



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 2018

CONSTRUCTION CONTRACTS ACT 2004

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

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1. PURPOSE OF THE ACT

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

The Act provides parties to a contract for the carrying out of construction work (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. 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 detailing the operation and effectiveness of the Act for the previous financial year (the reporting period). This report is submitted before 1 November in each calendar year allowing the outcomes of adjudicated payment disputes claimed 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 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.

2.1 ADJUDICATION ACTIVITY

Table 2.1 below shows the number of applications for adjudication for the current reporting period against historical reporting periods. Since the Act commenced operation, 1,987 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
2005/2006	29	\$10,485,828.12	\$361,580.28
2006/2007	36	\$15,938,123.77	\$442,725.66
2007/2008	86	\$98,222,008.65	\$1,142,116.38
2008/2009	105	\$35,838,998.23	\$341,323.79
2009/2010	172	\$233,266,050.32	\$1,356,197.97
2010/2011	197	\$308,553,664.77	\$1,566,262.25
2011/2012	178	\$183,701,052.55	\$1,086,988.48
2012/2013	208	\$226,300,887.35	\$1,103,906.77
2013/2014	175	\$378,903,585.63	\$2,165,163.35
2014/2015	235	\$580,655,848.46	\$2,470,875.95
2015/2016	225	\$685,990,359.67	\$3,048,846.04
2016/2017	176	\$187,563,024.84	\$1,065,699.00
2017/2018	165	\$71,942,426.85	\$436,014.71
Grand Totals	1987	\$3,017,361,859.10	\$1,518,551.51

2017/18 outcomes: Applications for adjudication for the current reporting period were significantly down from the previous 2016/17 reporting period with numbers retreating by 6.25 per cent and the total value of the payment disputes down by over 61.64 per cent. The number of applications made during 2017/18 was the second lowest in both number and total value of payment disputes in seven years.

Tables 2.2 to 2.4 below provide descriptive statistics on the use of applications for adjudication by stakeholders, industry and value categories

**Table 2.2 – Applications for Adjudication 2017/2018
(By Applicant and Respondent types)**

Applicant type	Respondent Type	Frequency	Percentage of the total number (165) (%)
Subcontractor	Head Contractor	32	19.39
Subcontractor	Registered Building Contractor	16	9.7
Subcontractor	Owner/Principal	7	4.24
Subcontractor	Subcontractor	11	6.67
Subcontractor(Supplier/Installer)	Head Contractor	9	5.45
Subcontractor(Supplier/Installer)	Registered Building Contractor	12	7.27
Subcontractor(Supplier/Installer)	Owner/Principal	8	4.85
Subcontractor(Supplier/Installer)	Subcontractor	19	11.51
Consultant	Registered Building Contractor/Head Contractor/ Owner/Principal/Developer/ Electrical Contractor	11	6.67
Head Contractor	Owner/Principal/Developer	4	2.42
Registered Painter/Building Practitioner	Owner/Principal	3	1.82
Registered Building Contractor	Subcontractor	1	0.61
Registered Building Contractor	Developer	2	1.21
Registered Building Contractor	Owner/Principal	24	14.55
Registered Building Contractor	Registered Painter	1	0.61
Licensed Electrical Contractor	Head Contractor/Subcontractor/ Registered Building Contractor	4	2.42
Owner/Principal	Registered Building Contractor	1	0.61

2017/18 outcomes: Applicants categorised as “subcontractors” were the largest Applicant group in the current reporting period. Subcontractor is a generic descriptor used to cover many entity types, ranging from sole operators to large private companies and denotes the position of the Applicant in the contractual chain on a project. Applicants categorised as subcontractors made 115 applications for adjudication during the current reporting period covering \$52,912,106.60 in payment disputes.

Table 2.3 – Applications for Adjudication 2017/2018 (By Industry Sector)

Industry Sector	Applications			
	Number	per cent Total Apps.	Total \$ Amount Payment Disputes	per cent Value of Payment Disputes
Public Building/works	37	22.42 per cent	\$24,921,381.54	34.64
Residential	35	21.21 per cent	\$5,195,142.39	7.23
Mining/oil and gas	26	15.76 per cent	\$21,860,230.04	30.39
Commercial	25	15.15 per cent	\$4,125,107.89	5.73
Civil works/infrastructure	11	6.67 per cent	\$12,296,328.05	17.09
Industrial	5	3.03 per cent	\$1,192,934.84	1.67
Civic (Local Government)	5	3.03 per cent	\$908,357.86	1.26
Mixed Use/Aged Care	12	7.27 per cent	\$718,313.14	0.99
Commonwealth	9	5.46 per cent	\$724,631.10	1.00
Totals	165	100.00 per cent	\$71,942,426.85	100.00 per cent

2017/18 outcomes: In terms of frequency of applications for adjudication, payment disputes under construction contracts for works on residential, commercial and industrial projects were the highest during the reporting period.

Payment disputes under construction contracts for work on 'Public Buildings/works' were ranked second in terms of total value in dispute, but this was lower than in the previous reporting period 2016/17. 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. 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 2017/2018
(By \$payment dispute value)**

Range	PAYMENT DISPUTE			
	Number Apps.	per cent	Total Value	Mean Value
\$0 to<\$1	1	0.61 per cent	\$0.00	\$0.00
\$1 to<\$10,000	16	9.7 per cent	\$99,560.20	\$6,222.51
\$10,000 to<\$25,000	18	10.91 per cent	\$355,169.69	\$19731.65
\$25,000 to<\$100,000	50	30.30 per cent	\$2,579,062.88	\$51,581.26
\$100,000 to<\$250,000	29	17.58 per cent	\$3,873,035.40	\$133,552.94
\$250,000 to>\$500,000	26	15.76 per cent	\$6,845,765.36	\$263,298.67
\$500,000 to<\$1,000,000	12	7.27 per cent	\$7,684,707.66	\$640,392.30
\$1,000,000 to<\$10,000,000	12	7.27 per cent	\$39,833,633.98	\$3,3319,469.50
>\$10,000,000	1	0.61 per cent	\$10,671,491.69	\$10,671,491.69
Totals	165	100.00 per cent	\$71,942,426.85	\$436,014.71

2017/18 outcomes: The Table shows 30.3 per cent of applications for adjudication (50/165) concerned payment disputes between \$25,000 to<\$100,000. The same range also had the highest claims frequency in 2016/7, but with a higher total value at \$2.86 million.

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 a matter arising out of the construction contract makes an order or other finding about the payment dispute;
- the Adjudicator is not satisfied that they can make a fair determination within the prescribed time or any extension because of the complexity of the payment dispute.

Section 32(3)(a) of the Act allows the Adjudicator to request that the parties extend the prescribed time for making a decision (either a dismissal or determination). 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 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). A summary of applications before the SAT in the current reporting period is set out in section 8.1 of this report.

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

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

Tables 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 current reporting period.

3.1. DISMISSALS

Table 3.1 – Applications Dismissed 2017/2018	
Number of applications dismissed	23
Total value dismissed	\$14,994,086.59
Largest dismissed payment dispute	\$9,081,933.52
Smallest dismissed payment dispute	\$3,740.61
Mean value of dismissed payment disputes	\$651,916.81

2017/2018 outcomes: 13.69 per cent of all applications for adjudication by number and 20.84 per cent by payment dispute value were dismissed by Adjudicators without a determination of the merits of the payment claim.

3.2. 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 outside of the adjudication process.

Table 3.2 – Applications Withdrawn 2017/2018

Total Number of Applications Withdrawn	33
Total Value of Payment Disputes Withdrawn	\$6,529,177.46
Value of Largest Payment Dispute Withdrawn	\$3,094,831.08
Value of Smallest Payment Dispute Withdrawn	\$2,749.26
Mean Value of Payment Dispute Withdrawn	\$197,853.86

2017/2018 outcomes: The number of reported withdrawals is principally linked to settlements of the payment disputes between the contracted parties.

During the current reporting period 20 per cent of all applications for adjudication were withdrawn. In comparison, during the previous 2016/17 reporting period, 17.6 per cent of applications for adjudication were withdrawn.

3.3. 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, as well as the quantum of the payment and the date by when it must be made together with any applicable interest either at the contract rate agreed between the parties, or if not stated, at the rate prescribed under the *Civil Judgments Enforcements Act 2004*.

Table 3.3 – Applications Determined 2017/2018

Total number of applications for determination	109
Total value of applications for determination	\$50,419,162.80
Total number of determinations found in favour of Applicants	97
Total value of determinations found in favour of Applicants	\$24,121,466.10
Largest single determination	\$4,486,641.03
Smallest single determination	\$92.21
Mean value of determinations in favour of Applicants	\$248,674.91

2017/2018 outcomes: Adjudicators made determinations for 66.06 per cent of all applications. This is slightly up from the previous 2016/17 reporting period of 63.07 per cent.

Further analysis shows 12 of the decisions 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.

4. PRESCRIBED APPOINTORS

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

In the majority of payment disputes an adjudication application is lodged with a prescribed Appointor of the Applicant's choice. Both Applicant and Respondent may have however already agreed on their choice of prescribed Appointor or Adjudicator. In these few instances the adjudication application is served on the agreed Appointor or directly on the agreed Adjudicator.

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

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.

The Regulations set out 8 industry bodies as prescribed Appointors but only 5 were active during the current reporting period in receiving applications made under the Act, receiving fees and appointing registered Adjudicators.

Table 4.1: Appointor Activity 2017/2018

Name of Prescribed Appointor	Number of Appointments	
	No.	per cent of Total
The Australian Institute of Building (AIB)	34	20.61
(National) Electrical and Communications Association of Western Australia (NECA)	18	10.91
The Institute of Arbitrators and Mediators Australia (IAMA)	61	36.97
Master Builders Association of Western Australia (Union of Employers) (MBA)	47	28.48
RICS Australasia Pty Ltd (RICS)	5	3.03
Total	165	100 per cent

2017/2018 outcomes: The panel of active prescribed Appointors dealt with a reduced volume of applications for the current reporting period (averaging just over 3.17 per week down from previous 2016/17 low of 3.4 per week).

5. REGISTERED ADJUDICATORS

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

A Register of Adjudicators (the Register) has been published by the Building Commissioner on the Department's web page at:

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

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

The Building Commissioner's *Code of Conduct and Practice Guidelines for Adjudicators* (the Code) is also published on the Department's web page at:

www.commerce.wa.gov.au/building-commission/adjudicators-responsibilities

Table 5.1 is an extract of the published Register of Adjudicators at the end of the current reporting period

Table 5.1 : Register of Adjudicators as at 30 June 2018					
Name	Cert #	Name	Cert #	Name	Cert #
Graham Anstee-Brook	1	Zvy Lieblich	36	Robert Woodforde	77
John Fisher	2	Mark Taylor	37	Barry Green	78
Phil Faigen	3	Graham Morrow	38	Nicholas Hobbs	79
Richard Machell	4	Kevin Windross	39	Gordon Smith	80
Alan Riley	5	Bernard Lynch	41	Dominic Pilkington	81
Kevan McGill	6	Alex Durning	42	Michael Heaton	82
Scott Ellis	7	Michael Murrey	43	Hugh Roger Davis	83
Antony Ednie-Brown	8	Rod Perkins	44	Gary Dunne	85
Roger Davis	9	Barry Tonkin	45	Deon Baddock	86
Kim Doherty	10	Thomas Muttrie	46	Laura Higgins	87
Laurie James	11	Gregory Downing	47	Shane Brown	88
Kersh De Courtenay	14	Auke Steensma	48	Caroline Woo	89
Adrian Goold	15	John Hockley	49	Matthew Grootveld	90
Mirina Muir	18	Lyndon White	50	Clive Raymond	91
Mark Jones	19	Dennis Oon	53	Helen Durham	92
Phillip Evans	20	Russell Welsh	54	David Baldry	93
Ralph Unger	21	Colin Bond	55	Mark Williams*	94
Paul Wellington	22	David Trinder	57	Martin Frayne*	95
Michael Charteris	23	Leon (Max) Doret	65	Nicholas Floreani*	96
Glynn Logue	24	Dulal Ghosh	66	Ranjit Khosla*	97
Philip Loots	25	Nikolas Karantzis	67	Johnathon Smith*	98
William Lau	26	Wayne Bradshaw	68	Robert Beck*	99
Raymond Gibson	27	Scott Johnson	69	Warren Fischer*	100
Peter Byrne	28	John Knuckey	70	David Francis*	101
Colin Touyz	29	Richard Rudas	71		
Vittorio Tassone	31	Damian Michael	72		
John Morhall	32	James Saunders	73	EOFY 2017/18	
Gavin Brackenreg	33	Ian Cartwright	74	Register Count	84
David Court	34	Neil Kirkpatrick	75		
Fulvio Prainito	35	Chidambara Raj	76		

Note: * - new adjudicators for 2017/2018

Table 5.2 : Overview of 2017/2018 registration activity

Number of registered adjudicators as at 30 June 2017	80
Net Change in registrations from 1 July 2017 to 30 June 2018	+8 - 4 = +4
Number of registered adjudicators as at 30 June 2018	84

2017/2018 outcomes: There were eight new adjudicators * (all based interstate) that were added to the Register during the current reporting period.

From the panel of 84 registered Adjudicators, 43 (51.19 per cent) were appointed to adjudicate the 165 applications made during the current reporting period. In 206/17, 33 (41.25 per cent) of 80 registered adjudicators were appointed to adjudicate 176 applications.

Table 5.3: Summary of Adjudication/Adjudicator fees 2017/2018

Total Adjudication fees (165 applications)	\$919,775.83
Mean	\$5,574.40
Highest	\$37,752.00
Lowest	\$450.45
Published Adjudicator fees per hour (excl.GST)	
Max	\$450.00
Min	\$100.00
Average hourly fee	\$275.00

2017/2018 outcomes: The total fees charged by the appointed Adjudicators rose 3.23 per cent from the previous 2016/17 reporting period. It is also worth noting that:

- the average hourly fee sought by the adjudicator panel increased by 6.79 per cent above the \$257.50 equivalent measure for the previous reporting period.
- the new average sits in the most frequent range for fees at an hourly rate of \$250 to \$300 sought by 25 (29.76 per cent) of the current panel of 84 adjudicators.
- 15/84 Adjudicators also offer their services for an hourly rate of between \$100 to \$250 per hour.

5.1. 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 unsuitable to conduct adjudications.

2017/2018 outcomes: One complaint regarding the conduct of an adjudicator was received by the Building Commissioner during the current reporting period. This matter is under investigation.

6. STAKEHOLDER ENGAGEMENT

During the current reporting period the Building Commissioner's officers engaged with a diverse range of 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 proposals to amend to existing provisions; and
- liaising with potential applicants regarding experience and qualifications requirements as prerequisites for registration as adjudicators.

Industry stakeholders and interested parties also had access to online information, a dedicated email cca@dmirs.wa.gov.au and 1300 484 481 telephone enquiry service.

A number of free seminars were conducted in regional locations on the operation of the Act and meetings on construction contracting related issues. Over 300 people attended these information sessions with the largest being held in conjunction with Chartered Accountants Australia.

The Department's website was also upgraded to provide more user-friendly information about the Act featuring online videos, fact sheets and new templates for Applications and Responses. This information can be found at:

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 registered adjudicators and publish changes to each practitioner's profiles, contact details and fees on the Department's web site;
- (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 Division, policy development and reporting to the Minister for Commerce;
- (e) certify adjudicated determinations for filing and court order;
- (f) monitor and assess the outcomes of:
 - i. State Administrative Tribunal (SAT) decisions with respect to adjudicated dismissals; and
 - ii. District and Supreme Courts judgements appealing adjudicated determinations;
- (g) maintain online content for all adjudication matters at www.dmirs.wa.gov.au/buildingcommission; and

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

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

2017/18 outcomes: During the current reporting period, publications and forms required for understanding and using the Act were updated in both electronic and hard copy format.

A series of Practice Guidance Notes were issued in the second half of the financial year to all registered adjudicators to clarify certain practices and procedures needed to be in accord with the Act.

The topics included the use of extensions of time, withdrawals, simultaneous adjudication of multiple payment disputes, limiting the awarding of costs to only those of the adjudicator's fees, the treatment of GST on interest awards and terminology matters.

The Building Commissioner also certified 35 adjudication determinations under section 43(2) of the Act to assist Applicants recover moneys owed through court order.

7.1. PUBLICATION OF ADJUDICATORS' DECISIONS

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

2017/2018 outcomes: No requests were received or decisions were made by the Building Commissioner for the public release of adjudicated decisions.

8. APPLICATIONS TO THE STATE ADMINISTRATIVE TRIBUNAL (SAT)

8.1. 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.

2017/2018 outcomes: No applications were made to SAT during the current reporting period in relation to a conflict of interest by an Adjudicator.

8.2. ADJUDICATOR'S DECISION

SAT cannot receive an appeal or review an adjudicator's determination. Under section 46(1) of the Act however 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 challenges brought before SAT. In 32 of those appeals 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 portal: www.ecourts.justice.wa.gov.au

2017/2018 outcomes: No applications were made to SAT or decisions released during the current reporting period in relation to reviewing an Adjudicator's decision under section 31(2)(a) of the Act.

8.3. 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.

2017/2018 outcomes: During the reporting period there were no applications made to challenge decisions of the Building Commissioner regarding the registration of any Adjudicator.

9. APPLICATIONS TO THE COURTS

Section 43 of the Act was amended in December 2016 to provide that an Adjudicator's determination certified by the Building Commissioner and filed with a court of competent jurisdiction is taken to be an order of that court.

The Magistrates' Court is such a court when the amount for the certified determination is less than \$75,000. The other jurisdictions to lodge an affidavit with are set out below.

9.1. THE DISTRICT COURT OF WESTERN AUSTRALIA

The District Court deals with civil matters (such as an adjudicated decision on a payment dispute) up to a financial limit of \$750,000.

2017/2018 outcomes: The Building Commissioner has certified determinations on request of a party to a payment dispute for filing but does not receive information from the District Court on the number of determinations actually filed.

9.2. THE SUPREME COURT OF WESTERN AUSTRALIA

The Supreme Court deals with civil matters (such as an adjudicated decision) where the value awarded is greater than \$750,000.

The Supreme Court is also the forum to receive applications for judicial review to challenge 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 made to the Supreme Court, or the Court of Appeal. Of those applications, 25 (or 46 per cent) have been dismissed.

2017/2018 outcomes: The Building Commissioner has certified determinations on request of a party to a payment dispute for filing but does not receive information from the Supreme Court on the number of determinations actually filed.

Four applications for judicial review of an adjudicator's determination were heard by the Supreme Court during the current reporting period.

- (a) *Easy Stay Mining Accommodation Pty Ltd vs Faigen* [2017] WASC 266 – application for interlocutory relief refused: determination upheld.
- (b) *Certa Civil Works Pty Ltd vs Gosh* [2017] WASC 327– application for certiorari refused: determination upheld.
- (c) *Total Eden Pty Ltd vs Charteris* [2018] WASC 60 - determination quashed for jurisdiction error.

- (d) *Clough Projects Australia Pty Ltd vs Floreani* [2018] WASC 101- determination quashed for jurisdiction error.

The full decisions by the Supreme Court in these matters and for disputes where the Act is cited in other proceedings can be searched via the portal: <https://ecourts.justice.wa.gov.au>

10. SUMMARY

During the current reporting period:

- Amendments to the Act that became operational during the previous reporting period have been factored into industry stakeholder and adjudicator practices.
- The number of applications for adjudication under the Act continued in retreat but at a slower rate than experienced in 2016/7. The use of the Act has trended with the general slowdown across the construction industry over the last 18-to-24 months.
- Applications for adjudication of payment disputes under construction contracts in the public building/works sector represented over half of all payment disputes by total value.
- Subcontractors continued as the primary user of the Act's adjudications approach with almost 70 per cent of all applications being submitted to pursue payments totalling \$52.9 million.
- Contractors also applied for an adjudicated solution to their payment disputes with their clients by submitting nearly 28% of all claims at a value of some \$17.4 million.
- Registered building contractors made 31 applications for adjudication covering a total of \$15.5 million in payment disputes and were the Respondent in 56 applications (multiple cases not individual claims). In 50 of those 56 applications, the Applicant was a subcontractor. This data to devise measures for influencing behaviour where one or both parties to a payment dispute are registered under the *Building Services (Registration) Act 2011*, or licensed under the *Plumbers Licensing Act 1995*.
- The market seems well catered for with a panel of registered adjudicators that increased from 80 to 84 in 2017/8. All 165 applications however were decided by 43 adjudicators, or just over 51 per cent of all practitioners on the Register. This ratio has however improved in the last twelve months in the face of a lower case load.
- The capacity of some adjudicators through their Appointor to provide a guaranteed fixed cost for low value payment claims has been particularly welcomed by subcontractors and new users of the adjudication service.

The Government's election commitment to better protect subcontractors in the construction industry through security of payment initiatives is the subject of a current review. Recommendations from that review and the Government's response will be included in the next Annual Report for the Act.

I look forward to presenting you with a report on the operation and effectiveness of the Act for the following 12 months highlighting further use by subcontractors.

KEN BOWRON
BUILDING COMMISSIONER