

2007/2008
WESTERN AUSTRALIA

**REPORT OF THE
CONSTRUCTION CONTRACTS REGISTRAR**

FOR THE YEAR ENDED
30 JUNE 2008

PRESENTED TO THE HON TROY BUSWELL MLA
MINISTER FOR HOUSING AND WORKS

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**HON TROY BUSWELL MLA
MINISTER FOR HOUSING AND WORKS**

I have pleasure in presenting the report of the Construction Contracts Registrar for the year ended 30 June 2008.

The Annual Report of the Registrar is submitted pursuant to section 52 of the *Construction Contracts Act 2004*.



PETER GOW
CONSTRUCTION CONTRACTS REGISTRAR

1. INTRODUCTION

The *Construction Contracts Act 2004* ("the Act") received Royal Assent on 8 July 2004 and was proclaimed on 14 December 2004 to commence operation on 1 January 2005.

The purpose of the Act is to provide security of payment for 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; and
- Providing an effective rapid adjudication process for payment disputes.

The *Construction Contracts Regulations 2004* ("the regulations") were gazetted on 14 December 2004.

The holder of the office of Executive Director, Building Industry Development, at the Department of Housing and Works, is designated to be the Registrar under Section 47(2) of the Act. Mr Peter Gow is acting in this position and continues to fill the role of Registrar.

2. REGISTERED ADJUDICATORS

Under section 48 of the Act, the Registrar may register an individual as a registered adjudicator if the Registrar is satisfied that the individual has the qualifications and experience prescribed by regulation 9 of the regulations. Registered adjudicators may adjudicate payment disputes where an application for adjudication has been lodged in accordance with section 26 of the Act. In the reporting period, 5 individuals applied for registration as an adjudicator, and these individuals have since been registered.

Table 2.1 Number of applications for registration as an adjudicator under the *Construction Contracts Act 2004*

Number of registered adjudicators at 1/7/2007	41
Number of applications 1/7/2007 – 30/6/2008	5
Applications for registration as adjudicators rejected 1/7/2007 – 30/6/2008	0
Number of appointments 1/7/2007 – 30/6/2008	5
Number of resignations 1/7/2007 – 30/6/2008	(1)
Total number of registered adjudicators at 30/6/2008	45
Number of applications pending at 30/6/2008	0

Table 2.2 Individuals registered as adjudicators under the *Construction Contracts Act 2004*

ADJUDICATOR'S NAME	CERT NO	ADJUDICATOR'S NAME	CERT NO
Graham Anstee-Brook	1	Philip Loots	25
John Fisher	2	William Lau	26
Phil Faigen	3	Raymond Gibson	27
Richard Machell	4	Peter Byrne	28
Alan Riley	5	Colin Touyz	29
Kevan McGill	6	Robert Wallis	30
Scott Ellis	7	Vitorio Tassone	31
Antony Ednie-Brown	8	John Morhall	32
Roger Davis	9	Gavin Brackenreg	33
Kim Doherty	10	David Court	34
Laurie James	11	Fulvio Prainito	35
Mark Sheehan	12	Zvy (Steve) Lieblich	36
Philip Dyer	13	Mark Taylor	37
Kersh De Courtenay	14	Graham Morrow	38
Adrian Goold	15	Kevin Windross	39
David Aitken	16	Gary Affleck	40
Mirina Muir	18	Bernard Lynch	41
Mark Jones	19	Alex Durning	42
Phillip Evans	20	Michael Murrey	43
Ralph Unger	21	Rod Perkins	44
Paul Wellington	22	Barry Tonkin	45
Michael Charteris	23	Thomas Muttrie	46
Glynn Logue	24		

+One resignation was received from Mr Brian Wales Certificate No. 17

3. PRESCRIBED APPOINTORS

A prescribed appointor is an industry body prescribed in the regulations. Prescribed appointors are authorised to appoint an adjudicator for the adjudication of a payment dispute where an application for adjudication has been served on the prescribed appointor in accordance with section 26 of the Act.

The Construction Contracts Amendment Regulations 2005 were gazetted on 1 April 2005, and prescribe eight industry bodies as prescribed appointors. The prescribed appointors, along with the numbers of appointments each made during the reporting period are outlined in Table 3.1.

Table 3.1 Prescribed appointors registered and number of appointments made during the reporting period (1/7/2007 – 30/6/2008)

Certificate Number	Prescribed Appointor	Number of Appointments Made
1	Australian Institute of Building	1
2	The Australian Institute of Quantity Surveyors	4
3	Electrical and Communications Association of Western Australia	1
4	The Institute of Arbitrators and Mediators Australia	37
5	Master Builders Association of Western Australia	41
6	The Royal Australian Institute of Architects	2
7	Australian Institute of Project Management	0
8	Royal Institute of Chartered Surveyors Australasia Pty Ltd	0
	Adjudicator not appointed by Prescribed Appointor	0
	Total	86

No applications for registration of a prescribed appointor were received during the period 1 July 2007 – 30 June 2008.

A list of all prescribed appointors, along with the fees they charge is maintained on the DHW website at http://www.dhw.wa.gov.au/330_823.asp.

4. CONSTRUCTION CONTRACTS OPERATIONS

4.1 Applications for Adjudication

The Act provides that if a payment dispute arises under a construction contract any party to the contract may apply to have the dispute adjudicated by a registered adjudicator. Eighty-six (86) applications for adjudication were reported to the Registrar during the reporting period. A summary of the results of these applications is outlined in Table 4.1.

Table 4.1 Applications for adjudication made during the reporting period (1/7/2007 – 30/6/2008)

Adjudications received	86
Number of determinations made	47
Applications for adjudication pending (as at 30/6/2006)	0
Number of applications for adjudication dismissed	29
Number of applications for adjudication withdrawn	10
Number of applications lapsed under section 31(3)	0

4.2 Amounts claimed, determined, dismissed and withdrawn

A summary of the results of all applications for adjudication made during the reporting period (1 July 2007 – 30 June 2008) is outlined in the tables below.

Table 4.2.1 Amounts claimed during the reporting period (1/7/2007 – 30/6/2008)

Total number of payment claims	86
Total value of payment claims	\$98,222,008.65
Mean value of payment claims	\$1,142,116.38
Largest single payment claim	\$24,769,409.00
Smallest single payment claim	\$5,775.00

Table 4.2.2 Value of determinations made during the reporting period (1/7/2007– 30/6/2008)

Total number of determinations	49
Total value of determinations	\$49,983,516.22
Mean value of determinations	\$1,135,989.01
Largest single determination	\$17,921,119.33
Smallest single determination	\$2,924.95

Table 4.2.3 Value of claims dismissed during the reporting period (1/7/2007 – 30/6/2008)

Total number of dismissals	27
Total value of claims dismissed	\$46,844,311.22
Mean value of claims dismissed	\$1,734,974.49
Largest single claim dismissed	\$11,902,596.90
Smallest single claim dismissed	\$3,199.90

Table 4.2.4 Value of claims withdrawn during the reporting period (1/7/2007 – 30/6/2008)

Total number of claims withdrawn	10
Total value of claims withdrawn	\$158,407.34
Mean value of claims withdrawn	\$26,401.22
Largest single claim withdrawn	\$158,407.34
Smallest single claim withdrawn	\$158,407.34

4.3 Construction occupations subject to applications for adjudication

Of 86 applications for adjudication made during the reporting period, a broad range of occupations was involved, as outlined in table 4.3.1. The range of claim size for each industry is outlined in table 4.3.2.

Table 4.3.1 Applications for adjudication by industry for the reporting period (1 July 2007 – 30 June 2008)

Industry	Number of claims	% of claims
Architecture	2	2.33%
Block Paving	1	1.16%
Building Commercial	35	40.70%
Building Residential	11	12.79%
Carpentry	1	1.16%
Civil Works	2	2.33%
Concreting	1	1.16%
Construction	15	17.44%
Demolition	1	1.16%
Earth Works	3	3.49%
Electrical	1	1.16%
Fabrication	1	1.16%
Not CCAct	2	2.33%
Painting	1	1.16%
Pipework	2	2.33%
Plumbing	2	2.33%
Shop Fitting	3	3.49%
Tiling	1	1.16%
Building Window Frames	1	1.16%
Total	86	100.00%

Table 4.3.2 Payment claims made by industry for the Reporting period 1 July 2007 – 30 June 2008

Industry	Highest Fee for adjudication	Lowest fee for adjudication	Mean fee for adjudication
Architecture	\$2,750.00	\$1,100.00	\$1,925.00
Block Paving	\$2,200.00	\$2,200.00	\$2200.00
Building Commercial	\$29,727.50	\$720.00	\$6,857.46
Building Residential	\$9,471.50	\$900.00	\$2,026.95
Carpentry	\$3,146.00	\$3,146.00	\$3,146.00
Civil Works	\$11,235.40	\$6,240.00	\$8,737.70
Construction	\$16,529.20	\$605.00	\$1,101.95
Demolition	\$17,500.00	\$17,500.00	\$17,500.00
Earth Works	\$1,500.00	\$726.00	\$1,113.00
Electrical	\$3,300.00	\$3,300.00	\$3,300.00
Fabrication	\$14,504.60	\$14,504.00	\$14,504.60
Not CCAct	\$1,200.00	\$1,188.00	\$1,194.00
Painting	\$2,000.00	\$2,000.00	\$2,000.00
Pipe-work	\$6,964.15	\$500.00	\$3,732.08
Plumbing	\$360.00	\$360.00	\$360.00
Shop Fitting	\$1,320.00	\$1,320.00	\$1,320.00
Tiling	\$1,760.00	\$1,760.00	\$1,760.00
Building Window Frames	\$3,240.00	\$3,240.00	\$3,240.00

4.4 The costs of adjudication

Adjudicators are responsible for setting their own fees. Details of fees are updated annually and published on a Department of Housing and Works webpage – http://www.dhw.wa.gov.au/330_822.asp.

Table 4.4.1 indicates the number of claims made, the total costs for adjudication in each value range, as well as the highest, lowest, and the average fee for adjudication for each value range for the reporting period.

Table 4.4.1 – Highest, lowest, & mean fees for the range of claims

Range of Claims	Total fees for adjudication	Highest fee for adjudication	Lowest fees for adjudication	Mean Fees for adjudication
\$1 - \$9,999	\$4,070.00	\$2,750.00	\$1,320.00	\$2,035.00
\$10,000 - \$24,999	\$40,203.55	\$18,942.50	\$500.00	\$3,350.30
\$25,000 - \$99,999	\$72,664.50	\$29,727.50	\$360.00	\$4,274.38
\$100,000 - \$249,999	\$47,733.63	\$7,000.00	\$726.00	\$3,671.82
\$250,000 - \$499,999	\$61,053.44	\$15,653.59	\$720.00	\$6,105.34
\$500,000 and over	\$192,592.58	\$27,406.50	\$2,300.00	\$12,037.04
TOTAL	\$418,317.70			

These data demonstrate that claim value does appear to influence costs of adjudication.

5. ADJUDICATION TRAINING COURSES

One of the qualifications for registered adjudicators under regulation 9(4) of the regulations is the successful completion of an appropriate training course, which qualifies the person for the performance of the functions of an adjudicator under the Act.

The Registrar has approved four adjudication-training courses:

- Institute of Arbitrators & Mediators Australia Training course
- Minter Ellison-Clifton Coney Group Adjudication Training course
- Australian Institute of Quantity Surveyors (WA Chapter) and Jackson McDonald Lawyers in conjunction with the Master Builders Association
- Royal Institution of Chartered Surveyors (RICS) Dispute Resolution Service

A number of individuals registered interest in attending an adjudication training course during this period, and as a result the Institute of Arbitrators & Mediators Australia will be conducting a two day training course on Friday 5th and Saturday 6th December 2008 at Trinity College in Crawley.

6. FORUMS

No public forums on the Act were conducted in the 2007-08 period. The Registrar made presentations at a number of forums arranged by related institutes or associations, whose members utilise the provisions and the requirements of the Act and regulations.

Further to these forums, both adjudicators and appointers have suggested proposals for review of certain provisions and requirements under the legislation. These proposals will form part of the review of the legislation which is proposed for 2009 pursuant to Section 56 of the Act.

7. WEBPAGE AND PUBLICATIONS

The Registrar has maintained a *Construction Contracts Act 2004* webpage on the Department of Housing and Works website: http://www.dhw.wa.gov.au/330_350.asp. This webpage is regularly updated with registered Adjudicators' contact details, rates and profiles and prescribed appointors' contact details and rates and details of adjudicator training courses.

Brochures entitled "Introduction to the *Construction Contracts Act 2004*"; and a "Information for Homeowners about the *Construction Contracts Act 2004*" are available for download from the webpage. The webpage also provides a series of information sheets, a Code of Conduct for Adjudicators, and Practice Guidelines for Registered Adjudicators and Prescribed Appointers. Links are also provided to PDF versions of the Act and regulations and the previous Annual Report.

8. MATTERS REFERRED TO THE STATE ADMINISTRATIVE TRIBUNAL

8.1 Conflict of interest

A conflict of interest may arise through the appointed adjudicator having a material personal interest in a payment dispute or in the contract under which a dispute has arisen. Section 29(3) of the Act provides that, if during the course of an adjudication, a party to a payment dispute becomes aware of a conflict of interest, and this occurs before the adjudicator's decision or determination is made, then that party may apply to the State Administrative Tribunal (SAT) to have the adjudicator disqualified.

There were nil matters referred to SAT in relation to an appointed adjudicator's alleged conflict of interest during the current reporting period.

8.2 Adjudicator's decision

Under section 46(1) of the Act, a person who is aggrieved by a decision made by a registered adjudicator under section 31(2)(a) to dismiss an application for adjudication may apply to the SAT for a review of the decision.

There were three applications to SAT seeking to review a decision of an adjudicator in relation to a payment dispute in the current reporting period.

Moroney & Anor and Murray River North Pty Ltd [2008] WASAT 36 19/2/2008

SAT ruled that an adjudicator's decision regarding jurisdiction of the Act is in itself reviewable, and that the adjudicator must make a clear determination supported by reasons for the decision to enable the parties and the Tribunal to consider the matter.

Moroney & Anor and Murray River North Pty Ltd [2008] WASAT 111 20/5/2008

This case followed the decision by SAT in [2008] WASAT 36 (above).

SAT ruled that, prior to dismissing an application for adjudication without making a determination of its merits, an adjudicator must consider each ground for dismissal pursuant to s 31(2) of the *Construction Contracts Act 2004* (WA) being:

- (i) the contract concerned is not a construction contract;*
- (ii) the application has not been prepared and served in accordance with section 26;*
- (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or*
- (iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason.*

Of note, in respect to a dismissal, is that a possible lack of information may not necessarily equate to complexity (as stated in Section 31(2)(iv)), in which case the matter must be determined by the adjudicator on the balance of probabilities as the Tribunal cannot usurp the role of the original decision-maker.

Silent Vector Pty Ltd T/as Sizer Builders and Squarcini [2008] WASAT 39 22/2/2008

SAT ruled that there was no need for adjudicators to provide detailed reasons particularly in relation to the determination of an adjudication application because there was no right of appeal. However, in the case of a dismissal without a consideration of the merits of the adjudication application, there is a right of review to the State Administrative Tribunal and reasons for decision must, therefore, be sufficient to enable a party to assess whether or not to apply for a review.

The Tribunal emphasised the importance of applicants providing a logical summary of claim that is cross referenced to relevant supporting documents to counter any view being formed by an adjudicator that a matter is too complex to be fairly determined.

8.3 Registrar's decision

Under section 49 of the Act, a person who is aggrieved by a decision made by the Registrar in relation to the registering of an adjudicator under section 48 of the Act may apply to the SAT for a review of the decision.

There were nil matters referred to SAT requesting a reversal of a decision made by the Registrar in relation to the registration of an adjudicator during the current reporting period.

8.4 Indian Ocean Territories

During the reporting period it became apparent, through attempts to adjudicate payment disputes in the Indian Ocean Territories that the provisions of the Act did not apply in Christmas Island and the Cocos (Keeling) Islands. Advice from the Australian Government (Attorney-General's Department) indicated that to give this legislation effect in these Island territories the Commonwealth Minister for Home Affairs can direct, through Section 8G of the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1955*, that powers under the *Construction Contracts Act 2004(WA)(CKI)(CI)* be vested in the Registrar. The Attorney-General's Department is finalising this arrangement and this legislation should come into effect into these Island territories in the near future.

9. CONCLUSION

The primary goal of the legislation is to ensure a mechanism for the rapid adjudication of construction contracts disputes to keep money flowing through the construction industry by avoiding the expense and delay of formal litigation.

The period 2007-08 indicates a significant increase in the number of adjudications, which has more than doubled from the previous period. Worthy of note is that a number of parties have sought to have adjudications certified by the Registrar for the purpose of enforcing the determinations by a court in accordance with Section 43 of the Act.

The data presented in this report demonstrate that the *Construction Contracts Act 2004* is operating as it was intended, and is making considerable savings, both financial and in time, in resolving construction contracts disputes.

The Department has produced, and has available through local governments, information brochures for homeowners, which continues to attract significant interest by construction tradespersons. The Plumbers Licensing Board and the Master Plumbing have requested that information brochures are published and made available for registered tradespersons in WA, so that they may consider adjudication as an option in settling payment disputes.