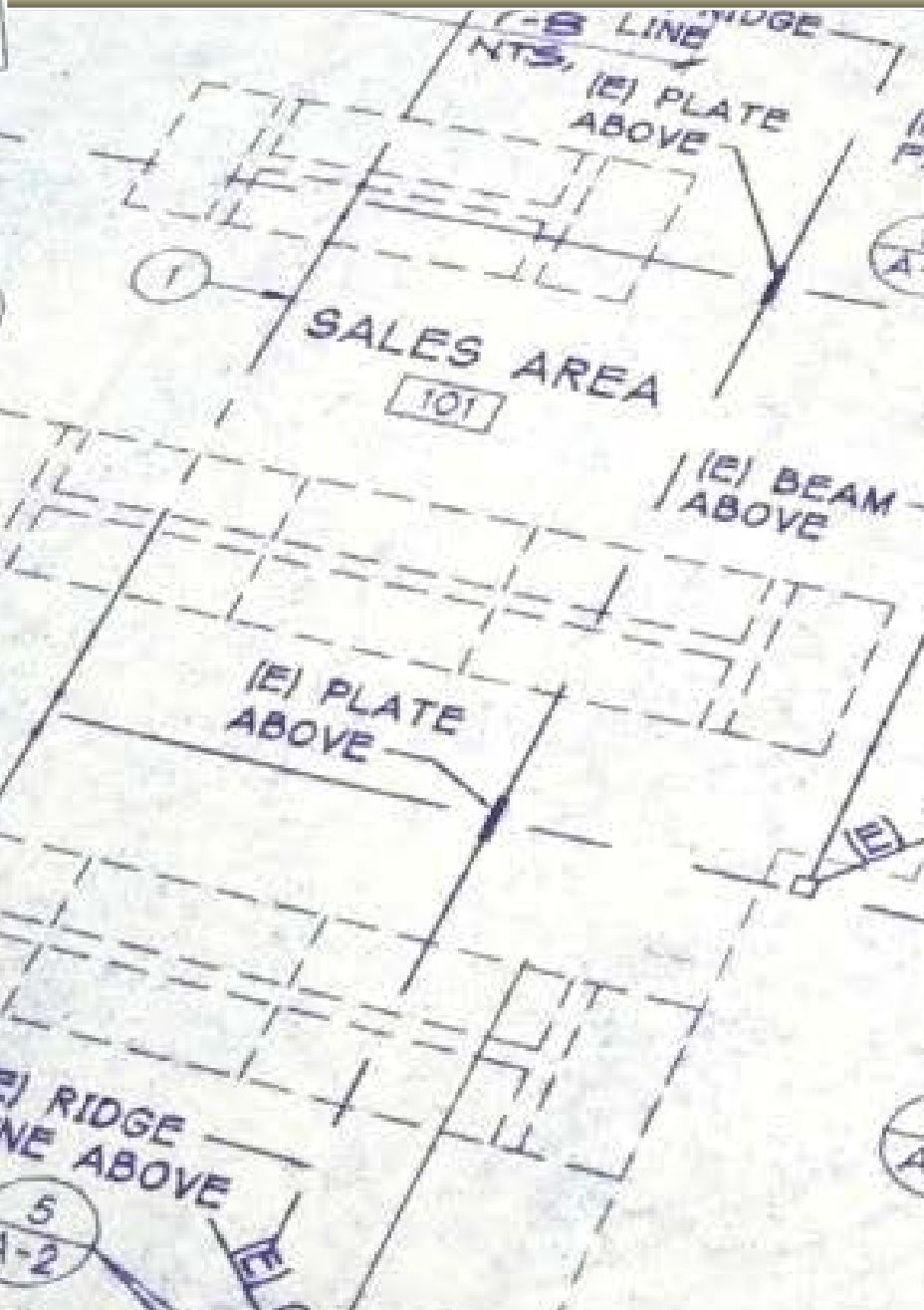


Discussion Paper

Statutory Review of the *Construction Contracts Act 2004 (WA)*



Professor Phil Evans

October 2014

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Declaration of Interests

Professor Phil Evans has declared an interest that he is a registered adjudicator under the *Construction Contracts Act 2004* and is also a member of the Institute of Arbitrators and Mediators Australia (IAMA). Professor Evans has suspended involvement in association activities and as an adjudicator for the duration of this Review. Professor Evans is being assisted in this Review by research assistant, Mr Auke Steensma, a PhD candidate at Curtin University and a member of IAMA. He has also declared an interest as a registered adjudicator in both Western Australia and the Northern Territory. Mr Steensma has suspended involvement in IAMA activities and his role as an adjudicator for the duration of this Review.

The closing date for written submissions is Friday 14 November 2014.

MESSAGE FROM THE BUILDING COMMISSIONER

Review of the *Construction Contracts Act 2004*

I am pleased to release this consultation discussion paper which represents an important step in reviewing existing security of payment legislation in Western Australia – the *Construction Contracts Act 2004*.

Release of this paper coincides with the public call for written submissions in which stakeholders can address all issues related to the operation of this legislation. The Building Commission is also arranging meetings in which key stakeholder groups can also express concerns directly to the Reviewer, Professor Phil Evans.

The Act preceded a new suite of building legislation implemented in Western Australia, which has delivered significant reforms to building regulation in this state.

With the reforms bedding down, and with a steady increase in the use of alternative dispute resolution in recent years, it is timely for industry participants to review how the Act has addressed security of payment. The Review is looking for suggestions for improvement in the provisions of the Act or details of other related initiatives that can be explored in terms of their potential to deliver security of payment.

The aim of the Review is to ensure that the Act is providing the best possible protection for subcontractors, head contractors and building owners. In considering any changes to legislation, the State Government is committed to carefully weighing up the advantages and disadvantages of any recommendations for legislative change. The reduction of red tape is one of the Government's key objectives and any change must avoid unnecessarily increasing the existing legal and administrative burden on businesses.

I encourage stakeholders to reflect on the Act's operation to date and contribute to the Review's deliberations by making a submission to it.

Peter Gow
BUILDING COMMISSIONER

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1. INTRODUCTION

The *Construction Contracts Act 2004* (the Act) came into operation on 1 January 2005. It provides for security of payment in the construction industry through the use of rapid adjudication processes to determine payment disputes. As indicated in the Second Reading speech, the legislative intent of State Parliament for the Act was "...to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex issues. 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."¹

The Act prohibits or modifies certain provisions in construction contracts. It also implies provisions in construction contracts about certain matters if there are no written provisions about these matters in the contract.

Although similar to security of payment legislation in the Northern Territory, the Act is fundamentally different from security of payment legislation in all the other states and the Australian Capital Territory. In Western Australia and Northern Territory the legislation largely operates by reference to the parties' own contractual arrangements whereas in the Eastern States legislation attempts to provide a claimant with statutory rights. The WA Act gives primacy to the parties' own contractual terms relating to payment.

1.1 Review Background

Section 56(1) of the Act requires the Minister for Commerce to review the operation and effectiveness of the Act as soon as practicable after the fifth anniversary of its commencement and prepare a report about the review.

The review became due on 1 January 2010 but was held over until the passage and implementation of a suite of new building legislation, including the *Building Services (Complaint Resolution and Administration) Act 2011*.

The implementation of the Act preceded implementation of this new suite of legislation and its provisions have not yet been integrated with the building regulation reforms.

On 10 June 2014 the Building Commissioner, Mr Peter Gow announced that Professor Philip Evans of Curtin University had been appointed to review the Act.

1.1.1 Purpose of Review

The Review meets the periodic statutory requirement to examine the operation and effectiveness of the Act and for the Minister for Commerce to present the report findings to Parliament. The State Government will then be able to

¹ Second Reading Speech, Hansard, Legislative Council, 8 April 2004, p1934b-1935a

respond to the findings and indicate its position on any recommendations for legislative amendment or other action.

The Review will provide a timely opportunity for key stakeholders to examine the provisions of the Act and to determine whether they are meeting the needs of industry and whether there is room for improvement and modification.

The Review provides stakeholders an opportunity to provide written and verbal submissions as to their concerns for the attention and deliberation of the Reviewer. Several workshops will be conducted during the review process.

1.1.2 Building Regulation Reform in Western Australia

Recent building industry regulation reform in Western Australia sought to promote innovation and productivity, whilst minimising unnecessary red tape by developing a more risk-based focus. Performance building standards are now backed by a rigorous but flexible certification process through a new *Building Act*.

A rigorous registration system under the new *Building Services (Registration) Act* ensures that practitioners are competent and take out professional indemnity insurance. Practitioners are free to apply their skills, subject to audit by the Building Commission, which ensures the maintenance of standards and consumer protection.

The *Building Services (Complaint Resolution and Administration) Act* empowers the Building Commissioner to oversee industry through inspections, auditing and enforcement of compliance with building laws. Under this legislation, anyone adversely affected by services provided by the industry can make complaints to the Commissioner and seek orders to remedy work or pay compensation. The Building Commissioner can deal with straightforward complaints quickly and informally, and can see that more complex disputes are dealt with formally by the State Administrative Tribunal (SAT).

In March 2013, the Small Business Commissioner, Mr David Eaton, delivered a final report² into an investigation into the non-payment of sub-contractors on construction projects administered by the State Government between October 2008 and October 2012. Mr Eaton recommended a review of the dispute resolution mechanisms available to small businesses in the Western Australian construction industry and suggested the possibility that mechanisms under the *Building Services (Complaint Resolution and Administration) Act* could be utilised to resolve disputes in the construction industry and which could also involve conciliation or referral to the SAT. This matter is a related consideration for this Review, and has thus been accommodated within the Review's Terms of Reference.

Within his investigation the Small Business Commissioner received submissions from stakeholders that indicated small business concerns about:

² Final Report Construction Subcontractor Investigation - Advice and Recommendations Provided to the Minister for Small Business from the Western Australian Small Business Commissioner, Mr David Eaton, March 2013

- the attractiveness of utilising the rapid adjudication process to resolve payment disputes as set out in the *Construction Contracts Act 2004* for small claims; and
- difficulties entailed with the Act's requirement of having to make a claim within 28 days of a dispute arising.

1.1.3 Terms of Reference

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) 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.

1.1.4 The Reviewer and Review Team

Professor Phil Evans is a professor of law at Curtin University and principal of PJ Evans and Associates. He is a lawyer, a graded arbitrator, an accredited mediator and registered adjudicator under the Act.

Dr Evans has lectured extensively in contract law; torts law; trade practices law; intellectual property law; evidence; project management; construction contracts and claims; and dispute resolution in the construction industry.

Prior to his university teaching and research roles at various Western Australian universities, Dr Evans practised as a civil and structural engineer for 20 years and later was the Head of the Department of Construction Management at Curtin University. He is a past President of the WA Chapter of the Australian Institute of Building.

Professor Evans is being assisted in this review by research assistant Mr Auke Steensma, a PhD Candidate at Curtin University. He is an arbitrator, an accredited mediator and a registered adjudicator in both Western Australia and the Northern Territory.

The Review Team is being assisted by the Industry Development Directorate of the Building Commission within the Department of Commerce. The Building Commission is now located in the Mason Bird Building in Cannington and some of the Review's consultation meetings will be held at this venue.

1.1.5 Purpose of this Consultation Discussion Paper

This Consultation Discussion Paper represents the first stage of the Review and is focussed on encouraging stakeholder input in regard to issues of concern and how they might be overcome.

The paper aims to initiate discussion about the context in which the Act now operates. It also suggests some key issues with the Act that have been previously identified and to which a written submission to the Reviewer may choose to address. However, the questions or issues identified are by no means a limitation on matters that may be raised in a submission in relation to the Act's operation and its effectiveness to date.

A detailed summary of the provisions of the Act are given as background for those stakeholders who want to make a submission addressing more complex legal, technical and administrative aspects of the legislation.

An examination of the Western Australian Construction Contracts Register is also provided in this Discussion Paper as it provides some background material in relation to the operation of the Act from 2005 to 2013.

1.1.6 Initial Consultation with Key Stakeholders

The Review will be liaising with relevant key stakeholder groups, including:

- All Prescribed Appointors pursuant to the Act and regulations
- Government agencies with an interest in the Act's operation, including:
 - Small Business Development Corporation, and
 - BMW Division of the Department of Finance
- Key building and housing construction organisations, including:
 - Housing Industry Association, and
 - Master Builders Association (WA)
- Legal institutions, including:

- Society of Construction Law Australia
- The Courts and the State Administrative Tribunal
- Organisations representing contractor interests, and
- Registered Adjudicators.

1.1.7 How to Have Your Say

Written submissions or seek a meeting

You are invited to make a submission to this Review. There is no specified format for these submissions. You are welcome to:

- Write a short letter expressing your views of the operation of the Act which can be emailed to ccareview@commerce.wa.gov.au;
- Respond to issues raised in this paper in Chapter 3;
- Write a more detailed submission on substantive matters related to the Act's operation;
- Contact the Building Commission if you, your business or organisation seeks to make a verbal submission to Professor Evans, at ccareview@commerce.wa.gov.au; or
- Leave comments online at the Review webpage on the Department of Commerce website, Building Commission Division section, via the public announcements link. This will be operational in early October.

If possible, please provide evidence to support your views. This will assist the Review in developing suitable options or responses to your areas of concern.

Guiding issues

This Consultation Discussion Paper highlights a range of specific issues that have been identified by some stakeholders. Do not feel constrained by these questions or issues or feel obliged to address all of these matters. You are welcome to raise additional issues and to suggest options for overcoming issues of concern. It would be helpful if you could include the reasons behind your suggestions as this will help the Review to better understand your viewpoint and will also assist in developing options for inclusion in the next stage of the Review. For example, you could couch your views as follows:

- “I think that the provision stipulating that payment disputes should be lodged within 28 days of a payment dispute arising is insufficient **because**.....”
- “I don't take matters to adjudication **because**.....”

1.1.8 Where to Send Submissions

Submissions are mailed to: Construction Contracts Review

Building Commission
Department of Commerce
Locked Bag 14
Cloisters Square
PERTH WA 6850

Or emailed to: ccareview@commerce.wa.gov.au

1.1.9 Review Updates

You can keep up to date with the progress of the Review at:

<http://www.commerce.wa.gov.au/announcements>

1.1.10 Information Provided May Be Made Public

After the written consultation period concludes, responses received may be publicly available on the Department of Commerce website. Please note that because your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate that in your submission. As submissions made in response to this paper will be subject to Freedom of Information requests, please do not include any personal or confidential information that you do not wish to become available to the public.

1.1.11 Written Submissions Close

The closing date for written submissions is **Friday 14 November 2014**.

1.1.12 Regulatory Impact Assessment Requirements

Regulatory Impact Assessment requirements

The Western Australian Government is committed to a regulatory gatekeeping process aimed at carefully considering the fundamental question of whether regulatory action is required or if policy objectives can be achieved by alternate measures, with lower costs for business and the community. Government agencies are therefore required to undertake a Regulatory Impact Assessment (RIA) process for all regulatory proposals which could potentially have a negative impact on business, consumers or the economy.

Preliminary Impact Assessment (Stage 1 of the RIA process)

This Consultation Discussion Paper, the accompanying public call for written submissions and the direct consultations that will occur constitute the first stage of the Regulatory Impact Assessment requirement. This Review will conclude with the publication of a Review Report, which the Minister for Commerce is obliged to table in State Parliament. The State Government has the option of responding to the findings and publicly indicating its course of action in relation to these findings and recommendations for action. If Government decides to take a particular course of action in relation to the findings, the RIA process requires that an opportunity for further stakeholder consultation will have to be provided so the relevant stakeholders can then address the actual proposals for change that the Government has adopted.

Consultation RIS (Stage 2 of the RIA process)

A public document called a Consultation Regulatory Impact Statement (Consultation RIS) will represent the next stage of the RIA process. The Consultation RIS will:

- outline the policy issues to be addressed;
- explain the objectives for resolving the issues;
- outline options for reform; and
- consider the costs and benefits of each option (advantages /disadvantages).

Further opportunity to provide input to the RIA process

Stakeholder feedback in response to the Consultation RIS will assist the Government in determining whether reforms are needed and, if so, the shape of those reforms. You are strongly encouraged to provide further input once the Consultation RIS is released for public consultation via the Building Commission's public consultation link mentioned above.

Decision RIS (Stage 3 of the RIA process)

Following analysis of submissions to the Consultation RIS, a Decision RIS will be prepared. The Decision RIS will analyse the impacts of the various options and will identify the Government's preferred options for implementation. The Decision RIS will be published via the Department of Commerce's website once the Government's decision is made public.

Role of the Regulatory Gatekeeping Unit

The Department of Finance's Regulatory Gatekeeping Unit is responsible for independently assessing whether the Consultation RIS and the Decision RIS meet specific adequacy criteria. This includes an assessment whether there is justification for Government action and ensuring that stakeholder concerns regarding preferred options have been addressed.

1.2 Industry Background

Building and construction is a major driver of the Australian economy. The sector makes a significant contribution in terms of the creation of national wealth and well-being of the community, particularly through the provision of shelter.

The construction sector added a record \$118.3 billion to the Australian economy in the year to March 2014. This was up two per cent from the previous year as the resources sector also remained strong.³

The pivotal role of the Western Australian resources sector in sustaining wealth creation and providing flow-on benefits has ensured that construction and engineering continues to make up a greater proportion of the West Australian economy than in other states. While population growth and infrastructure spending fuelled by resources activity has been winding back, housing, unit and renovation construction activity is becoming a source of growth on its own.

For example, construction of apartment complexes remains strong with the recent commencement of 66 apartment buildings that are expected to deliver 3,500 apartments by mid-2016. There are a much larger number of projects in the planning pipeline.⁴

In this environment, it is important that the subcontracting industry remains vibrant and is not adversely hampered by persistent security of payment issues. Government has a role in assisting industry with appropriate and workable security of payment mechanisms.

1.2.1 Industry Snapshot

The construction industry contributes almost 12 per cent of Western Australia's Gross State Product and employs 10.6 per cent of the state workforce.

Key statistics currently paint a healthy picture of the local industry: ⁵

- An annualised average of 141,450 were employed in the industry (May 2013 - May 2014);
- Compared to the previous twelve months, employment increased 8.4 per cent to May 2014;
- 40 per cent of the State's apprentices were employed by the industry;
- Approximately 27,000 construction workers are working on resource industry infrastructure construction projects;

³ BIS Shrapnel, "Long Term Forecast 2014-29", September 2014.

⁴ Marissa Lague, "It's a high rise in apartments", The West Australian, 10 September, 2014, West Business, p.16

⁵ "Construction Industry Snapshot July 2014", Construction Industry Training Fund

- The value of residential and non-residential construction work, excluding heavy engineering, in the year to March 2014 increased by 3.8 per cent compared to the year to March 2013;⁶
- Seasonally adjusted, dwelling commencements increased by 12.1 per cent in the quarter to March 2014; and ⁷
- On an annualised basis compared to March 2013, dwelling commencements increased by 28.9 per cent.⁸

In 2009-10, 97.9 per cent of the businesses in the State's construction industry were small businesses.⁹ The industry has the highest number of contractors of any industry.¹⁰

1.2.2 Challenges Facing the Construction Industry

There are some perennial challenges confronting the construction industry that go to the very heart of how the industry is structured and the cyclical economic environment in which it operates:

- In most construction projects, many of the onsite building practitioners typically have no direct contractual relationship with the client. There are subcontractors engaged by the head contractor, subcontractors are engaged by the subcontractors and so on. A given project can often have a lengthy and complex contracting chain.¹¹
- Unfair risk transfer from stronger parties to weaker parties is endemic. The principal invariably attempts to transfer risk to the contractor, and contractors are left in the position of having to accept an unfair risk allocation or lose work to competitors who are prepared to take on these risks. The actual outcome may often not be as cost effective and efficient as it otherwise could be but the practice persists and is widespread.¹²
- The industry consistently records the highest level of insolvencies amongst all industries. Key nominated causes of business failure are inadequate cash flow or high cash use; poor strategic management of the business; poor financial control, including lack of records; and under capitalisation, in that order.¹³

Evidence from recent insolvency investigations in Western Australia¹⁴ and New South Wales¹⁵ suggest that existing measures by governments to provide for

⁶ ABS 8755.0 and 8762.0 Construction and Engineering Work Done

⁷ "Construction Industry Snapshot July 2014", Construction Industry Training Fund

⁸ "Construction Industry Snapshot July 2014", Construction Industry Training Fund

⁹ ABS 8165.0 Counts of Australian Businesses, including Entries and Exits, June 2009 to June 2013

¹⁰ ABS, Forms of Employment Survey, November 2011, Summary of Findings

¹¹ Bruce Collins QC, Final Report, Independent Inquiry into Construction Industry Insolvency in NSW, November 2012

¹² "Scope for Improvement 2014 - Project Pressure Points - Where Industry Stands", Ashurst, Australian Constructors Association, Infrastructure Partnerships Australia, p53-54.

¹³ ASIC Insolvency Statistics: External administrators' reports

¹⁴ Final Report Construction Subcontractor Investigation - Advice and Recommendations Provided to the Minister for Small Business from the Western Australian Small Business Commissioner, Mr David Eaton, March 2013

¹⁵ Bruce Collins QC, Final Report, Independent Inquiry into Construction Industry Insolvency in NSW, November 2012

security of payment in the industry do not sufficiently ameliorate these structural factors and impacts.

Also, many forecasts for engineering construction investment are gloomy. For example, Deloitte Access Economics sees a decline to five per cent of Gross Domestic Product (GDP) by 2015, falling below 4 per cent by 2020. Federal Treasury is predicting a sharp fall in investment in 2015-16 and 2016-17 and projections from ANZ Bank see mining investment fall to as low as two per cent of GDP by 2016.¹⁶ Domestic building is not expected to be enough to fill the gap.

As a consequence, competition for some construction work may be expected to tighten considerably in coming years, exacerbated by a persistence of higher construction costs that have been a result of the mining boom.¹⁷

1.2.3 Security of Payment Issues

The construction industry is one of the most dynamic sectors of the economy. The response of the industry to trends and fluctuations in market demand is significant. In time of high construction activity, legal claims arise from hasty contract formation, inadequate documentation, poor workmanship and claims for extensions of time and extras. In times of low demand, legal claims arise in situations where contractors attempt to recover low profits through claims of latent site conditions, variations and extras under the contract.

The resolution of construction disputes, especially those relating to payment, are notoriously time-consuming and expensive. These disputes are often founded in or exacerbated by misunderstandings between the parties as to their respective rights and obligations. There is also often a significant power imbalance between owner and contractor or contractor and sub-contractor.

Security of payment has been the subject of many inquiries and reports over the past decades at national, state and territory levels. Noteworthy in the late 1990s was the carefully crafted Law Reform Commission of Western Australia's "Financial Protection in the Building and Construction Industry" discussion paper and its final report which 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.

In 2001, a State Government-initiated Security of Payment Taskforce delivered a report on options for security of payment legislation. A *Construction Contracts Bill* was approved by State Cabinet for drafting in 2002. The purpose of the Bill was to legislate for security of payment in the building and construction industry by:

- Prohibiting payment provisions in contracts that slow or stop the movement of funds through the contracting chain;

¹⁶ Deloitte Access Economics, "Major Infrastructure Projects; Costs and Productivity Issues", Australian Constructors Association, 7 March 2014, p8.

¹⁷ *Ibid.*

- 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 arising under construction contracts, whether they are written or oral.

The Bill received Royal Assent on 8 July 2004 and became the Act that is now undergoing its first statutory review.

1.2.4 The Role of the *Construction Contracts Act 2004*

Prior to the introduction of the Act, when there has been a dispute over payment for work done or materials supplied the person who has done the work or supplied the materials has been at a distinct disadvantage. They were faced with the prospect of a lengthy and time-consuming task in attempting to obtain payment for work for which they were legitimately entitled.

The implementation of the Act has significantly altered the rights of parties seeking payment for work performed or materials supplied in connection with construction work by providing a quick, informal and less expensive procedure for the resolution of payment disputes.

Additionally, the Act enables an adjudication to be commenced either before or during arbitration or litigation in order to “keep the money flowing”.

The Act also abolished “pay when paid” provisions in construction contracts and prohibits lengthy times for payment by the owner or principal.

1.2.5 Divergence in Approach Compared to Other States

There is no uniformity with respect to security of payment legislation amongst the states and territories and one of the purposes of the review will be to consider the need for, and the possibilities of uniformity. Each state and territory has developed its own legislative pathway and there are now both significant and many minor differences in the operation of legislation in each jurisdiction even though the objectives of the respective legislative regimes are identical. The difficulty for Western Australia is that its model is considered by some legal academics to be largely better in practical operation than all other states. It is believed that little will be gained by adopting the majority legislative model as this is viewed as inferior in practice¹⁸.

National consistency may require all states and territories to concede that their legislative pathways are deficient in some way and to agree that inconsistencies in approach across the nation are detrimental to the economy as a whole. Engagement between the states and territories would have to be

¹⁸ Report on Security of Payment and Adjudication in the Australian Construction Industry”, Australian Legislation Reform Sub-Committee of Society of Construction Law Australia, February 2014

initiated and an agreement struck as to a means that would satisfy requirements in all states and territories. Commonwealth legislation could be enacted to achieve uniformity¹⁹ or alternatively, there could be the adoption of a set of principles by all states and territories by which all jurisdictions agree to amend their respective legislation²⁰. All this is highly unlikely at this point in time but it is, nevertheless, within the realm of possibilities.

Legal academics refer to the *Construction Contracts Act 2004* (WA) and its near equivalent in the Northern Territory as the “West Coast” model of security of payment legislation. All other states and the Australian Capital Territory have adopted a different legislative approach often referred to by these academics as the “East Coast” model.

Master Builders Australia has cogently described the key differences as such:²¹

- The East Coast model (New South Wales; Queensland; Victoria; South Australia; Tasmania; and the Australian Capital Territory) prescribe a statutory payments scheme that is not only detailed but also overrides any inconsistent provisions;
- By contrast, the West Coast model (Western Australia; and Northern Territory) maintains the parties’ contractual payment regimes to a large degree, rather than explicitly overriding them;
- East Coast Acts only permit for statutory payment claims to be made up the contractual chain, which usually means a subcontractor making a payment claim against the head contractor. West Coast Acts allow for payment claims to be made up and down the contractual chain; and
- While both models allow for an adjudication scheme that determines payment claims as an immediate fast-track remedy, there are significant differences in terms of the provisions for adjudicator appointments, submissions which an adjudicator is permitted to consider and the way an adjudicator needs to adopt to arrive at his or her decision. The East Coast Acts are more restrictive in all these aspects than the Western Australian and Northern Territory Acts.

Calls for national uniformity in security of payment legislation have been made by the Cole Royal Commission²², the Society of Construction Law Australia²³ and Master Builders Australia²⁴.

¹⁹ The Cole Royal Commission made this case.

²⁰ This a conclusion in Master Builders Australia, “Submission to Australasian Procurement and Construction Council on Security of Payment in the Building and Construction Industry, 31 July 2012

²¹ Master Builders Australia, “Submission to Australasian Procurement and Construction Council on Security of Payment in the Building and Construction Industry, 31 July 2012

²² Royal Commission into the Building and Construction Industry, “Security of Payments in the Building and Construction Industry”, Discussion Paper 12, 2002

²³ “Report on Security of Payment and Adjudication in the Australian Construction Industry”, Australian Legislation Reform Subcommittee of the Society of Construction Law Australia, February 2014

²⁴ Master Builders Australia, “Submission to Australasian Procurement and Construction Council on Security of Payment in the Building and Construction Industry, 31 July 2012

2. BACKGROUND INFORMATION: *THE CONSTRUCTION CONTRACTS ACT 2004*

2.1 Provisions of the Act

In this section, the Consultation Discussion Paper outlines the provisions of the Act for the information of stakeholders and to facilitate their informed comment.

The actual Act can be downloaded from the following link:

http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_188_homepage.html

The regulations can be found at this link:

http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_1251_homepage.html

2.1.1 The Main Provisions of the Act

The Act applies to all contracts for construction work undertaken in Western Australia. Construction work includes site preparation, actual construction, repair, renovation and design, drafting and management.²⁵ Where the contract is silent with respect to terms regarding payment provisions the Act will imply terms regarding the contractor's entitlement to be paid.²⁶

Not all construction work is included in the Act. Work in discovering or extracting oil or natural gas is excluded as well as the mining for minerals and the constructing of plant for the purpose of extracting oil or minerals and wholly artistic work²⁷. There is also exclusion for watercraft.²⁸

The provisions relating to the rapid adjudication process reflect a compromise between expediency on one hand and legal formality on the other. The principal aim of the Act is to keep the money flowing in the contractual chain by ensuring timely payment for work completed and avoiding complex protracted litigation.

The process is determined by registered adjudicators with a background in construction contract management and dispute resolution. The role of the adjudicator is to review the claim made under the construction contract and the response and, if satisfied that the claim is justified, make a binding determination on the issues.

²⁵ See ss 4(1), (2).

²⁶ See Division 2-Implied provisions.

²⁷ See s 4(3)

²⁸ See s 4(4).

2.1.2 The Application of the Act

Construction work

What constitutes construction work is very broadly defined in the Act. It includes all of the activities associated with civil works such as roads railways, waterways, harbours ports and marinas, pipelines for water, gas, oil or sewerage. Additionally, it includes activities associated with the repair restoration, demolition and installation of plant and machinery associated with construction works, and activities such as cleaning, painting, decorating, site restoration and landscaping.²⁹

2.1.3 Goods and Services Related to Construction Work

Contracts relating to the supply of plant and materials used in construction work are also subject to the Act.³⁰ Further contracts for services that are provided by a profession that are related to construction work are subject to the Act. The services include surveying, planning, architectural design, plan drafting, engineering, quantity surveying and project management services.³¹

2.1.4 Work Not Designated as Construction Work

The Act excludes a number of activities which one might normally associate with construction work,³² in particular, work associated with mining and mineral exploration and extraction. For example:

- Drilling for the purposes of discovering or extracting oil or natural gas;
- Constructing a shaft pit or quarry for the purposes of discovering or extracting any mineral bearing or other substance; and
- Constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas.

Other work excluded under the Act is any work associated with wholly artistic works such as sculptures and murals³³ and constructing the whole or any part of watercraft.³⁴ A number of services are excluded from the provisions of the Act. For example, accounting, financial and legal services are excluded because they are not considered services that relate to construction work.³⁵

²⁹ Section 4(2) (a) to (g) inclusive.

³⁰ Section 5.

³¹ Section 5(2)(a)(i).

³² Section 4(3)(a) to (e) inclusive.

³³ Section 4(3)(d).

³⁴ Section 4(4).

³⁵ Section 5(2)(b).

2.1.5 Payment Dispute

The Act only applies to a payment dispute arising out of a contract for construction work.³⁶ A payment dispute will arise if, 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;
- any money retained by a party under the contract, the money has not been paid if due to be released; or
- any security held by a party under the contract is due to be returned under the contract, the security has not been returned.³⁷

The phrase “due to be paid” is significant. This presupposes that time for payment is expressly included in the contract. However, not all contracts may contain an express term with respect to time for payment. In these cases the Act requires that the time for payment will be 28 days from receipt of the payment claim.³⁸

The reference to money retained on security held relates to terms commonly found in construction contracts where there is provision for retention sums to be held by the principal for the purpose of ensuring the proper performance by the contractor or subcontractor of the contract.³⁹

2.1.6 Construction Contracts to which the Act Applies

Again, the Act construes the definition of a construction contract broadly. Construction contracts are defined to mean a contract or other agreement, whether or not in writing, under which a person has an obligation to carry out construction work, to supply goods that are related to this construction work or to provide the professional services related to the construction work.⁴⁰

In this respect, the form of the contract differs from that required under the *Home Building Contracts Act 1991* (WA) which requires that for a contract for home building work to be enforceable, it must be in writing.⁴¹

2.1.7 Prohibited Provisions

Section 9 of the Act prohibits “pay if paid” or “pay when paid” provisions in construction contracts. These provisions provide for the liability of a party to pay money under the contract to the other party contingent on the first party being paid by another person. The typical situation is where a term of the contract states that a subcontractor will not be paid until the main contractor has been paid by the principal or the owner.

³⁶ Section 6.

³⁷ Sections 6(a),(b),(c).

³⁸ Schedule 1, Division 5, section 7.

³⁹ For example, see General Conditions of Contract (AS 2124-1992), Clause 5.

⁴⁰ Section 3(a),(b),(c).

⁴¹ Section 4 (1)(a).

2.1.8 Time for Payment

The *Act* further prohibits terms in construction contracts which require a payment to be made more than 50 days after the payment is claimed. Such terms are now to be read as being amended to require the payment to be made within 50 days after it is claimed.⁴²

2.1.9 Implied Provisions

Where a construction contract does not contain written provisions with respect to matters such as variations, payment entitlement, progress payments or the mode and manner of making payment claims, Part 2, Division 2 of the *Act* Schedule 1 will imply terms in these situations.

2.1.10 Variations

There are a large number of expressions in building contracts dealing with additions or alterations to the work. These include extras, alterations, additions, changes and substitutions. The most common expression which covers all of these is the term "variation".⁴³

Section 1 of Schedule 1 of the *Act* provides that the contractor is not bound to perform any variation of its obligations under the contract unless the contractor and the principal have agreed upon the nature and extent of the variation of those obligations and the amount, or a means of calculating the amount to be paid for the variations. This provision prevents principals issuing variation orders to the contractor for additional works which may fall outside the scope of the original obligations.

2.1.11 Entitlement to Claim a Progress Payment

A progress payment claim in the absence of an express contrary intention, entitles the contractor to be paid for work done and materials supplied even though the whole work is not yet complete. Where a construction contract under the *Act* does not have a written provision regarding whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed, the provisions of Schedule 1 Division 3 entitle the contractor to make one or more claims for a progress payment in relation to those obligations.⁴⁴

2.1.12 Making Claims for Payment

Where a contract does not have a written provision about how a party is to make a claim to another party for payment, Schedule 1 Division 4 of the *Act* provides for the contractor to make a claim at any time after the contractor has

⁴² Section 10

⁴³ See J. Dorter, 'Variations' (1990) 6 Building and Construction Law 156.

⁴⁴ Section 15.

performed any of its obligations.⁴⁵ A payment claim is defined in section 3 and means a claim:

- 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 nonperformance by the contractor of its obligations under this contract.

The payment claim must be in writing, addressed to the party to which the claim is made, and itemised with a description of the obligations performed by the party making the claim and the amount of the claim.⁴⁶

2.1.13 Responding to Claims for Payment

Where the written contract is silent on this issue, and where a party receives a payment claim and believes the claim should be rejected or disputes the whole or part of the quantum of the claim, the receiving party must within 14 days of the receipt of the claim give the claimant a notice of dispute. This notice of dispute must also be in writing and include the reasons for the belief that the claim has not been made in accordance with the contract.⁴⁷

2.1.14 Time for Payment

Where the construction contract does not have a written provision regarding the time when a payment must be made, within 28 days after a party receives a payment claim the party, where they do not reject or wholly dispute the claim, must pay the whole amount of the claim or pay the amount of the claim that is not disputed.⁴⁸

2.1.15 Interest on Overdue Payment

The *Act* provides that interest will be payable on any payment that is not made at the time required by the contract.⁴⁹ The rate of interest is the amount prescribed under section 8 of the *Civil Judgments Enforcement Act 2004* (WA).

2.1.16 Ownership of Goods

In the past, the issue of whether a subcontractor or supplier could recover materials previously delivered to site, and not subsequently paid for by the recipient, involved a legal consideration of when property passes.⁵⁰ At

⁴⁵ Section 16.

⁴⁶ Schedule 1, Division 4, s 5(2).

⁴⁷ Schedule 1, Division 5, s 7.

⁴⁸ Schedule 1, Division 5, s 7(3).

⁴⁹ Section 19.

⁵⁰ *Hewith v Court* (1983) 149 CLR 639 at 65).

common law the property in materials brought to a site passed to the builder or building owner only when those materials were fixed into the construction.⁵¹

Under the *Act*, ownership of the goods which are supplied by the contractor will not pass from the contractor until the contractor is paid for the goods or until the goods become fixtures.⁵²

2.1.17 Duties as to Unfixed Goods on Insolvency

At common law, where a builder becomes insolvent and the subcontractor has delivered materials under a supply and installation of materials subcontract but has not yet received payment, a proprietor does not have ownership of the materials until the materials are installed. Contracts will often contain retention of goods clauses and may prevent the passing to the builder, and limit rights to materials supplied on site.

Where a construction contract does not have a written provision about what is to happen to unfixed goods, if either the principal or the person for whom the principal is performing construction work becomes insolvent then the provisions of the *Act* imply that the principal or the other person must not during the insolvency allow the goods to become fixtures or to fall into the possession of any other person other than the contractor. Secondly, the principal must allow the contractor a reasonable opportunity to repossess the goods.⁵³

2.1.18 Retention Money

Many standard-form subcontracts provide for the principal to deduct from payments otherwise due to the contractor a specified amount as security for proper performance of the contract.⁵⁴ The effect of such a provision is to oblige the principal to set aside these retention moneys in a trust fund for the contractor, subject to the principal's entitlement to access these funds in the event of any nonperformance of the contractor's obligations. Where a contract does not have a written provision concerning the status of money retained by the principal for the performance by the contractor of its obligations, the *Act* prescribes that the principal is to hold the money on trust for the contractor until the happening of a number of specified events.⁵⁵ For example, the money is paid to the contractor or the contractor agrees in writing to give up the claim to the money.

2.1.19 Adjudication of Disputes

The *Act* provides for what may be described as a rapid adjudication procedure for payment disputes, by registered adjudicators. Adjudicators must have a degree in a building or construction discipline such as Architecture, Building, Engineering, Quantity Surveying or Building Surveying and at least five years' experience in the administration of construction contracts or dispute resolution

⁵¹ *RJ Grills Pty Ltd v Dellias* [1988] VR 136 at 139.

⁵² Schedule 1, Division 7, s 9.

⁵³ Schedule 1, Division 8, s 10.

⁵⁴ For example, see General Conditions of Contract (AS 2124-1992), Clause 42.3

⁵⁵ Schedule 1, Division 9, s 11.

relating to construction contracts. Additionally, the adjudicator must have successfully completed an appropriate training course.⁵⁶

2.1.20 Commencing an Adjudication

The adjudication process commences by the lodging of an application by either party to the payment dispute. However, a party cannot apply if an application for an adjudication has already been made or the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.⁵⁷

2.1.21 Applying for Adjudication

Within 28 days after the dispute arises, a party to the contract must prepare a written application for adjudication and serve it on each other party to the contract and the adjudicator if the parties have appointed an adjudicator.⁵⁸ This application must set out all the information, documentation and the submissions on which the party making the application (the Applicant) relies.⁵⁹

2.1.22 Responding to an Application

Within 14 days after service of the application, the recipient (the respondent) must prepare a written response to the application and serve it on the applicant and the adjudicator.⁶⁰ This response must set out the details of the rejection of the dispute and include all the information and documentation on which the respondent will rely.⁶¹

It is important that both the applicant and respondent fully detail their submissions, as the adjudication will be based on the documents only. However, there is provision in the Act for the adjudicator, in order to obtain sufficient information to make a determination, to request a party to make further written submissions or request the parties to attend a conference with the adjudicator.⁶²

2.1.23 Appointment of an Adjudicator

The parties may agree to the appointment of an adjudicator or a party may serve an application for adjudication upon a prescribed appointor. 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.⁶³

⁵⁶ *Construction Contracts Regulations 2004 (WA)*, s 9.

⁵⁷ Section 25.

⁵⁸ Section 26(1).

⁵⁹ Section 26(2).

⁶⁰ Section 27(1).

⁶¹ Section 27(2).

⁶² Section 32(2).

⁶³ Section 55.

The following organisations are approved as prescribed appointors: RICS Australasia Pty Ltd (Dispute Resolution Service), Australian Institute of Building, Master Builders Association of Western Australia (Union of Employers), National Electrical and Communications Association (Western Australia) and Institute of Arbitrators and Mediators Australia. (See Building Commission website: <http://www.commerce.wa.gov.au/building-commission/find-appointor>).

Within five days of being served with an application for adjudication the prescribed appointor must appoint a registered adjudicator to adjudicate the payment dispute, send the application to the adjudicator and notify the parties accordingly.⁶⁴

2.1.24 Conflicts of Interest

The aim of an adjudication of a payment dispute is to determine the dispute as fairly, quickly and inexpensively as possible.⁶⁵ Concepts of fairness not only involve each party being given the opportunity to prepare its submission and respond to the claim, but also require the adjudication to be conducted by an independent, impartial third party. Put simply, not only must justice be done, it must be seen to be done. Consequently, an appointed adjudicator who has a material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen, will be disqualified from adjudicating the dispute.⁶⁶

2.1.25 The Adjudication Procedure

The Act requires that the adjudicator must act informally and where possible make the determination on the documents.⁶⁷ Secondly, the adjudicator is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.⁶⁸ These provisions should, however, be applied with caution. While the Act provides that the dispute is to be determined informally, there will be situations where the rules of evidence will apply. For example, where a written contract purports to contain all of the terms of a contract, the parole evidence rule will prevent extrinsic evidence being led to contradict or vary the written terms of the contract.⁶⁹

The adjudicator may also, in order to obtain sufficient information, request the parties to make further written submissions and request the parties to attend a conference.⁷⁰ An adjudicator may also inspect any work or thing to which the payment dispute relates, arrange for things to which the payment dispute relates to be tested, or engage an expert to investigate and report on any matter relevant to the payment dispute, unless all the parties object.⁷¹

⁶⁴ Section 28.

⁶⁵ Section 30.

⁶⁶ Section 29.

⁶⁷ Section 32(1)(a).

⁶⁸ Section 32(1)(b).

⁶⁹ *Mercantile Bank of Sydney v Taylor* (1891) 12 LR (NSW) 252.

⁷⁰ Sections 32(2)(a), 32(2)(b).

⁷¹ Section 32(2)(c).

2.1.26 Prescribed Time

The Act requires the adjudicator to determine the dispute as quickly as possible and prescribes maximum periods for the determination.⁷² Within 14 days of the service of the response to the application or, if a response is not served, within 14 days after the last date on which a response is required to be served, the adjudicator must either dismiss the application or otherwise determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment.⁷³

There are a number of situations where the adjudicator must dismiss the application without making a determination of its merits.⁷⁴ For example, if the contract concerned is not a construction contract or there has already been an order made on the matter in dispute by an arbitrator, court or other person. The adjudicator may also dismiss the application if satisfied that it is not possible to make a determination within the prescribed time because of the complexity of the matter.

2.1.27 Extension of Time

Where the adjudicator considers it is not possible to determine the application within the prescribed time, the adjudicator may, with the consent of the parties, extend the time for making a determination.⁷⁵

2.1.28 Payment of Interest

Having determined that a party to the dispute is liable to make a payment, the adjudicator may determine that interest be paid. Where the payment is overdue under the construction contract, the rate of interest will be that specified in the contract.⁷⁶ Otherwise the rate shall not be greater than that prescribed in the Civil Judgments Enforcement Act 2004 (WA).⁷⁷

2.1.29 The Parties' Cost

The usual rule in litigation is that the successful party is entitled to its costs. This is described as "costs follow the event". However the starting point with costs of adjudication under the Act is that the parties to a payment dispute will bear their own costs in relation to the adjudication.

The term "costs of an adjudication" is described in the Act as the entitlement of the appointed adjudicator and the costs of any testing done or expert engaged by the adjudicator.⁷⁸ However, where the adjudicator is satisfied that a party to the dispute incurred costs of the adjudication because of unfounded claims

⁷² Section 31(1).

⁷³ Section 31(1)(a), 31(1)(b).

⁷⁴ Section 31(2)(a).

⁷⁵ Section 32(3)(a).

⁷⁶ Section 33(1)(a).

⁷⁷ Section 8(1)(a), Currently 6% pa.

⁷⁸ Section 44 (1)(a), 44(1)(b).

or frivolous or vexatious conduct by the other party, the adjudicator may decide that the other party must pay some or all of the costs.⁷⁹

Consequently, the Act provides that, where the adjudicator makes an order with respect to costs, he or she must decide the amount of the costs, give reasons for the decision and communicate those reasons in writing to the parties.⁸⁰

2.1.30 Form and Content of the Adjudicator's Determination

Section 36 of the Act prescribes the form and content of the adjudicator's decision. The adjudicator's decision must:

- be in writing;
- state the amount to be paid and the date on or before it is to be paid; and
- give reasons for the determination.

The decision must also identify any confidential information which is not suitable for publication by the Registrar.⁸¹ The decision must then be given to the parties to the adjudication and to the Registrar.⁸²

Consequently the Act provides that, where the adjudicator makes an order with respect to costs, he or she must decide the amount of the costs, give reasons for the decision and communicate those reasons in writing to the parties.⁸³

2.1.31 Effect of Determinations

The fact that an adjudication application has been made with respect to the payment dispute does not prevent the parties commencing proceedings on other issues arising out of the dispute before an arbitrator or court. However, the adjudicator's determination of the payment dispute is binding on the parties.⁸⁴

The adjudicator's determination is also final and the adjudicator cannot, without the consent of the parties, amend or cancel the determination⁸⁵ unless there has been some accidental slip or omission, arithmetic error or material mistake in the description of any person or thing.⁸⁶

2.1.32 Contractor May Suspend Its Obligations

At common law, a contractor is unable to suspend the performance of its obligations where the other party has not paid a progress payment on time unless the contract includes an express right to suspend work for non-

⁷⁹ Section 34(2).

⁸⁰ Section 34(3)(c).

⁸¹ Section 36(a).

⁸² Sections 36(f), 36(g).

⁸³ Section 34(3)(c).

⁸⁴ Section 38.

⁸⁵ Section 41(1).

⁸⁶ Section 41(2).

payment.⁸⁷ This is consistent with the principle that unless there is a breach of a condition, the breach does not discharge the innocent party from performance of its unperformed obligations. However, the Act provides a right to the contractor to suspend work if the other party does not pay in accordance with the determination, subject to the issuing of a notice in writing to suspend performance of its obligations.⁸⁸

The Act further provides that a contractor who suspends the performance of its obligations in accordance with the above is not liable for any loss or damage suffered by the principal or any other person claiming through the principal and the contractor retains its rights under the contract.⁸⁹

2.1.33 Determinations May Be Enforced As Judgments

An adjudicator's 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.⁹⁰ A court of competent jurisdiction in relation to a determination is defined in section 43(1) as 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.

2.1.34 The Adjudicator's Costs

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.⁹¹ The Building Commission's website contains a list of registered adjudicators:

<http://www.commerce.wa.gov.au/building-commission/find-adjudicator>

As noted above, the parties involved are liable to pay the costs of an adjudication in equal shares and the parties are jointly and severally liable to pay the costs of the adjudication.⁹² 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.⁹³

2.1.35 Concurrent Proceedings

Concurrent proceedings are proceedings in a court, tribunal or arbitration dealing with a dispute or other matter arising under the contract between the parties. The Act provides that adjudication under the *Act* will not affect concurrent proceedings.⁹⁴ These proceedings can continue at the same time

⁸⁷ See A. May (ed), *Keating on Building Contracts* (5th ed, 1991)157.

⁸⁸ Section 42(2).

⁸⁹ Sections 42 (5)(a), 42(5)(b).

⁹⁰ Section 43(2).

⁹¹ Section 44(1).

⁹² Sections 44(5), 44(6).

⁹³ Section 44 (12).

⁹⁴ Section 45(1).

as the adjudication, unless all the parties, in writing, require the adjudicator to discontinue the adjudication.⁹⁵

Consequently, if litigation or arbitration of the dispute has already commenced, the applicant is still entitled to pursue payment under the Act. The Act provides that an arbitrator or court must take into account any amount determined under the Act.⁹⁶ Where proceedings have commenced in a court, tribunal or arbitration before the time of the adjudication, the adjudicator may still continue with the adjudication. However, the adjudicator cannot have regard to those proceedings. Similarly, anything said or done in an adjudication is not admissible before an arbitrator or any other body.⁹⁷

Where a party is dissatisfied with the amount, if any, determined by the adjudicator, the party may still commence proceedings before an arbitrator or other person.⁹⁸

2.1.36 Review of Adjudicator's Determinations

Grounds for a review of an adjudicator's decision are limited.⁹⁹ A person who is aggrieved by a decision made under s 31(2)(a) of the Act may apply to the State Administrative Tribunal (SAT) for a review of the decision. The SAT came into operation on 1 January 2005 and amalgamated most of the review, civil and disciplinary functions of nearly 50 industry and public sector boards and tribunals and a number of courts. SAT matters are divided into four streams that are appropriate to the matter under review. The forum which considers reviews of decisions of adjudicators is the Commercial and Civil stream which deals with strata title and retirement village disputes, commercial and personal matters. Details regarding the operation of the SAT can be found on the Tribunal's website.¹⁰⁰

2.1.37 Circumstances Where an Adjudication May Be Set Aside

The Act sets out the circumstances where an adjudication may be set aside by SAT. These are:

- the contract is not a "construction" contract;
- the application has not been served in accordance with the provisions of the Act;
- an order has already been made by another person (court or arbitrator) about the matter which is the subject of the application; and
- the adjudicator fails to make a decision within the time prescribed.

⁹⁵ Section 45(2).

⁹⁶ Section 45(4).

⁹⁷ Section 45(3).

⁹⁸ Section 45(1).

⁹⁹ Section 46.

¹⁰⁰ See www.sat.justice.wa.gov.au.

Further, where the adjudicator decides incorrectly that he or she has jurisdiction to hear a dispute, the determination may be subject to review by the Supreme Court on the basis of a jurisdictional error. This ground for review will also apply where the adjudicator decides that he or she has no jurisdiction to determine the matter when in fact they do. Put simply, a jurisdictional error occurs when a person or tribunal exercises jurisdiction to decide a matter that has not been entrusted to it by statute.

However it is considered that the court will not set aside an adjudicator's decision where the adjudicator has made a non-jurisdictional error, for example, in applying the law or in the interpretation of the contract. The court may set aside an adjudicator's decision if the adjudicator has not acted honestly or has breached the requirements of natural justice.¹⁰¹ In other words, the observance of natural justice requires the decision maker to be unbiased and that each party must have the opportunity to prepare and present its case and respond to any allegations.

Where there is an appeal arising from an adjudicator's determination, the adjudicator should not become involved in the appeal. If they do, the adjudicator may end up paying the costs of the review.¹⁰²

2.1.38 Administration of the Act

Part 4 of the Act details a number of administrative provisions. In particular, matters such as the appointment and functions of the registrar, the registration of adjudicators and the publication of adjudicators' decisions.¹⁰³

2.1.39 Miscellaneous Provisions

Part 5 of the Act contains a number of miscellaneous provisions. These include no contracting out, immunity from tortious liability, regulations and review of the Act.

2.1.40 No Contracting Out

Section 53 prohibits terms in a construction contract that purport to exclude, modify or restrict the operation of the Act. The effect of this provision is that any agreement to modify or exclude rights under the Act will be void. Similarly, an adjudicator cannot by agreement vary his or her statutory obligations.

2.1.41 Immunity from Tortious Liability

Section 54 provides adjudicators with immunity against an action in tort for anything done in good faith in the performance of a function under the Act. However if an adjudicator attempts to act outside the provisions of the Act, then the adjudicator will leave himself or herself subject to personal liability. The

¹⁰¹ For a discussion of the requirements of natural justice see *Ridge v Baldwin* (note 51 supra) and *Najjar v Haines* (1991) 25 NSWLR 224.

¹⁰² See *Najjar v Haines* at 248.

¹⁰³ Sections 47 to 52 inclusive.

difficulty with this section is the lack of consensus or authority with respect to what exactly is meant by good faith.¹⁰⁴

2.2 The Act in Operation: 2005 to 2013

Below are some observations derived from the Western Australian Construction Contracts Registrar's Annual Reports¹⁰⁵ for the period 2005 to 2013:

2.2.1 Annual Applications for Determination

Since the Act commenced there have been a total of 1011 applications for determination. In the first year of operation (2005-06) the number of applications for adjudication was 29 and in the period 2012-13, there were 208 applications.

It is presumed that the increase in the applications since the commencement of the Act is due to increasing awareness of the provisions of the Act. Contributing to the increase in awareness of the Act's provisions has been the regular presentation of continuing professional development sessions to the legal profession, the building construction, engineering and alternate dispute resolution associations.

2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	Total
29	36	86	105	172	197	178	208	1011

Table 1 – Applications for Adjudications made

2.2.2 Industry Source of Applications

Since 2005, commercial building payment disputes have attracted the greatest number of adjudication applications. These have accounted for 197 (of the 1011 or 19.49 per cent) of the total number of payment disputes since the commencement of the Act. Since 2010-11, where the figure was 164, there has been an increase of 33 disputes, which equated to a percentage change of 20 per cent.

This is followed by residential building payment disputes totaling 129 (12.76 per cent). Electrical applications comprised 5.24 per cent of the total number of applications.

¹⁰⁴ See *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *Perini Corporation v Commonwealth* [1969] 2 NSWLR 530; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

¹⁰⁵ The Annual Reports of the Construction Contracts Registrar/Building Commissioner may be accessed at: <https://www.commerce.wa.gov.au/publications/construction-contracts-act-annual-reports>.

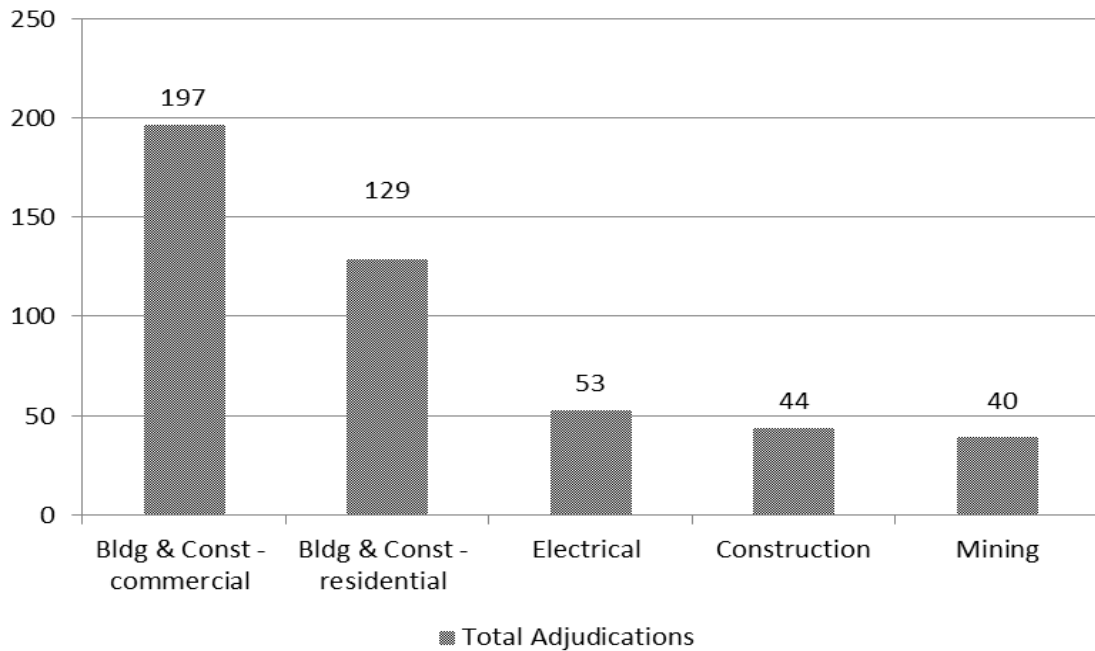


Figure 2 – Top 5 adjudications by industry type (2005-13)

The number of adjudication applications arising from the mining industry is nevertheless significant. In 2010-11, mining-related activities which did not fall within the exemptions in the Act, constituted only 12 (or 1.92 per cent) of the 625 adjudication applications since 2005. Since 2010-11 mining-related activities numbered 40 (or 3.96 per cent). However, the 40 applications account for the highest total dollar values of adjudications payment claims and determinations.

Since the commencement of the Act, mining related activities accounted for \$173.9m (or 30.61 per cent) of the total of the then \$568.2m value of adjudications in the mining industry generally. Mining related activities now account for \$268.7m (or 24 per cent) of adjudication claims. This is a percentage change of an increase of 55 per cent.

In relation to the dollar value of claims, this is followed by commercial building adjudications at \$180.6m (or 16 per cent). Marine works are now third at \$110.4m (or 11.29 per cent). The lowest amount claimed in an application (window frames), accounted for only \$1320 (0.0002 per cent).

2.2.3 Prescribed Appointors

The majority of appointments are made by the prescribed appointors, rather than by the Building Commission. They account for 99.3 per cent of adjudication applications over the period examined with only four not appointed by a prescribed appointor. Currently in Western Australia there are eight prescribed appointors regulated by the Act. All eight are either professional institutes or associations. This differs considerably to the other states that have allowed commercial and private companies to be included as prescribed appointors.

Since the commencement of the Act in 2005, 53 per cent of adjudications (or 535 adjudications) have been appointed by the Institute of Arbitrators and Mediators Australia. This was followed by the Master Builders Association with 35 per cent (or 350 adjudications) since the introduction of the Act.

2.2.4 Qualifications of Registered Adjudicators

The adjudication of the payment dispute is carried out by registered adjudicators. In essence the role of the adjudicator is to review the claim made under the construction contract and the subsequent response and, if satisfied that the claim is justified, make a binding written determination on the issues. The adjudicator is required to act informally and is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.¹⁰⁶

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 per cent), 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 to provide a rapid adjudication process to deal quickly with payment disputes and ensure money keeps flowing in the contracting chain.¹⁰⁷

The background of the adjudicators is consistent with the intention of the framers of the Act that the process was 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.

There is currently only one female registered adjudicator. A second has completed training but has not yet applied for registration. Both persons are legal practitioners. In the last reporting period, 2012-13, only 35 of the 64 registered adjudicators undertook adjudications.

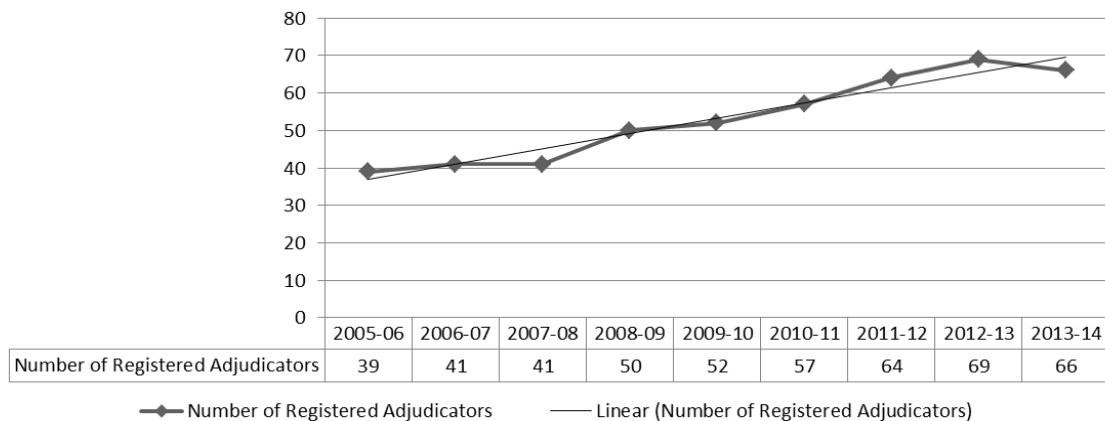


Figure 3 - Number of Registered Adjudicators (2005-14)

¹⁰⁶ The adjudicator's functions and the adjudication procedure is set out in sections 31 and 32 of the Act respectively.

¹⁰⁷ Building Payment Disputes; Information for Homeowners about the Construction Contracts Act, Department of Housing and Works (WA), DHW Q562, 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.

2.2.5 Applications, Determinations and Dismissals

Since the commencement of the Act, there have been 1011 applications for adjudications. The figures indicate, on average, that only 60 per cent of applications result in a determination. In the latest two reporting periods a decrease in the number of determinations is evident and the reasons for this are unclear.

2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	Total
21	17	47	69	90	99	88	86	607

Table 2 – Number of determinations made (2005-13)

There are a number of situations where the adjudicator must dismiss the application without making a determination of its merits.¹⁰⁸ For example, if the contract concerned is not a construction contract or there has already been an order made on the matter in dispute by an arbitrator, court or other person. The adjudicator may also dismiss the application if satisfied that it is not possible to make a determination within the prescribed time because of the complexity of the matter. On average, since 2005, 29 per cent of applications over the total period were dismissed by the adjudicator. In 2012-13, 74 (out of 208 or 35 per cent), were dismissed.

2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	Total
2	10	27	25	57	57	40	74	178

Table 3 – Number of dismissals (2005-13)

The Act, unlike the *Construction Contracts (Security of Payments) Act* (Northern Territory), makes no provision for the withdrawal by an Applicant, or both parties, if the dispute is resolved by the parties themselves prior to the adjudication determination.

Since 2005, 183 (or 18 per cent) adjudication applications have been discontinued by the parties, yet there are no mechanisms or provisions that exist in the Act to deal with this situation. The *Construction Contracts (Security of Payments) Act* (Northern Territory) provides that pursuant to section 28A; a party may withdraw the application by writing to the prescribed appointor (where no adjudicator is appointed), the adjudicator and the other party.

The numbers of applications that have been withdrawn are shown at Table 4:

¹⁰⁸ *Construction Contracts Act 2004* (WA) s 31(2)(a).

2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	Total
6	3	10	10	25	27	50	48	183 (18%)

Table 4 – Number of applications withdrawn (2005-13)

The total value of payment claims over the period 2005 to 2011 was \$702,304,674. When the amounts for the two latest reporting periods are included, this figure increases to \$1,112,306,614.

In the first reporting period (2005-06), the total value of payment claims amounted to \$10,485,828. In 2010-11, the total amount of claims equated to \$308,553,665. The latest figures show a decrease in the total amount claimed to \$183,701,052. It is not possible to be definitive at this stage regarding the reason for the reduction in the amounts claimed. However in the latest reporting period (2012-2013) the claims have increased to \$226,300,887.

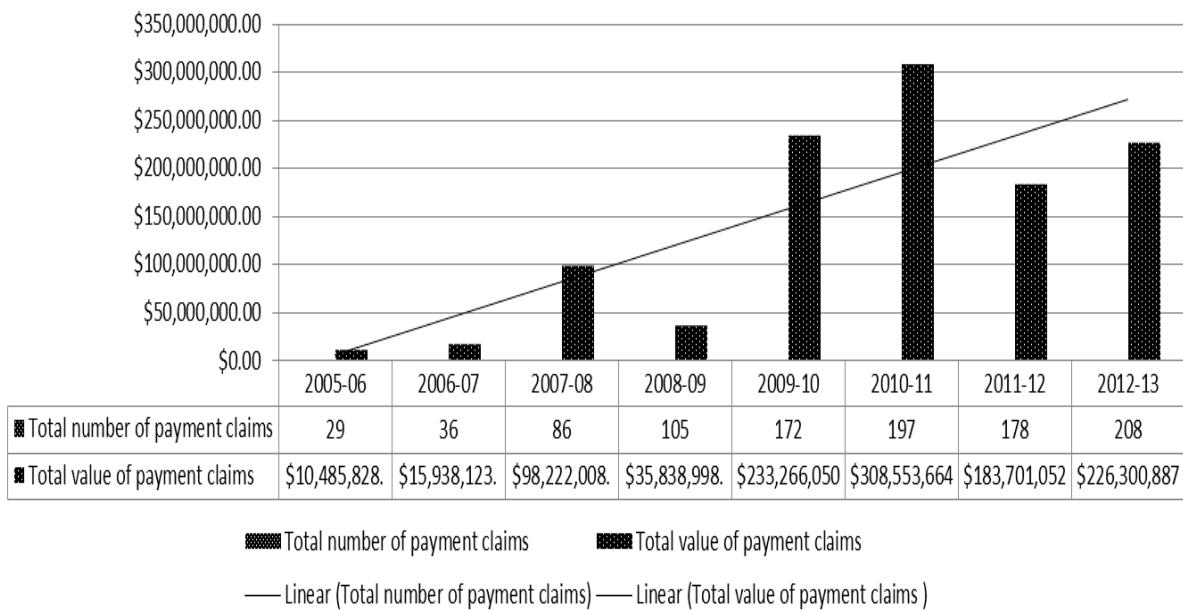


Figure 4- Total value of payment claims - (2005- 3)

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 total payment reporting period (2005–13) is \$822,345. This figure is significant. It is trite to say that the intention of the Act was to provide a speedy resolution of payment disputes involving smaller 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 the vernacular 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 entire reporting period (2005 to 2013) remains at \$38,638,536 (2010-11). The smallest single payment determination amount was \$1320 (2009-10). The mean value of payment claims over 2005–13 is \$521,091. With respect to adjudicators' fees, the highest adjudicator fee recorded over the period 2012-13 for a building construction payment dispute was \$29,944.

On the basis of the 1011 adjudications during 2005-11, the average adjudication fee charged was \$3,982 per adjudication. The lowest recorded fee remains at \$120 for a commercial building dispute in 2010-11. The average adjudicator's fee per hour is \$251. Individual adjudicators' fees, as noted on the Building Commission website, range from \$180 to \$400 per hour.

2.2.6 Review of Adjudication Determinations

Section 31(2)(a) of the Act specifies the circumstances where an adjudication may be set aside by the Western Australian State Administrative Tribunal (SAT).

To date, the Western Australian SAT has indicated in its decisions that it will only set aside an adjudication determination where there has been a failure to comply with the provisions of 31(2)(a) of the Act and will not review a decision "on the merits." It remains to be seen how the Tribunal would respond to an issue of a "substantial" breach of the rules of natural justice as noted by Hodgson JA in *Brodyn Pty Ltd T/A as Time Cost and Quality v Davenport and Anor.*¹⁰⁹

Since the commencement of the Act, there have been 26 applications for review to SAT under section 46 of the Act. Section 46 of the Act provides for a limited right of review with respect to a decision made under section 31(2)(a) of the Act. This represents 2.6 per cent of the total determinations over the period of review. The number of appeals annually is also shown in Figure 4.

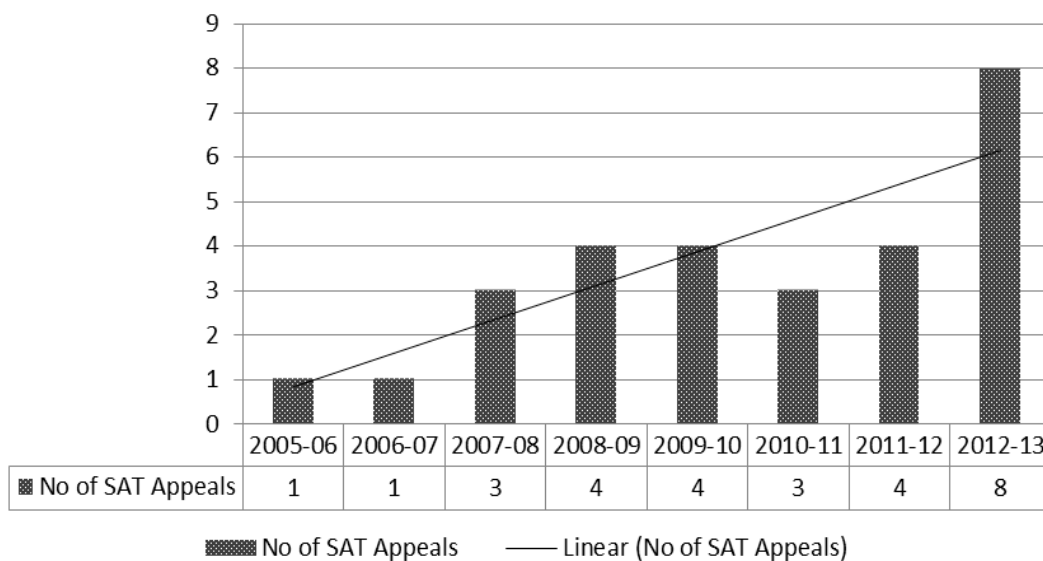


Figure 5 – Determination Reviews to SAT (2005-13)

¹⁰⁹ [2004] NSWCA 394 at para [57]

Of the 26 appeals to the SAT, 18 (or 69.2 per cent) were dismissed.

Both the SAT and the Western Australian Supreme Court have determined that there is no appeal against a decision by an adjudicator to proceed with a determination even where there is an arguable case that the claim should have been dismissed under section 31 of the Act.¹¹⁰ The rationale appears to be that both have recognised the rights of the parties to proceed to an agreed alternative dispute resolution process.

The provisions of the *State Administrative Tribunal Act 2004* (WA) generally allow for an appeal on a question of law to the Supreme Court.¹¹¹ Over the period of review, 18 adjudications have been appealed within s.46 of the Act. This accounts for 1.8 per cent of the total adjudications applications.

2.2.7 Observations

From the study of the Construction Contracts Act - Building Commissioner (formerly the Registrar) Annual Reports over the period 2005 to 2013, a number of relevant trends have been identified:

- The number of applications for adjudication is generally increasing at a significant rate per year with the commercial building sector attracting the largest proportion of applications.
- Major infrastructure projects comprised only 2.37 per cent of the total number of applications.
- Payment claims arising from the mining industry comprised less than 3.96 per cent of the number of applications but 27.47 per cent of the total value of payment claims.
- With respect to adjudication nominations, 53 per cent came from the Institute of Arbitrators and Mediators (Australia) and 35 per cent came from the Master Builders Association.
- Of the current registered adjudicators, 77 per cent are not legal practitioners.
- Only 60 per cent of applications proceed to a determination with the remainder either withdrawn or dismissed.

¹¹⁰ *O'Donnell Griffen Pty Ltd v Davis and Ors* [2007] WASCA 215

¹¹¹ Appeals can be made on a question of law. The procedures set out in section 105 of the *State Administrative Tribunal Act 2004* allow an appeal to the Court of Appeal (of the Supreme Court), if the decision was made by a Tribunal that included a judicial member; or the Supreme Court in all other SAT matters.

- The average and total quantum of the individual claims clearly indicate that the Act does not appear to be operating at the lower end of the contracting chain.
- At the same time, there have been relatively few applications to review adjudication determinations to both the State Administrative Tribunal (2.6 per cent) and the Western Australian Supreme Court (1.8 per cent).

3. KEY ISSUES TO BE EXAMINED

3.1 Some Key Issues for which the Review Seeks Comment

The original purpose of State Parliament was to provide the means, "...to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex issues".¹¹²

Despite the best of intentions and the utmost thoroughness in drafting, there can be unintended consequences or instances where the provisions enacted have been inadequate in achieving the legislative objectives in practice.

Market conditions and industry structure can also alter over time and impede the effectiveness of certain provisions or fail to accommodate the changed circumstances. The Review is seeking to identify such provisions and the altered environment in which these provisions were intended to apply.

The following issues and questions have been collated from the experiences stakeholders have had with the Act over time. This collation of issues form the basis on which the Review seeks to stimulate discussion and comment in written submissions and stakeholder meetings with the Reviewer. However, the issues raised here are by no means meant to restrict or confine comment and all stakeholders are encouraged to raise whatever matters that may be of concern to them in relation to the operation and effectiveness of the Act. Evidence that supports any claims will assist the Reviewer in his deliberations.

3.1.1 Time limits in which an Application Can Be Made

Concern has been expressed about the time period the Act provides in which the adjudication must be brought, or a payment claim can be made. Section 26 of the Act stipulates that the time limit is "28 days after the dispute arises". A dispute arises on the date that a payment was due and has not been paid in full or has been part paid. The concerns of small businesses expressed to the Small Business Commissioner's 2013 investigation into subcontractor insolvencies is that the time period is too short to serve the needs of small subcontractors.¹¹³

In the near equivalent Northern Territory security of payment legislation the time limit is 90 days after the dispute arises. In New South Wales, Section 13(4) of the *Building and Construction Industry Security of Payment Act 1999* allows a period of "...12 months after the construction work to which the claim relates was last carried out...", while in the Malaysian *Construction Industry Payment and Adjudication Act 2012*, the period is six years.¹¹⁴

¹¹² Second Reading Speech, Hansard, Legislative Council, 8 April 2004, p1934b-1935a

¹¹³ Final Report Construction Subcontractor Investigation - Advice and Recommendations Provided to the Minister for Small Business from the Western Australian Small Business Commissioner, Mr David Eaton, March 2013

¹¹⁴ Report on Security of Payment and Adjudication in the Australian Construction Industry", Australian Legislation Reform Sub-Committee of Society of Construction Law Australia, February 2014

The Society of Construction Law Australia's Legislation Reform Subcommittee suggests that in Western Australia a suitable compromise would be amending Section 28 so the period of time is 90 days.¹¹⁵

Time limits in which an Application Can Be Made

Question 1.

- a) Should Section 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?

3.1.2 Timelines for Responses, Determinations and Extensions

As indicated in the Second Reading Speech, it was the desire of State Parliament for adjudications to be rapid. Below is a graphical representation of the process time periods that are involved and which are a function of the desire for rapid adjudication that keeps the money flowing in the contracting chain:

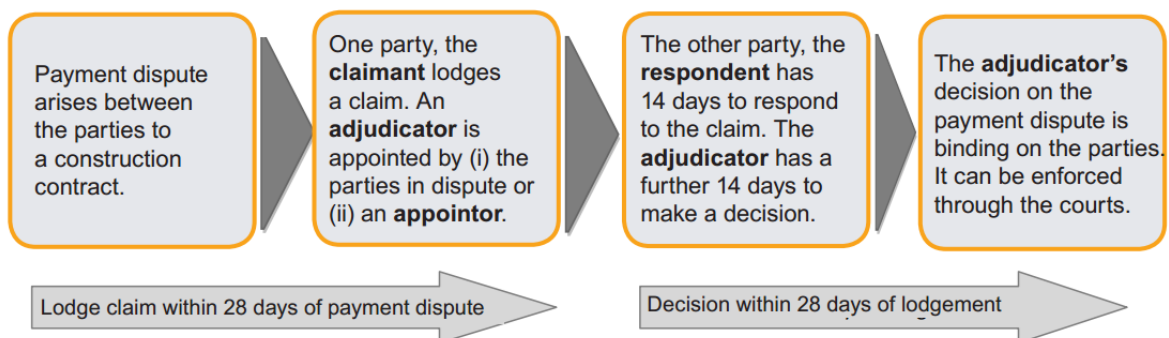


Figure 1: Construction Contracts Act 2004 – Process Time Periods

Under Section 27 of the Act, the respondent to a payment claim has 14 days in which to prepare a written response to the application and serve it on the applicant and the adjudicator.

Under Section 31 of the Act, the adjudicator must either dismiss an application or otherwise determine on the balance of probabilities whether any party to the dispute is liable to make a payment. This must occur within 14 days of the service of the response to the application or if a response is not served, within 14 days after the last date on which a response is required to be served.

¹¹⁵Report on Security of Payment and Adjudication in the Australian Construction Industry”, Australian Legislation Reform Subcommittee of Society of Construction Law Australia, February 2014.

Generally speaking, the respondent has 14 days to respond to a payment claim and the appointed adjudicator has a further 14 days to make his or her decision.

The Society of Construction Law Australia's Legislation Reform Subcommittee indicates that a "one size fits all approach" in terms of such timelines is likely to deliver poor results at both ends of the complexity spectrum.

Small and simple claims can be adequately dealt within shorter time frames, allowing smaller subcontractors to receive their money quickly. These payment claims can be processed in less than 14 days, while complex payment claims with extensive documentation and those involving very large financial sums may require more time for an adequate outcome.

Timelines for Responses

Question 2.

- a) 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?
- b) If not, what is an appropriate balance to facilitate rapid adjudication?
- c) 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?

Timelines for Determinations

Question 3.

- a) Does the 14 day time limit allow sufficient time, in which the appointed adjudicator has to make a determination?
- b) If not, what is the appropriate balance to facilitate rapid adjudication?
- c) 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?

Timelines for Extensions

Question 4.

An Adjudicator can, pursuant to Section 32, with the consent of the parties, extend the time prescribed by Section 31(2) for making a determination. Many Adjudicators are finding that with the larger and more complex adjudications, parties are not consenting to any requested extension.

- a) If the time to make a determination remains at 14 days, should the Adjudicator be able to grant an additional 7 days extension of time, without the consent of the parties?
- b) Should the Adjudicator be able to then seek an additional 7 days extension of time with the permission of the parties?

3.1.3 Underutilisation of the Act's Provisions for Payment Claims

As indicated in Chapter 3, the average and total quantum of the individual claims has clearly indicated that the Act is not operating at the lower end of the contracting chain. This is contrary to State Parliament's legislative intent.

In 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, himself, all raised concerns about the attractiveness of utilising the Act for small claims.¹¹⁶

Underutilisation of the Act's Provisions for Payment Claims

Question 5.

- a) Is the *Construction Contracts Act 2004* a suitable vehicle for resolving some payment claims?
- b) Is there any way the Act could be modified to better facilitate the rapid adjudication of these claims?

¹¹⁶ Final Report Construction Subcontractor Investigation - Advice and Recommendations Provided to the Minister for Small Business from the Western Australian Small Business Commissioner, Mr David Eaton, March 2013

3.1.4 Development of Alternative Dispute Resolution Mechanisms

The Small Business Commissioner has recommended that the Building Commission's suite of dispute resolution legislation and services be reviewed,

*"... to ascertain what amendments or enhancements are required, and what funding is necessary, to improve the accessibility of dispute resolution processes in the construction industry for small business operators."*¹¹⁷

The enactment of the *Building Services (Complaint Resolution and Administration) Act 2011* has provided for a modern complaint resolution system for building services delivered in this state. Part 2 of the legislation established a system for handling and resolving building complaints affecting owners, registered building service providers and approved owner-builders. The Act allows for a two-stage dispute resolution service. Complaints are received and dealt with by the Building Commissioner and more difficult disputes are determined by the State Administrative Tribunal (SAT).

Part 6 of this Act established the position of the Building Commissioner. A Building Services Levy finances the operation of the Building Commissioner's services, including the dispute resolution services.

A copy of the applicable legislation can be downloaded from this link: http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_12299_homepage.html

Alternative Dispute Resolution Mechanisms for Small Claims

Question 6.

- a) Should the *Building Service (Complaint Resolution and Administration) Act 2011* 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?
- b) 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?
- c) If not, what other alternative means should be explored by Government to address the issue of small claims?

¹¹⁷ Final Report Construction Subcontractor Investigation - Advice and Recommendations Provided to the Minister for Small Business from the Western Australian Small Business Commissioner, Mr David Eaton, March 2013, p72.

3.1.5 Regulation of Adjudicators

The *Construction Contracts Regulations 2004* (WA) reg 9¹¹⁸ states that an adjudicator must have a degree in a legal or construction industry related course. They must be eligible for membership of a professional institution such as the Institute of Arbitrators and Mediators of Australia or the Institution of Engineers Australia. They must have had at least five years' experience in administering construction contracts or dispute resolution relating to construction contracts. The individual must have successfully completed an appropriate training course which qualifies the person for the performance of the functions of an adjudicator.

The registration of an adjudicator in WA is a once-off requirement at the cost of \$50, pursuant to the *Construction Contracts Regulations 2004* (WA) reg 10.¹¹⁹

Regulation of Adjudicators

Question 7.

- a) Are the registration requirements correct?
- b) Should adjudicators be registered for a finite time?
- c) Should Adjudicators complete a post-graduate qualification such as a Graduate Certificate in Building and Construction Law, as a prerequisite?
- d) Is there a need for continuing professional development (CDP)?
- e) The average Adjudicator's fees are about \$265 per hour. The fees range from \$100 to \$400 per hour. Should adjudicator fees be prescribed?
- f) How should adjudicator performance be audited?

3.1.6 Exclusion of Damages

Subsection 10B(2)(c) of Victoria's *Building and Construction Industry Security of Payment Act 2002* specifically excludes amounts related to damages claims for breach of construction contracts when progress payments are calculated.

There have been representations that the lack of a similar exclusion in the *Construction Contracts Act 2004* may be causing issues but no evidence exists that this is actually the case. Nevertheless, it may be prudent to include such a provision as part of other amendments to disallow liquidated damages to be included in a progress payment or payment claim.

¹¹⁸ *Construction Contracts Regulations 2004* (WA), Regulation 9.

¹¹⁹ *Construction Contracts Regulations 2004* (WA), Regulation 10.

Exclusion of Damages

Question 8.

- a) Do you agree that a provision for the exclusion of liquidated damages from progress payments or payment claims is warranted?

3.1.7 Inclusion of Domestic Building Contracts

Legislators in Western Australia did not exempt domestic building work from the provisions of the Act. Domestic contracts under this Act have comprised 11.6 per cent of payment claims since 2005 and the total value of payment claims for domestic building work has been \$29.86 million.¹²⁰

In Northern Territory the *Construction Contracts (Security of Payments) Act 2004* (NT) does not exempt domestic building work.

In South Australia, the *Building and Construction Industry Security of Payment Act 2009* (SA) includes building work within the meaning of the *Building Act 2004* (SA).

The *Building and Construction Industry Payments Act 2004* (Qld), the *Building and Construction Industry Security of Payment Act 1999* (NSW), the *Building and Construction Industry Security of Payment Act 2002* (Vic) and the *Building and Construction Industry (Security of Payment Act) 2009* (ACT) do not apply to domestic building contracts.

Inclusion of Domestic Building Contracts

Question 9.

- a) Should matters related to the *Home Building Contracts Act 1991* be included in the Act?

3.1.8 Exclusion of Certain Mining Activities

The Act, pursuant to Section 4(3)(a & b), states that construction work does not include drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not, and constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance.

¹²⁰ Auke Steensma, 'The Construction Contracts Act 2004 (WA): Its Operation and Effectiveness - 2005–2014' (2014), unpublished

Exclusion of Certain Mining Activities

Question 10.

- a) Should the Act apply to the resources sector?

3.1.9 Exclusion of the Construction of Plant for Purposes of Extracting or Processing

The Act, pursuant to Section 4(3)(c), states that construction work does not include 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.

Construction of Plant for the Purposes of Extracting or Processing

Question 11.

- a) Should the Act apply to the construction of plant for the purposes of extracting or processing?

3.1.10 Exclusion of Artworks

The Act, pursuant to Section 4(3)(d), states that construction work does not include the constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations and murals.

Exclusion of Artworks

Question 12.

- a) Should the Act apply to artworks?

3.1.11 Lack of National Uniformity in Security of Payment Legislation

As indicated elsewhere in this consultation paper, there have been numerous calls for national uniformity in security of payment legislation. For example, the Society of Construction Law has proposed the adoption of a national approach to security of payment laws and the process of rapid adjudication.¹²¹

¹²¹ Report on Security of Payment and Adjudication in the Australian Construction Industry", Australian Legislation Reform Sub-Committee of Society of Construction Law Australia, February 2014

National Uniformity and 'Harmonisation'

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?
- b) In terms of 'harmonisation' should Western Australia consider adopting the *Construction Contracts (Security of Payments) Act 2004* (NT)?
- c) Should Western Australia maintain its version of the current 'West Coast model', with minor amendments?

3.2 Other Issues Not Identified in this Discussion Paper

There are numerous issues that stakeholders may raise in relation to the operation and effectiveness of the Act. Stakeholders are not restricted in any way in terms of the issues that may be addressed in written and verbal submissions. The above questions are just discussion stimulators and in no way predetermine the outcome of the Review's findings. Please feel free to address matters that fall within the Review's Terms of Reference.