

2009/2010  
WESTERN AUSTRALIA

**REPORT OF THE  
CONSTRUCTION CONTRACTS REGISTRAR**

FOR THE YEAR ENDED  
30 JUNE 2010

PRESENTED TO THE HON BILL MARMION MLA  
MINISTER FOR COMMERCE

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**HON BILL MARMION MLA  
MINISTER FOR COMMERCE**

I have pleasure in presenting the report of the Construction Contracts Registrar for the year ended 30 June 2010.

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

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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 Commission at the Department of Commerce, is designated to be the Registrar under Section 47(2) of the Act. Mr Peter Gow holds 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, 6 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 on 30/6/2009	45
Number of applications 1/7/2009 – 30/6/2010	6
Applications for registration as adjudicators rejected 1/7/2009 – 30/6/2010	0
Number of appointments 1/7/2009 – 30/6/2010	6
Number of resignations 1/7/2009 – 30/6/2010	0
<b>Total number of registered adjudicators at 30/6/2010</b>	<b>51</b>
Number of applications pending at 30/6/2010	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	Raymond Gibson	27
John Fisher	2	Peter Byrne	28
Phil Faigen	3	Colin Touyz	29
Richard Machell	4	Robert Wallis	30
Alan Riley	5	Vitorio Tassone	31
Kevan McGill	6	John Morhall	32
Scott Ellis	7	Gavin Brackenreg	33
Antony Ednie-Brown	8	David Court	34
Roger Davis	9	Fulvio Prainito	35
Kim Doherty	10	Zvy (Steve) Lieblich	36
Laurie James	11	Mark Taylor	37
Mark Sheehan	12	Graham Morrow	38
Philip Dyer	13	Kevin Windross	39
Kersh De Courtenay	14	Gary Affleck	40
Adrian Goold	15	Bernard Lynch	41
David Aitken	16	Alex Durning	42
Brian Wales (retired)	17	Michael Murrey	43
Mirina Muir	18	Rod Perkins	44
Mark Jones	19	Barry Tonkin	45
Phillip Evans	20	Thomas Muttrie	46
Ralph Unger	21	Andrew Muller	47
Paul Wellington	22	Auke Steensma	48
Michael Charteris	23	John James Hockley	49
Glynn Logue	24	Lyndon Mark White	50
Philip Loots	25	Natasha Owen-Conway	51
William Lau	26		

### 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 (1/7/2009 – 30/6/2010)**

Certificate Number	Prescribed Appointor	Number of Appointments Made
1	Australian Institute of Building	3
2	The Australian Institute of Quantity Surveyors	4
3	Electrical and Communications Association of Western Australia	0
4	The Institute of Arbitrators and Mediators Australia	106
5	Master Builders Association of Western Australia	51
6	The Royal Australian Institute of Architects	4
7	Australian Institute of Project Management	0
8	Royal Institute of Chartered Surveyors Australasia Pty Ltd	3
	Adjudicator not appointed by Prescribed Appointor (Contract appointed)	1
	Total	172

No applications for registration of a prescribed appointor were received during the period 1 July 2009 – 30 June 2010.

A list of all prescribed appointors, along with the fees they charge is maintained on the Building Commission website at <http://www.buildingcommission.wa.gov.au> follow link to Customer Services

#### **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. One hundred and seventy two (172) 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 4.1.1 Applications for adjudication made during the reporting period (1/7/2009 – 30/6/2010)**

Adjudications received	172
Number of determinations made	90
Applications for adjudication pending (as at 30/6/2006)	0
Number of applications for adjudication dismissed	57
Number of applications for adjudication withdrawn	25
Number of applications lapsed under section 31(3)	0

**Table 4.1.2 Total of applications received 2005 to 2010**

Year	Number of Adjudications	Total Value of Payment Claims	Mean value of Payment Claims
2005-2006	29	\$10,485,828.12	\$361,580.28
2006-2007	36	\$15,938,123.77	\$442,725.66
2007-2008	86	\$98,222,008.65	\$1,142,116.38
2008-2009	105	\$35,838,998.23	\$341,323.79
2009-2010	172	\$233,266,050.32	\$1,356,197.97

**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 2009 – 30 June 2010) is outlined in the tables below.

**Table 4.2.1 Amounts claimed during the reporting period (1/7/2009 – 30/6/2010)**

Total number of payment claims	172
Total value of payment claims	\$233,266,050.32
Mean value of payment claims	\$1,356,197.97
Largest single payment claim	\$36,861,228.78
Smallest single payment claim	\$1,320.00

**Table 4.2.2 Value of determinations made during the reporting period (1/7/2009– 30/6/2010)**

Total number of determinations	90
Total value of determinations	\$68,788,979.53
Mean value of determinations	\$764,321.99
Largest single determination	\$16,606,389.72
Smallest single determination	\$1,320.00

**Table 4.2.3 Value of claims dismissed during the reporting period (1/7/2009 – 30/6/2010)**

Total number of dismissals	57
Total value of claims dismissed	\$134,246,245.54
Mean value of claims dismissed	\$2,355,197.29
Largest single claim dismissed	\$36,861,228.78
Smallest single claim dismissed	\$1,320.00

**Table 4.2.4 Value of claims withdrawn during the reporting period (1/7/2009 – 30/6/2010)**

Total number of claims withdrawn	25
Total value of claims withdrawn	\$30,428,519.74
Mean value of claims withdrawn	\$1,217,140.79
Largest single claim withdrawn	\$9,468,087.44
Smallest single claim withdrawn	\$5,962.00

### 4.3 Construction occupations subject to applications for adjudication

Of 172 applications for adjudication made during the reporting period, a broad range of occupations was involved. The range of claim size for each industry is outlined in table 4.3.1

**Table 4.3.1 Applications for adjudication by industry for the reporting period (1 July 2009 – 30 June 2010)**

Industry	Number of Claims	% of claims	Total payment claims by industry
Architect Services	3	1.74%	\$16,898.00
Brickwork	1	0.58%	\$10,665.70
Carpentry	3	1.74%	\$239,752.05
Carpet Laying	1	0.58%	\$17,811.72
Cattle Handling Facility	1	0.58%	\$239,816.94
Civil Construction and Concrete Works	1	0.58%	\$1,723,177.58
Civil Engineering	4	2.33%	\$5,153,501.84
Cleaning Services	1	0.58%	\$16,550.33
Commercial Building	50	29.07%	\$122,380,694.19
Concrete Works	5	2.91%	\$4,267,042.99
Earth Works	3	1.74%	\$3,660,677.36
Electrical	6	3.49%	\$6,943,020.90
Fabrication	3	1.74%	\$1,844,448.69
Fire Protection	2	1.16%	\$1,586,389.74
Glazing	1	0.58%	\$46,476.56
Ground Works	1	0.58%	\$253,282.46
Hydraulic Services	3	1.74%	\$616,508.22
Marine Works	3	1.74%	\$5,303,167.26
Mechanical Works	1	0.58%	\$197,437.50
Not CCA	2	1.16%	\$896,611.19
Paving	1	0.58%	\$113,063.31
Piling Works	1	0.58%	\$118,569.00
Pipe Works	1	0.58%	\$869,608.93
Plant Works	5	2.91%	\$48,308,970.66
Plumbing	6	3.49%	\$819,654.70
Residential Building	24	13.95%	\$21,070,471.77
Retaining Walls	1	0.58%	No figures reported
Scaffolding	17	9.88%	\$2,209,347.68
Steel Works	2	1.16%	\$588,454.35
Texturing	1	0.58%	\$40,840.81
Tiling	3	1.74%	\$318,119.70
Transportable Buildings	12	6.98%	\$3,393,698.10
Windows	3	1.74%	\$1,320.00
<b>Total</b>	<b>172</b>	<b>100.00%</b>	<b>\$233,266,050.32</b>



**Table 4.3.2 Fees charges by industry for the Reporting period 1 July 2009 – 30 June 2010**

INDUSTRY	TOTAL FEES FOR INDUSTRY	QTY PER INDUSTRY	HIGHEST FEE PER INDUSTRY	LOWEST FEE PER INDUSTRY	AVERAGE (MEAN)
Architect Services	*\$1,485.00	*3	*\$1,485.00		*\$1,485.00
Brickwork	\$750.00	1	\$750.00		\$750.00
Carpentry	\$5,819.50	3	\$2,470.00	\$990.00	\$1,939.83
Carpet Laying	\$4,840.00	1	\$4,840.00		\$4,840.00
Cattle Handling Facility	\$6,608.55	1	\$6,608.55		\$6,608.55
Civil Construction and Concrete Works	\$1,080.00	1	\$1,080.00		\$1,080.00
Civil Engineering	\$24,974.39	4	\$8,582.93	\$4,291.93	\$6,243.60
Cleaning Services	\$2,519.00	1	\$2,519.00		\$2,519.00
Commercial Building	\$249,140.50	50	\$24,420.00	\$360.00	\$4,982.81
Concrete Works	\$8,613.80	5	\$3,146.00	\$900.00	\$1722.76
Earth Works	\$22,562.10	3	\$15,830.10	\$3,366.00	\$7,520.70
Electrical	\$34,690.45	6	\$6,729.15	\$4,200.00	\$5781.74
Fabrication	\$30,484.78	3	\$12,512.50	\$8,775.00	\$10,161.59
Fire Protection	\$13,750.00	2	\$10,000.00	\$3750.00	\$6,875.00
Glazing	\$8,800.00	1	\$8,800.00		\$8,800.00
Ground Works	\$4,392.30	1	\$4,392.30		\$4,392.30
Hydraulic Services	\$8,274.41	3	\$5,985.15	\$2,289.26	\$2,758.14
Marine Works	\$7,893.75	3	\$6,093.75	\$900.00	\$2,631.25
Mechanical Works	\$4,471.50	1	\$4,471.50		\$4,471.50
Not CCA	\$11,210.00	2	\$10,000.00	\$1,210.00	\$5,605.00
Paving	\$693.20	1	\$693.00		\$693.00
Piling Works	\$3,630.00	1	\$3,630.00		\$3,630.00
Pipe Works	\$2,500.00	1	\$2,500.00		\$2,500.00
Plant Works	\$45,845.26	5	\$13,138.13	\$4,723.13	\$9,169.05
Plumbing	\$25,255.50	6	\$12,525.00	\$2,409.50	\$4,209.25
Residential Building	\$89,756.38	24	\$16,615.50	\$594.00	\$3,739.85
Retaining Wall	\$0.00	1	*No figures reported	*No figures reported	*No figures reported
Scaffolding	\$35,365.90	17	\$9,000.00	\$726.00	\$2,080.35
Steel Works	\$7,428.85	2	\$5,225.00	\$2,203.85	\$3,714.43
Texturing	\$6,362.00	1	\$6,362.00		\$6,362.00
Tiling	\$10923.00	3	\$5,478.00	\$2,475.00	\$3641.00
Transportable Buildings	\$37,224.54	12	\$7,150.00	\$660.00	\$3,102.05
Windows	\$1,056.00	3	\$396.00	\$330.00	\$352.00
	\$718,400.46	172			

\* Adjudication settled prior to any figures being obtained

\* Architects Services - 2 of 3 adjudications were zero balances hence figures shown

#### 4.4 The costs of adjudication

Adjudicators are responsible for setting their own fees. Details of fees are updated annually and published on the Building Commission webpage – <http://www.buildingcommission.wa.gov.au> (follow link to Customer Services/Construction Contracts

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**

<b>Range of Claims</b>	<b>Total fees for adjudication</b>	<b>Highest fee for adjudication</b>	<b>Lowest fees for adjudication</b>	<b>Mean Fees for adjudication</b>
\$1 - \$9,999	\$10,595.50	\$2,970.00	\$330.00	\$458.91
\$10,000 - \$24,999	\$48,134.84	\$12,540.00	\$726.00	\$3,208.99
\$25,000 - \$99,999	\$84,135.95	\$8,800.00	\$360.00	\$2,157.33
\$100,000 - \$249,999	\$107,116.24	\$12,512.00	\$660.00	\$4,119.86
\$250,000 - \$499,999	\$96,133.06	\$16,615.50	\$1,000.00	\$5,340.73
\$500,000 and over	\$372,784.87	\$24,420.00	\$480.00	\$7,168.94
<b>TOTAL</b>	\$718,400.46			

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

## **6. FORUMS**

No public forums on the Act were conducted in the 2009-10 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 pursuant to Section 56 of the Act.

## **7. WEBPAGE AND PUBLICATIONS**

The Registrar has maintained a *Construction Contracts Act 2004* webpage on the Building Commission website: <http://www.buildingcommission.wa.gov.au> 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 "Information for Homeowners about the *Construction Contracts Act 2004*" is 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 four applications to SAT seeking to review a decision of an adjudicator in relation to a payment dispute in the current reporting period.

**Details can be viewed at Appendix A**

### **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**

The Minister for Home Affairs, the Hon Bob Debus MP, directed, through section 8G of the *Christmas Island Act 1958* of the Commonwealth and the *Cocos (Keeling) Islands Act 1955 of the commonwealth* that powers under the applied *Construction Contracts Act 2004* (WA)) be vested in Mr Peter Gow as the Construction Contracts Registrar for Christmas Island and the Cocos (Keeling) Island..

The delegation will allow Mr Peter Gow, in the office of the Construction Contracts Registrar, to carry out the functions under the applied Act in the Territories of Christmas Island and the Cocos (Keeling) Islands.

### **8.5 Prescribed Appointer Fees**

If the parties to a payment dispute can agree on an adjudicator they may appoint the adjudicator directly under section 26(1)(c)(i). The role of the prescribed appointer is to make a neutral appointment of an adjudicator on the application of one (section 26(1)(c)(iii)) or both (section 26(1)(c)(ii)) of the parties. The prescribed appointer may charge a fee for the appointment, and this fee is listed on the Building Commission website. Prescribed appointers are not-for-profit industry bodies who undertake the role as service to the industry and the community, as well as to their members. While prescribed appointers may turn first to members of their own organisation in order to find a suitable registered adjudicator, they are required to consider the whole pool of registered adjudicators if a member is not available or suitable for the particular case.

In some eastern states adjudicators under similar security of payment legislation are not registered, and parties do not have the ability to agree on an adjudicator. This has given rise to a number of commercial prescribed appointers who charge adjudicators a fee for the privilege of being nominated. The fee may be a percentage of the fee charged by the adjudicator to the parties.

Some informal approaches have been made to the Registrar in Western Australia to establish a similar system in this State. The Registrar has some concerns about introducing a "for profit" approach to appointing adjudicators without public debate on the merits and possible problems. This can be best handled as part of the formal review of the Act. In the meantime the current system in Western Australia seems to be working satisfactorily.

In a related matter the Institute of Arbitrators and Mediators, Australia, has introduced a professional development service for its members where members are requested to provide copies of their determinations for review by other adjudicators. In order to fund this and other member services, members are asked to pay a review fee to the Institute with each determination being reviewed. When originally instituted this process caused

the Registrar some concerns as it functioned similarly to the “for profit” appointment process outlined above. That is, the Institute required the adjudicator to agree to provide the Institute with a fee of 10% of the adjudicator’s fee and a copy of the determination as a condition of being appointed. The Registrar was also concerned that the parties to the adjudication had not consented to the determination being disclosed to other parties. Adjudicators appointed by the Institute were also unsure whether the Institute’s fee was to be deducted from the fee established by the fee rates published on the Building Commission website, or whether it should be charged as an additional fee.

Following discussions between the Registrar and the Institute the following principles have been agreed:

- The prescribed appointer (the Institute) and the adjudicator must not charge more than the fees published on the Building Commission website.
- The adjudicator must obtain the consent of the parties to release a copy of the determination to the Institute for professional development purposes and must disclose that the adjudicator is to pay the Institute a fee for this service.
- The Institute’s primary obligation as prescribed appointer is to appoint a suitable registered adjudicator and this should not be contingent on the proposed adjudicator agreeing to pay the Institute a fee. It is open to the Institute to make it a requirement of membership that adjudicators undergo regular professional development, and that for this purpose they pay a fee and obtain the parties’ consent to have determinations disclosed to the Institute.

## **REVIEW OF THE ACT**

The Act became due for review on the 5<sup>th</sup> anniversary of its commencement on 1 January 2005. The Building Commission has prepared a suite of legislation to reform building regulation in Western Australia and this is scheduled to be introduced into Parliament in the spring session of 2010. The review of the *Construction Contracts Act* should commence after this suite of legislation has been introduced into Parliament so that comments can be informed by the new legislation and its possible effect on security of payment and payment disputes.

## **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 2009 - 2010 indicates a significant increase in the number of adjudications, which has increased by over 60% 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 Plumbers and Gasfitters Association of WA 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.

## **APPENDIX A**

### **Searle & Kelso (2009) WASAT 255 23 December 2009**

The applicant applied under s 46(1) of the Construction Contracts Act 2004 (WA) to review a decision of an adjudicator to dismiss an adjudication application without a determination on the merits. The applicant builder gave notice of termination of his building contract to the respondent owners, as he was entitled to do, on 15 October 2007. On 23 November 2007, he issued an invoice for almost \$18,000 as the 'total due' after taking into account the deposit paid by the respondents. The invoice was never paid, and the parties issued separate proceedings in the Magistrates Court and the Building Disputes Tribunal.

On 19 June 2009, the applicant sent another invoice to the respondents for more than \$29,000, which comprised the amount previously claimed, GST omitted from the amount previously claimed, and three fresh invoices of subcontractors and suppliers, together with builder's margin on these new items. The applicant made the adjudication application on the premise that failure to pay the 19 June 2009 invoice within seven days constituted a payment dispute under the Construction Contracts Act 2004 (WA). The Tribunal considered the terms of both the building contract and the Construction Contracts Act 2004 (WA) in order to determine whether either or both of the invoices were payment claims capable of giving rise to a payment dispute. It found that although the 23 November 2007 invoice was capable, having regard to the contract, of constituting a payment claim, it did not, because it failed to comply with the requirements for such claims implied by the Construction Contracts Act 2004 (WA). In respect of the 19 June 2009 invoice, the Tribunal found that to the extent that it repeated the previously invoiced claim, it suffered from the same failure; that the additional charges for the fresh invoices also failed to comply with the implied requirements; and that the GST claim could not stand alone in the absence of the proper itemisation and description of the work to which it applied.

The Tribunal considered the alternative basis for the adjudicator's rejection of the 19 June 2009 invoice as a payment claim that under the contract a final claim had to be made prior to the expiry of the required notice period for termination, for which it found support when the contractual termination clause was read as a whole. It did not determine that issue however. It found that the 23 November 2007 invoice was the final account contemplated by the termination clause, and that no further account giving rise to a payment dispute could be submitted.

The application for review was therefore dismissed and the decision of the adjudicator was affirmed.

### **Searle & Kelso (2009) WASAT 255 (S) 23 December 2009**

The respondents applied for their costs of an application arising from the Tribunal's dismissal of the application. The application concerned a claim by the applicant to an entitlement to be paid certain amounts as a final payment, which claim was dismissed by an adjudicator. The applicant sought review of the adjudicator's decision. The respondents claimed that the application was obviously unmeritorious and that the applicant acted unreasonably and inappropriately, and, therefore, that they should be awarded their costs.

The Tribunal agreed with the circumstances for which the respondents contended as giving rise to an order for costs. However, on considering the nature of the application

and the factors upon which the Tribunal was required to adjudicate in reaching its decision, it disagreed that the application could be regarded as obviously unmeritorious. It also found against the respondents on whether the applicant had acted unreasonably or inappropriately in the formulation of his case. Alternatively, to the extent that the applicant did so act, the respondents were able to discriminate so that most of the time spent was allocated to those issues deserving of substantive responses. Accordingly, the Tribunal dismissed the respondents' costs application.

### **Longmont Consolidated Pty Ltd & Fleetwood Pty Ltd (2010) WASAT 22 17 February 2010**

The applicant applied under s 46(1) of the Construction Contracts Act 2004 (WA) to review a decision of an adjudicator to dismiss an adjudication application as being out of time without a determination of the merits.

The Tribunal held that the decision of the adjudicator to the effect that the adjudication application was out of time was correct, although for different reasons.

The Tribunal concluded that the relevant contractual provision concerning payments to the applicant was dependent on an approved invoice being submitted. The relevant contractual provision required the applicant to submit estimates of work performed and projected for performance during that month and by the 20th of each month. Once such an estimate is provided, the respondent was required to review the estimates and, upon approval, return them to the applicant to be submitted on the 1st of the following month. The relevant clause went on to provide that only following that process was the respondent to make payment to the applicant 30 days after receipt of an approved invoice.

The Tribunal held that the relevant contractual provision was silent as to what was to occur should an estimate not be approved or where no response to an estimate was given, and therefore did not provide a mechanism for making or responding to a payment claim, as defined in s 3 of the Construction Contracts Act 2004 (WA).

Alternatively, the Tribunal found that such a contractual provision purports to modify or restrict the operations of the Construction Contracts Act 2004 (WA) and had no effect by virtue of s 53 of that Act.

On either bases, the Tribunal found that s 16, s 17 and s 18 of the Construction Contracts Act 2004 (WA) applied and that, consequently, no payment dispute ever arose and, therefore, the adjudication application was not made within 28 days of a payment dispute arising.

### **Longmont Consolidated Pty Ltd & Fleetwood Pty Ltd (2010) WASAT 23 17 February 2010**

The applicant applied under s 46(1) of the Construction Contracts Act 2004 (WA) to review a decision of an adjudicator to dismiss an adjudication application as being out of time without a determination of the merits.

The Tribunal held that the decision of the adjudicator to the effect that the adjudication application was out of time was correct, although for different reasons.

The Tribunal concluded that the relevant contractual provision concerning payments to the applicant was dependent on an approved invoice being submitted. The relevant contractual provision required the applicant to submit estimates of work performed and projected for performance during that month and by the 20th of each month. Once such an estimate is provided, the respondent was required to review the estimates and, upon approval, return them to the applicant to be submitted on the 1st of the following month. The relevant clause went on to provide that only following that process was the



respondent to make payment to the applicant 30 days after receipt of an approved invoice.

The Tribunal held that the relevant contractual provision was silent as to what was to occur should an estimate not be approved or where no response to an estimate was given, and therefore did not provide a mechanism for making or responding to a payment claim, as defined in s 3 of the Construction Contracts Act 2004 (WA).

Alternatively, the Tribunal found that such a contractual provision purports to modify or restrict the operations of the Construction Contracts Act 2004 (WA) and had no effect by virtue of s 53 of that Act.

On either bases, the Tribunal found that s 16, s 17 and s 18 of the Construction Contracts Act 2004 (WA) applied and that, consequently, no payment dispute ever arose and, therefore, the adjudication application was made within 28 days of a payment dispute arising.

The Tribunal, therefore, dismissed the application to review.