

CONSTRUCTION | JUNE 2022

WA GOVERNMENT ACTION PLAN FOR CHANGES TO SECURITY OF PAYMENT IMMINENT

Building and Construction companies in Western Australia should start preparing for stage one of the WA Government's Action Plan for the ongoing implementation of the new Security of Payment reforms for the industry, due to commence in August 2022.

The new Building & Construction (Security of Payment) Act 2021 (the New Act) came into force in June 2021. However, the commencement of most of the operative provisions of the New Act have been delayed to allow construction businesses time to adapt to the wide-sweeping changes.

The Action Plan

The government's Action Plan was released in October 2021 and has a three-stage timeline for implementation of the new changes:

STAGE 1: 1 AUGUST 2022 - Commencement of the new Security of Payment laws

From this date, the majority of the new processes for payment claims, and adjudications and the new statutory rights, protections and prohibitions will take effect. The key changes relate to the following:

- **Narrowing types of "construction contracts"** – the New Act does not apply to "low value" home building contracts and construction performed as a condition of a loan agreement.
- **Narrowing the "mining exclusion"** – construction works now include fabrication and assembly of plant for drilling / extracting / processing of oil / natural gas / mineral substances.
- **Reducing Due Dates for Payment** – principals are liable to pay head contractors within 20 business days of receiving a payment claim and contractors must pay subcontractors within 25 business days.
- **Narrowing Payment Claims to "up-stream" claims** – Payment Claims can only be made for "progress payments", meaning "down-stream" claims are no longer protected by security of payment laws.
- **Streamlining the "rapid" adjudication** – deadlines to make applications are shorter and the right to respond is significantly restricted by a new "Payment Schedule" system.
- **Prohibition on "Unfair Notice-Based Time Bars"** – Courts and adjudications can now declare contractual time-bars as unfair and void if they are not reasonably possible or unreasonably onerous – a new prohibition that is not replicated anywhere else in Australia!
- **New rights and restrictions on performance security** – recourse to performance security is now restricted by new notice provisions.

STAGE 2: 1 FEBRUARY 2023 - Retention Trust Scheme (High Value Projects) and Regulatory Powers

From this date, the following will take effect:

- A new mandatory retention trust scheme is introduced, requiring head contractors to set up a trust account for construction contracts over \$1 million.
- New powers for the Building Services Board to refuse registration of persons and businesses with a history of insolvency and to discipline building service providers for unpaid debts.
- New offences for threatening or intimidating claimants in relation to the exercising of any rights under the New Act.

STAGE 3: 1 FEBRUARY 2024 - Retention Trust Scheme (Low Value Projects)

From this date, the mandatory retention trust scheme will be extended to all construction contracts with a value of \$20,000 or more.

What do you need to do?

The bulk of the changes fall under Stage 1, which commences in two months. It is vital that all participants in the construction industry take steps now to familiarise themselves with the changes and update their contracts, including:

1. Consider whether your contracts / services fall within the definitions under the New Act.
2. Review your contracts to ensure that you will not be in breach of any new statutory prohibitions.
3. Update your payment terms and procedures for making and/or responding to payment claims.
4. For principals / head contractors – ensure you are ready for the new trust scheme for retention moneys.
5. Review your standard notice provisions and consider - are they *unfair*?

If you have any specific questions about the New Act and wish to discuss what the changes mean for your business, please contact:



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