



Government of Western Australia  
Department of Mines, Industry Regulation and Safety



# **Discussion Paper – Workshop 1**

## **Security of payment reform**

**February 2018**

## Message from the Assistant-Chair



The building and construction industry is a vital part of the Western Australian economy. Last year it accounted for \$20.3 billion in activity and the direct employment of around 140,000 people.

Ensuring WA families and small businesses that rely on the building and construction industry can live with confidence and security that they will be paid for the work they do is of paramount importance to the McGowan State Government.

Our Government is committed to delivering on the promises made at the last election to ensure better payment protections for industry participants. For the industry to truly thrive and be as productive as possible, we believe all parties involved in a project must have the confidence they will be paid for the work they do, on time, every time.

The Industry Advisory Group provides a great opportunity for key stakeholders to provide input and have a say on reforms that will shape the future of the industry.

It is with great pleasure that I present to you this first Discussion Paper for your consideration. Only through open dialogue can government and industry work together to identify and bring about meaningful and lasting change.

I encourage you to take the time to carefully and fully consider the proposals and questions in this Discussion Paper, and I look forward to discussing these with you in further detail.

**The Hon Matthew Swinbourn MLC**  
Member for East Metropolitan Region  
February 2018

## Terminology used in this paper

The following is a summary of key terms used in this Discussion paper. The definitions listed will apply to these terms throughout the Discussion paper, unless a contrary intention is indicated.

ABS	Australian Bureau of Statistics
Adjudicator	A person registered by the Building Commissioner to conduct adjudications under the CCA
Appointor Body	A person or body prescribed by the CCR to appoint adjudicators. The following bodies are currently prescribed by the CCR to be appointors: <ul style="list-style-type: none"> <li>• Australian Institute of Building</li> <li>• Australian Institute of Project Management</li> <li>• Australian Institute of Quantity Surveyors</li> <li>• Electrical and Communications Association of Western Australia</li> <li>• Institute of Arbitrators and Mediators Australia</li> <li>• Master Builders Association of Western Australia</li> <li>• RICS Australasia Pty Ltd</li> <li>• The Royal Australian Institute of Architects</li> </ul>
ASIC	Australian Securities and Investments Commission
Building Commission	Department of Mines, Industry Regulation and Safety – Building and Energy Division (a merger of the former Building Commission and Energy Safety Divisions)
Building Commissioner	An executive office created under section 85 of the <i>Building Services (Complaint Resolution and Administration Act) 2011 (WA)</i>
CCA	<i>Construction Contracts Act 2004 (WA)</i>
CCR	<i>Construction Contracts Regulations 2004 (WA)</i>
IAG	Industry Advisory Group
Discussion paper/s	The series of documents (including this document) prepared by the IAG Secretariat to facilitate the IAG's inquiry into the Terms of Reference; or a document in the above described series (such as this document)
Minister	Hon William (Bill) Johnston MLA, Minister for Commerce, Industrial Relations
NSW	New South Wales
SA	South Australia
Terms of Reference	The Terms of Reference for the Industry Advisory Group approved by the Minister on 22 February 2018.
QLD	Queensland
WA	Western Australia

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# Purpose

This Discussion paper is the first in a series of Discussion papers designed to assist the IAG with carrying out its inquiry into improving fairness and security of payment for subcontractors and suppliers in Western Australia's building and construction industry.

This Discussion paper comprises three parts:

- Part I provides a brief snapshot of the building and construction industry in WA.
- Part II contains an overview of the problem the Government seeks to address, including a history of inquiries and measures that have been introduced to try and tackle the problem.
- Part III details potential reforms and strategies to improve the operation of the CCA. This part is intended to assist the IAG with its inquiry into item 3 of the Terms of Reference.

The reforms and questions presented in Part III will be considered in the first workshop. The options for reform presented in Part III do not represent final government policy.

The other areas of inquiry set out the Terms of Reference will be addressed in later Discussion papers.

If IAG members wish to make written submissions on the reform proposals and discussions questions in Part III, these may be made prior to or after the first workshop. Please direct any written submissions to:

**IAG Secretariat**  
[SoPReform@dmirs.wa.gov.au](mailto:SoPReform@dmirs.wa.gov.au)

All written submission on this Discussion paper must be received no later than **1 week after** the first workshop (3 April 2018).

## Disclaimer

This Discussion paper has been released to seek feedback on the issue of security of payment in the building and construction industry and does not represent legal advice. The State of Western Australia makes no statement, representation, or warranty about the accuracy or completeness of any information contained in this Discussion paper. The State of Western Australia disclaims all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages and costs any person might incur as a result of the information being inaccurate, or incomplete in any way for any reason.

## Part I Defining the industry

The building and construction industry is an important economic and social driver in WA. Given that the industry has experienced a significant downturn in recent times, driven by declines in the rate of net migration and mining related construction, the willingness of businesses to continue to join and invest in the industry is critical to ensuring growth and jobs and meeting the State's future critical infrastructure needs.

Broadly, the industry can be broken into the three segments of - residential building; commercial building; and infrastructure and engineering construction. Within each segment is a varied mix of clients, consultants, head contractors, subcontractors and suppliers, each filling its own market niche and using its own business model. The characteristics of these industry segments are shown below.



### Residential building

The residential building industry includes land development, home construction, home renovations and low/medium-density housing. It comprises a diversity of participants, including volume builders, small to medium builders, renovators, residential developers, trade contractors, product manufacturers and suppliers and consultants.



### Commercial building

The commercial segment of the building and construction industry is concerned with buildings for commercial and community use, such as offices, schools, multi-use developments, shopping centres, hospitals, restaurants, factories, warehouses and public buildings.



### Infrastructure and engineering construction

This segment of the industry delivers small to large scale projects – often involving a significant level of complexity, including public transport, pipelines, bridges, roads, highways and mining infrastructure.

The greatest total number of businesses is in the residential building segment of the industry. The industry also hosts the largest number of small businesses, accounting for 19 per cent of all small businesses and 17 per cent of all small business employment in WA.

## Industry snapshot<sup>1</sup>

**\$20.3 billion**  
worth of work during 2016/17 in the building and  
construction industry



**140,000**  
Western Australians earn a living in the building and  
construction industry



**\$1,462**  
is the average weekly earnings of a person working in  
the building and construction industry, **up 1.6%** from  
2016



**42,361**  
local businesses operate in the building and  
construction industry



**19%**  
of all Western Australian small businesses are in the  
building and construction industry



**21,000**  
homes are projected to be built in Western Australia in  
2017/18, **up 11%** from 2016



## Part II Defining the problem

Security of payment in the building and construction industry has been a long-standing and vexed problem across all Australian States and Territories.<sup>2</sup>

Indeed, as far back as 1869, a member of the Queensland parliament recounted an observation of the Secretary for Public Lands that “*he had seen men treated shamefully in being deprived of their hard-earned wages, and it was quite time they were protected*”.<sup>3</sup>

At the most basic level, ‘security of payment’ refers to the inability to consistently ensure participants in the industry are paid in full and on time for the proper performance of work, despite contractual obligations to do so. The problem includes not being paid on time, receiving only part payment for work completed, or not being paid at all. In an industry that employs complex, multi-tiered contractual arrangements to deliver its services, it is often those parties occupying the lower tiers of the contractual chain, such as subcontractors and suppliers, which face the greatest risk of non-payment. This risk can manifest as the consequence of the actions of a direct contractual counterpart, or as a consequence of the actions of a party operating at a higher tier within the contractual chain that then ripples downward.

The underlying philosophical rationale to warrant intervention to address this problem was stated by Bruce Collins QC in the Final Report of the ‘Independent Inquiry into Construction Industry Insolvency in NSW’ that it is “*borne out of fairness and a recognition that the head contractor is being paid for the most part for work carried out by others further down the contractual chain*.”<sup>4</sup>

It is this fundamental principle of fairness that underlies the Government’s election commitment to ensure all participants on building and construction projects have the confidence they will get paid for the work or services they provide.

### Causes, scope and gravity of the problem

The problem of security of payment has been the subject of numerous investigations, studies and surveys. The conclusion consistently reached is its causes are complex, multifaceted and difficult to quantify in empirical terms. However, some of the contributing causes identified are outlined below.





### **Tight profit margins**

Where a business operates on tight profit margins, financial shocks (such as those stemming from contractual disputes, tender pricing errors or supplier defaults) can wipe out the business's profit on a given project and start to erode its capital base. This can lead to financial distress which, in the short term, is often exhibited in late and non-payment of subcontractors and suppliers and, in the longer term, can result in insolvency.

When there is an urgent need for cash flow, businesses in the building and construction industry have been known to tender for work at or below its actual cost. This practice of 'buying work' may stave off financial distress in the short term but usually magnifies the problem in the medium to longer term.

Data from the Australian Bureau of Statistics (ABS) shows that since 2013 the profit margins of businesses in the building and construction has been lower than the national average.<sup>5</sup>

### **Low capitalisation**



Businesses operating in the building and construction industry usually have low levels of capital, sometimes lacking the financial buffer needed to survive financial shocks.

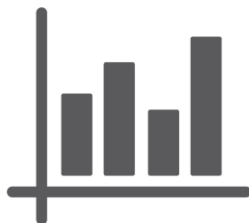
There exists an underlying tension between a business's stability and an owner's return on capital. On the one hand, maintaining adequate levels of capital (particularly working capital) relative to the amount of work a business conducts is an important element in ensuring a business's stability. On the other hand, such capital (particularly working capital), that may otherwise be considered idle or under-utilised can be funnelled away into separate ventures (e.g. property development) that generate better returns.

There is also the temptation for an owner to take and enjoy all of the profits instead of reinvesting an adequate share back into their business. Reinvestment of profits (or the sourcing of additional capital) is important for a business seeking to:

- maintain its operational capacity over the medium to long term; and
- grow.

Failure to do so will lead to the erosion of a business's capital base (in relative and possibly absolute terms) and increases its risk of not being able to survive financial shocks.

### **Business capabilities**



ASIC data collated from external administrator reports shows poor strategic management of the business and poor financial control, including a lack of record keeping, as leading causes of business failures in the building and construction industry.<sup>6</sup>

A recent survey by the Construction Training Fund (WA) identified the need to improve business training throughout the industry, particularly for subcontracting businesses and new trade entrants.<sup>7</sup>



### Inefficient risk allocation

Survey data from the University of Melbourne shows one of the primary reasons for amending accepted standard form construction contracts is to alter risk allocation.<sup>8</sup> Further, this reallocation tends to be driven by the party in the stronger negotiating position wanting to minimise its risk exposure.<sup>9</sup>

This practice sees principals push risk down to head contractors, then head contractors push risk down to subcontractors and so on and so forth. In some cases, this results in an efficient allocation of risk, however all too often the party ultimately required to accept responsibility for a risk is the party least able to manage or mitigate its occurrence.



### High rates of insolvency

The factors listed above have contributed to the present situation where the building and construction industry experiences a disproportionately high rate of insolvency. ABS data for the four financial years up until 30 June 2016 shows the building and construction industry as accounting for between 16.17% and 16.51% of all businesses operating in Australia.<sup>10</sup> For the same four financial years, ASIC data shows the building and construction industry as accounting for between 20.75% and 24.26% of all companies entering external administration in Australia.<sup>11</sup>

Such insolvency events cause financial shocks that can ripple up and down a contractual chain and can result in further insolvencies.

Outside of contract provisions dealing with bank guarantees and retention moneys, security agreements covering the assets of another party as collateral for their performance of contractual obligations are rare in the building and construction industry. Where they do exist, they tend to be for the benefit of an 'up-stream' party like a principal, not a 'down-stream' party like a subcontractor. This means that when an insolvency event occurs, subcontractors are typically left as unsecured creditors and debts owed to them are given the lowest priority in terms of being paid. ASIC reports indicate that in the event of an external administrator being appointed, unsecured creditors, on average, will receive less than 11 cents for every dollar they are owed.<sup>12</sup>



### A culture of late payment

Evidence provided to previous inquiries suggests head contractors generally seek to extend payments to subcontractors for a period ranging from 30 to 90 days.<sup>13</sup> Dun & Bradstreet data shows the building and construction industry has one of the highest rates of payment delinquency.<sup>14</sup> Figures sourced from the *Royal Commission Into Productivity in the Building Industry in NSW* also showed that monies lost from late payment were 0.34% of turnover and losses from payment default were 2.50% of turnover.

## Previous actions to address the problem

The need to afford special protections for subcontractors in the WA building and construction industry has been repeatedly acknowledged in inquiries conducted over the last century. Various reforms have also been considered and implemented on an incremental basis since 1897.

### Historical synopsis of the actions taken to date

<b>December 1897</b>	<p><i>The Workmen's Liens Act 1897 (WA)</i> comes into effect to secure the better payment of workmen's wages. The impetus for the legislation is noted in the Second Reading Speech, by the then Attorney General, who states "<i>where contracts, and particularly large contracts are taken, there are, unfortunately, in this as in every other community, many persons who will perpetuate a fraud and rob the poor workman of his wages.</i>"<sup>15</sup></p>
<b>October 1898</b>	<p>The <i>Workmen's Wages Act 1898 (WA)</i> comes into effect with a view to replacing the <i>Workmen's Liens Act 1897 (WA)</i>, which had been criticised as being unworkable in practice. The Act provides workmen with a first charge for unpaid wages up to £10 on money payable by the owner to the head contractor.</p>
<b>March 1974</b>	<p>Charles Howard Smith QC delivers his 'Report of the Inquiry into the Building Industry of Western Australia 1973-74'.<sup>16</sup> The report recommends the enactment of legislation based upon the South Australian <i>Worker's Liens Act 1893 (SA)</i> creating charges in favour of subcontractors.</p>
<b>October 1974</b>	<p>The Law Reform Commission of WA delivers a report on 'Contractors' Liens', examining the practical effects of enacting liens and charges legislation to protect the interests of persons involved in the building and construction industry. The Commission notes the unduly high incidence of insolvency in the industry, and recommends that alternative proposals to liens and charges be examined by the State Government.</p>
<b>December 1995</b>	<p>The Law Reform Commission of WA delivers a report on 'Financial Protection in the Building and Construction Legislation'. The Commission finds that "<i>the chain of contracts</i>" in the building and construction industry "<i>is itself risky, with those at the end of the chain bearing the greatest risk</i>" in relation to non-payment.<sup>17</sup> The Commission recommends legislation is enacted to provide that all sums received by a head contractor on account of its contract price be held in trust independently of a head contractor's other moneys. The State Government commits to implementing legislation to provide for rapid adjudication as a preferred method for promoting security of payment.</p>
<b>November 2001</b>	<p>The Security of Payment Taskforce delivers its report to the then Minister for Housing and Works, recommending legislation to require timely payments between parties to construction contracts and to provide for rapid resolution of payment disputes.<sup>18</sup></p>
<b>February 2003</b>	<p>The 'Final Report of the Royal Commission into the Building and Construction Industry' is delivered to the Commonwealth Government. The Royal Commission finds that "<i>the security of payment problems in the building and construction industry</i>" were "<i>significant enough to warrant government action</i>", and proposes a rapid adjudication system for dealing with unpaid or disputed payment claims be introduced.<sup>19</sup></p>

<b>July 2004</b>	The CCA is passed by the WA Parliament and receives Royal Assent on 8 July 2004. The CCA introduces the rapid adjudication system recommended by the Security of Payment Taskforce and the Royal Commission. The CCA commences operation on 1 January 2005.
<b>March 2013</b>	The Small Business Commissioner, Mr David Eaton, completes his investigation into the non-payment of subcontractors on construction projects administered by Building Management and Works between October 2008 and October 2012. The Small Business Commissioner makes a number of recommendations, all of which are supported by the State Government.
<b>June 2013</b>	Department of Finance - Building Management and Works Division (BMW) commences a trial of Project Bank Accounts (PBAs) on some government construction projects.
<b>August 2015</b>	Professor Phillip Evans completes a statutory review of the CCA. Professor Evans makes a number of recommendations to improve the operation of the CCA.
<b>September 2016</b>	The State Government extends the use of PBAs to all government construction projects managed by BMW over \$1.5 million using the AS2124 General Conditions of Contract.
<b>November 2016</b>	The <i>Construction Contracts Amendment Act 2016 (WA)</i> is passed by the WA Parliament and receives Royal Assent. The Act amends the CCA and is intended to improve access to the rapid adjudication process for subcontractors and implement the recommendations from the statutory review. Most of the amendments commence operation on 15 December 2016.

Despite more than a century of incremental reform, the Government accepts the problem of security of payment continues to exist today and further reform is required. Recent financial collapses of building companies have also served to highlight the need for intervention.<sup>20</sup>

While there is no 'silver-bullet' solution, the Government is committed to working with the industry to implement reforms to reduce the significant economic, social and emotional costs of the problem.

## Part III Discussing reforms

Item 3 of the Terms of Reference requires that:

The IAG makes full and careful inquiry with respect to:

**Whether improvements can be made to the rapid adjudication process under the CCA, to:**

- (a) assist subcontractors and suppliers with small value disputes use the adjudication process; and**
- (b) improve the compliance framework and standards for registered adjudicators.**

The CCA functions to improve security of payment for both contractors (which includes subcontractors) and principals to contracts for the carrying out of construction work, or supply of related goods and services in WA, by:

- prohibiting terms in contracts that prescribe:
  - a 'pay when paid' or 'pay if paid' arrangement; and
  - unreasonably long times for the making of contractually due payments;
- implying fair and reasonable payment terms into contracts that are not in writing; and
- providing a system for the referral of payment disputes to an independent Adjudicator for a decision.

The CCA allows either the contractor or principal to make an application to an independent Adjudicator to decide a payment dispute that has arisen under the parties' contract. Once the application is made, the Adjudicator has a short period of time in which to issue a binding and enforceable decision on which party is owed money, and if so, what amount. The parties still retain their rights to pursue any other legal or contractual remedy.

The purpose of the rapid adjudication process was aptly summarised by the Hon Alanah MacTiernan MLA, the then Minister for Planning and Infrastructure, in the Second Reading Speech of the Construction Contracts Bill 2004 (WA):

*"The rapid adjudication process allows an experienced and independent adjudicator to review the claim and, when satisfied that some payment is due, make a binding determination for money to be paid. The rapid adjudication process is a trade-off between speed and efficiency on the one hand and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contractual chain by enforcing timely payment and side-lining protracted or complex disputes. The process is kept simple, and therefore cheap and accessible, even for small claims. In most cases the parties will be satisfied by an independent determination and will get on with the job. If the party is not satisfied, it retains full rights to go to court or use any other dispute resolution mechanism available under the contract. In the meantime, the determination stands, and any payments ordered must be made on account pending an award under the more formal and precise process."<sup>21</sup>*

Since the CCA commenced operation on 1 January 2005, a total of 1,869 applications for adjudication have been made, concerning \$2.9 billion in payment disputes.<sup>22</sup>

A review of the CCA was completed by Professor Phillip Evans in 2015. Professor Evans found that while the CCA had been “*successful both as a statutory scheme for the evaluation of payment claims and in providing a quick and uncomplicated dispute resolution process,*”<sup>23</sup> awareness and use of the rapid adjudication system among many participants at the lower end of the contracting chain was limited.

Following Professor Evans’ findings, a number of significant amendments were made to the CCA. The amendments were effected through the *Construction Contracts Amendment Act 2016* (WA), with the majority taking effect from 15 December 2016, including:

- increasing the time limit for lodging an application for adjudication to 90 business days, and allowing for disputed ‘recycled’ payment claims to be referred for adjudication;
- reducing the maximum contractual payment terms permitted under the CCA to 42 calendar days;
- removing the requirement to seek leave of the courts to enforce an Adjudicator’s determination; and
- changing the calculation of time for certain provisions of the CCA from calendar days to business days to prevent ‘ambush’ applications occurring over the traditional industry shut-down periods.

Despite the amendments being described by some within the industry as “long overdue”<sup>24</sup>, the Government considers further measures are needed to:

- assist subcontractors with smaller claims to use the rapid adjudication process; and
- improve the registration and compliance requirements for Adjudicators to ensure utmost confidence is maintained in the integrity and independence of the rapid adjudication process.

## Assisting subcontractors with smaller claims

### Background

Under the current provisions in the CCA, either party to a construction contract can apply for adjudication of a payment dispute (the Applicant). The application for adjudication must be made either to an Adjudicator or an Appointor Body specified in the parties’ or, if no Adjudicator or Appointor Body is specified in the contract, the application is made to an Appointor Body of the Applicant’s choice.

The application for adjudication must meet certain formal requirements and be served on the other party to the payment dispute (the Respondent), the Appointor Body, or the Adjudicator (as the case may be). Applications may be served personally; by post; or, if the party receiving the application has expressly agreed, by electronic means (e.g. email).<sup>25</sup>

Where the application is served on an Appointor Body, it has five business days to appoint an Adjudicator. The Respondent then has 10 business days from receiving the application to serve a response on the Adjudicator and Applicant. After which, the Adjudicator has 10 business days from receiving the response (or from when it was due) to make a decision on the payment dispute.

There are currently eight Appointor Bodies and 83 Adjudicators registered in WA. All Appointor Bodies are not-for-profit organisations or peak industry bodies.

Appointor Bodies charge a fee for receiving applications and nominating Adjudicators, which range from \$200 to \$600 depending on the circumstances. Adjudicators are entitled to charge the parties a fee for service, either at an agreed rate or, if no rate is agreed, at the rate published on the Building Commission’s website. The Applicant and the Respondent are jointly liable for the fees, unless the Adjudicator determines that one party has engaged in frivolous or vexatious conduct, in which case all, or a larger portion, of the fees may be apportioned to that party.

The current rates charged by Adjudicators range from \$150 per hour up to \$500 per hour depending on the value of the payment dispute and the experience of the Adjudicator. The average fees charged by Adjudicators last financial year was \$5,466, with the average hourly rate being \$257.50.

While average fees charged by Adjudicators in WA are fairly comparable to other jurisdictions, a comparison of fees charged for payment disputes below \$100,000, indicates fees in WA have tended to be higher than those charged in NSW and QLD in this segment.

Dispute value	Average adjudicator fees				
	NSW <sup>26</sup>	QLD		WA	
	2015/16 <sup>27</sup>	2015/16 <sup>28</sup>	2016/17 <sup>29</sup>	2015/16	2016/17
\$0–\$4,999	\$932	\$539	\$595	\$1,561	\$1,426
\$5,000–\$9,999	\$1,121	\$858	\$900	\$1,956	\$714 <sup>30</sup>
\$10,000–\$24,999	\$1,690	\$1,265	\$1,424	\$2,148	\$2,412.5
\$25,000–\$39,999	\$2,697	\$3,510	\$2,972	\$3,217	\$926 <sup>31</sup>
\$40,000–\$99,999	\$4,019	\$5,119	\$4,977	\$4,138	\$5,945

Further analysis reveals WA has the highest average fees when compared to the value in dispute. The average fees charged compared to the average amount awarded to Applicants in 2015/16 also ranged between 44.9 per cent for payment disputes below \$5,000, to 14.25 per cent for disputes between \$40,000 and \$99,999.

Dispute value	Adjudicator fees			
	Average total fee expressed as a % of average amount in dispute			Average fees charged compared to amount determined to be paid to Applicant expressed as a %
	2015/16			2015/16 <sup>32</sup>
	NSW	QLD	WA	WA
\$0–\$4,999	32.5%	25.40%	51%	44.9%
\$5,000–\$9,999	15.5%	10.86%	25.75%	44.15%
\$10,000–\$24,999	10.5%	7.46%	13.53%	32.05%
\$25,000–\$39,999	8.5%	10.07%	10%	35.38%
\$40,000–\$99,999	4.25%	7.45%	6.2%	14.25%

The high cost of adjudicating small value disputes was raised in a number of submissions received by Professor Evans during his review of the CCA. As one submission commented:

*“As the lesser value claims generally involve small subcontractors, if the applicant does receive a favourable determination, the cost of the adjudication, even though it may be equally shared between the parties, still significantly reduces the net payment to the applicant.”<sup>33</sup>*

Another submission noted that:

*“For smaller disputes less than \$5,000 the cost of adjudication can be prohibitive... [and that] there should be an express adjudication/mediation process for smaller sums.”<sup>34</sup>*

Similar comments have been also made in submissions to a recent Commonwealth review of security of payment laws.<sup>35</sup> Including the observation by an industry peak body in its submission that:

*“Costs associated with any kind of dispute resolution method (litigation, arbitration etc.) deter parties from advancing their claims. Adjudication is no different because small, unsophisticated parties are typically unfamiliar with relevant legislation and cannot source good, reasonably priced assistance with their submissions...”<sup>36</sup>*

The Government is concerned the cost of adjudication makes it uneconomical for resolving smaller value disputes. Typically, these disputes involve subcontractors who may not be familiar with the CCA or confident following the necessary processes, and consequently incur additional costs obtaining legal advice. This is contrary to the original intent of the CCA to provide a simple process that is cheap and accessible even for small claims.

Faced with the relatively high cost involved in pursuing a small value dispute, many smaller businesses may choose to write off their claims.

While other dispute resolution processes cater for small value payment disputes, such as minor case and general procedure claims through the Magistrates Court, these processes do not provide the same quick resolution that may be achieved through adjudication.

The current adjudication application process can also make it challenging for parties unable to afford professional assistance or legal advice. Unlike most courts, where originating applications can be filed electronically through a central registry, applications for adjudication must be posted or physically served on the chosen Adjudicator or Appointor Body (unless there is prior agreement that electronic service will be acceptable). Anecdotal evidence suggests smaller businesses or sole traders are time poor with limited capacity to undertake administrative tasks. The availability of online tools to assist with preparing and lodging applications may make it more economical and easier to use adjudication for resolving small value payment disputes.

## Options for reform

Four possible options for reform have been identified below. This is not an exhaustive list of possible options. Members of the IAG are welcome to suggest alternative options.

### ➤ *Option 1: Status quo*

Under this option no changes would be made to the CCA. The Building Commission will continue the work currently being undertaken to identify Adjudicators and Appointor Bodies willing to charge fixed fee rates for small value payment disputes. Thus far, one Appointor Body offers fixed fees for adjudicating payment disputes below \$20,000.

### ➤ *Option 2 – Cap fees for small value payment disputes*

Amend the CCA to cap the fees Adjudicators and Appointor Bodies can charge for deciding small value payment disputes (e.g. \$50,000 or less). An online form will be made available to assist parties preparing adjudication applications and responses.



➤ *Option 3 – Provide Adjudicators with more discretion to award costs*

Amend the CCA to provide Adjudicators with more discretion to award the costs of the adjudication (i.e. the Adjudicator's fees) against one party, where the total amount determined to be paid is \$100,000 or less.

In exercising his or her discretion, the Adjudicator could be required to have regard to less strenuous factors than those currently prescribed in section 34(2) of the CCA. Such factors could simply include:

- the failure by one party to participate in the adjudication process; and/or
- the merit of the reasons given by the Respondent for not paying the claim the subject of the adjudication application.

➤ *Option 4 – Allow the Building Commissioner to appoint Adjudicators for small value disputes*

Amend the CCA to allow the Building Commission to act as an Appointor Body for low value payment disputes (e.g. \$100,000 or less). A party seeking adjudication under the CCA would be able to lodge their application with the Building Commission who would appoint an Adjudicator to make a decision. However, the parties would still retain the right to nominate an Adjudicator in their contract or choose another Appointor Body.

The Building Commissioner would nominate Adjudicators from a panel established for small value payment disputes. Adjudicators on the panel would agree to charge fixed fees for payment disputes below \$20,000. A scale of hourly fees would then apply for payment disputes above \$20,000. Entry to the panel would be open to all Adjudicators.

A referral grading policy would be used by the Building Commissioner to assess which Adjudicator from the panel should be appointed. A small fee may be charged by the Building Commission to cover the costs of processing the application and appointing an Adjudicator.

To make the process as easy as possible, the Building Commissioner would provide an online facility to help Applicants prepare and lodge their documents. This would be similar to the facility currently operated by the Queensland Building and Construction Commission for adjudications under the *Building Industry Fairness (Security of Payment) Act 2017*. A power could also be created to limit the length of submissions that can be made in the adjudication process through the Building Commissioner.

## Discussion questions

1. Which option do you support and why?
2. Do you believe a combination of the options is preferable? For example, both option 2 and 3?
3. For option 2, how should the maximum fee be set? Should it be a fixed rate or a percentage of the amount in dispute (e.g. 10 per cent)?
4. For option 4, do you believe the Building Commission should be an Appointor Body for payment disputes more than \$100,000?
5. Are other changes needed to the adjudication process to support option 4? For example, should adjudicators be required to hold conferences between the parties to try and encourage the parties to settle the dispute early? Should the parties be prevented from having legal representation at these conferences?
6. Are there alternative solutions you want to raise in relation to this proposal?

## Improving the registration requirements and training for Adjudicators

### Background

The rapid adjudication system under the CCA is premised on the notion that a person who is qualified and experienced in a relevant discipline will have the ability to rapidly and fairly determine a payment dispute that arises under a construction contract. It is therefore of critical importance that Adjudicators possess a benchmark level of competence for performing adjudications and that their conduct as Adjudicators is reflective of the objectives of CCA.

The role of an Adjudicator requires an individual to have certain attributes – to be able to consider evidence from both parties on an impartial basis; comply with the strict statutory rules for the conduct of the adjudication process; understand legal concepts and industry terminology; and interpret terms and conditions of construction contracts. An Adjudicator may at any one time be required to preside over payment disputes for less than \$5,000, through to large scale payment disputes involving millions of dollars and complex legal and factual issues. An Adjudicator's determination is binding on the parties and appeal rights from the determination are very limited. In *WQube Port of Dampier and Loots of Kahlia Nominees* it was noted<sup>37</sup>:

*“There is no doubt that, in undertaking an adjudication, an adjudicator is required to determine questions of law. Most obviously, an adjudicator is required to construe the terms of the relevant construction contract which is the subject of dispute. He or she must determine whether or not the requirements of the contract have been met such that a payment is due, or a security must be returned. The decision of the adjudicator clearly affects legal rights and obligations, even though those same rights and obligations may be the subject of the other court or arbitration proceedings.”*<sup>38</sup>

The current registration framework for Adjudicators is outlined under section 48(1) of the CCA. The Building Commissioner may only register a person as an Adjudicator provided that person, at the time of an application for registration, has the qualifications and experience prescribed in the CCR. The qualifications and experience for registration purposes are prescribed in regulation 9 of the CCR, which are summarised as follows:

Qualifications	Experience
<p>There are three pathways to demonstrating the required “qualifications” for the purposes of registration as an Adjudicator. The individual must either:</p> <ul style="list-style-type: none"> <li>• Have a degree, from a university or other tertiary institution in Australia, or an equivalent qualification from an overseas university or tertiary institution, in law, architecture, engineering, quantity surveying, building surveying, building, constructional or project management; or</li> <li>• Be eligible for membership of the Royal Australian Institute of Architects, Institution of Engineers Australia, Australian Institute of Quantity Surveyors, Australian Institute of Building Surveyors, The Australian Institute of Building, The Institute of Arbitrators and Mediators of Australia, or Australian Institute of Project Management; or</li> <li>• Be a builder registered under the <i>Building Services (Registration) Act 2011</i> (WA).</li> </ul>	<p>The individual must have had at least 5 years’ experience in:</p> <ul style="list-style-type: none"> <li>• administering construction contracts; or</li> <li>• dispute resolution relating to construction contracts.</li> </ul>

Registration as an Adjudicator requires a once-off payment of \$53.95. Once registration has been granted, it exists indefinitely unless cancelled by the Building Commissioner.

Under section 48(5) of the CCA, the Building Commissioner may cancel an Adjudicator’s registration where satisfied that the individual:

- has ceased to be eligible to be registered; or
- has misconducted, or is incompetent or unsuitable to conduct, adjudications under Part 3 of the CCA.

These are the only grounds upon which cancellation may occur.

As part of the current registration process, Adjudicators must agree to comply with the Code of Conduct and Practice Notes issued and updated from time to time by the Building Commissioner.

The Code of Conduct provides non-statutory guidance to Adjudicators with respect to the Building Commissioner’s expectations of behaviour. It effectively establishes a form of voluntary regulation – a set of rules that communicate expected standards which if contravened may affect the registration of the Adjudicator.

While non-compliance with the Code of Conduct may lead the Building Commissioner to investigate the conduct of an Adjudicator, ultimately the only grounds for compliance action against an Adjudicator remain those set out in section 48(5) of the CCA (noted above).

The only form of compliance action that the Building Commissioner may currently take against an Adjudicator is cancellation of their registration. There are no other statutory powers that may be exercised by the Building Commissioner in the alternative to cancellation of registration.

Compared to other Australian jurisdictions, the reporting and compliance requirements placed on Adjudicators in WA are very low. Queensland and SA impose strict reporting and compliance requirements on Adjudicators to ensure adherence to appropriate standards and limit the potential for actual or perceived bias. An overview of the requirements in QLD and SA are summarised in the table below.

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### Compliance Requirements

<b>QLD</b>	<p>Adjudicators are required to comply with conditions imposed by the Registrar (a position equivalent to the Building Commissioner under the CCA).</p> <p>A standard condition imposed on all adjudicators is adherence to the <i>Adjudicator Responsibilities Policy 2015</i>. Failure to comply is an offence and may result in an adjudicator's registration being cancelled or suspended for a period of time.</p> <p>Recent amendments to the legislation in Queensland has increased compliance requirements for adjudicators further by:</p> <ul style="list-style-type: none"><li>• requiring adjudicators to complete Continued Professional Development courses as a precondition to renewing their registration as an adjudicator<sup>39</sup>; and</li><li>• providing a power for the Registrar to suspend adjudicators who have failed to comply with the requirements in the yet to be prescribed Code of Conduct.<sup>40</sup></li></ul>
<b>SA</b>	<p>South Australia has adopted what is referred to as a 'yellow card, red card' system for adjudicators. Under this system, Authorised Nominating Authorities (equivalent to appointor bodies under the CCA) must not appoint an adjudicator found by a court to have made technical errors in performing adjudication, unless satisfied the cause of the error has been resolved.<sup>41</sup> If an adjudicator is found to have not acted in good faith, two or more times in five years by a court, the Authorised Nominating Authorities must not appoint the adjudicator without the approval of the Minister for Small Business.<sup>42</sup></p>

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In the recent statutory review into the operation and effectiveness of the CCA, Professor Evans concluded there was limited support for the introduction of periodic registration for Adjudicators. Largely, this conclusion was based on the finding that the majority of Adjudicators are members of other professional organisations relevant to their particular discipline (e.g. lawyers, engineers, architects), and the purposes of the CCA are best achieved by having the widest pool of Adjudicators available.

While the Government acknowledges that maintaining a wide pool of available Adjudicators is important, it is of the view that it is equally important to:

- ensure Adjudicators act with the integrity, independence, diligence and skill; and
- take appropriate remedial action where the contrary occurs.

This ensures users of the rapid adjudication process have complete confidence there is sufficient oversight of individuals registered as Adjudicators and monitoring of compliance with expected standards of skill and probity. The Government believes that there are options for strengthening the registration requirements without unduly affecting the pool of available Adjudicators.

## Options for reform

Three possible options for reform have been identified below. This is not an exhaustive list of possible options. Members of the IAG are welcome to suggest alternative options.

### ➤ *Option 1 – Status quo*

Under this option no changes would be made to the CCA. Life-time registration would remain and no additional compliance or reporting requirements would be imposed.

### ➤ *Option 2 – Bolster the powers of the Building Commissioner to require compliance with the Code of Conduct*

Amend the CCA to create a head of power for the imposition of a mandatory Code of Conduct to be prescribed in the CCR.

Also amend the CCA to give the Building Commissioner a broader suite of remedial powers, such that where the Building Commissioner is satisfied that an Adjudicator has breached the Code of Conduct; has misconducted, is incompetent; or is unsuitable to conduct adjudications, the Building Commissioner may:

- cancel the Adjudicator's registration;
- suspend the Adjudicator's registration for a set period;
- suspend the Adjudicator's registration pending the completion a remedial course of training or other demonstrable outcome; or
- place limiting conditions on an Adjudicator's ongoing registration.

### ➤ *Option 3 – Introduce periodic registration and Continued Professional Development requirements*

Under this option, periodic registration for Adjudicators would be introduced with a three-year registration period following initial registration and each successful renewal thereafter. A requirement for Adjudicators to complete Continued Professional Development (CPD) courses, as may be prescribed by the CCR, as a precondition to being granted a renewal of registration would also be introduced.

The periodic registration would operate on the basis that the applicant for registration renewal:

- pays a renewal fee to the Building Commission (fees to be set as cost reflective);
- provides a statutory declaration that they have completed the prescribed CPD; and
- provides a national police clearance issued within three months of the date of the renewal application.

Under such a periodic registration scheme, existing Adjudicators would be granted a period of continued registration of between one and three years after the scheme's implementation. Prior to the expiry of this grace period such Adjudicators would be required to apply to renew their registration.

## Discussion questions

1. Which option do you support and why? What benefits/costs do you foresee with the options presentd?
2. Do you believe a combination of the options is preferable? For example, both option 2 and 3?
3. For option 3 do you support a periodic registration period of 3 years? Should it be longer?
4. For option 3, what would you consider to be an appropriate minimum number of hours per year to be dedicated to CPD? Would you support the partial or full recognition of CPD undertaken for the purpose of a related professional capacity (i.e. maintaining standing as a lawyer, an architect, a quantity surveyor, etc.)? Do you support a requirement of 10 CPD points over 3 years?

## Additional reforms

The Government also proposes to make minor amendments to the CCA to:

- streamline the process for adjudicating multiple payment disputes; and
- expand the powers of the Building Commissioner to share information on the outcomes of adjudications with other regulatory bodies.

### Adjudication of two or more disputes between the same parties

Professor Evans recommended that “*section 32(4)(b) of the Act [now section 32(3)(b)] should be amended to allow an adjudicator in his or her discretion to adjudicate simultaneously two or more payment disputes*” that exist between contracting parties. The rationale for this amendment is to provide an Adjudicator with discretion to minimise the costs to the parties by removing the need to deliver two or more separate determinations.

Currently, the CCA requires an Adjudicator to obtain consent to adjudicate simultaneously two or more payment disputes between the same parties. However, where the payment disputes are between two different sets of parties, the Adjudicator has a discretion under the recently amended section 32(3)(c) of the CCA to adjudicate them simultaneously without the consent of the parties provided they are satisfied that doing so will not adversely affect their ability to adjudicate the dispute in accordance with section 30. Section 30 of the CCA outlines the objectives of the adjudication process, being to determine disputes fairly and as quickly, informally and inexpensively as possible.

It is proposed that section 32(3)(b) of the CCA be amended along the same lines as section 32(3)(c) to give an Adjudicator the discretion to adjudicate two or more payment disputes simultaneously provided they can comply with the objectives expressed in section 30. The current requirement for the consent of the parties is liable to cause delay in the adjudication process, particularly if one party unreasonably withholds consent for strategic reasons.

Allow the Building Commissioner to share information with other regulatory bodies

The Government believes a minor amendment is needed to section 50 of the CCA to allow the Building Commissioner to provide information to other regulatory bodies on the outcomes of adjudications under the CCA for use in the performance of their statutory duties.

Currently, section 50 of the CCA prevents the Building Commissioner from disclosing the identities of the parties to an adjudication to other regulatory bodies, such as the Australian Building and Construction Commission, the WA Small Business Commissioner and interstate regulatory authorities. The restriction hampers the ability for Building Commission to assist these bodies carrying out certain functions under their legislation or regulations (e.g. *Code for the Tendering and Performance of Building Work 2016* (Cwlth)), which in some instances may concern dealing with security of payment issues.

### Discussion questions

1. Do you support amending section 32(3)(b) of the CCA to remove the requirement for an Adjudicator to obtain consent to adjudicate two or more payment disputes between the parties? If not, why?
2. Do you support amending section 50 of the CCA to allow the Building Commissioner to disclose the identity of the parties to an adjudication to another regulatory body for use in the performance of their functions?

Do you consider that other reforms are needed to the CCA and/or the rapid adjudication process? Please specify

# Endnotes

<sup>1</sup> Data sourced from: ABS Catalogue 1379.0.55.001 *Regional Statistics Annual (2010-11 to 2015-16) Western Australia*; Government of Western Australia, Department of Jobs, Tourism, Science and Innovation *Western Australian Economic Profile December 2017*; Government of Western Australia, Department of Housing. *Housing Industry Forecasting Group: Forecasting Dwelling Commencements in Western Australia 2016-17*. Government of Western Australia, Small Business Development Corporation. *Small businesses in Western Australia – At a Glance*.

<sup>2</sup> Prominent examples include the findings of the South Australian Select Committee Report on the “*Operation of the Worker’s Liens Act 1893*” in August 1990, the UK Latham Report “*Constructing the Team – Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry*” in July 1994, the Victorian Economic Development Committee Report of the “*Inquiry into the Victorian Building and Construction Industry*” in September 1994, the Queensland Implementation Steering Committee Report on “*Security of Payment in the Building and construction Industry*” in October 1997, the New South Wales Joint Standing Committee Report on “*Security of Payment for the New South Wales Building Industry*” in September 1998, and the New Zealand Law Commission’s Report on “*Protecting Construction Contractors*” in November 1999.

<sup>3</sup> Hon Mr Miles, “*Station Wages and Debts Bill*”, Second Reading Speech, Queensland Parliamentary Debates, 11 June 1869, p. 324.

<sup>4</sup> Page 137.

<sup>5</sup> Australian Bureau of Statistics (ABS) catalogue 8155.0 *Australian Industry 2015-16* Table 4.

<sup>6</sup> ASIC. *Submission to Senate Inquiry into Insolvency in the Construction Industry*. (April 2015) pp. 20.

<sup>7</sup> Government of Western Australia, Construction Training Fund. *Business Skills Training for Apprentices in their Final Year: Summary Report* (October 2017) pp. 4-6.

<sup>8</sup> Professor John Sharkey AM, Matthew Bell, Wayne Jovic and Rami Marginean. *Standard Forms of Contract in the Australian Construction Industry: Research Report*. (June 2014) University of Melbourne page 5.

<sup>9</sup> Athol Yates and Bill Sashegyi. *Effective risk allocation in major projects: Rhetoric or reality? A survey on risk allocation in major WA construction projects*. (2001)

<sup>10</sup> ABS, *Counts of Australian businesses including entries and exits Jun 2012-Jun 2016*, ABS Catalogue Number 8165.0;

<sup>11</sup> ASIC, *Insolvency Statistics Series 3.1 – 2012/13 – Table 3.1.1*; ASIC, *Insolvency Statistics Series 3.1 – 2013/14 – Table 3.1.1*; ASIC, *Insolvency Statistics Series 3.1 – 2014/15 – Table 3.1.1*; ASIC, *Insolvency Statistics Series 3.1 – 2015/16 – Table 3.1.1*;

<sup>12</sup> Department of Housing and Public Works (QLD), *Security of Payment - Discussion Paper*, December 2015, pp 6 - 7;

<sup>13</sup> Commonwealth of Australia. Senate Standing Committee on Economics. *I Just Want to be Paid: Inquiry into Insolvency in the Australian Construction Industry*. (December 2015) pp. 22-23; Deloitte. *Analysis of security of payment reform for the building and construction industry: prepared for the Queensland Department of Housing and Public Works*. 8 November 2016.

<sup>14</sup> Dun & Bradstreet. *Australian Trade Payments Analysis: Q3 2016* pp. 4; Dun & Bradstreet. *Payment Study 2016*. pp. 55; Dun & Bradstreet. *Late Payments in Australia: 1<sup>st</sup> Analysis 2017* pp. 3-4; Dun & Bradstreet. *Late Payments in Australia: 2<sup>nd</sup> Quarter Analysis 2017*. pp. 3-5; Illion. *Australian Late Payments: 3<sup>rd</sup> Quarter Analysis 2017*. pp. 6.

<sup>15</sup> Hon R. W. Pennefather, “*Workmen’s Lien Bill*”, Second Reading Speech, WA Legislative Assembly Debates, 29 November 1897, p. 664.

<sup>16</sup> Charles Howard Smith Q.C., “*Report of the Inquiry into the Building Industry of Western Australia 1973-74*”, Department of Public Works Western Australia, 1974.

<sup>17</sup> Law Reform Commission of Western Australia, “*Project No 82 – Report - Financial Protections in the Building and Construction Industry*”, March 1998, page. 8.

<sup>18</sup> Security of Payment Taskforce for the Western Australian Building and Construction Industry, “*Report to the Minister for Housing and Works*”, November 2001.

<sup>19</sup> The Honourable Terence Rhoderic Hudson Cole RFD Q.C., “*Final Report of the Royal Commission into the Building and Construction Industry – Reform – National Issues – Part 2*”, February 2003, page. 235.

<sup>20</sup> ABC News. February 8 2018. ‘Cooper & Oxley placed in administration as subcontractors assess debts up to \$1 million’; ABC News. February 26 2018. ‘BCL Group collapse hits WA subcontractors with big debts in fresh blow for building industry.’; Sunday Times. January 30 2018. ‘WA’s suspended home builder Choice Living ‘owes thousands to Perth brickie.’; The West Australian. April 22 2017. ‘ASIC bid to liquidate builder Diploma.’; The West Australian. April 13 2017. ‘Builton creditors left with nothing.’

<sup>21</sup> Western Australia, *Hansard*, Legislative Assembly, 3 March 2004, p274d-275a (Allanah MacTiernan).

<sup>22</sup> Department of Mines, Industry Regulation and Safety. *Report of the Building Commissioner for the Financial Year to 30 June 2017: Construction Contracts Act 2004*. November 2017. pp 4; Department of Mines, Industry

<sup>23</sup> P Evans. *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*. August 2015 pp 1.

<sup>24</sup> Anthony Igra. ‘Changes to the WA Construction Contracts Act’.<<https://sourceable.net/changes-to-the-w-a-construction-contracts-act/>>.



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<sup>25</sup> As the CCA is silent on how applications (and responses) must be served sections 75 and 76 of the *Interpretation Act 1984* and sections 9 and 11 of the *Electronic Transactions Act 2011* are taken to apply. See also *Re David Scott Ellis; Ex Parte Triple M Mechanical Services Pty Ltd [No 2]* [2013] WASC 131 per Hennan J at [64].

<sup>26</sup> No data for the reporting period of 2016/17 for NSW is available

<sup>27</sup> New South Wales Government, Department of Finance & Services. *Building and Construction Industry Security of Payment Act 1999: Adjudication Activity in New South Wales Annual Report 2015/16*. pp 5

<sup>28</sup> Queensland Building and Construction Commission. *Monthly Adjudication Statistics June 2016*. pp 6.

<sup>29</sup> Queensland Building and Construction Commission. *Monthly Adjudication Statistics June 2017*. pp 7.

<sup>30</sup> Only 2 adjudications fell within this category in 2017, which affected the average.

<sup>31</sup> Only 2 adjudications fell within this category in 2017, which affected the average.

<sup>32</sup> A similar comparison for the 2016/17 financial year is not possible because all applications below \$100,000 were dismissed, either because the parties settled, or the adjudicator dismissing the application on jurisdictional grounds.

<sup>33</sup> Australian Institute of Building Submission on the *Discussion Paper: Statutory Review of the Construction Contracts Act 2004 (WA)*.

<sup>34</sup> APC Constructions Submissions on the *Discussion Paper: Statutory Review of the Construction Contracts Act 2004 (WA)*.

<sup>35</sup> Australian Government, Department of Employment. *Review of Security of Payment laws: Issues Paper* (February 2017)

<sup>36</sup> Resolution Institute. Submission to Review of Security of Payment Laws: Issues Paper by John Murray AM. (May 2017) pp 33.

<sup>37</sup> [2014] WASC 331

<sup>38</sup> Per Chaney J at [142]

<sup>39</sup> *Building Industry Fairness (Security of Payment) Act 2017* section 167(5)(b).

<sup>40</sup> *Building Industry Fairness (Security of Payment) Act 2017* section 170.

<sup>41</sup> Small Business Commissioner. (April 2017). *Code of Conduct for Authorised Nominating Authorities: Building and Construction Industry Security of Payment Act 2009*. pp. 3.

<sup>42</sup> *Ibid* pp. 4