

REPORT OF THE BUILDING COMMISSIONER
FOR THE FINANCIAL YEAR 30 JUNE 2016

CONSTRUCTION CONTRACTS ACT 2004

**PRESENTED TO THE HON.MICHAEL MISCHIN MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE**

1. PURPOSE OF THE ACT

The *Construction Contracts Act 2004* ("the Act") commenced on 1 January 2005*.

The Act provides measures of security and fairness to building and construction industry participants by:

- prohibiting unfair payment provisions in construction contracts that inhibit the movement of funds through the contracting chain;
- implying fair and reasonable payment terms into construction contracts that are not in writing;
- clarifying the right to deal in unfixed materials when a party to a contract becomes insolvent; and
- providing a mechanism supporting rapid adjudication of construction contract payment disputes.

The Building Commissioner administers the Act and pursuant to s.52 presents an annual report to the Minister for Commerce detailing the operation and effectiveness of the Act for the previous financial year. The timetable for the annual report is due by 1 November each calendar year taking into account applications for adjudication lodged and active by 30 June from the previous financial year that were unresolved.

2. CONSTRUCTION CONTRACT PAYMENT DISPUTES

The Act provides at s.25 that if a payment dispute arises under a construction contract a party to that contract may apply to have the dispute determined by an adjudicator registered with the Building Commissioner. In order to bring action under the Act, an applicant must refer the matter for adjudication within 28 days of a dispute arising. Under s.6 a payment dispute arises when:

1. the time for a payment claim under the contract to be paid has passed without full payment or where the claim has been rejected or wholly or partly disputed; or
2. the time for the release of security or retention moneys has passed without the return of the amount of security or retention money in full.

ADJUDICATION ACTIVITY

Tables 2.1 to 2.5 below summarise industry use of the Act. Table 2.1 shows the number of applications for adjudication for the current reporting period tracked against historical outcomes. Later Tables 2.2 to 2.5 provide descriptive statistics for applications activity specific to FY 2015/16.

<i>Financial Year</i>	<i>Number of Applications</i>	<i>Total Payment Claims</i>	<i>Mean value of Payment Claims</i>
2005-2006* (half year)	29	\$10,485,828.12	\$361,580.28
2006-2007	36	\$15,938,123.77	\$442,725.66
2007-2008	86	\$98,222,008.65	\$1,142,116.38
2008-2009	105	\$35,838,998.23	\$341,323.79
2009-2010	172	\$233,266,050.32	\$1,356,197.97
2010-2011	197	\$308,553,664.77	\$1,566,262.25
2011-2012	178	\$183,701,052.55	\$1,086,988.48
2012-2013	208	\$226,300,887.35	\$1,103,906.77
2013-2014	175	\$378,903,585.63	\$2,165,163.35
2014-2015	235	\$580,655,848.46	\$2,470,875.95
2015-2016	225	\$685,990,359.67	\$3,048,846.04
Grand Totals	1646	\$2,757,856,407.52	\$1,675,489.92

2015/16 outcomes: Applications for the reported year were slightly down in number from 2014/15 but reached the highest yearly claims level by value over the life of the Act. Total claims were up \$105,334,511.21 (~18.14%) superseding the previously reported year high.

In 2015/16 the Act was applied to high value construction payment disputes in the mining/oil and gas sector, prominent public building projects and school and educational works. The Act also assisted smaller payment disputes brought by new trade claimants at record numbers in various types of residential building.

Tables 2.2 to 2.5 below show the number, range and averages of disputed payment claims serviced by the Act across all industry sectors for construction work state wide.

Category	Value
Number of Applications:	225
Total Value of Payment Claims	\$685,990,359.67
Mean Value of Payment Claims	\$3,048,846.04
Largest Payment Claim	\$169,930,144.00
Smallest Payment Claim	\$1,443.44*

2015/16 outcomes: Subcontractors and suppliers were the main claimant group using the Act 170/225 (>75%) of all applications being \$485.1M/\$685.9M (70.72%) of all claims by value. Head Contractors consequently made up the largest Respondent type involved in 64% (144/225) payment disputes.

A single claim from the mining sector represented almost 25% of all claims in the reporting period. This significantly skewed the year's average for all industry sectors.

Of all applications made three claims only did not contain information required under the Act to conduct an adjudication where (a) a claim value was not stated or evident or (b) the parties to the dispute settled and withdrew the application prior to the adjudication process commencing.

Industry Sector(Construction)	Claims for Payment			
	Number *	% Total no. Claims	Total \$ Amount Claimed	% Value of Claims
Residential	60	26.68%	\$5,970,882.49	0.87%
Mining/oil and gas	47	20.89%	\$590,563,856.95	86.09%
Public buildings	46	20.44%	\$66,609,463.85	9.71%
Commercial	42	18.67%	\$16,981,092.08	2.48%
Civil works/infrastructure	12	5.33%	\$2,429,374.59	0.36%
Other	10	4.44%	\$3,891,891.26	0.35%
Industrial	8	3.55%	\$806,794.46	0.12%
Totals	225	100.00%	\$685,990,359.67	100.00% (adj.)

2015/16 outcomes: Construction claims in the residential, commercial and industrial property sectors together made up less than 3.5% of claims value but represented just less than 49% of all payment claims by number. The latter included the use of adjudication at a five year high by trades in single dwellings, units, multistorey and aged care building.

Parties to construction contracts in several prominent capital works and other public school builds continued to use adjudication services to assist in resolving payment disputes in public sector building. Claims numbers matched the 2014/15 outcomes at 46 each but increased by 2.7 times on the claims value (\$66.6M>\$24.8M).

Payment disputes in construction works supporting mining/oil and gas projects continued to dominate applications claims at over 86% by value. Despite claims numbers from this sector being down (47<80) on 2014/15 figures the value of the disputes were up 26.8% (\$590.5M>\$465.4M).

The Civil works and infrastructure and industrial sectors however were down in use and significance in comparison to previously reported results.

Range	CLAIMS			
	Number	%	Total	Mean
\$ 0	3	1.33%	\$0.00	\$0.00
\$1 - <\$10,000	15	6.67%	\$75,213.59	\$5,014. 21
\$10,000 – <\$25,000	28	12.45%	\$441,135.19	\$15,754.86
\$25,000 - <\$100,000	62	27.56%	3,273,484.20	\$52,798.13
\$100,000 - <\$250,000	36	16%	\$5,505,704.00(a)	\$152,940.40
\$250,000 -< \$500,000	22	9.78%	\$7,703,728.18	\$350,169.46
\$500,000 - <\$1,000,000	19	8.45%	\$13,794,357.18	\$726,018.80
\$1,000,000 .-<\$10,000,000	27	12%	\$90,154,749.41	\$3,339,064.79
\$10,000,000 and above	13	5.77%	\$565,041,987.30	\$43,464,768.28
Totals	225	100.00%	\$685,990,359.67	

2015/16 outcomes: The range and distribution of claims shows that rapid adjudication is in demand across all payment disputes amounts. Tight cash flow pressures in 2015/16 drove a need for greater awareness, use and understanding of adjudication services by subcontractors and suppliers with the payment claims grouping of up to \$100,000 (108 claims totalling \$3.83M) exceeding 2014/15 figures (86 claims totalling \$3.24M).

The 40 x claims of \$1M and upwards in large scale and high cost mining and public building projects accounted for over 95% of all claims by value for the reported year. This continues an upward annual trend for adjudication to be applied to determine entitlements and liabilities between the parties in high value complex construction contract payment disputes.

Location	Number	% Total Claims
Metropolitan	140	62.3%
Regional	81	36%
Unknown/Not disclosed	4	1.7%
Totals	225	100.00%

2015/16 outcomes: The Building Commission records the location of construction contract works by both Local Government and Regional Development Authorities to provide a snap shot of payment disputes and to assist in compliance and administration of the Act.

The number of appointments in the metropolitan area led regional adjudications as a result of the greater take-up of the Act by trades and services seeking assistance in resolving their payment disputes mainly in public building projects and new residential builds and redevelopments. The value of metropolitan applications at \$86.9M was also up from \$58.3M reported in 2014/15.

Regional payment claims at some \$585.5M were heavily weighted by disputes from large mining projects. This total was up from \$503.7M reported in 2014/15 and far exceeded the value of metropolitan Perth disputes. The Pilbara region again dominated with 47/225 claims in 2015/16 representing over 84% of the State's total adjudication claims by value.

ADJUDICATION OUTCOMES 2015/16

The Act provides at s.31 that within a prescribed time (14 days unless an extension of time is granted by both parties) an appointed adjudicator will issue a decision to the parties to the dispute and either dismiss or determine an application. This outcome will be based on evidence gained from the application claim and from the respondent in the dispute.

The adjudicator's decision on the payment dispute is binding on the parties subject to a review by the State Administrative Tribunal (WASAT) only in instances where the application has been dismissed. There are avenues to appeal to higher jurisdictions on questions of procedure and law.

Tables 2.6 to 2.8 below report descriptive statistics for set adjudication outcomes (x numbers, value and percentages).

Dismissals

The Act requires an appointed adjudicator to first consider an application against qualifying criteria in the Act that defines a valid claim (s.3) and a payment dispute (s.6). The application must be dismissed if it also fails on any one of further hurdles in s.31(2)(a)(i to iv). The adjudicator is required to consider whether the payment claim comes from a valid construction contract, is served in time and in a prescribed manner and is not too complex to decide within set time limits.

Number of claims dismissed:	77
Total value dismissed:	\$156,321,754.06
Largest dismissed claim:	\$91,780,288.60
Smallest dismissed claim:	\$11,308.00
Mean value of dismissed claims:	\$2,030,152.65
Total adjudicator fees for claims dismissed:	\$294,819.60
Mean value of adjudicator fees for claims dismissed:	\$3,828.82

2015/16 outcomes: Read in conjunction with Table 2.2 shows that over a third of all claims and over 22.5% of claims by value were dismissed by appointed adjudicators in the current reporting period.

The largest amount dismissed was from the mining/oil and gas sector and that single decision represented nearly 59% of the value of all dismissed amounts state-wide. The adjudication fees earned from failed applications also represents 20% of all fee payments to adjudicators in the financial year.

Determinations

Applications that are not dismissed must then be determined by the adjudicator, on the balance of probabilities, whether a payment is due by a party to the construction contract, the amount determined and the date and by when it must be paid usually with interest at a stated contract rate or a prescribed rate under the *Civil Judgements Enforcements Act 2004*.

Total number claims with awards to applicants:	138
Total value of awards to applicants:	\$116,520,224.88
Largest single award:	\$54,631,234.59
Smallest single award:	\$375.00
Mean value of awards to applicants:	\$1,088,974.06
Total adjudicator fees for successful claims:	\$822,326.48
Mean value of adjudicator fees for successful claims:	\$7,685.29

2015/16 outcomes: Read in conjunction with Table 2.2 reveals that some 48% of all disputed claims were decided in favour of the applicant with an average of some 17% of the total value originally claimed being awarded.

Of the 138 determinations made by appointed adjudicators however 31 did not award a payment

The range of construction contract payment disputes catered for under the Act (largest to smallest in value above) affects the reported mean and median averages. Again the largest determination was from a mining construction contract with a single award in the Pilbara region accounting for 47% of the value of all determined amounts state-wide in 2015-2016.

The fees earned by appointed adjudicators from determinations in favour of the applicant represented some 56% of all fees payments for appointments during the financial year.

“Withdrawals”

The Act does not provide a formal mechanism to allow an adjudication to be withdrawn or cancelled. Applicants request appointed adjudicators to discontinue their payment claim usually following a settlement between the contracted parties. This may occur when the application is first served prior to an adjudicator being appointed or within the 14x day timeframe for a response or at any time during the adjudication process.

Appointed adjudicators normally use the existing provisions of the Act to allow the withdrawal request to be accommodated by enabling the application to run out of time under s.31(3) and be dismissed or by determining there is no payment dispute to adjudicate as a result of a settlement between the parties.

The number and details of appointments resulting in a “withdrawal” including cancellations are tracked for reporting and review purposes:

Total Number of Claims Withdrawn:	10
Total Value of Claims Withdrawn:	\$4,021,996.60
Largest Claim Withdrawn:	\$2,869,744.22,
Smallest Claim Withdrawn:	\$0.00
Mean Value of Claims Withdrawn:	\$402,199.66
Total Adjudicator Fees for Withdrawn Claims:	\$8,688.75
Mean Value of Adjudicator Fees for Withdrawn Claims:	\$866.88

2015/16 outcomes: The number of withdrawals in the reported period included two cancellations. These translate to (4.4% of all claims by number and less than 0.6% by claims value) a significant reduction from 2014/15 levels (13% and 6.25% respectively).

During the course of the year the majority of adjudicators used the existing provisions under the Act to deal with settlements between parties to a payment dispute.

3. PRESCRIBED APPOINTORS

Parties to a construction contract payment dispute may self-appoint an adjudicator or use a prescribed appointor to select a registered adjudicator. Section 28 of the Act requires appointments by a prescribed appointor to be made within 5 days of receiving an application for adjudication and communication of that appointment to the parties and the Building Commissioner.

Several peak construction and building industry bodies are registered under the Act to fulfil the role of prescribed appointor whose conduct is subject to compliance with *Practice Guidelines* published at www.commerce.wa.gov.au/buildingcommission/prescribed-appointors-responsibilities.

Each adjudicator appointment for example cannot be contingent on that person being a member of a particular Institute or Association or agreeing to pay any assessment fee to the appointor.

It is however open to an industry body, as a prescribed appointor, to make it a requirement of membership that adjudicators undergo regular professional development and that for this purpose they pay a fee and obtain the parties’ consent to have determinations disclosed to their professional body solely for assessment and peer review purposes.

Name of Prescribed Appointor	Number of Appointments	
	No.	% of Total
The Australian Institute of Building (AIB)	27	12%
(National) Electrical and Communications Association of Western Australia (Union of Employers) (NECA)	34	15.11%
The Institute of Arbitrators and Mediators Australia (IAMA)	117	52%
Master Builders Association of Western Australia (Union of Employers) (MBA)	35	15.55%
RICS Australasia Pty Ltd (RICS)	11	4.89%
Other -adjudicator appointed directly by the parties	1	0.45%
Total	225	100%

2015/16 outcomes: For the reporting period IAMA continued an historical trend to award most adjudication appointments. NECA AIB and RICS each made more appointments (and a greater share) than previous years. IAMA and RICS seek to service all payment disputes across the construction industry. Generally MBA, NECA and AIB provided adjudication appointment services to specific industry trades.

4. REGISTERED ADJUDICATORS

Section 48 of the Act provides that individuals may become registered adjudicators subject to possessing prescribed qualifications, knowledge and experience accepted by the Building Commissioner. Once registered these individuals may be appointed to adjudicate construction contract payment disputes where an application for adjudication has been lodged in accordance with s.26 of the Act.

A *Code of Conduct and Practice Guidelines for Adjudicators* (the Code) issued by the Building Commissioner and published on the web site applies to these registered persons. Matters dealt with by the Code include (a) potential conflict of interest issues as set out in s.29 of the Act (b) where an adjudicator is appointed by a prescribed appointor the adjudicator is to charge no more than the web published fees (c) the consent of the parties must be obtained to release a copy of the determination to the appointor for professional development purposes only and must disclose that the adjudicator is to pay any fee for this assessment and (d) the requirement to forward a copy of the determination to the Building Commissioner within 24 hours of completion or release to the parties (whichever is the sooner).

Where the parties agree to self-appoint an adjudicator a higher fee may be negotiated to apply.

At any one time a registered adjudicator may be unable to take on an appointment under the Act. This can occur due to an adjudicator being contracted elsewhere, unavailable, on overseas postings, on academic or government assignments or where a potential conflict of interest is perceived from the offered appointment.

A Register of Adjudicators is published on the Building Commission web page that includes a profile of each registered adjudicator, their skills and experience, contact details and fees for adjudication appointments. The Code also requires registered adjudicators to inform the Building Commissioner of any changes to their details for publication update.

Table 4.1 below shows the number of persons on the published Register of Adjudicators as at 30 June 2016.

Table 4.1 – 2015-2016 Register of Adjudicators as at 30 June 2016 (Page 1)

Name	Certificate #	Name	Certificate #
Graham Anstee-Brook	1	Bernard Lynch	41
John Fisher	2	Alex Durning	42
Phil Faigen	3	Michael Murrey	43
Richard Machell	4	Rod Perkins	44
Alan Riley	5	Barry Tonkin	45
Kevan McGill	6	Thomas Muttrie	46
Scott Ellis	7	Gregory Downing	47
Antony Ednie-Brown	8	Auke Steensma	48
Roger Davis	9	John Hockley	49
Kim Doherty	10	Lyndon White	50
Laurie James	11	Natasha Owen-Conway	51#
Philip Dyer	13	Dennis Oon	53
Kersh De Courtenay	14	Russell Welsh	54
Adrian Goold	15	Colin Bond	55
David Aitken	16#	Peter Simper*	56
Mirina Muir	18	David Trinder	57
Mark Jones	19	Leon Doret	65
Phillip Evans	20	DulalGhosh	66
Ralph Unger	21	Nikolas Karantzis	67
Paul Wellington	22	Wayne Bradshaw	68
Michael Charteris	23	Scott Johnson	69
Glynn Logue	24	John Knuckey	70
Philip Loots	25	Richard Rudas	71
William Lau	26	Damian Michael	72
Raymond Gibson	27	James Saunders	73
Peter Byrne	28	Ian Cartwright	74
Colin Touyz	29	Neil Kirkpatrick	75
Vittorio Tassone	31	Chidambara Raj	76
John Morhall	32	Robert Woodforde	77
Gavin Brackenreg	33	Barry Green	78
David Court	34	Nicholas Hobbs	79
Fulvio Prainito	35	Gordon Smith*	80
Zvy (Steve) Lieblich	36	Dominic William Pilkington	81
Mark Taylor	37	Michael David George Heaton	82
Graham Morrow	38	Hugh Roger Davis	83
Kevin Windross	39	Julian Louis Sher	84

denotes 2 X registered adjudicators effectively precluded from appointment due to fulltime membership of the State Administrative Tribunal.
 Note: Several adjudicators are Sessional members of WASAT. This role does not exclude appointment as an Adjudicator outside those sessions.

Table 4.1 – 2015-2016 Register of Adjudicators as at 30 June 2016 (Page 2 Extract)	
Name	Certificate #
John Dunne	85*
Dean Baddock	86*
Laurie Higgins	87*
Shane Brown	88*
2015/16 Adjudicators Registered =76	

The following 2xTables summarise registration activity and fees for adjudicated appointments over the reported period.

Table 4.2 : Overview of 2015-2016 registration activity	
Number of registered adjudicators as at 30 June 2015	71
Change in registrations from 1 July 2015 to 30 June 2016 (shown with * in Table 4.1 Page 2)	+5
Number of registered adjudicators as at 30 June 2016	76

2015/16 outcomes: Four new adjudicators and one reinstatement (with no retirements or cessation of registration) added to the pool of registered persons potentially available for appointment to adjudicate construction contract payment disputes under the Act.

From the pool of 76 registered adjudicators 38 (50%) were appointed to the 225 applications made in 2015/16. In FY2014/15 these equivalent figures were 36 (53%) of 71 persons to deal with 235 applications.

Table 4.3: Summary of Adjudication/Adjudicator fees 2015-2016	
Total Adjudication fees (225 claims)	\$1,468,349.07
Mean	\$6300.10
Max	\$47,960.00
Min	\$300/\$0.00
Appointed Adjudicator fees per hour (excl GST)	
Max	\$400.00
Min	\$100.00
Avg	\$271.30

2015/16 outcomes: The gross fees for adjudicators approximately matched the FY2014/15 incomes despite the lower number of adjudication applications (225<235). The average hourly rate for adjudication services in the current year was off the previously reported rate by 6.5%. A contributing factor to this were 14/225 appointments where \$NIL or nominal fees were levied due to settlements, cancellations and withdrawals very early in the adjudication process.

At the other end of the spectrum the highest adjudication fee was for a \$54.6M payment dispute in a Pilbara mine and port works project. The adjudicator's report was 55 pages and took 24 days to complete and provide the decision to the parties.

5. EDUCATION MATTERS

The *Construction Contracts Regulations 2004* at Regulation 9(4) requires the successful completion of an appropriate training course before a person is qualified to apply for registration to the Building Commissioner to perform the functions of an adjudicator under the Act.

From time to time adjudication training courses are held under the auspices of appointors for prospective candidates.

2015/16 outcomes: Two approved training courses were conducted in Perth by IAMA and RICS. Both courses were promoted on the Building Commission web site.

NECA also conducted workshop sessions for its membership interested in gaining a better knowledge of the Act to risk manage identified cash flow earned from construction contract work.

6. INDUSTRY ENGAGEMENT

During the reporting period the Building Commissioner and assigned staff dealt with stakeholders from all levels of the construction industry including registered building contractors and trade practitioners, residential owners, commercial and industrial developers as well as representatives involved in civil and infrastructure works and from the mining industry.

During 2015/16 this liaison ranged from providing information to prospective users of the Act either as an applicant or respondent, assessing the qualifications of four applicants as adjudicators prior to registration approval to considering matters raised by appointors, adjudicators and legal advocates over the current Act's regulatory requirements and proposed changes arising out of the recent statutory review.

On 12 April 2016 the Building Commissioner also issued a warning to local companies to comply with the existing Act provision s.9 (2) that prohibits debtor payment terms in a construction contract that exceed a maximum of 50 days.

7. ADMINISTRATION

The Building Commissioner and staff have responsibilities under the Act to:

- (a) administer the initial registration of Adjudicators (s.48) and Appointors (s.3) and update records of profiles, contact details and fees for both the Register of Adjudicators (s.51) and List of Appointors (s.51);
- (b) record all adjudication appointments and outcomes for analysis, process improvement and reporting to the Minister;
- (c) deal with both internal government information requirements and external enquiries with respect to the workings of the Act and provide information to industry participants;
- (d) certify adjudicators' determinations for debt enforcement purposes (s.43(3));
- (e) monitor the outcomes of relevant court proceedings referencing an adjudication determination for administrative purposes, possible practice improvement through the Code and consideration in legislative Review;
- (f) maintain web site content for all matters adjudication at www.commerce.wa.gov.au/buildingcommission to provide links to the Act, the Register of Adjudicators (s.48(6)), prescribed appointor details, payment dispute information and related publications such as the *Code of Conduct and Practice Guidelines* for Adjudicators and Appointors and dates for training sessions for prospective applicants for adjudicator registration;
- (g) ensure appointor adjudicator training course content is relevant, current and consistent with the Act; and
- (h) prepare and present an annual report to the Minister on the operations of the Act (s.52) for the previous financial year. Annual reports commencing from mid-2005/2006 are published on the Department of Commerce web site at www.commerce.wa.gov.au/publications/construction-contracts-act-annual-reports.

2015/16 outcomes: During the reporting period web based information on the Act was refreshed along with Application (Form 2) and Response (Form4) to assist parties using the Act to submit valid claims and responses consistent with the current Regulations.

The Building Commissioner also certified 31 adjudication determinations (item (d) above) during the reporting period. This was up over 47% from 21 certifications in 2014/15 indicative of the tight financial conditions in the construction industry.

7.1 Publication of adjudicators' decisions

The Act provides at s.50 that the Building Commissioner may make adjudicators' decisions available to the public subject to commercial confidentiality provisions that do not disclose the identity of the parties to a payment dispute.

2015/16 outcomes: Apart from general references and descriptive statistics in this report there were no specific decisions made available by the Building Commissioner under this head of power in the reporting period.

8. MATTERS REFERRED TO THE STATE ADMINISTRATIVE TRIBUNAL (WASAT)

8.1 Conflict of interest

Section 29(3) of the Act provides that, if during the course of an adjudication, a party to a payment dispute believes there is a conflict of interest on the part of the adjudicator, and this occurs before the adjudicator's decision or a determination is made, then that party may apply to the State Administrative Tribunal (WASAT) to have the adjudicator disqualified from adjudicating the dispute.

2015/16 outcomes: No matters were referred to WASAT in relation to a conflict of interest by an appointed adjudicator.

8.2 Adjudicator's decision

Under s.46 (1) of the Act, a person who is aggrieved by a s.31(2)(a) decision by a registered adjudicator to dismiss an application for adjudication may apply to WASAT for a review of that decision. There is however no avenue through WASAT to seek a review of an adjudicator's decision to determine an application for adjudication.

Since the commencement of the Act in 2005 and incorporating the findings below WASAT has reviewed 43 adjudicator decisions to dismiss an application. In 30 cases the adjudicators' decisions were affirmed with 13 cases returned to the appointed adjudicator to revisit the original decision.

2015/16 outcomes: Of the 77 applications at Table 2.6 dismissed by registered adjudicators under s.31 (without consideration of merit) there were six that were referred by aggrieved parties for review by WASAT:

- (i) Modular Forms Pty Ltd and Cecich [2015] WASAT 76;
- (ii) Field Deployment Solutions Pty Ltd and SC Projects Australia Pty Ltd [20154] WASAT 84;
- (iii) Conbrio Construction & Maintenance Pty Ltd t/a *DWG Contracting* and ABB Australia Pty Ltd [2015] WASAT 122;
- (iv) Leevilla Pty Ltd and Doric Contractors Pty Ltd [2015] WASAT 127;
- (v) BGC Contracting Pty Ltd and Ralma Pty Ltd t/a RJ Vincent & Co [2015] WASAT 128;
- (vi) Field Deployment Solutions Pty Ltd and SC Projects Australia Pty Ltd [2016] WASAT 47;

The full WASAT decision for each of the above six matters is published at www.decisions.justice.wa.gov.au.

In summary for matters (i), (ii), (iii), (iv) and (vi) the Adjudicators' decisions (to dismiss) were affirmed by WASAT.

In matter (v) the adjudicator's original decision of 4 May 2015 was set aside by WASAT on 13 November 2015 with a directive to make a determination under s 31(2) (b) of the Act within 14 days.

8.3 Building Commissioner's decision

At s.49 the Act provides that a person who is aggrieved by a decision made by the Building Commissioner in relation to the registering of an adjudicator under s.48 of the Act may apply to WASAT for a review of that decision.

2015/16 outcomes: No action was initiated to challenge decisions of the Building Commissioner regarding the registration of Adjudicator(s).

9. MATTERS REFERRED TO THE COURTS OF WESTERN AUSTRALIA

9.1 The District Court of Western Australia (WADC)

Matters potentially before the WADC, acting as a court of competent jurisdiction, include granting leave to enforce an Adjudicator's determination under s.43(3) of the Act or hearings on related construction contract disputes between parties.

Over the Act's ten year life and to the end of 2015/16 there have only been nine matters referred to the WADC. This represents just 0.55% of all 1646 applications (Table 2.1) lodged in a payment dispute dealt with by registered adjudicators.

2015/16 outcomes: No matters were referred to the WADC in the reporting period.

9.2 The Supreme Court of Western Australia (WASC)

Matters before the WASC typically include challenges by the respondent (as plaintiff) to an adjudicator's determination of a construction contract dispute or hearings on related construction contract disputes between parties.

Over the life of the Act and to the end of the current reporting period there have been 40/1646 matters referred to the WASC to review appointed adjudicator determinations. Historically this represents some 2.43% of all applications lodged under the Act. Of the matters heard 22/40 (or 55%) have been dismissed.

2015/16 outcomes: Eight matters arising under the Act were decided and delivered by the WASC in the reporting period

These were:

- (i) Laing O'Rourke Australia Construction Pty Ltd-v- Samsung C & T Corporation [2015] WASC 237 (Pts 1&2)
- (ii) NRW Pty Ltd as Trustee for the NRW Unit Trust –v- Samsung C & T Corporation [2015] WASC 369
- (iii) NRW Pty Ltd as Trustee for the NRW Unit Trust –v- Samsung C & T Corporation [2015] WASC 372
- (iv) SC Projects Australia Pty Ltd -v- Field Solutions Pty Ltd [No 2] [2016] WASC 51
- (v) BGC Construction Pty Ltd -v- Citygate Properties Pty Ltd [2016] WASC 88
- (vi) Citygate Properties Pty Ltd -v- BGC Construction Pty Ltd [2016] WASC 101
- (vii) Duro Felguera Australia Pty Ltd -v- Samsung C&T Corporation [2016] WASC 119; and
- (viii) Giovanni Maurizio Carrello as Liquidator of Perrinepod Pty Ltd (In Liq.) -v- Perrine Architecture Pty Ltd [2016] WASC 145 (Pts 1&2)

In summary for these matters::

- (i) Certiorari issued Leave to enforce the determination refused;
- (ii) Certiorari refused Leave to enforce the determination granted;
- (iii) Judgement registered Leave to enforce the determination granted;
- (iv) Orders issues Questions answered;
- (v) Application for Leave to enforce a determination dismissed Later applications allowed and determination quashed;
- (vi) Application for Leave to enforce determination granted;
- (vii) Application dismissed; and
- (viii) Judgement for plaintiff with interest.

The full decision by WASC for each of these matters is published at www.justice.wa.gov.au/supreme . *At the time of writing this report there were related actions before the WASC. Those outcomes will be included in the 2016/17 Annual Report.*

10. REVIEW OF THE ACT

The Minister announced to the Parliament in June 2014 that an independent statutory review of the operation and effectiveness of the Act would be undertaken by an expert on construction law and adjudication. For a summary of that review and its consultations with stakeholders please refer to the previous 2014/15 Annual Report on the Act.

The August 2015 *Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (the Report) was subsequently provided by Professor Philip Evans of Curtin University to the Minister in mid-September 2015.

The Minister then consulted with other portfolios, including the Minister for Small Business, on any implications from the recommendations to arrive at a settled position for the Government prior to tabling the Report in the Parliament.

Following further consideration and Cabinet approval the Construction Contracts Amendment Bill 2016 was First Read in the Legislative Assembly on 22 September 2016. At the time of writing this Annual Report the Bill was Third Read on 20 October 2016 and transmitted to the Legislative Council for passage by the end of the current 39th Parliament.

Interested readers can track the progress of the Bill and its amendments at www.parliament.wa.gov.au and related media statements.

11. SUMMARY

The Act has been used for over a decade to varying degrees by all sectors of the State's construction industry to assist in the resolution of contract payment disputes. The adjudication approach is an alternative to litigation and formal Court process. The Act can provide access to less expensive and rapid decision making identifying moneys owing under the terms of the parties' contract or (in the absence of specific contract terms) implied into the contract by the Act.

For the reported period claims values were at historic highs for the life of the Act. This position was represented however by fewer payment disputes as large scale mining construction projects came on stream and by public building as hospitals and government and private school builds approached handover stage. Claims in the mining sector almost halved from 2014/15 (47<80) but the total value of payment disputes still exceeded the previous year (\$590.56M>\$465.42M). Public buildings claims fell slightly from 2014/15 (42<46) but grew significantly (\$66.58M >\$24.77M) to rank second by all sector value.

There was growth in building in a composite (private) education and aged care grouping but from a low base. The other construction industry sectors all fell in the value of claims from 2014/15 results. While residential claims grew in 2015/16 (53>39) they were at reduced dollar values (\$4.73M<\$14.2M).

In response to a predicted increase in the number of dismissals (77>52) the Building Commission has developed a series of education initiatives to promote industry awareness and effective use of the Act. New users from the supply side typically need awareness, assistance and easy access in order to lodge a valid and timely application for adjudication.

Building services contractors and practitioners registered under the *Building Services Registration Act 2011* in building, painting and plumbing have been identified for initial training and knowledge sessions. Other education workshops for interested stakeholders are scheduled for later in the year. These sessions are likely to be held in conjunction with relevant peak industry bodies that are accredited training providers and with the assistance of interested adjudicators drawn from the Register of Adjudicators.

During the reporting period the panel of registered adjudicators increased from 71 to 76. This pool of adjudication expertise has historically been able to effectively deal with all claims lodged state-wide with the Act's appointors.

Analysis of the activity level of individual registered adjudicators and the distribution of appointments under the Act shows half of all registered adjudicators in 2015/16 were appointed to the 225 construction contract payment disputes lodged for resolution.

This also means that some 38 adjudicators on the Register were not appointed last financial year. Some reasons for this inactivity are apparent such as holding full time employment in the industry or government service, a potential conflict of interest evident with either party in the payment dispute or being unavailable working either on other assignments, being overseas or due to personal circumstance.

A survey of adjudicators will be undertaken in the new financial year to assess the potential and ways to engage all registered persons in the adjudication service including taking up appointments, conducting industry knowledge sessions and providing advice to individuals and industry stakeholders.

On the basis that the current amendment Bill passes through the Parliament there will be significant change to the operation and administration of the Act beginning in the second half of 2016/17. The new measures when enacted into law will deliver more certainty for participants using the adjudication approach to realise payments due in a timely manner and to reduce the number of dismissals on procedural grounds.

The Building Commission as regulator and administrator of the Act looks forward to working with all registered adjudicators and appointors and assisting existing and new clients and other stakeholders under the soon to be amended *Construction Contracts Act 2004*.



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BUILDING COMMISSIONER