

2012/2013  
WESTERN AUSTRALIA

REPORT OF THE BUILDING COMMISSIONER  
***CONSTRUCTION CONTRACTS ACT 2004***

FOR THE FINANCIAL YEAR ENDED  
30 JUNE 2013

**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 2012/2013

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 report (a) the level of activity in applications for adjudication (numbers and outcomes) in the current reporting period and (b) a summary of total adjudication applications since the commencement of the Act.

Number of Applications:	208
Total Value of Payment Claims	\$226,300,887.35
Mean Value of Payment Claims	\$1,103,906.77
Median Value of Payment Claims	\$160,147.58
Largest Payment Claim	\$21,567,786.70
Smallest Payment Claim	\$0.00

205 applications were submitted with known claim values. 3 were not submitted with the required information under the Act and were consequently dismissed.

The largest payment claim came from a mining sector adjudication and represents 9.5% of all claims. Similar large claims from this sector significantly skew the mean value for all sectors to be substantially higher than the median claim value.

<b>Financial Year</b>	<b>Number of Applications</b>	<b>Total Payment Claims (\$)</b>	<b>Mean value of Payment Claims (\$)</b>
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
<b>2012-2013</b>	<b>208</b>	<b>\$226,300,887.35</b>	<b>\$1,103,906.77</b>
Total	1011	\$1,112,306,613.76	

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

The current reporting period showed a return to the long term trend of increasing numbers over last FY of +16.85% and in value of application claims +23% (principally via high value mining construction, related infrastructure and public sector projects).

<b>Industry Grouping</b>	<b>Claims for Payment</b>			
	<b>Number (n)</b>	<b>Claims (%)</b>	<b>Total Amount Claimed(\$)</b>	<b>Value of Claims (%)</b>
Building design-residential:	1	0.48%	\$30,062.50	0.01%
Building design-commercial:	2	0.96%	\$5,304,319.96	2.34%
Building construction-residential:	40	19.23%	\$6,328,418.64	2.80%
Building construction-commercial:	60	28.85%	\$15,555,436.51	6.87%
Civil design-infrastructure:	0	0.00%	\$0.00	0.00%
Civil design-mining:	0	0.00%	\$0.00	0.00%
Civil construction-infrastructure:	30	14.42%	\$70,321,718.38	31.07%
Civil construction-mining:	38	18.27%	\$109,298,716.32	48.30%
Other (not specified):	37	17.79%	\$19,462,215.03	8.60%
Not known:	0	0.00%	\$0.00	0.00%
<b>Totals</b>	<b>208</b>	<b>100.00%</b>	<b>\$226,300,887.35</b>	<b>100.00%</b>

Commercial and residential activities seeking adjudications appointments made up 50% of all claims by number translated to 12% by payment claim value.

Construction contract disputes dealing with mining/oil and gas sector projects represented a third of all claims by number and some 80% by payment claim value.

The Other (not specified category) contains industrial construction and several prominent public sector undertakings including hospitals and local schools. It is proposed to list these recurrent and prominent categories in future Industry Group reports.

RANGE OF APPLICATIONS	CLAIMS (n,%, \$)			
	Number	Claims (%)	Total Amount by Claim Size (\$)	Mean Claim Size (\$)
\$1 - \$9,999:	12	5.77%	\$63,667.09	\$5,305.59
\$10,000 - 24,999:	18	8.65%	\$320,654.39	\$17,814.13
\$25,000 - \$99,999:	44	21.15%	\$2,233,668.38	\$50,765.19
\$100,000 - \$249,999:	32	15.38%	\$5,227,462.73	\$163,358.21
\$250,000 - \$499,999:	20	9.62%	\$7,794,999.55	\$389,749.98
\$500,000 and over:	65	31.25%	\$210,660,435.26	\$3,240,929.77
Other (invalid/zero amount/superseded claim):	3	1.44%	\$0.00	\$0.00
Totals:	<b>208</b>	<b>100.00%</b>	<b>\$226,300,887.40</b>	

The Act services a wide range of payment claim disputes by value. For the current reporting period over 85% of all claims are above \$25,000. Payment claim disputes in the range \$25,000 to \$99,999 representing less than 1% of all claims value. Claims over \$500,000 have jumped approaching one third of all claims in number but more significantly over 93% 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 2012/13 \$33.72M or 14.9% was extinguished by the adjudications process from the total original claimed amount of \$226.3M*

Total number claims with awards to applicants:	86
Total value of awards to applicants:	\$56,085,109.92
Largest single award:	\$18,567,253.61
Smallest single award:	\$577.15
Mean value of awards to applicants:	\$652,152.44
Median value of awards to applicants:	\$104,318.87
Total adjudicator fees for successful claims:	\$549,054.18
Mean value of adjudicator fees for successful claims:	\$6,384.35

For the current reporting period 41.35% of all applications by number were determined in favour of the applicant. The amount awarded was 24.78% of the total 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 award representing approximately one third of the value of all determined amounts in 2012/13.

The fees cited above earned by registered Adjudicators from determinations in favour of the applicant represented some 62% of all fees paid to adjudicators from 2012/13 appointments.

Number of claims dismissed:	74
Total value dismissed:	\$102,051,283.79
Largest dismissed claim:	\$14,149,222.19
Smallest dismissed claim:	\$9,438.20
Mean value of dismissed claims:	\$1,379,071.40
Median value of dismissed claim:	\$203,088.02
Total adjudicator fees for claims dismissed:	\$290,538.72
Mean value of adjudicator fees for claims dismissed:	\$3,926.20

Applications dismissed by the adjudications process (primarily on procedural grounds precluding a determination and without merit grounds) were 35.6% of all claims in number and over 45% of the total 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 decision represented 13.86% of the value of all dismissed amounts in 2012/13.

The fees cited above earned by registered Adjudicators from failed applications represented about 32.81% of all fees paid to adjudicators from 2012/13 appointments.

Total Number of Claims Withdrawn:	48
Total Value of Claims Withdrawn:	\$34,450,211.75
Largest Claim Withdrawn:	\$13,323,116.40
Smallest Claim Withdrawn:	\$0.00
Mean Value of Claims Withdrawn:	\$717,712.74
Median Value of Claims Withdrawn:	\$45,899.57
Total Adjudicator Fees for Withdrawn Claims:	\$45,836.70
Mean Value of Adjudicator Fees for Withdrawn Claims:	\$954.93

The outcomes for the reporting period show applications “withdrawn” from the adjudications process at the request of the participants ran at some 23.1% of all claims in number and 15.22% of the total 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 38.67% of the value of all claims withdrawn in the reporting period.

The fees cited above earned by registered Adjudicators from failed applications represented some 5.19% of all fees paid to adjudicators from 2012/13 appointments.

The Act does not provide a formal withdrawal mechanism however many Applicants in practice request appointed adjudicators to discontinue their payment claim 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)	9	4.33%
*Australian Institute of Project Management (AIPM)	0	0%
*The Australian Institute of Quantity Surveyors (AIQS)	0	0%
(National) Electrical and Communications Association of Western Australia (Union of Employers) (NECA)	6	2.88%
The Institute of Arbitrators and Mediators Australia (IAMA)	114	54.81%
Master Builders Association of Western Australia (Union of Employers) (MBA)	66	31.73%
RICS Australasia Pty Ltd (RICS)	12	5.77%
*The Royal Australian Institute of Architects (AIA)	1	0.48%
Other -adjudicator appointed directly by the parties	0	0%
Total	208	100.00%

IAMA and the MBA were the most active appointors for adjudicators in 2012/13. This continued a long term trend. AIA made 1x appointment during the reporting period.

AIQS did not deal with any appointments in the current reporting period and has previously advised the Building Commissioner that they wish to withdraw from the list of appointors. Published information has been updated with the Regulations to be amended as part of the review of the Act.

### 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 2012	64
Net position for 1 July 2012 - 30 June 2013 (5 new appointments and 1 deceased adjudicator)	4
Total number of registered adjudicators as at 30 June 2013	68

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](http://www.buildingcommission.wa.gov.au) together with a profile on each of the registered adjudicators, their skills and experience and fees for adjudication appointments. 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 35 of the 68 registered adjudicators were appointed to the 208 applications for payment dispute resolution.

<b>Table 4.2 : Summary of Adjudication/Adjudicator fees in 2012-13</b>	
Total Adjudication fees for the 208 claims made.	<b>\$885,429.60</b>
Mean	\$4,277.44
Median	\$2,640.00
Max	\$29,944.20
Min	\$0.00
<b>Adjudicator fees per hour</b>	
Max	\$390.00
Min	\$180.00
Avg	\$265.36
StdDev	\$54.29

The highest adjudication fee was for a complex payment dispute of \$8.31M in an infrastructure project

A zero Adjudication fee was charged by several adjudicators in 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 adjudicators 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 current 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 a determination.

Since the introduction of the Act in 2005 there have been 1011 applications for adjudication of payment disputes (Table 2.1.2). Historically there have been 26 x decisions to dismiss (some 2.5% of all applications) referred, by one of the parties to the dispute, to WASAT for review. Eight of these matters have been returned to the 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) *Tormaz Pty Ltd v High Rise Painting Contractors Pty Ltd* [2012] WASAT 166.
- (ii) *Howard v Farrell* [2012] WASAT 169.
- (iii) *All Roofs Pty Ltd v Southgate Corporation Pty Ltd* [2012] WASAT 178.
- (iv) *City Residence Pty Ltd and Catoj* [2013] WASAT 29.
- (v) *Digdeep Investments Pty Ltd and NW Constructions Pty Ltd* [2013] WASAT 60.

In matters (i), (ii) (iii) and (iv) the Adjudicators' decisions to dismiss were affirmed by WASAT. In matters (v) the Adjudicator's original decisions was set aside, a revised determination was issued by the adjudicator and the Building Commission's records updated.

### **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 2012-2013 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) In the reporting period the following determination was certified for enforcement by the District Court of Western Australia, as a court of competent jurisdiction:

- *Michael Ebbott t/as South Coast Scaffolding and Rigging Services v Hire Access Pty Ltd* [2012] WADC 66.

(b) From the commencement of the Act to the current reporting period there have been 1011 applications for adjudication of payment disputes (Table 2.1.2). Of these matters 18/1011 (some 1.8%) have been referred to the Supreme Court of Western Australia (WASC) for a review of the adjudicator's determination.

The following five matters were referred in 2012/13 to WASC for review:

1. *RE Graham Anstee-Brook; Ex Parte Karara Mining Ltd* [2012] WASC 129 (S).
2. *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304.
3. *Synergon Constructions Pty Ltd v Cusack Group Pty Ltd* [2012] WASC 474.
4. *Triple M Mechanical Services Pty Ltd v Ellis* [2013] WASC 67.
5. *RE Graham Anstee-Brook; Ex Parte Karara Mining Ltd [No 2]* [2013] WASC 59.

In the above matters no adjudicator's determination was overturned by the WASC. The Building Commission monitors the outcomes of court proceedings referencing an adjudication determination for the purposes of possible legislative review and adjudication practice improvement.

## 10. REVIEW OF THE ACT

Section 56(1) of the *Act* required the Minister to review the operation and effectiveness of the *Act* as soon as practicable after the fifth anniversary of the *Act's* commencement on 1 January 2005. This statutory review has been held over pending several new building services laws, such as the *Building Services (Complaint Resolution and Administration) Act 2011* that deals with non payment disputes in construction contracts, coming into full effect.

The statutory review will address how the *Act* works or should operate. Building and construction industry practitioners and stakeholders will be invited to make formal submissions.

A review paper will be distributed to include questions on recurrent and specific issues identified through data collected by the Building Commission in the annual reports on the *Act's* activities and comments drawn from industry forums. Matters to be addressed will include the strict time frame requirements of the *Act*, coverage of the resources sector, "withdrawals" from the adjudications process, Court decisions and best practice approaches. Comment will also be invited on other areas of particular interest to subcontractors such as the effectiveness of the *Act* and security of payment mechanisms cited in the Small Business Commissioner's report to the Parliament in June 2013.

## 11. CONCLUSION

The Building Commission's collection of data for 2012/13 adjudication activity shows a return to the growth over 2011/12 with all sectors of the construction industry using the relatively inexpensive and speedy adjudication process to access moneys subject to a payment dispute.

Participants in mining sector construction and related infrastructure projects continue to be the dominant users of the *Act* (measured in contract payment claim value terms). The reporting period also saw adjudications occurring in large scale construction contracts for public buildings such as hospitals, schools, industrial facilities and infrastructure projects. The commercial and residential sectors had the largest number of payment claims serviced by adjudicators.

The large number and value of dismissals of applications in 2012/13 is of particular concern to the Building Commission. It appears that otherwise valid claims have failed because applications, particularly from subcontractors, have not been submitted within the *Act's* strict 28 day deadline. This lack of knowledge and understanding of the day count is a double edged sword also for respondents who fail to reply within the prescribed 14 day window set out in the *Act*. This in turn results in determinations proceeding based solely on the Applicant's claim.

The panel of registered adjudicators grew again in the financial year (up from 64 to 68) indicating optimism from new entrants. This has built an adequate supply of expert help for future construction contracts disputes across all industry sectors. It is noted however that only 33 of the 68 registered adjudicators were appointed to all adjudications in the 2012-2013.

The Building Commission will recommend to the Minister a statutory review of the *Act* commence in 2014 with local industry stakeholders, peak bodies and practitioners invited to make formal submissions to the review in due course.

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PETER GOW  
BUILDING COMMISSIONER