



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 2020**

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

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

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## **1. PURPOSE OF THE ACT**

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

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

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

The Act also:

- prohibits 'paid-if-paid' or 'paid-when-paid' provisions in construction contracts that inhibit the movement of funds through the contracting chain;
- implies fair and reasonable payment terms into construction contracts that are not in writing; and
- clarifies the right to deal with unfixed materials when a party to a construction contract becomes insolvent.

## **2. PURPOSE OF THIS ANNUAL REPORT**

The Building Commissioner administers the Act. Under section 52 of the Act, the Building Commissioner is required to present a report to the Minister for Commerce before 1 November in each detailing the operation and effectiveness of the Act for the immediately preceding financial year (the reporting period).

The report timing enables outcomes of adjudication applications made on or before 30 June to be included in the reporting period.

## **3. DATA SOURCES**

For the purposes of preparing this annual report, information was gathered from the following sources:

- Determinations of adjudicators;
- Information provided by prescribed appointors;
- Information provided by adjudicators;
- The online decisions database of the Supreme Court of Western Australia.

#### 4. EXECUTIVE SUMMARY

- The total number of applications for adjudication reduced by 7.8 per cent in 2019-20 when compared to the previous reporting period.
- The highest frequency of adjudication applications was from the residential sector of the industry.
- The lowest, highest and mean value of payment dispute values for the reporting period were \$4142.47, \$8,759,062.95 and \$786,286.56 respectively.
- The highest frequency of adjudicator appointments by a prescribed appointor was 45, by the Resolution Institute.
- The lowest, highest and mean value of adjudication fees were \$495, \$46,926 and \$7935.40 respectively.
- In March 2020, the *Construction Contracts Regulations 2005* were amended to, among other things, prescribe Adjudicate Today Pty Ltd as an appointor.
- There were three applications to the Supreme Court for judicial review of adjudication determinations. All three were dismissed.

#### 5. ADJUDICATION ACTIVITY

Table 1 shows the number and values of applications for adjudication by reporting period.

| Table 1: Applications for Adjudication by Financial Year |                        |                    |                               |
|--|------------------------|--------------------|-------------------------------|
| Financial Year   | Number of Applications | Gross Claims Value | Mean Value of Payment Dispute |
| 2005-06  | 29                     | \$10,485,828.12    | \$361,580.28                  |
| 2006-07  | 36                     | \$15,938,123.77    | \$442,725.66                  |
| 2007-08  | 86                     | \$98,222,008.65    | \$1,142,116.38                |
| 2008-09  | 105                    | \$35,838,998.23    | \$341,323.79                  |
| 2009-10  | 172                    | \$233,266,050.32   | \$1,356,197.97                |
| 2010-11  | 197                    | \$308,553,664.77   | \$1,566,262.25                |
| 2011-12  | 178                    | \$183,701,052.55   | \$1,086,988.48                |
| 2012-13  | 208                    | \$226,300,887.35   | \$1,103,906.77                |
| 2013-14  | 175                    | \$378,903,585.63   | \$2,165,163.35                |
| 2014-15  | 235                    | \$580,655,848.46   | \$2,470,875.95                |
| 2015-16  | 225                    | \$685,990,359.67   | \$3,048,846.04                |
| 2016-17  | 176                    | \$187,563,024.84   | \$1,065,699.00                |
| 2017-18  | 165                    | \$71,942,426.85    | \$436,014.71                  |
| 2018-19  | 115                    | \$60,524,242.18    | \$526,297.76                  |
| <b>2019-20</b>   | 106                    | \$83,346,375.80    | \$786,286.56                  |
| <b>Grand Total</b>                                       | 2,208                  | \$3,161,232,477.08 | \$1,431,717.61                |

Table 2 provides statistics on the applications for adjudication by industry sector.

| Table 2: Applications for Adjudication in 2019-20 by Industry Sector |              |                |                          |                   |
|--|--------------|----------------|--------------------------|-------------------|
| Industry Sector  | Applications |                |                          |                   |
|  | Frequency    | % Total Claims | Total \$ Amounts Claimed | % Value of Claims |
| Residential  | 33           | 31.02          | \$8,749,194.97           | 10.50             |
| Public Building/Works  | 14           | 13.16          | \$12,218,667.66          | 14.66             |
| Commercial   | 23           | 21.62          | \$21,782,962.63          | 26.14             |
| Mining/Oil and Gas   | 15           | 14.10          | \$14,296,959.17          | 17.15             |
| Commonwealth purposes  | 1            | 0.94           | \$253,243.85             | 0.30              |
| Industrial   | 6            | 5.66           | \$24,218,280.96          | 29.06             |
| Civic (Local Government)   | 2            | 1.88           | \$325,602.84             | 0.39              |
| Rural/Agricultural   | 2            | 1.88           | \$357,996.98             | 0.42              |
| Mixed Use  | 6            | 5.66           | \$749,917.11             | 0.90              |
| Aged Care  | 1            | 0.94           | \$21,312.00              | 0.02              |
| Special Purpose  | 3            | 2.82           | \$372,237.63             | 0.44              |
| <b>Total</b>   | 106          | 100 (adj)      | \$83,346,375.80          | 100.00 (adj)      |

Table 3 provides statistics on the applications for adjudication by payment dispute value.

| Table 3: Applications for Adjudication in 2019-20 by payment dispute value |                 |            |                 |                |
|--|-----------------|------------|-----------------|----------------|
| Range  | PAYMENT DISPUTE |            |                 |                |
|  | Applications    | %          | Total Value     | Mean Value     |
| \$0 to<\$1   | 1               | 0.94       | \$0.00          | N/A            |
| \$1 to<\$10,000  | 9               | 8.49       | \$57,057.76     | \$6,339.75     |
| \$10,000 to<25,000   | 14              | 13.20      | \$233,985.37    | \$16,713.24    |
| \$25,000 to<\$50,000   | 7               | 6.6        | \$257,415.90    | \$36,773.70    |
| \$50,000 to<\$100,000  | 15              | 14.15      | \$1,049,480.86  | \$69,965.38    |
| \$100,000 to>\$250,000   | 19              | 17.92      | \$3,071,341.42  | \$161,649.54   |
| \$250,000 to<\$500,000   | 12              | 11.32      | \$3,817,084.54  | \$318,090.37   |
| \$500,000 to<\$1,000,000   | 12              | 11.32      | \$7,480,313.80  | \$623,359.48   |
| \$1,000,000 to<\$1,500,000   | 3               | 2.83       | \$3,908,881.32  | \$1,302,960.40 |
| >\$1,500,000   | 14              | 13.2       | \$63,470,814.84 | \$4,533,629.63 |
| <b>Total</b>   | 106             | 100% (adj) | \$83,346,375.81 | \$786,288.56   |

## 6. ADJUDICATION OUTCOMES

Table 4 shows the number of applications for adjudication that were determined, withdrawn or dismissed.

| Table 4: Applications adjudicated 2019-20 |    |
|---|----|
| Number of determinations                  | 61 |
| Number of withdrawals                     | 20 |
| Number of applications dismissed          | 25 |

## 7. PRESCRIBED APPOINTORS

Table 5 provides statistics on the number of adjudicator appointments made.

| Table 5: Appointor Activity 2019-20  |                        |           |
|--|------------------------|-----------|
| Name of Prescribed Appointor   | Number of Appointments |           |
|  | #                      | % Total   |
| Adjudicate Today Pty Limited   | 2                      | 1.88      |
| Australian Institute of Building   | 24                     | 22.56     |
| Australian Institute of Project Management   | 0                      | 0         |
| Master Builders' Association of Western Australia (Union of Employers) (MBA)       | 19                     | 17.86     |
| Resolution Institute (previously Institute of Arbitrators and Mediators Australia) | 45                     | 42.3      |
| RICS Australasia Pty Ltd   | 7                      | 6.58      |
| The Electrical and Communications Association of Western Australia Inc.            | 8                      | 7.54      |
| <i>Self-appointed</i>  | 1                      | 0.94      |
| <b>Total</b>   | 106                    | 100 (adj) |

Table 6 provides a summary of adjudication fees.

| Table 6: Summary of Adjudication/Adjudicator fees 2019-20 |               |
|---|---------------|
| Published Adjudicator fees per hour (excl. GST)           |               |
| Max   | \$700.00      |
| Min   | \$100.00      |
| Indicative Average hourly fee                             | \$400.00      |
| Actual Adjudication fees (106 applications)               | \$ 841,152.84 |
| Mean  | \$7,935.40    |
| Highest fee revenue                                       | \$46,926.00   |

Table 6: Summary of Adjudication/Adjudicator fees 2019-20

|                           |          |
|---------------------------|----------|
| Lowest fee revenue (>\$0) | \$495.00 |
| Max fee applied           | \$450.00 |
| Min fee applied           | \$230.00 |

## 8. CERTIFICATION OF ADJUDICATION DETERMINATIONS

The Building Commissioner certified 29 determinations under section 43(2) of the Act to allow Applicants to recover amounts owed through the courts.

## 9. JUDICIAL REVIEW

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

During the reporting period, the following judicial review applications in connection with the Act were decided:

| Case  | Summary   |
|---|---|
| <i>Sandvik Mining and Construction Australia Pty Ltd v Fisher</i> [2019] WASC 352       | Application for an injunction and/or suspension order.<br>Dismissed – determination upheld.   |
| <i>Salini-Impregilo S.P.A. v Francis</i> [2020] WASC 72                                 | Applications dismissed.<br>Determination found valid with no jurisdictional error and upheld. |
| <i>Sandvik Mining and Construction Australia Pty Ltd v Fisher [No 2]</i> [2020] WASC123 | Application for a judicial review dismissed.  |

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Kristin Berger  
**BUILDING COMMISSIONER**