

# Supporting Explanatory Statement

*Building and Construction Industry (Security of Payment) Amendment Bill 2025*

Consultation Draft



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## Overview

The *Building and Construction Industry (Security of Payment) Amendment Bill 2025* (the Bill) will strengthen and streamline subcontractor protections on State Government funded construction projects.

Principally, the Bill introduces a scheme (known as 'construction trusts') in the *Building and Construction Industry (Security of Payment) Act 2021* (the SOPA) to replace the existing use of Project Bank Account arrangements (PBAs) on State Government construction projects.

PBAs have been required under procurement rules for the majority of State Government construction projects since 2019 to ensure protection and transparency to subcontractor payments.

While Western Australia has led the nation in the use of PBAs, changes are needed to reduce administrative burden and improve certainty for all parties.

The construction trust scheme in the Bill will:

- remove the up-front administrative burdens with PBAs of executing complex and lengthy legal documentation;
- clarify legal rights in the event of head contractor insolvency and remove the need for subcontractors to register security interests; and
- provide choice and flexibility for head contractors by allowing any transaction or deposit account provided by a bank to be used as a trust account for the purpose of the scheme.

The Bill also:

- makes minor amendments to the SOPA to remove unnecessary time restrictions in the giving of copies of various documents required as part of the rapid adjudication process; and
- enhances to the powers of the Building Commissioner to require documents as part of undertaking financial investigations.

The consultation draft of the Bill and supporting regulations have been released for public comment for a period of 6 weeks. The period for comment closes on **14 November 2025**.

Comments received will be considered before the Bill is introduced into the WA Parliament.

All comments and submissions are to be provided to Building and Energy by email to [sopreform@lgirs.wa.gov.au](mailto:sopreform@lgirs.wa.gov.au).

## The statutory construction trust scheme

Part 2 of the Bill contains the main provisions for establishing the construction trust scheme.

### When does the scheme apply?

The scheme will apply automatically where there is an eligible head contract with a “State agency” within the meaning of the *Procurement Act 2020* (WA), and the contract was entered on or after the commencement date of the Bill.

PBAs will continue to be used and operate on any projects where the date of the contract predated the commencement of the scheme.

To be eligible for the scheme, the contract must meet the same financial minimum value threshold for the use PBAs, being \$1.5 million (including GST) or greater. Some exceptions will apply to contracts solely for professional services, maintenance work, or which are short-term contracts (less than 3 months until practical completion). The financial threshold, and exemptions, are addressed in the draft regulations.

A Government Trading Enterprise (GTE) within the meaning of the *Government Trading Enterprises Act 2023* (WA), may voluntarily opt-in a head contract to the scheme. This carries over the current flexibility available to GTE’s on the use of PBAs.

Subcontractors and suppliers contracted directly by the head contractor for the project (‘first-tier’) will be beneficiaries under the scheme, ensuring their payments are safeguarded and protected in the event of insolvency.

The scheme does not impose trustee obligations on subcontracting businesses for payments owed down the contracting chain, which has proven burdensome and problematic in other Australian jurisdictions.

The existing retention trust scheme in Part 4 of the SOPA will continue to provide the necessary protections for subcontractor retentions at all levels of the contracting chain on both State Government and private construction projects.

### How is the trust created?

The Bill greatly simplifies the process for the creation of the trust as compared to PBAs.

A trust is created by force of law, in connection with progress payments owed by head contractors to first-tier subcontractors, from the earliest possible point in time so that trust obligations are clearly defined prior to any insolvency event.

The need for legal documentation, such as the PBA Trust Deed Poll, PBA Agreement, and Deed of Release or a Priority Deed Poll, is removed entirely, as the Bill will create the trust and grant a security interest in the trust funds for the purpose of the Commonwealth’s personal property securities laws. This significantly reduces red-tape and administrative burden for all parties.

The Bill includes anti-avoidance provisions to ensure that the establishment of a trust cannot be disrupted when there are related entities involved in the supply chain.

### **Administration of the construction trust**

The Bill does not impose any new or additional obligations on builders and head contractors than already apply under the current PBA model on State Government projects.

A head contractor will be required to establish a construction trust account with a recognised financial institution of their choice. The account must be a general transaction or deposit account and include various identifying information including the words “trust account” in the account description.

On a day-to-day basis, the head contractor will receive progress payments from the State Government principal into the trust account and make payments to subcontractors as per their determined contractual entitlements.

The Bill sets out rules for when money may be withdrawn from the account. For example, the money cannot be withdrawn to cover the other debts of the trustee (e.g., business overheads, wages etc.) or invested in any other way.

The account may only be closed once the trust is lawfully dissolved.

### **Head contractor statements**

The provisions in Part 2 of the Bill will carry over and strengthen the existing contractual rights on State Government projects that require declarations to be provided by head contractors on subcontractor payments.

The requirement for head contractor statements is to ensure transparency and accountability is maintained. State agencies can take appropriate action if head contractors do not comply with the construction trust scheme or make timely payments owed to subcontractors.

## **Minor amendments to the SOPA**

Part 3 of the Bill will amend the SOPA to clarify several minor matters.

The Bill confirms that an application for adjudication (or adjudication review) or adjudication response (or adjudication review response) is not invalid merely because a copy is served on the other party out of time.

The Bill clarifies that in determining the adjudication fees and expenses of an adjudication review, the review adjudicator may have regard to the amount of adjudication fees and expenses payable or paid by a party in relation to the adjudication that is the subject of review.

Finally, the Bill clarifies that a term in a State-led contract, or first-tier subcontract thereunder, which seeks to achieve a position such that the head contractor is paid the same day as first-tier subcontractors receive payment, is not rendered unenforceable if it were to fall within the definition of a pay-if-paid/paid-when-paid provision of a construction contract.

## **Amendments to other legislation**

Part 4 of the Bill makes minor amendments to the *Building Services (Registration) Act 2011* (BSR Act) and the *Building Services (Complaint Resolution and Administration) Act 2011* (CRA Act) to enhance the powers of the State’s building regulators.

The Bill will amend the BSR Act to confirm that in considering an application for the grant or renewal of registration as a building service contractor, the Building Services Board (Board) may consider information up to the point in time of its decision to grant or refuse registration.

The Bill will also amend the CRA Act to improve the information gathering powers of the Building Commissioner, including the requirement for financial information.



**Department of Local Government, Industry Regulation and Safety  
Building and Energy**

**Office:** Level 1, 303 Sevenoaks Street, Cannington WA 6107

**Post:** Locked Bag 14, Cloisters Square, Perth 6850

**Phone:** 1300 489 099 **Fax:** (08) 6251 1901

**Email:** [be.info@lgirs.wa.gov.au](mailto:be.info@lgirs.wa.gov.au)

**Web:** [www.lgirs.wa.gov.au/building-and-energy](http://www.lgirs.wa.gov.au/building-and-energy)

**National Relay Service: 13 36 77**

**Quality of service feedback line: 1800 304 059**