

REPORT OF THE BUILDING COMMISSIONER
FOR THE FINANCIAL YEAR 30 JUNE 2015

CONSTRUCTION CONTRACTS ACT 2004 (WA)

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

1. PURPOSE OF THE ACT

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

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

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

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

2. CONSTRUCTION CONTRACT PAYMENT DISPUTES

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

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

ADJUDICATION ACTIVITY

The tables 2.1 to 2.5 below summarise use of the Act. Table 2.1 shows the number of applications for adjudication for the current reporting period tracked against historical outcomes. Grand total payment claims values since commencement now exceed \$2B. Later Tables 2.2 to 2.5 provide descriptive statistics for applications activity specific to 2014/15.

<i>Financial Year</i>	<i>Number of Applications</i>	<i>Total Payment Claims</i>	<i>Mean value of Payment Claims</i>
2005-2006* (half year)	29	\$10,485,828.12	\$361,580.28
2006-2007	36	\$15,938,123.77	\$442,725.66
2007-2008	86	\$98,222,008.65	\$1,142,116.38
2008-2009	105	\$35,838,998.23	\$341,323.79
2009-2010	172	\$233,266,050.32	\$1,356,197.97
2010-2011	197	\$308,553,664.77	\$1,566,262.25
2011-2012	178	\$183,701,052.55	\$1,086,988.48
2012-2013	208	\$226,300,887.35	\$1,103,906.77
2013-2014	175	\$378,903,585.63	\$2,165,163.35
2014-2015	235	\$580,655,848.46	\$2,470,875.95
Grand Totals	1421	\$2,071,866,047.85	\$1,458,033.81

2014/15 outcomes: The total number of applications increased by 60 (35%) and by \$201.75M (53%) in claims value over the previous reporting period 2013/14. Both adjudication activity measures (number and value of payment claim) for the reporting period 2014/15 were at the highest levels over the near decade life of the Act.

Applications for adjudication were dominated by large scale high value construction payment disputes from (a) mining/oil and gas projects, related infrastructure and civil works in regional areas and (b) major public sector capital works in the metropolitan area. The Tables below show the impact of these dominant industry groups in the number, range and averages for payment claims serviced by the Act in the reporting period.

Number of Applications:	235
Total Value of Payment Claims	\$580,655,848.46
Mean Value of Payment Claims	\$2,470,875.95
Median Value of Payment Claims	\$280,500.00
Largest Payment Claim	\$81,791,710.78
Smallest Payment Claim	\$1456.00

2014/15 outcomes: Of the 235 applications in Table 2.2 four claims did not contain information required under the Act to conduct an adjudication such as (a) not providing a claim value or (b) being settled or withdrawn by the parties prior to the appointment of an adjudicator.

As expected the Act was predominantly used by subcontractors and suppliers submitting 190/235 (80%) of all applications and \$544M/\$580M (nearly 94%) of all claims by value.

Both the smallest (ie greater than \$Nil) and largest payment claims by value came from the mining/oil and gas sector. The largest claim represented >14% of all claims in the reporting period. Large scale payment claims from this grouping markedly skew the mean value for all industry sectors to be substantially higher than the year's median claim value.

<i>Construction/Building Group</i>	<i>Claims for Payment</i>			
	<i>Number</i>	<i>% Total n Claims</i>	<i>Total \$ Amount Claimed</i>	<i>% Value of Claims</i>
Residential	39	16.60%	\$14,199,632.75	2.45%
Commercial	48	20.43%	\$26,213,621.16	4.51%
Industrial	8	3.40%	\$8,078,458.68	1.39%
Public buildings	46	19.57%	\$24,774,271.31	4.27%
Civil works/infrastructure	12	5.11%	\$41,952,656.71	7.23%
Mining/oil and gas	80	34.04%	\$465,420,707.85	80.15%
Other	2	0.85%	\$16,500.00	0.0028%
Totals	235	100.00%	\$580,655,848.46	100.00%

2014/15 outcomes: Table 2.2 shows residential, commercial and industrial construction works together made up almost 41% of all payment claims by number but only some 8.35% by value.

Over one third of the number of disputed payment claims came from participants in construction works supporting mining/oil and gas projects. These claims represented over 80% of the value of all 2014/15 payment claims.

Industry participants undertaking works at several metropolitan hospitals and Perth CBD civic projects also sought adjudication determinations at historically high levels but at lower claims value than reported in 2013/14.

Parties to civil works and infrastructure projects in roads, services and ground works in all industry groupings continued to apply for rapid adjudication under the Act but at significantly reduced activity levels and claims values than reported last year.

Range	CLAIMS			
	Number	%	Total	Mean
\$ 0	12	5.11%	\$0.00	\$0.00
\$1 - \$9,999	12	5.11%	\$66,297.87	\$5,524.82
\$10,000 - 24,999	13	5.53%	\$215,651.36	\$16,588.57
\$25,000 - \$99,999	49	20.85%	\$2,962,777.72	\$60,464.85
\$100,000 - \$249,999	33	14.04%	\$5,046,711.21	\$152,930.64
\$250,000 - \$499,999	26	11.06%	\$9,497,433.41	\$365,285.90
\$500,000 and over	90	38.30%	\$562,866,976.95	\$6,254,077.52
Totals	235	100.00%	\$580,655,848.46	

2014/15 outcomes: Table 2.4 shows that the range of payment claim disputes lodged for adjudication were dominated by disputes over \$500,000 (40% of all claims in number but over 95% by value).

This position reflects the use of the Act by the supply side (subcontractors and suppliers) to the mining oil/gas industry, to assist in determining their entitlements in large value construction contract payment disputes.

Importantly 25 valid claims for adjudication were submitted for claims less than \$25,000 and nearly double in the next range (\$25,000 to \$99,999). These 14/15 numbers and claim values substantially exceed outcomes for the previously reported 13/14 outcomes. This result features a return by subcontractors and suppliers in the traditional construction residential, commercial and industrial groups to use the rapid adjudication process to realise their revenue entitlements.

A dozen claims however did not proceed to adjudication as those applications were invalid. This underscores the need for construction industry sole traders and small contractors to gain a better knowledge of the Act and its specific requirements for the group and other prospective users to submit future valid claims.

Location	Number	% Total Claims rounded
Metropolitan	118	50.20%
Unknown/Not disclosed	2	0.85%
Regional	115	48.95%
Totals	235	100.00%

2014/15 outcomes: Table 2.5 gives a snap shot of the location of all applications for adjudication. These figures are drawn from the Commission's recording of all adjudication matters x Local Government Authority and Regional Development Authority areas.

In summary the number of applications for adjudication in regional WA and metropolitan Perth largely matched for the reporting period. This reflected a greater take up of the Act by residential/commercial industry participants in the metropolitan area in 2014/15 over 2013/4 results.

Regional claims values of \$503.7M were however at over 8.6 x the value of capital city dispute claims at \$58.3M. The Pilbara in particular dominated the regional areas in the current reporting period with 94/115 claims representing 40% of the State's total adjudication claims.

ADJUDICATION OUTCOMES 2014/15

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

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

Tables 2.6 to 2.8 that follow report the outcomes of adjudications (x numbers, value and percentages) for FY 2014/15.

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

Dismissals

Number of claims dismissed:	52
Total value dismissed:	\$69,790,890.89
Largest dismissed claim:	\$18,583,362.65
Smallest dismissed claim:	\$4,871.35
Mean value of dismissed claims:	\$1,342,132.52
Median value of dismissed claim:	\$144,530.70
Total adjudicator fees for claims dismissed:	\$237,158.33
Mean value of adjudicator fees for claims dismissed:	\$4,560.74

2014/15 outcomes: Table 2.6 reports key statistics for dismissed applications and read in conjunction with Table 2.2 shows that 22% of all claims in number and over 12% of claims by value were dismissed.

The largest amount dismissed was from the mining/oil and gas sector and that single decision represented nearly 27% of the value of all dismissed amounts state-wide in 2014-2015. The fees earned by appointed adjudicators from failed applications represented some 16% of all fee payments in the reported period.

Applications that are not dismissed must then be determined by the adjudicator on the balance of probabilities whether a payment is due by a party to the construction contract, that amount and date and by when it must be paid.

Determinations

Total number claims with awards to applicants:	153
Total value of awards to applicants:	\$117,242,618.32
Largest single award:	\$23,200,319.82
Smallest single award:	\$500.00
Mean value of awards to applicants:	\$766,291.62
Median value of awards to applicants:	\$103,143.72
Total adjudicator fees for successful claims:	\$1,171,070.46
Mean value of adjudicator fees for successful claims:	\$7,578.89

2014/15 outcomes: Table 2.7 reports key statistics for applications determined by adjudication under the Act. Read in conjunction with Table 2.2 reveals that some 65% of all disputed claims were decided in favour of the applicant with an average of some 20% of the total value originally claimed being awarded.

The range of construction contract payment disputes catered for under the Act (largest to smallest in value above) affects the reported mean and median averages. Again the largest determination was from the mining/oil and gas sector with a single award in the Pilbara region accounting for 20% of the value of all determined amounts state-wide in 2014-2015.

The fees earned by appointed adjudicators from determinations in favour of the applicant represented some 81% of all fees payments in 2014-2015.

“Withdrawals”

The Act does not specifically provide a formal withdrawal mechanism however many applicants in practice request appointed adjudicators to discontinue their payment claim for a number of sound commercial reasons.

Typically a withdrawal request follows a settlement of the claim between the contracted parties occurring after the application is served or at some time during the adjudication process. Appointed adjudicators may however use the existing provisions of the Act to allow the withdrawal request to be accommodated by enabling the application to run out of time under s.31(3) and be dismissed or by determining there is no payment dispute to adjudicate.

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

Total Number of Claims Withdrawn:	30
Total Value of Claims Withdrawn:	\$35,861,259.87
Largest Claim Withdrawn:	\$22,208,817.05
Smallest Claim Withdrawn:	\$72,387.55
Mean Value of Claims Withdrawn:	\$1,195,375.33
Median Value of Claims Withdrawn:	\$81,157.20
Total Adjudicator Fees for Withdrawn Claims:	\$37,911.32
Mean Value of Adjudicator Fees for Withdrawn Claims:	\$1,263.71

2014/15 outcomes: Table 2.8 reports key statistics for applications “withdrawn”. When read in conjunction with Table 2.2 close to 13% of all claims in number and some 6.25 % of the total original claimed value were withdrawn.

The range of construction contract payment disputes catered for under the Act (largest to smallest in value above) impacts on reported mean and median averages. The largest amount withdrawn was from the mining/oil and gas sector and that single outcome for a Pilbara project represented approximately 62% of the value of all claims withdrawn in the reporting period.

The fees earned by appointed Adjudicators from applications that were “withdrawn” represented less than 3% of all fees paid to adjudicators from 2014-2015 appointments.

3. PRESCRIBED APPOINTORS

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

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

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

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

The prescribed appointor however cannot charge more than the fees published on the Building Commissioner's web site.

Name of Prescribed Appointor	Number of Appointments	
	No.	% of Total
The Australian Institute of Building (AIB)	11	4.68%
(National) Electrical and Communications Association of Western Australia (Union of Employers) (NECA)	11	4.68%
The Institute of Arbitrators and Mediators Australia (IAMA)	142	60.43%
Master Builders Association of Western Australia (Union of Employers) (MBA)	60	25.53%
RICS Australasia Pty Ltd (RICS)	3	1.28%
Other -adjudicator appointed directly by the parties	8	3.40%
Total	235	100%

2014/15 outcomes: Table 3.1 shows the distribution of appointment activity for the reporting period. IAMA and the MBA continued the historical trend to be the most active of appointors although AIB and NECA made more appointments than previous years. IAMA and RICS seek to service all construction industry sector payment disputes. Generally MBA, NECA and AIB have provided adjudication appointment services to specific construction industry segments.

4. REGISTERED ADJUDICATORS

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

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

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

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

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

Table 4.1 shows the number of persons on the published 2014/15 Register of Adjudicators as at 30 June 2015.

Table 4.1 – 2014-2015 Register of Adjudicators as at 30 June 2015

Name	Certificate #	Name	Certificate #
Graham Anstee-Brook	1	Bernard Lynch	41
John Fisher	2	Alex Durning	42
Phil Faigen	3	Michael Murrey	43
Richard Machell	4	Rod Perkins	44
Alan Riley	5	Barry Tonkin	45
Kevan McGill	6	Thomas Muttrie	46
Scott Ellis	7	Gregory Downing	47
Antony Ednie-Brown	8	Auke Steensma	48
Roger Davis	9	John Hockley	49
Kim Doherty	10	Lyndon White	50
Laurie James	11	Natasha Owen-Conway	51#
Philip Dyer	13	Dennis Oon	53
Kersh De Courtenay	14	Russell Welsh	54
Adrian Goold	15	Colin Bond	55
David Aitken	16#	David Trinder	57
Mirina Muir	18	Leon Doret	65
Mark Jones	19	Dulal Ghosh	66
Phillip Evans	20	Nikolas Karantzis	67
Ralph Unger	21	Wayne Bradshaw	68
Paul Wellington	22	Scott Johnson	69
Michael Charteris	23	John Knuckey	70
Glynn Logue	24	Richard Rudas	71
Phillip Loots	25	Damian Michael	72
William Lau	26	James Saunders	73
Raymond Gibson	27	Ian Cartwright	74
Peter Byrne	28	Neil Kirkpatrick	75
Colin Touyz	29	Chidambara Raj	76
Vittorio Tassone	31	Robert Woodforde	77
John Morhall	32	Barry Green	78
Gavin Brackenreg	33	Nicholas Hobbs	79
David Court	34	Gordon Smith*	80
Fulvio Prainito	35	Dominic William Pilkington*	81
Zvy (Steve) Lieblich	36	Michael David George Heaton*	82
Mark Taylor	37	Hugh Roger Davis*	83
Graham Morrow	38	Julian Louis Sher*	84
Kevin Windross	39	Total number of prescribed Adjudicators as at 30 June 2014/15	71

Key: # denotes 2 X registered adjudicators effectively precluded from appointment due to fulltime WASAT Membership.

Note: Adjudicators may from time to time act as session members of WASAT. These persons are not excluded from appointment outside those sessions.

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

<i>Table 4.2 : Overview of 2014-2015 registration activity</i>	
Number of registered adjudicators as at 30 June 2014	66
Change in registrations from 1 July 2014 to 30 June 2015 (shown with * in Table 4.1)	+5
Number of registered adjudicators as at 30 June 2015	71

2014/15 outcomes: For the reporting period there were five new adjudicators (with no retirements or cessation of registration) added to the pool of registered persons potentially available to adjudicate construction contract payment disputes under the Act.

From this pool 36 (>50%) of the 71 registered adjudicators were appointed to the 235 applications made in 2014/15. In the previous reporting period these equivalent figures were 35 (53%) of 66 persons dealt with 175 applications.

<i>Table 4.3: Summary of Adjudication/Adjudicator fees 2014-2015</i>	
Total Adjudication fees (235 claims)	\$1,470,752.31
Mean	\$6300.10
Median	\$4843.81
Max	\$36075.79
Min	\$300/\$0.00
Adjudicator fees per hour (excl. GST)	
Max	\$400.00
Min	\$180.00
Avg	\$290.00

2014/15 outcomes: Based on the findings in Table 4.2 the average hourly fee (GST excluded) charged for adjudication work exceeded the previously reported 13/14 average by 9.2%.

The highest adjudication fee was for a complex payment dispute in a civil works project. There were several commercial settlements that ended payment disputes early in the adjudications process. In these matters no or nominal fees were charged by the appointed adjudicators to the parties or the Applicant seeking to "withdraw" a claim from adjudication.

The gross overall fee incomes for adjudications increased over the previous reporting period mainly due to the increased number of adjudication applications (235 > 175). The above fee average measures were 12% and 14% off the equivalent outcomes in 2013/14.

5. EDUCATION MATTERS

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

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

2014/15 outcomes: 2x approved training courses were conducted in Perth by IAMA and RICS. Both courses were promoted on the Building Commission web site.

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

6. INDUSTRY ENGAGEMENT

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

This engagement ranged from providing information to prospective users of the Act either as an applicant or respondent, considering the qualifications of five applicants as adjudicators prior to registration approval to considering matters raised by appointors, adjudicators and legal advocates over the current Act's efficacy and supporting the conduct of the independent review of the Act during 2014/15.

7. ADMINISTRATION

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

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

2014/15 outcomes: During the reporting period all publications and forms linked to the Act were refreshed in both electronic and hard copy format. The recommended but unprescribed adjudication Application (Form 2) and Response (Form4) were updated to assist parties using the Act to submit valid claims and responses consistent with the current Regulations.

The Building Commissioner certified 21 adjudication determinations pursuant to s.43(3) during the reporting period.

7.1 Publication of adjudicators' decisions

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

2014/15 outcomes: Apart from general references and descriptive statistics in this report there were no instances of disclosure of adjudication outcomes made available by the Building Commissioner under this head of power in the reporting period.

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

8.1 Conflict of interest

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

2014/15 outcomes: No matters were referred to WASAT in relation to a conflict of interest by an appointed adjudicator.

8.2 Adjudicator's decision

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

Since the commencement of the Act in 2005 WASAT has reviewed 37 dismissal decisions. In 25 cases the adjudicators' decisions were affirmed with 12 cases returned to the appointed adjudicator to revisit the original decision to dismiss (without consideration of merit).

2014/15 outcomes: Eight dismissals were referred to WASAT by aggrieved parties for review of the adjudication decisions. WASAT made orders on the following 7 cases (i) to (vii) from 2013-14 and 1 case (viii) in the current reporting period:

- (i) Field Deployment Solutions Pty Ltd and SC Projects Australia Pty Ltd [2014] WASAT 101;
- (ii) MRCN Pty Ltd *t/as Westforce Construction* and ABB Australia Pty Ltd [2014] WASAT 135;
- (iii) Alliance Contracting Pty Ltd and Tenix SDR Pty Ltd [2014] WASAT 136;
- (iv) R & D Building Pty Ltd and Jackson [2014] WASAT 141;
- (v) Digdeep Investments Pty Ltd and NW Constructions Pty Ltd [2014] WASAT 147;
- (vi) Marine & Civil Pty Ltd and WQUBE Port of Dampier Pty Ltd [2014] WASAT 167;
- (vii) GRC Group Pty Ltd and Kestell [2015] WASAT 11; and
- (viii) SC Projects Australia Pty Ltd and Sea Trucks Australia Pty Ltd and Field Deployment Solutions Pty Ltd [2015] WASAT 69.

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

In matters (ii) the adjudicator's decision was remitted to correct the date when a payment dispute was found by WASAT to have arisen; and (vii) the adjudicator's decision was set aside by WASAT with a directive to make a determination under s 31(2)(b) of the Act. The required amendments are contained within the statistics for this report.

The full WASAT decision for each of the 8 x matters is published at www.decisions.justice.wa.gov.au/SAT

8.3 Building Commissioner's decision

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

2014/15 outcomes: No action was initiated to challenge decisions of the Building Commissioner regarding the registration of Adjudicator(s).

9. MATTERS REFERRED TO THE COURTS OF WESTERN AUSTRALIA

9.1 The District Court of Western Australia (WADC)

Matters potentially before the WADC include orders for the enforcement of an adjudicator's determination certified by the Building Commissioner or hearings on related construction contract disputes between parties.

Over the life of the Act to the end of 2014/15 there have been nine matters referred to the WADC. This represents less than 0.75% of all 1412 applications lodged in a payment dispute (Table 2.1) dealt with by registered adjudicators.

2014/15 outcomes: One matter was dealt with by the WADC, as a court of competent jurisdiction, for a 2014-15 adjudication decision, granting leave to enforce the Adjudicator's determination under s. 43(3) of the Act.

- (i) *Kuredale Pty Ltd -v- John Holland Pty Ltd* [2015] WADC 61.

The full decision by WADC in this matter is published at www.decisions.justice.wa.gov.au/district

9.2 The Supreme Court of Western Australia (WASC)

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

Over the life of the Act to the end of the current reporting period there have been 32/1421 matters referred to the WASC to review appointed adjudicator determinations. Historically this represents some 2.3% of all applications lodged under the Act. Of the matters heard 19/32 (or 59%) have been dismissed.

2014/15 outcomes: Nine matters arising under the Act were considered by the WASC that included challenges to seven Adjudicator determinations comprising 6 cases from 2013-14 being (i) to (vi) and 3 being (vii) to (ix) in the current reporting period:

- (i) *WQUBE Port of Dampier -v- Philip Loots of Kahlia Nominees Ltd* [2014] WASC 331;
- (ii) *RE Scott Johnson; Ex Parte Decmil Australia Pty Ltd* [2014] WASC 348;
- (iii) *Hamersley Iron Pty Ltd -v- James* [2015] WASC 10;
- (iv) *Hamersley HMS Pty Ltd -v- Davis* [2015] WASC 14;
- (v) *Field Deployment Solutions Pty Ltd -v- SC Projects Australia Pty Ltd* [2015] WASC 60;
- (vi) *SC Projects Australia Pty Ltd -v- Field Deployment Solutions Pty Ltd* [2015] WASC 115;
- (vii) *Delmere Holdings Pty Ltd -v- Green* [2015] WASC 148;
- (viii) *Field Deployment Solutions Pty Ltd -v- Jones* [2015] WASC 136; and
- (ix) *Delmere Holdings Pty Ltd -v- Green* [2015] WASC 148.

In summary for the purposes of this report matters: (i), (ii), (iii), (iv), (vi) and (viii) were dismissed.

In matters (v) Leave to appeal was granted, an earlier WASAT decision affirmed and the Declaration made; and in (vii) and (ix) the Applications were allowed and Certiorari was issued.

The full decision by WASC for each of these matters is published at www.decisions.justice.wa.gov.au/supreme

Notes: (i) no subsequent appeals were initiated in the current reporting period to the Western Australian Supreme Court of Appeal (WASCA); and

- (ii) at the time of writing this report there are four cases before the WASC that are due to be delivered for publication. These matters will be included in the next Annual Report.

10. REVIEW OF THE ACT

The Minister announced to the Parliament in June 2014 that an independent statutory review of the operation and effectiveness of the Act would be undertaken. Professor Philip Evans of Curtin University was appointed to conduct the review and present the Government with recommendations to consider improving security of payment issues for construction industry participants.

The reviewer issued a discussion paper on 1 October 2014 inviting comment from identified stakeholders at trade, contractor and corporate levels as well as from registered adjudicators and appointors and from legal, academic and government sectors.

The discussion paper identified a range of relevant issues evident over the life of the Act. Stakeholders were asked to provide specific comment however as these matters were not seen as exhaustive stakeholders were also able to provide comment based on their experiences in dealing with the Act and also to provide general observations.

Written submissions were also sought from other interested persons and the public also given the opportunity to attend consultation sessions to present their views and experience directly with the reviewer on the operation of the current Act.

During the course of the consultations period the Building Commission website carried the discussion paper and posted updates of the review's progress. A dedicated email address was also set up to receive enquiries and written submissions sent electronically.

The original timetable for these consultations was extended till 21 November 2014 to enable late submissions to be considered from a final Subcontractors' Forum held on 14 November 2015. Overall the review held 14 consultation sessions and received 53 written submissions from 50 individual and corporate stakeholders.

A Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (the Report) was provided by Professor Evans to the Minister in mid-September 2015. At the time of writing this 2014/5 annual report on the Act the Minister is consulting with other portfolios, including the Minister for Small Business, on any implications from the recommendations to arrive at a settled position for the Government prior to tabling the Report in the Parliament.

11. SUMMARY

For almost ten years the Act has been used by all sectors of the State's construction industry, albeit at different levels, to assist in the resolution of payment disputes. The adjudication approach continues to afford access to less expensive and rapid decision making that identifies moneys owing under the terms of the parties' contract or (in the absence of specific contract terms) implied into the contract by the Act.

Measures of adjudication activity in 2014/15 shown earlier at Table 2.1 were at historic highs for the life of the Act recovering sharply over 2013/14 appointment numbers and claims value. Parties to large scale mining oil/gas sector construction projects in the Pilbara region and metropolitan capital works for hospitals and schools continue to seek the Act's assistance in determining high value payment disputes.

The downturn in the State's economic climate accelerated the return of participants in the traditional residential, commercial and industrial sectors to use rapid adjudication to determine business cash flow credits. For the reported period this grouping led the mining sector in terms of the number of claims (95>80) but second by claims value (\$48.49M<\$465.4M). In the main applications from the supply side that were dismissed demonstrated a lack of knowledge of the requirements of the Act regarding the lodgement of a valid claim.

During the year the Building Commission revised both web based application and response forms and began a series of education initiatives to promote the usefulness of the Act. Existing building services contractors and practitioners registered under the *Building Services Registration Act 2011* are potential candidates for enhanced training and workshops.

The *Construction Contracts Act 2004* also deals with payment disputes for civil and marine works and at locations throughout the State that are outside the current scope of the existing building services laws. Other education approaches for participants entering into construction contracts in these areas with other jurisdictions and relevant peak industry bodies to conduct local industry awareness sessions.

During the reporting period the panel of registered adjudicators increased from 66 to 71. This pool of expertise, outside of the formal courts system, is growing and has historically been able to rapidly deal with all lodged claims for the resolution of all types of construction contract payment disputes state-wide.

The activity level of individual registered adjudicators under the Act and the distribution of appointments shows approximately half of all registered adjudicators in 2014/15 were appointed to the 235 construction contract payment disputes. The adjudicators on the Register (Table 4.1) that were not appointed last financial year were precluded for various reasons including potential conflict of interest based on their employment type or were unavailable due to other assignments, being overseas or due to personal circumstances.

The independent review of the coverage, operation and effectiveness of the Act has recently been completed by Professor Philip Evans of Curtin University. This initiative was a key feature of the 2014/15 year with the reviewer undertaking extensive consultation with construction industry participants, stakeholders and the public in formulating his report and recommendations that are currently being considered by the Minister.

PETER GOW
BUILDING COMMISSIONER