REPORT OF THE BUILDING COMMISSIONER FOR THE FINANCIAL YEAR TO 30 JUNE 2017

CONSTRUCTION CONTRACTS ACT 2004

PRESENTED TO THE HON BILL JOHNSTON MLA
MINISTER FOR COMMERCE AND INDUSTRIAL RELATIONS

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1. PURPOSE OF THE ACT

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

The main purpose of the Act is to provide a speedy adjudication process for resolving payment disputes under construction contracts. Payment disputes are determined on an interim basis pending any formal dispute resolution provided in the parties' contract (e.g. arbitration), or court process. The Act also:

- prohibits paid-if-paid or paid-when-paid provisions in construction contracts that inhibit the movement of funds through the contracting chain;
- implies fair and reasonable payment terms into construction contracts that are not in writing; and
- clarifies the right to deal with unfixed materials when a party to a construction contract becomes insolvent.

The Building Commissioner administers the Act. Under section 52 of the Act, the Building Commissioner is required to present a report to the Minister for Commerce detailing the operation and effectiveness of the Act for the financial year (the reporting period).

The report is provided by 1 November in each calendar year to allow for the outcomes of payment disputes adjudicated under the Act on or before 30 June to be included.

2. AMENDMENTS TO THE ACT

On 22 November 2016, the Parliament passed a number of amendments to the Act. Most of the amendments commenced operation on 15 December 2016. These amendments included:

- extending the time for making an application for adjudication to 90 business days;
- amending the definition of a payment claim in the Act to include previously disputed or rejected payment claims;
- removing the exclusion of 'wholly artistic works' from the definition of construction work in the Act;
- clarifying when a payment dispute arises for the purposes of the Act;
- amending the time measures in the Act for counting days for applications, responses and the adjudication determinations from calendar days to business days;
- narrowing the "mining exclusion" under the Act to exclude only fabricating and assembly of plant used for works for extracting or processing oil, natural gas and minerals from the definition of construction work;
- allowing adjudicators to deal with other adjudication applications simultaneously, if satisfied they can do so without time, cost or efficiency costs to any parties;
- permitting the adjudicator to decide substantial compliance with the section 26(2)(a) of the Act when deciding the validity of an application;

- providing a formal mechanism for applications for adjudication to be withdrawn, and or for adjudicators to issue a determination giving effect to a settlement reached between the parties; and
- providing a faster means for determinations to be enforced through the courts, by removing the need for leave of the court to be granted.

On 3 April 2017, the remaining amendments to the Act commenced operation. The effect of the amendments is that where a construction contract provides that payment shall be made more than 42 calendar days after it is claimed, it will be read as requiring payment within 42 calendar days. The amendment to the Act applies to all construction contracts executed after 3 April 2017.

3. CONSTRUCTION CONTRACT PAYMENT DISPUTES

Section 25 of the Act provides that if a payment dispute arises under a construction contract, a party to that contract may apply to have the payment dispute determined by an independent adjudicator registered by the Building Commissioner. To commence an adjudication application under the Act, the party making the application (the Applicant) must prepare and serve the application within 90 business days of the payment dispute arising.

Under section 6 of the Act a payment dispute arises if:

- the payment claim has been rejected or wholly or partly disputed; or
- by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full; or
- by the time when any money or security retained by a party under the contract is due to be paid under the contract, the money or security has not been paid or returned.

Once served with the application, the other party to the construction contract (the Respondent) has 10 business days to prepare and serve their response on the Applicant and the adjudicator appointed to determine the payment dispute. The adjudicator then has 10 business days (or any extension granted by the parties) from receiving the response, or from when the response was due to be received, to make a decision.

3.1 ADJUDICATION ACTIVITY

Tables 2.1 to 2.8 below summarise the use of the Act to date.

Table 2.1 shows the number of applications for adjudication for the current reporting period against historical reporting periods.

Tables 2.2 to 2.8 provide descriptive statistics for adjudication activity specific to the current reporting period.

Table 2.1: Applications for Adjudication by Financial Year			
Financial Year	**Number of Applications**	**Total Value of Payment Disputes**	**Mean value of Payment Disputes**
2005-2006	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
2016-2017	**176**	**$187,563,024.84**	**$1,065,699.00**
Grand Totals	1822	$2,945,419,432.25	$1,616,585.86

2016/17 outcomes: Applications for adjudication during the current reporting period were down by 21 per cent from the 2015-16 reporting period. Overall the number of applications made during the current reporting period was the second lowest in both number and total value of payment disputes in 7 years. The level of adjudication applications has historically trended with the levels of construction activity in the State. The mining/oil and gas sector has been the dominant user of the adjudication process to resolve payment disputes. The slowdown in this sector is considered a contributing factor to the reduction in the number of adjudication applications made during the current reporting period.

Table 2.2 – Applications for Adjudication 2016-2017 (By Applicant and Respondent categories)		
Applicant type	**Respondent type**	**Frequency and % of total =176**
Subcontractor	Head Contractor	31 (17.6%)
Subcontractor	Registered Builder	50 (28.5%)
Subcontractor	Owner/Principal	9 (5.1%)
Subcontractor	Subcontractor	25 (14.2%)
Head Contractor	Owner/Principal	12 (6.8%)
Registered Building Contractor	Head Contractor	8 (4.6%)
Registered Building Contractor	Owner/Principal	18 (10.2%)
Registered Building Contractor	Subcontractor	2 (1.1%)
Registered Building Contractor	Registered Builder	3 (1.7%)
Owner/Principal	Registered Builder	3 (1.7%)
Owner/Principal	Subcontractor	2 (1.1%)
Consultant	Head Contractor/ Owner/Principal/Subcontractor	13 (7.4%)

2016/17 outcomes: Applicants categorised as "subcontractors" were the largest Applicant group to use the Act to recover moneys overdue for payment. Subcontractor is a generic descriptor used to cover many entity types, ranging from sole operators to large private companies. The descriptor denotes the contractual relationship between the Applicant and Respondent to the payment dispute.

Subcontractors submitted 115 of 176 (65 per cent) adjudication applications made in the current reporting period. These applications represented $135.04 million of the $187.65 million (72 per cent) of the total value of payment disputes adjudicated under the Act.

Within the subcontractor category there are two main sub-categories of Applicants. These were:

(a) licensed trades, including the three key building (electrical, plumbing and painting) trades regulated by the Department of Mines Industry Regulation and Safety (DMIRS); and

(b) trades and services entities not subject to statutory licensing regimes, including materials suppliers, installers, finishing trades and civil contractors.

For the current reporting period, Applicants in sub-category (a) made 16 applications for adjudication covering $16.38 million in payment disputes. Applicants in subcategory (b) made 26 applications covering $8.79 million in payment disputes.

One subcontractor in the mining/oil and gas sector of the industry submitted an application for the largest payment dispute. The application represented over 36 per cent of the value of all payment disputes adjudicated during the reporting period.

Table 2.3 – Applications for Adjudication 2016-2017 (By Industry Sector)

Construction Industry Sector	Applications			
	Number	% Total Apps.	Total $ Amount Payment Disputes	% Value of Payment Disputes
Residential	73	41.5%	$7,639,969.75	4.07%
Public Building	28	15.9%	$31,616,546.65	16.86%
Commercial	30	17.0%	$6,158,411.16	3.28%
Mining/oil and gas	23	13.0%	$127,832,006.12	68.15%
Civil works/infrastructure	19	10.8%	$7,924,666.50	4.23%
Industrial	2	1.2%	$6,335,985.56	3.38%
Other	1	0.6%	$64,439.10	0.03%
Totals	**176**	**100.00%**	**$187,563,024.84**	**100.00%**

2016/17 outcomes: In terms of frequency of applications for adjudication, payment disputes under contracts for residential, commercial and industrial construction works were the highest. However, payment disputes in this group ranked third overall by total value.

Payment disputes under construction contracts for 'Public Buildings' were ranked second in terms of total value, but at significantly lower levels than in the 2015-16

reporting period (46 applications and $66.6 million in value). This category captures payment disputes under construction contracts where the owner of the building (or principal) is the State Government, Commonwealth Government or Local Government Authority.

While total values of payment disputes under construction contracts for mining/oil and gas projects dropped in the reporting period, the value was still significantly greater than the combined value across other industry sectors.

Table 2.4 –Applications for Adjudication 2016-2017 (By Payment Dispute Value)				
Range	PAYMENT DISPUTE			
	Number Apps.	%	Total Value	Mean Value
$ 0	2	1.14%	$0.00	$0.00
$1 < $10,000	23	13.07%	$133,583.06	$6,071.96
$10,000 < 25,000	19	10.79%	$309,643.98	$17,202.44
$25,000 <$100,000	54	30. 68%	$2,864,819.66	$58,465.71
$100,000 <$250,000	29	16.48%	$4,388,862.84	$162,550.48
$250,000 <$500,000	10	5.68%	$3,373,217.95	$337,321.79
$500,000 -$1,000,000	20	11.37%	$12,005,267.39	$750,329.21
$1,000,000<10,000,000	16	9.09%	$51,980,112.65	$3,248,757.04
$10,0000,000 and above	3	1.70%	$112,507,517.31	$37,502,505.77
Totals	**176**	**100.00%**	**$187,563,024.84**	

2016/17 outcomes: Applications for adjudication of payment disputes in the $25,000-to-$100,000 range were the most prevalent during the current reporting period. Payment disputes up to $100,000 accounted for 98 of the 176 applications (55.7 per cent) made during the current reporting period. The equivalent range in the previous 2015-16 reporting period was 108 of the 225 applications (48 per cent) made.

Payment disputes within the $10,000 range showed some growth from the figures in the 2015-16 reporting period. Applicants in this range tended to be subcontractors involved in payment disputes for residential and trade works.

Except for the $10,000 threshold range, the number and value of payment disputes in all other ranges was less than the figures in the 2015-16 reporting period.

Table 2.5 – Applications for Adjudication 2016-2017 (By WA location)		
Location	***Number***	***% Total***
Metropolitan	138	78.40%
Regional	38	21.56%
Totals	176	**100.00%**

2016/17 outcomes: The location of construction works tracked by regional development and Local Government Authority areas provides a snap shot of the distribution of payment disputes State-wide.

The number of applications for adjudications for payment disputes on metropolitan construction projects exceeded those on regional projects by almost 3.5:1.

Payment disputes under contracts for construction works on projects in the City of Stirling (18 of 138 applications or 13 per cent) accounted for the most adjudication applications within metropolitan area.

Similar to the 2015-16 reporting period, adjudication applications for payment disputes under contracts for construction works on projects in the Pilbara were the highest (25 applications or 65 per cent). Mining/oil and gas sector projects in the Pilbara accounted for 71 per cent of the total adjudication applications for the reporting period. Construction works carried out on projects in the Shire of Ashburton hosted the most payment disputes (12 of the 38 applications or 32 per cent) within regional areas.

3.2 ADJUDICATION OUTCOMES

Section 31 of the Act provides that within 10 business days of being served by the Respondent with a response to the application for adjudication (or 10 business days from when the response was due to be served), the adjudicator must either dismiss the application or make a determination on the merits. The adjudicator's decision will largely be based on evidence gained from the submissions and documents provided by both parties.

The adjudicator is bound to dismiss the application for adjudication if it fails on any one of the jurisdictional hurdles specified in section 31(2)(a) of the Act. This section requires the adjudicator to dismiss the application without determining the merits if;

- the contract is not a construction contract;
- the Applicant gives written notice to the Respondent and the adjudicator that they wish to withdraw;
- the application has not been prepared and served in accordance with section 26(1), (2)(b) or (c) of the Act;
- the adjudicator is not satisfied that the application sufficiently complies with the requirements in section 26(2)(a) of the Act;
- an arbitrator or court or other body dealing a matter arising out of the construction contract makes an order or other finding about the payment dispute;

- the adjudicator is not satisfied that they can make a fair determination within the prescribed time or any extension because of the complexity of the payment dispute.

Section 32(3)(a) of the Act allows the adjudicator to request that the parties extend the prescribed time for making a decision (either a dismissal or determination). Requests to extend the prescribed time are not usual.

An adjudicator's determination is binding and any payment awarded is due on account. However, the parties retain full rights to resolve the dispute through litigation or other dispute resolution processes (e.g. arbitration).

Where the adjudicator has dismissed the application without making a determination of the payment dispute, an aggrieved party can apply for a review by the State Administrative Tribunal (SAT). A summary of applications before the SAT in the current reporting period is set out in section 8.2 of this report.

Where the adjudicator makes a determination, the Respondent does not have a right to apply to the SAT for review. A determination can only be challenged by way of an application for judicial review to the Supreme Court of Western Australia (Supreme Court) on the grounds of jurisdictional error.

A summary of the applications for judicial review determined by the Supreme Court in the current reporting period is contained in section 9.2 of this report.

Tables 2.6 to 2.8 below show the outcomes of all adjudication decisions (by decision type, their numbers, range values and percentages) made during the current reporting period.

3.2.1 DISMISSALS

Table 2.6–Applications Dismissed 2016-2017	
Number of applications dismissed:	34
Total value dismissed:	$9,256,635.94
Largest dismissed payment dispute:	$6,323,117.76
Smallest dismissed payment dispute:	$2,285.71
Mean value of dismissed payment disputes:	$272,253.99

2016/2017 outcomes: Less than 20 per cent of all applications for adjudication were dismissed during the current reporting period. In contrast, a third of all applications made in the 2015-16 reporting period were dismissed.

One of the contributing factors to the decline in the number of dismissed applications during the current reporting period was the amendment to section 26(1) of the Act to extend the time for making applications to 90 business days. Previously, the Act

provided that applications needed to be made within 28 calendar days of the payment dispute arising. Many applications made in previous reporting periods did not meet this timeframe, consequently adjudicators were obliged under section 31(2)(a)(ii) of the Act to dismiss the applications.

As mentioned previously, an amendment to section 31(2)(a) of the Act also commenced operation on 15 December 2016, which provides that an adjudicator must dismiss the application where the Applicant gives written notice they wish withdraw their application. These matters are reported below as "Withdrawals", but are also included as dismissals in Table 2.6.

The largest payment dispute by value dismissed by an adjudicator was from a mining infrastructure project in the Pilbara region. This decision represented over two thirds of the total value of all matters dismissed State-wide for the reporting period.

3.2.2 WITHDRAWALS

Typically, a request by the Applicant to withdraw the adjudication application follows a settlement of the payment dispute between the parties occurring after the application is served, or at some time prior to the adjudicator making a decision.

Adjudicators have previously accommodated a withdrawal request by allowing the prescribed time under section 31(3) of the Act to determine the application to run out. Alternatively, adjudicator's have made a determination only on the fees owed by each party. This historical approach occurred with 9 dismissals in the first six months of the current reporting period.

However, on 15 December 2016, the amendment to section 31(2)(a) of the Act to provide a formal withdrawal mechanism commenced operation. In the second half of the current reporting period 22 applications for adjudication were withdrawn by the Applicant.

Table 2.7 below shows all withdrawals for the current reporting period as an amalgam of outcomes before and after the formal withdrawal mechanism became operational.

Table 2.7–Applications Withdrawn 2016-2017	
Total Number of Applications Withdrawn: pre and post s.31(2)(a)(ia)	31
Total Value of Payment Disputes Withdrawn:	$10,286,638.82
Value of Largest Payment Dispute Withdrawn:	$6,463,150.66
Value of Smallest Payment Dispute Withdrawn:	$5,523.39
Mean Value of Payment Dispute Withdrawn:	$380,986.62

2016/2017 outcomes: 17 per cent of all applications in number and 5.5 per cent of the total value of payment disputes were withdrawn during the reporting period. The spike in the number of applications withdrawn when compared to the 2015-16

reporting period (10), is largely attributable to the introduction of the formal withdrawal mechanism.

3.2.3 DETERMINATIONS

Adjudication applications that are not dismissed must be determined by the adjudicator on the balance of probabilities whether payment is due to a party to the construction contract, as well as the quantum of that payment and the date by when it must be made (usually with interest).

Table 2.8– Determinations by Adjudication 2016-2017	
Total number of applications determined	111
Total number of determinations in favour of Applicants:	91
Total value of determinations in favour of Applicants:	$21,878,566.69
Largest single determination:	$6,798,806.24
Smallest single determination:	$638.00
Mean value of determinations in favour of Applicants:	**$240,423.81**

2016/2017 outcomes: During the current reporting period, 63 per cent of all applications for adjudication made under the Act were determined. Of the applications determined, 91 (51 per cent) were determined in favour of the Applicant.

For the current reporting period, there were 20 applications where 'Nil' was determined.

The largest determination was made in a payment dispute involving an electrical contractor carrying out construction works on a public building in the metropolitan area. This represented over 30 per cent of the total value of payment disputes determined State-wide.

On 15 December 2016, a new section 31(2A) of the Act commenced operation. This section allows the appointed adjudicator to make a "consent determination" to give effect to a settlement between the parties. One consent determination was made during the current reporting period.

5. PRESCRIBED APPOINTORS

A list of appointor bodies is prescribed in the *Construction Contracts Regulations 2004* (the Regulations) to appoint adjudicators to adjudicate payment disputes under construction contracts. These bodies are referred to as "prescribed appointors".

Typically, an adjudication application is lodged with a prescribed appointor of the Applicant's choice. The application must be lodged within 90 business days from when the payment dispute arose under the construction contract.

However, in some instances both the Applicant and Respondent may have already agreed on an adjudicator or prescribed appointor, in which case the adjudication application is served on the agreed adjudicator/prescribed appointor.

Section 28 of the Act requires a prescribed appointor within five business days of receiving an application to appoint an adjudicator and communicate that appointment to the parties and the Building Commissioner.

The rates that will be charged by each prescribed appointor for making an appointment are published on the DMIRS web page at: www.dmirs.wa.gov.au/building-commission/find-appointor

The Building Commissioner has also issued a *Code of Conduct and Practice Guidelines* applicable to a prescribed appointor's functions. This is revised from time to time. The current governing document is published at: www.dmirs.wa.gov.au/building-commission/prescribed-appointors-responsibilities

The Regulations prescribe 8 bodies as appointors, but only 5 of were active during the current reporting period. Their activities are set out below.

Table 3.1: Appointor Activity 2016-2017

Name of Prescribed Appointor	Number of Appointments	
	No.	% of Total
The Australian Institute of Building (AIB)	15	8.5%
(National) Electrical and Communications Association of Western Australia (NECA)	38	21.6%
The Institute of Arbitrators and Mediators Australia (IAMA)	86	48.9%
Master Builders Association of Western Australia (Union of Employers) (MBA)	29	16.5%
RICS Australasia Pty Ltd (RICS)	7	3.9%
Total	**175#**	**99.4%**

On 1 occasion during the reporting period the adjudicator was chosen by the parties to the payment dispute

2016/2017 outcomes: Applications for adjudications made to prescribed appointors during the current reporting period averaged over 3 per week. IAMA made almost 50 per cent all appointments. NECA and the MBA were ranked second and third respectively.

5. 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.

The Building Commissioner maintains a Register of Adjudicators (Register), which is published on the DMIRS web page at:

www.commerce.wa.gov.au/building-commission/find-adjudicator

The Register contains a profile of each registered adjudicator, their skills and experience, contact details and fees for adjudication appointments.

The Building Commissioner's *Code of Conduct and Practice Guidelines for Adjudicators* (the Code) is applicable to registered adjudicators. Matters dealt with by the Code include:

(a) potential conflict of interest issues as set out in section 29 of the Act;

(b) requirements for notifying the Building Commissioner of any changes to an adjudicator's details;

(c) requirements to obtain the consent of the parties to release a copy of a determination to the prescribed appointor for professional development purposes; and

(d) requirements to forward a copy of the adjudication decision to the Building Commissioner within 24 hours of completion of the report or release to the parties (whichever is the sooner).

Table 4.1 below contains an extract of the Register as at 30 June 2017.

Table 4.1 – 2016-2017 Register of Adjudicators				as at 30 June 2017	
Name	**Certificate #**	**Name**	**Certificate #**	**Name**	**Certificate #**
Graham Anstee-Brook	1	John Morhall	32	Scott Johnson	69
John Fisher	2	Gavin Brackenreg	33	John Knuckey	70
Phil Faigen	3	David Court	34	Richard Rudas	71
Richard Machell	4	Fulvio Prainito	35	Damian Michael	72
Alan Riley	5	Zvy Lieblich	36	James Saunders	73
Kevan McGill	6	Mark Taylor	37	Ian Cartwright	74
Scott Ellis	7	Graham Morrow	38	Neil Kirkpatrick	75
Antony Ednie-Brown	8	Kevin Windross	39	Chidambara Raj	76
Roger Davis	9	Bernard Lynch	41	Robert Woodforde	77
Kim Doherty	10	Alex Durning	42	Barry Green	78
Laurie James	11	Michael Murrey	43	Nicholas Hobbs	79
Philip Dyer	13	Rod Perkins	44	Gordon Smith	80
Kersh De Courtenay	14	Barry Tonkin	45	Dominic Pilkington	81
Adrian Goold	15	Thomas Muttrie	46	Michael Heaton	82
David Aitken	16#	Gregory Downing	47	Hugh Roger Davis	83
Mirina Muir	18	Auke Steensma	48	Gary Dunne	85
Mark Jones	19	John Hockley	49	Deon Baddock	86
Phillip Evans	20	Lyndon White	50	Laura Higgins	87
Ralph Unger	21	Natasha Owen-Conway	51#	Shane Brown	88
Paul Wellington	22	Dennis Oon	53	Caroline Woo*	89
Michael Charteris	23	Russell Welsh	54	Matthew Grootveld*	90
Glynn Logue	24	Colin Bond	55	Clive Raymond*	91
Philip Loots	25	Peter Simper	56	Helen Durham*	92
William Lau	26	David Trinder	57	David Baldry*	93
Raymond Gibson	27	Leon Doret	65		
Peter Byrne	28	Dulal Ghosh	66	**EOFY 2016-2017**	
Colin Touyz	29	Nikolas Karantzis	67	**Total Register Count**	**80**
Vittorio Tassone	31	Wayne Bradshaw	68		

Key: **#** 2 registered adjudicators were precluded from appointment due to fulltime employment with the SAT. * New adjudicators registered during the current reporting period.

Tables 4.2 and 4.3 summarise the number of registrations of adjudicators and fees the fees charged by adjudicators during the current reported period.

Table 4.2 : Overview of 2016-2017 Registration Activity	
Number of registered adjudicators as at 30 June 2016	76
Net Change in registrations from 1 July 2016 to 30 June 2017	+4
Number of registered adjudicators as at 30 June 2017	80

2016/2017 outcomes: There were five new adjudicators added to the Register during the current reporting period. However, 1 adjudicator resigned (in August 2016) resulting in the net reported position.

From the panel of 80 registered adjudicators, 33 (41 per cent) were appointed to adjudicate the 176 applications made during the current reporting period. During the 2015-16 reporting period, 38 (50 per cent) of 76 registered adjudicators were appointed to adjudicate 225 applications.

Table 4.3: Summary of Adjudication/Adjudicator fees 2016-2017	
Total Adjudication fees (176 applications)	$890,964.61
Mean	$5,466.04
Max	$32,488.00
Min	$346.50
Adjudicator fees per hour (excl.GST)	
Max	$365.00
Min	$150.00
Average hourly fee	$257.50

2016/2017 outcomes: The total fees charged by adjudicators were down substantially (39.3 per cent) from the 2015-16 reporting period of $1,468,349.07. This was caused by a sharp drop in the number of applications made during the current reporting period.

The average hourly fee (GST excluded) charged by adjudicators reduced 5.2 per cent from the average of $271.30 in the 2015-16 reporting period. The highest adjudication fee was for a payment dispute related to the Perth Children's Hospital project.

5.1 COMPLAINTS

Under section 48(5)(b) of the Act, the Building Commissioner may cancel an adjudicator's registration if satisfied the adjudicator has misconducted, or is incompetent, or unsuitable to conduct adjudications.

2016/2017 outcomes: 2 complaints regarding the conduct of adjudicators were received by the Building Commissioner during the current reporting period. These complaints remain under investigation.

6. EDUCATION MATTERS

Regulation 9(4) of the Regulations provides that an applicant must successfully complete an appropriate training course to apply for registration to the Building Commissioner to perform the functions of an adjudicator under the Act.

2016/2017 outcomes: During the current reporting period adjudicator training courses were held in Perth and at interstate venues. These training courses were run by prescribed appointors.

7. INDUSTRY ENGAGEMENT

During the current reporting period, Building Commission officers engaged with a diverse range of stakeholders in the construction industry, including registered building contractors, trade contractors, residential owners, commercial and industrial property developers, and representatives from civil and infrastructure companies. This engagement ranged from:

- providing information to prospective users of the Act (either as an Applicant or Respondent);
- liaising with potential applicants for registration as adjudicators on the experience and qualifications requirements; and
- clarifying issues raised by prescribed appointors, adjudicators, and legal firms regarding the Act's operation and the amendments to its provisions.

From December 2016 until May 2017, the Building Commission also delivered information sessions on the Act. These information sessions were mainly targeted at builders, subcontractors and suppliers. The information sessions were delivered in partnership with Jackson McDonald, Master Builders Association of WA and HHG Legal Group. A total of 250 people attended the information sessions.

The Building Commission also produced and published a specific guide for subcontractors on resolving payment disputes. This was made available on the DMIRS website.

Industry Bulletin IB074/2016 "Changes to the Construction Contracts Act (2004)" was published on the DMIRS web site in December 2016. This summarised the amendments to the Act for industry stakeholders' education and use.

A second Industry Bulletin IB080/2017 "Commencement of the Remaining Amendments to the Construction Contracts Act 2004" was issued in March 2017 ahead of a change applicable to new contracts from 3 April 2017 prohibiting payment terms over 42 calendar days.

During the period of legislative reform the Building Commission conducted a series of industry forums and made available an online seminar on the changes to the Act. This complemented existing online information and the dedicated email cca@dmirs.wa.gov.au and 1300 484 481 telephone service available to industry stakeholders.

8. ADMINISTRATION

The Building Commission has responsibilities under the Act to:

(a) administer the registration of adjudicators and appointors and their compliance with the *Code of Conduct* and *Practice Guidelines for Adjudicators and Appointors*;

(b) update the Register to reflect changes to adjudicator's profiles, contact details and fees;

(c) answer enquiries about the Act and Regulations;

(d) manage the adjudication process (via disclosure measures, confirming report and appointment details and aging date) recording all adjudication outcomes for analysis, process improvement, internal use within the Building Commission, policy development and reporting to the Minister for Commerce;

(e) certify determinations;

(f) monitor and assess the outcomes of:

i. SAT decisions with respect to dismissals; and

ii. District Court and Supreme Court judgements concerning adjudication determinations.

(g) maintain online content for all matters adjudication at www.dmirs.wa.gov.au/buildingmission; and

(h) prepare and present an annual report to the Minister for Commerce on the operations of the Act for the previous financial year. Annual reports commencing from 2005/2006 are published on the DMIRS website at:

www.dmirs.wa.gov.au/publications/construction-contracts-act-annual-reports.

2016/17 outcomes: During the current reporting period, all publications and forms related to the Act were updated in both electronic and hard copy format.

The Building Commissioner also certified 21 adjudication determinations pursuant to section 43(2) of the Act for court enforcement purposes.

7.1 PUBLICATION OF ADJUDICATORS' DECISIONS

Section 50 of the Act provides that the Building Commissioner may make the result of adjudicators' decisions publicly available provided the identity of the parties, or any other information determined by the adjudicator to be confidential is not disclosed.

2016/2017 outcomes: Due to the potential for commercial harm to parties to a payment dispute, no adjudication decisions have been made publicly available since the Act commenced operation. In line with this policy, no adjudication decisions were published by the Building Commissioner during the current reporting period.

9. APPLICATIONS TO THE STATE ADMINISTRATIVE TRIBUNAL (SAT)

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 before the adjudicator's decision is made, the party may apply to the SAT to have the adjudicator disqualified from adjudicating the payment dispute.

2016/2017 outcomes: No applications were made to the SAT during the current reporting period in relation to conflicts of interest by an adjudicator.

8.2 ADJUDICATOR'S DECISION

Under section 46(1) of the Act, a person who is aggrieved by a decision of the adjudicator to dismiss an application for adjudication may apply to the SAT for review. However, the SAT cannot review an adjudicator's determination.

Since the commencement of the Act, the SAT has reviewed 45 dismissals. In 32 applications, the adjudicator's decisions to dismiss has been affirmed with 13 applications returned to the adjudicator to make a determination on the merits.

2016/2017 outcomes: Two applications dismissed by adjudicators (without consideration of the merits) from 2015/2016 payment disputes were referred by the aggrieved parties for review by the SAT. These were:

(a) *MRCN Pty Ltd (trading as West Force Construction) and Pindan Contracting Pty Ltd* [2016] WASAT 114

(b) *Bocol Constructions Pty Ltd and Keslake Group Pty Ltd* [2017] WASAT 15

In both cases the adjudicator's decision (to dismiss) was affirmed by the SAT.

The full decision for each of these cases is published at www.sat.justice.wa.gov.au.

8.3 BUILDING COMMISSIONER'S DECISION

Section 49 of 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 section 48 of the Act, may apply to the SAT for a review of that decision.

2016/2017 outcomes: No applications were made to challenge decisions of the Building Commissioner regarding the registration of any adjudicator(s) during the current reporting period.

10. APPLICATIONS TO THE COURTS

9.1 THE DISTRICT COURT OF WESTERN AUSTRALIA

The District Court of Western Australia (District Court) deals with civil matters up to a financial limit of $750,000. Applications can be made to the District Court to enforce an adjudicator's determination made under the Act.

Since the commencement of the Act, a total of 9 applications have been heard by the District Court for leave to enforce a determination. These are published at www.decisions.justice.wa.gov.au.

Amendments to section 43 of the Act have since removed the need to seek leave of a court of competent jurisdiction to enforce an adjudicator's determination. Determinations certified by the Building Commissioner may now simply be filed with a court of competent jurisdiction, upon which they will be taken to be an order of that court.

2016/2017 outcomes: No applications were made to the District Court during the current reporting period that required a published decision. The Building Commission does not receive information from the District Court on the number of determinations filed.

9.2 THE SUPREME COURT OF WESTERN AUSTRALIA

The Supreme Court deals with enforcement of determinations where the value awarded is greater than $750,000. Applications for judicial review may also be made to the Supreme Court to challenge an adjudicator's determination on the grounds of jurisdictional error.

Since the commencement of the Act, there have been 50 applications for judicial review of determinations made to the Supreme Court, or the Court of Appeal. Of those applications, 23 (or 46 per cent) have been dismissed.

2016/2017 outcomes: During the current reporting period, the Supreme Court published 5 decisions on applications for judicial review of an adjudicator's determination. The applications for judicial review concerned determinations made in previous reporting periods.

The decisions published by the Supreme Court in the current reporting period were:

(a) *M+W Singapore Pte Ltd vs Anstee-Brook* [2016] WASC 310 - determination quashed for jurisdictional error;

(b) *Samsung C&T Corporation vs Loots* [2016] WASC 330 (Parts 1-3) - second and third determinations set aside for jurisdictional error, leave granted to enforce first, fourth and fifth determinations;

(c) *Cooper & Oxley Builders Pty Ltd vs Steensma* [2016] WASC 386 - both determinations quashed for jurisdiction error;

(d) *Total Eden Pty Ltd vs ECA Systems Pty Ltd* [2016] WASC 58 - enforcement proceedings in District Court remitted to Supreme Court and enforcement of judgement order suspended until determination of judicial review application; and

(e) *John Holland Pty Ltd vs Chidambara* [2017} WASC 179 - determination quashed for jurisdiction error.

An appeal on an application for judicial review was heard by the Court of Appeal during the current reporting period, in the case of *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2016] WASC 130 (Parts 1 and 2). The appeal was allowed, and refusal to grant leave to enforce first and second determinations upheld.

The full decisions by the Supreme Court and Court of Appeal for each of these judgements is published at www.supremecourt.wa.gov.au

11. SUMMARY

During the current reporting period:

- Amendments to the Act were passed by the Parliament on 22 November 2016. Most amendments commenced operation on 15 December 2016, with the remaining amendments commencing on 3 April 2016.
- Principally, the amendments to the Act were designed to assist subcontractors and suppliers to use the adjudication process, as well as implement the recommendations made following the statutory review of the Act completed in August 2015.
- Despite the amendments, the number of applications for adjudication under the Act was significantly down from those made in the 2015-16 reporting period. This is likely attributable to the general slowdown across the construction industry over the last 18-to-24 months.
- Applications for adjudication of payment disputes under construction contracts for mining/oil and gas projects representing 68 per cent of all payment disputes by total value. Participants in the mining oil/gas sector of the industry continue to use the adjudication process.
- Subcontractors were the primary user of the adjudications process with over 65 per cent of all applications for adjudication being submitted to pursue payments totalling $135.04 million.
- 35 per cent of applications for adjudication came from registered building contractors, consultants, head contractors and owner builders.
- Registered building contractors made 31 applications for adjudication covering a total of $15.5 million in payment disputes and were the Respondent in 56 applications (multiple applications not individual payment disputes). In 50 of those 56 applications, the Applicant was a subcontractor. The Building Commission will use this data to devise measures for influencing behaviour where one or both parties to a payment dispute are registered under the *Building Services (Registration) Act 2011*, or licensed under the *Plumbers Licensing Act 1995*.
- The number of registered adjudicators grew from 76 to 80. However, all adjudication applications (176) were decided by only 33 adjudicators, or just over 40 per cent of all adjudicators on the Register, which has generated concern that only a small set of adjudicators are receiving appointments. This will be investigated further by the Building Commission.

The State Government's election commitments to better protect subcontractors in the construction industry is likely to drive reform in future reporting periods through direct administrative changes, education and training initiatives and legislative amendment.

I look forward to presenting you with a report on the operation and effectiveness of the Act for the following 12 months that sets out substantial progress and achievement.

PETER GOW
BUILDING COMMISSIONER