Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)

August 2012

Professor Philip Evans
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August 2015

The Honourable Michael Mischin
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Dear Minister

Review of Construction Contracts Act 2004 (WA)

In June 2014 I was appointed to enquire into, make recommendations and report on the operation and effectiveness of the Construction Contracts Act 2004 (WA). It was intended that the report was to be submitted to you by the end of March 2015.

Arising out of the submissions and stakeholder meetings, a number of additional issues were identified which expanded the scope of the Review and delayed its completion. Whilst a number of these issues at first sight might appear to be outside the specific terms of reference of the Review and were not directly related to the issue of the application of the Act, they were clearly collateral to the Act and I have made reference to these issues in my report without making specific recommendations on a number of these issues.

As one would expect in a review of this nature, many of the submissions with respect to the issues were contrasting and dissimilar. In this regard it is important to note that the written and oral submissions to the Review are untested. I did not receive evidence under oath and had no powers of compulsion. Consequently in many instances the information in the submissions reflects opinion or allegations.

Additionally I have taken into account my own experience as a consulting engineer, chartered builder and construction law and construction management educator, mediator, arbitrator and registered adjudicator. Nevertheless at the same time I have been reluctant to make any recommendation regarding amendments to the Act in the absence of probative evidence. Some of the suggestions made in submissions were not sustainable; however I have attempted to address all relevant issues raised in the submissions.

This Review involved the preparation of a detailed Discussion Paper which was sent to all stakeholders, meetings with individuals and groups, and the receipt and consideration of 51 written submissions. The submissions were received from a wide range of interested persons including the professional and trade associations and the legal community. An extensive review of the security of payment literature and legislation was also conducted as part of the Review.
In conducting the research associated with this review, I was assisted by two research assistants Professor Gabriel Moens and Mr Auke Steensma. However, all comments, conclusions, suggestions and recommendations are mine.

I am pleased to submit to you herewith the report and recommendations.

[Signature]

Professor Philip Evans
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Contents

1. EXECUTIVE SUMMARY ............................................................................................................ 1
   1.1 Summary of Recommendations and Findings ................................................................. 3
   1.1.1 Issues Identified in the Discussion Paper ................................................................. 3
   1.1.2 Other Relevant Issues Arising from the Review ...................................................... 6

TERMS OF REFERENCE .................................................................................................................. 9

2. INTRODUCTION ........................................................................................................................ 10

3. ISSUES IDENTIFIED ................................................................................................................. 15
   3.1 Time Limits in Which an Application Can Be Made ...................................................... 15
       Recommendation ....................................................................................................................... 23
   3.2 Timelines for Responses ................................................................................................... 23
       Recommendation ....................................................................................................................... 25
   3.3 Timelines for Determinations ............................................................................................ 26
       Recommendation ....................................................................................................................... 27
   3.4 Timelines for Extensions in Making a Determination .................................................... 27
       Recommendation ....................................................................................................................... 30
   3.5 Underutilisation of the Act’s Provisions for Payment Claims ......................................... 31
       Recommendation ....................................................................................................................... 35
   3.6 Alternative Dispute Resolution (ADR) Mechanisms for Small Claims ............................ 35
       Recommendation ....................................................................................................................... 38
   3.7 Regulation of Adjudicators ............................................................................................... 38
       Recommendations ..................................................................................................................... 46
   3.8 Exclusion of Liquidated Damages ..................................................................................... 46
       Recommendation ....................................................................................................................... 47
   3.9 Inclusion of Domestic Building Contracts ....................................................................... 47
       Recommendation ....................................................................................................................... 47
   3.10 Exclusion of Certain Mining Activities ............................................................................ 48
       Recommendation ....................................................................................................................... 52
   3.11 Construction of Plant for the Purposes of Extracting or Processing ............................. 53
       Recommendation ....................................................................................................................... 54
   3.12 Exclusion of Artworks ...................................................................................................... 55
       Recommendation ....................................................................................................................... 56
   3.13 National Uniformity and ‘Harmonisation’ ....................................................................... 56
4. OTHER RELEVANT ISSUES ARISING FROM THE REVIEW ............................................. 60

4.1 Prescribed Appointors .............................................................................................. 60

4.2 Judicial Review of Adjudications ............................................................................. 64

4.3 Enforcing the Prohibitions and Responding to Complaints ..................................... 69

4.4 Calculation of Time Limits ...................................................................................... 72

4.5 Withdrawal of Applications ..................................................................................... 73

4.6 Failure to Include Minor Details in the Application .................................................. 73

4.7 Implied Terms .......................................................................................................... 74

4.8 Trust Funds/Retention Monies/Project Bank Accounts (PBA) .................................. 80

4.9 The Consent of the Parties to Adjudicate Simultaneously Two or More Payment Disputes .................................................................................................................. 86

4.10 Oral Contracts ......................................................................................................... 87

4.11 Inequality of Bargaining Power/Economic Duress/Unconscionable Conduct .......... 90

4.12 Publication of Adjudicators’ Decisions ................................................................. 95

4.13 Contracting Out ...................................................................................................... 96

4.14 The Use of Standard Form Contracts .................................................................... 97

4.15 Statutory Declaration Requirement ....................................................................... 99

5. ACKNOWLEDGEMENTS .................................................................................... 100

6. BIBLIOGRAPHY ..................................................................................................... 101
1. EXECUTIVE SUMMARY

The effectiveness of the Act in achieving its objectives

There was clear consensus between all stakeholders that the Construction Contracts Act 2004 (WA) was an extremely important item of legislation which had radically improved the traditional risk allocation between parties contracting in the construction industries; providing contractors, suppliers and consultants with rights and protection which were not previously available under the common law. Consequently the Act has had a very positive influence on payment practices and associated issues in the construction industry.

The Review has indicated that the Act has been successful both as a statutory scheme for the evaluation of payment claims and in providing a quick and uncomplicated dispute resolution process. Additionally the Act has clearly facilitated meaningful dialogue between the parties in dispute over payment, which on numerous occasions has resulted in settlement of the dispute. This has been one of the great benefits of the Act. There was anecdotal evidence to suggest that following the introduction of the Act, the larger construction companies developed more efficient contract administration and business practices to deal with payment issues and disputes. Unfortunately this does not appear to be the case with many parties at the lower end of the contracting chain.

Unlike the Wallace Review1 of the Queensland security of payment legislation, this Review did not find that the Act had any polarising effect on the industry participants; that is, those who have benefited from the provisions of the Act and those who felt they had been disadvantaged by the Act. All sections of the construction industry acknowledged the overall benefits of the Act, albeit with some suggestions for modification.

Amendments to the Act

In consideration of the responses to the issues raised in both the Discussion Paper and in the broad terms of reference for this Review, I find that no significant structural amendments to the Act are required. However I have made a number of recommendations for changes which I consider will assist in improvement to the operation and effectiveness of the Act in achieving its stated objectives.

Where amendments are suggested, they are provided on the premise that a primary purpose is to keep the provisions of the Act as simple as possible so that the effectiveness of the Act is not impeded by complex legislation.

Lack of awareness of the Act’s provisions

Throughout the Review it was noted that many issues affecting stakeholders did not result principally from significant deficiencies in the Act’s provisions but from a lack of awareness of the Act and especially its primary objectives. These are:

- to prohibit or modify certain provisions in construction contracts; and

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to imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts;

- to provide a means for adjudicating payment disputes arising under construction contracts, and for related purposes.

There was a lack of understanding that adjudication determinations are interim in nature and do not affect the parties’ rights under the common law of contract. These rights are preserved allowing subsequent arbitration or litigation. The emphasis on the *Construction Contracts Act 2004* (WA) is on maintaining cash flow. It is in effect a system of pay now, where there is a legitimate entitlement, and argue later.

Additionally many issues raised related to a general lack of understanding of the basic principles of contractual rights and obligations. There needs to be widespread education and training by all sections of the construction industry as well as additional efforts by the Building Commission to ensure awareness and compliance with the provisions of the Act.

**Adjudicator training and knowledge**

The majority of adjudication applications and responses appear to involve legal counsel or claims consultants. This has resulted on occasions in an additional legal complexity which was not anticipated during the planning of the training courses, which were designed to provide adjudicators with the skills necessary to determine payment disputes rapidly. The content of approved training courses should be expanded to include an overview of the law of contract and the laws relating to building and construction, analysis of building contracts, analysis of costs and claims in the industry, and detailed analysis of building and construction claims and contractor entitlements.

**Current commercial practices in the construction industry**

Collateral to the provisions of the Act and the specific terms of reference, a number of submissions related to issues of unfair contracts, economic duress and unconscionable conduct, both under statute and common law. Again, it is not within the spirit and express objectives of the Act to specifically address these issues, but it is critical that all sections of the construction industry are made aware of their rights and obligations with respect to these issues and the protection provided under the *Australian Consumer Law*.

Whilst it is accepted that government should be reluctant or wary to intervene in the affairs of two commercial parties who have entered into contracts at arm’s length, at the same time government has a public policy obligation even in commercial contracts where the behaviour of some parties has the effect of seriously damaging the rights of others. The measure of intervention is to be left to government.

**Insolvency**

The issue of insolvency in the construction industry and its effect on subcontractors is a serious issue. The Western Australian Government should consider the creation
of a separate taskforce of major public sector construction agencies to address concerns about the consequences of insolvencies on major public sector projects.

**Harmonisation of security of payment legislation**

The majority of submissions did not support legislative ‘harmonisation’ of security of payment legislation. There was strong preference for the *Construction Contracts Act 2004* (WA) to be the basis for any uniform legislation in the future. The research indicated serious issues with respect to the East Coast models of security of payment legislation with the academic writers proposing that any future uniform legislation should be based on the *Construction Contracts Act 2004* (WA).

In conclusion, the recurring issue throughout this review was the critical need for widespread education and publicity regarding the existence of, and the provisions of the Act. Unless this occurs as a matter of urgency and priority, the Act will not fully achieve its objectives for the benefit of all sections of the construction industry.

It is suggested that where the recommendations are marked with an asterisk (*), the Act should be amended, or action taken, as soon as possible in order to speedily institute the changes necessary to assist the Act in achieving all of its stated objectives for the benefit of the construction industry as a whole. It is acknowledged that some recommendations will require further investigation.

### 1.1 Summary of Recommendations and Findings

The recommendations made and discussed in detail later in this report may be summarised as follows;

#### 1.1.1 Issues Identified in the Discussion Paper

1. **Time Limits in Which an Application Can Be Made**

   *The time limits in which an Application can be made should remain at 28 days. If the provisions of the contract have been followed with respect to the submission of the original payment claim, if all supporting documentation has been provided to the superintendent or contract administrator, in order to reasonably consider the basis of the claim, then it is considered that 28 days to prepare an Application under the Act is adequate. There should be no amendment to the 28 day period based on an arbitrary assessment of the type of construction work or quantum of the claim.*

   *It does not appear to be practical to amend s 6 of the Act to additionally define when a dispute arises where the parties initially choose to pursue a resolution of the payment dispute through negotiation as part of the contract's dispute resolution clause in that it has the potential to further delay resolution and is therefore inconsistent with the object of the Act to resolve the payment dispute in a timely manner.*

   *It is essential for professional groups, contracting organisations and the Building Commission to provide extensive awareness and educational*
programs in order to ensure that all stakeholders are aware of their rights, obligations and procedures under the Act, particularly with respect to the time limits under the Act.

2. **Timelines for Responses**

   The existing 14 day timeline for responses should not be amended.

3. **Timelines for Determinations**

   The existing 14 day timeframe should remain. This is necessary if the objects of rapid determination, in the absence of complex legal arguments, are to be retained.

4. **Timelines for Extensions**

   Section 32 of the Act should be amended to permit the adjudicator to extend the time for the determination for an additional 7 business day period without the consent of the parties. Any additional time should be permitted with the consent of both parties. Issues which could arise given the discretionary nature of such a decision could be minimised by way of regulation or advice from the Building Commission with respect to the relevant factors to be taken into account when exercising the discretion. The Building Commissioner should institute a monitoring process to track the progress of delayed determinations. (*)

5. **Under-utilisation of the Act’s Provisions for Payment Claims**

   The Building Commission should investigate the introduction of training and awareness programs conducted by both the Building Commission and approved organisations to ensure that all sections of the building and construction industry are aware of the provisions of the Construction Contracts Act 2004(WA) and its intended role.

6. **Alternative Dispute Resolution Mechanisms for Small Claims**

   It is not considered that the objectives of the Act will be significantly improved by amendments to the Act which create a separate dispute resolution service provided by the Building Commission, notwithstanding the reluctance of supporters of the proposal to fund an alternative scheme through a Building Services levy.

   The Building Commission should publish on its website the names of organisations and approved Alternative Dispute Resolution (ADR) practitioners who provide ADR services to the construction industry together with details of the range of options for the resolution of disputes.

   The adjudicator’s details of experience and expertise shown on the Building Commission website should be expanded to provide additional information to parties seeking an adjudicator. Adjudicators should be
requested to confirm if they are willing to adjudicate smaller payment disputes or act for a fixed fee.

7. Regulation of Adjudicators

The current registration requirements for adjudicators do not require amendment. The purposes of the Act are best achieved by having the widest pool of adjudicators available. There is no need for formalised Continuing Professional Development (CPD) requirements. There is no evidence to suggest that the adjudicator fees are excessive and deter parties from using the adjudication process and consequently fees should not be prescribed.

The content of the current approved adjudicator training program should be expanded to include topics of contract formation, terms of the contract, performance and breach and damages. Additionally it would be helpful to include discussions of the Australian Standard General Conditions of Contract and the common industry based general conditions of contract.

Approved courses should also include sessions dealing with issues that have given rise to State Administrative Review Tribunal (SAT) or judicial review of determinations.

8. Exclusion of Liquidated Damages

The Act should not be amended to exclude liquidated damages.

9. Inclusion of Domestic Building Contracts

The domestic building contracts inclusion should be retained.

10. Exclusion of Certain Mining Activities

The wording of s 4(3)(a) and (b) of the Act should be amended to bring the current excluded activities within the jurisdiction of the Act. (*)

11. Construction of Plant for the Purposes of Extracting or Processing

The wording of s 4(3)(c) of the Act should be amended to bring the current excluded activities within the jurisdiction of the Act. (*)

12. Exclusion of Artworks

Section 4(3)(d) of the Act should be amended in order to allow construction work associated with wholly artistic works to be deemed construction work for the purposes of the Act, and the term ‘wholly artistic’ should be defined in the Act. (*)

13. National Uniformity and ‘Harmonisation’

The Construction Contracts Act 2004 (WA) should remain as the method of security of payment legislation in Western Australia subject to the
amendments as suggested as a result of this review.

1.1.2 Other Relevant Issues Arising from the Review

1. Prescribed Appointors

The current governance issues relating to the prescribed appointor organisations are consistent with the aims and objectives of the dispute resolution functions of the Act and no amendments to the Act are required. It is recommended that a regulation be introduced to ensure that the 10% additional nomination fee, where levied, is borne by the association member and not the parties.

2. Judicial Review of Determinations

It is not considered constitutionally possible to amend the Act to further restrict the review of adjudicators’ determinations. The Courts of Appeal of several states have affirmed that the Kirk principles constitutionally guarantee Supreme Court judicial review for jurisdictional error in adjudication determinations under the state security of payment legislation. The Western Australian Court of Appeal has held that in making a determination an adjudicator was exercising a statutory power that could affect the rights of the parties and was subject to the supervisory jurisdiction of the Supreme Court, including the writ of certiorari.

The stakeholder meetings established that there were serious concerns regarding the present process of enforcing the adjudication determinations as judgments of the court. Consideration should be given to the introduction of complementary regulations of the courts, or a statutory amendment to s 46 in order to allow speedy registration of the adjudication determinations as a court order.

Alternatively it is recommended that power be conferred by regulation on the Building Commissioner to permit the Commissioner to approve the enforcement of the adjudicator’s determination. This would significantly reduce the current legalistic burden associated with the enforcement of determinations. (*)

3. Enforcing the Prohibitions and Responding to Complaints

The Act should be amended to include penalties for failure to comply with the prohibitions. The liability should be strict and not subject to proof of intention. Alternatively, the Annual Reports of the CCA Registrar should include a section detailing instances, and naming the relevant parties, where failure to comply with the provisions has been proved. (*)

4. Calculation of Time Limits

All time limits in the Act should be expressed in ‘business days’ rather than calendar days. The periods between 24 December and 7 January and Good Friday to Easter Monday should be excluded from the counting of
5. **Withdrawal of Applications**

The Act should be amended to allow the Applicant to withdraw the application by writing to the prescribed appointor (where no adjudicator is appointed), the adjudicator and the other party. Additionally, s 44(2) should be amended to allow the adjudicator to be paid for his or her work undertaken up until notice of the withdrawal of the application. (*)

6. **Failure to Include Minor Details in the Application**

Section 26 and reg 4 should be amended to state that the application should be valid, and not dismissed, if there has been substantial compliance with the Regulations. (*)

7. **Implied Terms**

The implied terms provisions should remain part of the Act. The State Administrative Tribunal has suggested that the ‘apparent overlap’ of ss 17 and 18 could be remedied by following the approach of the Northern Territory legislation to those matters. This suggestion is worthy of further investigation.

8. **Trust Funds/Retention Monies/Project Bank Accounts (PBA)**

Consideration should be given to amending div 9 s 11 of the Act in order to remove the requirement that ‘the principal holds the retention money on trust for the contractor’, with the trust money to be held instead by an independent third party. As with the Wallace recommendation, the funds could be held by the Building Commissioner.

It is acknowledged that there may be practical administrative problems if the funds are to be held by a third party. At first sight it would appear that PBAs may not be suitable for smaller projects that fall within the jurisdiction of the Act. However it is recommended that these issues should be considered by way of a separate future review by others.

The Western Australian Government should consider the creation of a separate taskforce of major public sector construction agencies to address potential concerns about the consequences of insolvencies for major public sector projects or in the construction industry generally.

9. **The Adjudication of Two or More Claims**

Section 32(4)(b) of the Act is to be amended to allow an adjudicator in his or her discretion to adjudicate simultaneously two or more payment disputes. (*)
10. **Oral Contracts**

*Construction contracts for the purpose of the Act should be in writing. There should be a pecuniary penalty for noncompliance and the contract should be voidable at the option of the aggrieved party. No recommendation is made regarding any monetary limits with respect to the writing requirement. These are to be determined by others.* (*)

11. **Inequality of Bargaining Power/Economic Duress/Unconscionable Conduct**

*The scope and coverage of the Act is now well settled and any changes by way of introducing provisions in the Act dealing with unconscionable conduct or unfair terms would potentially add legal complexity and hinder the principal objectives to the Act with respect to the rapid determination of payment disputes. The examples given during the stakeholder meetings, fall within both common law remedies and the statutory provisions of the Australian Consumer Law. If the unfair conduct complained of is common, then the state government should consider the introduction of contract review legislation similar to the Contracts Review Act 1980 (NSW). The Building Commission website should contain a link to sources of information relating to the unconscionable conduct provisions of the Australian Consumer Law.*

12. **Publication of Adjudicators’ Decisions**

*The Building Commissioner should publish those determinations which in the Commissioner’s opinion add to the body of law and practice relative to the administration of the Act. In addition to the exclusions stated in s 50(2) of the Act, the name of the adjudicator should be removed.*

13. **No Contracting Out**

*There should be no change to s 53 of the Act. In the absence of cogent evidence in support of contracting out, the Act should not permit contracting out because it is considered that it would result in contracting parties being given unreasonable ultimatums to accept the provision.*

14. **Standard Form Contracts**

*It is recommended that where the state government is a principal in a contract or the contract administrator, that the Australian Standard forms of contract be used on the project.*

15. **Statutory Declarations as a Provision in the Act**

*The Act should not be amended to require a claimant to provide a statutory declaration attesting to the payments of workers, subcontractors or suppliers as a precondition to the submission of a payment claim under the contract.*
TERMS OF REFERENCE

The Discussion Paper referred to broad terms of review as follows:

The Review will consider the operation and effectiveness of the Construction Contracts Act 2004 in terms of:

1. The context in which the Act now operates;
2. Issues related to how the Act operates, including (but not exclusively):
   a. The scope of the Act;
   b. The mechanisms in the Act;
   c. Court rulings and interpretation;
   d. Adjudicators;
   e. Prescribed Appointors; and
   f. Other issues identified during stakeholder consultations.
3. Whether amendments to it or other related Acts are needed to improve its effectiveness and efficiency; and
4. Any negative impact or additional regulatory burden that may be foreseen with proposed amendments that may be subject to Regulatory Impact Assessment at a later date.
2. INTRODUCTION

The Construction Contracts Act 2004 (WA) (‘the Act’) operates to provide greater security of payment for both contractors and principals in an industry which has historically functioned under a hierarchical chain of contracts with significant inequalities in bargaining power.

All sections of the construction industry unequivocally agreed that the Act is an extremely important item of legislation which has radically altered the traditional risk allocation between parties contracting in the construction industries and provides contractors, suppliers and consultants with rights and protection which were not available under the common law.

Where there was a dispute relating to payment for work done or materials supplied prior to the introduction of the Act, the beneficiary of that work had a significant advantage in that they were able to retain any monies owing until a determination by either court or arbitrator. The difficulties, expense, time and delays inherent in receiving a judgement clearly deterred many from pursuing this course of action and those who did may have had to wait months if not years for payment. Sadly, history indicates that by the time of payment many bona fide claimants had become insolvent. Additionally the common law did not provide a party with a right to suspend work when a payment due under the contract was not paid.

The Act has greatly redressed these imbalances through the establishment of a rapid and relatively inexpensive adjudication process, the prohibition of what we might describe as unfair terms relating to payment and the implication of payment terms in the absence of express provisions. The time limits prescribed for each step of the adjudication process are extremely important features that have significantly contributed to the success of the legislation and one of its principle objectives of ‘keeping the money flowing’ and ‘pay now argue later’. Another unique feature of the legislation is that adjudication can be commenced before litigation or arbitration and does not prevent the payment issues being revisited in a judicial or arbitral forum.

Put simply, all of the submissions and stakeholder meetings clearly indicated that the Act has had a very positive influence on payment issues.

In a review of this type, the issues for consideration must reflect the objectives and purpose of the legislation. The objectives of the Construction Contracts Act 2004 (WA) are described in its long title:

- To prohibit or modify certain provisions in construction contracts;
- To imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts;
- To provide a means for adjudicating payment disputes arising under construction contracts, and for related purposes.

In passing this Act it was not the intention of the WA Parliament to provide comprehensive protection to parties unable to look after their own commercial interests. As noted, in part, by the Hon Alannah MacTiernan, the then Minister for
Planning and Infrastructure, in the Second Reading Speech of the Construction Contracts Bill 2004 (WA):

Apart from these specific unfair practices, the Bill does not unduly restrict the normal commercial operation of the industry. Parties to a construction contract remain free to strike whatever bargains they wish between themselves, as long as they put the payment provisions in writing and do not include the prohibited terms.

and later;

This Bill cannot remedy every security of payment issue. Insolvency can be addressed only by commonwealth legislation. Participants in the industry still have to look after their own commercial interests. This Bill will provide the industry with simple and effective tools to clarify rights to be paid and to enforce those rights.

The purpose of the Act has also been noted by the Western Australian Supreme Court in Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd,² where Pullin JA described the purpose of the Act as follows:

The broad purpose of the Act, insofar as it relates to payment disputes, is to ensure that, in construction contracts, progress claims are paid on time and that principals obliged to pay do not act as their own judge and jury and hold up payment on their own assertion that they have a defence warranting refusal to pay. It is a ‘pay now, argue later’ system, with the primary aim of keeping the money flowing by enforcing timely payment. If a payment dispute arises, then the Act provides for a system of rapid and summary adjudication which is conducted without any oral hearing. If the adjudicator, having received written submissions, makes a determination that the payment has to be made, then that determination gives rise to a debt ‘presently due’ and payable by the principal.

Also in Re Anstee-Brook; Ex parte Mount Gibson Mining Ltd ³ the general object of the Act was described by Martin J as follows:

It is of fundamental importance, in my view, to understand that the object of this legislation was to attempt to reform earlier unacceptable scenarios of inequality of bargaining power in the construction contract environment. Contractors were highly vulnerable to being hurt by being kept out of funds due to them by an ongoing legal dispute in circumstances where they had performed the contracted work, but had not been paid. It is easy to see how a contractor who is leveraged and pressed for funds may lack the time, opportunity or resources to press its position to a result in a drawn out fight for payment against a well-resourced principal, in a protracted arbitration or contested litigation. The speedy and informal procedures delivered as reforms by the [Act] do not make

² Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91 [55]. The phrase ‘pay now and argue later’ was also used by Palmer J when referring to the NSW Act in Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 [86].

the adjudicator’s decision on the payment of funds final (save as to the capacity to obtain and enforce payment).\(^4\)

The conduct of this review has been subsequently based on a consideration of the operation and effectiveness of the Act in achieving these objectives. Nevertheless, submissions were made with respect to issues of inequality in bargaining power and what might be described as unfair contract practices, and these will be referred to in this Report. An essential aspect of the Review has been both the written and oral submissions received from a wide range of stakeholders. Without their valuable contributions and assistance this Review would not have been possible.

There were a number of issues which, because of their importance and the nature and extent of the submissions, suggested significant changes to the Act that by necessity have had to be discussed in some detail by reference to the published literature and case law. These were the mining exclusions, the judicial review of determinations and the implied terms provisions. I am conscious that the ‘legalistic’ approach in consideration of these issues may be subject to criticism but I felt it was necessary to adequately address the issues in view of their significance.

As can be appreciated, there is also some overlap or commonality with respect to a number of issues. Consequently where relevant, a number of details and comments have been repeated under various headings to assist with the coherence of the Report. For example the issue of complexity is relevant to the matter of times for the application, response and determination. Thus, by necessity, complexity has been considered in the discussion with respect to each of these issues.

In an industry of this type there are naturally diverse and various goals, aspirations and priorities among the personalities within the industry. Consequently it is not unexpected that conflicts and difficulties will arise between the respective participants with respect to some issues, even when acknowledging the benefits of the Act as a whole.

This is particularly evident in view of what might be fairly described as the ‘universal’ use of subcontracting in the Western Australian construction industry. It is interesting that in the Report of the Inquiry into the Building Industry of Western Australia by Mr C H Smith QC in 1973, it was noted that the growth of the subcontracting system has brought with it a ‘waning of the traditional master builder and the entry of the entrepreneurial builder.’ Clearly these observations can be confirmed 40 years later.

Accordingly, as mentioned earlier, it will be appreciated that the submissions received often comprised conflicting and disparate viewpoints and cannot be determinative of the issues alone. It has therefore been necessary to refer to the considerable literature on the topic of security or payment legislation, involving a wide range of texts, reports, seminar and conference papers, academic research and court and tribunal judgements.

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\(^4\) In accordance with s 45(1) of the Act, a determination under pt 3 of the Act does not finally determine the rights of the parties to the payment dispute concerning a payment claim made under the construction contract. Part 3 does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person, or a court or other body, in relation to a dispute or other matter arising under the contract.
A significant and helpful resource which greatly assisted in the Review were the Annual Reports on the operation of the Act prepared by the Building Commissioner. Throughout this review, numerous references are made to the Registrar’s Annual Reports. As of 29 August 2011, the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) amended certain parts of the *Construction Contracts Act 2004* (WA) (the CCA) and the Building Commissioner now performs the functions of the former Construction Contracts Registrar.

This Review is premised on the assumption that there must be relevant and probative evidence which is logically coherent to support any significant changes to the legislation. In any case, the relevance of the submissions has to be considered with respect to the legislative intent of the Act.

The method adopted for this Review was based on the Public Sector Commission *Guidelines for the Review of Legislation* (2003). Initially, a detailed Discussion Paper (47 pages) was prepared for circulation to all relevant stakeholders. It provided background information regarding the purpose of the Review and was written in such a form as to assist in the understanding of the operation of the Act for those persons both familiar and unfamiliar with the Act. The Discussion Paper has been referred to throughout this report and should be read in conjunction with this Report.  

The Discussion Paper identified a range of relevant issues arising from the operation of the Act over the period 2005 to 2013. It was noted however that these issues were not exclusive and stakeholders were invited to comment on all issues experienced by parties who have utilised the provisions of the Act or who wished to comment generally. Consequently, the terms of reference identified in the Discussion Paper were expressed in very broad terms. The preparation of the Discussion Paper was an important aspect of the Review and was widely acknowledged as assisting in the preparation of submissions.

All stakeholders and interested parties were identified from Building Commission records. The Discussion Paper was circulated to over 10,300 business entities listed in the Building Commission’s main email database and included all of the state’s building surveyors, painters, plumbers, builders, relevant industry and professional associations, local government authorities, statutory bodies and registered adjudicators, together with the Law Society of WA, President of the State Administrative Tribunal and the Chief Justices of the Western Australian District Court and Supreme Court.

The Discussion Paper also indicated that I would be willing to meet with both individuals and representatives from interested organisations. Subsequently 11 meetings were held in addition to a well-attended public forum held at the Building Commission Offices on 14 November 2014. The names of relevant persons and organisations are shown in the appendices to this report.

In addition I made a number of presentations to legal practices and their major clients during the conduct of the Review. These included Minter Ellison, Jackson McDonald, Lavan Legal, the Society of Construction Law Australia and the Construction Law Group of the Law Council of Australia.

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The closing date for the receipt of written submissions was extended until 21 November 2014 on the basis of a number of late requests from parties wishing to submit responses. Subsequently fifty one (51) written submissions were received. As expected, not all submissions addressed the issues identified in the Discussion Paper and a number were related to issues more connected with commercial contract practices and contract administration and as such did not strictly fall within the broad terms of reference. Where the name of an individual or organisation is not specifically referred to in this Report it should not be implied that any submission has not been considered. Additionally, a number of submissions were expressly marked confidential and this has been respected.

Overall, the major industry and professional associations together with the legal profession agreed that the Act had a beneficial influence on the resolution of payment disputes and construction payment claims practices generally. At the same time, there was a general concern by all representative groups that many parties did not understand both their rights and responsibilities under the Act and this was limiting its effectiveness.

The diverse range and content of the submissions clearly indicates that all relevant stakeholders were identified and subsequently responded to all relevant aspects of the operation of the Act. A secondary, if not unexpected, benefit arising from the preparation and circulation of the Discussion Paper is the anecdotal evidence that this has created a greater awareness of the existence of the Act and its specific objectives.

In arriving at my recommendations I have taken into consideration, and weighted accordingly, all of the written submissions, comments made at stakeholder meetings and as mentioned previously, articles on security of payment legislation in a wide range of academic, industry and learned journal publications. A number of submissions recommended or perhaps rather suggested changes to the Act without cogent reasons, rationale or supporting evidence. In this regard it is important to note that the written and oral submissions to the Review are, for want of a better term, untested. I did not receive evidence under oath and had no powers of compulsion. Consequently in many instances the information remains as opinion or allegations.

Additionally, I have taken into account my own experience as a consulting engineer, chartered builder, construction lawyer, educator, mediator, arbitrator and registered adjudicator. Nevertheless, at the same time I have been reluctant to make any recommendation regarding amendments to the Act in the absence of probative evidence and have attempted to adopt the Latin maxim primum nil nocere.7

In this review, references to the Act are to the Construction Contracts Act 2004 (WA) unless otherwise noted. A Glossary of Terms (Annex B) has also been prepared together with a list of abbreviations used in this report (Annex C) to assist the reader.

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6 Mr Laurie James AM, Senior In-house Counsel Kott Gunning Lawyers and Co-chair of the WA Chapter LEADR/IAMA has stated that no other item of Western Australian legislation has had such a beneficial effect on the construction industry generally (Personal communication, 21 July 2015).

7 Which translates as 'first do no harm'.
3. ISSUES IDENTIFIED

3.1 Time Limits in Which an Application Can Be Made

This issue resulted in divergent views from the broad stakeholder groups. Statistically, 53% of the submissions preferred an extension to the 28 day period whilst 27% considered that the 28 day period should remain. A number of submissions considered that the timeframes should be expressed in working days rather than calendar days and I have considered this as a separate section later in this report. There is no dispute that the intention of the Act is principally to allow for payments to flow quickly down the contracting chain in order to maintain cash flow. Again, there was certainly consensus among the submissions that the 28 day period in which an application may be lodged reflected the purpose and the objectives of the Act. Whilst acknowledging the preferences shown in the statistics, any recommendations to amend the Act in order to enhance its legislative objectives cannot be determined simply on the basis of a poll of stakeholders or other interested parties, and as stated in the Introduction to this report, I have taken into consideration a wide range of factors in arriving at my recommendations.

As part of this Review I have also referred to the provisions of other security of payments legislation, reports and articles. Whilst it is not possible to make direct comparisons, especially with respect to time and curial review of adjudication determinations between the various Acts due to the differing if not contrasting provisions, I note the comments in the Wallace Report that it is difficult to comprehend why the drafters of the “East Coast” Acts allow a claimant to bring a payment claim up to 12 months after the work was performed. Wallace notes that this has enabled contracted parties to serve large and complex payment claims in an untimely and unfair manner. 8

The time limits in which an application can be made are found in s 26 of the Act:9

26. Applying for adjudication

(1) To apply to have a payment dispute adjudicated, a party to the contract, within 28 days after the dispute arises or, if applicable, within the period provided for by section 37(2)(b), must —

(a) prepare a written application for adjudication;

(b) serve it on each other party to the contract;

(c) serve it —

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, on the adjudicator;

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(ii) if the parties to the contract have appointed a prescribed appointor, on that appointor;

(iii) otherwise, on a prescribed appointor chosen by the party;

and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or the prescribed appointor requires under section 44(8) or (9).

The wording, ‘after the dispute arises’, is significant and s 26 is to be read in conjunction with s 6 of the Act which states: 10

6. Payment dispute

For the purposes of this Act, a payment dispute arises if —

(a) by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed;

(b) by the time when any money retained by a party under the contract is due to be paid under the contract, the money has not been paid; or

(c) by the time when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

After the introduction of the Act, a number of issues arose with respect to the interpretation of s 6 of the Act but these have been clarified following the SAT decision in Blackadder v Mirvac. 11 The decision has been succinctly summarised by Mr. James as follows:

When the Act first came into effect, there was a school of thought which considered that because a payment claim had to be made under the Contract, it was necessary to show precise compliance with every precondition for payment. However, in the case of Blackadder and Mirvac (2009) WASAT 133 the Tribunal rejected the proposition that a payment claim for the purposes of the Act had to comply with every formality and precondition set out in the Contract. In that case, it was objected by the Principal that no final statement and release document in a form acceptable to the Principal had been provided, but it was concluded by the SAT that the reference in the definition of ‘Payment Claim’ to a claim being made under a construction contract was merely intended to be descriptive and did not require anything other than to show that the claim arose under the construction contract. It was then a

10 With reference to s 6, James has noted; ‘In passing I might say that I have never been able to understand the difference between wholly or partly disputing a claim, on the one hand, or rejecting the claim on the other. However it is clear that the amount concerned must be claimed in the payment claim.’ See L James, ‘When is a Payment Claim not a Payment Claim?’ (IAMA Perth presentation, 18 February 2013).

11 (2009) WASAT 133.
matter for the adjudicator to decide whether noncompliance with the requirement affected the validity of the claim.

I have attempted to summarise the submissions for both the retention of the 28 day period and for an increase in the period. Whilst considering all submissions on the issue, I noted in particular the submissions of significant parties in the adjudication process. They were the Law Society of Western Australia, the Australian Institute of Building (AIB), the Master Builders Association (MBA) the Institute of Arbitrators and Mediators Australia (IAMA) and the Housing Industry Association (HIA). As noted in the Discussion Paper, IAMA and the MBA as proscribed appointors have been responsible for 88% of the nominations since the commencement of the Act. Each of these organisations implicitly or expressly acknowledged the comments made in the Second Reading Speech that:

The rapid adjudication process was a trade-off between speed and efficiency on the one hand and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes. The process is kept simple and therefore cheap and accessible even for small claims.\footnote{Second Reading Speech, Construction Contracts Bill 2004 (WA), 3 March 2004.}

In support of the retention of the 28 day period, the Law Society submitted that the 28 day limit for making an application should not be altered. The AIB did not support s 26 of the Act being amended to extend the time limit. Both submissions considered that the current 28 day time limit serves the central purpose of the Act which is to ensure that the money keeps flowing. IAMA also submitted that the 28 day time limit should not be altered on the basis that if the time limit for making an application is extended, particularly to 90 days, then the cash flow justification for the rapid adjudication process ceases to be relevant, especially if there is a consequential increase in the response time. IAMA further commented that ‘work expands to fill the time available to perform it’ with additional expense being the consequence.

The MBA submission stated that its members expressed different views on the time limit but generally agreed that the 28 day limit reflected the objective of keeping the money flowing in the contracting chain. Furthermore, the MBA considered that the 28 day period was sufficient for ‘unsophisticated’ contracts but no criteria were provided regarding what might be classified as an ‘unsophisticated contract’.

In support of an increase in the time for lodging of an application, the HIA, whilst noting that their preference was for the adjudication process to remain rapid, commented that industry awareness of the CCA is not ‘strong’, particularly in regional areas, and that often the 28 day timeframe has passed before an applicant has become aware of the relevant provisions of the CCA. This lack of awareness of the Act was a common theme throughout a number of the review meetings and is subject to separate comment later in this review. The HIA view was that the 28 day requirement may have the effect of pre-empting the decision to negotiate a settlement or partake in the alternative dispute resolution (ADR) processes under the contract. I do not consider either of these to be a bad thing. Despite its preference for a rapid process, the HIA favoured an amendment to the timeframe to allow 90 days for the lodging of an application as applicable under the Northern Territory’s security
of payment legislation.\textsuperscript{13} The Northern Territory Act as originally passed was identical to the WA Act with respect to the 28 day timeframe. The 28 day timeframe was subsequently amended essentially to acknowledge what, for want of a better term, might be described as ‘cultural’ commercial factors where applicants were generally tardy in asserting contractual rights.\textsuperscript{14} The comment by the Northern Territory Registrar was that in general claimants were not immediately, or within a reasonable time, responsive to the rejection of claims, and the 90 day period was inserted to reflect the idiosyncrasies of the NT contracting culture. The Northern Territory Registrar commented that there have been numerous complaints by respondents protesting that the 90 day period was unfair in view of the 10 day period in which they are required to prepare and file a response.\textsuperscript{15}

The MBA also referred to the lack of awareness or ignorance of the provisions of the Act, if not its existence. This is discussed in other sections of this Review The MBA, as a prescribed appointor and in providing dispute resolution advice to both members and consumers, submitted that many persons are oblivious to the existence of the adjudication process and many of those familiar with the concept have only a rudimentary understanding of it. This was also a recurring theme in a significant number of stakeholder meetings.

There was support for a 90 day period in the submission by the Rev Peter Abetz MLA\textsuperscript{16} who submitted that:

the adjudicators, builders and subcontractors were unanimous that the 28 day time limit needs to be extended to at least 90 days (which in most cases will be nearly 3 payment cycles) but preferably 180 days.

In his submission he notes, in part, that payments can easily be rejected a few days before they are due and consequently, by the time most applicants decide to proceed with adjudication, their claim is denied for being outside the time limit. In particular, Rev Abetz states:

I have been told that a common ‘trick’ consists in formally disputing part or whole of the claim as soon as received whilst informally agreeing that it will be reviewed. When the payment date is due (which may be up to 50 days later) the contractor is well out of time for adjudication.

I am unsure of the reference to rejection of a payment claim a few days before it is due. Whilst acknowledging that the 28 days provision serves the objective purpose of the Act very well, in some circumstances (again subject to more industry awareness) the MBA supported an ‘easing’ of the 28 day period. They were not in favour of the 90 day alternative and did not specify a recommended time.

There was strong criticism of the 28 day period in the submissions by Mr Mark Jones.\textsuperscript{17} Mr Jones was concerned that the question raised in the Discussion Paper provides the options of only 28 days or 90 days without any explanation of the

\textsuperscript{13} Construction Contracts (Security of Payments) Act 2004 (NT) s 28.
\textsuperscript{14} Northern Territory Construction Contracts Registrar, Personal Communication, 26 March 2015.
\textsuperscript{15} Construction Contracts Act (Security of Payments) Act 2004 (NT) s 29(1).
\textsuperscript{16} Minister and Member for Southern River in the West Australian Parliament.
\textsuperscript{17} Civil Engineer, Registered Builder, Adjudicator, Arbitrator, Mediator and Expert Determiner.
problem caused by the short period available. Mr Jones comments, ‘This is the 1st example of what appears to be a predetermination of the results.’ He does not refer to any other examples.

My first reaction is to defend the allegation but that is perhaps left to others when my report is viewed in its entirety. I would add, however, that the issues raised in the Discussion Paper were not meant to be definitive and no other submission viewed the reference to 28 or 90 days as being determinative on the issue.

In his submission Mr Jones provides examples in support of an increase in the timeframe. In paragraph 1.3 he states:

The short time frame of 28 days has been a dismal failure and the cause of most unjust dismissals. Its most obvious victims are the small contractors who were the intended beneficiaries of the Act, and those who frequently do not understand the Act. Most advisors in this area would be approached by contractors who are unwittingly already too late according to s 26 of the existing Act, at least weekly. [Underlining mine.]

As I have noted throughout this Report, the lack of understanding of the provisions of the Act has been a common theme in the submissions. I have considered the additional comments by Mr Jones in his paragraphs 1.4 to 1.8 inclusive. Without reproducing these in full and at the risk of being deemed selective, I note Mr Jones’ comments regarding commercial practice in the industry and additionally the suggestion that the ‘time limit should be such that two payment cycles can pass before a dispute is mandatorily declared’.

In his concluding paragraph Mr Jones opines, ‘For round figures 100 days should be the absolute minimum if calculated logically although there is nothing intrinsically wrong with the Queensland option of 6 months or the New South Wales option of 12 months’. With due respect to the submission, as a consequence of the significant differences in the application and operation of the CCA to the Queensland and NSW Acts, it is not possible to make this simple comparison regarding the timeframes. I would also add that there has been significant criticism of both the Queensland and NSW Acts with respect to their failure to determine payment disputes quickly and without legal complexity. ¹⁸

In summary, there was no consensus with respect to the specific time limits in which an application can be made.

If the time was to be increased to 90 or 100 days, it is anticipated that there would inevitably be requests to have some proportionate increase in the response time on the basis of equity. The Northern Territory Construction Contracts Registrar has commented that this has been a consequence of the amendment of the Northern Territory Act to increase the time from 28 to 90 days.¹⁹ This would then frustrate the ‘cash flow’ intention of the Act.

If the time limits were to be based on some arbitrary decision about what is complex

¹⁹ Northern Territory Construction Contracts Registrar, Personal Communication, 26 March 2015.
or unsophisticated in the absence of legislative guidelines, then varying time limits based on these considerations could give rise to legalistic arguments about time limits. Additionally, it is important to note that the Act operates in parallel to any other legal or contractual remedy. If the matter is complex or sophisticated, the parties retain their full rights to go to court or use any other dispute mechanism under the contract or agreement between the parties.

I refer to the issue of complexity later in this Report, but apart from general comments regarding large claims, high value claims or complex legal issues, no submissions were definitive with respect to these descriptions in order to assist me in my deliberations. I consider that the issue of complexity with respect to time limits is best considered at the discretion of the adjudicator, rather than time scales being amended based on an arbitrary assessment of the type of construction work or quantum of the claim.

In my meeting with the Building Commissioner as part of this Review, I asked about the origin and basis of the 28 day period. I was informed that the 28 day period was premised on the basis that an application for adjudication will generally be based upon a claim which has already been formulated by the applicant as part of its normal payment claims. Put simply, the 28 day requirement is based on the assumption that a claim under the contract has been prepared properly and with sufficient information for a superintendent or contract administrator to adequately consider the claim. If the claim is rejected and subsequently referred to adjudication then one would assume that, if the claim had been properly prepared, a period of 28 days would be adequate to escalate the claim to adjudication with sufficient detail to allow a determination. The premise has some merit.

All construction contracts, whether standard20 or bespoke21 (unless oral) will contain detailed provisions for payment to the contractor or subcontractor of progress or interim payments. This right to payment is generally expressed in detailed provisions setting out the procedures for claims, valuations and certificates for progress payments. These provisions will set time limits within which actions must be taken (by both principal and contractor) and may also provide remedies to the contractor in the event of those limits being exceeded. There will importantly be preconditions which apply to the contractor requiring evidence in support of the claim.

For instance, according to AS 2124-1992:22

At the time stated in the Annexure, and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor

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20 The two contracts in general use for non-residential construction in Australia are AS2124-1992 and AS4000-1997. AS2124 General Conditions of Contract comprise a single set of general conditions of contract suitable for a wide variety of civil engineering, building, electrical and mechanical engineering and other types of construction contracts. The current edition of AS2124 is the 1992 revision. However Standards Australia are still publishing the 1986 revision to run concurrently with the 1992 revision. The latest revision to AS2124 has been renumbered as AS4000 and is a substantial change to the style and format of the recent editions of AS2124. AS4000 is published concurrently with AS2124. These are non-mandatory standards and the user is free to elect to use whichever edition they prefer, however it should be noted that the later Standards have had the benefit of adopting current rulings in the law and current practices in the industry. AS2545 is the companion subcontract document specifically prepared to be compatible with AS2124.

21 Bespoke means ‘especially made for a particular purpose’. From my experience they are particularly used in the mining and resources sector.

22 Clause 42.1.
shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract for any alleged breach thereof. [Underlining mine.]

Similarly, AS 4000-1997 states:

The Contractor shall claim payment progressively in accordance with Item 28.

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the Superintendent and shall include details of the work done and may include details of other moneys then due to the Contractor pursuant to provisions of the Contract. [Underlining mine.]

As can be seen, it is mandatory for the claimant to provide all supporting documentation necessary for the Superintendent to reasonably assess the claim and authorise payment within the time stipulated on the contract. Even in the absence of express provisions regarding payment, this condition will be readily implied on the basis of trade usage and custom, business efficacy, or so obvious that it goes without saying.

Additionally, it is well established at common law that a claimant is required to plead the claim with; ‘as much certainty and particularity … as is reasonable’. This principle has been cited with approval in *Placer v Thiess*. If the provisions of the contract have been followed with respect to the submission of the original payment claim, that is, all supporting documentation has been provided to the superintendent or contract administrator in order to reasonably consider the basis of the claim, then I am of the opinion that 28 days to prepare an application under the Act is adequate. With due respect to both applicant and respondent, the submission of a payment claim under the contract should not be seen as a ‘dry run’ (rehearsal or practice exercise) to adjudication.

A confidential submission in support of the 28 day timeframe stated that the merits of the claim should not require additional information to the extent that more than 28 days is required. With respect to the response time, the submission noted that a claim ‘does not come like a bolt out of the blue’.

The MBA further referred to an issue which was raised at a number of stakeholder meetings. This issue relates to the possibility that an adjudication application may become time-barred when parties, after the date when payment is due under the act.

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23 Clause 37.1.
24 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.
25 *Ratcliffe v Evans* [1892] 2 QB 524, 532–533.
26 (2003) 196 ALR 257, 266.
contract, participate in a negotiation process which may be required by an operative
dispute resolution clause found in most standard or industry based construction
contracts, and this negotiation process subsequently fails or is prolonged by a tardy
party.

Firstly, while the courts will enforce a properly worded dispute resolution clause as
binding on the parties just like any other clause in the contract, participation in the
contractual dispute resolution process is not a precondition to the lodging of an
application for adjudication under the Act. As discussed later in this Report, there is
no contracting out of the provisions of the Act. Consequently it would be
commercially astute, or perhaps simply good practice, to seek adjudication as soon
as the payments claim is rejected for any one of the reasons as set out in s 6 of the
Act. This would not prevent attempts to subsequently negotiate a settlement and as
advised to me, it is not unusual for the adjudication application to prompt and
encourage a settlement by the parties.

Secondly, as an alternative I have attempted to find the appropriate wording of a
clause to be added to s 6 of the Act to additionally define when a dispute arises
where the parties initially choose to pursue a resolution of the payment dispute
through negotiation as part of the contract’s dispute resolution clause. For example:

(d) Where the parties subsequent to one of the events listed in (a) to (c)
above attempt to resolve the dispute by negotiation in accordance with the
dispute resolution clause in the contract, then a dispute will arise for the
purposes of the Act 14 business days after the initial meeting of the parties if
the payment issues are not resolved by negotiation.

I acknowledge that this clause is extremely problematic and fraught with difficulties.
As a lawyer and mediator I am well aware of delaying tactics and tardiness by
parties in these processes and at the end of the day I am not convinced that a clause
of this type would be beneficial with respect to a timely resolution of the payment
dispute as required by the Act.

In conclusion, while there was divergence of opinion with respect to the retention of
the 28 day period, there was unequivocal support with respect to the objectives of
the Act to resolve payment disputes quickly and inexpensively in order to keep the
money flowing in the contracting chain by enforcing timely payment and sidelining
protracted or complex disputes.

With respect to submissions that 28 days is simply too short a period to prepare a
claim, the preparation of an application for adjudication will generally be based upon
a claim which has already been properly prepared by the applicant as part of its
normal payment claims procedure under the contract. Consequently I am of the
opinion that a period of 28 days is adequate to prepare any other relevant
information in support of the application for adjudication.

There may be issues of reluctance by some claimants to initially invoke the
provisions of the Act within the required timeframe and I have addressed some of the
issues in the section of this Report dealing with unconscionable conduct and

27 Construction Contracts Act 2004 (WA) s 53.
28 Mr Charles Anderson, MBA Contracts and Administration Manager, Personal communication, 14 July 2015.
Throughout this Review I have become aware of a basic lack of understanding of contractual rights and obligations and dispute resolution procedures contained in the contract by many parties to the contract. Additionally, there was a widespread lack of awareness of both the objects and provisions of the Act. This serious issue strongly suggests that there is an important, if not crucial, need for extensive awareness and educational programs by professional groups, contracting organisations and the Building Commission in order to ensure that all stakeholders are aware of their rights, obligations and procedures under the Act.

**Recommendation**

The time limits in which an Application can be made should remain at 28 days. If the provisions of the contract have been followed with respect to the submission of the original payment claim, and if all supporting documentation has been provided to the superintendent or contract administrator in order to reasonably consider the basis of the claim, then it is considered that 28 days to prepare an Application under the Act is adequate. There should be no amendment to the 28 day period based on an arbitrary assessment of the type of construction work or quantum of the claim.

It does not appear to be practical to amend s 6 of the Act to additionally define when a dispute arises where the parties initially choose to pursue a resolution of the payment dispute through negotiation as part of the contract’s dispute resolution clause in that it has the potential to further delay resolution and is therefore inconsistent with the object of the Act to resolve the payment dispute in a timely manner.

It is essential for professional groups, contracting organisations and the Building Commission to provide extensive awareness and educational programs in order to ensure that all stakeholders are aware of their rights, obligations and procedures under the Act, particularly with respect to the time limits under the Act.

### 3.2 Timelines for Responses

The relevant section in the Act is s 27 which states in part:29

27. **Responding to an application for adjudication**

   (1) Within 14 days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on —

   (a) the applicant and on any other party that has been served with the application; and

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29 *Construction Contracts Act 2004 (WA)* s 27.
(b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointor on which the application was served under s 26(1)(c).

There was general agreement for the retention of the 14 day period. The majority of the responses found the 14 day period appropriate in terms of supporting the objectives of rapid resolution. The responses indicate that the current timelines are justified by the need to maintain cash flow in the contracting chain and this purpose will not be served by extending the time limits. Four of the responses suggested 21 days as preferable whilst five responses supported a 28 day response time. The arguments for the extension of the response time were based on the assumption that it may be difficult for respondents to prepare their responses in a timely manner. However the complexity of the issue or the quantum of the claim may be poor indicators of the appropriate response time because simple disputes may involve complex issues and large claims may be relatively straightforward. Again, it is expected that the response would also involve the submission of arguments referred to in the original rejection of the claim.

The AIB submission referred to a recurring issue arising during the stakeholder meetings which might be described as the increasing ‘legalism’ of the process. Specifically, the AIB stated that in their experience the majority of applications were prepared by legal practitioners and contained reference to legal issues which required a legal response. The current 14 day period was problematic for obtaining a considered response on any legal issues raised in the application. As noted in the IAMA submission, the comment that a respondent may find it difficult to prepare a response may be exaggerated since, as mentioned above, the respondent will have already seen the details of the payment claim in the contract administration and will have a reasonable opinion about the merits of the claim.

The HIA submission stated that the 14 day framework for responding to an application was appropriate and they had received no adverse feedback from members in respect of the 14 day timeframe, noting also that the NT Act allows for only 10 days to respond to the application.30

The MBA submission considered that the 14 day response time was probably prejudicial in enough instances to warrant reform and suggested a 21 day period with discretion on the part of the adjudicator to extend the period to 28 days. However the comment was general and I was not referred to any particular examples of what might be considered ‘prejudicial’. The Society of Construction Law (SOCLA) Legislative Reform Subcommittee suggested that a ‘one size fits all’ approach in terms of timelines is likely to deliver poor results at both ends of the complexity spectrum. Whilst there may be some basis for the response time to be increased where a claim is apparently complex, this is a relatively subjective determination. With respect to the quantum of the claim being some guide as to the appropriate time of response as noted earlier, small claims can be both factually and legally complex and large claims simple.

Regardless of the size of the payment claim, it should not make any difference to the facts and principles of law or the requirement that a claimant provide the

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superintendent or contract administrator with all details in support of the claim. The value doesn’t in itself make a matter inherently technically complex.

The objects of the Act are not achieved if the scheme is complicated. On balance and in consideration of the issues and arguments presented in the submissions it is considered that, rather than adding to indeterminate legalistic argument about time limits, the existing 14 day time should not be amended.

By way of comparison, the equivalent section in the NT Act (s 29) requires a response within 10 working days after the date on which a party to a construction contract is served with an application for adjudication.

The suggestion to adopt a tiered approach with respect to the timelines for responses was not generally supported in the submissions received. However, a small number of responses were in favour of the suggestion. It was unanimously agreed that the objective intent of the Act was to provide a uniform and streamlined mechanism for promptly and efficiently resolving payment disputes in order to maintain cash flow, and the introduction of a tiered approach has the potential to promote an undue level of complexity associated with the prompt resolution of the dispute.

The complexity issue should also be considered through the operation of s 31(2)(a)(iv) which allows adjudicators to dismiss a claim that they consider to be too complex. It may be argued that the Act is not intended to deal with “complex” payment disputes. Having said this, I have not received submissions that described what criteria were relevant in determining if a dispute is complex. If I assume that the definition of complex is ‘complicated, convoluted or involving difficult issues of legal interpretation’, then the background and training of adjudicators does not provide for the resolution of complex payment disputes. These types of disputes are intended to be resolved through litigation or alternative dispute procedures. Whilst in the context of reasons for determinations, the complexity issue is relative to the comment relating to the qualifications of adjudicators, as held by Pritchard J in Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd: An adjudicator will not necessarily be legally qualified and, as I have already observed, the Parliament did not, in my view, intend that an adjudicator should express reasons for a determination with the same degree of precision as might be employed by, or expected of, a court.

Recommendation

The existing 14 day timeline for responses should not be amended.
3.3 Timelines for Determinations

Currently, an adjudicator has 14 days to either dismiss or determine the payment dispute:33

31. Adjudicator’s functions

(1) In this section —

prescribed time means —

(a) if the appointed adjudicator is served with a response under section 27(1) — 14 days after the date of the service of the response;

(b) if the appointed adjudicator is not served with a response under section 27(1) — 14 days after the last date on which a response is required to be served under section 27(1).

(2) An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a) —

(a) dismiss the application without making a determination of its merits …

(b) otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security and, if so, determine …

The majority of the submissions supported the retention of the 14 day determination period. Three of the submission favoured a 21 day period whilst one submission favoured a 28 day determination period. By way of comparison the NT Act prescribes the time as 10 days.34 The rationale, again for the retention of the 14 day period, was the need to maintain cash flow in the contracting chain. I note in particular that the retention of the 14 day period was endorsed by the two largest prescribed appointors (IAMA and the MBA) together with the Law Society of WA, the HIA and AIB.

The Registrar’s Annual Reports over the period 2005 to 2014 indicate that there have been 845 determinations and the average time for these has been 13 days.35

In response to a question regarding a tiered approach to accommodate different time limits for payment claims of various levels of complexity or quantum of claims the majority of the responses did not support a tiered system. The SOCLA submission

33 Construction Contracts Act 2004 (WA) s 31.
34 Construction Contracts Act (Security of Payments) Act 2004 (NT) s 33. The Construction Contracts Act 2004 (WA) s 31(1) provides that an adjudicator has 14 days to either dismiss or determine the payment dispute.
35 The longest time for a determination was 105 days. Auke Steensma, ‘The Construction Contracts Act 2004 (WA): Its Operation and Effectiveness 2005–2014’ (2014) Unpublished. The paper notes that the average length of a determination in the period 2013–2014 was 16 pages and to date the largest determination was 70 pages.
suggested a tiered system which provides for the response time to be determined on
the basis of the amount being claimed. The premise apparently being that there is a
correlation between complexity and the quantum of the claim. The two main
appointors IAMA and the MBA, did not consider that a tired approach was warranted.

The issue of complexity has been addressed in recent changes to the Queensland
security of payment legislation. Changes have been introduced in the Queensland
Act as a result of the legislature recognising that ‘complex’ claims should be treated
differently from ‘simple’ claims. The Dictionary in Schedule 2 of the Queensland Act
states:

**Complex payment claim** means a payment claim for an amount greater than
$750,000 (exclusive of GST) or if a greater amount is prescribed by
regulation, the amount prescribed.

Increased timescales apply to complex payment claims and claimants must identify
in the payment claim whether the claim is a standard or a complex claim. The
provisions relating to the time scales are somewhat complicated and due to the
inherent differences between the Queensland and Western Australian Acts it is not
possible to make a direct comparison with respect to time scales. Put as simply as
possible the Queensland Act now allows for extended timeframes for a payment
schedule of up to 15 business days for responding to large or complex claims and 30
business days for a payment claim served more than 91 days after a reference
date. The timeframe for providing an adjudication response will be extended from
five business days to 10 business days, unless it is complex claim when the
timeframe will be up to 15 business days, with the potential for the adjudicator to
grant an additional 15 business days.

The arguments based on complexity and amount claimed in establishing prescribed
times has been referred to above and the retention of the existing timeframe is to be
preferred if the object of rapid determination, in the absence of complex legal
arguments, is to be retained.

**Recommendation**

*The existing 14 day timeframe should remain. This is necessary if the objects of
rapid determination, in the absence of complex legal arguments, are to be retained.*

**3.4 Timelines for Extensions in Making a Determination**

Section 32 of the Act permits an extension of time for the making of a determination
as follows:40

32. **Adjudication procedure**

(3) An appointed adjudicator may —

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37 Ibid, s 18A
38 Ibid, s 24A
39 Ibid, s 25B.
40 Construction Contracts Act 2004 (WA) s 32.
(a) with the consent of the parties, extend the time prescribed by section 31(2) for making a determination;

The responses that considered the issue (44% did not) were equally divided on the issue of whether the adjudicator should have a discretionary power under the Act to grant an additional seven days’ extension. With respect to the submission by the two main appointors, IAMA and MBA, IAMA notes that whilst there were exceptions it was not their experience that parties were unwilling to extend time limits for adjudications. This is a relevant comment. The Law Society of WA together with the AIB and HIA made the same comment. The MBA supports maintaining the current s 32 provisions and was concerned the power of the adjudicator to extend would by default result in 21 days becoming the period for determination.

Comments were made at some stakeholder meetings that some adjudicators were automatically requesting extensions of time immediately upon receipt of the papers, as a matter of course, without due regard to complexity or issues. From information obtained from the Registrar’s Annual Reports it is noted that the longest time to determine an application was 105 days. I have no details regarding the background to this extension.

There was no evidence that parties were unreasonably unwilling to extend the time limits for adjudication determinations. Details of extensions of time are recorded in the 2013–2014 Annual Report. Extensions of time were agreed in 39 of the 175 adjudications, that is 22%.

The Act allows for the adjudicator to dismiss the application under s 31(2)(a)(iv) if they consider the matter too complex. If the adjudicator is permitted to unilaterally extend the time for determination the real deadline for making a determination will become 21 days and this may be inconsistent with the fundamental objective that the determination should be made promptly. If there are events beyond the control of the adjudicator it may be appropriate that an extension be granted. This would require an amendment to the Act which listed these events or changes to the regulations which permitted the Building Commissioner to extend by a prescribed amount.

A number of submissions were supportive of amendment to the Act to allow the adjudicator the power to extend the time for determination for an additional 7 days where the Registrar consents. This power is granted under the NT Act as follows:41

34. Adjudication procedure

(3) An appointed adjudicator may:

(a) with the Registrar’s consent, extend the time for making a determination under section 33(1);

The issue of complexity relative to the time for the adjudicator’s determination of payment disputes has also been considered by Alan Moss a former judge of the Supreme Court of South Australia who was commissioned in December 2014 to undertake a review of the South Australian security of payment legislation.42 The

41 Construction Contracts Act (Security of Payments) Act 2004 (NT) s 34.
Moss Review in part also recommended differentiating between simple and complex claims. The review whilst acknowledging the ‘quick and dirty’ adjudication process was reasonable for small claims, suggested some expansion of the time limit for adjudicators making their determination in larger, more complex cases. There is no reference in the report regarding times for submissions of applications or responses.

Rather than any change to the legislation, Moss suggests that ‘the adjudication procedures set out in s 21 of the Act give scope to a wise adjudicator to extend the time for adjudication.’ And later in the paragraph:

Section 21 (3) (b) provides that the parties may agree to extend time, if after receiving the matter from, let’s say the SBC and perhaps conferring with the SBC, the adjudicator considers the matter to be ‘complex’, then the adjudicator could either encourage the parties to agree to a longer time, or only agree to accept the adjudication if the parties agree to a longer time or both.

The SA Act does not provide a distinction between complex and simple matters. In his recommendations Moss states: ‘That either the SBC, as the ANA, or the adjudicator determines whether the adjudication is simple or complex (by regulation). As stated by Moss, this could be done without legislative change. However this may be problematic.

The complexity issue together with adjudicator legal knowledge has been recently considered by Mitchell J. in the Supreme Court of Western Australia Laing O’Rourke Australia Construction Pty Ltd v Samsung C & T Corporation. His Honour stated;

It was implicit in some of the submissions advanced by LORAC that some greater allowance was necessary for adjudicators who, generally lacking legal training, would not have the capacity to resolve disputes turning on the proper construction of complicated contracts according to law. Senior counsel said that an adjudicator could not be expected to know what Mason J said in Codelfa or to understand the controversy relating to the reasons for refusing special leave to appeal in Western Export Services Inc v Jireh International Pty Ltd. So much may be accepted.

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44 At paragraph 32.
45 At paragraph 40.
46 Fenwick Elliot comments; ‘The review also suggests some expansion of the time limit for adjudicators making their determination in larger, more complex cases. Again, the suggestion that is that this could be done without legislation, but the mechanism proposed in the Review is very much less robust in this regard. It is suggested that an adjudicator might, under section 21(4)(a) request further submissions in a complex case, and set a deadline for those submissions well outside the 10 business day period allowed for the determination. It is to be doubted that any such mechanism is available to an adjudicator. That said, it is possible that the somewhat wide powers under the Act to make regulations under section 35 might be sufficient to extend the timetable in specified matters, for example over a specified amount of claim, without the need for amendment of the Act itself.’ Robert Fenwick Elliott, ‘SA to Join Queensland?’ on Robert Fenwick Elliott Blog (22 May 2015) https://feconslaw.wordpress.com/2015/05/22/sa-to-join-queensland/.
47 [2015] WASC 237, [223]–[226].
48 Codelfa Constructions Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337, 352.
However, Parliament cannot, in my view, be taken to have contemplated that payment disputes involving tens of millions of dollars and turning on questions of contractual construction would be resolved other than by reference to the contractual provisions.

If an adjudicator is faced with a payment dispute raising legal problems he or she is not able to resolve within the limited time for which the Act provides, the proper approach would be to dismiss the application without determining its merits under s 31(2)(a)(iv). That is the mechanism provided for dealing with a complex payment dispute of the present character.

Given that mechanism, provisions for a speedy determination of disputes by a person who need have no legal qualifications do not justify reading s 31(2)(b) to authorise the determination of payment disputes other than by reference to the terms of the construction contract which the parties have chosen to govern their rights, duties and liabilities in relation to each other.

As an aside, with due respect to counsel, on the basis of my experience as a construction law educator I would argue that the majority of adjudicators would be aware of Mason J's statement in Codelfa.

In my view an adjudicator is likely to be the best placed independent person to deal with the question of whether an extension should be granted. They are in possession of all of the documentation. My experience is that where the adjudicator is appointed by the prescribed appointor, the appointor takes into account the nature of the dispute and the qualifications of the adjudicator. Where the issues in dispute may be complex or special expertise is required, an experienced adjudicator will be appointed by the appointor or especially chosen by the parties. A difficulty which could arise given the discretionary nature of such a decision is the differences in the way the discretion may be exercised. This could be minimised by way of regulation or advice from the Building Commission with respect to the relevant factors to be taken into account when exercising the discretion.

In summary, the overall consensus in the submission was that the current 14 day time limit should remain as it is consistent with the requirement that decisions should be made promptly. Where there are events outside of the control of the adjudicator, or in his or her opinion additional time is required to determine the matter, the Act should be amended to allow the adjudicator power to extend the time for a further 7 days. A recurring comment was the failure by some adjudicators to properly address the issue of complexity and dismiss the application where appropriate.

**Recommendation**

*Section 32 of the Act should be amended to permit the adjudicator to extend the time for the determination for an additional 7 business day period without the consent of the parties. Any additional time should be permitted with the consent of both parties. Issues which could arise given the discretionary nature of such a decision could be minimised by way of regulation or advice from the Building Commission with respect to the relevant factors to be taken into account when exercising the discretion. The*
Building Commissioner should institute a monitoring process to track the progress of delayed determinations.

3.5 Underutilisation of the Act’s Provisions for Payment Claims

As indicated in Chapter 3 of the Discussion Paper, the average and total quantum of the individual claims appears to indicate that smaller parties are not adequately utilising the provisions of the Act.

The Small Business Commissioner’s 2013 investigation into subcontractor insolvencies, individual subcontractors, the Subcontractors for Fair Treatment Committee, the Master Builders Association and the Building Commissioner, have all raised concerns about the attractiveness of utilising the Act for small claims.50

As noted in the Discussion Paper, the largest single payment claim of $104,733,908 occurred in the 2010-11 reporting period. The smallest single payment claim remains at $1320 in 2009-10.

The mean value of payment claims over the Discussion Paper reporting period (2005–13) is $822,345. This figure is significant. The intention of the Act was to provide a speedy resolution of payment disputes involving all participants in the construction industry. However, the amounts in dispute and the background of the parties indicate that the Act is being predominantly used to assist what might be described in a number of submissions as the ‘big end of town’. The total value of payment claims made since 2005 is $1,112,306,614.

The largest single payment determination amount over the Discussion Paper reporting period (2005 to 2013) remains at $38,638,536 (2010-11). The mean value of payment claims over 2005–13 is $521,091.

Since the distribution of the Discussion Paper the Builder Commissioner has published his Report on the Act for the financial year 30 June 2014. 51

Again it can be seen that the Act is being increasingly used to resolve payment disputes in the high end high value construction in mining/oil and gas construction related infrastructure and civil works infrastructure projects. 52 The largest payment claim by value came from the mining/infrastructure sector. This one claim represented 21.9% of all claims. The average and mean values of the claims are not helpful in that the large claims from the mining/oil sector significantly skew the values.

Nevertheless the Report shows that during the reporting period less than ten claims were submitted seeking adjudications for disputes for amounts less than $25,000. Additionally, payment claim disputes in the range of $25,000 to $100,000 account for less than 0.5% of the value of all claims.

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52 See Table 2.3.
The major organisations (IAMA, AIB, HIA, and the Law Society of WA) with the exception of the MBA considered that the Act was suitable for small claims. However the MBA stated that the Act is ‘clearly not helping in the area of small claims’.

In his submission Mr Jones notes\textsuperscript{53} that:

\ldots the Act is a very suitable vehicle as demonstrated by the decrease in litigation. Unfortunately like arbitration before it, adjudication is being highjacked by the legal industry. Solving that problem would arguably be the biggest success of this review.

However, the important question for this Review is: why are smaller parties generally not using (or underutilising) the Act if the objectives of the Act are to assist smaller parties in the contracting chain and the major professional and industry organisations consider that the Act is suitable for small claims?

The strongly recurring, and I might add disturbing, theme in all of the written submissions and particularly the stakeholder meetings was the widespread lack of knowledge regarding the provisions of the Act. A second and serious issue which has been referred to earlier in this report and will be addressed again later is the general lack of awareness by individuals or smaller organisations of their rights and obligations under the common law of contract and issues which might be generalised under inequalities of bargaining power and unfair practices by larger organisations.

The submission by the Small Business Development Corporation was helpful with respect to reasons why small contractors and subcontractors were not utilising the provisions of the Act. These included:

- Being ‘strung along’ for payment by contractors, leaving them outside of the time period mandated to access the rapid adjudication process;
- Not wanting to damage the business relationship with the head contractor;
- Not wanting to jeopardise their reputation amongst the other head contractors;
- The complexity of the adjudication process;
- The ineffectiveness of adjudication to resolve the matters fairly;
- The costs involved in resolving disputes; and
- The likelihood that larger building companies are better able to protect their interests (e.g. financing legal costs, lack of human resources to expend on preparing for adjudication and expert representation).

Some of these matters were also referred to in part in the submissions of the Subcontractors for Fair Treatment, Master Electricians Australia, the Minister for Southern River, the Hon Rev Peter Abetz MLA and a number of confidential submissions.

\textsuperscript{53} At [5.1].
It was clear during meetings with stakeholders that many persons were not only unfamiliar with the objectives of the Act but unfortunately considered that the Act was there to compensate or protect persons from the normal vicissitudes of construction contracting or inequities in bargaining power. Without dismissing the significance of these issues and the concerns of smaller parties, it is considered that the importance of educating stakeholders cannot be overestimated. The lack of awareness about the Act was also referred to in a number of submissions.

The submission by the Small Business Development Corporation was also helpful with respect to identifying unacceptable practices in the building and construction industry and in succinctly identifying the needs and concerns of members of the construction industry, particularly those with low bargaining power.

With respect to its specific comments on the effectiveness of the rapid adjudication process, the Corporation noted that when the process has been utilised by parties in good faith it has provided sound and timely outcomes for payment disputes. At the same time, the Corporation indicated that the cohort most in need of the service (small business) is not sufficiently informed about its benefits or lacks the time and resources to become acquainted with it. The Corporation further submitted that consideration should be given to the ‘preparation of resource materials and education services to promote the service to industry participants including small businesses’.

The Law Society of WA submitted that while the Act was an appropriate mechanism for the resolution of small claims, the main difficulty arising is that small payment claims are prepared without any real knowledge of the Act. Frequently the claims are lodged late and not in accordance with the requirements of the Act. The Law Society also referred to widespread ignorance of the implied terms provisions of the Act.

The Law Society commented:

These difficulties would arise less often if there were greater grassroots knowledge of the existence and operation of the Act. It appears that frequently small contractors and subcontractors find out about the Act after the horse has bolted.

The IAMA submission was virtually identical to the comments made by the Law Society.

The HIA submission was that in principle the provisions of the Act were suitable for the resolution of payment disputes. As with the AIB submission, it considered that the costs associated with the preparation of the application together with the adjudicator’s fees and the costs associated with enforcement might deter smaller industry participants from utilising the Act.

There is no definitive information currently available regarding the cost of preparing the application or the enforcement of judgements but details of adjudication fees are available from the Building Commission Annual Reports. As noted in the Discussion Paper the highest adjudicator fee recorded over the period 2012–13 for a building construction payment dispute was $29,944.
Of the 1011 adjudications during the period 2005–11, the average adjudication fee charged was $3982 per adjudication. On the basis of information in the latest report of the Building Commissioner which was not available at the time of the preparation of the Discussion Paper, the average adjudicator’s fee for the determinations carried since 2005 is $7265 but this value has been ‘skewed’ as a consequence of a number of recent large determinations. The lowest recorded fee remains at $120 for a commercial building dispute in 2010–11. Individual adjudicator’s fees, as noted on the Building Commission website, range from $180 to $390 per hour. The average adjudicator’s fee per hour is $265.

Objectively, it would appear that the adjudicator’s fees are not considered so prohibitive as to discourage applications.

The MBA submission referred to the loss of focus of the Act’s stated purpose with respect to ‘determining the dispute fairly and as quickly informally as possible’ and referred to a trend identified earlier where the process appears to be becoming ‘increasingly technical and legalistic’. This point has been referred to explicitly by Mr. Jones in his submission. The MBA further opined that the involvement of legal representation invariably results in applications and responses replete with complex legal arguments and references to court and tribunal decisions which ‘obscure the heart of the matter’.

There was anecdotal evidence from adjudicators regarding the volume of the submissions (on one occasion some 47 lever arch files were submitted), and one adjudicator being asked to determine an application on the basis of the interpretation of a High Court dissenting decision.

It was generally acknowledged that the Act was not the only forum for the resolution of payment claims. However there was some misconception by some subcontractor stakeholders that the Act was intended to provide a mechanism for the resolution of all of the issues which may be in dispute in a construction contract. Again, the purpose of the Act is to provide a rapid adjudication process without legal complexities where there is a payment dispute; to prohibit specified ‘unfair’ terms in construction contracts; and imply certain terms where the contract is silent on these issues.

Whilst the concerns of many of the subcontractor stakeholder organisations or groups regarding contractual issues and inequality of bargaining power are acknowledged (and considered important) it is still necessary to look at the purposes of the Act. Previous reference has been made to the Second Reading Speech relating to the Construction Contracts Bill 2004 (WA), and I quote in part:

> Apart from those specific unfair practices, the Bill does not unduly restrict the normal commercial operation of the industry. Parties remain free to strike whatever bargains they wish between themselves as long as they put the payment provisions in writing and do not include the prohibited terms.

Also:

> The process is kept simple, and therefore cheap and accessible even for small claims. In most cases the parties will be satisfied by an independent
determination and will get on with the job. If a party is not satisfied it retains its full rights to go to court or use any other dispute resolution mechanism available under the contract.

The submissions by the Law Society of WA and IAMA succinctly summarise the consensus of the submissions regarding the critical imperative to immediately instigate education programs for awareness and application of the Act at all levels. Specifically:

These difficulties should be addressed by an active education campaign by the registrar and the industry associations rather than by amending the legislation. The active promotion of the Act should be part of the broader training in business basics for small contractors and subcontractors.

I would add that active promotion and knowledge of the Act should be part of the training of all participants in the Western Australian construction industry.

In summary, I am of the opinion that, whilst not exclusive, the most significant issue with respect to the level of utilisation at the lower end of the contracting chain results from a lack of awareness of the objectives and provisions of the Act.

Whilst acknowledging that the role of education and training is not exclusive to the Building Commission and additionally acknowledging the significant and helpful information currently on the Commission website, my recommendation with respect to the role of the Building Commission in the educative process is as follows.

**Recommendation**

*The Building Commission should investigate the introduction of training and awareness programs, conducted by both the Commission and approved organisations, in order to ensure that all sections of the building and construction industry are aware of the provisions of the Construction Contracts Act 2004 (WA) and its intended role.*

### 3.6 Alternative Dispute Resolution (ADR) Mechanisms for Small Claims

A number of comments common or relative to alternate dispute resolution (ADR) have been referred to above. As expected there was no clear consensus with respect to the issue. A number of submissions, including those of the Law Society of WA and the AIB, endorsed amendments to the Act to allow the Building Commission to manage an alternative low cost adjudication service for subcontractors seeking payments in relation to claims under $25,000. The MBA, IAMA and HIA did not support the proposal, submitting that the Act currently provides for the resolution of smaller payment disputes. Where there was support for the introduction of an alternative mechanism, there was no consensus that this should be supported by a building services levy, but rather a fee for service.

The Small Business Development Corporation submission supported access for construction businesses to dispute resolution that is both cheap and accessible as well as designed and resourced to provide timely outcomes. The SBDC submission outlined its current ADR service. The service is essentially ‘interest’ based, utilising
negotiation, conciliation and mediation as compared to a ‘rights’ based process involving arbitration or adjudication.

From the Building Commissioner’s Annual reports, as stated previously, it appears that the majority of applications under the Act involve larger organisations or parties. By way of example, in the period 2011–12, 20% of claims were under $25,000; in the period 2012–13, 23% of the claims were under $25,000; and in 2013–14, 9% of the claims were under that amount. I have previously referred to the value of claims in the 2013–14 Annual Report.

At the same time, as noted earlier, there is some anecdotal evidence that the widespread dissemination of the Review Discussion Paper raised significant awareness of the provisions of the Act among smaller parties and there has been a consequent increase in the number of smaller applications, or legal advice sought with specific respect to the preparation of claims.54

As also previously noted, there were comments that the costs of the applications and adjudications were possibly deterring applications from smaller parties, but there was no definitive evidence with respect to this issue. Whilst no evidence was given with respect to the ‘legal’ costs incurred in preparing an application or response, the information obtained from the Commissioner’s Annual Reports indicate that adjudicators’ fees represent on average only 0.35% of the quantum of the claims.

However it should be noted that this may not accurately reflect the adjudicator’s fees specifically with respect to smaller claims. Also on the basis of reported information it is not possible to be definitive with respect to the success or otherwise of smaller adjudicated claims.

On the basis of the submissions viewed overall, it is not considered that the objectives of the Act will be significantly improved by amending to provide for a separate ‘rights based’55 dispute resolution service managed by the Building Commission, notwithstanding the reluctance of supporters of the proposal to fund an alternative scheme via a Building services levy.

As has been referred to earlier, adjudication is not the only means of determining small payment disputes. Apart from the ADR service offered by the SBDC, a large number of organisations and individuals in Western Australia provide ADR services.

The Western Australian Magistrates Court also is important with respect to small claim disputes. The Magistrates Court can deal with claims up to $75,000. There are two ways a claim can be made in the Magistrates Court. A claimant may choose to have the claim heard as a minor case or may make a general procedure claim. The claim can heard as a minor case if it is for an amount of up to $10,000. The aim of the minor cases procedure is to help the parties to come to an agreement generally without lawyers. If the parties cannot or will not agree, the court must hear the matter at a hearing and make a decision. This is only done as a last resort.

54 Jackson McDonald Lawyers, Personal Communication, 11 March 2015.
55 The determinative processes of adjudication and arbitration are essentially (legal) rights based. Mediation is a facilitative process which focuses on the party’s interests rather than rights.
The process in minor case claims is informal and proceedings are not as complex as in those for general procedure claims. All proceedings are to be held in private unless the court otherwise orders. The parties cannot be legally represented unless all parties and the magistrate agree.

I emphasise again, throughout the Review it was clear that many issues arose from a misunderstanding of the purpose and objectives of the Act, a lack of understanding or awareness of the alternative procedures for the resolution of small claims, and ignorance of basic contractual rights and obligations. The term ignorance is not used in any pejorative sense, but as stated earlier it strongly suggests it is incumbent on stakeholder organisations and professional bodies together with the Building Commission to regularly conduct appropriate training and awareness sessions.

The Small Business Development Corporation and the Terms of Reference of the Review queried whether other Building Services legislation could be amended or enhanced to provide small business with other dispute resolution mechanisms. However this appears to be premised on the basis that the Act does not provide a 'suitable service'. I am not convinced on the evidence that this is the case.

I am not convinced that a third statutory rights based process (additional to adjudication or arbitration) is required for the resolution of payment disputes. The advocates of mediation refer to the success of and the increase in the use of mediation in the resolution of commercial disputes.56

Unfortunately there are no statistics publically available for the number of mediation compared to arbitration or adjudication nominations made by the appointers or professional associations. I note by way of example, that with respect to member categories, at the time of writing this report that the Western Australian IAMA/LEADR membership comprised 33 arbitrators, 39 adjudicators and 251 mediators but I acknowledge that I cannot draw conclusions relating to a preference for mediation from these figures.

The Chief Justice of the Supreme Court of Western Australia, the Hon Wayne Martin, has stated that the Supreme Court's approach to managing civil disputes using mediation is very successful and that as a result less than 2% of contested civil matters are resolved by trial.57

In summary, the resolution of payment disputes is provided on a legislative basis through the Construction Contracts Act 2004 (WA) and the Commercial Arbitration Act 2012 (WA). The Commercial Arbitration Act is not confined to complex disputes but allows for expedited processes suitable for small claims. Additional avenues for the resolution of small claims are available through other ADR processes including mediation and expert appraisal offered by a number of organisations.58

Regarding the role of the Building Commission I make the following recommendation.

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56 L Boulle, Mediation: Principles, Process and Practice (Butterworth’s, 2005); T Sourdin, Alternative Dispute Resolution (Lawbook Co., 2002).
57 Supreme Court of Western Australia, Annual Review 2014 (2014) 15.
58 These include the Small Business Development Corporation (SBDC), Institute of Arbitrators and Mediators Australia (IAMA), Lawyers Engaged in Dispute Resolution (LEADR), Chartered Institute of Arbitrators (CIArb), and the Law Society of Western Australia.
Recommendation

It is not considered that the objectives of the Act will be significantly improved by amendments to the Act or associated legislation which create a separate dispute resolution service provided by the Building Commission and in consideration of the reluctance of supporters of the proposal to fund an alternative scheme through a building services levy.

The Building Commission should publish on its website the names of organisations and approved ADR practitioners who provide ADR services to the construction industry together with details of the range of options for the resolution of disputes.

The adjudicator’s details of experience and expertise shown on the Building Commissions website should be expanded to provide additional information to parties seeking an adjudicator. Adjudicators should be requested to conform if they are willing to adjudicate smaller payment disputes or act for a fixed fee.

3.7 Regulation of Adjudicators

The main consideration with respect to this issue was whether current registered adjudicators are competent, by way of qualifications, training and experience, to deal with the issues arising from the resolution of construction payment disputes (again in a ‘timely’ manner) where submitted by some stakeholders were increasing complex issues. This was described as a ‘creeping legalism’ or judicial approach to the resolution of the issues. In one candid submission, referred to above, this was described as a ‘high jacking of the process by lawyers’. It was apparent from the research carried out during the preparation of the Discussion Paper that a number of disputes involved issues of law which at first sight might be beyond the competence of a non-legally trained adjudicator.59

As mentioned above there was a submission that suggested that fees charged by some adjudicators were excessive in comparison to the amounts claimed or awarded and consequently some reluctance by parties to utilise the provisions of the Act in view of the overall cost.

The role of the Building Commission and the nominating authorities in monitoring adjudicator performance was considered in the preliminary research associated with this review.

The dispute resolution provisions of the Act are premised on the basis that a person qualified, and with prescribed experience, in law or one of the construction related disciplines would have the ability to rapidly determine typical payment disputes which may arise in a construction contract. It is trite to say that it was never the intention of the framers of the Act to require a level of legal knowledge consistent with that of a legal practitioner.60 I have previously, with respect to the issue of complexity, cited

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59 The research carried out in the preparation of the Discussion Paper indicated that approximately 76% of adjudicators were not legally trained.

60 The Master Builders Association comment that they regularly use trade trained adjudicators in a range of disputes. Personal Communication, 14 July 2015.
the decision in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd*, where Pritchard stated:61

An adjudicator will not necessarily be legally qualified and, as I have already observed, the Parliament did not, in my view, intend that an adjudicator should express reasons for a determination with the same degree of precision as might be employed by, or expected of, a court.

At the same time, Martin J noted in *Red Ink Homes Pty Ltd v Court* that this was ‘not an invitation towards an acceptance of arbitrary or irrational decisions’.62

The requirements of an adjudicator with respect to questions of law were noted by Chaney J in *WQube Port of Dampier and Loots of Kahlia Nominees*.63

There is no doubt that, in undertaking an adjudication, an adjudicator is required necessarily to determine questions of law. Most obviously, an adjudicator is required to construe the terms of the relevant construction contract which is the subject of dispute. He or she must determine whether or not the requirements of the contract have been met such that a payment is due, or a security must be returned. The decision of the adjudicator clearly affects legal rights and obligations, even though those same rights and obligations may be the subject of the other court or arbitration proceedings.

The extent of an adjudicator’s legal knowledge has also been recently considered, as noted above, by Mitchell J in the Supreme Court of Western Australia in *Laing O’Rourke Australia Construction Pty Ltd v Samsung C & T Corporation*.64

The currently registered adjudicators are drawn from a wide range of construction disciplines but also include a number of legal practitioners with backgrounds in construction law. Most are members of professional associations such as the Australian Institute of Building (AIB), the Institute of Arbitrators and Mediators Australia (IAMA), the Royal Institute of Chartered Surveyors (RICS), the Australian Institute of Quantity Surveyors (AIQS), the Chartered Institute of Arbitrators, Engineers Australia (EA Aust.), the Australian Institute of Architects (AIA) and the Law Society of Western Australia. Each of these organisations offers continuing professional development programs (CPD) in various aspects of the Act. The Building Commission’s website contains a list of registered adjudicators.65

The mandatory qualifications of registered adjudicators are set out in reg 9 of the *Construction Contracts Regulations 2004* (WA):

**Regulation 9. Qualifications of registered adjudicators**

(1) For the purposes of section 48(1) of the Act, an individual must have the qualifications and experience set out in sub-regulations (2), (3) and (4) to be eligible to be a registered adjudicator.

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61 *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, [124].
62 *Red Ink Homes Pty Ltd v Court* [2014] WASC 52 [142].
63 *WQube Port of Dampier and Loots of Kahlia Nominees* [2014] WASC 331.
64 [2015] WASC 237, [223]–[226].
(2) The individual must —

(a) have a degree, from a university or other tertiary institution in Australia, in a course listed in the Table to this paragraph, or an equivalent qualification from an overseas university or tertiary institution;

| Table |
|------------------|------------------|
| Architecture     | Building         |
| Engineering      | Construction     |
| Quantity surveying| Law              |
| Building surveying| Project management|

(b) be eligible for membership of a professional institution listed in the Table to this paragraph;

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<td>The Royal Australian Institute of Architects</td>
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<td>The Institute of Arbitrators and Mediators of Australia</td>
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<td>Australian Institute of Project Management</td>
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or

(c) be a builder registered under the Builders’ Registration Act 1939.

(3) The individual must have had at least 5 years' experience in —

(a) administering construction contracts; or

(b) dispute resolution relating to construction contracts.
(4) The individual must have successfully completed an appropriate training course which qualifies the person for the performance of the functions of an adjudicator under the Act.

(5) For the purposes of sub regulation (2)(a), a qualification is equivalent to another if the course of study for the first qualification covers approximately the same matters as does the course of study for the second.

**Regulation 10. Adjudicator application fee**

For the purposes of section 48(3) of the Act, a fee of $51 is payable on the application of an individual for registration as a registered adjudicator.

In the first year of operation of the Act (2005–06), 39 people applied to the Construction Contracts Registrar for registration as an adjudicator. Currently, there are 66 registered adjudicators. Of the 66 current adjudicators, 50 (76%), are non-lawyers, with the majority having civil engineering, building, architecture or project management backgrounds. This appears to be consistent with the intention of the Act that adjudicators with qualifications and experience in the basic construction disciplines would be equipped to provide a rapid adjudication process to deal quickly with payment disputes and ensure the continued flow of money in the contracting chain.66

The general background of the adjudicators, as noted above, is also consistent with the intention of the framers of the Act, and supported by decisions of the WA Supreme Court, that the adjudication process is to be relatively free of issues requiring complex legal analysis and designed so that persons with basic legal training would be able to hand down a competent determination.

In the reporting period 2012–13, only 35 of the 64 registered adjudicators undertook adjudications. The Discussion Paper provided details of the adjudicator registration over the period 2005–2013.

The costs of adjudication are essentially the costs of the adjudicator at a rate previously agreed between the adjudicator and the parties and the costs of any testing done or expert engaged.

I have referred to some of the following information earlier in this report but the details are repeated to assist in the understanding of the matters relative to the issue. Information from the Building Commission website reveals that adjudicators’ fees range generally from $100 to $400 per hour, plus GST. Currently the average fee per hour is $265. The fee variation appears to relate to the qualifications and experience of the adjudicators. All of the adjudicators with fees of $350–400 per hour are legal practitioners, and all are experienced members of the independent bar or solicitors within the construction industry. One adjudicator, charging similar fees, is an engineer with vast experience in management roles, construction contract

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66 Department of Housing and Works (WA), ‘Building Payment Disputes; Information for Homeowners about the Construction Contracts Act’ (DHW Q562, Department of Housing and Works (WA), May 2007). See also Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture [2005] WASAT 269. This was the first application for review of an adjudication determination under the Act.
administration and dispute resolution within the construction industry. I note that 25 (38%) of 66 adjudicators listed hourly fees higher than $250. Of these, 11 (44%) of the 25 were legal practitioners.

The highest adjudicator fee was recorded over the period 2013–14 for a marine works payment dispute and was $42,350, while the lowest recorded fee remains at $120 for a commercial building dispute in 2010–11 as stated earlier.

The total adjudicator fees over the period 2005–2014 were $5,242,947.47 for 1186 payment claims. When considered in comparison to the amount claimed, the adjudicator fees represent only 0.35% of the amount claimed. On this basis there is no evidence to suggest that the adjudicator fees are excessive and deter parties from using the adjudication process.

A number of submissions referred to the high legal costs associated with the preparation of the application or the response where legal practitioners are involved. One submission indicated that the legal costs associated with the preparation of a claim were in the vicinity of $100,000. However no details were provided regarding the quantum of the claim. Overall, no definitive information was presented by any other party and this information is not available on the public record.

With respect to the cost of adjudication, the Act provides that the parties involved in the payment dispute are to pay the costs of the adjudication in equal shares and the parties are jointly and severally liable to pay the costs of the adjudication.67 The costs of the adjudication may be recovered from a person liable to pay the costs in a court of competent jurisdiction as if the costs were a debt to the adjudicator.68 The submissions indicated that enforcement of the adjudication determination was an issue of concern in the operation and effectiveness of the Act, and this will be discussed separately below.

The consensus from the written submissions, together with comments made at the stakeholder meetings, indicate that the registration requirements are generally satisfactory. Only four of the 49 submissions did not agree with the current registration requirements. There is a diverse range of occupations and experience within the current adjudicators which is relevant to the determination of construction payment issues. I note that adjudicators in NSW are not required to undergo any prescribed training and are not required to be registered.69

There were a number of references to what I have described above as the ‘creeping legalism’ of the disputes as a consequence of complex legal issues. Upon reflection, the comment appeared to have been made by some parties as a reaction to the involvement of the legal profession in the preparation of claims and responses rather than the complexity of the legal issues. The issue then becomes one of whether the current approved adjudicator programs provide the necessary skills required for the diverse range of issues relevant to contemporary payment disputes.

67 Sections 44(5), 44(6).
68 Section 44 (12).
The current approved Prescribed Appointors who conduct adjudicator training are IAMA and the RICS (conducted in association with Jackson McDonald Lawyers). Each of the courses emphasises the specific provisions and applications of the Act and are conducted over two days together with a determination writing exercise. They presume knowledge and awareness of the basic law of contract. In the meetings with adjudicators and persons with a good knowledge of the Act, such as the professional organisations and legal community, the importance of an adequate level of understanding of the basic laws of contract was emphasised. With the involvement of the legal profession in the preparations of both applications and responses, issues of contract interpretation, breach and damages form a large part of the determination. As mentioned above, an example was given of an adjudicator being asked to determine an issue which involved dissenting opinions of members of the High Court of Australia (HCA). Additionally, one of the first adjudications, which was subsequently subject to SAT review in Western Australia, required a non-legally trained adjudicator to make a determination on the existence of a binding contract from an interpretation of the principles established by the High Court of Australia (HCA) in Masters v Cameron.  

Adjudicators have given to me a number of examples where, increasingly, applications and responses involve voluminous submissions on legal issues relating to contractual interpretation and performance. 

From an examination of the content of the current adjudicator programs and from personal knowledge as a consequence of having completed a training program (and in some part as a consequence of my own experience as an adjudicator), I believe that the current content of approved training programs should be expanded to include topics of contract formation, terms of the contract, performance, breach and damages. Additionally, it would be helpful to include sections dealing with the principal Australian Standard General Conditions of Contract together with issues which have given rise to SAT or judicial review. 

With respect to the questions raised in the Discussion Paper, again there was some diversity of opinion but, on balance, the current registration requirements do not require amendment and the consensus was that there was no significant support for registration for a finite time. The AIB submitted that it would be beneficial to require formal postgraduate qualifications for adjudicators but overall the submissions conclude that the purposes of the Act, with respect to adjudication, are best achieved by having the widest pool of adjudicators available. 

With reference to the submissions by the legal profession and the nominating organisations, the Law Society considered that the present system for the regulation of adjudicators was satisfactory and there is no need for postgraduate qualifications, although knowledge of basic contract principles is appropriate. The Law Society did

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70 Masters v Cameron (1954) 91 CLR 353. 
71 The Independent Inquiry into Construction Industry Insolvency (The Cole Inquiry) also referred, in part, to aspects of the Building and Construction Industry Security of Payment Act 1999 (NSW). The Inquiry recommended that training for adjudicators include an overview of the law of contract and the laws relating to building and construction; analysis of building contracts, analysis of costs and claims in the industry, and detailed analysis of building and construction claims and contractor entitlements. See also; NSW Department of Finances and Services, ‘Proposed Amendments to the Building and Construction Industry Security of Payment Act 1999’ (Consultation Paper, 23 January 2013) www.services.nsw.gov.au. A similar recommendation regarding the content of adjudicator training courses is found in Recommendation 38 of the Wallace Report at page 12.
not see the need for further ‘specific’ CPD requirements as there are already a number of organisations providing CPD services. A review of the literature reveals that there are also numerous articles published in the professional and learned journals regarding adjudication. The Law Society did not advocate the regulation of fees on the basis that there was no clear relationship between an adjudicator’s hourly rates and the cost of the adjudication.

As noted above, the AIB did support the need for formal postgraduate qualifications for adjudicators but in view of the current programs did not see the need for formalised specific CPD requirements. The AIB did not support the prescription of adjudicators’ fees due to the ability of the parties to independently access the hourly fees as provided on the Building Commission website.

The IAMA submission on the issues was extensive, perhaps in view of their significant role in both adjudicator training and as a prescribed appointor. They submitted that the requirements are in general terms satisfactory and there is no objective justification for adjudicators to be registered for a specific time. The requirement for postgraduate qualifications was not supported due to concerns that it could reduce the number of adjudicators, particularly those available to deal cheaply with small scale disputes. As with the Law Society and AIB, there was no support for additional specific CPD requirements by way of amendment to the legislation. IAMA addressed the issue of hourly rates in some detail but concluded that high rates do not necessarily result in expensive determinations. They submitted that the hourly rates of adjudicators are substantially less than those of the lawyers involved in the process and consequently are not seen as unreasonable. The hourly rates of adjudicators have been noted above.

At the same time there were a number of submissions relating to the ability of non-lawyer adjudicators with respect to contractual issues. As mentioned above, the two approved adjudicator accreditation courses in Western Australia are run by the Institute of Arbitrators and Mediators Australia (IAMA) and the Royal Institute of Chartered Surveyors (RICS). I have also had the opportunity to review the IAMA (Qld) training course. The emphasis in the courses is on the interpretation and application of the provisions of the Act, that is, the jurisdictional and administrative procedures of the Act. The presumption being that those otherwise qualified, as per the regulations, would have a good understanding of contract law or the provisions of the standard general conditions of contract. Whilst the number of applications for review of determinations is low\(^{72}\) in comparison with the number of determinations as noted in the Discussion Paper, there were a number of issues which might generally be termed as contractual rather than jurisdictional despite the approach of SAT to only consider review on the basis of jurisdictional error and not on the merits.

There was general consensus for the need for continuing professional development. It was not considered that this be formalised in any way in view of the fact that the nominating bodies (especially IAMA) conduct regular sessions and ‘master classes’ dealing with the Act. The Review has also indicated that organisations such as the

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\(^{72}\) The Annual Reports of the Building Commissioner provide details of all adjudications reviewed by SAT and the Supreme Court. By way of example, during the 2013–2014 period, of the 175 applications, seven matters were referred to SAT for review and seven matters were referred to the Supreme Court. From the commencement of the Act until June 2014, less than 2% (23/1186) of all adjudications have been referred to the Supreme Court. Peter Gow, ‘Report of the Building Commissioner for the Financial Year ’30 June 2014’ (2014) [10].
Society of Construction Law, the Law Society of WA, Legalwise and CPDS Seminars regularly provide seminars or conferences dealing with aspects of the Act. Additionally, a number of learned journals regularly feature articles on the Act. The overall ability of adjudicators and the extent of their participation in CPD appear to be a factor taken into account in allocating matters to adjudicators.

At the same time there is an important role for the Building Commission in the provision of professional development activities. The Building Commissioner is the most appropriate person to identify problematic issues with respect to adjudicator performance. I am of the view that there would significant benefit with respect to the application and effectiveness of the Act, if the Building Commissioner was to conduct regular seminars and workshops either face to face or online. The introduction of an email “alert” system by the Building Commission in response to issues which arise would also be of assistance to all stakeholders.

With respect to the issue of prescribed fees there was some divergence of opinion. There is no evidence that high hourly rates result in expensive determinations. There is some validity in the argument that experienced adjudicators with higher rates may be able to determine the issues in a shorter time.

In considering the issue of prescribed fees I also referred to the West Australian Workers’ Compensation Arbitration Service which consists of a Registrar and Arbitrators who determine matters in dispute in accordance with the *Workers’ Compensation and Injury Management Act 1981* (WA) and *Workers’ Compensation and Injury Management Arbitration Rules 2011* (WA), without attempting to resolve it by conciliation. The rate prescribed by the sessional arbitrators for this work is $275 per hour.

With respect to the auditing of adjudicator performance, it is considered that adequate provisions are made in the current Act. With respect to IAMA adjudicators, the Institute has initiated a process which might be described as ‘monitoring’ where panels of three experienced adjudicators view determinations after they have been submitted to the Building Commissioner. The anecdotal evidence indicates that this assists in maintaining the required standard of IAMA adjudicators.

Any formal process of auditing, outside of the existing provisions of the Act, is problematic in that it may infer a process of substantive review of the merits of determinations upon the application by a party dissatisfied with a particular outcome. In terms of misconduct or incompetence the Act currently provides in s 48(5) that:

48. Registering adjudicators

(5) The Building Commissioner may cancel the registration of an individual as a registered adjudicator if satisfied that the individual —

(a) has ceased to be eligible to be registered;

(b) has misconducted, or is incompetent or unsuitable to conduct, adjudications under Part 3.

Consequently the Commissioner has the power to deregister adjudicators in the prescribed circumstances. Further, in accordance with s 49 of the Act, a person who is aggrieved by a decision of the Building Commissioner made under s 48 may apply to the State Administrative Tribunal for a review of the decision. A process for the review of determinations, albeit on restricted grounds, is provided in the Act in s 46.

The Act is clear in s 45 that a determination does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.

In summary, the current registration requirements do not require amendment and the consensus was that there was no significant support for registration for a finite time. Additionally, there was limited support for adjudicators requiring postgraduate qualifications but overall the contention was that the purposes of the Act are best achieved by having the widest pool of adjudicators available.

The widespread use of legal practitioners in the process appears to have introduced a degree of legal complexity in adjudications which was not anticipated in the planning of the adjudicator training courses.

There was general consensus on the need for continuing professional development. It was not considered that this should be formalised in any way.

There is no evidence to suggest that adjudicator fees are excessive and deter parties from using the adjudication process.

**Recommendations**

The current registration requirements for adjudicators do not require amendment. The purposes of the Act are best achieved by having the widest pool of adjudicators available. There is no need for formalised continuing professional development (CPD) requirements. There is no evidence to suggest that the adjudicator fees are excessive and deter parties from using the adjudication process and consequently fees should not be prescribed.

The content of the current approved adjudicator training program should be expanded to include topics on contract formation, terms of the contract, performance, breach and damages. Additionally, it would be helpful to include discussions of the principal Australian Standard General Conditions of Contract and the common industry based general conditions of contract.

Approved courses should also include sessions dealing with issues which have given rise to State Administrative Appeal (SAT) or judicial review of determinations.

**3.8 Exclusion of Liquidated Damages**

With the exception of those responses which did not address the issue, the overall response was clearly in favour of the notion that liquidated damages should be permitted to be awarded as part of an adjudication determination. In the research associated with the preparation of the Discussion Paper there was no convincing evidence in support of an exclusion of liquidated damages. One submission referred
to s10B(2)(c) of the **Building and Construction Industry Security of Payment Act 2002 (Vic)** which specifically excludes damages related to claims for breach of construction contracts when progress payments are calculated.\(^{74}\)

There are however strong arguments in support of granting liquidated damages as part of an adjudication. Firstly, claims for liquidated damages can impact significantly on the financial position of the parties. Also they are ‘pre-agreed’ at the time of entering into the contract and at this stage the parties can elect to claim either general or liquidated damages. If they are ‘penal’ they will be set aside on common law principles.\(^{75}\) A comment was made that on one large Perth construction site, a subcontract provided for liquidated damages of one dollar per day, however no documentary evidence was provided in support of the allegation. I have referred to the issues of economic duress and unconscionable conduct later in this report.

Secondly, the scheme of the Act is that the outcome of the determination with respect to the payment claim must reflect the legal obligation and entitlements of the parties. Excluding particular claims outside the parameters of the previously agreed contract terms is not appropriate. Finally, if the adjudicator considers that an issue of liquidated damages is too complex the application may be dismissed under s 31(2)(a)(iv) of the Act.

**Recommendation**

*The Act should not be amended to exclude liquidated damages.*

### 3.9 Inclusion of Domestic Building Contracts

This inclusion should be retained. Only one response indicated a preference for the removal of domestic construction work from the Act, however no valid arguments were presented as to why a significant industry sector should be excluded from the Act. The issue was considered in some detail during the drafting of the Act. As noted in the Discussion Paper, applications in connection with domestic construction payment issues constitute some 12% of the overall applications since 2005. The provisions of the Act with respect to domestic construction appear to be utilised by consumers, subcontractors and builders and thus should remain unchanged. From the nature of domestic construction work it may be viewed that the Act is working in this section of the ‘smaller’ market.

**Recommendation**

*The domestic building contracts inclusion should be retained.*

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\(^{74}\) As part of the Review, reference was made from time to time to various state security of payment legislation. Coggins has suggested that the complexity of the Victorian Act, including these amendments, ‘may possibly deter industry usage’. Similarly Snookal notes that ‘adjudication remains relatively unused. Undoubtedly that is the natural consequence of our complex and difficult Act’. (Society of Construction Law – Australia, ‘Report on Security of Payment and Adjudication in the Australian Construction Industry – Australian Legislation Reform Sub-Committee’ (Society of Construction Law – Australia, 2014) 29.

\(^{75}\) *Dunlop Pneumatic Tyre Company v New Car Garage & Motor Company Limited* [1915] AC 79.
3.10 Exclusion of Certain Mining Activities

This has been a somewhat complex and controversial issue (with respect to the origins of and rationale for the exclusion) and it has been necessary to consider the issue in some detail. Hopefully the comments may assist in the interim with respect to some of the confusion relating to the exclusion. The majority of the submissions favoured the removal of the ‘mining’ exclusion. So far as the submissions are concerned, 44% of the submissions supported applying the Act to the resources sector while 8% were opposed. 48% of the submissions did not comment upon this issue.

In support of the removal of the mining exemption, the submissions from the major organisations (the Law Society of WA, the AIB, IAMA, and the MBA) were in agreement that the construction work associated with the activities listed in s 4(3) are not fundamentally different from construction work in other contexts and the Act should be amended to reflect this.

The HIA submission did not consider it appropriate ‘that a piece of legislation specifically established for the construction industry should be extended to an unrelated industry which has entirely different work arrangements.’

The most cogent submission in support of the current exclusion came from a major resource Company. The submission noted in part that s 4(3)(c) is unclear and has led to significant debate over the application of the Act. The submission also referred to the Second Reading of the Construction Contracts Bill 2004 (WA) where it was stated that the ‘mining industry has been excluded from this legislation’. The Second Reading however continued by saying that the Act ‘excludes activities that are commonly associated with mining, but it does not prevent its terms operating in respect of some aspects that may be incidental to mining such as construction of work other than those set out in the exclusion.’

The submission also referred to the decisions in Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd and Re Graham Anstee-Brook; Ex Parte Kara Mining Ltd and commented that these interpretations do not reflect the intention of the Act to exclude the mining industry or activities commonly associated with mining. (These two decisions are discussed further below.)

The submission stated that s 4(3) of the Act should be reviewed both to clarify and expand the mining exclusion beyond its current narrow interpretation. This submission appears to be based on the notion that it was the intention of the framers of the legislation to totally exclude the mining industry and suggests that s 4(3) of the Act be reworded as follows:

Constructing projects for any plant, infrastructure or buildings, and related equipment, for the purpose of, necessary or incidental to the extraction, processing, or transport of oil, natural gas, any mineral bearing or other substance, or any of their derivatives.

77 [2012] WASC 120.
The proposed additions are shown in bold text. The submission continued that reading the intention of the framers of the Act to totally exclude all mining activities, the current wording of the exemption has a potential economic impact on mining and resources projects. Rather than paraphrase or summarise I have reproduced the conclusion in total as follows:

Without this clarification and with the multitude and diversity of work on any mining site or project, owners and operators of mining and resource projects are potentially exposed to significant and complex adjudications, from multiple contractors and over consecutive months. Such activity has the ability to cripple the industry, delay and impede a project, and significantly increase tactical claims as sophisticated contractors continue to litigate around the application of the exception within the mining projects.

The research associated with the preparation of the Discussion Paper and this Review could not objectively determine the legislative basis for the exclusion and in particular whether the intention was for a total exclusion. Despite the difference in wording of the mining exclusions in the Western Australian Act and the Queensland Building and Construction Industry Payments Act 2004 (BCIPA), I noted with interest the submission of the Queensland Resources Council which refers to the Western Australian mining exclusion in its submission to the Wallace Review, stating:

The current BCIP Act acts as a surcharge on projects in Queensland, a cost that both the companies producing wealth and the state can ill afford as resource project investment across Australia as well as in Queensland now battles to achieve major cost reductions in the entrenched economic paradigm of collapsed commodity prices. Major companies are entitled to evaluate the total legislative regime in Queensland in their investment risks assessments. The BCIP is a sovereign risk factor. Amending s 10(3) of the BCIP Act so as to align with the WA mining exemption would only be adopting the best legislative standard presently in force in Australia. It would only level the playing field for project investment in Queensland tackling investment leakage to WA head-on. Significantly it is not a total exemption and nor would its adoption put Queensland projects ahead of WA on the risk curve.

The competitive reference to Western Australia is also noted in the Wallace Report where it was stated:

The Queensland Resources Council in its written submissions to the review encouraged the Queensland Government to expand upon the exclusionary provisions contained in s 4(3) of the WA Act to strategically position Queensland as ‘being more attractive to investment than the WA resources sector.’

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78 At page 28 Wallace refers to the principles associated with project risks and quotes the Australian Corporate Finance Law as follows: ‘Each project will have a unique set of risks and circumstances for the financier to consider. Part 3 of this chapter discusses the most significant risks that arise in project financing. In this context it is important to note that not all risks demand the same level of importance for each project, For instance, sovereign risk is largely considered to be of minimal concern in a country such as Australia but it may be of paramount importance for a project in more volatile parts of the world like West Africa.’ Australian Corporate Finance Law, Lexis Nexis Australia, March 2013, Chapter 4 at [4.080].

79 Page 43.
Wallace did not accept that the BCIPA constitutes an unreasonable sovereign risk to the state of Queensland and concluded that there was little justification to restrict the operation of the BCIPA. Consequently, no recommendation was made concerning the expansion of the BCIPA exclusionary provisions with respect to mining.\(^{80}\)

As an aside, Wallace commented that if the proposed review of the Western Australian Act recommended an amendment to include claiming for the construction of plant and equipment, then the 'Queensland Government may consider consulting with the Western Australian Government on this issue to arrive at an appropriate and consistent exclusionary provision for the extraction of oil, gas and minerals'.\(^{81}\)

In order to assist in determining this issue, I considered the provisions of the East Coast and West Coast (WA and NT) legislation and a number of judicial decisions relating to the mining exclusion. Despite the geographical differences I have included NT as part of the West Coast model in view of the similarities in the legislation. Rather than reproduce the section of the Act, the provisions may be generalised as follows.

The Western Australian Act provides that ‘construction work does not include any of the following work on a site in WA — (a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not; [or] (b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance’.\(^{82}\) The Northern Territory exclusions are laid out in similar terms.\(^{83}\)

These exclusions have been the subject of limited judicial consideration in both Western Australia and the Northern Territory.\(^{84}\) It appears, as submitted by a major resource company, that the courts have taken a narrow view of what constitutes ‘mining’ activity. It has been suggested that the second exclusion ‘will certainly exclude … contracts to construct mine shafts, quarries and processing plants, as well as professional services contracts for the design of the same.’\(^{85}\) Perhaps surprisingly, the West Coast provisions do not expressly exclude the extraction of minerals or tunnelling or boring for that purpose.\(^{86}\)

The East Coast exclusions are in different terms, saying that:

construction work does not include any of the following work:

(a) the drilling for, or extraction of, oil or natural gas, [or]

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\(^{80}\) At page 43.

\(^{81}\) At page 43.


\(^{83}\) Construction Contracts (Security of Payments) Act 2004 (NT) s 6(2).

\(^{84}\) Since 2005, the four cases pertaining to mining, oil and gas and processing are; Pilbara Iron ore Pty Ltd v Derek Noel Ammon [2008] WASCA 202, Silent Vector Pty Ltd v Sizer Builders and Squarcini [2008] WASAT 3, Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd [2012] WASAT 13 and Re Graham Anstee-Brooke; Ex parte Karara Mining Ltd [2012] WASC 129.


(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose.\textsuperscript{87}

In some respects the exclusions under the East Coast Acts are narrower than those in the West Coast legislation. While the West Coast provisions refer to drilling for the purposes of discovery or extraction, the East Coast provisions are limited to extraction.\textsuperscript{88} However, the East Coast provisions exclude the extraction of minerals, while the West Coast Acts do not.

It appears that the East Coast exclusion relating to oil or natural gas has not been subject to extensive judicial consideration. However, the exclusion for the extraction of minerals has been narrowly interpreted in Queensland. In the \textit{Thiess} case,\textsuperscript{89} the Queensland Court of Appeal held that this exclusion was not to be given a broad construction, given the ‘beneficial purpose’ of the Act in ensuring the quick interim payment of claims.\textsuperscript{90}

The exclusion was for the extraction of minerals, not work associated with the extraction of minerals. A broader meaning would have required broader language.\textsuperscript{91} While the definition of extraction expressly included ‘tunnelling or boring, or constructing underground works’, it did not expressly refer to ‘equivalent surface works’.\textsuperscript{92} If Parliament had intended the exclusion to extend to activities that were necessary for mineral extraction, it would have been a simple matter to include express words to that effect.\textsuperscript{93} The construction of dams and drains thus did not fall within the exclusion.\textsuperscript{94}

In the \textit{HM Hire} case,\textsuperscript{95} the appellant hired dump trucks and a loader from the respondent.\textsuperscript{96} Under a subcontract with another party the appellant was obliged to carry out clearing and grubbing, topsoil stripping and placement at a coal mine.\textsuperscript{97} The appellant did not undertake any excavation of coal.\textsuperscript{98} Applying its ruling in the \textit{Thiess} case, the Queensland Court of Appeal held that the preparatory earthworks performed by the appellant were not an extraction of minerals.\textsuperscript{99}

In the \textit{J & D Rigging} case,\textsuperscript{100} the appellant had undertaken to dismantle and remove a mineral treatment plant that was bolted onto concrete footings on land that was subject to mining leases.\textsuperscript{101} The Queensland Court of Appeal held that the security


\textsuperscript{88} Coggins, Elliott and Bell, above n 86, 18.

\textsuperscript{89} \textit{Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd} [2013] 2 Qld R 75; [2012] QCA 276.

\textsuperscript{90} \textit{Thiess} [62].

\textsuperscript{91} \textit{Thiess} [63].

\textsuperscript{92} \textit{Thiess} [66].

\textsuperscript{93} \textit{Thiess} [68].

\textsuperscript{94} \textit{Thiess} [69]. The other judges agreed on these points: at [2], [4].

\textsuperscript{95} \textit{HM Hire Pty Ltd v National Plant and Equipment Pty Ltd} [2013] QCA 6.

\textsuperscript{96} \textit{HM Hire} [2].

\textsuperscript{97} \textit{HM Hire} [11].

\textsuperscript{98} \textit{HM Hire} [8].

\textsuperscript{99} \textit{HM Hire} [9]. The other judges agreed on these points: at [1], [32].

\textsuperscript{100} \textit{J & D Rigging Pty Ltd v Agripower Australia Ltd} [2013] QCA 406.

\textsuperscript{101} \textit{J & D Rigging} [2]–[3], [45].
of payment legislation applies to construction work carried out on land that is subject to a mining lease except in the narrow area where the mining exclusion applies.\footnote{J & D Rigging [47]–[53]. The other judges agreed on this point: at [1], [62].} The High Court refused special leave to appeal this decision, indicating that there were insufficient prospects for its success.\footnote{Agripower Australia Ltd v J & D Rigging Pty Ltd [2014] HCATrans 106, 10, line 338.}

In summary, as can be seen from the above the current wording of the mining exclusion has created considerable debate and uncertainty where provisions in the Act apply to a number of (but not all) construction contracts for work on mining sites in Western Australia.\footnote{Davis, above n 85, 163–164.} Due to the resources exclusions, the resources industry has operated independently from the security of payment legislation in many respects. For example, the Act prohibits contractual payment periods of over 50 days.\footnote{Construction Contracts Act 2004 (WA) s 10.} However, comments were made during the Review that such terms are commonplace in the resources sector. It is appreciated that full application of the security of payment legislation to the resources sector would involve a major adjustment to longstanding practices.

Such a change may result in a major reallocation of contractual risk in favour of contractors but against the mining companies. It is acknowledged that to impose a more onerous payment system upon the industry in a period of economic uncertainty may require caution.

However when viewed objectively, construction work involves common issues and risks whether it be for a multi-storey commercial building or a mining construction. Provided the construction work falls within the provisions as set out in ss 4(1) and 4(2) of the Act, I am not convinced that the mining or resources sector should be considered so different as to fall outside the provisions of the Act. The submissions, with the exception of the two discussed above, stated that the commercial pressures being felt by the mining industry, apart from those generated by the size of the projects, are no different to those experienced by other sectors of the construction industry and there can be no justification for legislation discriminating against a party because of the size of the work. As was noted in a number of the submissions, large claims are not necessarily more complex than smaller claims. Whilst acknowledging the economic benefits to the state as a consequence of the mining and resource sector,\footnote{P Downes, K Hanslow, P Tulip, ‘The Effect of the Mining Boom on the Australian Economy’ (Research Discussion Paper 2014-08, Reserve Bank of Australia) \url{http://www.rba.gov.au/publications/rdp/2014/pdf/rdp2014-08.pdf}.} I cannot objectively conclude that contracting parties in this sector should be treated differently to other parties in all other sectors of the building and construction industry.

**Recommendation**

*The wording of s 4(3)(a) and (b) of the Act should be amended to bring the current excluded activities within the jurisdiction of the Act.*
3.11 Construction of Plant for the Purposes of Extracting or Processing

The submission and comments regarding this issue generally reiterated the views with respect to the general mining exclusion and this section should be read in conjunction with the previous section as the issues are related. 44% of the submissions supported applying the Act to the construction of plant for extracting or processing purposes, while 10% of submissions were opposed. 46% of the submissions did not comment upon this issue.

In terms of the submissions from major organisations, the Law Society of WA, the AIB, IAM and the MBA were emphatic that the exclusion should be removed. The general consensus appears to be that the existence of the exclusion has served only to complicate and ‘cloud’ the issue and exclude activities which would have otherwise quite reasonably been construed to be within the Act’s objectives and intentions. As with the mining activities exclusion, the HIA did not consider it appropriate that a piece of legislation specifically established for the construction industry should be extended to an unrelated industry, and further, ‘the scope and coverage of the Act is now well settled and any changes in this area would potentially add unnecessary and unwarranted complexity.’

The Western Australian Act currently provides that ‘construction work does not include … the following work on a site in WA — … (c) constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance’. This provision is unique to the Western Australian Act.

The issue has been considered both by the academic writers and in the Western Australian jurisdiction. It appears that the exclusion has also been narrowly interpreted, but this issue is far from settled. In the Anstee-Brooke case, a contractor was required to construct a pipeline that would transport water to an iron ore mine. The Western Australian Supreme Court held that whether the pipeline fell within the exclusion ‘depends upon whether the pipeline, and the function performed by it, is so related to the extraction or processing of iron ore that it warrants being held to be plant.’

After its transportation along the pipeline the water was used for extracting or processing iron ore. However, no extraction or processing of iron ore occurred in the pipeline. The pipeline did not form part of a plant for the purposes of extracting or processing a mineral, so it did not fall within the exclusion.

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107 Construction Contracts Act 2004 (WA) s 4(3)(c).
109 Wallace, above n 1, 42.
111 Anstee-Brook [2]–[3].
112 Anstee-Brook [16].
113 Anstee-Brook [16].
In the Conneq case, a desalination plant was to be constructed as part of an iron ore mine. A contractor was required to undertake mechanical and electrical work for the plant construction. The State Administrative Tribunal held that work constructing any plant ‘encompasses work forming part of the process of constructing a plant’, but not the installation of an already completed plant. In this case the contractor was required to assemble and complete the building of the plant from modules, which constituted ‘constructing the plant’.

The exclusion also required that the purpose of the plant was to extract or process ‘any mineral bearing or other substance’. The word ‘mineral’ in this context was not identical to its meaning under the State’s Mining Act 1978 (WA). ‘Mineral bearing substance’ was better defined in terms of its dictionary definition as an inorganic substance. Salt was a mineral according to those definitions and general usage. The desalination plant would ‘process’ salt water.

The words ‘or other substance’ do not mean any substance at all. Those words should be interpreted in accordance with their resources industry context. Coal is not a mineral but would constitute an ‘other substance’ that is mined. The substance need not be mined for profit. The exclusion is directed to the purpose of the plant and not to the use of the product of the plant. The purpose of the plant was to produce desalinated water, even though that water was used to process ore.

As with the general mining exclusion it appears that the present section was drafted as a consequence of the special importance of the resources industry for Western Australia. Whilst conjectural, it appears that the provision was adopted with the specific needs of the State in mind with respect to reducing factors which may impede or fetter the important resource industry.

Again, the majority of submissions were in favour of amending the Act to include among construction work generally, the constructing of any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance. When the objectives of the Act are considered (especially the principle of ‘keeping the money flowing’), there is no strong objective reason for the current exclusion.

**Recommendation**

*The wording of s 4(3)(c) of the Act should be amended to bring the current excluded activities within the jurisdiction of the Act*

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115 Conneq 1], [11].

116 Conneq [59].

117 Conneq [60].

118 Conneq [61].

119 Conneq [65]. See s 8(1), Mining Act 1978 (WA).

120 Conneq [70].

121 Conneq [71].

122 Conneq [81].

123 Conneq [75].

124 Conneq [76].

125 Conneq [82].

126 Conneq [84].
3.12 Exclusion of Artworks

The Act provides that, pursuant to s 4(3)(d), construction work, for the purposes of the application of the Act, does not include the constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations and murals. The issue for consideration was whether the exclusion should continue to apply in view of the ‘construction activities’ associated with or in connection with, the installation of artworks. There is no definition in the Act with respect to what constitutes or what would be deemed as ‘artworks’ or ‘wholly artistic.’

The specific provisions are:127

4. Construction work

(3) Despite subsection (2) construction work does not include any of the following work on a site in WA —

(a) constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations and murals; …

Similar provisions are found in The Construction Contracts (Security of Payments) Act 2004 (NT):128

6. Construction work

(2) However, construction work does not include any of the following work on a site in the Territory:

(c) constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing wholly artistic works including sculptures, installations and murals;

Whilst the research conducted as part of the Review could not determine the rationale for the current exemption, it is presumed that the WA exclusion was intended to apply specifically to principally ‘aesthetic’ items such as a painting, sculpture, photograph, or murals that are created to be aesthetically pleasing or to express an important idea or feeling.

However a number of submissions referred to construction activities associated with the creation of finished ‘artworks’ which involved trades or activities including design, drafting, brickwork, tiling, and steel fabrication, and commented that the work done by associated trades should fall within the definition of ‘construction work’ in the Act.

It was submitted that artistic sculptures were being increasingly utilised in architectural design and the example was given of one local government authority

127 Construction Contracts Act 2004 (WA) s 43.
which requires that proposals for commercial and mixed residential commercial developments over a certain threshold are to set aside 1% of the total project cost for the development of public art.\textsuperscript{129}

In terms of specific response to this issue, of the total submissions received, 28 did not comment on the issue. As with other failures to respond to particular issues, this does not imply acceptance of the artworks exemption. Only one of the submissions expressly noted that the artwork exemption should remain. Twenty of the submissions elaborated on the fact that associated construction work should be applicable to artworks. Whilst the issue is not considered overly significant in the overall context of the Review, nevertheless it is considered that the artworks exemption should not apply to any construction activities not considered as ‘wholly artistic’ and the term ‘wholly artistic’ should be defined in the Interpretation section of the Act (s 3).

Recommendation

Section 4(3)(d) of the Act should be amended in order to allow construction work associated with wholly artistic works to be deemed construction work for the purposes of the Act, and the term ‘wholly artistic’ should be defined in the Act.

3.13 National Uniformity and ‘Harmonisation’

The lack of uniform or national security of payment legislation is a relevant issue and there have been a number of suggestions for statutory reform.\textsuperscript{130} The issue for consideration with respect to national harmonisation was whether or not Western Australia should adopt the Society of Construction Law Australia’s proposal for a national approach to security of payment legislation (The SOCLA Report)\textsuperscript{131}. The issue has also been considered in a number of academic papers cited in the references.

In 2001, the Cole Inquiry found that national consistency was unlikely to be achieved without federal legislation.\textsuperscript{132}

It is relevant to note that whilst some 22% of the submissions favoured the adoption of a national approach to security of payment legislation, this was clarified by comments noting that the uniform legislation should be based on or inspired by the WA Act which would serve as the model for the uniform security of payment law. Of the 23 written submissions on the issue, 21 responses favoured the retention of the WA Act (albeit subject to some minor amendments) whilst two submissions did not support the continuation of the WA Act. Despite the preference for the WA Act the issue is contemporary and recurring, so has been considered in some detail. It is beyond the scope of this review to make a detailed comparison of all of the provisions of the respective legislation but they are briefly summarised as follows.

\textsuperscript{129} See City of Vincent Planning and Development Manual, Policy No 7.5.13; Percent for Public Art.
\textsuperscript{131} Society of Construction Law Australia, Australian Legislative Reform Sub-Committee, Report on Security of Payment and Adjudication in the Australian Construction Industry (February 2014).
As mentioned above there are two broad models of security of payment legislation in Australia. Using the terminology described above, the ‘East Coast model’ applies in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria. Under that model a ‘dual payment’ system operates where claims may be made under the Act or under the contract. The statutory payments system overrides any contrary contractual provisions.\textsuperscript{133} Claims may only be made ‘upwards’ in the contractual chain. The provisions regarding matters such as the appointment of an adjudicator and the submissions that may be considered by the adjudicator are more prescriptive than those in the West.\textsuperscript{134}

As stated above, the ‘West Coast model’ applies in Western Australia and the Northern Territory. Under that model, payment claims are in accordance with the contract. Contractual provisions regarding payment are thus mostly preserved. The Act enforces the contract.\textsuperscript{135} Claims may be made both ‘upwards’ and ‘downwards’ in the contractual chain. The provisions regarding matters such as the appointment of an adjudicator and the submissions that may be considered by the adjudicator are less prescriptive than those in the East.\textsuperscript{136}

Given the divergences between these two broad models, there have been suggestions that national harmonisation of security of payment legislation should be a goal. For example, in 2014 the Society of Construction Law Australia proposed the adoption of a national model for security of payment legislation.\textsuperscript{137} So far as the submissions are concerned, 27% did not support consideration of the Society’s proposal, 23% did support its consideration, and 50% did not comment upon this issue.

Given the larger number of jurisdictions that have adopted the East Coast model, there is likely to be considerable pressure for any harmonisation to be based upon that model. If there are advantages in the retention of the West Coast model, harmonisation on the basis of the East Coast model might be a regressive development for Western Australia.

Coggins, Elliot and Bell have catalogued the numerous clear procedural advantages that the West Coast model offers over the East Coast model. Under the East Coast model, a contractor may only make a claim by endorsing the claim as being made under the Act. A contractor may be reluctant to do so out for fear of being blacklisted by the principal.\textsuperscript{138} The West Coast system does not suffer from this disadvantage. The availability of ‘downwards’ claims in the contractual chain is another clear advantage of the West Coast model.\textsuperscript{139}

The rights of respondents are also superior under the West Coast models. Under the West Coast model it is not necessary to make a response to the payment claim in

\textsuperscript{133} The dual payment system has been colourfully dubbed a ‘dual railroad track system’. See Transgrid v Siemens [2004] NSWSC 87, [56]; Schokman v Xception Construction Pty Ltd [2005] NSWSC 297, [23].

\textsuperscript{134} Coggins, Elliot and Bell, above n 86, 15-16, 23.


\textsuperscript{137} Society of Construction Law Australia, above n 131. See also Zhang, above n 136.

\textsuperscript{138} Coggins, Elliot and Bell, above n 86, 23.

\textsuperscript{139} Coggins, Elliot and Bell, above n 86, 24.
order to be able to make an adjudication response, which provides improved procedural justice for respondents.\textsuperscript{140} Under the West Coast model, the adjudicator determines the procedure, whereas legal representation is prohibited under the East Coast system.\textsuperscript{141} Under the East Coast model, the parties cannot agree to appoint a specific person as their adjudicator, but they can do so under the West Coast model.\textsuperscript{142} The East Coast dual payment system creates an administrative burden for payers,\textsuperscript{143} and has also generated far more litigation than has arisen under the West Coast schemes.\textsuperscript{144} The SOCLA Report states that the East Coast model has failed to provide the necessary quality assurance as demonstrated by the frequency with which adjudications are set aside on the basis of jurisdictional error.\textsuperscript{145}

In terms of ‘harmonisation’ and whether Western Australia should consider adopting the \textit{Construction Contracts (Security of Payments) Act 2004} (NT), 31\% did not support adoption of the Northern Territory scheme, only 6\% supported its adoption, and 63\% made no comment upon this issue. There was thus very little support in the submissions for Western Australia to adopt the Northern Territory Act.

During the decade that the Western Australian Act has been in operation,\textsuperscript{146} the construction industry has become accustomed to operating under the present system. In those circumstances, the Northern Territory system would need to be clearly superior to the Western Australian system to justify the inconvenience of such a regulatory change. The submissions to the present Review have not demonstrated any marked superiority of the Northern Territory system over the Western Australian system.

In any event, the Northern Territory legislation is largely based on the Western Australian model, the main difference being the time for lodging an application and exclusion for the construction of plant in the Western Australian Act.\textsuperscript{147} Introducing a new system that differs mainly in detail would be an unnecessary inconvenience for those who already use the existing system.

With respect to whether Western Australia should maintain the current West Coast model (albeit with minor amendments), 42\% supported retention of the existing model, 4\% did not support its retention, and 52\% made no comment upon this issue. There was thus very little support among the submissions for moving to a different model.

The issue of harmonisation has more recently been considered in detail by Marquet.\textsuperscript{148} In referring to the East Coast model, Marquet stated:

\begin{itemize}
\item \textsuperscript{140} Coggins, Elliot and Bell, above n 86, 26.
\item \textsuperscript{141} Coggins, Elliot and Bell, above n 86, 27.
\item \textsuperscript{142} Coggins, Elliot and Bell, above n 86, 27.
\item \textsuperscript{143} Coggins, Elliot and Bell, above n 86, 28.
\item \textsuperscript{144} Coggins, Elliot and Bell, above n 86, 30–31.
\item \textsuperscript{145} Above n 131.
\item \textsuperscript{146} The Western Australian Act entered into force on 1 January 2005. See Western Australia, \textit{Western Australian Government Gazette}, No 216, 14 December 2004, 5999.
\end{itemize}
In addition, much adjudication is overturned for jurisdictional error, suggesting that the east coast adjudication process generates flawed determinations. Under the west coast model, however, there are minimal judicial review applications, and very few of those applications result in the adjudications being quashed on the basis of jurisdictional error. Thus, the west coast system presents significant advantages, both in terms of time and cost, and the determination of claims in accordance with the lawful process.

Marquet concludes that the starting point for the reform of security of payment regimes should commence with the national adoption of the West Coast model.149

Given the marked advantages of the West Coast model (particularly with respect to the issue of procedural fairness and the comparatively lower number of grounds for review of determinations),150 if harmonisation were to take place it should be based on the West Coast model rather than the East Coast model. In the absence of such an approach to harmonisation, Western Australia should maintain its current model, subject to the amendments recommended in the Review.

**Recommendation**

*The Construction Contracts Act 2004 (WA) should remain as the method of security of payment legislation in Western Australia subject to the amendments as suggested as a result of this Review.*

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149 ibid 14.
150 Determinations under the NSW Act have been subject to widespread applications for review for what might be described as minor or technical breaches of the rules of natural justice prompting the description of adjudication as a 'lawyers bonanza'. See P Evans and S Withnall, 'A Little Breach of Natural Justice is Alright – Judicial Review of Adjudicator’s Decisions.' (2005) 17(5) *Australian Construction Law Bulletin.*
4. OTHER RELEVANT ISSUES ARISING FROM THE REVIEW

As indicated in the Introduction to this Review, it was not the intention of the Review to restrict submissions only to those identified in the Discussion Paper. Since the introduction of the Act, a number of judicial decisions, academic commentators and CPD Seminar presenters have highlighted a range of issues relevant to the application and operation of the Act. Additionally, the submissions and stakeholder meetings identified a number of important ancillary issues with respect to the application of the Act. These are discussed below but the order does not reflect any significance or priority. They are:

- Prescribed appointors;
- Judicial review of determinations;
- Enforcing the prohibitions and responding to complaints;
- Calculation of time limits;
- Withdrawal of applications;
- Failure to include minor details in the application;
- Implied terms;
- Trust funds/retention monies;
- The adjudication of two or more claims;
- Oral contracts;
- Inequality of bargaining power/economic duress/unconscionable conduct;
- Publication of adjudicators’ decisions;
- Contracting out;
- The use of standard form contracts;
- Statutory declaration requirements.

4.1 Prescribed Appointors

The terms of reference of the Review also referred to the issue of prescribed appointors. The question related to whether the provisions of the Act with respect to prescribed appointors are appropriate for the efficient operation of the Act. A prescribed appointor is a body registered by the Registrar and prescribed in the regulations as having authorisation to appoint an adjudicator for the adjudication of the payment dispute.\(^\text{151}\)

\(^{151}\) Construction Contracts Act 2004 (WA) s 55.
The responsibilities of prescribed appointors are listed on the Building Commission website. In part, they must keep the identities of the parties to the adjudication confidential and must ensure that the adjudicator does not have a conflict of interest. Prescribed appointors may set their own fees. The Building Commissioner must be notified of these fees and they must be published on the Building Commission’s website and in related publications. Additionally, the prescribed appointor must ensure that information about the fees to be charged is readily available to the public through the prescribed appointor’s own publications, and finally, prescribed appointors must ensure that the Building Commissioner is kept informed of changes to their contact details so that service of requisite documents can be effected and parties to a payment dispute have their legal rights preserved.

In Western Australia, the majority of appointments are made by the prescribed appointors rather than by the Building Commission. By way of example, over the period 2005–2014 they account for 99.3% of adjudication applications with only four not appointed by a prescribed appointor. Currently there are five prescribed appointors regulated by the Act. All five are either professional institutes or associations. Since the commencement of the Act, the majority of the adjudicators (53%) have been appointed by the Institute of Arbitrators and Mediators, Australia (IAMA), followed by the Master Builders Association (MBA) with 35%.

This differs from the other states which have allowed commercial and private companies to be regulated to be included as prescribed appointors. The role of appointors generally is significant. As mentioned in the section of this report dealing with the registration of adjudicators, in NSW adjudicators do not have to attend any training programs or undertake any accreditation process and are not required to be registered. Under the security of payment legislation in other states, generally the parties are unable to select an adjudicator by agreement but they are required to apply to an authorised nominating authority (ANA) licensed by the state government, who will then nominate an adjudicator.

A problem which has been identified with the use of ANAs is that they are profit-making institutions, which could give rise to a conflict of interest or issues of impartiality. It has been stated that ‘this model has not fostered high quality adjudications.’ Marquet notes that in 2014 the Queensland government, following a review of its security of payment legislation, established a single adjudication registry within its Building and Construction Commission, which is responsible for the appointment and quality control of adjudicators.

In the section of this report dealing with harmonisation, I have referred in part to the SOCLA Report which noted the frequency with which adjudications are overturned and commented that the east coast model has clearly failed to provide the quality assurance necessary if the objects of rapid determination are to be achieved. The

153 The Construction Contracts Regulations 2004 (WA) provide that for the purposes of the definition of ‘prescribed appointor’ in s 3 of the Act, the following organisations are prescribed and active: Australian Institute of Building; Electrical and Communications Association of Western Australia, Institute of Arbitrators and Mediators Australia, Master Builders Association; and Royal Institute of Chartered Surveyors (Australia).
154 For example, Building and Construction Industry Security of Payment Act 1999 (NSW), s 17(3).
156 n 6.
report added that this is largely due to the competing demands of the for-profit ANAs and recommends that they should be banned. 157 Fenwick Elliott has been somewhat more candid in claiming that ANAs have always been ‘distinctly suspect’. 158

The issue of the independence of adjudicators was also referred to in the Minister for Planning and Infrastructure’s Second Reading Speech, where it was stated that to ensure the expert and independent status of adjudicators, they will be registered by the registrar appointed under the Bill. Further, prescribed appointors will typically be professional bodies active in the industry but free of sectional interests. 159 Clearly the system of appointing adjudicators under the Act is preferable to that of the use of ANAs.

The terms of reference of this review relating to prescribed appointors were not definitive, but I have considered the issue with respect to the following specific questions:

• Are there too many prescribed appointors?
• Are the prescribed appointors selecting the most appropriate adjudicators?
• Should the prescribed appointors be allowed to run a stable of adjudicators or must they pick from the whole register?
• Should the Building Commissioner appoint adjudicators instead of prescribed appointors?

Some of these issues have been considered in the section dealing with the regulation of adjudicators. With respect to these issues and in consideration of the responses, I am of the opinion that the Act is working effectively and does not require amendment with respect to these issues.

In terms of whether there were too many prescribed appointors, no submissions were received regarding the number of appointors. None of the submissions complained that additional appointors were required in order to provide the necessary number of adjudicators. The nature of the current providers extends across a range of disciplines and interests in the construction industry and there were no comments made with respect to delays in the appointment of adjudicators.

The issue of the selection and appointment of the most suitable adjudicators has been considered specifically in the section dealing with regulation of adjudicators. There was certainly consensus that adjudicators should be appointed relevant to their knowledge and experience in the specific area of construction, and I have previously referred to the need to provide additional contract law training to adjudicators.

In a confidential submission it was stated that; ‘There is often discussion within the industry that there is a perception of bias by adjudicators against contractors and in some cases principals.’ This is clarified later by the interesting comment ‘the perceived bias in most cases is just perceived.’ No other submissions raised the

157 Society of Construction Law Australia, above n 131.
issue of bias and overall I am satisfied that the prescribed appointors are selecting the most appropriate adjudicators and conforming to their obligations under the regulations.

Whilst no specific submissions referred to the selection of the adjudicator by the appointors to adjudicate a claim, from my experience of the appointment procedures used by the three main appointors, IAMA, MBA and the AIB, adjudicators are appointed from among those member adjudicators, registered with the Building Commission, whose qualifications, training and experience are suitable to determine the payment issue in dispute. There was no evidence to suggest that the current appointment process is not consistent with the objects of the Act and should be amended.

The approved appointor nominating fees are provided on the Building Commission’s website.\textsuperscript{160} The fees range from $220 to $660 depending on the amount of the claim. Both IAMA and RICS require adjudicators to pay a separate nomination fee of 10\% of the fees charged to them. The IAMA website states that ‘Adjudicators who accept nominations from the Institute are required to pay 10\% of professional fees to the Institute. The funds raised from appointee fees are used by the Institute to further its objectives on behalf of members’.\textsuperscript{161} There were no submissions relating to the amount of the nomination fee and consequently it is not considered that this practice would restrict applicants from lodging an application.

In the absence of any specific submissions it is not clear to me whether the 10\% of the adjudicator’s fees are ‘passed on’ to the parties. I cannot see any legal impediment to preventing either IAMA or RICS in prescribing this additional levy on its members, but specific reference should be provided in the regulations to ensure that this amount is not passed on to the parties to the adjudication.

To conclude this section, there was no support for the Building Commissioner to appoint adjudicators instead of prescribed appointors. As noted above, the Queensland government, following a review of its security of payment legislation, established a single adjudication registry within its Building and Construction Commission to control the appointment and quality control of adjudicators, in view of concerns relating to quality and independence of the adjudicators previously appointed by the ANAs in that state.\textsuperscript{162}

**Recommendation**

*The current governance issues relating to the prescribed appointor organisations are consistent with the aims and objectives of the dispute resolution functions of the Act and no amendments to the Act are required. It is recommended that a regulation be introduced to ensure that the 10\% additional nomination fee, where levied, is borne by the association member and not the parties.*


4.2 Judicial Review of Adjudications

A number of submissions put this issue, candidly if not bluntly, in terms of: ‘how can we stop interference with adjudication determinations?’ Whilst perhaps a simple question, nevertheless the answer is necessary complex.

In his submission, the Rev Peter Abetz, MLA, referred to the case of WQube Port of Dampier and Loots of Kahlia Nominees. Rev Abetz submitted that:

The fact that an aggrieved person can still apply to the Supreme Court for a judicial review of the decision effectively creates a right of appeal, which as this case shows, is often blatantly exploited by unscrupulous operators.

Apart from the above submission, this was an issue that in the absence of specific submissions by the parties required considerable research and reference to case law in order to adequately address the issue.

The Supreme Court of WA has held that the right of review by the State Administrative Tribunal under the Act is limited to a decision to dismiss an adjudication application. Where an adjudicator decides not to dismiss an application and makes a determination on the merits, the respondent does not have a right to apply to the SAT for review of the determination. However, a determination on the merits can be challenged by either a judicial review by the Supreme Court on the ground of jurisdictional error or where an application is made to a court of competent jurisdiction to enforce the adjudicator’s determination on the grounds that the determination exceeded the jurisdiction of the adjudicator and consequently there was no determination under the Act.

Earlier, the Wallace Report into the operation of the Queensland security of payment legislation identified the rationale for judicial review in the security of payment context: ‘Given that an adjudicator’s decision is an interim one and given that it is often made in a “pressure cooker” environment under extremely tight timeframes, it is entirely appropriate that adjudicators’ decisions are subject to the supervisory control of the Supreme Court’.

A complete exclusion of judicial review from the security of payment system is not possible since under the Commonwealth Constitution the state Supreme Courts have an entrenched jurisdiction to grant relief for jurisdictional error. The High Court has made clear that, under the Federal Constitution, a privative clause may validly deny judicial review by the state Supreme Court of non-jurisdictional errors by decision-makers under state law. However, a privative clause law may not validly deny judicial review of jurisdictional errors by decision-makers under state law. These constitutional restrictions apply to the adjudication process under the state security of payment laws.

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165 Wallace Report, above n 1109, 221.
It is not possible in a review of this type to give a comprehensive discussion on the topic of jurisdictional error. However, by way of assistance, the High Court has held that jurisdictional error includes (inter alia) erroneous assertion or denial of jurisdiction, misunderstanding or disregard of the limits of jurisdiction, decision-making wholly or partially beyond the limits of a power, conducting proceedings where a jurisdictional fact is absent, disregarding a condition of jurisdiction, considering a matter that is required to be ignored and incorrect interpretation of a statute leading to a misunderstanding of function.

The Commonwealth Constitution provides that ‘[t]he High Court shall have jurisdiction … to hear and determine appeals from all judgments, decrees, orders, and sentences … of the Supreme Court of any State’. In Kirk v Industrial Relations Commission the High Court held that this provision requires that there be a Supreme Court for each state. The state parliaments do not have power to ‘alter the constitution and character’ of that Supreme Court in a manner that would prevent it from satisfying that ‘constitutional description’.

At Federation, a privative clause did not prevent the exercise of the power of a colonial Supreme Court to grant certiorari for jurisdictional error. The power of the Supreme Courts to grant prohibition, certiorari, mandamus and habeas corpus is a ‘defining characteristic of those courts’. Depriving the Supreme Court of its jurisdiction to enforce limitations upon executive and judicial power would ‘create islands of power immune from supervision and restraint’.

A state privative clause that purports to deny the power of the Supreme Court to grant relief for jurisdictional error is invalid. However, a state privative clause may validly deny to the Supreme Court the power to grant relief for non-jurisdictional error. The High Court thus now interprets state privative clauses as ineffective to

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165 Kirk [71].

166 Craig v South Australia (1995) 184 CLR 163, 177–178, cited in Kirk [72].

167 s 73(ii), Commonwealth Constitution (1900).


171 Kirk [96].

172 Kirk [97].

173 Kirk [98].

174 Kirk [99].

175 Kirk [100]. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ delivered a joint judgment. Heydon J agreed with these holdings: at [113].
displace the state Supreme Court’s entrenched jurisdiction to grant relief for jurisdictional error.176

The Courts of Appeal of several states have affirmed that the Kirk principles constitutionally guarantee Supreme Court judicial review for jurisdictional error in adjudication determinations under the state security of payment legislation. In the Perrinepod case,177 the Western Australian Court of Appeal held that in making a determination an adjudicator was exercising a statutory power that could affect the rights of the parties and was subject to the supervisory jurisdiction of the Supreme Court, including the writ of certiorari.178

The Act provided that a person who was aggrieved by a decision not to dismiss an application for adjudication could apply to the State Administrative Tribunal for a review of that decision.179 The privative clause provided that except for this review by the Tribunal, an adjudicator’s decision or determination could not be appealed or reviewed.180

The Court of Appeal held that this privative clause must be construed in accordance with the restrictions laid down in the Kirk decision.181 The clause did not oust judicial review of a decision to dismiss or determine an application for adjudication.182 The provision was not directed towards judicial review or the grant of prerogative relief.183 However, the Court indicated by way of obiter dictum that, given the scheme of the Act, an adjudicator’s determination was not subject to judicial review for non-jurisdictional error.184 The Court acknowledged that judicial review for jurisdictional error is constitutionally guaranteed.185

In the Chase Oyster Bar case186 the New South Wales Court of Appeal confirmed that, as a statutory dispute resolution process, the adjudication process was subject to its supervisory jurisdiction and was amenable to its jurisdiction to issue certiorari.187 Spigelman CJ observed that the Kirk decision had given the distinction between jurisdictional and non-jurisdictional error ‘a constitutional dimension in State law’.188

The Court acknowledged that the Kirk principles operate as a restriction upon the valid effect of a privative clause in the state security of payment legislation.189 Under the Act an adjudication certificate was enforceable as a judgment debt when filed with the competent court.190 The Act’s privative clause provided that the respondent

178 Construction Contracts Act 2004 (WA) s 46(1).
179 Construction Contracts Act 2004 (WA) s 46(3).
180 Perrinepod [1], [113]–[114].
181 Perrinepod [1], [121].
182 Perrinepod [1], [7]–[8], [120]. See Construction Contracts Act 2004 (WA) s 31(2).
183 Perrinepod [1], [122].
184 Perrinepod [1], [118].
185 Perrinepod [1], [128].
187 Chase Oyster Bar [5], [259], [262].
188 Chase Oyster Bar [29], cited with approval in Thiess, above n 89, [95].
189 Chase Oyster Bar [58].
190 Building and Construction Industry Security of Payment Act 1999 (NSW) s 25(1).
could not challenge the adjudicator’s determination in proceedings to set aside the judgment debt.\textsuperscript{191}

The Court held that this provision did not purport to oust the Supreme Court’s jurisdiction to issue certiorari in relation to an adjudication determination that was tainted by jurisdictional error.\textsuperscript{192} The provision was not directed to the Court’s supervisory jurisdiction and the reference to an adjudication ‘determination’ was to be interpreted to mean a determination that had not been rendered in jurisdictional error.\textsuperscript{193}

In the \textit{Northbuild} case,\textsuperscript{194} the Queensland Court of Appeal acknowledged that the State Parliament was constitutionally prohibited from excluding the Supreme Court’s jurisdiction to review jurisdictional error.\textsuperscript{195} An adjudicator’s decision under the security of payment legislation was an administrative decision subject to such judicial review.\textsuperscript{196}

By amendments to the state judicial review legislation, the State Parliament had apparently sought to exclude judicial review of decisions by an adjudicator.\textsuperscript{197} The Court interpreted the exclusion as not affecting its pre-statutory judicial review jurisdiction, or the Court’s entrenched jurisdiction in relation to jurisdictional error.\textsuperscript{198} The security of payment legislation itself did not exclude the Court’s supervisory jurisdiction.\textsuperscript{199}

Prior to the \textit{Kirk} decision, in Victoria several Supreme Court decisions had held that the Court’s certiorari jurisdiction in relation to adjudications had not been limited in the manner required for the amendment of the relevant jurisdictional provision of the state Constitution.\textsuperscript{200} These decisions have not been followed in relation to the scope of certiorari.\textsuperscript{201} The Western Australian Constitution Acts do not contain an equivalent provision.\textsuperscript{202} In practical terms these rulings have been overtaken by the \textit{Kirk} decision since the federal constitutional restrictions may not be removed by the state parliaments. While the state Constitution is amendable at the state level, the Commonwealth Constitution is not.\textsuperscript{203}

As can be seen above, the issue is complex and the constitutional constraints cannot be overcome by statutory intervention at the state level. Whilst the \textit{Perinpod} decision prohibits a respondent’s ability to challenge a decision not to dismiss an application

\textsuperscript{191} \textit{Building and Construction Industry Security of Payment Act 1999} (NSW) s 25(4)(iii).
\textsuperscript{192} \textit{Chase Oyster Bar} [59], [90], [108], [264]–[265].
\textsuperscript{193} \textit{Chase Oyster Bar} [59], [86], [88], [264]–[265].
\textsuperscript{194} \textit{Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd} [2012] 1 Qd R 525; [2011] QCA 22.
\textsuperscript{195} \textit{Northbuild} [6], [33], [72], [75]. See also \textit{Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd} [2014] QSC 170 [29].
\textsuperscript{196} \textit{Northbuild} [6], [28], [75].
\textsuperscript{197} \textit{Northbuild} [4]–[6], [38].
\textsuperscript{198} \textit{Northbuild} [35], [37], [78].
\textsuperscript{199} \textit{Northbuild} [78].
\textsuperscript{200} \textit{Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd} (2009) 26 VR 112, [85]–[87]; [2009] VSC 156 (obiter); \textit{Grocon Constructors Pty Ltd v Planit Coccia Joint Venture (No 2)} (2009) 26 VR 172, [82], [95]–[101]; [2009] VSC 426 (holding). See \textit{Constitution Act 1975} (Vic) s 85; Bell, above n 130, 41–42.
\textsuperscript{201} \textit{Sugar Australia Pty Ltd v Southern Ocean Pty Ltd} [2013] VSC 535, [111]–[115].
\textsuperscript{202} See \textit{Constitution Act 1889} (WA); \textit{Constitution Acts Amendment Act 1899} (WA).
\textsuperscript{203} \textit{Commonwealth Constitution} (1900) s 128. The appropriate form for a State constitutional amendment to remove judicial review for error on the face of the record is discussed in Peter Vickery, ‘Security of Payment Legislation in Australia, Differences between the States – Vive la Différence?’ Building Dispute Practitioners Society, 12 October 2011, [71].
with respect to s 46(1) of the Act, the Court of Appeal decision has reaffirmed that judicial review of such decisions is still possible.

In addition to the issue of review of determinations, the other concern expressed by a range of stakeholders related to the enforcement of adjudicators’ determinations by courts of competent jurisdiction. Section 43 provides as follows:

43. Determinations may be enforced as judgments

(1) In this section —

court of competent jurisdiction, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.

(2) A determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect, and if such leave is given, judgment may be entered in terms of the determination.

(3) For the purposes of subsection (2), a determination signed by an adjudicator and certified by the Building Commissioner as having been made by a registered adjudicator under this Part is to be taken as having been made under this Part.

The issue was raised in the meetings and submissions by the stakeholders as to how adjudication determinations can be better protected and parties prevented from using the courts in order to delay the payment process. Some examples were given of disgruntled parties using s 43 to delay payments, particularly in the lower courts where magistrates were unfamiliar with the provisions of the Act. In consideration of this issue it was noted, as stated in Cape Range, that the intention of s 45(1) of the Act was that the parties to a contractual dispute retain their entitlement to resolve the dispute in another forum after an adjudication. The review noted that seven out of the total responses raised concerns about the enforcement of determination. Interestingly, the Law Society of WA, AIB, IAMA and MBA did not comment on the issue. From a consideration of recent WA decisions it would appear at first sight that, where a successful adjudication party applies for leave to enforce its determination, it can expect that the court will exercise its discretion and grant leave, but there have been exceptions.

In addition to comments made during the stakeholder meetings regarding the difficulties of enforcement, the HIA submitted that feedback from members indicated that the timeframes for enforcing judgments through the courts were unduly complicated. The process was potentially lengthy and HIA provided details of the difficulties in enforcing adjudicators’ determinations in the Magistrates Court by way

204 Submission by the Member for Southern River, Rev. Peter Abetz, MLA.
205 Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd [2012] WASC 304.
206 KPA Architects Pty Ltd v Diploma Constructions (WA) Pty Ltd [2013] WADC 106.
of a recent example. In the example cited, there was a four month delay from when the builder’s progress claim became due for payment to when the builder was able to enforce the sum as a judgment in the Magistrates Court. Additionally, there were further legal expenses incurred by the builder in the process.

It was suggested that the problem arises due to a failure to legislate complementary regulations of the courts to allow speedy and efficient registration of the adjudication as a court order. It was additionally stated, as referred to above, that it appeared that magistrates and registrars were not familiar with the provisions of the Act.

**Recommendation**

*It is not considered constitutionally possible to amend the Act to further restrict the review of adjudicators’ determinations. The Courts of Appeal of several states have affirmed that the Kirk principles constitutionally guarantee Supreme Court judicial review for jurisdictional error in adjudication determinations under the state security of payment legislation. The Western Australian Court of Appeal has held that in making a determination, an adjudicator was exercising a statutory power that could affect the rights of the parties and was subject to the supervisory jurisdiction of the Supreme Court, including the writ of certiorari.*

The stakeholder meetings established that there were concerns regarding the present process of enforcing the adjudication determinations as judgments of the court. Consideration should be given to the introduction of complementary regulations of the Courts, or a statutory amendment to s 46 in order to allow speedy registration of the adjudication determinations as a court order.

*Alternatively it is recommended that power be conferred by regulation on the Building Commissioner to permit the Commissioner to approve the enforcement of the adjudicator’s determination. This would significantly reduce the current legalistic burden associated with the enforcement of determinations.*

**4.3 Enforcing the Prohibitions and Responding to Complaints**

In the stakeholder meetings and in a number of written submissions it was stated that it was not uncommon for payment periods in excess of 50 days to apply in breach of the prohibitions as found in s 10 of the Act. I was not shown specific examples of contracts. A number of submissions suggested the imposition of penalties for breaches of the prohibitions would be helpful in the prevention of this practice. As can be seen from the following, the prohibitions do not allow the imposition of penalties for breach or abuse. The prohibition provisions are:

9. **Prohibited: pay if paid/when paid provisions**

A provision in a construction contract has no effect if it purports to make the liability of a party (A) to pay money under the contract to another party

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208 *Construction Contracts Act 2004 (WA) pt 2 — Content of construction contracts, div 1 — Prohibited provisions.*
contingent, whether directly or indirectly, on A being paid money by another person (whether or not a party).

10. **Prohibited: provisions requiring payment to be made after 50 days**

A provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed is to be read as being amended to require the payment to be made within 50 days after it is claimed.

11. **Prohibited: prescribed provisions**

A provision in a construction contract has no effect if it is a provision that is prescribed by the regulations to be a prohibited provision.

12. **Other provisions of contract not affected**

A provision in a construction contract that has no effect because of s 9 or 11 or that is modified under s 10 does not prejudice or affect the operation of other provisions of the contract.

As can be seen, the s 10 provision prohibiting payment periods greater than 50 days in a contract defaults to 50 days and the party to a signed contract could assert its legal rights but in practice not without compromising the commercial relations and jeopardising future association.

The submissions relating to the inequality of bargaining power (considered later in this report), between the parties means that the longer period (albeit legally void) term is reluctantly accepted as a commercial reality and is clearly contrary to the objective of the Act to keep the money flowing in the contracting chain. Before considering the options in the event of a breach of the prohibitions, it is necessary to consider the existing powers of the Building Commission to regulate alleged breaches of the prohibitions contained in existing legislation.

As a state department, the Building Commission may receive a complaint about offending terms being in a contract (often through the Minister’s office). Without the exercise of any specific powers, the Building Commission may investigate the complaint, suggest to the person complained about that they may have acted not in the spirit of the *Construction Contracts Act*, and make recommendations with respect to instituting changes in behaviour. This may be followed by formal advice in writing to the complainant that the Act prevents those terms having effect and that the complainant might seek legal advice on the implications. This is a mainstream ‘public service’ response to such a complaint.

The Building Commissioner is given specific functions and powers to investigate and resolve some types of complaint under the *Building Services (Complaint Resolution and Administration) Act 2011* (WA). These are:

1. Building services complaints about a regulated building service not being carried out in a proper and proficient manner or being faulty or unsatisfactory;
2. Home Building Work Contract complaints about a matter referred to in the *Home Building Contracts Act 1991* (HBWC) s 17 or 20 or Schedule 1 clause 5;

3. Disciplinary complaints about the alleged occurrence of a disciplinary matter in relation to a registered building service provider or an approved owner-builder.

It is unlikely that the inclusion of s 9, 10 or 11 CCA clauses in a construction contract would substantiate a building services complaint or a HBWC complaint.

However it is possible that inclusion of a s 9, 10 or 11 clause in a contract would provide a basis for a disciplinary complaint under s 53 (1) (e) of the *Building Services (Registration) Act 2011* (WA) on the grounds that a registered building service provider has been negligent or incompetent in connection with carrying out a building service (where the clauses are included through ignorance). In this case the Building Commission would need to prove negligence or incompetence, which may be difficult if the contract terms were written by someone other than the registered building service provider. This is particularly relevant as the contract terms are generally provided by a third party such as a legal practitioner, industry association or architect for example.

It is also possible that inclusion of a s 9, 10 or 11 clause in a contract would provide a basis for a disciplinary complaint under s 53 (1) (j) of the *Building Services (Registration) Act* on the grounds that the registered building service provider has engaged in conduct that is; ‘harsh, unconscionable, oppressive, misleading or deceptive’ in connection with a contract for the carrying out or completion of a building service or a variation of that contract. In this case the Building Commission would need to prove misleading or deceptive conduct on the part of the registered building service provider. It does not appear that the s 53(1) (j) provisions of the *Building Services (Registration) Act* have been utilised significantly in the past.

The *Building Services (Registration) Act* contains a number of disciplinary provisions but these appear to be problematic with respect to enforcing the s 10 prohibition in the Act for the following reasons:

- The CCA covers a broader range of matters and not all entities entering into a construction contract are captured by the *Building Services (Registration) Act*. That is, not all parties to a ‘construction contract’ would be registered building services providers and would not therefore be subject to the disciplinary provisions.

- There may be difficulties in obtaining evidence and intent (unless the provision was of strict liability) to prove the types of conduct that can be prosecuted under the *Building Services (Registration) Act* for such an offence.

- There is currently no reference to the CCA in the *Building Services (Registration) Act* and the references in the *Building Services (Complaints Resolution and Administration) Act* are transitional and definitional matters (ss 128 and 137) would require amendments.
It is considered preferable for the ease of enforcement and education to have the penalty prescribed in the principal Act that it relates to; that is, the CCA. Further if the legislature intends the application of a penalty for engaging in actions which are prohibited for reasons of policy, then it would be more effective for the penalty to be provided in the legislation itself rather than relying on subsidiary legislation.

From the submissions received, I am of the opinion that the inclusion of prohibited times for payments, whilst perhaps not widespread in the industry, is nevertheless of concern to a number of subcontractors. During the stakeholder meetings, reference was made to a number of prohibited inclusions in contracts prepared by large organisations, which I would assume were not ignorant of the existence of the express prohibitions.

There are a number of options regarding the initiating of processes to enforce the prohibitions. Firstly penalties could be introduced into the Act or through the Regulations for breaches or failure to comply with the prohibitions in the Act. The quantum of the penalty should reflect the desire of the legislature to remove the unacceptable practice and secondly, to act as a deterrent to the continuation of these practices. The principal offending failure to comply is the case of s 10 and the clause could be amended to stipulate that a party that presents a contract containing 50 day plus payment terms may be guilty of an offence subject to requisite standard of proof for civil breaches or offences. Additionally, reference to the CCA prohibitions in the Building Services suite of legislation could be made by consequential amendment.

The alternative to the introduction of pecuniary penalties is the power of the Building Commission to name and publish details of those parties in the Annual Report to the Minister and to require offending parties to introduce some form of compliance and awareness training for organisations shown to have failed to comply with the prohibitions. It is difficult to predict whether moral persuasion and threat of reputational damage through adverse publicity may yield the required effect.

On balance it is considered that preference should be given to the introduction of penalties for breach of the prohibitions. It is critical that the issue of prohibitions be addressed in order to clearly indicate that the legislature, through the Building Commission, is seriously concerned with the legitimate interests and lawful rights of all parties in enforcing the objectives of the Act. The type or quantum of the penalties is to be determined by the legislature.

**Recommendation**

*The Act should be amended to include penalties for failure to comply with the prohibitions. The liability should be strict and not subject to proof of intention. Alternatively, the Annual Reports of the Construction Contracts Act Registrar should include a section detailing instances, and naming the relevant parties, where failure to comply with the provisions has been proved.*

**4.4 Calculation of Time Limits**

There was significant support in both the written and oral submissions for all time limits to be expressed in ‘business days’ rather than calendar days.
Subject to the provisions of the *Interpretation Act 1984* (WA), the time limit for the response, for example, should be 10 business days rather than 14 calendar days. The Easter and Christmas periods can significantly prejudice parties and adjudicators because of the number of public holidays that may occur during those calendar periods. It is not considered that this change would have any significant detrimental effect on the ‘standard’ time limits. It is also considered that the period between 24 December and 7 January should be excluded from the counting of days as the construction industry and support services are generally on vacation during this period. The period Good Friday to Easter Monday inclusive should also be excluded.

**Recommendation**

*All time limits in the Act should be expressed in ‘business days’ rather than calendar days. The periods between 24 December and 7 January and Good Friday to Easter Monday should be excluded from the counting of days.*

### 4.5 Withdrawal of Applications

On the basis of the submissions and from the information reported in the Registrar’s Annual Reports, there is a need for a provision in the Act which allows for applications to be withdrawn. The Discussion Paper at page 33 identified that in the period 2005–2013 some 183 or 18% of applications were discontinued. Figures are not available for the specific reasons for discontinuation. There is some anecdotal evidence to suggest that service of the application upon the respondent may be sufficient to initiate a settlement. However the Act does not contain a provision by which an application can be withdrawn.

Additionally, an adjudicator is not entitled to payment under s 44(2) of the Act unless the application is dealt with by a determination or dismissed under s 31(2(a)). This was an issue raised in submissions by the registered adjudicators.

The *Construction Contracts (Security of Payments) Act 2004* (NT) provides in s 28A that a party may withdraw an application by writing to the prescribed appointor (where no adjudicator is appointed), the adjudicator and the other party.

**Recommendation**

*The Act should be amended to allow the applicant to withdraw the application by writing to the prescribed appointor (where no adjudicator is appointed), the adjudicator and the other party. Additionally, s 44(2) should be amended to allow the adjudicator to be paid for his or her work undertaken up until notice of the withdrawal of the application.*

### 4.6 Failure to Include Minor Details in the Application

Submissions were received regarding s 26(2) of the Act (and Regulations) where the provisions have been interpreted in such a way that a failure to include minor aspects of the contact details of the prescribed appointor or a respondent could

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209 Section 61.
result in an application being dismissed. Section 26 prescribes that an adjudication application must be prepared in accordance with the regulations. Regulation 4 requires the inclusion of the ABN or ACN of the ‘prescribed appointor’ in the application ‘to the extent to which the person required to give the details knows those details.’ It is obvious that this could result in the dismissal of an application for reasons which are unrelated to issues of either jurisdiction or merits. This is inconsistent with the objects and spirit of the Act. The application should be valid if there has been ‘substantial’ compliance with the Regulations. Whilst the decision in WQube has assisted with this issue, it would be advantageous to amend the wording in s 26 and reg 4.

Recommendation

Section 26 and reg 4 should be amended to state that the application should be valid, and not dismissed, if there has been substantial compliance with the Regulations.

4.7 Implied Terms

The issue of implied terms was raised by a number of the smaller stakeholders and was the subject of a detailed submission from a senior construction law practitioner. It was also raised in a resource company submission. The practitioner’s submission reasoned articulately for the removal of the implied terms provisions in the Act. Whilst the issue of implied terms was not expressly considered in the other written submissions (with the exception of the resource company submission), presumably because the focus was generally on the adjudication process, the issue is nevertheless important. As with the issues of mining exclusions and judicial review of determinations it has been necessary to refer to authorities on the topic. The discussion is lengthy but is nevertheless necessary in light of the specific issues raised in the submission.

The starting point of the practitioner’s written submission referred to above was that, in principle, terms should only be implied where there is a level of expectation on the parties that the implication of such terms is reasonable or goes without saying, as per the definitive decision in BP Refinery (Westernport) Pty Ltd v Hastings Shire Council. The summary in the submission stated:

In summary there is a fundamental jurisprudential, intellectual and practical objection to the inclusion of terms to be implied by the Act which would not be expected by those contracting to be implied. In this regard it is dangerous to make the assumption that participants in the construction industry entering into construction contracts should be aware of the provisions of the Act. There

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210 See WQube Port of Dampier and Loots of Kahlia Nominees [2014] WASC 331, [97]–[101]. Here neither the ABN nor the ACN of IAMA (the prescribed appointor) were included. Chaney J found that this omission did not render the application invalid. His Honour found that those directly involved in the preparation of the adjudication application on behalf of the applicant did not know the ABN or ACN of IAMA.

211 Some guidance on the interpretation of ‘substantial’ may be found in Tillmans Butcheries Pty Ltd v Australian Meat Industries Employees Union (1979) 27 ALR 367 where substantial was held to be ‘more than trivial, minimal, nominal or not insignificant.’

212 (1977) 180 CLR 266.
is sufficient evidence that can be found in the adjudication applications and determinations that parties have been unaware of the implied terms in the Act and that on becoming aware of these provisions, parties may seek to abuse and unreasonably exploit the implied terms against unsuspecting opposition.

As referred to in other sections of this report, it is clear that there is a widespread lack of awareness through all sections of the construction industry of the objectives and provisions of the Act and this certainly relates to the issue of implied terms.

The resource company submission in part held that the provisions in sch 1 of the Act should only be implied into a contract which is completely silent and does not have a written provision at all on the relevant matter. Referring to the decision in *Blackadder Scaffolding Services* and *Mirvac Homes*, the resource company submitted that the Act should be clarified to state that where a contract contains any provision relating to the subject matters referred to in ss 14 and 23 of the Act, the parties have turned their minds to the issue at hand and the provisions in sch 1 of the Act should not be implied.

The submission concluded by stating that where the implied terms are the subject of an adjudication application, the implication of terms should be at the discretion of the adjudicator, such that terms are only implied where and to the extent it is fair to do so in accordance with the stated object of the adjudication process at s 30 of the Act. With due respect I do not consider that the issue relates to discretion or fairness but rather what the law says with respect to the implication of terms in the absence of express terms.

Part 2 div 2 of the Act implies certain provisions into construction contracts that do not make written provision regarding particular matters. Individual sections of the Act relating to particular matters imply into such contracts the relevant contractual provisions that are set out in a specific Division of the Schedule to the Act. Rather than reproduce the specific provisions of the Act relating to implied terms, they are summarised as follows.

The implied provisions are implied into construction contracts that do not make written provision regarding variations of the contractor’s obligations, the amount that the contractor is to be paid for the obligations they perform, whether the contractor is entitled to claim progress payments, how a party is to make a claim for payment, when and how to respond to a claim for payment, the time when a payment must be made, interest payable on late payments, the passing of

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214 Sections 17 and 18 refer to the same Division of the Schedule (div 5).
215 s 13 and sch 1 div 1 cl 1.
216 Or a means of determining the amount.
217 s 14 and sch 1 div 2 cl 2.
218 s 15 and sch 1 div 3 cls 3–4.
219 s 16 and sch 1 div 4 cl 5.
220 s 17 and sch 1 div 5 cls 6–7.
221 s 18 and sch 1 div 5 cls 6–7.
222 s 19 and sch 1 div 6 cl 8.
ownership of goods related to the work, the disposition of unfixed goods upon insolvency, and retention money.

The issue was referred to in the Minister’s Second Reading Speech where the Minister also described the implied provisions as ‘fair and effective terms’. The Minister added: ‘This means the parties should have clear contractual payment rights and obligations so that misunderstanding and disputes are minimised.’

The Western Australian court or tribunal decisions have generally concerned the implied provisions regarding when and how to respond to a claim for payment. These implied provisions require that the recipient must give notice that the claim is rejected or disputed within 14 days of receiving the claim. This notice must (inter alia) be in writing, signed and dated, and state the reasons for rejecting or disputing the claim. Within 28 days after receiving the claim, if the recipient has not rejected or wholly disputed the claim, the recipient must pay either the whole claim or the undisputed part of the claim.

In the Moroney case, the State Administrative Tribunal held that the adjudicator had mistakenly relied upon oral statements by the parties where the contract did not make written provision regarding the response to a claim for payment. In these circumstances the implied provisions regarding this matter applied. The implied provisions were a ‘safety net’ where the parties had not made written provision regarding this matter. Many of the requirements of the relevant implied provisions were mandatory rather than directory as they were stated in imperative terms (i.e. ‘must’). The notice of dispute was thus required to be written. An oral notice of dispute did not comply with the implied provisions and was ineffective.

In the Blackadder case, the State Administrative Tribunal considered two sections of the Act that refer to the same implied provisions. These sections relate to when and how to respond to a claim for payment (s 17) and the time when a payment must be made (s 18). The contract at issue did make written provision in relation to the time when a payment must be made, so s 18 did not apply. However, s 17 did apply to the contract at issue.

Under cl 7(3) of the implied provisions, within 28 days after receiving a payment claim, if the recipient has not rejected or wholly disputed the claim, the recipient must pay either the whole claim or the undisputed part of the claim. The Tribunal referred to the words ‘[w]ithin 28 days after a party receives a payment claim’ as the ‘time

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223 s 20 and sch 1 div 7 cl 9.
224 s 21 and sch 1 div 8 cl 10.
225 s 22 and sch 1 div 9 cl 11.
226 Western Australia, Parliamentary Debates, Assembly, 3 March 2004, 275 (Allannah MacTiernan).
227 sch 1 div 5 cl 7(1).
228 sch 1 div 5 cl 7(2).
229 sch 1 div 5 cl 7(3).
231 Moroney [37], [39]–[40].
232 Moroney [50].
233 Moroney [55]–[56].
234 Moroney [58], [60].
236 sch 1 div 5.
237 Blackadder [47].
238 Blackadder [49].
phrase’ of this clause. The Tribunal observed that this was the only element of time referred to in the provision. The remainder of cl 7(3) concerns when and how to respond to a claim.239

Section 17 also concerns when and how to respond to a claim. The Tribunal held that if s 17 applies, the implied provisions in cl 7 apply with the exception of the time phrase. Section 18 relates to the time when a payment must be made. The Tribunal held that if s 18 applies, the time phrase in cl 7(3) applies.240

The Tribunal also held that a notice of dispute that did not comply with the implied provisions would create a payment dispute. The statutory purpose would not be assisted by requiring the claimant to ignore the rejection of its claim until the contractual date for payment had passed.241 The Tribunal expressly rejected the approach taken in the Moroney case, where the noncompliant notice of dispute had been treated as ineffective.242

In the South Coast Scaffolding case,243 the State Administrative Tribunal followed the Blackadder decision.244 In this case s 17 applied but s 18 did not apply.245 This raised the ‘time phrase’ in cl 7(3) of the implied provisions. Since s 17 applied but s 18 did not, all of cl 7 of the implied provisions applied, with the exception of the time phrase in cl 7(3).246 The Tribunal also followed the Blackadder approach to the effect of a notice of dispute that did not comply with the Act.247 The Tribunal added that Blackadder and the text of cl 7(2) made clear that ‘any rejection or dispute must be unequivocal and identify with some specificity the reasons for the dispute and the claim to which the notice of dispute relates’.248

In related proceedings the District Court249 held that the Blackadder interpretation of the interaction of ss 17 and 18 was correct, including the applicability of the time phrase.250 The Court observed that ss 17 and 18 did not provide that all of div 5 of the Schedule was to be implied into the contract. Those sections each dealt with a different matter, so ‘only the relevant subject matters required from Schedule 1 Division 5 are to be implied into the contract.’251

The Court approved the argument of counsel that five reasons supported the correctness of the Blackadder decision.252 Firstly, ss 17 and 18 dealt with separate topics.253 Secondly, the implied provisions drew on an established common law

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239 Blackadder [50].  
240 Blackadder [50].  
241 Blackadder [58].  
242 Blackadder [59].  
243 South Coast Scaffolding and Rigging v Hire Access Pty Ltd [2012] WASAT 5.  
244 South Coast Scaffolding [56].  
245 South Coast Scaffolding [47]–[48].  
246 South Coast Scaffolding [50].  
247 South Coast Scaffolding, [55]. The Blackadder approach to this issue was also followed in Conneq Infrastructure Services (Australia) Pty Ltd v Sino Iron Pty Ltd [2012] WASAT 13, [104].  
248 South Coast Scaffolding, [59].  
249 Ebbott t/as South Coast Scaffolding and Rigging Services v Hire Access Pty Ltd [2012] WADC 66. The State Administrative Tribunal remitted the matter to the adjudicator: at [9]. The applicant then sought to enforce the adjudicator’s subsequent determination in the District Court: at [1], [10].  
250 Ebbott [54].  
251 Ebbott [47].  
252 Ebbott [48].  
253 Ebbott [31].
Thirdly, the implied provisions must be distinguished from the prohibited terms where the language used indicates that the statute is to prevail over inconsistent provisions in the contract. Fourthly, the general approach of the Act is to preserve freedom of contract, subject to specific exceptions. Fifthly, the long title of the Act supports these first three reasons.

In the Witham case the District Court held that the failure of the recipient to serve a notice of dispute within 14 days (cl 7(1)) had the effect that the claim must be paid in full (pursuant to cl 7(3)).

In the MCIC case the State Administrative Tribunal considered the calculation of time under cl 7(3)(a). That clause requires action by the recipient within 28 days after receipt of a payment claim. The Tribunal held that the day the payment claim was received was excluded from the calculation of the 28 day period. Where the 28th day falls on a weekend or public holiday, that day is excluded from the count. The 28th day would thus fall on the next day that is not a weekend or public holiday.

In the Digdeep case the State Administrative Tribunal held that the implied provisions regarding time for payment did not apply where the contract made written provision for a 14 day period for payment. The 28 day period set by cl 7(3) of the implied provisions thus did not apply.

Several cases have considered other implied provisions, one of which sets out the requirements for a payment claim. In the Searle case the State Administrative Tribunal commented that the purpose of this provision ‘is to ensure that the recipient of a payment claim can be clear as to the authenticity of the claim being made, the tasks forming part of the entire contract to which the claim relates, and as to how the claim is calculated or arrived at’.

In the Croker Construction case the State Administrative Tribunal considered s 16, which deals with how to make a payment claim. The Tribunal observed that the wording of s 16 is different to that of s 17, which concerns the response to a payment claim. This indicates that a different approach needs to be taken to the implication of terms by each of these sections. Section 17 implies the provisions ‘about that matter’, while s 16 contains no such limitation. Section 16 thus applies the entirety of the implied provisions to which it relates, whereas ss 17 and 18 apply only the relevant parts of the implied provisions.

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254 Ebbott [32].
255 ss 9–11.
256 Ebbott [33].
257 Ebbott [34].
258 Ebbott [36].
260 Witham [75].
261 MCIC Nominees Trust v Red Ink Homes Pty Ltd [2013] WASAT 177.
262 MCIC at [46].
263 Digdeep Investments Pty Ltd v NW Constructions Pty Ltd [2014] WASAT 147.
264 Digdeep [60]–[62].
265 sch 1 div 4 cl 5(2).
267 Searle [35].
269 Croker Construction [14].
Divisions 4 and 5 of the Schedule relate to making a payment claim and responding to a payment claim. The Tribunal stated that while the parties are free to make written provision for the mechanism to be applied in each case, the contractual provisions must be ‘of a similar nature’ to the implied terms since contracting out of the operation of the Act is of no effect. The Tribunal rejected the argument that the implied provisions would only apply if there were no written provisions about the matters dealt with by divs 4 and 5 of the Schedule.

With reference to the written submission by a legal practitioner referred to at the commencement of this section of the report, the common law principles relating to the implication of contractual terms are rather more restrictive than the more prescriptive approach taken by the implied provisions of the Act. In the definitive *BP Refinery* case the Privy Council said that for a term to be implied into a contract, the term must be (a) ‘reasonable and equitable’; (b) ‘necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it’; (c) ‘so obvious that “it goes without saying”’; (d) ‘capable of clear expression’; and (e) ‘must not contradict any express term of the contract’. This is a very strict test – all of these elements must be satisfied before a term will be implied.

The High Court has often applied the Privy Council’s test as part of Australian common law. However, the High Court has also cautioned that these strict principles are limited to formal written contracts that are complete on their face. A less rigid approach is taken in the absence of a formal written contract. In that situation the question is whether ‘the implication of the particular terms was necessary for the reasonable or effective operation of the contract in the circumstances of the case’.

The implication of contractual terms by statute in the Act is not unique. The Northern Territory security of payment Act also includes implied provisions. Generally statutory implied terms cannot be excluded by contract. By contrast, the parties to a construction contract are able to avoid the implication of the implied provisions by making their own express contractual provisions regarding the matters that they cover. However, their freedom to do so may be somewhat restricted if the

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270 Croker Construction [15]. See s 53(1).  
271 Croker Construction [18].  
272 *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1978) 180 CLR 266.  
273 *BP Refinery* 283; summarised by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 347.  
276 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 121; *Byrne*, 422, 441–442.  
279 See *Construction Contracts (Security of Payments) Act 2004* (NT)s 16–24 and sch.,  
280 Eg *Australian Consumer Law* s 64(1). See also *Insurance Contracts Act 1984* (Cth) s 14(1) (where reliance on a provision of the contract would be to fail to act with the utmost good faith that provision may not be relied upon). Under the sale of goods legislation the statutory implied terms may be excluded by contract. See *Sale of Goods Act 1895* (WA) s 54.
approach of the State Administrative Tribunal in the Croker Construction case is followed.

If the typical standard form or industry based contracts do not embody provisions dealing with these issues on the assumption that the issue will be dealt with under the common law, then this cautions against relying upon standard form contracts without regard to applicable local statute law.

As stated in a legal practitioner’s written submission, and as acknowledged throughout this Review, if there is still limited knowledge of the implied provisions within the industry after the Act has been in operation for a decade, an appropriate awareness campaign should be conducted by the Building Commission. Industry bodies must also take some responsibility for this and inform their members about the implied provisions.

The written submission by the legal practitioner argued for the repeal of cl 7(3) of the Schedule, which deals with the recipient’s obligation to pay a claim: ‘on one argument, [this clause] contains a deemed liability provision that makes a party liable to pay by mere failure to dispute a claim even if the amount claimed is not in fact due.’ This sub-clause of the Schedule should be amended to clarify that there is no deemed liability where the amount claimed is not in fact owed.

Section 17 of the Act relates to when and how to respond to a payment claim. Section 18 relates to the time when a payment must be made. In the Blackadder case the State Administrative Tribunal suggested that the ‘apparent overlap’ of ss 17 and 18 could be remedied by following the approach of the Northern Territory legislation to those matters. This suggestion is worthy of further investigation. However it is considered that the implied provisions should remain part of the Act.

**Recommendation**

*The implied terms provisions should remain part of the Act. The State Administrative Tribunal has suggested that the ‘apparent overlap’ of ss 17 and 18 could be remedied by following the approach of the Northern Territory legislation to those matters. This suggestion is worthy of further investigation.*

### 4.8 Trust Funds/Retention Monies/Project Bank Accounts (PBA)

The Discussion Paper at page 14 raised the issue of a trust scheme.

With respect to retention money the Act provides as follows:

**Division 9 — Retention money**

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281 *Blackadder, [51]–[52]. See Construction Contracts (Security of Payments) Act 2004 (NT) s 20.*

282 The Law Reform Commission of Western Australia’s ‘Financial Protection in the Building and Construction Industry’ discussion paper and its final report recommended the implementation of a trust scheme. The recommendation was not adopted due to difficulties in implementation and the inflexibility that would have been imposed on a builder’s business operations.

283 *Construction Contracts Act 2004 (WA) sch 1 div 9 cl 11.*
11. Retention money to be held on trust

If the principal retains from an amount payable by the principal to the contractor for the performance by the contractor of its obligations a portion of that amount (the *retention money*), the principal holds the retention money on trust for the contractor until whichever of the following happens first —

(a) the money is paid to the contractor;
(b) the contractor, in writing, agrees to give up any claim to the money;
(c) the money ceases to be payable to the contractor by virtue of the operation of this contract; or
(d) an adjudicator, arbitrator, or other person, or a court, tribunal or other body, determines that the money ceases to be payable to the contractor.

As stated in the submission by the Hon Rev Abetz there is no requirement for retention monies to be held in a ‘separate’ account but it is held in the trading account of the principal. I note in Queensland, the *Subcontractors’ Charges Act 1974* (Qld) enables subcontractors to secure a statutory charge over money owed (or allegedly owed) to them by their contractor. In effect, the charge is handed to the principal (owner) to secure disputed money away from the contractor. The money is then frozen pending a final resolution through the courts. The Act is administered by the Queensland Building and Construction Commission.

As a consequence of the provisions of the Corporations Law, where the principal subsequently becomes insolvent, the retention money will not be available to the contractor.

The issue of retention money was also considered in the Wallace review. The report recommended that in the opinion of the author, the most equitable approach for safeguarding monies held on retention and other forms of security would be by the establishment of what was described as a ‘Construction Retention Bond Scheme’. In part the scheme would apply to construction contracts where the sum was $100,000 or greater. It would be self-funded by the interest earned on monies held on trust for the benefit of the contracting parties and be administered by the Queensland Building Services Authority.

The Abetz submission refers to the Collins Inquiry into Insolvency in the NSW Construction Industry. Of the 44 recommendations made arising from the Review,
Rev Abetz refers in particular to the establishment of a licensing scheme system and the carrying out of financial ‘health’ checks and states that the scheme:

... would require all builders and construction contractors operating in the commercial building sector to qualify within a particular graduated licence category according to the net financial backing they are able to demonstrate, in respect of proposed projects. The result will be that the work ... will be restricted to the category of project value for which they have demonstrated financial backing and licensed accreditation.

The reference to a financial ‘health’ check refers to the role of a proposed NSW Building and Construction Commission (as recommended in the Collins Report) with respect to financial monitoring and auditing of accounts and financial affairs of all builders in NSW.

A small number of additional written submissions referred to a number of general payment difficulties and unacceptable practices and suggested benefits which might result from the creation of a statutory construction retentions trust scheme which would see retention monies go into escrow pending completion of the works. The issue was also raised in a number of meetings with subcontractor stakeholders. These retention monies would be held by a third party and paid back to the subcontractor at the completion of the defects liability period. It was further submitted that this system would overcome the current disparity whereby principal contractors can earn interest off the retention monies held and delay repayment based on their opinion as to whether the subcontract work is complete.

Whilst I appreciate the significance of the problem, in considering this issue I am nevertheless again mindful of the Minister for Planning and Infrastructure’s Second Reading Speech, referred to earlier in this report, which in part stated that ‘This Bill cannot remedy every security of payment issue. Insolvency can be addressed only by commonwealth legislation. Participants in the industry still have to look after their own commercial interests.’

Like the NSW Act, the CCA does not provide protection for subcontractor payments in the event of insolvency by the head contractor.288

The HIA did not support the introduction of any form of trust scheme in its written submission but appears to confine this to the residential building industry. The submission cited legal and practical difficulties in determining which parties in the supply chain are worthy of any legislative protection. The HIA submission further commented that the imposition of trust arrangements discriminates against the party that assumes the majority of the risk and this, according to the HIA, is the builder and principal contractor. It was submitted that the imposition of a trust fund will restrict the ability of the builder to use money received from progress payments in a flexible manner, thus depriving them of working capital and forcing them to incur additional financing costs. I appreciate that there may be practical issues with respect to an independently administered trust fund.

288 When establishing the inquiry into the operation of the Building and Construction Industry Security of Payment Act 1999 (NSW), the NSW Government created a separate taskforce of major public sector construction agencies to address potential concerns about the consequences of insolvencies on major public sector projects.
On occasions during the review meetings, the specific issue of project bank accounts (PBA) was raised. The submission by the Subcontractors for Fair Treatment also suggested that PBAs be used for both government and non-government contracts. Whilst possibly outside the formal scope of the Review and perhaps not directly related to any amendments to the Act, consistent with the wish to acknowledge and respond to all issues raised where possible, the following comments are included as part of the Review.

A project bank account (PBA) is an interest bearing bank account with trust status used in construction projects, into which funds are deposited for the purpose of making payments to the main contractor and subcontractors in the supply chain in a timely manner. As the account has trust status, monies can only be paid to the designated beneficiaries of the account. Thus, the PBA is linked to a trust deed which confines the monies in the account for the designated beneficiaries: ‘The presence of a trust deed ensures once monies are paid into the account they are only accessible to the parties to the trust deed; the main contractor and the members of its supply chain who have agreed to be joined to the deed.’ The trust deed typically stipulates that any monies paid into the account shall be paid to the main contractors and subcontractors in the supply chain when such monies become due for payment in accordance with the terms of the construction contract. As the PBA is confined, a client’s assets or profits are financially separated from other accounts and, as such, the PBA is protected from third party creditors. The Guidelines for deploying Welsh Government Project Bank Account Policy (issued in April 2014) points out that the overall aim of PBAs ‘within public procurement is to improve payment practices … and thereby facilitate faster payment to subcontracting suppliers.’

With respect to the operation of a PBA, it could be opened by the main contractor in the contractor’s name only (i.e. a single or sole account) or, alternatively, it could be set up jointly by the client and contractor (i.e. a joint account). Amounts due under the main contract are paid directly into the PBA by the client. Each month, contractors, subcontractors and suppliers submit their payment applications, and payment is made by the client/employer directly to the relevant person in the supply chain on the contractually agreed dates from the PBA’s confined account.

Before money is paid into the account, the main contractor must prepare a breakdown of the main supply chain payments included in its valuation. Authorised signatures of the client and the main contractor release funds directly to the supply chain in the amounts contained in the contractor’s valuation. As the PBA account is governed by a trust deed, subcontractors can claim the money if the contractor becomes insolvent. If a client needs to make a deduction for defective work, it will need to ensure that the PBA arrangements allow it to act upon such a deduction. The terms of the PBA will need to dovetail with the payment provisions of the construction contract to ensure that the trust provisions are properly set up and that it is clear how the payments are to be made following on from the certification process in the contract.

291 Ibid 3.
There has been experience overseas with PBAs. As noted in the Master Electrician’s submission, the concept emanated in the United Kingdom in response to continuing payment issues which, for some time, have been a problem in the construction industry. For example, there is always the threat of insolvency on the part of clients and contractors, especially in a volatile economic climate. Also, late payment can have devastating consequences for suppliers and subcontractors in the supply chain. In the United Kingdom, the Joint Contracts Tribunal published its Project Bank Account (PBA) documentation for use in conjunction with its main standard forms of contract in October 2009. Other standard form construction contracts, such as NEC’s Engineering and Construction Contract and PPC2000 have also been amended to allow for the use of PBAs. In addition, the UK Office of Government Commerce’s ‘Guide to Best ‘Fair Payment’ Practices’ (OGC Guide) recommends that ‘public sector clients should progressively specify use of PBA where practicable and cost effective.’ The OGC Guide has estimated that public sector clients could save up to 2.5% on construction costs by introducing better payment processes involving the use of PBAs. According to Scott, the use of PBAs in ‘construction projects in the UK to date, has been relatively low’.

In the UK, project bank accounts are mainly used by public sector clients and their use in private construction projects is minimal. Hence the question is whether, in Australia, private sector clients should use such accounts in circumstances where the Construction Contracts Act 2004 (WA) already applies.

In terms of perceived benefits, PBAs have been described as a convenient payment mechanism, the purpose of which is to act as a channel for payment on construction projects. One of the benefits of PBAs is that these accounts create greater payment certainty because there is no need for cash to flow down the various steps in the supply chain. This, in turn, might speed up the process of payment and reduce the number of payment disputes. It has also been suggested that it helps to increase the transparency of cash flow to the supply chain. In addition, the risk of non-payment as a consequence of the insolvency of a supply chain member further up the supply chain is reduced. Hence, even if the main contractor becomes insolvent, payments can still be made to other members of the supply chain. In this way, PBAs would also protect the client in circumstances where they still need to pay the subcontractor when the main contractor, before becoming insolvent, has failed to pass on the monies to subcontractors.

At the same time there are a number of significant disadvantages associated with PBAs, and it appears that a PBA might not be suitable, particularly in private sector projects, for the following reasons:

- A PBA neither ensures that correct payment is made nor does it eliminate payment disputes. For example, it would still be the main contractor who determines the amount that is due to subcontractors and, therefore, a PBA does not eliminate the dangers associated with suspect practices.

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293 Ibid, 3
• The establishment and maintenance of a PBA involves a degree of administration, cost and training for the parties involved in the project.

• The protection offered by a PBA is only in relation to a particular interim payment.

• There are possibly more effective ways to protect the participants involved in a construction project. For example, if the main contractor becomes insolvent, a client could be allowed to complete a project with another contractor and recover the costs from the original main contractor, or offset those costs against sums due to the original contractor.

• As the money is paid into the PBA, it will not be possible for main contractors to delay payments to subcontractors in the supply chain. Hence, main contractors will not be able to use the money to finance other unprofitable operations. Although this might be perceived as a benefit of the PBA, it may actually also increase contractors’ tender prices, making construction projects more expensive than expected.

• PBAs are most effective for one-off major projects, but their usefulness for smaller projects is highly questionable. In particular, use of PBAs involves yet another process which may substantially increase the complexity of the Act.

The usefulness of PBAs appears to be limited to higher value or large one-off projects. It is considered that they are generally unsuitable for the majority of construction projects regulated by the Construction Contracts Act 2004 (WA).

At the same time the submissions relating to the holding of retention monies have merit. If the retention monies are held ‘independently’ in some form of ‘separate’ account, this will assist in the prevention of a situation where parties to a lawful claim under the contract are prevented from receiving their payment entitlement as a consequence of the Corporations Act 2010 (Cth).

With references to licensing schemes and health checks and the matter of insolvency in the construction industry overall, the issues relating to insolvency in the construction industry are complex and significant. By way of example, the Collins Inquiry into Construction Industry Insolvency in NSW report 295 comprises some 450 pages. The issues of construction industry insolvency in Western Australia should be considered separately by way of a future independent review.

Whilst acknowledging the significance and importance of this issue, due to the small number of submissions on the matter, it has not been possible provide a definitive recommendation specifically addressing the concerns raised, and this is reflected in the generality of my recommendation.

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Recommendation

Consideration should be given to amending div 9 s 11 of the Act in order to remove the requirement that ‘the principal holds the retention money on trust for the contractor’, with the trust money to be held instead by an independent third party. As with the Wallace recommendation, the funds could be held by the Building Commissioner.

It is acknowledged that there may be practical administrative problems if the funds are to be held by a third party. At first sight it would appear that PBAs may not be suitable for smaller projects that fall within the jurisdiction of the Act. However it is recommended that these issues should be considered by way of a separate future review by others.

The Western Australian Government should consider the creation of a separate taskforce of major public sector construction agencies to address potential concerns about the consequences of insolvencies for major public sector projects or in the construction industry generally.

4.9 The Consent of the Parties to Adjudicate Simultaneously Two or More Payment Disputes

The Act currently requires that an adjudicator obtain the consent of the parties to adjudicate simultaneously two or more payment disputes. Specifically, s 32(3(b) reads: 296

32. Adjudication procedure

(3) An appointed adjudicator may —

(b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties;

The same provision is found in the Construction Contracts (Security of Payments) Act 2004 (NT)297 and would appear to have been included on the basis of reducing costs and time and increasing efficiency.298

Examples were given of parties with multiple payment claim disputes running simultaneously. In State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [2012] WADC 27 and State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2] [2012] WADC 60, a single application was submitted for two different payment claims for different projects, but both from the same applicant and respondent.

296 Construction Contracts Act 2004 (WA) s 32(3)(b).
297 Construction Contracts (Security of Payment) Act 2004 (NT), s 34(3)(b).
298 By way of comparison s 27C (Consolidation of arbitral proceedings) of the Commercial Arbitration Act 2012 (WA) confers a wide range of procedural powers upon the arbitrator in order to facilitate optimal coordination between related proceedings.
It appears that the adjudicator chose to undertake the two payment claims simultaneously and ‘determine the dispute fairly and as quickly, informally and inexpensively as possible.’

The court noted that the adjudicator did not seek the consent of the parties, although it appears that the respondent had insisted that they were not going to participate in the payment claim dispute, were not going to give consent to hearing the payment claim disputes simultaneously and had decided not to submit a response.

The decision by the District Court appears to have failed to consider s 30. The cost to the parties would have increased as a consequence of the two separate determinations.

The matter proceeded to the Supreme Court, however by this time one of the parties had gone into administration. Following Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd [No 2], it was held that there was no denial of procedural fairness by the adjudicator failing to have regard to material furnished by the applicant outside of the 14 day period required by s 27 of the Act.

It is recommended that with respect to determining the payment dispute ‘fairly and as quickly, informally and inexpensively as possible’ the adjudicator should have the discretion to determine whether the matters should be adjudicated simultaneously.

Recommendation

Section 32(4)(b) of the Act should be amended to allow an adjudicator in his or her discretion to adjudicate simultaneously two or more payment disputes.

4.10 Oral Contracts

Examples were given during a number of stakeholder meetings of difficulties experienced by smaller parties who have entered into wholly oral contracts. A number of examples were also given of large projects where the agreement was constituted by a simple purchase order giving a brief description of the work and a lump sum amount. The Act currently provides that there is no requirement for writing for a construction contract. Section 3 of the Act provides:

3. Interpretation

construction contract means a contract or other agreement, whether in writing or not, under which a person (the contractor) has one or more of these obligations —

(a) to carry out construction work;

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299 Construction Contracts Act 2004 (WA) s 30.
300 [2013] WASC 59.
301 One example given was to ‘Provide plumbing services to (location). Total cost $xxxx.’
302 In State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [2012] WADC 27 an oral agreement entered into by telephone was held to be a construction contract for the purposes of the Act.
303 Construction Contracts Act 2004 (WA) s 3.
(b) to supply to the site where construction work is being carried out any goods that are related to construction work by virtue of section 5(1);

(c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2);

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b);

The provision acknowledges the widespread practice, particularly at the lower end of the contracting chain that numerous contracts for the supply of goods and services are entered into on an oral basis. A fact that generally surprises the layperson is that there is no general rule requiring contracts to be in writing and generally a contract is enforceable even though, at common law, it is wholly oral or partly written and oral. Where written evidence of a contract is required this will be due to the operation of statute.304

The reference to ‘or other agreement’ in the definition is relevant.305

As noted in the Corrs Chambers Westgarth article, the phrase was considered in two decisions of the NSW Supreme Court.306 While these two decisions were made with respect to the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOPA), where a construction contract is defined as a ‘contract or other agreement’ (as in the CCA), the Act will apply not just to construction contracts in the strict sense of the term, but to arrangements for construction work more broadly.

In Machkevitch307 it was claimed that as an evidentiary matter there was no undertaking and even if there was, such an oral undertaking could not constitute a construction contract for the purposes of the Act. However McDougall J determined that Machkevitch did provide an oral undertaking and that an oral undertaking can constitute a construction contract for the purposes of s 4 of the SOPA.

The authors note that the decision was based on the plain meaning of the definition of construction contract under the SOPA; that is, ‘… a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party’.

McDougall J held that by adding the word ‘arrangement’ to the definition of construction contract, the legislation intended an entitlement to payment should not depend on the degree of formality of the arrangement.

Additionally, McDougall J concluded that for a construction contract under the SOPA:

There must be something more than a mere undertaking; or something which can be said to give rise to an engagement, although not a legally enforceable

304 Property Law Act 1969 (WA). It does not appear to be well known that the Sale of Goods Act 1895 (WA) stipulates a writing requirement for the sale of goods valued at more than $20.00.
305 ‘Construction Contracts – A Wider Net Than You Think.’ Corrs Chambers Westgarth, 3 December 2012.
306 Machkevitch v Andrew Building Constructions [2012] NSWSC 546; see also, IWD No 2 Pty Ltd v Level Orange Pty Ltd [2012] NSWSC 1439.
engagement, between two parties; or a state of affairs under which one party undertakes to the other to do something; or an arrangement between parties to like effect.

Put simply, for the purposes of the Act a ‘construction contract’ is something less than a formal contract. This would appear to include an arrangement which is not legally binding.

By way of comparison, s 4 of the Home Building Contracts Act 1991 (WA) does contain a writing requirement for home building construction work currently valued between $7500 and $500,000. The provision states:

4. **Contracts to be in writing; prescribed explanatory notice to be given**

   (1) A contract —

   (a) must be in writing —

      (i) setting out all of the terms, conditions and provisions of the contract; and

      (ii) showing the date of the contract;

   and

   (b) must be signed by the builder and the owner or their respective agents.

   (2) A notice containing an explanation of the relevant provisions of this Act is to be prescribed.

   (3) The owner must be given a notice referred to in subsection (2) before the owner signs a contract.

   (4) A builder who is a party to a contract must ensure that the requirements of subsections (1) and (3) are complied with in respect of that contract.

Penalty: $2 000.

   (5) If any requirement of subsection (1) is not complied with by the builder the contract may be terminated by the owner in accordance with section 19.

5. **Owner to be given copy of contract**

   (1) The owner must be given a copy of the signed contract —

      (a) as soon as is reasonably practicable after a contract has been signed by both parties; and

      (b) before the home building work is commenced.
(2) A builder who is a party to a contract must ensure that the requirements of subsection (1) are complied with in respect of that contract.

Penalty: $500.

Whilst it is acknowledged that many oral contracts run smoothly, on balance it is considered that construction contracts for the purpose of the Act should be in writing to avoid evidentiary problems and uncertainty and reduce the problems arising from the incorporation of implied terms. There should be a pecuniary penalty for noncompliance and the contract should be voidable at the option of the aggrieved party. No recommendation is made regarding any monetary limits with respect to the writing requirement. These are to be determined by others.

**Recommendation**

*Construction contracts for the purpose of the Act should be in writing. There should be a pecuniary penalty for noncompliance and the contract should be voidable at the option of the aggrieved party. No recommendation is made regarding any monetary limits with respect to the writing requirement. These are to be determined by others.*

**4.11 Inequality of Bargaining Power/Economic Duress/Unconscionable Conduct**

In a number of meetings and submissions, issues were raised which at first sight would appear to fall outside the terms of reference regarding the operation and effectiveness of the Act. At the same time they are clearly collateral to this Review and whilst no recommendations are specifically made with respect to amendments to the Act with respect to the allegations made or specific conduct complained of, it is nevertheless incumbent upon me to raise them in this report for any future action or enquiry which may be deemed appropriate by the Building Commission or Minister for Commerce.

At the lower level of the contracting chain it was evident, as I have noted in a number of sections of this report, that there was a basic lack of understanding of contractual principles and rights and obligations under the contract apart from any issues of inequality of bargaining power or economic duress. There was a general misunderstanding that the Act was there to provide some overall commercial protection to smaller parties in the contracting chain. This was nevertheless a serious issue, but once again I refer to the Minister for Planning and Infrastructure’s Second Reading Speech which, in part, states:

The Bill supports good payment practices in the building and construction industry by prohibiting payment provisions in contracts that slow or stop 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 the contract becomes insolvent …

This Bill cannot remedy every security of payment issue. Insolvency can be addressed only by Commonwealth legislation. Participants in the industry still have to look after their own commercial interests.
Referring to this statement again is in no way meant to be dismissive of an important issue affecting smaller parties. Throughout this report, reference has been made to the urgent need to address the lack of education regarding the objectives, existence and application of processes for dealing with payment disputes. The role of authorities in correcting this lack of knowledge is to be considered at the appropriate level but it is clearly incumbent upon all of the professional and trade associations to take an active part in assisting parties to develop appropriate contract administration knowledge and skills. I have referred earlier to the helpful information on the Building Commission website but many persons appeared to be unaware of this information.

With respect to what might be described as ‘unfair’ practices in the construction industry, the submissions of the Small Business Development Corporation, the Subcontractors for Fair Treatment and Master Electricians Australia have provided details of practices which appear to be unethical and in some cases perhaps unlawful. These examples appear to be in breach of any implied common law requirement of good faith in contractual dealing. Some of these practices were also referred to in the confidential submissions and stakeholder meetings. The submission by the Hon Rev Peter Abetz (MLA) refers to some of these practices as follows:

It is a common reality that some larger well established businesses take advantage of their small subcontractors by deferring payment beyond the agreed terms of trade. These businesses are aware that their small subcontractors depend on them for their livelihood and are not usually in a position to bargain with them effectively or threaten to withdraw their labour.

In the section above dealing with the enforcement of the provisions of the Act, there is reference to the powers of the Building Commissioner with respect to specific breaches relating to the inclusion of the prohibited terms in construction contracts.

I note also that Western Australia does not have the equivalent of the Contracts Review Act 1980 (NSW) which confers upon the Supreme, District and Local Courts, powers to review contracts that are ‘unjust’ (defined in s 4 to include harsh, oppressive or unconscionable conduct).

However, many of the examples given in the review submissions clearly fall within the jurisdiction or provisions of the Australian Consumer Law (ACL). The ACL (which forms part of the Competition and Consumer Act 2010 (Cth)) sets out a number of rights and responsibilities that serve to guide businesses in their day-to-day dealings with consumers and in particular with other businesses. Among other things, the ACL prohibits unconscionable conduct.

The Australian Competition and Consumer Corporation (ACCC) website also

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308 The implementation of terms into contractual agreements requiring the parties to act in good faith is controversial and uncertain and a discussion is beyond the terms of reference of this Review. The issue is considered in detail in Elisabeth Peden, Good Faith in the Performance of Contracts, (Lexis Nexis, 2003).

309 The Misrepresentation Act 1972 (SA) provides criminal sanctions against misrepresentation in certain commercial transactions; to expand the remedies available at common law and in equity for misrepresentation; and for other purposes.

310 Unconscionable conduct provisions also exist in the Australian Securities and Investments Commission Act 2001 (Cth), which applies to transactions involving financial products and services.
contains a helpful publication, *Business Snapshot*. This provides practical tips for businesses to minimise the risk of becoming a victim of unconscionable conduct or to avoid engaging in such conduct towards other businesses or consumers. It also explains unconscionable conduct using actual examples.

The specific provision of the ACL with respect to small business transactions is:

**22. Unconscionable conduct in business transactions**

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to another person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from another person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

To understand the extent of the conduct which is prohibited it is helpful to reproduce from s 22(1) of the ACL the matters which a court may take into account when determining whether conduct in connection with small business is unconscionable:

(a) the relative strengths of the bargaining positions of the supplier and the business consumer; and

(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier’s conduct towards the business consumer was consistent with the supplier’s conduct in similar transactions between the supplier and other like business consumers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:
   (i) any intended conduct of the supplier that might affect the interests of the business consumer; and
   (ii) any risks to the business consumer arising from the supplier’s intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and

(j) if there is a contract between the supplier and the business consumer for the supply of the goods or services:
   (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the business consumer; and
   (ii) the terms and conditions of the contract; and
   (iii) the conduct of the supplier and the business consumer in complying with the terms and conditions of the contract; and
   (iv) any conduct that the supplier or the business consumer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and

(l) the extent to which the supplier and the business consumer acted in good faith.

A number of the practices complained of in the submissions are specifically referred to in cls (a), (c), (d), (k) and (l). These provisions in the ACL have been included to prevent the conduct complained of but it was apparent that many of the smaller stakeholders were unaware of the protection provided by the ACL.

There was some limited awareness of the existence of the unfair contract terms provisions of the ACL but the protection does not currently assist small business.\(^{312}\) The provision currently only applies to ‘consumer’ contracts:

23. Unfair terms of consumer contracts

   (1) A term of a consumer contract is void if:

\(^{312}\) s 23 ACL.
(a) the term is unfair; and
(b) the contract is a standard form contract.

(2) The contract continues to bind the parties if it is capable of operating without the unfair term.

(3) A **consumer contract** is a contract for:

(a) a supply of goods or services; or

(b) a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

There are currently reforms proposed to the *Competition and Consumer Act*.313 A number of submissions to the Harper Review have suggested reforms which would assist small business in particular. One of these is to extend the unfair contract term provision to contracts involving small business. This was also the subject of separate review by the Commonwealth government.314

These reviews have now resulted in the drafting of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015* which was read for the second time on 17 August 2015. The proposal is to amend the *Competition and Consumer Act 2010* (Cth) to extend the unfair contract terms protections to a business with less than 20 employees agreeing to standard form contracts valued at less than $100,000 or $250,000 if the duration of the contract is more than 12 months.315 This would significantly address some of the concerns raised by small business operators particularly when faced with unilateral contract provisions or changes by larger organisations.

I have noted previously in this report that the written and oral submissions to the Review are untested. I did not receive evidence under oath and had no powers of compulsion. Consequently in many instances, the information in the submissions relating to unfair practices reflects opinion or allegations. Whilst I do not question the integrity of those who raised these issues, I am unable to be definitive about the occurrences of these practices despite noting the emotive newspaper statements from time to time.

The issue for me with respect to the Review’s terms of reference, is what changes should be made to the Act to prevent the alleged unfair conduct from occurring?

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Should issues of complexity be introduced into an Act which objectively has been considered generally by stakeholders as being successful in providing a rapid determination of payment disputes?

Subject to further investigation, should these practices be common in the industry, one possibility is to expand the prohibitions currently listed in pt 2 div 1 of the Act. However the scope and coverage of the Act is now well settled and any changes by way of introducing provisions in the Act dealing with unconscionable conduct or unfair terms would potentially add legal complexity and hinder the principal objectives of the Act.

I am of the view that if the unfair conduct complained of is common then the state government should consider the introduction of contract review legislation similar to the Contracts Review Act 1980 (NSW).

In summary, a significant number of the issues raised originated from a lack of knowledge of contractual rights and obligations rather than specific failures of the Act (CCA) to address all of the commercial issues which arise in contracts. The existing provisions of the Australian Consumer Law (ACL) directly apply to many of the issues referred to as ‘unfair’ or specifically prohibited by the ACL. Additionally it is considered that the submissions to the Harper Review and the subsequent recommendations as reflected in the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 will result in reforms which would assist small contracting business in particular.

**Recommendation**

The scope and coverage of the Act is now well settled and any changes by way of introducing provisions in the Act dealing with unconscionable conduct or unfair terms would potentially add legal complexity and hinder the principal objectives of the Act with respect to the rapid determination of payment disputes. The examples given during the stakeholder meetings, fall within both common law remedies and the statutory provisions of the Australian Consumer Law. If the unfair conduct complained of is common, then the state government should consider the introduction of contract review legislation similar to the Contracts Review Act 1980 (NSW). The Building Commission website should contain a link to sources of information relating to the unconscionable conduct provisions of the Australian Consumer Law.

**4.12 Publication of Adjudicators’ Decisions**

A small number of oral submissions referred to the power of the Building Commissioner to publish adjudication determinations.316 The Act states: 317

**50. Publication of adjudicators’ decisions**

(1) The Registrar may make available for public inspection the result, or a report, of the decisions of registered adjudicators.

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316 A similar provision is found in s 54 of the Construction Contracts (Security of Payment) Act 2010 (NT).
317 Construction Contracts Act 2004 (WA) s 50.
(2) The Registrar is to ensure that there is not included in the result, or a report, of the determination made available under subsection (1) —

(a) the identities of the parties to the adjudication;

(b) any information in the determination that is identified under s36(e) as being not suitable for publication because of its confidential nature.

To date, the Building Commissioner has not elected to publish selected determinations. I acknowledge that there may be issues of ‘adjudicator shopping’ if the determinations are made public.\(^\text{318}\) There may be a benefit arising from publication in that reading a determination may help parties (and additionally new adjudicators) better understand how the provisions of the Act are interpreted and applied and the legal issues arising from the payment dispute.

While the specific details of a past payment dispute and the legal issues may differ from case to case, the ability to view an adjudicator’s decision may also give parties general information about the rapid payment dispute resolution process.

However, apart from the risk of “adjudicator shopping” there are reasons against the publication of all determinations. A determination is provisional in nature and not subject to submissions and testing of evidence as would be available in arbitration. Put simply, there will be occasions when the adjudicator gets it wrong. It would be unfortunate if these decisions, whilst perhaps not frequent, were to act as some form of precedent.

A perusal of the Northern Territory Department of the Attorney General and Justice website dealing with the NT Act reveals that not all determinations are published. The determinations on the website are dated from November 2013 to December 2014.\(^\text{319}\) Whilst all references to sites, parties, and legal representation are deleted, the name of the adjudicator is published.

I am of the opinion that the discretion to publish should remain with the Building Commissioner. However, I would encourage the Building Commissioner to publish those determinations which in the Building Commissioner’s opinion are likely to add to the body of law and practice relative to the efficient administration of the Act.

**Recommendation**

The Building Commissioner should publish those determinations which in the Building Commissioner’s opinion add to the body of law and practice relative to the efficient administration of the Act. In addition to the exclusions stated in s 50(2) of the Act, the name of the adjudicator should be removed.

4.13 Contracting Out

One confidential submission suggested that the Act should be amended to permit contracting out of the Act’s provisions where the amount exceeds a certain value.

\(^{318}\) Personal communication, 10 June 2015.

However no criteria were provided in the submission for the determination of the value of the maximum amount. The relative section of the Act is s 53 which states:

53. **No contracting out**

(1) A provision in an agreement or arrangement, whether a construction contract or not and whether in writing or not, that purports to exclude, modify or restrict the operation of this Act has no effect.

(2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.

(3) Any purported waiver, whether in a construction contract or not and whether in writing or not, of an entitlement under this Act has no effect.

The extent to which the NSW Act’s provision equivalent to s 53 affects the primacy of parties’ bargains has been considered in detail by Robert McDougall who states:

Regardless of the Act’s apparent attempts to preserve contractual freedoms, I suggest that s 34 is a bulwark against provisions attempting to eradicate or limit the rights established by the Act. The section, as amended, may be seen to have transformed the Act from a legislative scheme providing default mechanisms to one which establishes a strong entitlement to a prompt, interim progress payment.

Following submissions made to me about inequalities in bargaining power in the industry, I am concerned that some parties may misuse their dominant market position and coerce parties to contract out of the provisions of the Act. Contracting out is also clearly inconsistent with the express provisions of the Act.

**Recommendation**

*There should be no change to s 53 of the Act. In the absence of cogent evidence in support of contracting out, the Act should not permit contracting out because it is considered that it would result in contracting parties being given unreasonable ultimatums to accept the provision.*

4.14 **The Use of Standard Form Contracts**

In a confidential submission I was handed a contract which I was informed has been used in a number of large subcontracts in Western Australia. In this instance it had been used on a project where the state government department was the principal. It was not a standard form contract and was not balanced in terms of allocation of

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risk as would be found for example in the Australian Standard suite of contracts.  
There were a number of exclusion clauses and a termination for convenience clause, which prompted me to wonder why a party would enter into such a contract. However I acknowledge that I make this comment as a lawyer and not as a subcontractor coping with the commercial realities of the construction industry.

Unfortunately, under common law harshness alone is not an invalidating factor, no matter how much courts might like it to be. In *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506, Menzies J stated:

> This appeal is concerned with perhaps the most wordy, obscure and oppressive contract that I have come across ... I am sure that not one oppressive provision which could have been found was omitted. The contract is so outrageous that it is surprising that any contractor would undertake work for the Railways Commissioner upon its terms ... The employment of such a contract tempts judges to go outside their function and attempt to relieve the harshness rather than give effect to what has been agreed between the parties.

Menzies J continued that he was bound by the law, however, and the contract must stand.

The advantages of the use of standard form contracts in the Australian construction industry have been well documented. As far back as 1990 it was stated:

> Standard forms of contract are preferred by the industry to contracts that are individually drafted for each project, if for no other reason than that as both parties are more likely to be fully familiar with the obligations assumed by each party using a Standard form they will thereby reduce incidents of dispute caused by concealing obligations in unfamiliar documents.

More recently, the benefits of standard form contracts have been noted in the research report by the Melbourne University School of Law. The report is extensive and detailed and states in part that 68% of contracts are based upon standard form contracts and the dominating factor identified by participants was the familiarity with the forms. Their widespread use over time and familiarity enables participants to clearly understand the meaning of terms and their rights and obligations under the contract. From my experience, the dispute resolution procedures used in these standard forms are extremely well understood. The forms have been prepared after long consultation with relevant stakeholders and interested parties and are subject to review and revision from time to time. A significant benefit in their use is that the risk is “balanced” between the contracting parties.

An additional benefit relates to the preparation of and costs associated with advice relating to obligations under nonstandard forms of contract. A confidential

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323 *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506, 512.


325 Sharkey, Bell, Jocic and Marginean, above n 320.
submission by a subcontractor stated that he had been charged $8,000 by a law firm to review a non-standard contract.

I accept that the state government should be reluctant to interfere with the commercial agreements between two commercial parties who have entered into contracts at arm’s length. Nevertheless it is considered that state government has a public policy obligation to assist (subject to law) even in commercial contracts where the behaviour of some has the effect of seriously damaging the rights of others.

**Recommendation**

It is recommended where the state government is a principal in a contract or the contract administrator that the Australian Standard forms of contract be used on the project.

### 4.15 Statutory Declaration Requirement

A condition found in a number of construction contracts requires contractors to provide a statutory declaration confirming that the contractor has paid all of its subcontractors as a precondition to its entitlement to lodge a progress claim under the contract. A confidential oral submission complained that this procedure was open to abuse by persons falsely stating in the declaration that this had been done. Whilst not expressly stated, I assume the comment was made in support of a proposed amendment to the Act to require a similar clause be incorporated into the Act as a further statutory measure to ensure that monies are properly paid without delay. Regardless of the legalities with respect to the making of a false declaration in the absence of corroboration or evidence, I am reluctant to make any suggestion regarding the alleged conduct. I am also concerned that it would create an additional administrative burden on the parties.

If a person falsely makes a statutory declaration under the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) that person commits an offence.\(^{326}\) If any person has evidence that a statutory declaration is false he or she should bring that matter to the police.

**Recommendation**

The Act should not be amended to require a claimant to provide a statutory declaration attesting to the payment of workers, subcontractors or suppliers as a precondition to the submission of a payment claim under the contract.

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\(^{326}\) sch 1 — Form of statutory declaration.
5. ACKNOWLEDGEMENTS

Throughout this Review I have been assisted with aspects of the research by two persons. Firstly Mr Auke Steensma, who is a postgraduate student at Curtin University and Professor Gabriël Moens, also from Curtin University. However as noted in the introduction to this Review, the interpretation of data, inferences drawn, comments and recommendations are mine.

I would also like to acknowledge the cooperation extended to me at all times during this Review by the office of the Building Commissioner. All requests for information and access to documents (where not confidential) were responded to promptly and courteously.

In conducting a review of this type, reference has been made to numerous printed and electronic materials such as lecture notes, course materials, academic papers, articles, websites, journals, conference papers and the multitude of papers that academics and legal practitioners collect over the years. At all times and wherever possible, care has been taken to properly acknowledge the source and authorship of these materials.

Finally a number of submissions were marked as confidential and every care has been taken to comply with this requirement.
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ANNEX A – GLOSSARIES


3. Interpretation

In this Act, unless the contrary intention appears —

**adjudication** means the adjudication of a payment dispute in accordance with Part 3;

**applicant**, in relation to an adjudication, means the person who, under section 26, makes the application for the adjudication;

**appointed adjudicator**, in relation to a payment dispute, means the registered adjudicator who, having been appointed under Part 3 to adjudicate the dispute, has been served with the application for adjudication;

**Building Commissioner** means the officer referred to in the Building Services (Complaint Resolution and Administration) Act 2011 section 85;

**construction contract** means a contract or other agreement, whether in writing or not, under which a person (the **contractor**) has one or more of these obligations —

(a) to carry out construction work;

(b) to supply to the site where construction work is being carried out any goods that are related to construction work by virtue of section 5(1);

(c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2);

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b);

**construction work** has the meaning given to that term in section 4;

**contractor** has the meaning given by the definition of ‘construction contract’;

**costs of an adjudication** has the meaning given to that term in section 44;

**determination** means a determination, made on an adjudication under Part 3, of the merits of a payment dispute;

**obligations**, in relation to a contractor, means those of the obligations described in the definition of ‘construction contract’ that the contractor has under the construction contract;
party, in relation to an adjudication, means the applicant and any person on whom an application for the adjudication is served;

party, in relation to a construction contract, means a party to the contract;

payment claim means a claim made under a construction contract —

(a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or

(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract;

payment dispute has the meaning given to that term in section 6;

prescribed appointor means a person prescribed as such by the regulations;

principal, in relation to a construction contract, means the party to whom the contractor is bound under the contract;

registered adjudicator means an individual registered as such under section 48.

4. Construction work

(1) In this section —

civil works includes —

(a) a road, railway, tramway, aircraft runway, canal, waterway, harbour, port or marina;

(b) a line or cable for electricity or telecommunications;

(c) a pipeline for water, gas, oil, sewage or other material;

(d) a path, pavement, ramp, tunnel, slipway, dam, well, aqueduct, drain, levee, seawall or retaining wall; and

(e) any works, apparatus, fittings, machinery or plant associated with any works referred to in paragraph (a), (b), (c) or (d);
site in WA means a site in Western Australia, whether on land or off-shore.

(2) In this Act —

construction work means any of the following work on a site in WA —

(a) reclaiming, draining, or preventing the subsidence, movement or erosion of, land;

(b) installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, any works, apparatus, fittings, machinery, or plant, associated with any work referred to in paragraph (a);

(c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form, whether permanently or not and whether in WA or not, part of land or the sea bed whether above or below it;

(d) fixing or installing on or in any thing referred to in paragraph (c) any fittings forming, or to form, whether permanently or not, part of the thing, including —

(i) fittings for electricity, gas, water, fuel oil, air, sanitation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing, and the safety of people; and

(ii) lifts, escalators, insulation, furniture and furnishings;

(e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any thing referred to in paragraph (c) or any fittings described in paragraph (d) that form part of that thing;

(f) any work that is preparatory to, necessary for, an integral part of, or for the completion of, any work referred to in paragraph (a), (b), (c), (d) or (e), including —

(i) site or earth works, excavating, earthmoving, tunnelling or boring;

(ii) laying foundations;

(iii) erecting, maintaining or dismantling temporary works, a temporary building, or a temporary structure including a crane or other lifting equipment, and scaffolding;

(iv) cleaning, painting, decorating or treating any surface; and
(v) site restoration and landscaping;
APPENDIX B: Glossary of legal terms

Ab initio

The literal meaning is ‘from the beginning; from the first act; from the inception’. A decision is said to be ‘void ab initio’ if it has at no time had any legal validity.

Act

Law passed by parliament, known as a ‘bill’ before assent by governor or governor general.

Adjournment

When a hearing or review, is postponed to a later date.

Adjudication

A process in which the parties present documentary arguments and evidence to a dispute resolution practitioner (the adjudicator), who makes a determination which is enforceable by a court. The most common form of enforceable adjudication is that conducted by adjudicators in connection with security of payment legislation.

Administrative appeal

An appeal against, or a review of an administrative decision. It usually only exists where a statute allows for it. An appeal on the merits may result in a substitute decision.

Administrative law

The legal principles governing decision-making by public officials and those entrusted with decision-making under an act of parliament.

Affidavit

A written declaration made under oath before a notary public or other authorised officer.

Alternative dispute resolution (ADR)

Refers to processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance. The processes include negotiation, mediation, expert determination or appraisal, and arbitration.
Appeal

An application to a higher court to review a decision of a lower court or tribunal. For example, an appeal from a decision of the District Court of Western Australia may be made to the Supreme Court of Western Australia.

Appellate jurisdiction

The power given to a court to hear appeals in certain matters.

Appellant

The person, organisation or corporation that commences an appeal in a court. Applicants, appellants, respondents, defendants are generally called ‘parties’.

Appellate courts

The courts to which an appeal is made.

Applicant

The individual, organisation or corporation who/which applies to the court or tribunal to start legal proceedings, or determine issues in dispute, against another person or persons.

Application

The document that commences proceedings in a court or tribunal.

Arbitration

A process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination according to law. The procedures are governed by statute. For example the Commercial Arbitration Act 2012 (WA).

Case law

The area of law developed by the courts while hearing and determining disputes.

Cause of action

A term used in a court to classify proceedings commenced with the court or tribunal.

Certiorari

A remedy, which may lie against a decision-maker or body, which has power to determine questions affecting the rights or interests of parties. This remedy has the effect of quashing an invalid decision.
Common law

Case law developed in common law courts. This term is sometimes used to describe all case law or judge made law.

Constitution

A set of legal rules or principles according to which a state or other organisation is governed. For example the Australian Constitution is an Act that sets out the structure of federal government and the powers of federal parliament.

Cross appeal

An application by a respondent in an appeal also seeking a review of the lower court or tribunal decision and made in response to the appeal. A cross appeal is not required if the respondent is simply seeking that the decision of the lower court or tribunal be upheld.

Cross claim

A claim made in a proceeding by one party against a co-party, such as the first respondent (or defendant) against the second respondent (or defendant). However, if the claim in the proceeding is by one party against an opposing party, such as the respondent (or defendant) against the applicant (plaintiff), it is called a counter claim. A cross claim has to be closely connected to what is in dispute in the original claim or a counter claim.

Damages

An amount of money awarded in compensation to the party who suffers the loss as a result of the other parties breach or default.

Defence

In the defence the respondent must answer each allegation made by the applicant in the statement of claim or application. Matters in dispute should be apparent when the defence is delivered. Points of disagreement between the parties are referred to as ‘issues’. Where facts are admitted they cease to be an issue in the proceedings. Consequently, they need not be proved at the hearing.

Delegated legislation

This is also referred to as subordinate legislation. The term describes various forms of legislative instruments made by administrative bodies pursuant to powers delegated by the legislation in the enabling Act.

Directions

Orders made by the court or tribunal in relation to the conduct of a proceeding. Before the trial or hearing of a matter a judge or arbitrator may give directions so that the parties involved will be properly ready. The directions usually set down a list of
steps to be taken by the parties and the deadline for those steps. The steps usually involve filing of material and defining the issues that require a decision by the Court.

**Disclosure**

Revealing all relevant information with respect to the issues in dispute.

**Discovery**

A process by which the parties involved in a legal proceeding must inform each other of documents they have in their possession and which relate to the matters in dispute between the parties.

**Discretion**

The ability to choose whether or not to proceed with a decision.

**Discretionary**

When the decision is made on what seems fit for the circumstances.

**Enabling act**

A statute empowering a person or body to take certain action, especially to make regulations, rules, or orders.

**Error of law**

This occurs when the decision-maker has misunderstood or misapplied a *statute*, for example, by applying the wrong criteria, or asking the wrong question. In practice this often occurs because the decision-maker has failed to read or understand the statute. In addition, where policy exists, decision-makers can fail to realise its limitations, sometimes believing that the policy empowers them, rather than the law.

**Evidence**

Evidence is material that tends to prove or disprove a particular fact or facts. Evidence might be an object or thing, it might be a document or it might be oral testimony from a witness. Whether evidence can be used in a hearing will depend on its admissibility. This may depend on a number of matters and there are many rules of evidence which take account of such matters as the relevance and reliability of evidence.

**Exhibit**

A document or item produced in court for the purpose of becoming part of the evidence in a proceeding.

**Expert appraisal**

A process in which an expert, chosen by the parties on the basis of his or her knowledge of the area in dispute, investigates the dispute and provides advice as to
the facts of the dispute and possible, probable or desirable outcomes and how these may be achieved.

**Expert determination**

A process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner, who is chosen by the parties on the basis of their specialist qualification or experience in the subject matter of the dispute (the expert) and who makes a binding determination.

**Full Court**

Three or more judges sitting together to hear a proceeding.

**General Conditions of Contract (GCOC)**

The document which forms part of the agreement between the parties, and which sets out all of the rights and obligations of the parties to the contract.

**Hearing**

That part of the proceedings where the parties present evidence and submissions to the court or tribunal. A hearing may also be determined on the basis of written submissions.

**Inferior body**

A court or tribunal of limited jurisdiction.

**Injunction**

A court or arbitral order making a person do, or refrain from doing, something.

**Interlocutory application**

Interlocutory proceedings are for dealing with a specific issue in a matter, usually between the filing of the application and the giving of the final hearing and decision. An interlocutory application may be for interim relief (such as an injunction) or in relation to a procedural step (such as discovery).

**Interrogatories**

A method of formal discovery wherein a lawyer serves upon the other party’s lawyer a written document consisting of a set of questions. The party served must answer the questions, under oath and in writing.

**Judicial review**

A review by a court, to determine if action has been taken according to principles developed by the courts to ensure that administrative action is not unfair or arbitrary. Judicial review does not involve a review of the merits of the decision. It is the
manner in which the decision has been made which theoretically concerns a court and not whether the right decision has been made.

**Judgment of the court**

The final order or set of orders made by the court after a hearing, or determination or award often accompanied by reasons which set out the facts and law applied in the case. A judgment or award is said to be ‘reserved’ when the court postpones the delivery of the judgment to a later date to allow time to consider the evidence and submissions.

**Jurisdiction**

A body which has jurisdiction has power to act. Jurisdiction is the term used where a judicial or quasi-judicial body is concerned. Jurisdiction may be limited or unlimited as in the case of the state Supreme Courts.

**Jurisdictional error**

Where a tribunal or body has limited jurisdiction, an error of law, an error of fact or an error of mixed law and fact, concerning matters upon which its jurisdiction depends constitutes a jurisdictional error. A decision made in excess of jurisdiction is void.

**Law**

The rules and principles established by court or parliament.

**Legislation**

An Act of parliament or piece of delegated legislation.

**Litigants**

Individuals, organisations or companies who/which are the parties to a proceeding before the court.

**Mediation**

A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement. An alternative is ‘a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute’.

**Merits review**

Merits review is a type of review that considers all the evidence about the merits of a decision and decides whether or not a correct and preferable decision should be
made. It is sometimes called a ‘de novo’ appeal. This means that the Tribunal puts itself in the shoes of the original decision-maker and considers all the evidence from a fresh perspective.

**Natural justice**

The right to be heard and to have the matter determined free of bias or impartially.

**Negotiation**

There are essentially two forms; bilateral negotiation and supported negotiation. With bilateral negotiation the parties approach each other without any third party assistance and try to seek a mutually acceptable outcome through discussion. The parties are in control of the process and any rules are perhaps described more as social (acceptable behaviour) than legal. With supported negotiation the process is much the same but the parties are assisted by an advisor.

**Parties**

The individuals or groups involved in a dispute or litigation. Applicants, appellants, respondents, defendants, are generally called ‘parties’.

**Plaintiff**

The party who initiates a civil action.

**Pleadings**

Pleadings include formal written statements of an applicant’s claim and a respondent’s defence. All of the material facts the parties intend to allege at the trial and the issues in dispute are defined in the pleadings. The pleadings show what facts are in dispute and what issues the Court will need to determine.

**Probative evidence**

Evidence having the effect of proof, tending to prove, or actually proving.

**Procedural fairness**

Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires that a fair and proper procedure be used when making a decision. A decision-maker who follows the correct procedures will reach a fair and correct decision.

**Proceedings**

The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the judgment.

**Regulations**

Rules, requirements and procedures established under the enabling legislation.
Reply

Where the respondent relieves to the applicant with respect to the matters claimed by the applicant.

Respondent

The individual, organisation or corporation against whom proceedings are commenced.

Security of payment

The term given to legislation introduced by all states and territories, in order to allow for the rapid determination of payment disputes under building contracts or subcontracts. The legislation generally prohibits certain terms in construction contracts and will imply terms dealing with payment in the absence of express terms.

Statement of claim

In the statement of claim the applicant alleges all of the material facts that show that the applicant has a cause of action that is enforceable against the respondent. The statement of claim may formulate any question of law that the court or tribunal will be asked to determine. It must set out the orders sought by the applicant against the respondent.

Statutes

A law made by parliament, either state or Commonwealth. It may also be known as an Act.

Statutory rule

The generic name for all types of delegated legislation.

Tribunal

A specialised adjudication body. The term is generally used to refer to administrative dispute resolution bodies other than courts. For example, arbitrators and adjudicators

Ultra vires

This occurs when a body has acted outside or beyond its powers. The term literally means ‘beyond power’. A body which acts beyond its powers may be subject to judicial review and any decision made may be invalid.

Void

This means of ‘no effect’. An administrative decision has effect until challenged. If challenged successfully, a decision may be found to be void because, for example it has been found to be in excess of jurisdiction. It will then be considered void ab initio as if it never existed.
Voidable

A decision has legal effect until voided. Some errors do not render a decision void but only voidable until an election by a party to seek to have the decision made void.

Writ

A written court order to do or refrain from doing something.
### APPENDIX C: Abbreviations used in the report

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
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<tbody>
<tr>
<td>ACCC</td>
<td>Australian Competition and Consumer Corporation</td>
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<tr>
<td>ACL</td>
<td>Australian Consumer Law</td>
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<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>AIA</td>
<td>Australian Institute of Architects</td>
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<tr>
<td>AIB</td>
<td>Australian Institute of Building</td>
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<tr>
<td>AIBS</td>
<td>Australian Institute of Building Surveyors</td>
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<tr>
<td>AIPM</td>
<td>Australian Institute of Project Management</td>
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<tr>
<td>AIQS</td>
<td>Australian Institute of Quantity Surveyors</td>
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<tr>
<td>CCA or the Act</td>
<td><em>Construction Contracts Act 2004 (WA)</em></td>
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<td>CCF</td>
<td>Civil Contractors Federation</td>
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<td>CLR</td>
<td>Commonwealth Law Reports</td>
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<td>CPD</td>
<td>Continuing Professional Development</td>
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<td>CTH</td>
<td>Commonwealth</td>
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<td>HCA</td>
<td>The High Court of Australia</td>
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<td>HIA</td>
<td>Housing Industry Association</td>
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<tr>
<td>IAMA</td>
<td>Institute of Arbitrators and Mediators Australia</td>
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<tr>
<td>LEADR</td>
<td>Lawyers Engaged in Alternative Dispute Resolution</td>
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<td>MBA</td>
<td>Master Builders Association</td>
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<td>MEA</td>
<td>Master Electricians Australia</td>
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<td>MLA</td>
<td>Member of the Legislative Assembly</td>
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<td>NECA</td>
<td>National Electrical and Communications Association</td>
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<td>New South Wales</td>
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<td>New South Wales Law Reports</td>
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<td>Northern Territory</td>
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<td>Project Bank Accounts</td>
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<td>Supreme Court of Queensland</td>
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<td>Royal Institute of Chartered Surveyors</td>
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<td>State Administrative Tribunal</td>
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<td>Small Business Development Corporation</td>
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<td>SFT</td>
<td>Subcontractors for Fair Treatment</td>
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<td>SOCLA</td>
<td>The Society of Construction Law Australia</td>
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<td>SOPA</td>
<td><em>Building and Construction Industry Security of Payment Act 1999 (NSW)</em></td>
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<td>TOR</td>
<td>Terms of Reference</td>
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<td>VIC</td>
<td>Victoria</td>
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<td>WA</td>
<td>Western Australia</td>
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<td>The District Court of Western Australia</td>
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<tr>
<td>WASAT</td>
<td>Western Australian State Administrative Tribunal</td>
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<tr>
<td>WASC</td>
<td>The Supreme Court of Western Australia</td>
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<tr>
<td>WASCA</td>
<td>The Western Australian Supreme Court of Appeal</td>
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ANNEX B – ISSUES IDENTIFIED IN THE DISCUSSION PAPER

The following issues were identified in the Discussion Paper:

1. Should s 26 of the Act be amended to extend the time limit in which the adjudication must be brought, or a payment claim can be made, from 28 days to 90 days from which a dispute arises?

2. Is there justification, or circumstances where it should be applicable, to extend the time period in s 26 from 28 days to 180 days and if so, what benefits would flow to the industry as a whole, and who would be the main beneficiaries from such an amendment?

3. Does the 14 day time limit, in which the respondent must prepare a written response to the application and serve it on the applicant and the adjudicator, allow sufficient time for this to undertaken adequately? If not, what is an appropriate balance to facilitate rapid adjudication? In this instance, would you support a tiered approach to accommodate different time limits for payment claims of various levels of complexity?

4. Does the 14 day time limit, in which the appointed adjudicator has to make his or her decision, allow sufficient time for this to undertaken adequately? If not, what is the appropriate balance to facilitate rapid adjudication? In this instance, would you support a tiered approach to accommodate different time limits for payment claims of various levels of complexity?

5. Why is the Construction Contracts Act 2004 (WA) an unsuitable vehicle for resolving small payment claims? Is there any way the Act could be modified to better facilitate the rapid adjudication of smaller claims?

6. Should the Building Service (Complaint Resolution and Administration) Act 2011 (WA) be amended to extend its provisions to allow the Building Commission to manage an alternative low cost adjudication service for subcontractors seeking payment from principals in relation to construction industry payment claims under $25,000 in value?

   If yes, should the adjudication service be fee-for-service, with administration costs partly funded by an increase in the Building Services Levy? Or are there alternative means of funding this service? If not, what other alternative means should be explored by Government to address the issue of small claims?

7. Are the registration requirements correct? Should adjudicators be registered for a finite time? Should adjudicators complete a post-graduate qualification such as a Graduate Certificate in Building and Construction Law, as a prerequisite? Is there a need for continuing professional development (CPD)? The average adjudicator's fees are about $265 per hour. The fees range from $100 to $400 per hour. Should adjudicator fees be prescribed? How should adjudicator performance be audited?
8. Do you agree that a provision for the exclusion of liquidated damages from progress payments or payment claims is warranted?

9. Should matters related to the *Home Building Contracts Act 1991* be included in the Act?

10. Should the Act apply to the resources sector?

11. Should the Act apply to the construction of plant for the purposes of extracting or processing?

12. Should the Act apply to artworks?

13. In terms of ‘harmonisation’, should Western Australia consider the Society of Construction Law Australia’s proposal for a national approach to security of payment legislation? In terms of ‘harmonisation’, should Western Australia consider adopting the *Construction Contracts (Security of Payments) Act 2004* (NT)? Should Western Australia maintain its version of the current ‘West Coast model’, with minor amendments?
ANNEX C – DISCUSSION PAPER QUESTIONS

The following information details the statistical responses to the various issues raised in the Discussion Paper. The responses cannot be viewed as determinative but are provided for indicative purposes only. The large number of ‘undecided’ or ‘not applicable’ responses reflects the diversity of the stakeholders and relevant issues with respect to individual stakeholders. As noted elsewhere in this report, the recommendations following this review are based not only on the written responses but also from the oral submissions made at a number of stakeholder meetings together with a consideration of the published literature dealing with security of payment both locally and nationally and judicial determinations. There were a total of 51 written responses received but two from the same sources have been consolidated into one response.

Question 1

Should s 26 of the Act be amended to extend the time limit in which the adjudication must be brought, or a payment claim can be made, from 28 days to 90 days from which a dispute arises?

- 26 responses or 53% support extension of time;
  - 14 of the 26 responses or 29% support an extension to 90 days,
  - 2 or 4% support an extension to 56 days.
- 13 responses or 27% do not support and recommend that the 28 day period remain.
- N/A - 10 responses or 20% made no comment.

Question 2a

Does the 14 day time limit in which the respondent must prepare a written response to the application and serve it on the applicant and the adjudicator, allow sufficient time for this to be undertaken adequately?

- 19 responses or 39% support the 14 day time limit;
- 15 responses or 31% do not support the 14 day period.
- 15 responses or 31% made no comment.

Question 2b

If not, what is an appropriate balance to facilitate rapid adjudication?

- 14 responses or 29% support maintaining 14 days.
- 5 responses or 10% support 28 days.
- 4 responses or 8% support 21 days.
Question 2c
In this instance, would you support a tiered approach to accommodate different time limits for payment claims of various levels of complexity and/or monetary threshold?

- 19 responses or 39% do not support a tiered system.
- 10 responses or 20% support a tiered system.
- 20 responses or 41% made no comment.

Question 3a
Does the 14 day time limit allow sufficient time for the appointed adjudicator to make a determination?

- 22 responses or 45% support the 14 day time limit.
- 8 responses or 16% do not support 14 day time limit.
- 19 responses or 39% made no comment.

Question 3b
If not, what is the appropriate balance to facilitate rapid adjudication?

- 12 responses or 24% support maintaining 14 days.
- 4 responses or 8% support 21 days.
- 1 response or 2% support 28 days.

Question 3c
In this instance, would you support a tiered approach to accommodate different time limits for payment claims of various levels of complexity and/or monetary threshold?

- 16 responses or 33% do not support a tiered system.
- 7 or 14% support a tiered system.
- 26 responses or 53% did not comment.

Question 4a
If the time to make a determination remains at 14 days, should the adjudicator be able to grant an additional seven days extension of time without the consent of the parties?

- 13 or 27% support the adjudicator being able to grant an additional seven days extension of time.
• 14 responses or 29% do not support the adjudicator being able to grant an additional seven days extension of time.
• 22 responses or 45% made no comment.

**Question 4b**

Should the adjudicator be able to then seek an additional seven days extension of time with the permission of the parties?

• 14 responses or 29% do not support the adjudicator seeking an additional 7 days extension.
• 10 responses or 20% support the adjudicator seeking an additional seven days extension.
• 25 responses or 51% have not made comment.

**Question 5(a)**

Is the *Construction Contracts Act 2004* (WA) a suitable vehicle for resolving some payment claims?

• 30 of responses or 61% support the *Construction Contracts Act 2004* (WA) as a suitable vehicle for resolving some payment claims.
• 3 responses or 6% do not support the *Construction Contracts Act 2004* (WA) as a suitable vehicle for resolving some payment claims.
• 16 responses or 33% made no comment.

**Question 5(b)**

Is there any way the Act could be modified to better facilitate the rapid adjudication of these claims?

• 18 responses or 37% support that the Act could be modified to better facilitate the rapid adjudication of these claims.
• 4 responses or 8% do not support that the Act could be modified to better facilitate the rapid adjudication of these claims.
• 27 responses or 55% made no comment.

**Question 6a**

Should the *Building Service (Complaint Resolution and Administration) Act 2011* (WA) be amended to extend its provisions to allow the Building Commission to manage an alternative low cost adjudication service for subcontractors seeking payment from principals in relation to construction industry payment claims under $25,000 in value?

• 14 responses or 29% support an alternative low cost adjudication service for subcontractors seeking payment from principals in relation to construction industry payment claims under $25,000 in value.
• 9 responses or 18% do not support an alternative low cost adjudication service for subcontractors seeking payment from principals in relation to construction industry payment claims under $25,000 in value.

• 26 responses or 53% made no comment.

Question 6b

If yes, should the adjudication service be fee-for-service, with administration costs partly funded by an increase in the Building Services Levy? Or are there alternative means of funding this service?

• 7 responses or 14% support the adjudication service being fee-for-service, with administration costs partly funded by an increase in the Building Services Levy.

• 6 responses or 12% do not support the adjudication service being fee-for-service, with administration costs partly funded by an increase in the Building Services Levy.

• 36 responses or 73% made no comment.

Question 6c

If not, what other alternative means should be explored by Government to address the issue of small claims?

• 7 responses or 14% do not support other alternative means being explored by Government to address the issue of small claims.

• 6 responses or 12% support other alternative means being explored by Government to address the issue of small claims.

• 36 responses or 73% made no comment.

Question 7(a)

Are the registration requirements correct?

• 21 responses or 43% support that the registration requirements are correct.

• 4 responses or 8% do not support that the registration requirements are correct.

• 24 responses or 49% made no comment.

Question 7(b)

Should adjudicators be registered for a finite time?

• 11 responses or 22% do not support that adjudicators be registered for a finite time.
• 8 responses or 16% support that adjudicators be registered for a finite time.
• 30 responses or 61% made no comment.

**Question 7(c)**

Should adjudicators complete a post-graduate qualification such as a Graduate Certificate in Building and Construction Law, as a prerequisite?

• 12 responses or 24% do not support adjudicators completing a post-graduate qualification such as a Graduate Certificate in Building and Construction Law, as a prerequisite.
• 8 responses or 16% support adjudicators completing a post-graduate qualification such as a Graduate Certificate in Building and Construction Law, as a prerequisite.
• 29 responses or 59% made no comment.

**Question 7(d)**

Is there a need for continuing professional development (CPD)?

• 18 responses or 37% support the need for continuing professional development.
• 4 responses or 8% do not support the need for continuing professional development.
• 27 responses or 55% made no comment.

**Question 7(e)**

The average adjudicator’s fees are approximately $265 per hour. The fees range from $100 to $400 per hour. Should adjudicator fees be prescribed?

• 16 responses or 33% do not support adjudicator fees being prescribed.
• 11 responses or 22% support adjudicator fees being prescribed.
• 22 responses or 45% made no comment.

**Question 7(f)**

How should adjudicator performance be audited? (If necessary)

• 12 responses or 24% support that adjudicator performance be audited.
• 7 responses or 14% do not support that adjudicator performance be audited.
• 30 responses or 61% made no comment.
Question 8
Do you agree that a provision for the exclusion of liquidated damages from progress payments or payment claims is warranted?

- 23 responses or 47% do not support that a provision for the exclusion of liquidated damages from progress payments or payment claims is warranted.
- 4 responses or 8% support that a provision for the exclusion of liquidated damages from progress payments or payment claims is warranted.
- 22 responses or 45% made no comment.

Question 9
Should matters related to the *Home Building Contracts Act 1991 (WA)* be included in the Act?

- 18 responses or 37% support matters related to the *Home Building Contracts Act 1991 (WA)* being included in the Act.
- 1 response or 24% do not support matters related to the *Home Building Contracts Act 1991 (WA)* being included in the Act.
- 30 responses or 61% made no comment.

Question 10
Should the Act apply to the resources sector?

- 22 responses or 45% support the Act applying to the resources sector.
- 4 responses or 8% do not support the Act applying to the resources sector.
- 23 responses or 47% made no comment.

Question 11
Should the Act apply to the construction of plant for the purposes of extracting or processing?

- 22 or 45% support the Act applying to the construction of plant for the purposes of extracting or processing.
- 5 responses or 10% do not support the Act applying to the construction of plant for the purposes of extracting or processing.
- 22 responses or 45% made no comment.

Question 12
Should the Act apply to artworks?

- 20 responses or 41% support the Act applying to artworks.
• 1 response or 2% do not support the Act applying to artworks.
• 28 responses or 57% made no comment.

**Question 13(a)**

In terms of ‘harmonisation’, should Western Australia consider the Society of Construction Law Australia’s proposal for a national approach to security of payment legislation?

• 14 responses or 29% do not support the Society of Construction Law Australia’s proposal for a national approach to security of payment legislation.
• 11 responses or 22% support the Society of Construction Law Australia’s proposal for a national approach to security of payment legislation.
• 24 responses or 49% made no comment.

**Question 13(b)**

In terms of ‘harmonisation’, should Western Australia consider adopting the *Construction Contracts (Security of Payments) Act 2004* (NT)?

• 15 responses or 31% do not support adopting the *Construction Contracts (Security of Payments) Act 2004* (NT).
• 3 responses or 6% support adopting the *Construction Contracts (Security of Payments) Act 2004* (NT).
• 31 responses or 63% made no comment.

**Question 13(c)**

Should Western Australia maintain the current ‘West coast model’, with minor amendments?

• 21 responses or 43% support Western Australia maintaining the current ‘West coast model’, with minor amendments.
• 2 responses or 4% do not support Western Australia maintaining the current ‘West coast model’, with minor amendments.
• 26 responses or 53% made no comment.
### ANNEX D – WRITTEN SUBMISSIONS RECEIVED

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<tr>
<th>Sub no</th>
<th>Sal</th>
<th>Name</th>
<th>Occupation Title</th>
<th>Business</th>
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<tr>
<td>1 &amp; 4</td>
<td>Rev</td>
<td>Peter Abetz</td>
<td>MLA</td>
<td>Member for Southern River</td>
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<tr>
<td>2 &amp; 3</td>
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<tr>
<td>5</td>
<td>Mr</td>
<td>Graham Morrow</td>
<td>Associate</td>
<td>HWL Ebsworth Lawyers</td>
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<tr>
<td>6</td>
<td>Mr</td>
<td>Richard Harris</td>
<td></td>
<td>Richard Harris Homes</td>
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<tr>
<td>7</td>
<td>Mr</td>
<td>Chris Dorian</td>
<td></td>
<td>Dorian Engineering Consultants</td>
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<td>8</td>
<td>Mr</td>
<td>Mark Peachey</td>
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<td>Amtech Painting</td>
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<tr>
<td>9</td>
<td>Mr</td>
<td>Peter Hodge</td>
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<td>Hodge Collard Preston Architects</td>
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<td>10</td>
<td>Mr</td>
<td>Michael Charteris</td>
<td>Quantity Surveyor</td>
<td>Michael Charteris</td>
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<td>11</td>
<td>Mr</td>
<td>Mathew Lepidi</td>
<td></td>
<td>S.W.E.P.S.</td>
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<tr>
<td>12</td>
<td>Mr</td>
<td>Bernie Elliott</td>
<td>Builder</td>
<td>Steelhomes</td>
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<tr>
<td>13</td>
<td>Mr</td>
<td>David Mexsom</td>
<td>Building Surveyor</td>
<td>Statewide Building Certification WA</td>
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<td>14</td>
<td>Mr</td>
<td>Paul Lewkowski</td>
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<td>APC Constructions 2007 Pty Ltd</td>
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<tr>
<td>15</td>
<td>Mr</td>
<td>John Fisher</td>
<td>Principal</td>
<td>JP Fisher Consulting</td>
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<td>16</td>
<td>Mr</td>
<td>Andrew MacPherson</td>
<td>General Counsel</td>
<td>Pindan</td>
</tr>
<tr>
<td>17</td>
<td>Mr</td>
<td>Bryce Steele</td>
<td>State Manager</td>
<td>SPASA</td>
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<td>20</td>
<td>Mr</td>
<td>Russell Kingdom</td>
<td>Mgr, City Design</td>
<td>City of Perth</td>
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<tr>
<td>21</td>
<td>Mr</td>
<td>Grahame Searle</td>
<td>Director General</td>
<td>Department of Housing</td>
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<tr>
<td>22</td>
<td>Mr</td>
<td>Kersh de Courtnay</td>
<td>Reg Adjudicator</td>
<td>R K de Courtenay</td>
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<tr>
<td>23</td>
<td>Hon</td>
<td>Mia Davies</td>
<td>MLA</td>
<td>Member for Central Wheatbelt</td>
</tr>
<tr>
<td>24</td>
<td>Ms</td>
<td>Caroline Woo</td>
<td>Senior Associate</td>
<td>Herbert Smith Freehills</td>
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<td></td>
<td>Mr</td>
<td>Dan Dragovic</td>
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<td>25</td>
<td>Mr Ante Golem</td>
<td>Partner</td>
<td>Property Council of Australia</td>
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<tr>
<td>28</td>
<td>Mr Basil Georgiou</td>
<td>Private capacity</td>
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<tr>
<td>29</td>
<td>Ms Jo Ogden</td>
<td>Proj Mgr, NECA</td>
<td>NECA, MPGA, MPDA, AMCA &amp; CSI</td>
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<tr>
<td>30</td>
<td>Mr Greg Downing</td>
<td>Reg Adjudicator</td>
<td>Downing Construction Support Services</td>
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<td>Mr Chidambara Raj</td>
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<td>Mr MJB Curran</td>
<td>General Manager</td>
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<td>Mr R K F Davis</td>
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<td>R K F Davis</td>
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<td>Mr Piero Di Giovanni</td>
<td>Builder</td>
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<td>Mr Kevan McGill</td>
<td>Reg Adjudicator</td>
<td>Kevan James McGill</td>
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<td>36</td>
<td>Ms Emily Tan</td>
<td>Policy Lawyer</td>
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<td>37</td>
<td>Ms Jillian Carney</td>
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<td>RICS Dispute Resolution</td>
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<td>Mr Mark Jones</td>
<td>Adjudicator</td>
<td>Mark Jones Consulting Pty Ltd</td>
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<td>Mr Roger Ward, Max</td>
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<td>Subcontractors For Fair Treatment</td>
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<td></td>
<td>Hannah</td>
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<td>Mr Basil Georgiou</td>
<td>Chair</td>
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<td>41</td>
<td>Ms Clare McKenzie</td>
<td>Solicitor</td>
<td>Jackson McDonald</td>
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<td>42</td>
<td>Mr James Cameron</td>
<td>Policy &amp; Advocacy Mgr</td>
<td>Australian Institute of Building</td>
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<td>43</td>
<td>Mr Jason O'Dwyer</td>
<td>GM, Workforce Policy</td>
<td>Master Electricians Australia</td>
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<td>44</td>
<td>Mr Glynn Logue</td>
<td>Reg Adjudicator</td>
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<td>Ms Helen Goddard</td>
<td>Administrator</td>
<td>Institute of Arbitrators &amp; Mediators Australia</td>
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<td>46</td>
<td>Mr Andy Graham</td>
<td>Policy Manager</td>
<td>Civil Contractors Federation</td>
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<td>Name</td>
<td>Position</td>
<td>Organization</td>
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<td>47</td>
<td>Ms Vivienne Sullivan</td>
<td>Exec Officer</td>
<td>Small Business Commissioner</td>
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<td>48</td>
<td>Mr Michael O’Kane</td>
<td>Workplace Advisor – IR &amp; Legal</td>
<td>Housing Industry Association Ltd</td>
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<td>50</td>
<td>Mr Charles Anderson</td>
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<td>Master Builders Association</td>
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Where details of the submissions above are not included the party has requested that the submission is CONFIDENTIAL.
ANNEX E – ATTENDANCE LIST SUBCONTRACTORS FORUM, BUILDING COMMISSION 14 NOVEMBER 2014

Attendance List Subcontractors Forum, Building Commission 14 November 2014:

- Professor Phil Evans, Reviewer
- Mr Auke Steensma, Research Assistant to Reviewer
- Mr Chris Szyidlowski, Senior Policy Officer, Policy & Legislation, Building Commission
- Ms Kirti Siwan, Policy Officer, Policy & Legislation, Building Commission
- Mr Greg Flowers, Building Inspector, Audits, Building Commission
- Mr Karl Millard, Membership Consultant, MBAWA
- Mr David Do, QN Designs, Cabinetmakers, Morley
- Mr Ha Hoang, QN Designs, Cabinetmakers, Morley
- Mr Todd Paterson, Director, KPA Architects, South Perth
- Ms Libby Pacilio, Associate, KPA Architects, South Perth
- Mr Bernie Elliott, Subcontractor and Builder, Steelhomes, Perth
- Mr Kevin Windross, Adjudicator/Principal, Shared Vision Solutions P/L, Yokine South
- Mrs Pamela Rocca, Aquila Earthmoving & Bitumen Paving, Wangara
- Mr Joe Rocca, Aquila Earthmoving & Bitumen Paving, Wangara
- Mr Russell Lang, General Manager, Jupiter Steel Fabrications, Myaree
- Mr Kevin Tompkins, General Manager, MP & HE Services Pty Ltd, Hydraulics Systems, Rockingham
- Mr Craig Parton, Owner, Living Iron, Steel Fabricator, O’Connor
- Ms Jane Edinger, Office Administrator, Living Iron, Steel Fabricator, O’Connor
- Ms Terri Batey, Visual Effect, Painter & Decorator (Jack Smyth)
- Mr Ron Jarvis, Spannas Engineering, Poly Pipe Welding & Plastic Fabrication, Crooked Brook (Boyanup)
- Mr Bruce Spanswick, Spannas Engineering, Crooked Brook
- Ms Jodie Spanswick, Finance Director, Spannas Engineering, Crooked Brook
- Mr Peter Durrant, unknown
- Mr Alfred Lim, Finance Controller, Palazzo Homes, Claremont
- Ms Mia Onorato-Sartari, Strategic Coordinator, CFMEU
ANNEX F – MEETING RECORD

The following persons attended meetings:

- Bill Keogh and Graeme Ferguson, Ferguson Corporation, 21 October 2014, Building Commission.
- Joint Industry Group Meeting: Garry Itzstein, Executive Director, National Electrical and Communications Association (NECA) et al; representatives from Master Plumbers & Gasfitters Association WA; Master Painters & Decorators Australia; 3 November 2014, Building Commission.
- Housing Industry Association Meeting: Michael Kane, Workplace Advisor (WA) – IR & Legal, HIA; John Gelavis, Executive Director, HIA; Rob Romberg, General Manager, Switch Homes (part of Pindan); Mr Terry Meyers, JWH Group; Mr Cameron Bourhill, Lavan Legal; 4 November 2014, Building Commission (see meeting minutes).
- Sasha Milosevic, Managing Director, Direct Tiles Mandurah, 5 November, 2014, Building Commission.
- Roger Ward, Managing Director, Cockburn Electrical and 4 others, including Max Hannah, Managing Director, Frogmat Landscape Construction, Subcontractors for Fair Treatment, 5 November 2014, Building Commission.
- Institute of Arbitrators and Mediators (IAMA), attended by registered adjudicators, 11 November 2014.
- Laurie James AM, Senior In House Counsel Kott Gunning Lawyers and Co-chair of the WA Chapter LEADR/IAMA. 21 July 2015