

Overview

A consultation draft of the Building and Construction Industry (Security of Payment) Regulations 2022 to be made under the Building and Construction Industry (Security of Payment) Act 2021 (WA) (the Act), was released by Building and Energy (WA) for public comment in November 2021. The closing date for comment is 21 January 2022.

Building and Energy has issued an Explanatory Statement regarding the draft regulations, which outlines the policy intent and poses a series of questions on which specific feedback is sought.

Key Elements of the Draft Regulations

The key elements of the draft regulations include those in the following table:

Value of contracts required by section 13 of the Act to be in writing and meet minimum standards	AU\$20,000
Home owner's notice for home building work over AU\$500,000	Form prescribed
Limitation on submissions to adjudicators for low value adjudications	For low value payment claims (less than AU\$50,000), the limit on a submission is 10 pages
Threshold value for review of adjudication applications by a senior adjudicator	AU\$200,000: <ul style="list-style-type: none"> • For a claimant: difference between the claimed and adjudicated amount • For a respondent: difference between the scheduled and adjudicated amount AU\$50,000: for a claimant where original adjudicator ruled against jurisdiction
Maximum fees and expenses for adjudication applications for low value adjudications	AU\$825-\$5,300 depending on the payment claim amount
Minimum credit rating for compliant performance bonds	AA Standard and Poor's Long-Term Issuer Credit Ratings
Threshold values for retention money trust scheme	AU\$1 million for phase 1 (from 1 February 2023) AU\$20,000 for phase 2 (from 1 February 2024)
Exclusions from the retention money trust scheme	Certain small value residential contracts are excluded
Withdrawal of interest earned on retention trust money	The trustee may withdraw interest every six months or at the end of the scheme
Redaction of information relating to identification of beneficiaries of retention trust scheme	A beneficiary can request access to accounting records of a trust account but the trustee can redact information identifying other beneficiaries

Codes of practice for nominating authorities (NA) and adjudicators/review adjudicators	<ul style="list-style-type: none"> • Detailed codes of practice are prescribed • Contravention by a nominating authority may lead to revocation of authorisation • Contravention by an adjudicator may lead to revocation of registration or imposition of conditions
Qualifications and experience for registration of adjudicators/review adjudicators	<p>Qualifications:</p> <ul style="list-style-type: none"> • Degree or equivalent from a university or other tertiary institution in architecture, engineering, quantity surveying, building and construction, construction management, built environments or law and the completion of an approved (by the Building Commissioner) training course <p>Adjudicator experience:</p> <ul style="list-style-type: none"> • Minimum of five years in management of construction contracts or disputes; or • Minimum of three years as above and completion of an approved adjudicator mentoring program; or • Judicial officer; or • Experience as an adjudicator under the Construction Contracts Act (WA) (CCA) or elsewhere <p>Review adjudicator:</p> <ul style="list-style-type: none"> • Minimum of 10 years' experience in management of construction contracts or disputes; and • Experience as an adjudicator under the CCA or elsewhere in determining at least 10 adjudications with a least five of them dealing with payment claims over AU\$100,000; or • Judicial officer
Grading of adjudicators	<p>Adjudicators may be registered Grade 1 or Grade 2 depending on experience; grading affects level of adjudications permitted under the codes of practice</p>
Service of documents	<p>Allowed by email and electronic lock box (e.g. Drop Box, Google Docs and OneDrive), as well as previous methods</p>
Time for service of documents	<p>Service by email and electronic lock box are taken to be received in accordance with the Electronic Transactions Act 2011 and when the document is uploaded in the lock box</p>



Comments on the Draft Regulations

The monetary caps and thresholds appear to generally follow those in other states and other legislation involving builders in WA.

The codes of practice on NAs and adjudicators are prescriptive and will undoubtedly be of concern to NAs and adjudicators. However, non-compliance will not invalidate a decision of the nominating authority or the adjudicator (sections 97(3) and 109(3) of the Act).

Of immediate concern is that Building and Energy are seeking public input on “Other Policy Matters” (pages 18 and 19 of the Explanatory Statement), in particular:

- Should there be regulations that widen the definition of “construction work” under the Act?
- What sort of terms should be in the model contracts?
- What additional terms (beyond unfair time bars) should be prohibited by regulation?

Perhaps the most fertile area for discussion will be the prohibited terms and whether they should apply only to certain classes of contract or contract values. Examples of potential prohibited terms are given in the Explanatory Statement:

- Termination for convenience
- Uncapped liquidated damages
- Compulsory dispute resolution before an entitlement to make a payment claim
- Limits on the right to register a PPSA interest.

Issues to be considered include how far should the regulations go in relation to intrusion into freedom of contract, whether there is a demonstrable need for further prohibitions, whether further prohibitions may have unforeseen consequences, and that unfair contract legislation already exists in one form (under the Australian Consumer Law).

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