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Dr Auke Steensma¹ and Professor Phil Evans²

Abstract

Recommendations arising from security of payment reviews are primarily based upon submissions from industry stakeholders and professional organisations. The experience of the authors in the Report of the Operation and Effectiveness of the Construction Contracts Act 2004 (WA) (the CCA),³ was that a number of submissions were emotive, conjectural and unsupported by evidence. The focus on the research reported in this article was to consider the statistical data relative to the operation of the CCA from the information provided in the annual reports of the Building Commissioner from the commencement of the CCA in 2005 until the latest report in 2018. This article commences with a discussion of the objectives and provisions of the CCA and then provides statistical data on the application of the CCA since its commencement in 2005 with the aim of identifying issues which will be relevant to any future amendments to the CCA or proposals relating to harmonisation of security of payment legislation. These issues include the number and quantum of claims, locations of disputes, categories of applicants and respondents, numbers and backgrounds of adjudicators and tribunal reviews of adjudication determinations.

1. Introduction

The Construction Contracts Act 2004 WA (the CCA) was introduced with the principal aim of ‘keeping the money flowing’⁴ to assist contractors in the construction industry in Western Australia. A significant provision in the CCA is the provision for security of payment through the use of a low-cost rapid adjudication process to determine payment disputes. The CCA applies to both written and oral contracts⁵ and implies terms where these contracts are silent on terms relating to payment for construction work,⁶ such as variations, payment entitlements, progress payments or the mode and manner of making payment claims. In these situations, the implied provisions in the CCA will be read into the construction contracts. The CCA also prohibits parties from including certain clauses relating to payment and payment periods in construction contracts.⁷

In summary, the objectives of the Act are to:

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

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² Professor Phil Evans (PhD), School of Law, University of Notre Dame is an arbitrator, mediator and adjudicator (NT & WA).
⁴ Ibid, 10.
⁵ Construction Contracts Act 2004 (WA), s 7(2).
⁶ Ibid, s 13.
⁷ Ibid, s 9-11.
A significant feature of adjudication is that the adjudicator is to determine the dispute fairly and as quickly, informally and inexpensively as possible.8

The term ‘construction contract’ is construed broadly. The CCA defines a construction contract as a contract where a person carries out any one or more of the listed obligations, which can be construction work, supplying goods, providing professional services and on-site services that are related to the construction work. It does not include legal services associated with construction work. This definition applies to written and oral contracts.

Similarly ‘construction work’ is also broadly defined in s 4 of the CCA to include all activities associated with civil works such as roads, railways and marine facilities, and pipelines for electricity, gas, water and sanitation. It also includes activities such as repairing, restoring, demolishing, cleaning, painting, landscaping and other works associated with construction. The CCA excludes a number of mining-related activities9 which would generally be considered to fall within the definition. Specifically the:

- drilling for the purposes of discovering or extracting oil or natural gas
- constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance
- 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.

Part 2 Division 1 of the CCA prohibits several provisions concerning payment in construction contracts. For example, the CCA Act prohibits the parties to the contract from including the following provisions in any construction contract:

- Requiring a party to pay money under the contract to the other party contingent on the first party being paid by another person. For example, a provision stating that a subcontractor will be paid when the contractor is paid by the principal or the owner will be prohibited by the Act (described as ‘paid when paid’ clauses).
- A provision that purports to require a payment to be made more than 50 days after the payment is claimed. In such a circumstance, it will be read as a requirement for the payment to be made within 50 days after it is claimed.

Note it is also prohibited to contract out of the provisions of the CCA.

What might be described as the ‘core’ of the CCA are the provisions in Part 3 of the CCA which provides for a rapid adjudication process for payment disputes, with either party to the contract having a right to apply to have a payment dispute adjudicated by a registered adjudicator unless:

- an application for adjudication has already been made by a party, whether or not a determination has been made; or
- the dispute is the subject of an order, judgment or another finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.

An application for adjudication of a payment dispute must be made by a party to the contract within 90 days after the dispute arises. The respondent, however, has only 10 business days to lodge its response with the adjudicator and serve it on the applicant.10

The adjudicator can call a conference of the parties but is not required to do so, and nearly all payment adjudications are determined on the written submissions by the parties. The adjudicator can also call for further submissions or further information, but is not obliged to.

Unless the parties agree to a longer timeframe, the adjudicator has another 10 business days from receipt of the respondent’s materials. The adjudicator may extend the time, but only with the consent of the

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8 Construction Contracts Act 2004 (WA), s 30.
10 Construction Contracts Act 2004 (WA), s 27(1).
parties. The parties must bear their own costs of the dispute unless the adjudicator determines that one party has engaged in frivolous or vexatious conduct or made an unsubstantiated submission. The parties are liable to pay the costs of the adjudicator in equal shares.

The adjudicator is not bound by the rules of evidence and must determine the application on the balance of probabilities as to whether the respondent is liable to make any payment to the contractor.

Amendments to the CCA in 2016 removed the requirement for parties to seek leave from the courts to enforce an adjudication determination as a judgment of the court. Now upon filing a copy of a determination certified by the Building Commissioner as a true copy and an affidavit as to the amount not paid, a determination will be taken to be an order of the court.

It should be remembered, however, that the CCA was never intended as a panacea for all construction-related issues. The purpose of the rapid adjudication process was more expansively noted 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) in 2004:

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.

The origins and rationale for the introduction of the CCA, and security of payment generally, have been well documented, but to date, there has been no definitive statistical analysis of the issues relevant to payment claims under the CCA. It has been the experience of the authors that unfortunately, comments on the operation of the CCA have often been anecdotal and conjectural and unsupported by factual evidence.

The information in this article has been obtained from the Annual Reports of the Building Commissioner over the period commencing with the introduction of the CCA in 2005 and the last available Building Commission Report in 2018 together with the Discussion Paper on the Operation of the Construction Contracts Act 19 and the 2016 Independent Statutory Review of the Construction Contracts Act.

The following issues are discussed in this article arising from a consideration of the statistics relating to adjudicated payment claims under the CCA:

- Applications for adjudication of payment claims
- The value of Building and Construction
- The cost of the application and the response

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11 Construction Contracts Act 2004 (WA), s 32(3).
12 Ibid s 34.
13 Ibid s 44(6).
14 Ibid s 31(2)(b).
15 Ibid s 43.
18 The Annual Reports of the Building Commissioner may be found at: https://www.commerce.wa.gov.au/publications/construction-contracts-act-annual-reports.
• Locations of disputes
• Industry source of the applications
• Applicants and respondents categories
• Prescribed appointors
• Registered adjudicators
• The number of determinations, dismissals, and withdrawals
• Review of adjudication determinations.

2. Applications for adjudication of payment claims

Since the commencement of the CCA in 2005, there have been a total of 198,721 applications for adjudication of payment claims. In 2005, there were 29 applications for adjudication of payment claims which increased to 197 in the 2010-11 reporting period and then declined to 178 the following year in 2012-2013. During 2014-15, applications increased to their highest, with 235 applications for adjudication of payment claims. Recently, there has been a declining trend with only 165 applications for adjudication in the latest reporting period, 2017-2018. Figure 1 below graphically indicates the application number history:

![Linear trend analysis - Applications for adjudication made (2005 - 2018)](chart)

It has not been possible to be definitive concerning the reasons for the decline in payment applications in WA. At first sight, it might be concluded generally that the Global Financial Crisis (GFC) may have had some effect in the lower results for 2007-2010. However research conducted at the University of Melbourne has indicated that;

The findings indicate that the impact was minimal for both material suppliers and construction companies, but especially severe for the more leveraged property developers and REITs. Building material suppliers and construction companies have benefitted substantially from the building economic stimulus package provided by the Australian government to mitigate the effects of the GFC.22

With respect to the post 2015 decline, it has also been suggested that the publication of the Discussion

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Paper prepared in connection with the statutory review of the CCA and the subsequent Review Report and widespread publicity regarding the CCA created a greater awareness of the provisions of the CCA and prompted early settlement of payment disputes in lieu of adjudication applications. One of the issues found in the independent statutory review of the CCA was the widespread ignorance of the existence of the CCA, particularly at the lower end of the contracting chain.

At the same time, the WA ‘mining boom’ created a significant boost to the WA construction industry and resulted in substantial increases in the quantum of claims, as shown in Figure 2 below.

With respect to the quantum of claim amounts, in the first year of the CCA, the ten payment claims submitted totalled some $10,458,828.12. There were 208 payment claims in 2012-13 declining to 175 in 2013-14. The total value of the payment claims from 2005-18 was $3,017,361,859.10.

In terms of the range of amounts claimed the largest single payment claim over the period considered was in 2015-16 for $169,930,144.00. The smallest single payment claim was in 2009-10 for an amount of $1320.

In the first year of the operation of the CCA (2005-06), the average value of all payment claims was $361,580.28. In the latest reporting period (2017-2018) the average value was $1,518,551.51, constituting a 420% increase on the 2005-06 average. In 2011-12, 35 out of 179 (or 20%) of payment claims were under $25,000 and the total value was $291,082.49. In 2013-14, only 16 out of 175 (or 9%) of payment claims were under $25,000 with a total value of $109,693.37. The figure increased to 46 out of 225 (or 20%) in 2015-16. The total value of payment claims, under $25,000 in that year was $516,349.58 (or 0.08% of payment claims made in that year).

\[ \text{Total payment claims made in 2014-15 = $580,655,848.52.} \]

23 In 2013, at the peak of the last mining boom, more than 116,000 people worked in the sector in Western Australia.

24 Total payment claims made in 2014-15 = $580,655,848.52.
In the latest reporting period, 2017-18, 35 (or 21%) of the 165 payment claims were under $25,000 with a total value of $454,729.89 (or 1%). Further 117 (or 71%) of the 165 payment claims were between $25,000 - $1,000,000, with a total value of $20,982,571.30 (or 29%). Lastly, 13 (or 8%) of the 165 payment claims were greater than $1,000,000, with a total value of $50,505,125.67 (or 70%).

Clearly, the CCA has not been utilised to recover payments at the lower end of the contracting chain. The Building Commission of WA has now introduced awareness training for all sectors of the construction industry, and while the independent review did not identify the cost of adjudications as a deterrent to the use of the CCA, the Commission has also sought expressions of interest from registered adjudicators who are willing to conduct adjudications at lower costs.

Further on 13 August 2019 the Second Reading Speech Small Business Development Corporation Amendment Bill 2019 was read in state parliament.

The Explanatory Memorandum states that one of the key initiatives of the WA government is the expansion of the role of the Small Business Commissioner to oversee and investigate complaints made to the Small Business Development Corporation (SBDC) into the poor behaviour experienced by subcontractors in construction industry supply chains. The memorandum notes that the;

...Bill seeks to add tools for the Commissioner to use when inquiring into business practices that adversely impact on small businesses. These measures will enhance the Commissioner’s ability to seek information, offer resolution services and protect complainants from retribution by preserving the identity of subcontractors and other businesses who experience late payments, coercive behaviour and breaches of contract terms in their commercial dealings with larger entities.  

3. The cost of the application and the response

The costs associated with adjudication are made up of both the adjudicator’s costs and the legal costs or professional costs associated with the preparation of the claim or the response.

The adjudicators’ fees range from $100 to $450 per hour, plus GST. In the latest reporting period, 2017-18, the average cost per hour was $293.88, plus GST. The ten highest Adjudicator fees per hour range from $395-450 per hour. Of the ten; 8 out of 10 (or 80%) are legal practitioners, all highly experienced barristers, and solicitors within the construction industry. The highest adjudication fee is charged by a Victorian Queens Counsel who charges $450 per hour plus GST.

The highest adjudicator fee was recorded over the period is in FY 2015-16. The payment claim came from within the Mining/Gas Infrastructure Industry and came in at $47,960.00. The payment claim was dismissed.

In the first year of the operation of the CCA (2005-06), as noted above, there were 29 applications for adjudication. The total fees paid to adjudicators for their services in that period was $71,512.55. The average cost of adjudication was $2,465.95. In the latest reporting period (2017-18), there were 165 applications for adjudication and the total fees paid was $9,992,789.29. The average cost of adjudication was $5,574.40.

The total adjudicator fees during the whole review period (2005-2018) were; $9,992,789.29 for 1987 payment claims. Adjudicator fees against the total 1987 payment claims are about 0.331% of the total payment claims, which is $3,017,361,859.21. These are represented graphically below.

One of the terms of reference relating to the Independent Statutory review of the CCA related to fixed-fee adjudications. Based on the submissions received, the report did not recommend the use of fixed fee adjudications. Interestingly one of the Eastern States nominating bodies ‘Adjudicate Today’ offers fixed price adjudications for small claims as follows:

- Up to $15,000 — fixed price of $1,089

• From $15,001 to $25,000 — fixed price of $2,178
• From $25,001 to $40,000 — fixed price of $3,300.26

In summary, there was no evidence to suggest that the cost of adjudicators fees had in any way affected the number of requites for application.

![Figure 4 – Adjudicator costs against payment claims — 2005-18](./image)

However, while data is available relating to adjudicators fees for determinations, there appears to be no statistical information relating to costs associated with the preparation of and response to payment claims. While one of the principal objectives of the CCA is to provide a rapid, cost-effective, means for adjudicating payment disputes arising under construction contracts in order to improve cash flow for contractors in the construction industry, the complexity of claims, with associated documentation, can result in significant costs to the parties. In consideration of the objectives of the CCA, one is reminded of the comment by Lovegrove (2014) who stated;

> Back in the day, too many building disputes turned into juggernauts, where the lead advocate headed up a gladiatorial pyramid, flanked by junior counsel, an army of building consultants, instructing solicitors and other human resource accoutrements. The cost of construction dispute resolution became “eye wateringly” expensive.

In one example given to the authors, an adjudicator received an application for adjudication consisting of 23 lever arch folders of submissions of 7,977 pages. The response to the claim consisted of 11 lever arch folders containing 3,929 pages. Apart from the onerous task involving the adjudicator reading the copious submissions and drafting the determination within the times prescribed in the CCA, it would be trite to say that the legal costs associated with the preparation of the claim would be significant.

### 4. Locations of Disputes

The CCA states that, pursuant to s 4(1), all construction worksites must be undertaken in Western Australia, ‘whether on land or offshore’. In the first eight years of the operation of the CCA, statistics were not kept with respect to the site of the construction where the payment dispute occurred.

In 2013-14 the Building Commission began undertaking analysis as to the location of the disputes, specifically the metropolitan or regional areas. The statistics are shown in Table 1 below:

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28 The CCA provides that pursuant to s 31(2)(a)(iv); that an Adjudicator, if convinced that the matter before him or her, is too complicated, they can ‘dismiss the application without making a determination on its merits’. It appears this is really invoked.

29 Construction Contracts Act 2004 (WA), s 4(1).
Table 1 — Location of Payment Claims — Metro v Regional

<table>
<thead>
<tr>
<th>Location</th>
<th>Qty 13/14</th>
<th>%</th>
<th>Qty 14/15</th>
<th>%</th>
<th>Qty 15/16</th>
<th>%</th>
<th>FY 16/17</th>
<th>%</th>
<th>FY 17/18</th>
<th>%</th>
<th>Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Metropolitan</td>
<td>69</td>
<td>39%</td>
<td>118</td>
<td>50%</td>
<td>140</td>
<td>62%</td>
<td>138</td>
<td>78%</td>
<td>111</td>
<td>67%</td>
<td>576</td>
<td>59%</td>
</tr>
<tr>
<td>Regional</td>
<td>102</td>
<td>58%</td>
<td>115</td>
<td>49%</td>
<td>82</td>
<td>36%</td>
<td>38</td>
<td>22%</td>
<td>53</td>
<td>32%</td>
<td>390</td>
<td>40%</td>
</tr>
<tr>
<td>Not Known</td>
<td>4</td>
<td>2%</td>
<td>2</td>
<td>1%</td>
<td>2</td>
<td>1%</td>
<td>0</td>
<td>0%</td>
<td>1</td>
<td>1%</td>
<td>9</td>
<td>1%</td>
</tr>
<tr>
<td>TBA</td>
<td>0</td>
<td>0%</td>
<td>0</td>
<td>0%</td>
<td>1</td>
<td>0%</td>
<td>0</td>
<td>0%</td>
<td>0</td>
<td>0%</td>
<td>1</td>
<td>0%</td>
</tr>
<tr>
<td>Total</td>
<td>175</td>
<td>100%</td>
<td>235</td>
<td>100%</td>
<td>225</td>
<td>100%</td>
<td>176</td>
<td>100%</td>
<td>165</td>
<td>100%</td>
<td>976</td>
<td>100%</td>
</tr>
</tbody>
</table>

There is nothing significantly determinative about the results apart from the fact that when this issue was initially considered, the regional areas had more disputes. That is, some 58% of payment claims were made in regional areas. This may be explained in part as a consequence of mining activity however, with the later downturn in the construction phase of the ‘Mining Boom’, construction work has relocated to the metropolitan areas. The decline of the Regional locations and the relocation of construction work to the Metropolitan areas, the number of payment claims in the metropolitan areas has increased to 67%. It appears that the interest in this issue for the Building Commission was initially to determine if additional awareness training programs were needed in regional areas, but the results have been determinative.

5. **Industry source of the applications**

The CCA provides pursuant to s 4,30 what is included in ‘construction work’. It further breaks it down into two major types that being civil works, as per s 4(1),31 and construction work, as per s 4(2).32

The Building Commission lists some 119 industry types for recording payment claims. They range from architectural services to waterproofing to building and construction — Commercial. The top five of these industry types are shown below.

![Figure 4 — Top 5 Payment claims by industry type (2005-18)](image)

The largest number of claims since the commencement of the CCA arise from ‘Building & Construction — Residential’, which in the period since 2005, had 306 (or 15.40% of the 1987 payment claims).

31 Ibid s 4(1).
32 Ibid s 4(2).
Second is ‘Building & Construction — Commercial’, 278 (or 14%), followed by, ‘Mining/Gas Infrastructure’, 146 (or 7.30%), ‘Electrical’, 97 (or 4.90%), and ‘Civil Construction & Concrete Work’ 75 (or 4.90%). Interestingly, in 2017-18, Mixed Use/Aged Care (12 payment claims) and Commonwealth (nine payment claims) entered the industry source, which had previously not been claimed.

However, the priorities change the quantum or value of the claims on an industry basis are considered as can be seen in Figure 5, below:

![Figure 5 — Top 5 — payment claims by industry type ($value) (2005-18)](image)

6. **Applicants and respondents categories**

Subcontractors have been the largest applicant group consisting of 52% since the commencement of the CCA. During the active construction period, 2012-2013 in Western Australia, 58% of payment claims came from subcontractors, 20% from head contractors and 16% for supplier/supplier installers.

A breakdown of the types of applicants is displayed below:

![Figure 6 — Top 3 — Breakdown of the type of applicant — 2005-18](image)

As seen in Figure 6, since 2011-12, 1362 applications have been submitted. Subcontractors made up 717 (53%) of the applications. Supplier/Supplier Installer make up 258 (or 19%), followed by Head Contractors 229 (or 17%) of the applications for payment claims.

With respect to respondents, the plurality since 2011-12 are head contractors totalling 669 (49%) The owner/principal was involved as a respondent in 341 disputes (25%) and the subcontractors involved 189 times (or 14%).

A breakdown of the types of respondents can be seen below:
Again what can be seen from these statistics is the low level of utilisation of the CCA by those at the lower level of the contracting chain. As a consequence and following recommendations arising from the Independent Statutory Review, in December 2016 and January 2017, the Building Commission ran free information sessions for building and construction industry participants relating to the provisions and proposed amendments to the CCA. Subsequently, online versions of these presentations were made available. In addition, the Building Commission has established on its website a range of materials which have been designed with the aim of assisting parties who wish to lodge a claim for payment under the CCA.33

7. **Prescribed appointors**

Under the CCA, parties to a payment dispute may self-appoint an adjudicator (providing both parties agree), or they may serve upon a prescribed appointor the application for adjudication.

When the Act and the subsequent Regulations34 were gazetted and commenced, there were eight prescribed appointors listed, pursuant to Regulation 11.35 As can be seen below, since 2005, the majority of the appointments have come from the former Institute of Arbitrators and Mediators — Australia (IAMA). IAMA has now become the Resolution Institute. Over the review period, they have made 1063 appointments (or 53%) of adjudicators. Considering the top five Prescribed Appointers; the second highest is the Master Builders Association of Western Australia (MBA) with 558 appointments (or 28%). The third highest prescribed appointer is the Australian Institute of Building (AIB), with 125 appointments (or 6%) followed by the National Electrical and Communications Association (NECA) with 116 appointments (or 6%) and the Royal Institution of Chartered Surveyors (RICS) with 76 appointments (or 4%).

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34 Construction Contracts Regulations 2004 (WA).

35 Ibid, Reg 11. They include; The Australian Institute of Building (AIB), Australian Institute of Project Management (AIPM), The Australian Institute of Quantity Surveyors (AQIS), Electrical and Communications Association of Western Australia (Union of Employers) (NECA), The Institute of Arbitrators and Mediators Australia (IAMA), Master Builders Association of Western Australia (Union of Employers) (MBA), RICS Australasia Pty Ltd (RICS), and The Royal Australian Institute of Architects (RAIA/AIA).
While again, it is not possible to be definitive concerning the reasons for the higher number of appointments by the Resolution Institute and MBA it could be reasonably concluded that both are the largest organisations with registered adjudicators as members. Additionally, in Western Australia, Resolution Institute and RICSCIS are currently the only prescribed appointors and training providers that offer an adjudicators training course which qualifies them for the performance of the functions of an adjudicator under the Act.\footnote{Construction Contracts Regulations 2004 (WA), Reg 9(4).}

The reduction in the number of adjudication applications can also be related to the decline of the number of requests for adjudicators to the Resolution Institute which went from 142 in the period 2014-15 down to 61 in 2017-18.

8. **Registered adjudicators**

There is currently no requirement that adjudicators must be legal practitioners. However, registration does require approved training and accreditation by one of the Building Commission approved training providers.

Of the 84 registered adjudicators in Western Australia; 65 (77%) live in the State. Six (7%) live in Queensland, five (6%) live in New South Wales, three (4%) live in Victoria, three (4%) live in South Australia, and two (2%) live in the Northern Territory. There were eight new adjudicators appointed in 2017-18. All are based interstate.38

Of the 84 registered adjudicators 80 (95%) are males. There are only four female (5%) registered adjudicators in Western Australia, but one is no longer acting as an adjudicator. There was previously another female registered and eligible for adjudications, Ms Natasha Owen-Conway. Ms Owen Conway, a former Barrister, is now a full-time Member of the State Administrative Tribunal (SAT), therefore is ineligible to be appointed to undertake adjudications. However, there are several adjudicators who are also sessional members of SAT, and this does not exclude an appointment as an adjudicator.39

Currently only 27 of the 84 (32%) registered adjudicators are legal practitioners with backgrounds in construction law. The majority of registered adjudicators are drawn from a wide range of construction disciplines. Most are members of professional associations such as the Australian Institute of Building (AIB), the Institute of Arbitrators and Mediators Australia (IAMA), the Royal Institute of Chartered Surveyors (RICS), the Australian Institute of Quantity Surveyors (AIQS), the Chartered Institute of Arbitrators, Engineers Australia (EA Aust.), the Australian Institute of Architects (AIA) and the Law Society of Western Australia. Each of these organisations offers continuing professional development programs (CPD) in various aspects of the Act. The Building Commission’s website contains a list of registered adjudicators.40

Regardless of formal legal qualifications, there are strict requirements placed on experience, skills and construction industry knowledge. In accordance with the regulations,41 in order to become a Registered Adjudicator, a person must have a relevant degree42 and be eligible for membership of a professional institution43 or be a builder registered under the Builders’ Registration Act 1939 (now repealed).44 The person must have had at least five years’ experience in administering construction contracts or dispute resolution relating to construction contracts45 and have completed an adjudicators training course which qualifies them for the performance of the functions of an adjudicator under the Act.46

It is interesting to note that under the arrangements currently in place in NSW, Victoria, Tasmania and the ACT, there are no regulations prescribing the requisite eligibility criteria and qualifications for adjudicators.

Clearly, the payment dispute resolution provisions of the CCA were premised on the basis that a person qualified, and with prescribed experience, in law or one of the construction-related disciplines would

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40 The site is located at: http://www.commerce.wa.gov.au/building-commission/find-adjudicator
41 Construction Contracts Regulations 2004 (WA), Reg 9.
42 Ibid Reg 9(2)(a); Architecture, Building, Engineering, Construction, Quantity surveying, Law, Building surveying, Project management.
43 Ibid Reg 9(2)(b); 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, Australian Institute of Project Management.
44 Construction Contracts Regulations 2004 (WA), Reg 9(2)(c). Now repealed by the Building Services (Registration) Act 2011 s. 107 (No. 19 of 2011) as at 29 Aug 2011 (see s. 2(b) and Gazette 26 Aug 2011 p. 3475-6).
46 Ibid Reg 9(4).
have the ability to rapidly determine typical payment disputes which may arise in a construction contract. It is trite to say that it was never the intention of the framers of the Act to require a level of legal knowledge consistent with that of a legal practitioner.\textsuperscript{47} I have previously, with respect to the issue of complexity, cited the decision in \textit{Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd}, where Pritchard J stated:

\begin{quote}
An adjudicator will not necessarily be legally qualified and, as I have already observed, the Parliament did not, in my view, intend that an adjudicator should express reasons for a determination with the same degree of precision as might be employed by, or expected of, a court.\textsuperscript{48}
\end{quote}

At the same time, Martin J noted in \textit{Red Ink Homes Pty Ltd v Court} that this was ‘not an invitation towards an acceptance of arbitrary or irrational decisions’.\textsuperscript{49}

The requirements of an adjudicator with respect to questions of law were noted by Chaney J in \textit{WQube Port of Dampier and Loots of Kahlia Nominees}:

\begin{quote}
There is no doubt that, in undertaking adjudication; an adjudicator is required necessarily to determine questions of law. Most obviously, an adjudicator is required to construe the terms of the relevant construction contract which is the subject of dispute. He or she must determine whether or not the requirements of the contract have been met such that a payment is due, or a security must be returned. The decision of the adjudicator clearly affects legal rights and obligations, even though those same rights and obligations may be the subject of the other court or arbitration proceedings.\textsuperscript{50}
\end{quote}

This issue was also considered by Mitchell J in the Supreme Court of Western Australia in \textit{Laing O’Rourke Australia Construction Pty Ltd v Samsung C & T Corporation}.\textsuperscript{51}

The Building Commissioner can investigate the suitability of adjudicators and their removal from the register in accordance with section 48(5) of the CCA, which states:

\begin{quote}
(5) The Registrar may cancel the registration of an individual as a registered adjudicator if satisfied that the individual –

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

(b) has misconducted, or is incompetent or unsuitable to conduct, adjudications under Part 3.\textsuperscript{52}
\end{quote}

The issue of adjudicator removal was also considered in \textit{Perrinepod Pty Ltd v Georgiou Building Pty Ltd}.\textsuperscript{53}

To date from a consideration of the Building Commissioners Annual Reports to date no adjudicator has had their registration cancelled due to misconduct, incompetence or being considered unfit to conduct adjudication. In terms of the number of registered adjudicators when viewed against the number of applications, it would not appear that the issue is significant with respect to the operation and effectiveness of the CCA.

\section{Application determinations, dismissals, and withdrawals}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{47} The Master Builders Association comment that they regularly use trade trained adjudicators in a range of disputes. Personal Communication, 14 July 2015.
\item \textsuperscript{48} \textit{Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd} [2012] WASC 304, [124].
\item \textsuperscript{49} \textit{Red Ink Homes Pty Ltd v Court} [2014] WASC 52 [142].
\item \textsuperscript{50} \textit{WQube Port of Dampier and Loots of Kahlia Nominees} [2014] WASC 331.
\item \textsuperscript{51} [2015] WASC 237, [223]–[226].
\item \textsuperscript{52} \textit{Construction Contracts Act 2004} (WA), s 48.5.
\item \textsuperscript{53} \textit{Perrinepod Pty Ltd v Georgiou Building Pty Ltd} [2011] WASCA 217, 17 [50(5)].
\end{itemize}
\end{footnotesize}
The significance of the findings in this category is a large number of applications that are dismissed, and the significant difference in the amounts claimed and the amounts determined for the respective applications.

The first issue for an adjudicator, apart from that of independence, is to consider whether they have jurisdiction to determine the matter, or dismiss the application. In some instance, the parties may agree to withdraw the application.

The adjudicator must initially decide if the payment claim is one pursuant to section 3. That is:

means a claim made under a construction contract —

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

(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract; 54

That claim must be for pursuant to a; ‘construction contract or other agreement, whether in writing or not’55 for the conduct of construction work,56 the supply of goods and services,57 in Western Australia, whether on land or offshore.58 The contract must have been made after 2004.

The adjudicator must also ensure that any claim sought excludes the work on a ‘worksite in WA, such as drilling for discovering or extracting oil or natural gas, mineral-bearing or other substance, constructing any plant for processing the aforementioned or constructing.59 Construction work also does not include: ‘constructing the whole or part of any watercraft’.60

The adjudicator must then decide that a dispute has arisen. Section 6 of the Act, states that ‘a payment dispute arises if:

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

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

(c) by the time when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.61

If the payment claim makes the requirements listed above, an adjudicator must then make a determination or decision. The objective of the adjudication process is found in section 30, which states: ‘The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.’62

Pursuant to section 31, of the CCA,63 the adjudicator must, on the ‘balance of probabilities’,64 make a determination on the payment dispute.

The number of payment claims

As noted above since 2005; there have been 1987 applications for adjudication of payment claims. The total amount of payment claims sought from 2005-2006 to the 2017-2018 period was $3,017,361,859.21.

54 Construction Contracts Act 2004 (WA), s 3, payment claim.
55 Ibid construction contract.
56 Ibid s 4.
57 Ibid s 5.
58 Ibid s 4(1).
59 Ibid s 4(3).
60 Ibid s 4(3).
61 Ibid s 6.
62 Ibid s 30.
63 Ibid s 31(2)(b).
64 Ibid.
Since 2005, only 1125 (or 57%) of payment claims have resulted in determination, while a total 529 of the 1987 payment claims or 27% have been dismissed by adjudicators. Since 2005; there have been 310 (or 16%) withdrawn by the parties and a further 23 payment claims (or 1%) that are listed as pending. There have been no reported applications which lapsed under section 31(3), where time has elapsed in making a determination within the prescribed time or with an extension of time.

These are represented in Figure 10 below:

**Figure 10 — Payment claims, determinations, withdrawals and dismissals (2005-18)**

In the first year of operation of the Act, 2005-2006, the total number of payment claims that were determined was 21 (or 72%). The largest single payment claim made was for $5,620,017.96, and the largest single determination made was for $300,414.42.

Of the 29 payment claims applications submitted, two (or 7%) were dismissed. The total value of payment claims dismissed was $768,045.58 (or 7%). The largest single claim dismissed was $758,498.00 (or 7%) total $value of payment claims and the smallest was $9,547.58 (or 0.09%).

Before 2016 the CCA did not provide a mechanism for the parties to withdraw their payment claims, the total number of claims withdrawn by the parties prior to 2016 was six (or 21%). The total $value of claims withdrawn was about; $6,543,553.04 (or 62%).

**The number of payment claims determined**

It is interesting to note that as mentioned above since 2005, only 1125 (or 57%) of payment claims have resulted in determination.

**Figure 11 — Number of determinations (2005-18)**

With respect to the time for making a determination an adjudicator must within the prescribed time, that being 10 business days, after the serving of the response or any extension granted by the parties, pursuant to s 31(2)(b);

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

(i) the amount to be paid or returned and any interest payable on it under section 33;

65 Pending is recognised as being undertaken in the year it is listed, however the determination, withdrawal or dismissal has not been received by the Building Commission during that financial year and listed as pending. The result determination, withdrawal or dismissals are reported in the following year.

66 Construction Contracts Act 2004 (WA), s 31(3).

67 Ibid s 31(1)(a).

68 Ibid s 32(3)(a).
and

(ii) the date on or before which the amount is to be paid or the security is to be returned, as the case requires.69

With respect to the value of claims the total value of determinations made since 2005 was; $732,212,769.02 (24% of the total $ value of payment claims).

The largest single payment determination made was $54,631,234.59 against a payment claim for $169,930,144.00 in the period 2015-2016. The Adjudicator determined that the amount due was $54,631,234.59, a reduction of $115,298,909.41 (or a percentage change of 67.85%). The smallest single payment determination made — $320.15 was in 2005-2006. The mean value of payment claims from since 2005-2006 is $631,072.53.

![Figure 12 —Total $ value of payment claims v total value of determinations (2005-16)](image)

The number of payment claims dismissed

The Act, pursuant to s 31(2)(a), only allows particular circumstances for the determination to be set aside, which includes contracts that are not ‘construction’ contracts,70 or those that have not been prepared and served in accordance with provisions of the Act,71 or that an order has been made by another person, arbitrator or court.72 Finally, an adjudication can be set aside if the adjudicator has failed to decide within the time prescribed or determines that the matter is too complex to make a decision.73

Since the commencement of the CCA, 529 of the 1987 payment claims (or 27%) were dismissed. The total value of payment claims dismissed is approximately $1,279,612,355.33 (or 42% of the value of payment claims).

![Figure 13 — Number of dismissals (2005-18)](image)

With respect to individual reporting periods, at its peak, of the 225 payment claims applications submitted in 2015-2016, 79 (or 22%) were dismissed. The most significant single claim dismissed was

69 Construction Contracts Act 2004 (WA), s 31(2)(b).
70 Ibid, s 31(2)(a)(i).
71 Ibid, s 31(2)(a)(ii).
72 Ibid, s 31(2)(a)(iii).
73 Ibid, s 31(2)(a)(iv).
$169,930,144.00 (or 25%) of the total $ value of payment claims in that year. The smallest was $1443.44 (or 0.00021%).

In the latest reporting period, 2017-2018, 23 (or 14%) of the 165 payment claims applications, were dismissed. The total value of payment claims dismissed in FY 2017-18, was $14,994,086.59.

The number of payment claims withdrawn

Before the Construction Contracts Amendment Act 2016 (WA), unlike the Northern Territory Construction Contracts (Security of Payments) Act 2004, the Western Australian CCA did not make provision for an applicant to withdraw its written application. However, a number of parties have withdrawn payment claims, outside the provisions of the CCA. No data is available with respect to the reasons for withdrawal. By way of example, there were 50 payment claims withdrawn in 2011-12.

However following recommendations suggested in the CCA review74 the CCA now allows the withdrawal of an application, pursuant to s 31(2)(a)(ia);75

In terms of the total number of withdrawals since 2005, of the 1987 applications for adjudication, 310 (or 16%) have been withdrawn by the parties. With respect to other reporting periods in 2015-2016, 10 payment claims were withdrawn. In 2016-2017, there were 31 withdrawals and 33 in 2017-2018.

![Figure 14 — Number of applications withdrawn (2005-18)](image)

In terms of the value of the claims withdrawn, the most substantial single claim withdrawn was for $5,620,017.96. The smallest individual claim withdrawn was for $1,750.

As mentioned, it has not been possible to definitively determine the reasons by parties for withdrawing a claim. By way of supposition, it could be greater awareness of the relevant provisions in the CCA. This will be the subject of future research.

10. Review of adjudication determinations

Under the CCA, once a payment dispute has been adjudicated, sections 38 and 41 of the CCA provide that any determination is final and binding on the parties and payment of the amount due under the determination must be made. However, section 46 of the CCA provides a limited right for a person aggrieved by a determination to seek a review of the adjudicator’s decision by the SAT. This right of


75 Construction Contracts Act 2004 (WA), s 31(2)(a)(ia).

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

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

(ia) the applicant gives written notice, to the adjudicator and each other party to the dispute, that they wish to withdraw the application;
review is only available where the adjudicator has dismissed the application under section 31(2)(a) without determining the merits. Where the adjudicator has made a determination under section 31(2)(b) on the merits of the payment dispute, the adjudicator’s decision is not reviewable by the SAT. Only the Supreme Court has the power to review the adjudicator’s determination under section 31(2)(b), and this review is limited to jurisdictional grounds.

Where a person who is aggrieved by the adjudicator’s decision to dismiss the application for adjudication under section 31(2)(a) applies to the SAT for a review, section 46(2) of the CCA provides that if the adjudicator’s decision is set aside by the SAT and reversed, the adjudicator must, within 14 days of the SAT’s decision make a determination under section 31(2)(b).


The Murray Report made 86 recommendations to improve consistency in security of payment legislation and enhance protections to ensure subcontractors get paid on time for work they have done, regardless of which state or territory they operate in and one of the main recommendations was to make security of payment laws nationally consistent with what is commonly known as the East Coast model, which is modelled on the NSW security of payment legislation. The Report states at page 49;

The enactment of the various security of payment legislative regimes (particularly with those jurisdictions that adopted the East Coast Model) have ‘spawned’ hundreds of court challenges of adjudicators’ determinations/decisions.77

However, this has not been the case with respect to an application for review of adjudicator’s decisions under the CCA (West Coast Model).

Since 2005, of the total 1822 applications for adjudication, there have only been 78 applications (or 4.3%) submitted to the WA State Administration Tribunal (SAT) for review. To date, the highest number of individual year reviews of adjudicator’s decisions has been 11 in both 2011-2012 and 2014-2015. The lowest number was in the first year of the operation of the CCA (2005-06). In both 2006-2007, and 2016-2017, there were three applications for review, and in the second half of 2017, only one review has been lodged with SAT.

![Figure 3 — Number of Reviews (2005-18)](image)

When considered against the number of determinations over the review period, there has actually been very few applications for an SAT review of the adjudicators' determinations.78

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78 The first case for review before the State Administrative Tribunal was on 4 October 2005, In the case of; *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture*, [2005] WASAT 269.
Over the whole period from 2005 to 2017 whilst there were 1822 applications for adjudication in WA, only 137 (7.52%) were taken to a court or tribunal, and of those only 47 were decided against the adjudicator.79

11. Conclusion

The 2016 Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA) found that there was clear consensus between all stakeholders that the CCA was an extremely important item of legislation which had radically improved the traditional risk allocation between parties contracting in the construction industries; providing contractors, suppliers and consultants with rights and protection which were not previously available under the common law. Consequently, the Act has had a very positive influence on payment practices and associated issues in the construction industry.

The Review indicated that the CCA has been generally successful both as a statutory scheme for the evaluation of payment claims and in providing a quick and uncomplicated dispute resolution process. Additionally, the Act has clearly facilitated a meaningful dialogue between the parties in a dispute over payment, which on numerous occasions has resulted in a settlement of the dispute. Unfortunately, this does not appear to be the case with many parties at the lower end of the contracting chain.80

The examination of the Building Commissioners Annual Reports since the commencement of the CCA in 2005 has additionally provided valuable definitive information concerning the significant issues arising out of the operation of the CCA and has in part dispelled a number of the conjectural and anecdotal submissions made with respect to previous CCA reviews.

In terms of the data examined, the decreasing numbers of applications is of concern, but there are no apparent definitive reasons which could be established for the decrease. Whilst the Building Commissioner has noted in the 2016-2017 report that lower construction activity in the state has affected the number of applications it is considered that additionally the publication of the Discussion Paper prepared in connection with the statutory review of the CCA and the subsequent Review Report and widespread publicity regarding the CCA created a greater awareness of the provisions of the CCA and prompted early settlement of payment disputes in lieu of adjudication applications. This is an issue that requires further research.

Also, the data with respect to adjudication fees did not suggest that this aspect was an impediment in making an application. The absence of data with respect to the cost of the legal fees associated with the preparation or response to a claim also requires further investigation.

The statistics clearly indicate that the CCA is still not being utilised by the lower end of the contracting chain when viewed against the background of the applicants and the quantum of the average claims. This also requires further investigation.

One of the most significant findings of the research was the differential between the amount claimed and the subsequent amount awarded by the adjudicator for the majority of claims. An inference which could be drawn is that the quantum of the claims are deliberately overinflated or that the evidence provided in support of the claims is not probative.

Finally, the statistics relating to both the low number of applications for review of adjudication determinations and the rate of rejection of the applications by SAT does not support the recommendations that the East Coast Model security of payment legislation should be preferred over the CCA.

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