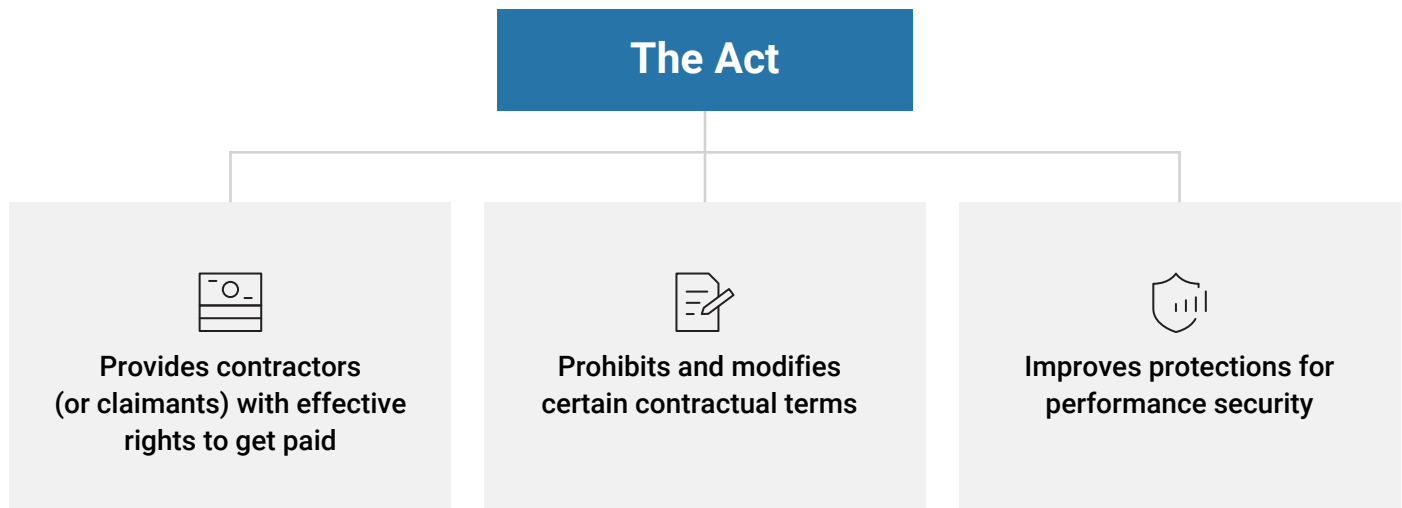


Topic 1

Overview of the *Building and Construction Industry (Security of Payment) Act 2021*

The *Building and Construction Industry (Security of Payment) Act 2021* (or the Act) promotes 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. This includes protections for head contractors, subcontractors and suppliers. It does not matter whether the job is on a privately-funded or government-funded project, the Act will apply.



Building and Energy monitors the operation of the Act. However, it does not take part in payment disputes or the enforcement of contractor rights under the Act. Contractors unsure of their rights under the Act should seek their own professional advice.



When does the Act apply?

The Act applies to the majority of contracts entered into for construction work or the supply of related goods and services in WA **after August 1 2022**. Construction contracts entered into **before August 1 2022** continue to be subject to the existing *Construction Contracts (Former Provisions) Act 2004 (WA)*.

A “construction contract” is defined very broadly, meaning the Act applies to the vast majority of contracts entered into in the industry, including those for residential, commercial, infrastructure and engineering construction works.



Examples of construction work and supply include (but are not limited to):

- the construction, alteration, repair, restoration, maintenance, extension, demolition, dismantling of buildings, structures and civil works whether permanent or not, as well any preparatory works, commissioning or finishing trades;
- installation of services in a building or structure, such as lifts, electricity, gas, water, heating and ventilation;
- reclaiming and dredging or prevention of subsidence of land;
- installation and supply of fixtures and fittings;
- plant and material supply, including concrete, steel works and plant and equipment sale or hire; and
- professional services, such as building design, engineering, planning, surveying and labour hire.



However, some types of contracts for construction work are excluded. These are:

- contracts for operational mining construction works, being:
 - drilling for discovering or extracting oil or natural gas, on land or off-shore;
 - constructing a shaft, pit or quarry, or drilling to discover or extract any mineral or other substance.
- contracts for fitting out the whole or part of a ship or watercraft;
- contracts directly with homeowners for home building works valued at \$500,000 or less;
- direct employee and employer arrangements;
- contracts that form part of or are a condition of a loan agreement, contract of guarantee or contract of insurance with recognised financial institutions (such as banks) or others;
- contracts for work or goods and services supplied for a job outside of WA; and
- contracts where the work payable is not calculated by reference to the value of the work completed.

What are the effective rights to get paid and recover debts?

All contractors doing construction work or supplying related goods and services under a construction contract have the right under the Act to claim and receive regular progress payments for their work.

Contractors can make claims for progress payments once per month for works or supply provided, or more frequently if provided for in the contract. This applies even if the contract is oral, written, absent or if the contract states the contractor cannot claim progress payments.



Contractors also have the right to claim for final payments, either in accordance with the terms of the contract, or, if there are none, under the default rules in the Act.

A payment claim must specify the amount to be paid, describe the items and quantities of work or supply, and state it is made under the Act.




A respondent who receives a contractor’s payment claim, must pay the amount in full by the due date, or give a payment schedule. The payment schedule must state how much of the contractor’s claim will be paid and why it is different from the claim, and outline all the reasons for withholding payment of the full amount claimed. A respondent who fails to provide a payment schedule within 15 business days or any shorter period under the contract is liable for the full amount claimed.

Where a respondent disputes the contractor's claim, the claimant can refer it to an independent third-party, called an ‘adjudicator’, for determination provided certain conditions are met. Adjudication is designed to be a rapid and cost effective way to resolve disputes over payment claims, outside of the court system, without the need for lawyers to become involved.

Alternatively, where the respondent is liable for the full amount claimed (because there has been no payment schedule and no payment, or they have not paid what was in the schedule), the contractor can choose to recover directly through the courts or adjudication, and suspend on-going works or supply.

Are certain contractual terms prohibited or modified?




The Act prohibits or modifies the operation of certain contract terms that may be used to unfairly deny payments to contractors.

This includes:		
		
<p>Pay-when-paid or pay-if-paid terms, when payment is denied to a contractor until the party required to pay receives money (including the release of security) from someone else</p>	<p>Terms that attempt to avoid or ‘contract out’ of the operation of the Act</p>	<p>Unfair notice-based time bar provisions</p>

A notice-based time bar can be declared unfair and of no effect by a court, arbitrator or adjudicator if compliance with the provision in the particular case is determined as not reasonably possible or would be unreasonably onerous.

Are there improved protections for performance security?

The Act also improves protections for contractor performance security, such as retention money and bank guarantees.

This includes:		
		
<p>Allowing progress payments to include claims for the return or substitution of performance security and for disputes over these claims to be adjudicated</p>	<p>Deeming retention money to be held on trust under certain conditions</p>	<p>Implying a minimum written notice period before a party has recourse to a contractors’ performance security</p>



**1 February
2023**



\$1,000,000

Trust requirements for retention money only apply to construction contracts entered into **after** February 1 2023 and where the value of the works is \$1,000,000 (one million dollars) or more. Contracts directly with individual homeowners and small scale residential contracts for home building work between head contractors and subcontractors are excluded.

Implied minimum written notice periods in respect of performance security also apply to construction contracts entered into from this date.



**1 February
2024**



\$20,000

Trust requirements for retention money will apply to construction contracts entered into **after** February 1 2024 where the value of the works is \$20,000 (twenty thousand dollars) or more. The same exception for small scale residential contracts will continue to apply.

Payment claims for the substitution of performance security also apply to construction contracts entered into **after** February 1 2024.

Important terminology

Adjudicator

is an individual registered under the Act as an adjudicator.

Business day

is any day other than a Saturday, Sunday or public holiday or day between 22 December and 10 January inclusive.

**Claimant
(or contractor)**

is the person who is or who claims to be entitled to a progress payment and who makes a payment claim.

Payment claim

is a claim given under the Act.

Respondent

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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