

2011/2012
WESTERN AUSTRALIA

REPORT OF THE BUILDING COMMISSIONER
CONSTRUCTION CONTRACTS ACT 2004

FOR THE FINANCIAL YEAR ENDED
30 JUNE 2012

**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 participants in the building and construction industry by:

- prohibiting unfair payment provisions (not wages and salary) in construction contracts that inhibit the movement of funds through the contracting chain;
- implying fair and reasonable payment terms into 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 payment disputes within the industry.

The Building Commissioner of the Department of Commerce administers the Act and pursuant to Section 52 of the Act provides an annual report to the responsible Minister detailing the operation and effectiveness of the Act for the previous financial year.

2. CONSTRUCTION CONTRACTS OPERATIONS 2011/2012

Section 25 of the Act provides that if a payment dispute arises under a construction contract any party to the contract may apply to have the dispute adjudicated by a registered adjudicator. In order to bring action under the Act an applicant must refer the matter for determination within 28 days of a dispute arising. A dispute arises when:

1. the time for payment of a payment claim has passed without payment being made in full or where the claim has been wholly or partly disputed; or
2. the time for the release of security or retention moneys has passed without the return in full of the amount of security or retention money taking place (refer section 6 of the Act).

Tables 2.1.1 to 2.1.4 below (a) report the level of activity in applications for adjudication (numbers and outcomes) in the current reporting period and (b) summarise total adjudication applications since the commencement of the Act.

Number of Applications:	178
Total Value of Payment Claims	\$183,701,052.55
Mean Value of Payment Claims	\$1,086,988.48
Median Value of Payment Claims	\$121,491.73
Largest Payment Claim	\$51,842,460.93
Smallest Payment Claim	\$0.00

169 applications were submitted with known claim values. 9 were submitted without the required information under the Act and were later dismissed.

The largest payment claim from the mining sector at over 28% of the value of all claims significantly skews the mean value to be substantially higher than the median claim value.

Financial Year	Number of Applications	Total Payment Claims (\$)	Mean value of Payment Claims (\$)
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
Total	803	\$886,005,726.41	

*Part year reporting as Act commenced on 1 January 2005.

The current reporting period showed a drop in the long term historical trend in the number and value of application claims. This is explained in part by a relative slowing in civil construction contracts (for large scale land development and infrastructure components) servicing the dominant mining sector.

Industry Grouping	Claims for Payment			
	Number (n)	Claims (%)	Total Amount Claimed(\$)	Value of Claims (%)
Building design-residential:	0	0.00%	\$0.00	0.00%
Building design-commercial:	2	1.12%	\$120,438.13	0.07%
Building construction-residential:	34	19.10%	\$2,773,001.04	1.51%
Building construction-commercial:	45	25.28%	\$11,274,228.59	6.14%
Civil design-infrastructure:	2	1.12%	\$112,797.37	0.06%
Civil design-mining:	6	3.37%	\$35,450,625.46	19.30%
Civil construction-infrastructure:	65	36.52%	\$94,344,942.19	51.36%
Civil construction-mining:	18	10.11%	\$38,444,184.44	20.93%
Other (not specified):	3	1.69%	\$222,324.39	0.12%
Not known:	3	1.69%	\$968,510.95	0.53%
Totals	178	100.00%	\$183,711,052.55	100.00%

Adjudications for the reporting period were largely directed to infrastructure and related construction contracts disputes serving the mining/oil and gas sector. These represented some 50% of all claims by number but dominated at approximately 85% by payment claim value.

All other groupings (including commercial and residential activities) seeking adjudications appointments were also 50% of all claims by number but made up only some 15% by payment claim value.

RANGE OF APPLICATIONS	CLAIMS (n,%, \$)			
	Number	Claims (%)	Total Amount by Claim Size (\$)	Mean Claim Size (\$)
\$1 - \$9,999:	6	3.37%	\$28,590.43	\$4,765.07
\$10,000 - 24,999:	16	8.99%	\$253,391.12	\$15,836.94
\$25,000 - \$99,999:	53	29.78%	\$2,933,597.08	\$55,350.89
\$100,000 - \$249,999:	34	19.10%	\$5,193,693.85	\$152,755.70
\$250,000 - \$499,999:	23	12.92%	\$7,518,438.67	\$326,888.64
\$500,000 and over:	34	19.10%	\$167,764,240.47	\$4,934,242.37
Other (invalid/zero amount/superseded claim):	12	6.74%	\$9,100.94	\$758.41
Totals:	178	100.00%	\$183,701,052.55	

The Act services a wide range of payment claim disputes by value. For the current reporting period over 80% of all claims are above the \$25,000 threshold with about 30% of all claims numbers dealing with disputes in the range \$25,000 to \$99,999 representing just over 1.5% of all claims value. Claims over \$500,000 represented just fewer than 20% of all claims numbers but more significantly over 90% of all claims value.

Tables 2.2.1 to 2.2.3 below report the outcome of adjudications in the reported period (numbers value and percentages) in terms of determinations and dismissals under the Act and “withdrawals” and adjudication costs associated with each of those outcomes.

Once an application is determined, dismissed or withdrawn any amounts in claims outside these categories is extinguished. For 2011/12 \$72.27M or 39.6% was extinguished by the adjudications process from the total original claimed amount of \$183.7M

Total number claims with awards to applicants:	88
Total value of awards to applicants:	\$62,461,202.81
Largest single award:	\$27,326,945.33
Smallest single award:	\$825
Mean value of awards to applicants:	\$458,862.91
Median value of awards to applicants:	\$35,875.64
Total adjudicator fees for successful claims:	\$467,500.46
Mean value of adjudicator fees for successful claims:	\$3,437.50

The outcomes for the reporting period show determinations in favour of the applicant ran at almost half (49.44% ie 88/178) of all applications in number and over a third (62.4M/183.7M) of the originally claimed value (Table 2.1.1).

The range of construction contract payment disputes catered for under the Act (largest to smallest in value above) impacts on the mean and median averages in the report. Again the largest determination was from the mining sector with a single decision representing 43.79% of the value of all determined amounts in 2011/12.

The fees cited above earned by registered Adjudicators from determinations in favour of the applicant represented approximately 68% of all fees paid to adjudicators from 2011/12 appointments.

Table 2.2.2 – Details of claims dismissed in the 2011-2012 financial year	
Number of claims dismissed:	40
Total value dismissed:	\$18,741,682.68
Largest dismissed claim:	\$7,273,581.40
Smallest dismissed claim:	\$540.00
Mean value of dismissed claims:	\$468,542.07
Median value of dismissed claim:	\$94,982.18
Total adjudicator fees for claims dismissed:	\$164,751.24
Mean value of adjudicator fees for claims dismissed:	\$4,118.78

The outcomes for the reporting period show dismissed applications ran at some 22% (40/178) of all claims in number and over 10% (18.74M/183.7M) of the original claimed value (Table 2.1.1).

The range of construction contract payment disputes catered for under the Act (largest to smallest in value above) impacts on the mean and median averages in the report. Again the largest amount dismissed was from the mining sector and that single outcome represents 38.8% of the value of all dismissed amounts in 2011/12.

The fees cited above earned by registered Adjudicators from failed applications represented about 24% of all fees paid to adjudicators from 2011/12 appointments.

Table 2.2.3 – Details of applications “withdrawn” in the 2011-2012 financial year	
Total Number of Claims Withdrawn:	50
Total Value of Claims Withdrawn:	\$30,227,982.88
Largest Claim Withdrawn:	\$5,468,987.27
Smallest Claim Withdrawn:	\$0.00
Mean Value of Claims Withdrawn:	\$604,559.66
Median Value of Claims Withdrawn:	\$48,275.76
Total Adjudicator Fees for Withdrawn Claims:	\$72,243.79
Mean Value of Adjudicator Fees for Withdrawn Claims:	\$1,444.88

The outcomes for the reporting period show applications “withdrawn” from the adjudications process at the request of the participants ran at some 28.1% (50/178) of all claims in number and over 16.45% (30.23M/183.7M) of the original claimed value (Table 2.1.1).

The range of construction contract payment disputes catered for under the Act (largest to smallest in value above) impacts on the mean and median averages in the report. Again the largest amount withdrawn was from the mining sector and that single outcome represents 38.8% of the value of all claims withdrawn in the reporting period.

The fees cited above earned by registered Adjudicators from failed applications represented some 8% of all fees paid to adjudicators from 2011/12 appointments.

The Act does not provide a formal withdrawal mechanism however many Applicants in practice request appointed adjudicators to withdraw their application for a number of sound reasons.

Typically this follows early settlement of the claim upon service of an application, but may arise where the application is withdrawn for example where the claim is made out of time, without merit or service was not correctly affected at address or the correct entity nominated as the respondent.

3. PRESCRIBED APPOINTORS

Parties to a construction contract payment dispute may use a prescribed appointor to assist in the appointment of a registered adjudicator. This process requires that an applicant serve an application for adjudication on the prescribed appointor in accordance with Section 26 of the Act.

Regulation 11 of the Construction Contracts Regulations 2004 (the Regulations) lists eight construction and building industry bodies as prescribed appointors.

Name of Prescribed Appointor	Number of Appointments	
	No.	% of Total
The Australian Institute of Building (AIB)	13	7.3%
*Australian Institute of Project Management (AIPM)	1	0.56%
*The Australian Institute of Quantity Surveyors (AIQS)	0	0.00%
(National) Electrical and Communications Association of Western Australia (Union of Employers) (NECA)	2	1.12%
The Institute of Arbitrators and Mediators Australia (IAMA)	92	51.69%
Master Builders Association of Western Australia (Union of Employers) (MBA)	53	29.78%
RICS Australasia Pty Ltd (RICS)	14	7.87%
*The Royal Australian Institute of Architects (AIA)	0	0.00%
Other -adjudicator appointed directly by the parties	3	1.68%
Total	178	100.00%

IAMA and the MBA were the most active appointors for adjudicators in 2011/12. This continued a long term trend.

AIQS and AIA again did not deal with any appointments in the current reporting period. Both professional bodies have signalled that they may withdraw from the list of appointors. The Commission's webpage on appointor details and the Regulations will be updated at an appropriate time when this advice is formally confirmed by these organisations.

4. REGISTERED ADJUDICATORS

Section 48 of the Act provides that individuals may become registered adjudicators subject to possessing prescribed qualifications and experience accepted by the Building Commissioner.

Once registered these individuals may adjudicate construction payment disputes where an application for adjudication has been lodged in accordance with Section 26 of the Act.

Number of registered adjudicators reported as at 30 June 2011	58
Number of applications 1 July 2011 - 30 June 2012 approved by the Building Commissioner	6
Total number of registered adjudicators as at 30 June 2012	64

The Building Commissioner publishes a Register of Adjudicators for public inspection pursuant to Section 48(6) of the Act. This information is located on the web site www.buildingcommission.wa.gov.au together with a profile on each of the registered adjudicators, their skills and experience and fees for adjudications. The information is updated from time to time on advice from the registered adjudicators as required by the Code of Conduct and Practice Guidelines.

The Building Commission also records details of matters referred to an adjudicator, the fees charged, the outcome of applications and the time taken to adjudicate disputes.

For the current reporting period 30 of the 64 registered adjudicators were appointed to the 178 applications for payment dispute resolution.

Table 4.2 : Summary of Adjudication/Adjudicator fees in 2011-12	
Total Adjudication fees for the 178 claims made.	\$688,724.19
Mean	\$4,443.38
Median	\$2,750.00
Max	\$26,752.00
Min	\$0.00*
Adjudicator fees per hour	
Max	\$390.00
Min	\$180.00
Avg	\$265.36
StdDev	\$54.29

The highest adjudication fee was for a complex payment dispute of \$3.94M in the mining sector.

A zero Adjudication fee was charged by adjudicators in several instances where a settlement and hence an end to a payment dispute occurred early in the adjudications process. In these instances where no significant costs were incurred the adjudicator felt it prudent not to charge the parties when requested to withdraw the matter.

Where an adjudicator is appointed by a prescribed appointor the Building Commissioner expects the adjudicator to charge no more than the published fees. Where the parties to a dispute agree to appoint an adjudicator directly then a higher fee may be negotiated.

5. ADJUDICATION TRAINING COURSES

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

Currently the Institute of Arbitrators & Mediators Australia (IAMA) is the State's only registered training institution that conducts the relevant course.

6. FORUMS

For this reporting period the Building Commissioner and staff presented at a number of meetings of industry peak bodies on the operation of the Act.

The Building Commissioner is aware that industry practitioners have raised issues and suggested proposals for review of certain provisions and requirements under the legislation.

7. WEBPAGE AND PUBLICATIONS

The Building Commission maintains a specific web page (cited above) about the Act, its operations and regulated practitioners located as part of the Department of Commerce web network. The web content is regularly updated with contact details, fees and profiles on the registered adjudicators and prescribed appointors.

Potential applicants can also access information on relevant training and the applicable Code of Conduct and Practice Guidelines for Registered Adjudicators and Prescribed Appointors.

Publications regarding the use of adjudication as an effective and alternate dispute resolution tool in payment disputes and a fact sheet on the Act and related Building Commission and complaints and dispute resolution processes provided by the Building Commission are available in hard copy and web based formats.

Links are also provided to PDF versions of the Act and its regulations and previous Annual Reports. Building Commission staff record all adjudication appointments and outcomes, deal with enquiries with respect to the workings of the Act, provide information to industry participants and assist in the certification of adjudicator determinations for enforcement purposes

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.

No matters were referred to WASAT in relation to a conflict of interest in the reporting period.

8.2 Adjudicator's decision

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

Since the introduction of the Act in 2005 there have been 803 applications for adjudication of payment disputes (Table 2.1.2). There have been 20 decisions to dismiss (ie 2.5% of all applications) referred, by one of the parties to the dispute, to WASAT for review. Seven of these matters have been returned to the appointed Adjudicator to revisit the original decision to dismiss.

For 2011-2012 adjudication activity, there were five decisions to dismiss (without consideration of merit) that were reviewed by WASAT:

- (i) Georgiou Group Pty Ltd v MCC Mining (Western Australia) Pty Ltd [2011] WASAT 120*
- (ii) South Coast Scaffolding v Rigging V Hire Access Pty Ltd [2012] WASAT 5*
- (iii) Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd [2012] WASAT 13*
- (iv) Classic Stone (Qld) Pty Ltd v Julie Mauretta Pitcher [2012] WASAT 80*
- (v) Classic Stone (Qld) Pty Ltd v Julie Mauretta Pitcher [2012] WASAT 80(S)*

In matters (i) and (ii) the Adjudicators' decisions were overturned, revised determinations issued, and the Building Commission's records updated. In matters (iii), (iv) and (v) the Adjudicators' decisions to dismiss were affirmed by WASAT.

8.3 Building Commissioner's decision

Under s.49 of the Act, a person who is aggrieved by a decision made by the Building Commissioner (previously the Registrar) in relation to the registering of an adjudicator under s.48 of the Act may apply to WASAT for a review of the decision.

In the 2011-2012 financial year, no action was initiated to challenge decisions of the Building Commissioner regarding the registration of Adjudicator(s).

8.4 Appointment fees

The following long standing principles continue to apply, pursuant to section 26 of the Act, with regard to fees charged and the disclosure of information for an appointment of a registered adjudicator by a prescribed appointor:

1. the primary obligation of a prescribed appointor (as an industry peak body) is to appoint a suitably registered adjudicator and this should not be contingent on that person being a member of a particular Institute or Association or agreeing to pay any assessment fee to the appointor;
2. it is open to an industry body, that is also 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;
3. the adjudicator must obtain the consent of the parties to release a copy of the determination to other parties for professional development purposes only and must disclose that the adjudicator is to pay any fee for this assessment. The identity of the parties must be removed from the copy of that determination; and
4. The prescribed appointor and the registered adjudicator must not charge more than the fees published on the Building Commission website.

9. MATTERS REFERRED TO THE DISTRICT OR SUPREME COURT OF WESTERN AUSTRALIA

(a) The following three determinations were certified in 2011/12 for enforcement by the District Court of Western Australia, as a court of competent jurisdiction:

1. *Witham v Raminea Pty Ltd* [2012] WADC 1.
2. *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [2012] WADC 27.
3. *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]* [2012] WADC 60.

(b) Since the introduction of the Act in 2005 there have been 803 applications for adjudication of a payment dispute (Table 2.1.2). Of these 12 matters (12/803) approximately 1.5% have been referred to the Supreme Court of Western Australia (WASC) for a review of the adjudicator's determination.

The following six matters and were referred in 2011/12 to WASC for review:

1. *RE Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* [2011] WASC 172.
2. *Perrinepod Pty Ltd -v- Georgiou Building Pty Ltd* [2011] WASC 217.
3. *Georgiou Building Pty Ltd -v- Perrinepod Pty Ltd* [2012] WASC 72.
4. *Hire Access Pty Ltd -v- Michael Ebbott t/as South Coast Scaffolding And Rigging* [2012] WASC 108.
5. *RE Graham Anstee-Brook; Ex Parte Karara Mining Ltd* [2012] WASC 129.
6. *DPD Pty Ltd -v- McHenry* [2012] WASC 140.

The outcomes of court proceedings referencing an adjudication determination are monitored by the Building Commission for the purposes of possible legislative review and adjudication practice improvement. In the above matters no adjudicator's determination was overturned by the WASC. The Perrinepod matters however established that a decision by an adjudicator is potentially subject to a prerogative writ.

10. REVIEW OF THE ACT

A statutory review of the operation and effectiveness of this Act did not proceed during the current reporting period. There are a number of issues related to the onset and establishment of the new building legislation package that have resulted in the review being deferred until it is practical to proceed.

A review will provide the opportunity for local building and construction industry practitioners and stakeholders to formally submit comment on the current adjudications process and its scope.

The annual reporting of adjudication activity has identified an industry practice to request an application be 'withdrawn' from the adjudications process. This arises due to a change of circumstance or settlement between the parties. The Act does not formally provide for a withdrawal. According to 31(3) the Adjudicator can with the consent of the parties let the dispute run out of time and be dismissed. This approach however does not seem to be universally adopted and there are other views as to how the requests of the parties to end an adjudication appointment should be accommodated under the Act. The adjudicator's rights also need to be considered to cover costs under such circumstances.

The review will also enable a consideration of how the Act currently works or should operate in the face of Court decisions such as Perrinepod and other building laws administered by the Building Commission such as the *Home Building Contracts Act 1991* and the complementary *Building Services (Complaint Resolution and Administration) Act 2011* that deals with non payment disputes.

11. CONCLUSION

For the reporting period 2011/12 data collected by the Building Commission showed marked decreases in both the number of applications for adjudications (down from 197 in 2010/11 to 178 a drop of 15.75%) and in the overall value of those claims (down from \$308.5m in 2010-2011 to \$183.7m a drop of 40%).

This is a reflection of the mining sector's increased use of the Act in recent years and its heavy weighting in recorded adjudications particularly in value terms. The downturn is seen as largely linked to existing mining projects moving onto other phases in their development lifecycle (such as construction of processing plant which is specifically outside the scope of the Act). The next round of new large scale construction contracts in civil works and infrastructure proceed is likely to return adjudication activity to its long term growth trend.

The panel of registered adjudicators grew in the financial year (up 10% from 58 to 64) which underscores optimism by new entrants. There should ensure an adequate supply of expert help for future construction contracts disputes across all industry sectors. The Building Commission will however continue to monitor the impact of the mining sector and whether there is disadvantage to lower value/profile disputation matters. However, with just 30 of the 64 registered adjudicators active in the 2011-2012 financial year, there appear to be adequate resources to service all sectors.

We continue to examine ways to promote the take up of the Act particularly through knowledge sessions for vulnerable groups such as industry subcontractors as well as existing and potential building services contractors. These matters along with issues regarding the registration of adjudicators and prescribed appointors will be included in the forthcoming review of the Act for further report to the Minister.

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