



Government of Western Australia  
Department of Mines, Industry Regulation and Safety  
Building and Energy



# **REPORT OF THE BUILDING COMMISSIONER FOR THE FINANCIAL YEAR TO 30 JUNE 2019**

## ***Construction Contracts Act 2004***

**PRESENTED TO THE HON. JOHN QUIGLEY MLA  
ATTORNEY GENERAL; MINISTER FOR COMMERCE**

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## 1. PURPOSE OF THE ACT

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

The Act provides parties to a contract for the carrying out of construction work and/or the supply of related goods and services (a construction contract) on a site in Western Australia (WA) with a means for the rapid adjudication of payment disputes.

Rapid adjudication is a dispute resolution process to help resolve disagreements between parties over payments for construction work and/or the supply of related goods and services. It is designed to be quick and reasonably cost effective.

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 previous financial year (the reporting period). The report is submitted before 1 November in each calendar year, allowing the outcomes of adjudication applications made on or before 30 June to be included in the reporting period.

## 2. 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 (Adjudicator) registered by the Building Commissioner.

To commence an application for adjudication 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:

- a payment claim made under the construction contract 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 construction contract, the amount has not been paid in full; or
- by the time when any money or security withheld by a party under a construction contract is due to be paid or returned, the money or security has not been paid or returned.

The Applicant must serve the application for adjudication on a prescribed Appointor (Appointor) or on an Appointor or Adjudicator agreed between the parties. The Applicant must also serve the application for adjudication on the other party to the construction contract (the Respondent).

Once served with the application, the Respondent has 10 business days to prepare and serve a response on the Applicant and the Adjudicator appointed to determine the payment dispute.

The Adjudicator then has 10 business days (or any extension of time granted by both parties) from receiving the response, or from when the response was due to be served, to make a decision.

## ADJUDICATION ACTIVITY

Table 2.1 below shows the number of applications for adjudication for the reporting period against historical reporting periods. Since the Act commenced operation, 2,102 applications for adjudication have been made, covering more than \$3 billion in payment disputes.

Table 2.1: Applications for Adjudication by Financial Year			
Financial Year	Number of Applications	Gross Claims Value	Mean Value of Payment Dispute
2005-06	29	\$10,485,828.12	\$361,580.28
2006-07	36	\$15,938,123.77	\$442,725.66
2007-08	86	\$98,222,008.65	\$1,142,116.38
2008-09	105	\$35,838,998.23	\$341,323.79
2009-10	172	\$233,266,050.32	\$1,356,197.97
2010-11	197	\$308,553,664.77	\$1,566,262.25
2011-12	178	\$183,701,052.55	\$1,086,988.48
2012-13	208	\$226,300,887.35	\$1,103,906.77
2013-14	175	\$378,903,585.63	\$2,165,163.35
2014-15	235	\$580,655,848.46	\$2,470,875.95
2015-16	225	\$685,990,359.67	\$3,048,846.04
2016-17	176	\$187,563,024.84	\$1,065,699.00
2017-18	165	\$71,942,426.85	\$436,014.71
<b>2018-19</b>	<b>115</b>	<b>\$60,524,242.18</b>	<b>\$526,297.76</b>
<b>Grand Totals</b>	<b>2102</b>	<b>\$3,077,886,101.28</b>	<b>\$1,464,265.51</b>

The total number of applications for adjudication reduced by 30 per cent in 2018-19 when compared to the previous reporting period (2017-18). Historically, the number of applications for adjudication has trended with the level of construction activity in WA. The number of adjudication applications for the current reporting period was the lowest level in a decade.

Tables 2.2 to 2.4 below provide descriptive statistics on the applications for adjudication by industry participant, sector and payment dispute value.

Table 2.2 – Applications for Adjudication 2018-19 (By Applicant and Respondent types)

Applicant type	Respondent Type	Value	Number	Percentage of the total number (115) (%)
Registered Building Contractor	Head Contractor	\$1,087,612.28	1	0.87
Registered Building Contractor	Owner/Principal	\$5,890,236.89	23	20
Registered Plumbing Contractor	Registered Building Contractor	\$36,877.78	5	4.35
Registered Painting Contractor	Registered Building Contractor	\$35,200.00	1	0.87
Registered Painting Contractor	Owner/Principal	\$20,945.00	1	0.87
Licensed Electrical Contractor	Head Contractor	\$289,691.31	4	3.48
Licensed Electrical Contractor	Registered Building Contractor	\$183,035.31	3	2.61
Licensed Electrical Contractor	Licensed Electrical Contractor	\$312,273.20	2	1.74
Subcontractor	Head Contractor	\$35,849,712.57	20	17.39
Subcontractor	Registered Building Contractor	\$1,421,887.91	10	8.7
Subcontractor	Owner/Principal	\$126,471.22	1	0.87
Subcontractor	Consultant	\$21,010.00	1	0.87
Subcontractor	Supplier/Installer	\$103,141.17	1	0.87
Supplier/Installer	Head Contractor	\$656,029.02	5	4.35
Supplier/Installer	Registered Building Contractor	\$406,384.83	6	5.22
Supplier/Installer	Owner/Principal	\$62,516.85	3	2.61
Supplier/Installer	Subcontractor	\$839,284.16	12	10.43
Supplier/Installer	Licensed Electrical Contractor	\$532,965.54	2	1.74
Supplier/Installer	Supplier/Installer	\$14,843.29	1	0.87
Consultant	Head Contractor	\$1,047,020.37	4	3.48
Consultant	Owner/Principal	\$84,510.80	1	0.87
Consultant	Licensed Electrical Contractor	\$12,209.85	1	0.87
Head Contractor	Owner/Principal	\$7,922,259.05	4	3.48
Head Contractor	Developer	\$2,387,537.88	2	1.74
Owner/Principal	Head Contractor	\$1,180,585.89	1	0.87
<b>9 x Applicant types</b>	<b>8 x Respondent types</b>	<b>\$60,524,242.18</b>	<b>115</b>	<b>100 (adj)</b>

For the reporting period, registered contractors/trades (i.e. those registered under Acts administered by the Department of Mines, Industry Regulation and Safety) made 40/115 applications for adjudication, covering \$7,855,871.79 in payment disputes. In the previous reporting period (2017-18), this same group made 35/165 applications for adjudication, covering \$11,065,675.35 in payment disputes.

Comparatively, 74 applications for adjudication (65 per cent) were made during the reporting period by contractors/trades not required to be registered, predominantly performing civil, mining and industrial construction work. In the reporting period there was also one instance where an owner/principal applied for adjudication to recover over \$1.1 million in liquidated damages from a head contractor.

Table 2.3 – Applications for Adjudication 2018-19 (By Industry Sector)

Industry Sector	Applications			
	Frequency	% Total Claims	Total \$ Amounts Claimed	% Value of Claims
Residential	47	40.87	\$7,614,403.20	12.58
Public Building/Works	18	15.65	\$14,897,719.37	24.61
Commercial	14	12.17	\$3,937,919.52	6.51
Mining/Oil and Gas	9	7.83	\$9,852,517.15	16.28
Civil Works/ Infrastructure	7	6.09	\$1,201,140.01	1.98
Industrial	7	6.09	\$21,329,978.07	35.24
Civic (Local Government)	5	4.35	\$489,633.44	0.81
Rural/Agricultural	4	3.48	\$246,630.78	0.41
Mixed Use	2	1.74	\$688,095.42	1.14
Aged Care	1	0.87	\$222,300.00	0.37
School/Educational (Private Sector)	1	0.87	\$46,905.21	0.08
<b>Totals</b>	<b>115</b>	<b>100.00</b>	<b>\$60,524,242.18</b>	<b>100.00</b>

In terms of frequency of applications for adjudication, payment disputes under construction contracts for works on residential projects were the highest during the reporting period.

Whereas projects in the industrial sector were the highest in terms of value of payment disputes, with one dominant project involving 5 adjudication applications representing over \$20 million in fabrication works.

Public buildings/works were ranked second in terms of total value of payment disputes, but these were at lower levels than in the previous reporting period (2017-18) (37 applications and \$24.9 million), largely reflecting later stages in these construction projects. This category captures applications for adjudication concerning payment disputes for work carried out on a building where the owner is the State Government or a Local Government Authority. However, the owner is not necessarily a party to the particular construction contract under which the payment dispute has arisen.

Table 2.4 –Applications for Adjudication 2018-19 (By payment dispute value)

Range	PAYMENT DISPUTE			
	Applications	%	Total Value	Mean Value
\$0 to<\$1	1	0.87	\$0.00	\$0.00
\$1 to<\$10,000	7	6.09	\$38,253.81	\$5,464.83
\$10,000 to<25,000	18	15.65	\$252,607.85	\$14,033.77
\$25,000 to<\$50,000	16	13.91	\$417,889.65	\$26,118.10
\$50,000 to<\$100,000	16	13.91	\$1,037,576.92	\$64,848.56
\$100,000 to>\$250,000	21	18.26	\$3,420,844.73	\$162,897.37
\$250,000 to<\$500,000	14	12.17	\$4,609,905.38	\$329,278.96
\$500,000 to<\$1,000,000	7	6.09	\$4,409,540.53	\$729,661.91
\$1,000,000 to<\$1,500,000	7	6.09	\$8,608,539.37	\$1,290,224.55
>\$1,500,000	8	6.96	\$37,729,083.94	\$4,716,135.49
<b>Totals</b>	<b>115</b>	<b>100.00</b>	<b>\$60,524,242.18</b>	<b>\$526,297.76</b>

Payment disputes of between \$25,000 and \$100,000 were the subject of the highest frequency of applications for adjudication during the reporting period at 32/115, or nearly 28 per cent of all applications. The same range also had the highest frequency in the previous reporting period (2017-18).

There appears to be sustained support for adjudicating payment disputes up to \$25,000, likely due to the availability of fixed fees that are offered by certain Adjudicators. This has attracted interest from mostly material suppliers, installers and finishing trade subcontractors.

### 3. 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 is largely 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 several jurisdictional hurdles specified in section 31(2)(a) of the Act. This section requires the Adjudicator to dismiss the application without determining its 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 their application;

- 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 with a matter arising out of the construction contract makes an order or other finding about the payment dispute; or
- 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). A request to extend the prescribed time requires both parties to agree.

An Adjudicator's determination is binding and any payment awarded is due on account only. The parties however retain full rights to resolve their dispute through litigation or other dispute resolution processes under their contract.

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).

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

A summary of the applications for judicial review determined by the Supreme Court in the current reporting period is contained in section 9 of this report.

Tables 3.1 to 3.3 below show the outcomes of all adjudication decisions (by decision type, their numbers, range values and percentages) made during the reporting period.

## DISMISSALS

Table 3.1 – Applications Dismissed 2018-19	
Number of applications dismissed	22
Total value dismissed	\$14,908,814.25
Largest dismissed payment dispute	\$7,177,565.52
Smallest dismissed payment dispute	\$4,699.99
Mean value of dismissed payment disputes	\$677,673.37

Approximately 20 per cent of all applications for adjudication by number, and close to 25 per cent by payment dispute value, were dismissed under sections 31(2)(a) (i) or (ii) or (ia) or 31(3) of the Act during the reporting period.

## WITHDRAWALS

Section 31(2)(a)(ia) of the Act provides that an Adjudicator must dismiss the application where the Applicant gives written notice that they wish to withdraw their application.

Applicants have successfully used this mechanism as an adjunct to negotiation with the Respondent to secure a settlement.

Total Number of Applications Withdrawn	22
Total Value of Payment Disputes Withdrawn	\$9,242,415.38
Value of Largest Payment Dispute Withdrawn	\$6,115,156.12
Value of Smallest Payment Dispute Withdrawn	\$8,882.50
Mean Value of Payment Dispute Withdrawn	\$420,109.79

Most withdrawals occurred due to settlements between parties, however in one case the withdrawal was due to a proposed self-appointment being invalid. Withdrawals as a subset of dismissals represented 19.13 per cent of the total number and 15.27 per cent of the payment dispute value of all applications for adjudication for the reporting period.

## DETERMINATIONS

Adjudication applications that are not dismissed or withdrawn must be determined by the appointed Adjudicator under Section 31(2)(b) of the Act.

The determination is based on the merits of the claim and, on the balance of probabilities, whether payment is due to a party to the construction contract.

Total number of applications for determination	70
Total value of applications for determination	\$36,373,012.55
Total number of determinations found in favour of Applicants	56
Total value of determinations found in favour of Applicants	\$23,704,283.19
Largest single determination	\$5,438,206.56
Smallest single determination (>\$0)	\$778.90
Mean value of determinations in favour of Applicants	\$423,290.77

In 2018-19 Adjudicators made determinations in 60.87 per cent of all applications. This is slightly down from 63.07 per cent in the previous reporting period (2017-18). Further analysis shows eight of the determinations awarded “Nil” amounts payable by Respondents. In those decisions, the Adjudicator allowed set-offs, such as back charges, variations and liquidated damages as valid counterclaims that exceeded any payments awarded to the Applicant.

#### 4. PRESCRIBED APPOINTORS

The *Construction Contracts Regulations 2004* (the Regulations) prescribe a list of industry peak bodies as Appointors with the responsibility to appoint Adjudicators to determine payment disputes arising under construction contracts defined by the Act.

In the majority of payment disputes an adjudication application is lodged with an Appointor of the Applicant's choice. Section 28 of the Act requires an Appointor within five business days of receiving an application to appoint an Adjudicator and communicate that appointment to the parties and the Building Commissioner.

An adjudication application may also be served on an Appointor or directly on an Adjudicator but only where both the Applicant and Respondent have a prior agreement on their joint choice of Appointor or Adjudicator. These appointments are termed 'self-appointed'.

Applicants are charged a fee for the appointment of an Adjudicator. The rates for this service are published at [www.dmirs.wa.gov.au/building-commission/find-Appointor](http://www.dmirs.wa.gov.au/building-commission/find-Appointor)

The Regulations set out eight industry bodies as the prescribed Appointors, but only five (see Table 4.1 below) actively receive applications made under the Act.

Name of Prescribed Appointor	Number of Appointments	
	#	% Total
The Australian Institute of Building (AIB)	19	16.52
(National) Electrical and Communications Association of Western Australia (Union of Employers) (NECA)	15	13.04
The Institute of Arbitrators and Mediators Australia (IAMA)	55	47.83
Master Builders Association of Western Australia (Union of Employers) (MBA)	16	13.91
RICS Australasia Pty Ltd (RICS)	6	5.22
<i>Self-appointed</i>	4	3.48
<b>Total</b>	<b>115</b>	<b>100</b>

The panel of active Appointors dealt with a reduced volume of applications for adjudication during the reporting period (averaging some 2.21 per week; down from 3.17 per week in the previous reporting period (2017-18). IAMA made the most appointments in the reporting period, with AIB and MBA ranked second and third respectively.

## 5. REGISTERED ADJUDICATORS

Section 48 of the Act provides that individuals may be registered by the Building Commissioner as Adjudicators, subject to possessing prescribed qualifications, knowledge and experience. These requisites are set out the Regulations. The following persons are registered as Adjudicators.

Table 5.1 : Extract from Register of Adjudicators as at 30 June 2019

Name	Cert #	Name	Cert #	Name	Cert #
Graham Anstee-Brook	1	Zvy Lieblich	36	Chidambara Raj	76
John Fisher	2	Mark Taylor	37	Robert Woodforde	77
Phil Faigen	3	Graham Morrow	38	Barry Green	78
Richard Machell	4	Kevin Windross	39	Nicholas Hobbs	79
Alan Riley	5	Bernard Lynch	41	Gordon Smith	80
Kevan McGill	6	Alex Durning	42	Dominic Pilkington	81
Scott Ellis	7	Michael Murrey	43	Michael Heaton	82
Antony Ednie-Brown	8	Rod Perkins	44	Hugh Roger Davis	83
Roger Davis	9	Barry Tonkin	45	Gary Dunne	85
Laurie James	11	Thomas Muttrie	46	Deon Baddock	86
Kersh De Courtenay	14	Gregory Downing	47	Laura Higgins	87
Adrian Goold	15	Auke Steensma	48	Shane Brown	88
Mirina Muir	18	John Hockley	49	Caroline Woo	89
Mark Jones	19	Lyndon White	50	Matthew Grootveld	90
Phillip Evans	20	Dennis Oon	53	Clive Raymond	91
Ralph Unger	21	Russell Welsh	54	Helen Durham	92
Paul Wellington	22	Colin Bond	55	David Baldry	93
Michael Charteris	23	David Trinder	57	Mark Williams	94
Glynn Logue	24	Leon (Max) Doret	65	Martin Frayne	95
Philip Loots	25	Dulal Ghosh	66	Nicholas Floreani	96
William Lau	26	Nikolas Karantzis	67	Ranjit Khosla	97
Raymond Gibson	27	Wayne Bradshaw	68	Johnathon Smith	98
Peter Byrne	28	Scott Johnson	69	Robert Beck	99
Colin Touyz	29	John Knuckey	70	Warren Fischer	100
Vittorio Tassone	31	Richard Rudas	71	David Francis	101
John Morhall	32	Damian Michael	72		
Gavin Brackenreg	33	James Saunders	73	<b>EOFY 2018-19</b>	
David Court	34	Ian Cartwright	74	<b>Register Count</b>	<b>83</b>
Fulvio Prainito	35	Neil Kirkpatrick	75		

The following tables summarise key Adjudicator matters from the current reporting period:

Table 5.2 : Summary of registration activity 2018-19	
Opening balance: Number of registered Adjudicators as at 30 June 2018	84
Net Change in registrations from 1 July 2018 to 30 June 2019	-1
Closing balance: Number of registered Adjudicators as at 30 June 2019	83

There were no additions to the Register of Adjudicators, however one Adjudicator retired during the reporting period.

Table 5.3 : Summary of Adjudicator appointments 2018-19	
Number of registered Adjudicators	83
Number of registered Adjudicators accepting appointments	38
Number of registered Adjudicators not appointed	45

From the Register of 83 Adjudicators, 38 (46 per cent) were appointed to adjudicate the 115 applications made during the reporting period. In the previous reporting period 43 (51.19 per cent) of 84 registered Adjudicators were appointed to adjudicate 165 applications for adjudication.

Of the 38 Adjudicators on the register, there were 15 single appointments, with 23 Adjudicators receiving multiple appointments.

Table 5.4 : Summary of Adjudication/Adjudicator fees 2018-19	
Published Adjudicator fees per hour (excl. GST)	
Max	\$450.00
Min	\$100.00
Indicative Average hourly fee	\$275.00
Actual Adjudication fees (115 applications)	\$712,602.19
Mean	\$6,196.54
Highest fee revenue	\$42,300.00
Lowest fee revenue (>\$0)	\$660.00
Max fee applied	\$425.00
Min fee applied	\$0.00

Total fees charged by Adjudicators fell by over 22.5 per cent in the reporting period when compared to the previous reporting period (2017-18). This was primarily due to a 30 per cent decline in total adjudication applications in the reporting period.

## COMPLAINTS

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

No complaints regarding the conduct of an Adjudicator were received during the reporting period.

## 6. STAKEHOLDER ENGAGEMENT

During the reporting period, the Department engaged with construction industry stakeholders including registered building contractors, trade subcontractors, owners of residential, commercial and industrial property, land developers, and representatives from civil and infrastructure companies and mining companies. These dealings are recurrent and principally centre on:

- providing information to prospective users of the Act (either as an Applicant or Respondent);
- clarifying issues with Appointors, Adjudicators, advocates and legal firms regarding the operation of the Act and observations to amend or expand existing provisions; and
- liaising with potential applicants regarding the experience and qualifications prerequisites for registration as Adjudicators under the Act.

Industry stakeholders and interested parties also have access to online information, a dedicated email [cca@dmirs.wa.gov.au](mailto:cca@dmirs.wa.gov.au) and a 1300 484 481 telephone enquiry service.

During the reporting period, the Department also delivered a series of information seminars on contract management, including defects and dispute resolution, and making variation and extension of time claims. These seminars were delivered in partnership with HHG Legal Group.

The pages on the Department's website dealing with all aspects of construction contract payment disputes were also consolidated to provide more user-friendly access, including featuring online videos, fact sheets and templates for Applicants and Respondents. This information can be found at:

[www.commerce.wa.gov.au/building-commission/information-using-construction-contracts-act](http://www.commerce.wa.gov.au/building-commission/information-using-construction-contracts-act)

## 7. ADMINISTRATION

The Building Commissioner 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) maintain a Register of Adjudicators and publish changes to each practitioner's profiles, contact details and fees on the Department's website;
- (c) answer enquiries about the Act and Regulations;
- (d) manage the adjudication process (via disclosure measures, confirming report and appointment details and the aging of adjudication reports), recording all adjudication outcomes for analysis, process improvement, internal use within the Department's Building and Energy Division, policy development and reporting to the Minister for Commerce;

- (e) certify adjudicated determinations for filing and court order;
- (f) monitor and assess for best practice adoption the outcomes of:
  - i. SAT decisions with respect to adjudicated dismissals; and
  - ii. Supreme Court decisions to overturn adjudicated determinations based on jurisdictional error;
- (g) maintain online content for all adjudication matters at [www.dmirs.wa.gov.au/buildingcommission](http://www.dmirs.wa.gov.au/buildingcommission); and
- (h) prepare and present an annual report to the Minister for Commerce before 1 November each year on the operation and effectiveness of the Act for the previous financial year. Each annual report from 2005-06 is published on the DMIRS website.

During the reporting period, quarterly and half yearly status reports of adjudication activity were issued to all registered Adjudicators and Appointors.

The Building Commissioner also certified 30 determinations under section 43(2) of the Act to allow Applicants recover amounts owed through the courts.

## **PUBLICATION OF ADJUDICATORS' DECISIONS**

Section 50 of the Act provides that the Building Commissioner may make publicly available the result of Adjudicators' decisions, provided that neither the identity of the parties, nor any other information determined by the Adjudicator to remain confidential, is disclosed.

No requests were received or decisions made by the Building Commissioner to publicly release an individual adjudicated decision or a report on the decisions of Adjudicators in the reporting period.

## **8. APPLICATIONS TO THE STATE ADMINISTRATIVE TRIBUNAL (SAT)**

### **CONFLICT OF INTEREST**

Section 29(3) of the Act provides that, if a party to a payment dispute believes there is a conflict of interest on the part of the appointed Adjudicator, then before the Adjudicator's decision is made that party may apply to SAT to have the Adjudicator disqualified from adjudicating the payment dispute.

No applications were made to SAT during the reporting period in relation to an allegation of conflict of interest by an Adjudicator.

### **ADJUDICATOR'S DECISION**

SAT cannot receive an appeal or review an Adjudicator's determination. However, 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 SAT for a review.

Over the life of the Act, there have been 45 applications for review to the SAT. In 32 of those reviews, the Adjudicators' decisions to dismiss have been affirmed. Of the balance, 13 decisions to dismiss were subsequently overturned by SAT and returned to each of the appointed Adjudicators to make determinations on the merits.

These matters can be searched via the Internet portal: <https://ecourts.justice.wa.gov.au>

No applications were made to SAT or decisions released during the reporting period in relation to reviewing an Adjudicator's decision under section 31(2)(a) of the Act.

### **BUILDING COMMISSIONER'S DECISION**

Section 49 of the Act provides that a person who is aggrieved may apply to SAT for a review of a decision made by the Building Commissioner in deciding to register an Adjudicator under section 48 of the Act.

For the reporting period there were no applications made to challenge decisions of the Building Commissioner regarding the registration of an Adjudicator.

## **9. APPLICATIONS TO THE COURTS**

Section 43 of the Act provides that, where an appointed Adjudicator's determination has been certified by the Building Commissioner and filed with a court of competent jurisdiction, then that decision is taken to be an order of that court.

The 30 determinations certified for enforcement by the Building Commissioner totalled \$23,595,213.37, with 27 determinations (representing \$22,737,382.22) falling within the Supreme Court's jurisdiction. The Building Commissioner does not currently receive information on the number of determinations that are actually filed with the courts.

### **JUDICIAL REVIEW**

The Supreme Court is the forum to receive applications for judicial review, such as a challenge to an Adjudicator's determination on the grounds of jurisdictional error.

Since the commencement of the Act, there have been 54 applications for judicial review of determinations heard by the Supreme Court, or the Court of Appeal. Of those applications, 25 (or 46 per cent) have been dismissed.

The Supreme Court's decisions in these matters, as well as for disputes where the Act is cited in other proceedings, can be searched via the Internet portal: <https://ecourts.justice.wa.gov.au>

For the reporting period there were no applications made to the Supreme Court for judicial review of a determination.

## **10. SUMMARY**

During the reporting period:

- The use of the Act continued on a downward trend following the decline in activity across key sectors of the construction industry. The number of applications for adjudication and the value of payment disputes were recorded at their lowest levels in a decade.
- Sixty five per cent of all applications for adjudication were submitted by subcontractors, suppliers and other contractors, including mining projects and civil works, concerning payment disputes totalling \$51.48 million or nearly 85 per cent of all payment disputes by value.
- Projects in the residential sector accounted for over 40 per cent of all applications for adjudication, with a total payment dispute value of just over \$7.6 million.

- Seventy four applications for adjudication (65 per cent) were made by subcontractors/trade contractors not registered under Acts administered by the Department.
- Forty applications for adjudication (35 per cent) were made by Subcontractors/trade contractors who are registered under Acts administered by the Department (building, plumbing electrical and painting). The majority of these applications (23/40) concerned payment disputes between builders and owners/principals.
- In 11 instances, both parties to the payment dispute were registered under Acts administered by the Department. There appears optimal scope to provide education about the Act and influence behaviour in payment disputes where one or both parties are registered.
- All 115 applications for adjudication were decided by 38 Adjudicators, or just 46 per cent of all Adjudicators on the Register. The Department will continue to monitor this situation to ensure an optimal allocation of workload for suitable Adjudicators interested in appointment under the Act.
- Subcontractors have benefited from the commercial decision by some Adjudicators in the face of tight economic circumstances to negotiate or discount their fees or offer a fixed cost for low value payment disputes when appointed.

Given the sustained downturn in construction activity and its flow-on effect to the use of adjudication, the Department is examining measures to further promote the awareness and use of the Act, particularly by subcontractors and registered trades/contractors.

I look forward to presenting you with a report on the operation and effectiveness of the Act for the next reporting period.

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David Hillyard,

DELEGATE OF THE  
**BUILDING COMMISSIONER**