Curtin Law School

A statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the State Administrative Tribunal and the Courts of Western Australia

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Declaration

To the best of my knowledge and belief this thesis contains no material previously published by any other person except where due acknowledgment has been made.

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university.

Signature: 

Date: 20 November 2018

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Abstract

In 2004, the Honourable Ms Alannah J. MacTiernan introduced, on motion, the *Construction Contracts Bill 2004 - Introduction and First Reading & Second Reading* (the Bill). The Minister then moved; 'that the Bill be now read a second time'.[1] The Bill would give rise to the *Construction Contracts Act 2004* (WA) (the Act) which was granted assent on 08 July 2004 and commenced on 01 January 2005.

From 2005 until 30 June 2017, the *Construction Contracts Act 2004* (WA) was used by those seeking a resolution to payment claim disputes within the Western Australian construction industry on 1822 occasions.

The statutory legislation provides three mechanisms that give rise to access in the Courts of Western Australia and the State Administrative Tribunal (SAT). The first is: s 43 of the Act, which allows an adjudicator's determinations to be enforced as orders of the court, before the Supreme and District Courts of Western Australia. There have been on 27 occasions, applications to both the WASC and the DCWA, to enforce the judgment of an adjudicator's determination.

Secondly, s 46 of the Act gives an aggrieved party a limited right of review of an adjudicator's determination/decision before the State Administrative Tribunal of Western Australia. There have been only 78 reviews submitted to the SAT.

Thirdly, in regard to the right of judicial review under the jurisdiction of the Supreme Court of Western Australia, there have been 49 applications to the Supreme Court seeking to overturn determinations made by adjudicators in the course of their role. There have been only three cases that have been before the Western Australian Supreme Court of Appeal, and no Western Australian case has come before the High Court of Australia.

This research will provide an opportunity to look back and see how effective the provisions of the Act have been since its commencement in January 2005. The study will also offer further opportunity to review provisions of the Act in order to determine how useful their application has been under the scrutiny of the State Administrative Tribunal and the Courts of Western Australia.

[1] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).

Acknowledgement

To Vis (State Side), I did the best that I could do with what was before me, and without what was denied to me as the 'primary decision maker'. This research has revealed that the 'primary decision maker' was denied his jurisdiction, and the District Court of Western Australia was wrong in its reasoning. But history and hindsight cannot right the wrong. May it serve as a beacon for, adjudicators, judicial officers, and legal practitioners, so the wrong may never happen again. You have every right to '*feel abandoned by and angry with, the system'*, though it gives me much pride to see that State Side remains a going concern.

To my supervisors Professor Philip Evans, Professor Gabriël Moens, Professor Dale Pinto, and Dr Rocco Loiacono. Phil, we started a journey along a winding trail, wide-eyed, sometimes going off course, and other times creating new paths, but we kept going. It amazes me to see what we have achieved along the way. No more excellent person would I have chosen to accompany me on such a journey. I think that we have changed the world in a little way. Gabriël, you came on the journey and immediately took the role of Captain/Navigator, guiding us and keeping us from straying and getting lost. 'Dank u, Meneer',[2] I have so very much enjoyed your excellent company, friendship, wisdom and counsel from one so esteemed. To Dale, one could choose no finer Chairman of the supervisory committee. You have provided us with the logistics and support to make the journey. Rocco, who joined our expedition at a later stage, I hope you have enjoyed the trip, as we have enjoyed your company.

To the Adjudicators:

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> *To Kim Doherty, the former Chairman of the Institute of Arbitrators and Mediators (WA Chapter) and Mentor, for it was you that pointed me in the direction that I have taken, and had it not been for your direction; I would never have taken the path that has challenged me and has brought me great passion, thank you.*

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To Robert Fenwick-Elliott, for *10 Days in Utopia*,[3] Sir Michael Latham for *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry*,[4] and Lord Ackner for the 'quick and dirty fix'.[5] Dr Jeremy Coggins *et al* for *Towards Harmonisation of Construction Industry Payment Legislation.* All were of significant influence on me.

To my mentors: Major 'Sid' Cheesman (Dec), Major 'Mick' Lappin (Dec), Mr Kevin

[2] Dutch: Thank you Sir

[3] Robert Fenwick Elliott, '10 Days in Utopia' (Proceedings of the IAMA, Glenelg, South Australia, 02 June 2007).

[4] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994).

[5] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >

O'Callaghan, LTCOL (Dr) Douglas Hinchliffe (Ret), and Major General Grant Cavanagh AO (Ret), who all saw something in the young digger, and helped 'turn a rough cut diamond' into a student, an officer, and a PhD candidate. Thank you.

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To all the honourable Judicial Officers of the Supreme Court and District Court of Western Australia, Members of the State Administrative Tribunal, and the Legal Fraternity involved with the *Construction Contracts Act* 2004 (WA): Thank you.

To the Honourable Ms Alannah J. MacTiernan: you got this one right, and for that, I take my hat off to you, honourable Lady. In the State of Western Australia, not many would disagree. Thank you.

To former Western Australian Attorney – General and Minister for Commerce, the Honourable Michael Mischin MLC: thank you for granting us the review and ensuring the implementation of our recommendations. Thank you to the Honourable Tony Krsticevic MLC and Sean L'Estrange MLC.

To Mr Graham Edwards, Veteran, State and Federal Politician, former State President of the RSL, for inspiration during adversity. Thank you Senator Dean Smith, well done…To Mr Ed Kuepper, always quietly playing in the background, so resilient, so talented. Thanks for the company and music, great Troubadour. Thanks Chris 'let's go camping and fly the drones'.

To all in the construction industry: remember, the *Construction Contracts Act 2004* (WA) lies by your side and gives rise to your protection, should you need it…

To my father; Auke Steensma (Dec), I miss you very much. The money you spent on my education all those years ago did not go astray. I hope that I have made you proud 'Sterkte'. To my mother; Marietta, and my siblings, Dirk, Alida, and Janine: I love you all, thanks.

To my faithful old friend, Bailey the Airedale, 'let's go for a walk, boofhead, I don't have to study today...'

To our children: Alistair and Aslinn, I love you both so much, and I am so proud of the wonderful people that you have both grown up to be. Thank you both for your love and patience as I studied.

But most importantly, to my wife, Stephanie: you are my lighthouse, you are the love of my life, my soulmate, without whose support, I would never have undertaken such a momentous journey. You have always guided me home. I love you so so much. Thank you for helping to shape my life and our life.

To the *Construction Contracts Act 2004* (WA) itself, long may you live to protect those that you serve…

Publications

Parts of this thesis have been published, or are pending publication, in the following peer-reviewed articles:

Philip Evans and Auke Steensma, 'The *Construction Contracts Act 2004* (WA); Its Application and Effectiveness' *(*2013) *79 Arbitration, Issue 4 2013 Chartered Institute of Arbitrators*

Vernon Nase, P. Evans and A. Steensma, 'Defective footings and defective principles: an analysis of the legal issues engendered by Woolcock Street Investments Pty Ltd v CDG Pty Ltd (unpublished)

Auke Steensma, 'The *Construction Contracts Act 2004* (WA): Its Operation and Effectiveness 2005 – 2014'. (Unpublished)

The above paper was presented at the following conference:

03 May 2014, Institute of Arbitrators and Mediators – Australia - 2014 National IAMA Conference – Canberra.

The author also undertook the following State Government Statutory Review:

Statutory Review of the *Construction Contracts Act 2004* (WA). Project Manager/Research Assistant to Professor Phil Evans. The former Western Australian Attorney General and Minister for Commerce, the Honourable Michael Mischin MLC and the former Building Commissioner of Western Australia, Mr Peter Gow commissioned the review in August 2014 to examine the existing security of payment legislation in Western Australia – the *Construction Contracts Act 2004*.

Table of Abbreviations/Terms and Definitions

ACT	Australian Capital Territory
ACT Act	*Building and Construction Industry (Security of Payment) Act 2009* (ACT)
ADR	Alternative Dispute Resolution
AIB	Australian Institute of Building
AIPM	Australian Institute of Project Management
BER	Building the Education Revolution'
BMW	The Department of Building Management and Works
CCA	The *Construction Contracts Act 2004* (WA) also referred to as the Act.
CFMEU	The Construction, Forestry, Mining and Energy Union
CIEC	Construction Industry Employers Council (UK)
DAF	Development Assessment Forum
East Coast model	The Security of payment legislation in East coast states of NSW, Victoria, Queensland, ACT, SA and Tasmania
EBA	Enterprise Bargaining Agreement
FY	Financial Year
GFC	Global Financial Crisis
GST	Goods and Services Tax
HCA	The High Court of Australia
HGCR Act	*Housing Grants, Construction and Regeneration Act* 1996
HIA	Housing Industry Association
IAMA	Institute of Arbitrators and Mediators of Australia (now the Resolution Institute)
LEADR	Lawyers Engaged in Alternative Dispute Resolution
MBA	Master Builders Association
MLA	Member of the Legislative Assembly
MLC	Members of the Legislative Council
NECA	National Electrical and Communications Association
NSW	New South Wales

NSW Act	*Building and Construction Industry Security of Payment Act 1999* (NSW)
NT	Northern Territory
NT Act	*Construction Contracts (Security of Payments) Act 2004* (NT)
Qld	Queensland
Qld Act	*Building and Construction Industry Payments Act 2004* (Qld)
RI	Resolution Institute (formerly IAMA & LEADR)
RIA	Regulatory Impact Assessment
RICS	Royal Institute of Chartered Surveyors
SA	South Australia
SA Act	*Building and Construction Industry Security of Payment Act 2009* (SA)
SAT	State Administrative Tribunal
SOCLA	Society of Construction Law – Australia
Tas	Tasmania
Tas Act	*Building and Construction Industry Security of Payment Act 2009* (Tas)
The Act	The *Construction Contracts Act 2004* (WA) also referred to as the CCA
The Regs	The *Construction Contracts Regulations 2004* (WA)
TOR	Terms of Reference
UK	United Kingdom
UK Act	Part II of *The Housing Grants, Construction and Regeneration Act 1996*
US	The United States of America
Vic	Victoria
Vic Act	*Building and Construction Industry Security of Payment Act 2002* (Vic)
WA	Western Australia
WADC	The District Court of Western Australia
WASAT	Western Australian State Administrative Tribunal
WASC	The Supreme Court of Western Australia
WASCA	The Western Australian Supreme Court of Appeal
West Coast model	The Security of payment legislation in Western Australia and the Northern Territory

PART 1

Part 1 – Introduction, Security of payment legislation: the historical perspective, and the overview of the State Administrative Tribunal and the Courts of Western Australia in enforcing or reviewing the *Construction Contracts Act 2004* (WA).

The aim of Part One of this research is to look at the security of payment legislation and the jurisdiction of the State Administrative Tribunal and the Courts of Western Australia in enforcing or reviewing the *Construction Contracts Act 2004* (WA). Part One will outline the strategy of the thesis, undertake a historical perspective of Security of payment legislation and the *Construction Contracts Act 2004* (WA) and the jurisdiction and application of review, by the Courts of Western Australia and the State Administrative Tribunal.

Part One has three chapters. They are:

- Chapter 1: Introduction,
- Chapter 2: Security of payment legislation: The Historical Perspective, and
- Chapter 3: The statutory regime and what constitutes a payment claim and a payment dispute.

Chapter 1

Introduction

In strategy, the longest way round is apt to the shortest way home.

Captain Sir Basil Liddell Hart
The way to win wars
(1942)[6]

1.1. Background of the study

The *Construction Contracts Act 2004* (WA) (the Act) was legislated to prohibit unfair practices in construction contracts and to allow for a rapid adjudication process to determine contract payment disputes.

Then Minister for Planning and Infrastructure, the Hon Ms A.J. MacTiernan, in her speech - *Construction Contracts Bill 2004* (WA), stated that 'security of payment (is) a vital foundation for the industry. Failure to pay at any link in the contracting chain can be disastrous to those subcontractors and suppliers who are waiting to be paid in their turn and, until now; there has been little recourse available to those who are affected'.[7]

Ms MacTiernan added:

> If a party is not satisfied, it retains its 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.[8]

The Act would gain assent and come into operation in Western Australia on 1 January 2005.

The Act provides two mechanisms that give rise to the jurisdiction of the Courts of Western Australia and the State Administrative Tribunal. The first is the enforcement of a determination

[6] Trevor Royle, *Collins Dictionary of Military Quotations*, (HarperCollins Publishers, 1991) 171.
[7] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).
[8] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).

made by an adjudicator, as an order of the court, pursuant to s 43 of the Act,[9] and the second is the limited right of review of a determination made by an adjudicator, pursuant to s 46 of the Act.[10]

Interestingly, there is no mention of the right of review by the Courts of Western Australia, notably the Supreme Court of Western Australia, within the provisions of the Act, or s 46. However, in 2010, the High Court of Australia would, in the now famous case of *Kirk,*[11] observe otherwise, and the implications of this ruling would have a fundamental effect on the application of s 46.

1.2. Research problem

In the 14 years since the Act commenced in Western Australia, there has been no significant research conducted that analyses the enforcement of the adjudicators' determinations by the Courts of Western Australia, the limited review of the adjudicators' determinations made by the State Administrative Tribunal, or the judicial review of the adjudicators' determinations by the Courts of Western Australia.

1.3. Research question and objective

The background to this research provides an excellent opportunity to review the application of: s 43 of the Act,[12] determinations may be enforced as orders of court; s 46 of the Act,[13] regarding the limited right of review of determinations made by adjudicators by the State Administrative Tribunal; and the judicial review of jurisdictional error by the Supreme Court of Western Australia of adjudicators' determinations. Hence, the fundamental research question to be addressed is:

> Are the current provisions of s 43, s 46 of the Act, and the judicial review of jurisdictional error effective?

1.4. The scope of the study

This research will look at three critical components of the Act, since 2005. It will examine:

[9] *Construction Contract Act 2004* (WA), s 43 Determinations may be enforced as orders of court.
[10] *Construction Contract Act 2004* (WA), s 46 Review, limited right of.
[11] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1.
[12] *Construction Contract Act 2004* (WA), s 43 Determinations may be enforced as orders of court.
[13] *Construction Contract Act 2004* (WA), s 46 Review, limited right of.

- the enforcement of adjudicators' determinations as orders of the court;
- the limited review of a determination made by an adjudicator, pursuant to s 46 of the Act by the State Administrative Tribunal of Western Australia; and
- the judicial review of jurisdictional error by the Supreme Court of Western Australia.

Furthermore, it will determine whether the Courts of Western Australia and the State Administrative Tribunal have been effective in the operation of the *Construction Contracts Act 2004* (WA).

1.5. The significance of the study

The study will provide an opportunity to look back and see how effective both the provisions of the Act have been since its commencement in January 2005. It will also offer further opportunity to review provisions of the Act, in order to determine how useful their application has been under the scrutiny of the State Administrative Tribunal and the Courts of Western Australia.

The study will also provide significant empirical data for use by legislators and those reviewing the future of the Act.

1.6. Research methods and analysis

The research conducted will examine:

- the enforcement of the adjudicators' determinations by the District and Supreme Court of Western Australia;
- the limited review of a determination made by an adjudicator, pursuant to s 46 of the Act by the State Administrative Tribunal of Western Australia; and
- the judicial review of a determination made by an adjudicator, by the Supreme Court of Western Australia.

A considerable volume of the research conducted for this study is undertaken using desktop research and applied available material found in various libraries and academic databases throughout Australian Universities.

The research also accessed the databases that contain the cases heard by the Supreme Court of Western Australia, the District Court of Western Australia and the State Administrative Tribunal of Western Australia.

Also analysed were annual reports of the Building Commission of Western Australia from the Building Commissioner (formerly the Registrar) of the *Construction Contracts Act 2004* (WA), that have been presented since 2005-2006. Furthermore a large volume of adjudication determinations/decisions, stored by the Building Commission, were accessed and studied.

The research will apply both qualitative and quantitative analysis. The model for this study will be based on two of the success parameters, recommended by Coggins, Fenwick Elliott, and Bell in *Towards Harmonisation of Construction Industry Payment Legislation*[14]. They are:

a. the levels of justice afforded by the legislation, and

b. the administrative and legal burden generated by the legislation.

The study will analyse:

- the associated legislation, such as, the *Construction Contracts Act 2004* (WA), the *State Administrative Tribunal Act 2004,* all the Acts of the associated Courts;
- the annual reports that were drafted by the Building Commission of Western Australia since the first drafting was released at the end of the financial year 2005 – 06;
- the decisions made by the State Administrative Tribunal, the District Court of Western Australia and the Supreme Court of Western Australia, including the Court of Appeal, and
- the contemporary literature available on the subjects.

The outcome of this research will determine if the application of Sections 43 and 46 of the Act are appropriately functioning or require amendments to the Act to ensure that the objectives and operations of the Act are attained.

1.7. The study in context

The review of academic literature pertaining to the Act highlights that there have been limited endeavours made to study the Western Australian Act itself, and thus its application and effectiveness in the Tribunals and Courts of Western Australia will be undertaken in Chapter 2, Security of payment legislation: A historical perspective.

[14] Jeremy Coggins, Robert Fenwick Elliott, and Matthew Bell,'Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia – plus Addendum' (2010). *Australasian Journal of Construction Economics and Building*, 10 (3),

Underpinning this chapter is the decline of arbitration in Australia as the method of dispute resolution in the building and construction industry. The changes were brought about by the experience in the United Kingdom, in shifting the focus from arbitration to adjudication which resulted from the work of Sir Michael Latham and his 1994 UK report *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry*. Later the Report would have a considerable influence on Australia.

1.8. Major areas of contribution

This research envisages that it will contribute to the body of knowledge by contributing to the following areas. This study will provide:

- empirical data pertaining to the application and effectiveness of the Act between 2004 – 2016, and linking to what had previously been limited to annual reports, created by the Building Commission of Western Australia.
- empirical data pertaining to the application and effectiveness of the Act in the Tribunals and Courts of Western Australia.
- adjudicators with knowledge about the legal interpretations raised and decided by the courts and tribunals, to assist them in making determinations/decisions, and therefore reducing further the number of reviews by the courts and tribunals.
- those administering the Act, and legislators a greater understanding of the Act, that can be utilised for future proposals, both at a state level and a national level. The study will furnish; empirical data and analysis of processes, and legal interpretation, that can be utilised to make future amendments to the Act.
- material to publish several papers on matters highlighted in this research, and other areas related to the Act, such as statistical analysis of the operational effectiveness of the Act since 2005.

1.9. Limitations of the study

This research is limited to three main areas. The first is the publication of adjudicators' determinations/decisions. One of the most substantial limitations of this research is the decision by the Building Commissioner of Western Australia not to publish the adjudicators'

determinations/decisions. Section 50 of the *Constructions Contracts Act 2004* (WA),[15] provides that they may be made available,[16] but do not include, 'the identities of the parties' and any confidential information that has been identified in the determinations/decisions.[17] To date, unlike those of the Building Registrar of the Northern Territory, the determinations/decisions remain unavailable.

Secondly, this study does not analyse the work conducted by legal practitioners in drafting writs seeking a review of an adjudicator's determinations/decisions. Due to the confidential nature of a legal practitioner's materials in drafting their cases to be put before the Courts, they remain unavailable. However, in most cases, the Corum of the Courts and SAT undertaking the reviews detail the arguments put before them. There remains legally bound confidentiality between the clients and legal counsel that cannot, and must not, be breached.

Thirdly, in regard to the courts and tribunals, to date, there have been no reviews conducted by the High Court of Australia about the Western Australian Act on reviews of adjudicators' determinations made by the Courts of Western Australia. This research does consider other cases decided by courts in other Australian States and Territories that were or are currently being reviewed by the High Court, in determining local issues.

1.10. Thesis outline

The thesis; 'The statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the SAT and the Courts', contains three parts. They are:

- Part 1 – Introduction, security of payment legislation: the historical perspective, and the statutory regime and what constitutes a payment claim and a payment dispute.
- Part 2 – The Jurisdiction of the Courts and the State Administrative Tribunal and the *Construction Contracts Act 2004* (WA).
- Part 3 – Conclusion – The statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the SAT and the Courts.

Part 1 – Introduction, security of payment legislation: the historical perspective, and the

[15] *Constructions Contracts Act 2004* (WA), s 50.
[16] Ibid s 50(1).
[17] *Constructions Contracts Act 2004* (WA), s 50(2). Section 36(e) states that An appointed adjudicator's decision made under section 31(2)(b) must identify any information in it that, because of its confidential nature, is not suitable for publication by the Building Commissioner under section 50.

statutory regime and what constitutes a payment claim and a payment dispute.

The aim of Part One of this research is to look at the Security of payment legislation and the jurisdiction of the State Administrative Tribunal and the Courts of Western Australia in enforcing or reviewing the *Construction Contracts Act 2004* (WA). It will outline the strategy of the thesis, undertake a historical perspective of Security of payment legislation and the *Construction Contracts Act 2004* (WA) and the jurisdiction and application of review, by the Courts of Western Australia and the State Administrative Tribunal.

Part One has three chapters. They are:

- Chapter 1: Introduction,
- Chapter 2: Security of payment legislation: A historical perspective, and
- Chapter 3: The statutory regime and what constitutes a payment claim and a payment dispute.

Chapter 1: **Introduction**

This chapter provides the background of the study, the research problem, research question and objective, proposed conceptual framework, the scope of the study, the significance of the study, research methods and analysis, the study in context, significant areas of contribution, limitations of the study, and a thesis outline.

Chapter 2: **Security of payment legislation: A historical perspective**

This chapter will focus chronologically on the development of the Act and those factors that affected that development, the associated literature, its application and effectiveness in Western Australia, and the changes made to the Act since it came into operation in early 2005.

The Chapter will look at Sir Michael Latham and the 1994 UK report *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry.* The Chapter will examine how in Australia it would take a *Royal Commission into the Building and Construction Industry by* Justice Terence Rhoderic Hudson Cole, to consider the issues pertaining to security of payment and the role of adjudication. The *Construction Contracts Act 2004* (WA) (the Act) was granted assent on 8 July 2004 and commenced on 1 January 2005. The *Construction Contract Regulations* 2004 (WA) (the Regs), were Gazetted on 14 December 2004 and like the Act, commenced on 1 January 2005.

Thirteen years later the Act would undergo changes that have affected both Sections 43 and 46 of the Act and the jurisdiction of the State Administrative Tribunal and the Courts of Western Australia. Section 46 of the Act is again under review at a federal level.

Chapter 3: **The statutory regime and what constitutes a payment claim and a payment dispute**

This chapter will focus on the starting point in the statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the SAT and the Courts, by determining what constitutes a payment claim and a payment dispute.

The Chapter will refer to the *Construction Contracts Act 2004* (WA) and decisions made before the Courts and the State Administrative Tribunal, to determine what is a 'payment claim'. The Chapter will look at how Senior Member Raymond first explained what is a 'payment claim' in the case of *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture:*[18] The Chapter will discuss the prohibited provisions and the implied provisions of the *Construction Contracts Act 2004* (WA). The Chapter will discuss what else constitutes a payment claim, such as Variations and Liquidated damages, what a payment claim looks like, how to respond to a payment claim, what happens if there is no written contract or agreement, and when a payment claim is not a payment claim.

The Chapter will also refer to the *Construction Contracts Act 2004* (WA) and decisions made before the Courts and the State Administrative Tribunal, to determine what is a 'payment dispute', when does a payment dispute arise, and when does a payment dispute arise? - Post amendments to the Act.

Part 2 – The Jurisdiction of the Courts and the State Administrative Tribunal and the *Construction Contracts Act 2004* (WA).

The aim of part two of this research is to examine the jurisdiction of the Courts in enforcing an adjudicator's determination as an order of the Court, and the limited right of review of an adjudicator's determination by the Courts of Western Australia and the State Administrative Tribunal.

Part two has three chapters. They are:

- Chapter 4: Section 43 – Determinations may be enforced as orders of court,
- Chapter 5: Section 46 (Review, limited right of) of the *Construction Contracts Act*

[18] [2005] WASAT 269.

2004 (WA) and the jurisdiction of the State Administrative Tribunal of Western Australia, and

- Chapter 6: Jurisdictional error, judicial review of the Construction Contracts Act 2004 (WA) and the jurisdiction of the Supreme Court of Western Australia.

Chapter 4: Section 43 – Determinations may be enforced as orders of court

This chapter will provide an overview of the enforcement of adjudicators' determinations, pursuant to s 43 of the Act,[19] by the courts of Western Australia; both the Supreme Court and the District, and the jurisdiction in dealing with the recovery of debts, that are due and payable.

This chapter will examine what the Act stipulates, provide the background to the Act and conduct a limited statistical analysis of s 43 of the Act. This chapter will scrutinise the District Court case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*,[20] and ultimately the commencement of judicial review in the WASC.

The chapter will observe s 43 and the post-*State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, Section 43 and the Amendments to the Act, the cases post-amendments to the Act and the future of s 43.

Chapter 5: Section 46 (Review, limited right of) of the *Construction Contracts Act 2004* (WA) and the jurisdiction of the State Administrative Tribunal of Western Australia

This chapter focuses on an overview of the jurisdiction of the State Administrative Tribunal and the Courts of Western Australia, and their jurisdiction within s 46 of the Act.[21]

This chapter will examine the background to s 46 of the Act, s 17 of the SAT Act,[22] s 21 of the SAT Act,[23] and s 29 of the SAT Act.[24] This section will conduct a limited statistical analysis of the reviews of adjudicators' determinations, the decisions made and the dismissals and withdrawals by the SAT.

[19] Ibid.
[20] [2012] WADC 27, and [2012] WADC 60.
[21] Ibid s 46, Review, limited right of.
[22] *State Administrative Tribunal Act 2004* (WA), s 17(1).
[23] *State Administrative Tribunal Act 2004* (WA), s 21.
[24] *State Administrative Tribunal Act 2004* (WA), s 29.

The chapter will also discuss the first case before the SAT, *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture,*[25] and how decisions made by the SAT in reviewing an adjudicator's determination, such as the reckoning of time, have affected other adjudicators' determinations.

This Chapter will scrutinise the cases of *Moroney & Anor and Murray River North Pty Ltd*,[26] Adjudicator Riley, Member Dr De Villiers and s 31(2)(a) of the Act. The Chapter will also explore the WASCA, the case of *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*, and s 46 of the Act.

This Chapter will explore the *Construction Contracts Act 2004* (WA) and:

- Section 31(2)(a)(i) Adjudicator's function dealing with when a contract is not a construction contract and The *Construction Contracts Act 2004* (WA) and the Mining Exclusion Clauses;
- Section 31(2)(a)(ii) Adjudicator's function dealing with an application not served in accordance with s 26 of the Act, and will consider the case of *the MCIC Nominees Trust t/As Capital Projects & Developments and Red Ink Homes Pty Ltd,*[27] and the reckoning of time prescribed by the Act;
- Section 31(2)(a)(iii) Adjudicator's function dealing with the matter under dispute is subject to an order, judgment or other finding before an arbitrator or other person or a court or other body. The effect of s 31(2)(a)(iii) and the cases of *Moroney & Anor and Murray River North Pty Ltd,* [28] and *BGC Contracting Pty Ltd and Ralmana Pty Ltd T/A RJ Vincent & Co*;[29] and
- Section 31(2)(a)(iv) Adjudicator's function dealing with complexity.

The chapter will also explore Fraud and later the post Amendments to the Act.

Chapter 6: Jurisdictional error, judicial review of the *Construction Contracts Act 2004* (WA) and the jurisdiction of the Supreme Court of Western Australia

This chapter considers the judicial review of an adjudicator's determination, jurisdictional error and the *Construction Contracts Act 2004* (WA). The chapter will conduct a limited statistical analysis of the jurisdictional error, judicial review by the

[25] [2005] WASAT 269.
[26] [2008] WASAT 36 and [2008] WASAT 111.
[27] [2013] WASAT 177.
[28] [2008] WASAT 111.
[29] [2015] WASAT 128.

WASC, and explore the effect that the cases of *Craig v South Australia,*[30] and *Kirk v Industrial Relations Commission,*[31] had on the Act.

This chapter will discuss jurisdictional error and the *Construction Contracts Act 2004* (WA), and the matter of falling into jurisdictional error, and natural justice and procedural fairness. The Chapter will identify specific Western Australian matters relating to jurisdictional reviews, such as Section 32(3)(b) adjudication procedure dealing with consent, set off and counterclaims, and quantum meruit.

The chapter will also discuss several East Coast Model matters of judicial review and how they may affect the Act. The chapter also observes the recent High Court of Australia cases of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor,*[32] and *Maxcon Constructions Pty Ltd v Vadasz (No 2),*[33] and the matter of non-jurisdictional error of law on the face of the record.

Part 3 – Conclusion – The statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the SAT and the Courts.

The aim of part three of this research is to conclude the statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the SAT and the Courts and propose changes, and to identify areas for further research.

Part 3 has one chapter, it is:

- Chapter 7: The future of the Act, Conclusion and a proposal for change.

Chapter 7: The future of the Act, Conclusion and a proposal for change

The Chapter will look at the future of the *Construction Contracts Act 2004* (WA), the *Construction Contracts Amendments Act 2016* (WA), the Murray review on Security of Payments Laws conducted for the Commonwealth, Western Australia in 2018 and another 'review to improve security of payments for subcontractors in Western Australia's building and construction industry.' It will analyse the matter of non-jurisdictional error of law on the face of the record and the cases before the High Court of Australia.

This chapter draws on the preceding chapters to conclude and provides recommendations

[30] (1995) 184 CLR 163.
[31] (2010) 239 CLR 531; [2010] HCA 1.
[32] [2016] NSWCA 379 (HCATrans 226).
[33] [2017] SASCFC 2 (HCATrans 226).

and proposals for change for the future of the *Construction Contracts Act 2004* (WA), and areas for further research.

1.11. Conclusion

This thesis provides analysis and insight into the statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the State Administrative Tribunal and the Courts of Western Australia since the Act gained assent and came into operation in Western Australia on 1 January 2005.

The thesis has examined the Act, its history, the decisions made by the SAT and the Courts, and clarifies how an Adjudicator's determination can be rendered void by being set aside and dismissed.

Chapter 2

Security of payment legislation, the 'quick and dirty fix': The historical perspective

> Nevertheless, disputes may arise, despite everyone's best efforts to avoid them. A contract form with a built-in adjudication process provides a clear route. If a dispute cannot be resolved first by the parties themselves in good faith, it is referred to the adjudicator for decision.
>
> Sir Michael Latham
> Constructing the Team (1994)[34]

2.1. Introduction

The building and construction industry throughout Australia is prone to disputes. The disputes range from industrial disputes to payment disputes. Historically, industrial disputes throughout the late twentieth century gained the most media attention due to the strong arm tactics used by the more militant trade unions, such as the Building Workers Industrial Union, or later, the Construction, Forestry, Mining, and Energy Union (CFMEU). Industrial disputes made for far more interesting and entertaining news coverage by all forms of media outlets. The heady days of 'blitzkrieg type industrial action', numerous pay rise claims and other antics shaped the construction environment. This would culminate with the release of the Cole Report resulting from the establishment of a Royal Commission by the then Prime Minister of Australia, the Honourable John Howard OM AC.

The Honourable Justice Terence Rhoderic Hudson Cole RFD QC drew considerable attention to the behaviours of the unions and found that there were many forms of incongruous conduct that affected the construction industry. They included, amongst his list that covered over four pages: industrial action, or threats; harassment by union officials of a subcontractor; and union officials restricting a subcontractor's opportunity to obtain work.[35]

[34] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), 87.
[35] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry*, *Final Report* (2003) vol 1, [Summary.6.19]. (Justice Terence Rhoderic Hudson Cole).

But it is not the industrial disputes or the blitzkrieg type industrial tactics that are of concern to this thesis. It is the significance of eight small words, found on page 6 of Vol 1 of the Cole Report, located under 'Findings regarding conduct and practices', at paragraph 15(u), that stated the 'absence of adequate security of payment for subcontractors'.[36] Further, his Honour recommended the enactment of 'legislation to improve the security of payments to subcontractors'[37] and made recommendations for 'reform in relation to security of payments.'[38] Cole would recommend the inclusion of the Commonwealth to enact 'a Building and Construction Industry Security of Payments Act'[39] and that the Commonwealth undertake a review to evaluate 'the introduction of the rapid adjudication legislation'.[40]

All this would ensure that a contractor or sub-contractor had a mechanism for the management of the payment disputes, an adjudication process to reduce the costs associated with 'clawing back' their entitlement, and that their legal rights were preserved by allowing a right of review by the courts.

Cole argued for a Commonwealth approach to the issue, a more 'harmonious' approach than the adoption of State/Territory legislation. Instead, each State of Australia and Territory took a more 'Federalist' approach and enacted their own 'security of payment' legislation. Ultimately, this would leave Australia with two distinct models that would become known as the 'West Coast Model' and the 'East Coast Model'.

The idea of a 'harmonious' approach was by now nothing new to the building and planning industry. In 1998, a Joint Industry submission by the Development Assessment Forum (DAF) noted that:

> The success of the Australian Building Codes Board (ABCB) in harmonising Australia's building controls points the way forward. It's time we addressed some unfinished business, using the same discipline to harmonise development assessment procedures.[41]

While their issue was directed at 'development assessment procedures', the concept of

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[36] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry, Final Report* (2003) vol 1, [Summary.6.15(u)]. (Justice Terence Rhoderic Hudson Cole).
[37] Ibid [Summary.16.35].
[38] Ibid [Summary.17.36(n)].
[39] Ibid [Summary.115.Recomendation 116(n)].
[40] Ibid [Summary.115.Recomendation 114].
[41] *Development Assessment Forum (DAF)*, 'Unfinished Business - Prospects for an Intergovernmental Agreement on Development Assessment' (1998) *Joint Industry Submission*, 3. Development assessment is the procedure of the granting of approvals that are mandatory for changes in the use of land or whole divisions of land, the construction of new buildings, infrastructure or structures, and the reworking or the demolishing of existing buildings and structures.

'harmonisation' again started to gain momentum. The DAF argued that:

> In total, between governments in Australia, we have nine different sets of rules about development assessment - one for each of the Commonwealth, state and territory jurisdictions - as well as countless sub-systems operating in more than 700 councils and local authorities.[42]

They suggested a 'best practice, harmonised framework for development assessment be established by cooperation and agreement between all governments in Australia'.[43] The DAF explained that:

> Harmonisation is a coordinated, co-operative reform process by which Governments agree to review comparable legislation in a given field, and seek to achieve both:
>
> - a common national purpose in the most effective way possible; and
> - a balance between the recognition of unique regional interests and broader goals.
>
> Harmonisation improves a regulatory system by making sure that its component parts are designed to work together rather than in isolation. Harmonisation creates efficiency by simplifying control systems, eliminating inconsistencies and reducing overlap and duplication.

Perhaps a more 'harmonious' approach could be considered for payment disputes, but the States have never been able to agree to a combined approach as had been suggested by Cole, though it is likely to be what the classic liberalism philosopher and economist, Friedrich Hayek, termed a 'synoptic delusion'.[44]

2.2. Payment disputes and how the *Construction Contracts Act 2004* (WA) came into being.

Sir Michael Latham was right when he declared in his 1994 report to the British Government of the day, 'Constructing the Team, 'nevertheless, disputes may arise, despite everyone's best

[42] *Development Assessment Forum (DAF),* 'Unfinished Business - Prospects for an Intergovernmental Agreement on Development Assessment' (1998) *Joint Industry Submission*, 4.
[43] Ibid.
[44] Friedrich Hayek, *Law, Legislation and Liberty - A new statement of the liberal principles of justice and* political economy (Routledge, 1st Ed, 1998) vol 1, 14-15. A Synoptic delusion' is as Hayek stated; 'on the fiction that all the relevant facts are known to someone mind, and that it is possible to construct from this knowledge of the particulars a desirable social order. Sometimes the delusion is expressed with a touching naivete by the enthusiasts for a deliberately planned society, as when one of them dreams of the development of 'the art of simultaneous thinking: the ability to deal with a multitude of related phenomena at the same time, and of composing in a single picture both the qualitative and the quantitative attributes of these phenomena.'

efforts to avoid them'.[45] Disputes do arise, often with regular monotony.

Payment disputes are costly, and small contractors or sub-contractors often do not have the 'deep pockets' that the larger principal has. The larger principal often has greater access to a legal response that, given the high costs, could fundamentally put a contractor or sub-contractor into administration. As Cole articulated, most contractors or sub-contractors are in an 'inadequate financial position to pursue the claim through the court system'.[46] Construction contracts have historically been skewed towards the principal and thus restraining the contractor or sub-contractor from 'playing on a level playing field'. The concept of 'level playing field' is in itself the dream, an academic economic rationalist view of how business should be managed in perfect conditions. The reality is somewhat different. The construction industry has never offered those conditions. The contracts that legally bound the parties often contained the now prohibited provisions that declared that a party will get 'paid when they get paid' provisions. Often these provisions would express that the payments may be made perhaps in 90 days or longer, or 'you will get paid when we get paid'.

At the Royal Commission it became clear that not all the blame and actions could be attributed to the CFMEU. On the contrary, the CFMEU would report to the Commission:

> Principal contractors frequently fail to make payments due under contracts at the time which they are due. Sometimes there are legitimate disputes as to the proper performance of contracts by the sub-contractor; in other cases the principal simply withholds payment for spurious reasons, knowing that the subbie does not have the means to pursue legal remedies or that the time and cost of litigation is not justified by the amount owed. The situation is further complicated by the use of verbal agreements, particularly in relation to variations. This is one of the major reasons for the high level of insolvencies in the building and construction industry.[47]

All these variables give construction contracts a perfect set of conditions for disputes to arise. Eilenberg[48] noted the words of the now late Brian W Totterdill, international author, UK

[45] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), 87.
[46] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry, Final Report* (2003) vol 8, [Chap 14.23]. (Justice Terence Rhoderic Hudson Cole).
[47] Ibid.
[48] Dr Ian M Eilenberg, a building consultant, mediator and arbitrator in the area of building and construction, lectured Construction Management at the Royal Melbourne Institute of Technology where the author of this Thesis, was undertaking a Master of Project Management and was introduced into conflict resolution, by Dr Eilenberg, as part of his studies.

arbitrator, adjudicator, and mediator, who stated:[49]

> Everyone who is involved in construction, whether as a contractor, designer or employer, will sooner or later be involved in a claim which will result in a dispute.

Eilenberg encapsulated the view held in the 1988 report by the Australian Federation of Construction Contractors (AFCC), who were firm in their belief that:

> Construction industry claims and disputes have now become an endemic part of the construction industry.[...] It was found that the problem of claims and disputes in the construction industry is a worldwide phenomenon.*[50]*

He would quote what a Melbourne solicitor, Michael Ryibidan, had written, that 'at some stage, every builder is going to get into a dispute with a client, which finishes up in legal action of some sort'.[51]

Ryibidan observed the comment made by Lord Browne-Wilkinson of the House of Lords, in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*,[52] who held that 'Building contracts are pregnant with disputes'.[53] Lord Browne-Wilkinson would go on to say that:

> The disputes frequently arise in the context of the contractor suing for the price and being met by a claim for abatement of the price or cross-claims founded on an allegation that the performance of the contract has been defective. Say that, before the final instalment of the price has been paid, the employer has assigned the benefits under the contract to a third party, there being at the time existing rights of action for defective work.*[54]*

But disputes have never been restricted to the United Kingdom (UK), or the east coast of Australia. Professor Peter Love et al. of the Curtin University of Technology and Construction Dispute Resolution Research Unit Department of Building and Construction stated that:

> Disputes have become an endemic feature of the Australian construction industry even though considerable efforts have been made by professional bodies, and government, particularly through the instigation of royal commissions, to curb their occurrence and

[49] Ian Eilenberg, *A students guide to Conflict Resolution in Construction Contracting* (Draft), (Royal Melbourne Institute of Technology, Draft, 10-1999), 7.
[50] Ian Eilenberg, *A students guide to Conflict Resolution in Construction Contracting* (Draft), (Royal Melbourne Institute of Technology, Draft, 10-1999), 7.
[51] Ibid, 8.
[52] [1993] ABC.L.R. 07/22.
[53] Ibid 6 [48].
[54] Ibid.

> improve its overall performance.[55]

What was beginning to be highlighted was the cost of the disputes.

Professor Evans noted that 'the estimated cost of non-residential construction disputes is approximately 8.4% of the contract price and the estimated total cost of resolving these disputes ranges from $560 million to $840 million per year'.[56] He also noted that if many 'indirect costs (legal services, experts, consultants) are added to these avoidable costs then the total wasted expenditure exceeds 7 billion dollars per year'.[57]

Professor Peter Love et al. added:

> Both parties feel the pain of a dispute when it ends up in the courtroom. It's a very emotional experience, and the costs can be unbelievable. There is only one winner, the lawyers. We try to avoid them all will at all costs.[58]

Professor Peter Love et al. further stated:

> A significant number of disputes are thus settled using alternative dispute resolution methods such as adjudication and arbitration and mediation. In addition, litigation proceedings were predominately found to occur between clients and contractors.[59]

For many years, arbitration met the needs of the building and construction industry dealing with disputes within the industry. Arbitration was always regarded as more flexible than litigation; the *Commercial Arbitration Act 1985*[60] had a limited right of review, and was cheaper and gave a quicker result.

2.3. Arbitration

Arbitration is said to be: 'the system for final determination of disputes in a judicial manner by

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[55] Peter Love et al, 'An Exploratory Study of Project Dispute Pathogens, Research Paper, School of the Built Environment', (2008) *Curtin University of Technology and Construction Dispute Resolution Research Unit Department of Building and Construction*, City University of Hong Kong, 2.
[56] Philip Evans, 'Avoidance of construction disputes through legal knowledge', (2012), *Queensland Roads*, Ed 12 – October 2012, 13-14.
[57] Ibid.
[58] Peter Love et al, 'An Exploratory Study of Project Dispute Pathogens, Research Paper, School of the Built Environment', (2008) *Curtin University of Technology and Construction Dispute Resolution Research Unit Department of Building and Construction*, City University of Hong Kong, 9.
[59] Philip Evans, 'Avoidance of construction disputes through legal knowledge', (2012), *Queensland Roads*, Ed 12 – October 2012, 13-14.
[60] *Commercial Arbitration Act 1985* (WA) later repealed and superseded by the *Commercial Arbitration Act 2012* (WA).

a private tribunal constituted for the purpose by the agreement of the disputants'.[61] Rana SC suggested that the roots of Arbitration were founded in 'historic times'[62] when communities would attempt to resolve disputes within or between other communities in surrounding areas. She says:

> Of all of mankind's adventures in search of peace and justice, arbitration is amongst the earliest. Long before law was established or courts were organized, or judges had formulated principles of law, man had resorted to arbitration for resolving disputes.[63]

However, that view would change over time as the commercial world became more sophisticated. In 1992, Then Federal Court Justice Robert French, in a speech addressed to the annual conference of the Institute of Arbitrators and Mediators – Australia described the historical view of arbitrators as below:

> In times not so far in the past, the arbitrator was seen in some circles as a dubious, below stairs figure, requiring close curial supervision, a quasi-judicial equivalent of Uriah Heep. He operated what was regarded by legal elites as second-rate system of backyard justice.[64]

Arbitration, remarked Astor and Chinkin, 'has been used in commercial disputes in Australia from the beginning of white settlement. The Australian colonies inherited the English *Arbitration Act 1697.'*[65]

At the Federation of Australia, the forefathers of the Australian Constitution recognised the need for arbitration, pursuant to s 51(xxxv):

> The Parliament shall, subject to this Constitution, have the power to make laws for the peace, order, and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.[66]

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[61] Peter Butt, *et al, LexisNexis – Concise Australian Legal Dictionary*, (LexisNexis Butterworths, Chatswood NSW, 4th Ed, 2011), 34.
[62] Rashda Rana, *Alternative Dispute Resolution; A handbook for In-House Counsel in Asia* (Lexis Nexus, 1st Ed, 2014), 153.
[63] Ibid.
[64] Robert Shenton French AC, 'Arbitration', Speech delivered at the annual conference of the Institute of Arbitrators and Mediators – Australia, in Canberra, in May 1992, recounted at an - Bar Association CPD Presentation dated 11 March 2009, 8.
[65] Hillary Astor and Christine Chinkin, *Dispute Resolution in Australia*, (LexisNexis Butterworths, 2nd ed, 2002), 299.
[66] *Commonwealth of Australia Constitution Act* (Cth) s 51(xxxv).

As Sourdin distinguishes, '[A]rbitration has been used as a form of dispute settlement for more than a century in Australia.'[67] In the United Kingdom (UK) arbitration is according to Turner, 'an accepted means of finally resolving disputes in a wide range of areas of commercial and other activity, be it commodities or insurance, maritime matters or rent disputes, commerce or construction.'[68]

For many years, in Australia, arbitration met the needs of dealing with disputes in the building and construction industry. Arbitration was considered as more flexible than litigation; it gave statutory protection, was cheaper and gave a quicker result.

Hence, by the latter part of the 20th century, most building and construction contracts contained arbitration clauses, aimed at keeping the disputes out of the courts. Fitch confirms:

> The construction industry appears to favour the resolution of disputes in the private dignity of arbitration proceedings. The arbitrator needs to have knowledge and understanding of the procedures which apply to the conducting of arbitration and a heightened sense of natural justice.[69]

The Chief Justice of Western Australia, the Honourable Wayne Martin AC, noted that each of the states of Australia had their Arbitration Acts.[70] He commented:

> [T]he legal regime governing commercial arbitration in Australia could be metaphorically described as an elaborate china vase, fractured by our federal system of government into a number of fragments, one in each State and Territory, with another fragment pertaining to international arbitration.

Federalism, he stated, would have an effect on arbitration within Australia:

> [O]ne of the weaknesses of our federal system of government was apparent in the different legal regimes governing commercial arbitration in each State and Territory, although each, broadly speaking, had their origins in the legal regime applicable in England.[71]

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[67] Tania Sourdin, *Alternative Dispute Resolution*, (Thompson, 2nd ed, 2005), 37.
[68] Ray Turner, *Arbitration Awards – A practical approach*, (Blackwell Publishing Ltd, 1st Ed, 2005), xx.
[69] Ronald Fitch, *Commercial arbitration in the Australian construction industry*, (The Federation Press, 1st Ed, 1989), 2.
[70] *The International Arbitration Act 1974* (Cth), *Commercial Arbitration Act 1986* (ACT), *Commercial Arbitration Act 1984* (NSW), *Commercial Arbitration Act 1985* (NT), *Commercial Arbitration Act 1990* (Qld), *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA), *Commercial Arbitration Act 1986* (Tas), *Commercial Arbitration Act 1984* (Vic) and *Commercial Arbitration Act 1985* (WA).
[71] Chief Justice Wayne Martin AC, at the Western Australian launch of the 'Australian Commercial Arbitration' by Hockley, Croft, Hickie and Ho at the Supreme Court of Western Australia on Tuesday, 03 June 2014, 2,3.

His Honour Chief Justice Spigelman and his Honour Justice Mason (President) in *Raguz v Sullivan*[72], held, at [50]:

> Despite continuing professional and judicial hostility, the commercial community has continued to support arbitration. If necessary, it was prepared to seek out legal regimes more sympathetic to party autonomy and readier to recognise the reasons lying behind the continued popularity of arbitration in particular fields.[73]

Overtime there grew an innate sense throughout the building and construction industry that arbitration was no longer considered a relevant method of alternative dispute resolution. Astor and Chinkin found that since the 1st edition of their book (1992) there was discontent with arbitration in the construction industry. They state: 'it is a reasonable perception that arbitration has broken down as a cheap and effective means of resolving construction disputes.'[74] Further, they add: 'arbitration remains theoretically flexible and able to be adapted to the parties' needs, but too often it seems these advantages have been lost and it has become increasingly little more than the 'privatisation' of litigation.'[75]

However, as Coggins noted:

> The traditional dispute resolution methods of litigation and arbitration available to contractors experiencing payment problems have proven too costly and time-consuming for most trade contractors to even contemplate with their limited resources.[76]

His Honour Chief Justice Spigelman, at the Opening of Law Term Dinner on 2 February 2009 stated that:

> the focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost-effective mode of resolution of disputes.[77]

Najar further reinforced the view of his Honour Chief Justice Spigelman:

> Arbitration is no longer fulfilling the basic need of business customers for early and

[72] [2000] NSWCA 240.
[73] *Angela Raguz v Rebecca Sullivan & Ors* [2000] NSWCA 240, 17 [50].
[74] Hillary Astor and Christine Chinkin, *Dispute Resolution in Australia*, (LexisNexis Butterworths, 2nd ed, 2002), 307.
[75] Ibid.
[76] Jeremy Coggins, *A Proposal for Harmonisation of Security of Payment Legislation in the Australian Building and Construction Industry*, (PhD Thesis, the University of Adelaide, 2012), 1.
[77] James Spigelman , (The Law Society of New South Wales - Opening of Law Term Dinner 2009, Sydney, 2 February 2009), 17.

> effective resolution of disputes. We are increasingly turning elsewhere, to mediation and other forms of ADR.*[78]*

In 2006, James[79] acknowledged;

> The process of arbitration seems to have declined markedly over the last ten years. That decline may well be deepening as a result of the rise of adjudication. Since its commencement in 2000 when the Building and Construction Industry Security of Payments Act 1999 (NSW) came into operation, adjudication as a statutory dispute resolution procedure in the building and construction industry has spread from New South Wales to most of the States and Territories.*[80]*

In the UK, arbitration was also in decline, though its decline had occured earlier. Fenn et al. found that:

> The number of construction disputes, while much smaller, has followed the same pattern; unconfirmed figures put the construction arbitrations at in excess of 600 in the late 1980's falling to 350 in 1991 and levelling out at ~170.*[81]*

The reduction in '[T]he number of construction arbitrations has also reflected the economic climate; construction output has declined markedly since 1988'.[82] At that time, the USA was also becoming critical of Arbitration.[83]

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[78]Najar JC (2008) "User's View on International Arbitration", (Speech delivered at Clayton Utz and the University of Sydney International Commercial Arbitration Lecture, Sydney 06 November 2008). Quoted by Professor Doug Jones in The Arbitrator & Mediator, The Institute of Arbitrators & Mediators Australia (IAMA) Vol 28. Number:1 Date: Oct 2009, 43.

[79] Mr Laurie Edmond James, was made a Member (AM) in the General Division of the Order of Australia, for significant service to the law, particularly alternative dispute resolution, as a practitioner, and to professional organisations.

[80] Laurie James, 'New Directions in Arbitration', (2006) *The Arbitrator & Mediator, The Institute of Arbitrators & Mediators Australia,* Vol 25. Number: 2 Date: December 2006, 13.

[81] Peter Fenn, Michael O'Shea and Edward Davies, *Dispute Resolution and Conflict Management in Construction - An international review* (E & FN Spon. 1ST Ed, 1998), 69.

[82] Ibid.

[83] Vincent King, *Constructing the Team: a U.S. Perspective,* (In D. A. Langford (Ed.), CIB working commission 65 organization and management of construction symposium: Conseil International du Bâtiment. London: E&FN Spon), 2. American lawyer, Vincent. King (JD) from Minneapolis in the State of Minnesota in the United States of America (US), would comment that like the UK the US was also becoming critical of Arbitration. He opined that; Arbitration, which until recently has been a favoured method of resolving such disputes, is under attack in the UK because of its "perceived complexity, slowness, and expense". Similar criticisms have been leveled in the US, where arbitration for many years has been well entrenched as the preferred method of private construction dispute resolution. Worse still, he claimed that in the US; a significant number of arbitrators" admit to not following either the law or the parties' contract in rendering their awards. Although an arbitration award can be set aside because the arbitrators exceeded their authority (which presumably includes the duty to apply the parties' contract including its governing law provisions), in practise since the arbitrators need not explain their decision it is very difficult to establish this ground as a basis for vacating the award.

While many, such as Rana and Sanson, would argue that 'arbitration is the single most preferred method of alternative dispute resolution in International commerce',[84] it was no longer being seen as a suitable tool or mechanism to resolve construction disputes. There had to be a far cheaper, quicker and more efficient mechanism with the associated legislation to rapidly deal with payment disputes within the construction industry. By 1994, the UK would start to change the direction in how payment disputes would be resolved.

2.4. The UK Experience

In 1994, Sir Michael Latham, a former British Conservative Member of Parliament, was jointly commissioned by the UK Government and the Construction Industry to undertake a report on the industry. His report would be of considerable influence in Australia and is still to this day a most dynamic report on the construction industry.

His general comments of the construction industry underpin how vital the industry was in the UK. He stated of the construction industry:

> There is no shortage of statistics about the construction industry. It contains 200,000 contracting firms, of which 95,000 are private individuals or one person firms. Only 12,000 contracting firms employ more than seven people. (Source: DOE, 1992. All figures are approximate) About 45% of registered architects are sole principals or employ five qualified staff or less (source: RIBA, 1993). The value of output in the whole industry in 1993 was €46.3 billion, which represented about 8% of Gross Domestic Product (source: DOE). Large construction firms (employing 80 people or more) carried out over 40% of the workload by value in 1992. The industry is vital to the economy, most people in the contracting sector work alone, or in small firms, but a limited number of large firms undertake a substantial proportion of the work.[85]

Sir Michael may have well have been discussing the construction industry within Australia, perhaps Western Australia. He reflected that '[T]he industry remains dependent upon wider economic stability'.[86] The point, certainly brought home in the UK, is not lost in Australia. His general observations deemed that:

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[84] Rashda Rana and Michelle Sanson, *International Commercial Arbitration*, (Thomson Reuters, 1st Ed, 2011), 15.
[85] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), 7.
[86] Ibid 8.

1. If the flow of work to the industry is less than the capacity available, a number of consequences follow:-
    a. Firms will reduce their staff, or may close altogether;
    b. Fee bids by consultants will become extremely keen, and may not allow the successful bidder to make any profit out of the commission;
    c. Tender prices submitted by contractors will be uneconomically low, with adverse effects on all participants in the construction process.[87]

In his comments relating to the recession that had gripped the UK and was strangling its economy, he was firm:

> The recession of recent years has hit the construction industry very hard, though hopefully, some improvement in trading conditions is now beginning. It affected the construction industry more deeply than other industries.[88]

Alas, Sir Michael said, 'if the economy is going wrong, little will go right in the construction industry'.[89] Economic growth is in return tied to the amount of construction work available, therefore 'the level of domestic construction workload is ultimately determined by Government economic policy. The industry can redistribute the work available amongst its participants through normal competitive forces'.[90]

Like Australia, there had been strong support within the construction industry to do away with the archaic and inequitable contract clauses and conditions that had filled the Standard Forms of Contract of Government departments. These included the now infamous 'pay when paid' clauses. He sought to encourage the 'Government to go faster and further and introduce legislation to ban 'pay when paid' clauses, and also to impose penal interest rates on late payment'.[91]

Sir Michael also noted of concern pertaining to issues of insolvency within the construction industry and also the lack of security of payment for contractors and subcontractors.

Insolvency & Security of Payment

In 1994 there was a substantial concern in the construction industry about the high levels of

[87] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), 7.
[88] Ibid 9.
[89] Ibid.
[90] Ibid.
[91] Ibid 34.

insolvency and the security of payment. Once the work has started, payments need to be made to ensure that all parts of the chain are delivered their due. The chain includes main contractors, subcontractors and 'and so on down the chain'.[92] Sir Michael categorically states that it 'makes the exposure of different parts of the process to the insolvency of one participant particularly serious'.[93] The chain will collapse and ultimately:

> If the main contractor fails, subcontractors will be treated as unsecured creditors in respect of work which they have already carried out (or purchased equipment), whether on or off-site. Even their retention monies will be at risk since domestic subcontracts make no provision for secure trust funds.[*94*]

The reality, at its harshest, is:

> If the main contractor becomes insolvent, is that the primary or secured creditors of the main contractor will receive some monies which are intended for and owing to the subcontractor for work carried out. If the client fails, the main contractor, and potentially also the subcontractors, will be disadvantaged.

Sir Michael observed that 'It is absolutely fundamental to trust within the construction industry that participants should be paid for the work which they have undertaken.'[95] But Latham was certainly realistic enough to understand that:

> However diligently clients, contractors or subcontractors check on each other, the causes of the failure of any participant may be unrelated to the particular contract, or even to work in this country. In a difficult trading climate for construction, firms will undertake work for low (or no) margins, and will not endanger their chances of being selected by demanding prepayment or indemnities, even if they are aware that there might be a payment problem.[*96*]

Not only does the prospect of insolvency and how to deal with the security of payment hover above the heads of those involved, like the 'sword of Damocles', but where all these variables come together, the propensity for dispute increases. Nevertheless; disputes may arise.[97]

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[92] Ibid 93.
[93] Ibid.
[94] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), 93.
[95] Ibid.
[96] Ibid 94.
[97] Ibid 87.

Disputes

Sir Michael noted that:

> When contracts are won on a price which can only produce a loss for the main contractor, the likelihood of a contract dominated by claims, and of disputes between the main contractor and subcontractors, is extremely high.[98]

Sir Michael concludes that, 'the best solution is to avoid disputes'. But when disputes arise, how are they best handled? Costs for going to court are prohibitive and often unaffordable for small sub-contractors. They can take a considerable time to be resolved and often the amounts spent on lawyers outweigh the amount retrieved.

A point not missed by Lord Woolf (as he was then). Lord Woolf, who was, from 1996 until 2000, the Master of Rolls and in 2000 appointed as the Lord Chief Justice of England and Wales, said of the court system:

> The defects I identified in our present system were that it is too expensive, in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under-resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown, and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no-one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties and not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.[99]

Add to this 'long before law was established, or courts were organized, or judges had formulated principles of law, man had resorted to arbitration for resolving disputes'[100] arbitration is no longer the 'weapon of choice' in resolving construction disputes; the solution lies in the contract and 'a contract form with a built-in adjudication process provides a clear

[98] Ibid 59. Latham also noted that the environment of the US construction industry has; become extremely adversarial and we are paying the price ... If the construction industry is to become less adversarial, we must re-examine the construction process, particularly the relationship between contractor/subcontractor. A positive alliance of these parties constitutes an indispensable link to a successful project ... Disputes will continue as long as people fail to trust one another.

[99] Robert Fenwick Elliott, *Construction Dispute Resolution: The New Regime* (2010) <http://feg.com.au/papers/Paper%20-%20Construction%20Dispute%20Resolution.htm>.

[100] Ibid.

route'.[101]

Adjudication

Sir Michael recognised the need for alternative methods to deal with disputes and ensure that they did not fall into litigation. But he did note that within the UK and the construction industry:

> There is considerable dissatisfaction with arbitration within the construction industry because of its perceived complexity, slowness and expense. The arbitrators themselves favour reforms to the procedures which will allow for less formality and speedier hearings.[102]

The view advocated by Uff affirmed the opinion of Sir Michael: 'by the 1990s arbitration was seen as unduly slow and expensive and incapable of providing an effective remedy for contractors and sub-contractors who were unable to obtain payment for work carried out'.[103]

Although Latham recognised that 'Arbitration has a continuing part to play in dispute resolution within the construction industry'[104], he felt it more prudent that 'if a dispute cannot be resolved first by the parties themselves in good faith, it is referred to the adjudicator for decision.'[105]

In the Executive Summary of the Report, [at 26], he unpretentiously asserted, 'adjudication should be the normal method of dispute resolution (Chapter 9, paragraph 9.14)'.[106]

At Recommendations 26.1 – 26.5: Adjudication of the Report, Latham recommended: 'that a system of adjudication should be introduced within all the Standard Forms of Contract (except where comparable arrangements already exist for mediation or conciliation) and that this should be underpinned by legislation.[107]

Sir Michael also recommended that:

1. There should be no restrictions on the issues capable of being referred to the

[101] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), 87.
[102] Ibid 90.
[103] John Uff, *Construction Law – Law and Practice relating to the Construction Industry,* (Thompson Reuters, 10th ed, 2009), 65. (John Uff is a UK Barrister, Chartered Engineer and Academic).
[104] Ibid 90.
[105] Ibid 87.
[106] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), viii.
[107] Ibid 91.

adjudicator, conciliator or mediator, either in the main contract or subcontract documentation.

2. The award of the adjudicator should be implemented immediately. The use of stakeholders should only be permitted if both parties agree or if the adjudicator so directs.
3. Any appeals to arbitration or the courts should be after practical completion, and should not be permitted to delay the implementation of the award unless an immediate and exceptional issue arises for the courts or as in the circumstances described in (4).
4. Resort to the courts should be immediately available if a party refuses to implement the award of an adjudicator. In such circumstances, the courts may wish to support the system of adjudication by agreeing to expedited procedures for interim payments.
5. Training procedures should be devised for adjudicators. A Code of Practice should also be drawn up under the auspices of the proposed Implementation forum.[108]

Equally concerning for the industry was the conclusion of Sir Michael Latham, cited through a paper by a Mr Roger Knowles, (Chairman of James R Knowles, Construction Contracts Consultants), who observed that:

> For disputes settled by these methods, appeals and reference to the High Court should not be permitted under any circumstances, as it is the constant spectre of appeal which conditions the manner in which many arbitrations are conducted and which has emasculated the whole process.*[109]*

In 1996, the UK Government introduced the *Housing Grants, Construction and Regeneration Act* 1996 (HGCR Act). The Bill was deliberated and widely debated in the House of Commons. The HGCR Act, as Davey noted: 'brought in the right to adjudicate and also introduced a contractual payment mechanism'.[110]

Sir Peter Coulson, the former Justice of the High Court, Queen's Bench Division, Bencher of Gray's Inn, found that the Bill was also widely debated in the House of Lords. He asserted that

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[108] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), 91.
[109] Ibid 88.
[110] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >

Lord Ackner said of the constant disparagement:

> What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of 'pay now, argue later', which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts.[111]

It would be Lord Ackner who would coin the now infamous term in the House of Lords about adjudication, as being, the 'quick and dirty fix'.[112] Lord Ackner found that:

> What is being proposed here is a speedy, fast-track arbitration which produces a binding conclusion, not open to any challenge after practical completion, but fixed and firm for all time in a wholly unrealistic timescale.[113]

While the HGCR Bill received Royal Assent in July 1996; there were still the fundamental concerns that were being raised by Lord Ackner and many others. The trepidations would result in 'decisive intervention', and it became evident that additional consultation would be required. The Department of the Environment would send out 'a consultation paper, seeking responses as to the nature and extent of the scheme'.[114]

Eventually, the concerns of Lord Ackner and the others were laid to rest, and a new adaptation of the scheme was drafted. As Riches and Dancaster acknowledged, the newly drafted and adopted HGCR Act:

> Became operative on 1 May 1998 in England, Wales and Scotland (01 June 1998 for Northern Ireland). Any construction contract formed after that date had to have the new right to adjudication incorporated in the contract in a form which satisfied the requirements of section 108 of the Act or it would be incorporated by default with the provisions of the Scheme.[115]

No longer was an adjudicator's determination be held to be 'fixed and firm for all time in a wholly unrealistic timescale' but it could be 'challenged'. Justice Sir Peter Coulson

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[111] Peter Coulson, *Coulson on Construction Adjudication* (Oxford University Press, 2nd ed, 2011), 12.
[112] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >
[113] Peter Coulson, *Coulson on Construction Adjudication* (Oxford University Press, 2nd ed, 2011), 12.
[114] Ibid.
[115] John Riches and Christopher Dancaster, *Construction Adjudication*, (Blackwell Publishing, 2nd ed, 2004), 3.

acknowledged:

> The concepts of arbitration and adjudication had been distinguished, and the scheme allowed for a decision which was binding and had to be complied with, although it could be challenged either in arbitration or in the courts.[116]

Acceptance of adjudication was very slow.[117] To seek adjudication, the parties 'had to both get into contract and get into dispute after 1 May 1998,[118] and as Riches and Dancaster comment; 'as many construction practitioners know, it is probably easier in the construction industry to find oneself in dispute than in contract'.[119]

The change to the acceptance of adjudication in the UK would come through the courts. The seminal case would be *Macob Civil Engineering Ltd v Morrison Construction Ltd*[120]. In *Macob*, the adjudicator determined that Morrison, the respondent, should pay £302,366.34 plus VAT, interest, and fees. The respondent, however, disputed the decision and argued that the 'decision was invalid'[121] and breached the regimes of natural justice. His Honour Justice Dyson upheld the decision of the adjudicator and indicated that it was enforceable, but at the same time, gave notice to adjudicators that any injustices were to be circumvented.

In 2004, after working in the UK, Australian construction Barrister and long-time construction disputes commentator Robert Fenwick Elliot observed that since the enactment of the HGCR Act:

> The effect of the legislation was dramatic, after a slowish start, there are now in the UK many times more adjudications than arbitrations and litigation combined. The reaction of the industry has been positive; most parties – even losers – reckon that the process produces a result that is at least as fair as the traditional system.[122]

Several years after the release of Latham's report, it would find its way across the Atlantic Ocean[123] and also to Australia.

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[116] Peter Coulson, *Coulson on Construction Adjudication* (Oxford University Press, 2nd ed, 2011), 12.
[117] John Riches and Christopher Dancaster, *Construction Adjudication*, (Blackwell Publishing, 2nd ed, 2004), 4.
[118] John Riches and Christopher Dancaster, *Construction Adjudication*, (Blackwell Publishing, 2nd ed, 2004), 4.
[119] Ibid.
[120] [1999] BLR 93.
[121] Peter Coulson, *Coulson on Construction Adjudication* (Oxford University Press, 2nd ed, 2011), 14.
[122] Robert Fenwick Elliott, *Construction Dispute Resolution: The New Regime* (2010) <http://feg.com.au/papers/Paper%20-%20Construction%20Dispute%20Resolution.htm>.
[123] Vincent King, *Constructing the Team: a U.S. Perspective*, (In D. A. Langford (Ed.), CIB working commission 65 organization and management of construction symposium: Conseil International du Bâtiment. London: E&FN Spon), 2. It was picked up by an American lawyer, V. King (JD) from Minneapolis in the State of Minnesota, who would comment; There are interesting parallels as well as interesting differences between the

2.5. Australia and the Cole Report

Back in Australia, by 2003, national issues within the construction industry were coming under constant scrutiny. The then Prime Minister of Australia, the Honourable John Howard OM AC, established a Royal Commission to be 'the first national review of the conduct and practices in the building and construction industry in Australia'.[124]

The Commonwealth would appoint the Honourable Justice Terence Rhoderic Hudson Cole RFD QC, a former judge of the Court of Appeal of New South Wales and Deputy Judge Advocate General[125] in the Australian Defence Force, to conduct the Royal Commission. Commissioner Cole's role was:

> 'to inquire into and report on the building and construction industry throughout Australia. It was not a Commission created to inquire into practices and conduct in each State and Territory. In order to obtain a national perspective of the matters identified in the Terms of Reference, however, it was necessary to obtain information and material from each State and Territory. One major way in which that was done was by holding hearings in New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, and the Northern Territory. Matters arising in the Australian Capital Territory were dealt with during the New South Wales hearings.*[126]*

Commissioner Cole found that 'the findings demonstrate an urgent need for structural and cultural reform'.[127] He noted the state of the industry to be as follows:

> 2. The building and construction industry is critical to welfare and prosperity in Australia. The total production of the industry in 2001-2002 was $59.7 billion of which $40.7 billion was within the scope of my Letters Patent. In 2001-2002 it directly accounted for 5.5 percent of Australia's gross domestic product, and 7.5 percent of employment. Indirectly it has a much greater impact. Every Australian business and every Australian citizen uses the built environment.

problems identified and solutions recommended in Sir Michael Latham's Report, Constructing the Team, and the state of the US Construction Industry in the mid-1990s. The parallels support the conclusion that the problems facing the construction industry worldwide are universal.

[124] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry, Final Report* (2003) vol 1, [Summary.3]. (Justice Terence Rhoderic Hudson Cole).

[125] The Honourable Justice Terence Rhoderic Hudson Cole RFD QC, would attain the rank of Commodore during his service in the Royal Australian Naval Reserve. In 2008, he was again appointed by the Commonwealth of Australia to lead the enquiry into the loss of the HMAS Sydney(II) that was sunk in WW2.

[126] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry, Final Report* (2003) vol 2, [4.27]. (Justice Terence Rhoderic Hudson Cole).

[127] Ibid vol 1 [Summary.3].

3. Productivity growth in the building and construction industry was less than the average for the market sector over the past five years. Were productivity growth to match that of the market sector, economic modelling shows that the accumulated gain in real gross domestic product between 2003 and 2010 would approximate $12 billion. All industries would benefit from an increase in output as a result of the reduction in the cost of building and construction.*[128]*

The terms of reference (TOR) given to Commissioner Cole included many areas and issues within the building and construction industry, such as industrial relations about which he dryly noted; 'Thus, industrial relations in the industry are based upon the notion of engendering surrender by the capacity to cause severe economic loss'.[129] There were three major sectors that he was asked to observe. These were:

(a) multi-unit and high-rise residential developments;

(b) non-residential buildings, such as office blocks, shopping centres, retail premises, educational institutions, and hospitals; and

(c) engineering construction work.*[130]*

The TOR did not include 'the building of single dwelling houses unless they are part of a multi-dwelling complex'.[131]

He was also asked to examine the issue of 'security of payment'. He stated:

1. The term 'security of payment' refers to attempts to redress a consistent failure to ensure that participants in the building and construction industry are paid in full and on time for the work they have done, even though they have a contractual right to be paid.*[132]*

He observed that at a national level:

111. The security of payment problem in the building and construction industry is exacerbated by the absence of an effective adjudication and enforcement mechanism in relation to disputes over progress payments, and the high cost and

[128] Ibid [Summary.3.2&3].
[129] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry, Final Report* (2003) vol 3, [1.22.66]. (Justice Terence Rhoderic Hudson Cole).
[130] Ibid [2.19.53-4].
[131] Ibid [2.19.54].
[132] Ibid.vol 8, [14.229.1].

> long delay in pursuing payment claims through the court system.[133]

Commissioner Cole found that:

> Security of Payment in the Building and Construction Industry throughout Australia remains one of the most significant and controversial issues impacting the success or failure of any party working in the construction industry. In fact, we believe it would be fair to say that despite endeavours to date to remedy Security of Payment in some states, in general, Security of Payment practices in this industry throughout Australia remain barbaric and definitely unfair. For that reason, we seek your assistance in taking up the initiatives outlined in this Discussion Paper to reform Security of Payment practices in the industry.[134]

The problem he found resulted from four main issues. They were:

(a) the operation of 'rogue' builders, who deliberately delay or avoid the payment of subcontractors;

(b) builders using non-payment of existing claims as a bargaining tool to reduce subsequent claims;

(c) builders who are in financial difficulty and do not have the cash flow to pay subcontractors; and

(d) builders who become insolvent and cannot pay the full amounts owing to their creditors, including subcontractors.[135]

Commissioner Cole noted that problems related to the security of payment were not 'confined to projects undertaken by rogue or insolvent builders. They can arise on projects involving some of the largest contractors in Australia'.[136] He noted the comment made by the Civil Contractors Federation (CCF) that ''unfortunately, tactics of deliberately delaying payments in this industry is not limited to rogue builders or head contractors in the industry and is now, in fact, a common practice throughout the contract chain commencing with the client'.[137] Often problems also arose as a consequence of 'building contractors entering into an unfavourable

[133] Ibid vol 3, [5.223.111].
[134] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry, Final Report* (2003) vol 8, [14.227]. (Justice Terence Rhoderic Hudson Cole).
[135] Ibid [14.231.10].
[136] Ibid. [14.231.11].
[137] Ibid.

contract with a client'.[138] The underpayment of claims, was another issue; 'where less than the amount is paid in the knowledge that the cost and time taken to recover the debt through the Courts is too long and expensive to be worthwhile'.[139]

The Commission found evidence in the case of Cairns Central, where in the construction of a shopping centre in Cairns, in 1996 – 97, several subcontractors went into 'liquidation or administration'[140] due to disputes between them and Multiplex Constructions Pty Ltd. He found that numerous subcontractors were owed considerable amounts of money and 'these disputes extended over a significant period; and 'there were no suitable mechanisms available for resolving them satisfactorily'.[141]

Several subcontractors sought legal counsel to try to recoup monies owing, only to be told that 'the legal costs would be substantial, and would almost invariably outweigh the benefit received.'[142] Cole observed that the best defence that a rogue builder has is the threat of 'protracted and expensive litigation'[143] as most subcontractors do not have sufficient financial resources to undertake such action.

As far as the states were concerned, it was only NSW that had legislated the *Building and Construction Industry Security of Payment Act 1999* (NSW) and Victoria with the *Building and Construction Industry Security of Payment Act 2002* (Vic.) had addressed the issue. He found; 'neither the Commonwealth, nor South Australia, Tasmania, the Australian Capital Territory or the Northern Territory has introduced legislation to regulate security of payment matters in their respective jurisdictions'.[144]

Of Western Australia, he observed:

> 74. Western Australia currently has no legislation regulating security of payment. In November 2001, a Western Australian Taskforce for the Building and Construction Industry (WA BITF) presented a proposed Bill (the Construction Industry Payments Bill 2001) that would if enacted, regulate security of payments matters. On 31 May 2002, the Western Australian Minister for Housing and Works announced that Cabinet had approved the drafting of a Construction Industry

[138] Ibid [14.231.11].
[139] Ibid [14.231.12].
[140] Ibid [14.232.13].
[141] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry, Final Report* (2003) vol 8, [14.232.14]. (Justice Terence Rhoderic Hudson Cole).
[142] Ibid [14.233.21].
[143] Ibid [14.236.36].
[144] Ibid [14.244.76].

> Payments Bill. This Bill aims to facilitate timely payments between parties and to provide rapid resolution of payment disputes and mechanisms for the rapid recovery of payments under construction contracts.[145]

Commissioner Cole commented on the Western Australian 'model', saying that:

> 75. Western Australia is dealing with the concerns about the NSW model by developing a proposal that enforces contractual entitlements only, with the adjudicator ruling on all matters rather than referring matters to the court.

2.6. Adjudication and the Security of Payment legislation

Lawyer Teena Zhang once said of the Australian building and construction industry:

> A typical construction project is made up of an outward branching tree of relationships with the principal at the very top, connected to the head contractor, with various chains of subcontractors below. Each contributor's role is important because contracted parties develop relationships of reliance through the need for each to deliver its works to enable others to proceed. It is therefore in the best interests of the project to ensure that each link in the chain is preserved.
>
> One of the most effective ways to facilitate this is by easing the flow of money throughout the construction chain. This preserves the liquidity of contributors to avoid costly replacement and delay. Cash flow is especially pertinent for smaller subcontractors who rely on it to meet debt obligations and keep their businesses solvent. Made vulnerable by their dependence on payment, these subcontractors can be taken advantage of by upstream debtors seeking to increase their margins by deliberately withholding payment in the hope that their creditor will become bankrupt. Recognising that these practices could not be allowed to prevail, governments took action to address the problem.[146]

The issue of cash flow and the security of payment, or the lack thereof, has always been recognised within the Australian building and construction industry.

As Fenwick Elliot comments: 'adjudication in a limited form was flourishing in the UK for years before the legislation; indeed, the legislation was inspired by the contractual model. Even now, the UK legislation works by requiring the parties to agree their adjudication scheme; it is

[145] Ibid [14.244.74].
[146] Teena Zhang, 'Why national legislation is required for the effective operation of the security of payment scheme' (2009) 25(6) *Building and Construction Law Journal (Australia)*, 376.

only if they fail to do so that the statutory rules cut in.'[147]

But in Australia, there was no adjudication or a statutory scheme that would ensure the security of payment. The first state to introduce legislation was NSW, and the rest of the states would follow over the next ten years. The timetable of the introduction of legislation was: *Building and Construction Industry Security of Payment Act 1999* (NSW); *Building and Construction Industry Security of Payment Act 2002* (Vic); *Building and Construction Industry Payments Act 2004* (Qld); *Construction Contracts (Security of Payments) Act 2004* (NT); *Building and Construction Industry (Security of Payment) Act 2009* (SA); *Building and Construction Industry Security of Payment Act 2009* (ACT); *Building and Construction Industry Security of Payment Act 2009* (Tas).

2.7. The *Construction Contracts Bill 2004* (WA), the *Construction Contracts Act 2004* (WA) and the *Construction Contracts Regulations 2004* (WA)

On Wednesday, 3 March 2004, then Member for Armadale and Minister for Planning and Infrastructure, the Honourable Ms Alannah J. MacTiernan, introduced, on motion, the *Construction Contracts Bill 2004 - Introduction and First Reading & Second Reading* (the Bill). She then moved; 'that be Bill be now read a second time'.[148]

A copy of the Bill can be found at **Appendix 1 – The *Construction Contracts Bill 2004* (WA).**

The Bill was subsequently read a second time, and the Minister declared that the Bill would deliver; 'the Government's commitment to introduce security of payment legislation for the building and construction industry'.[149]

The Bill stated that; 'This Bill delivers the Government's commitment to introduce security of payment legislation for the building and construction industry'.[150] Ms MacTiernan made it clear that:

> The Bill applies to contracts for the carrying out of construction work and related services. The Bill also covers contracts for the provision of related professional services and the supply of goods and materials to the construction site. To be covered by the Bill, contracts for services have to relate directly to construction work, and contracts for

[147] Robert Fenwick Elliott, '10 Days in Utopia' (*Proceedings of the Institute of Arbitrators & Mediators Australia, Glenelg, South Australia, 02 June 2007),* 8.
[148] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).
[149] Ibid..
[150] Ibid.

> supply must require the materials or goods to be supplied to the site where the construction work takes place.[151]

Ms. MacTiernan recognised the need to adhere to the obligations given by the parties to a contract, and the simple entitlement for a party to be paid for the work that they will perform under that contract.

> This legislation supports the privity of the contract between the parties. A party commissioning construction work must pay for the work. That party cannot make payment contingent on it being paid first, under some separate contract. The notorious "pay if paid" and "pay when paid" clauses will be banned.[152]

The Bill identified that 'security of payment (is) a vital foundation for the industry. Failure to pay at any link in the contracting chain can be disastrous to those subcontractors and suppliers who are waiting to be paid in their turn and, until now, there has been little recourse available to those who are affected.'[153]

A further issue often forgotten was the simple fact that the Act 'cannot remedy every security of payment issue'[154] and that those 'participants in the industry still have to look after their own commercial interests'[155]. Those entering the arena of the building and construction industry still have to be responsible for their own negotiation, and maintain a 'going concern' but the Bill 'will provide the industry with simple and effective tools to clarify rights to be paid and to enforce those rights'.[156]

The Bill recognised that similar legislation had already been enacted in 'United Kingdom, New South Wales, and Victoria',[157] although it holds firm that the proposed Western Australian version of the legislation had 'been drafted to overcome a number of problems that have become apparent in those jurisdictions'.[158]

The final paragraph is the 'reality check' and recognises the power of the Commonwealth in matters about the Act. But Ms. MacTiernan is clear that the day-to-day running of a company and the risk associated with that responsibility will ultimately fall on the shoulders of those that

[151] Ibid.
[152] Ibid.
[153] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).
[154] Ibid 2.
[155] Ibid.
[156] Ibid.
[157] Ibid 1.
[158] Ibid 1.

hold that mantle:

> This Bill cannot remedy every security of payment issue. Insolvency can be addressed only by Commonwealth legislation. Participants in the industry still have to look after their own commercial interests. This Bill will provide the industry with simple and effective tools to clarify rights to be paid and to enforce those rights.[159]

The Hansard records that the Bill was then debated and adjourned by the then Shadow Minister for Community Services and Seniors and Opposition Leader of Business, the Honourable Mr. Robert Johnson.[160]

History would show that the Bill, in its simplicity, would be laid on the floor of Parliament and the Bill would give rise to the *Construction Contracts Act 2004* (WA) (the Act) which was granted assent on 8 Jul 2004 and commenced on 1 January 2005. The *Construction Contract Regulations* 2004 (WA) (the Regs), were Gazetted on 14 December 2004 and like the Act, commenced on 1 January 2005.

A copy of the Act can be found at **Appendix 2 – The *Construction Contracts Act 2004* (WA) - The original**

Evans noted that within WA 'It provides a rapid adjudication process, having as its primary aim to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes while retaining the parties' full rights, if not satisfied, to go to court or use any other dispute resolution mechanism, available under the contract.'[161]

In 2008 then WA Building Registrar Peter Gow affirmed: 'The adjudicator may have much more freedom to balance cost and time against legal purity'.[162]

He also acknowledged that within Australia, 'we have what might be called an "east coast" model and a "west coast" model of providing security of payment through rapid adjudication'.[163] Coggins et al. (2010), recognised that 'the WA and NT legislative models significantly differ from the other Australian Acts in both their underlying conceptual frameworks and in the detail of the drafting which is laid upon them. This led to the WA and

[159] Ibid 2.
[160] Ibid.
[161] Philip Evans, 'The Resolution of Construction Contract Payment Disputes in the Western Australian Construction Industry through Security of Payment Legislation' (Paper presented at the 18th International Annual Conference - Building and Construction Contracts Between Traditional Legal Rules and Developed Legal Systems, Dubai United Arab Emirates 18-21 April 2010) (Printed in Proceedings),439.
[162] Peter Gow, 'The Construction Contracts Act in Western Australia', (2008) *The Arbitrator & Mediator*, The Institute of Arbitrators & Mediators Australia Vol 27. Number: 2 ( ), 38.
[163] Ibid

NT Acts, which bear more resemblance to construction industry payments legislation proposed by the Cole Commission Report'.[164] Bell and Vella observed that the latest edition of Jacobs, Security of Payment in the Australian Building and Construction Industry had stated that 'the sooner there is uniform legislation in a relatively small country such as Australia, the better for the construction industry'.[165] When dealing with individual state legislation and similar acts, it is as Bell and Vella affirm: 'This legislative autonomy at State level apparently has translated into a competition between various vested interests'.[166]

Vickery[167] remarks that: 'Divergence in the development of the law in this area is best explained as an accident of recent history. Being not directly within Commonwealth power, the legislation quickly became accident prone to difference, as the States individually adopted and developed Security of Payment schemes throughout the country. This happened relatively quickly, and in the absence of any effective voice, preaching the virtues of uniformity'.[168]

As Riddell asserted: 'the states do not exist in a vacuum. They exist in a Federation of states known as the Commonwealth of Australia. The legal relationship between the states on the one hand and the Commonwealth on the other is prescribed by the Commonwealth of Australia Constitution Act (the Constitution Act). Section 109 of the Constitution Act, Inconstancies of Law provides: 'Where a law of a State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.[169] Bailey notesthat 'Harmonisation of the disparate security of payment legislation could be expected to be, but regrettably is not, on the agenda'.[170]

2.8. The West Coast v The East Coast Model

We have what might be called an "east coast" model and a "west coast"

[164] Jeremy Coggins, Robert Fenwick Elliott, and Matthew Bell,'Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia – plus Addendum' (2010). *Australasian Journal of Construction Economics and Building*, 10 (3) 14-35, 2.
[165] Matthew Bell, and Donna Vella, 'From motley patchwork to security blanket: The challenge of national uniformity in Australian security of payment legislation', Australian Law Journal, 84, 565, 9.
[166] Ibid 10.
[167] The Hon. Justice Peter Vickery.
[168] Peter Vickery, 'Security of Payment Legislation in Australia, Differences between the States – Vive la Différence?' (Building Dispute Practitioners Society, Melbourne, 12 Oct 2011), 2.
[169]Robert Riddell, 'The Cases for and Against Harmonisation of Security of Payment Regimes in Australia: Constitutional Speed Limiters', (Proceedings of the Institute of Arbitrators and Mediators Australia National Conference, Melbourne, 30 May 2009), 2.
[170] Ian Bailey, 'Reform of Legislation - Construction Industry and Dispute Resolution', (Proceedings of the Institute of Arbitrators & Mediators Australia Annual Conference, 29-31 May 2009), 9.

model of providing security of payment through rapid adjudication.[171]

Peter Gow
Then WA Building Registrar, later Building Commissioner
2008

In 2007, Robert Fenwick Elliott, construction lawyer and Barrister and a staunch social commentator on rapid adjudication, in his paper, *10 Days in Utopia*,[172] coined the term The East Coast model. He made no reference to the West Coast Model, only stating the use of 'the Western Australian/UK models'.[173]

Even Peter Gow, then WA Building Registrar, recognised that there were in Australia two distinct models of security of payment and their adjudication processes. By 2009, a then student and later lawyer, Teena Zhang, would write:

> [a] difference in views on mechanisms used to enforce the objectives has resulted in the forming of two distinct groups of legislation commonly termed the "East Coast" and "West Coast" models. The East Coast States are made up of New South Wales, Victoria, Queensland and soon, it appears, South Australia, Tasmania, and the Australian Capital Territory. These States have drafted their legislation based in part on the New South Wales model. The West coast model is based on the legislation in Western Australia and broadly followed by the Northern Territory.*[174]*

Interestingly, it would take until 2016 that the Courts of Western Australia would refer to the 'East Coast' and 'West Coast Models' in a judgment. Le Miere J, in *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*[175] made note that:

> Each State and Territory has enacted construction industry security of payment legislation. The Western Australian and Northern Territory legislation significantly differ from the other Australian Acts in both their underlying conceptual frameworks and in the detail of their drafting. The Western Australian and Northern Territory Acts have been collectively labeled as the 'West Coast' model legislation as opposed to the 'East Coast'

[171] Ibid
[172] Robert Fenwick Elliott, '10 Days in Utopia' (Proceedings of the Institute of Arbitrators & Mediators Australia, Glenelg, South Australia, 02 June 2007), 5.
[173] Robert Fenwick Elliott, '10 Days in Utopia' (Proceedings of the Institute of Arbitrators & Mediators Australia, Glenelg, South Australia, 02 June 2007), 10.
[174] Teena Zhang, 'Why national legislation is required for the effective operation of the security of payment scheme' (2009) 25(6) *Building and Construction Law Journal (Australia)*, 377.
[175] [2016] WASC 119.

> model label given to the other Australian Acts which more closely resemble the Building and Construction Industry Security of Payment Act 1999 (NSW) (the NSW Act).[176]

There is within Western Australia, and the Northern Territory, a powerful desire to maintain the 'West Coast Model' and any move to enact the 'East Coast Model' would likely result in an outright rejection of any such move.

Professor Evans in the 'Report on the Operation and Effectiveness of the *Construction Contracts Act 2004* (WA)' categorically states that 'Western Australia should maintain its current model, subject to the amendments recommended in the review.'[177]

Coggins felt that:

> Adjudication under the East Coast model is more suited to the efficient determination of smaller progress payment claims (below $100,000) for construction works actually carried out or goods and services actually supplied. Adjudication under the West Coast model is not as efficient at resolving smaller, straightforward progress payment claims. However, it is more suitable for the equitable determination of larger and/or more complex payment claims.[178]

Adjudicators of both models continue to claim that their model is the superior model. However, this will be the consideration for any future harmonisation of security of payment legislation.

2.9. The application of the West Coast Model

In Western Australia, between 2005 and June 2017, there have been 1822 applications for adjudications.[179]

A detailed breakdown of all the related statistics pertaining to the number of applications for payment claims and adjudications is as illustrated below, in **Figure 1**.

---

[176] *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*, 10-11 [30].
[177] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 59.
[178] Jeremy Coggins, 'A Review of Statutory Adjudication in the Australian Building and Construction Industry, and a Proposal for a National Approach', (Paper presented at the RICS COBRA Research Conference, University of Cape Town, 10-11th September 2009), 1555.
[179] All data, statistics etc, unless otherwise cited, are a culmination of extrapolation, statistical analysis of Building Commission - annual – 'Report of the Building Commissioner *Construction Contracts Act 2004* (WA), (since 2005 – 2016) by the author as part of his PhD candidacy. The author has assisted the Building Commission in the development and drafting of the annual reports for 2011-12, 2012-13, 2013-14, 2014-15, and 2015-16.

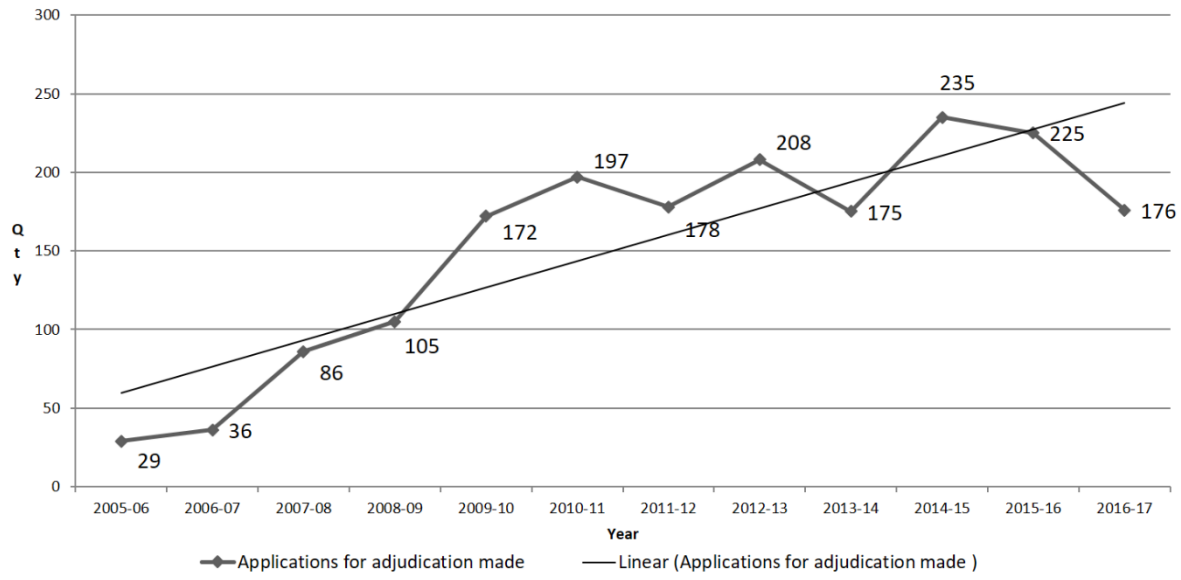

Figure 1 – Linear trend analysis – Applications for payment claims

The total value of the payment claims from 2005-2017 is $2,945,419,432.36. It must be recognised, however, that this figure is only an ambit claim. The total value of payment claims is illustrated below in **Figure 2**.

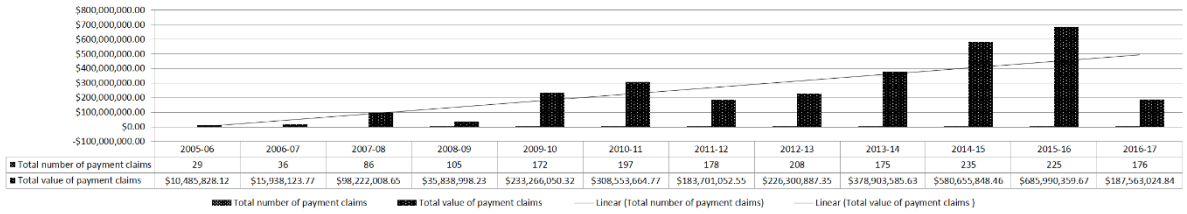

Figure 2 – Total value of payment claims (2005-2017)

Industry source of the applications

The Act provides, pursuant to s 4,[180] what type of work is included in the meaning of construction work. It further breaks it down into two major types, being civil works, as per s 4(1),[181] and construction work, as per s 4(2).[182]

The Building Commission lists some 122 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 displayed below in **Figure 3**.

[180] *Construction Contracts Act 2004* (WA), s 4.
[181] Ibid s 4(1).
[182] Ibid s 4(2)

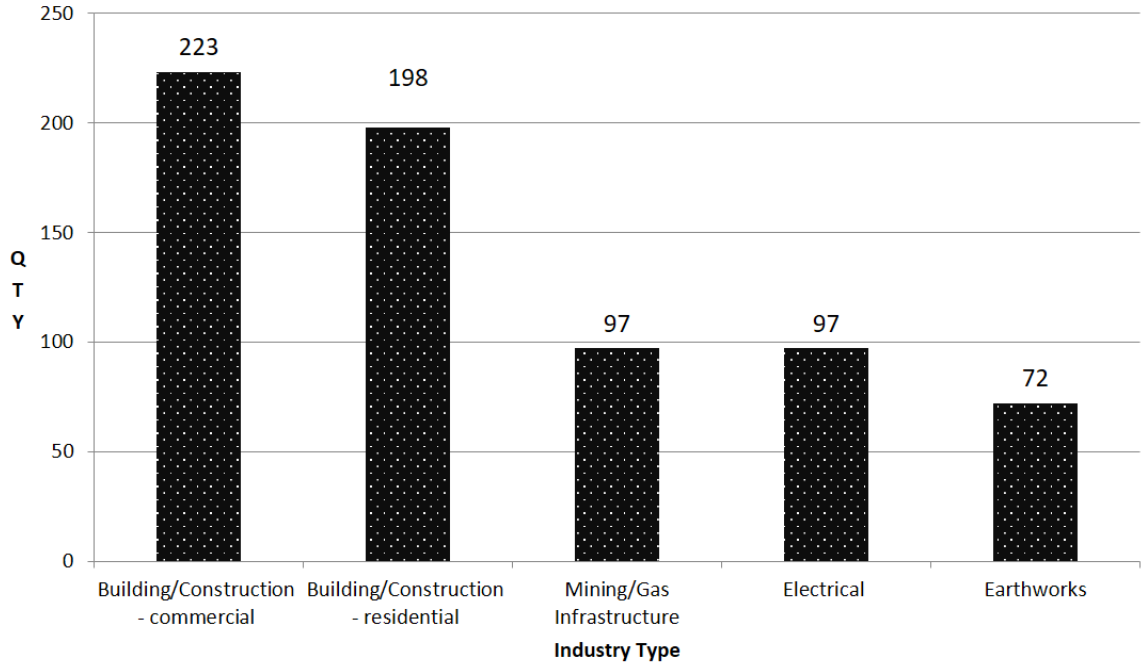

Figure 3 – Top 5 Payment claims by industry type (2005-2017)

Leading is Building & Construction – Commercial, which in the period since 2005, had 223 (or 12.20%) of the 1822 payment claims; second is Building & Construction – Residential, 198 (or 10.90%); equal third, Mining/Gas Infrastructure, 97 (or 5.30%), with, Electrical, 97 (or 5.30%), and Earthworks 72 (or 4%).

When considering the Payment claims by industry type (dollar value of the payment claims), a different result emerges, as shown below in **Figure 4**, below.

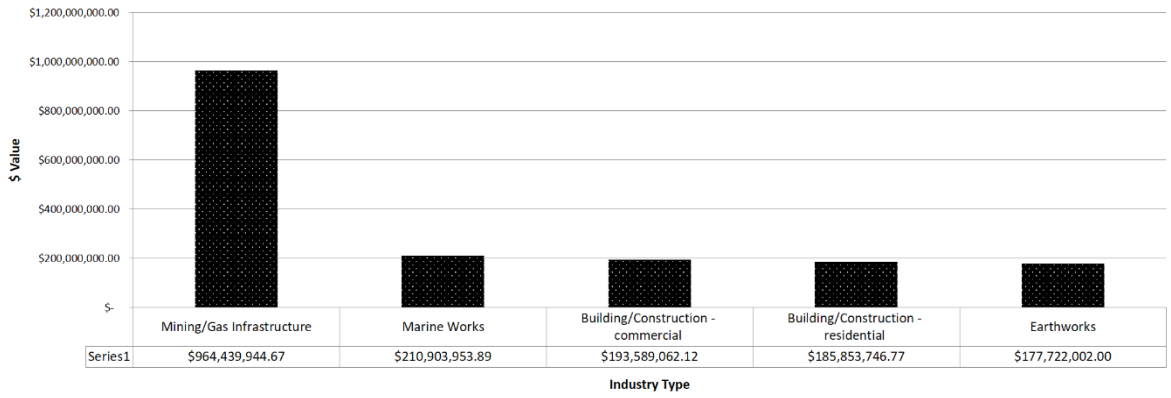

Figure 4 – Top 5 - payment claims by industry type ($ value) (2005-2017)

Mining/Gas Infrastructure makes up 33% of the total payment claims since 2005, at a staggering amount of $964,439,944.67; this is followed by Marine Works at $210,903,953.89 (or 7.2%), then Building & Construction – Commercial at $193,589,062.12 (or 6.6%), then

Building/Construction – Residential at $185,853,746.77 (or 6.3%); this is followed by Earthworks at $177,722,002.00 (or 6%). The claims of the top five industry types make up 59% of total dollar value payment claims.

2.10. The Department of Building Management and Works and 'Building the Education Revolution'

One of the great issues to plague the construction industry in Western Australia was the plight of subcontractors during the granting of federal funds under the 'Building the Education Revolution' or BER projects during 2008 to 2012. The BER program:

> was part of the Commonwealth Government's $42 billion Nation Building Economic Stimulus Plan, which was announced in February 2009. The BER program was allocated $16.2 billion nationally to fund primary and secondary school infrastructure and maintenance projects.[183]

At a state level, project funding was managed by the Department of Building Management and Works (BMW). The BMW administered some $1.26b worth of projects under the program. During the period of funding, several head contractors went into receivership leaving many smaller subcontractors out of pocket and seeking payment claims under the Act.

On 17 October 2012, the Small Business Commissioner, Mr. David Eaton, was tasked by the Minister for Finance, Commerce and Small Business, to investigate a series of grievances made by subcontractors,[184] who had not been paid by contractors. In some cases they had gone into liquidation/administration. All were related to the BER projects that were managed by the

[183] David Eaton 'Final Report - Construction Subcontractor Investigation by Small Business Commissioner Mr dated March 2013, [22]).

[184] Key Allegations of Subcontractors: The Investigation Team identified the following key allegations made by subcontractors:

(a) inadequate prequalification processes for builders undertaking BMW-managed work;
(b) low pre-tender estimates for BMW-managed projects requiring builders to tender so low as to either lose money or force them to extract unreasonable discounts from subcontractors;
(c) poor business risk analysis upon award of specific projects to head contractors;
(d) mismanagement of payment systems, in particular a failure to check the veracity of statutory declarations submitted by head contractors pursuant to clause 43 of the standard building contract AS2124,
(e) unfair treatment of subcontractors by BMW in circumstances where projects were re-tendered and there had already been a supply of nominated materials;
(f) failure by BMW to listen to warnings from subcontractors about non-payment;
(g) failure by BMW to report contractors to police for submitting false statutory declarations, and
(h) inadequacy of the *Construction Contracts Act 2004* regime to address serial non or late payment by head contractors.

BMW.

This research will refer to the case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*,[185] and how a small subcontracting electrical firm (State Side), became involved in the BER/BMW fiasco. The subcontractor would lose hundreds of thousands of dollars, as a result of the failure of a contractor to pay, which would lead to adjudication, a failure to enforce a determination in the District Court and eventually before the Supreme Court, before the contractor went into administration and then liquidation.[186]

The Final Report - Construction Subcontractor Investigation by Small Business Commissioner Mr. David Eaton, noted of the aforementioned case:

> This subcontractor sought and obtained an adjudication on a portion of the monies owed to his business by KMC Group ($128,000). However, KMC Group failed to pay the adjudicated sum, or its portion of the adjudication fee, so the subcontractor was required to try to enforce the adjudication in the District Court.
>
> On the day before the hearing, KMC Group went into administration. The subcontractor was left with an unsatisfied adjudicated amount, the costs of adjudication and around $60,000 in legal fees.
>
> Because the process of obtaining an order was frustrated, BMW could not pay the subcontractor directly.
>
> It is not surprising that this subcontractor feels abandoned by, and angry with, the system.[187]

On 26 June 2013, Daniel Emerson, of The West Australian newspaper, wrote:

> The State Government has set up a $5 million ex gratia fund to help 110 subcontractors left out of pocket when head contractors working for its building management arm became insolvent.[188]

Emerson reported:

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[185] [2012] WADC 27.
[186] As a matter of transparency, it should be noted that I was the Adjudicator that made the determination on that Adjudication.
[187] Western Australia, *Final Report - Small Business Commissioner Construction Subcontractor Investigation*, March 2013, 48. (David Eaton).
[188] Daniel Emerson, *Govt sets up $5m fund for subcontractors* (The West Australian 26 June 2013, 1:09 pm), <http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914339c3f8254adc98fc128482580120006ca38/$file/tp-4339.pdf>.

> Dr Nahan told Parliament the State bore no legal liability to any subcontractor under its so-called head contractor model. "(But) The State Government does recognise that subcontractors that have come forward during the investigation have suffered hardship."[189]

The following day; 'The Opposition immediately accused the Government of stinginess for only allowing subcontractors to claim back 50 percent of proved losses'.[190]

The subcontractor of State Side would receive just over $92,000 in compensation.

2.11. The SAT, DCWA, WASC, and the WASCA

Overriding the *Construction Contracts Act 2004* (WA), is the State Administrative Tribunal (SAT), the District Court of Western Australia (WADC), the Supreme Court of Western Australia WASC, and Supreme Court of Appeal of Western Australia (WASCA).

Of the 1822 applications, only nine determinations (or 0.49%) came before the WADC for enforcement.

Of the 1822 applications, 137 (or 7.52%) found their way before the aforementioned Courts and SAT for limited review or judicial review. One South Australian Barrister and Solicitor, Flavio Verlato, said in a passing comment to the author of this research: 'this may indicate that many small contractors may just abide by the determinations/decisions of the adjudicators because this is probably the cheapest and only available method for many to claw back money, as most are unable to afford the high litigation costs.'

Of the 137 that came before the Courts and the SAT, 70 (or 51%) were dismissed, 47 (or 34%) decided against the adjudicators decisions, and 20 (or 15%) were withdrawn. The statistics would indicate that of the 1822 applications, adjudicators were incorrect in their determinations/decisions only 2.58% of the time.

As this research will show there is a significant role to be played in the review of the adjudicators' determinations/decisions made under the *Construction Contracts Act 2004* (WA) by the Courts and the SAT.

[189] Ibid.
[190] Daniel Emerson, 'Subbies get $5m payout for losses', *The West Australian* 27 June 2013.

SAT

The State Administrative Tribunal (SAT) was established in January 2005, due to key reforms within the Western Australian justice system. Dr De Villiers noted:

> Attorney General Jim McGinty described SAT as 'a cohesive new jurisdiction' and the fulfilment of an important commitment to the people of WA 'to establish a modern, efficient and accessible system of administrative law decision-making across a wide range of areas.[191]

Parry and De Villiers acknowledged that the SAT 'replaced or took over work from almost 50 courts, tribunals, boards, and adjudicators.'[192] They noted that the SAT has over '900 sources of jurisdiction under about 150 State Acts and Regulations authorised by Acts'.[193] These Acts are known as enabling Acts. Amongst the list is the CCA. The enabling Acts can limit or equally amplify the power authority of the SAT.

The SAT Act affirms that pursuant to s 5, *'If there is any inconsistency between this Act and an enabling Act, the enabling Act prevails'*.[194] Parry and Dr De Villiers give a warning and declare that; '*it is, therefore, essential that a person conducting proceedings in SAT should carefully review the relevant enabling legislation'*.[195]

The *State Administrative Tribunal Act 2004* (WA), pursuant to s 9 of the SAT Act,[196] states that the objectives of the Tribunal are:

> (a) to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case; and
>
> (b) to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and
>
> (c) to make appropriate use of the knowledge and experience of Tribunal members.

Dr De Villiers, himself a member of the SAT, acknowledged that '[R]egardless of its objective of resolving disputes with as little formality and technicality as practicable, SAT is bound by

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[191] Bertus De Villiers, 'The State Administrative Tribunal of Western Australia – Time to End the Inquisitorial/Accusatorial Conundrum' (2014), *The University of Western Australia Law Review, Volume 37, Issue 2*, 195.
[192] David Parry, Bertus De Villiers, *Guide to Proceedings in the WA State Administrative Tribunal* (Thomson Reuters, 1st Ed, 2012), 2.
[193] Ibid.
[194] *State Administrative Tribunal Act 2004* (WA), s 5.
[195] David Parry, Bertus De Villiers, *Guide to Proceedings in the WA State Administrative Tribunal* (Thomson Reuters, 1st Ed, 2012), 4.
[196] *State Administrative Tribunal Act 2004* (WA), s 9.

the rules of natural justice',[197] but is not 'bound by the rules of evidence',[198] though they continue to provide guidance.[199] The SAT, he said, 'may inform itself on the matter it sees fit',[200] and wisely; the SAT 'makes appropriate use of the knowledge and experience of the Tribunal members',[201] as many Members do not come from a legal background, but are considered an expert in their chosen professions.

Evans and Steensma[202] noted that, whilst a decision by an adjudicator will not be set aside where a non-jurisdictional error has been made by the adjudicator, 'the SAT may set aside an adjudicator's decision if the adjudicator has not acted honestly or has substantially breached the requirements of natural justice', as held by the Honourable Coram of; Mason P, Giles JA, and Hodgson JA in *Brodyn*,[203]

The SAT is presided over by a Supreme Court judge who is the President of the SAT. Justice Jeremy Curthoys currently holds this appointment.[204] The SAT also has two positions for Deputy Presidents. Only one of those appointments has been filled, while the other remains vacant. The structure of the SAT is displayed below in **Figure 5**.

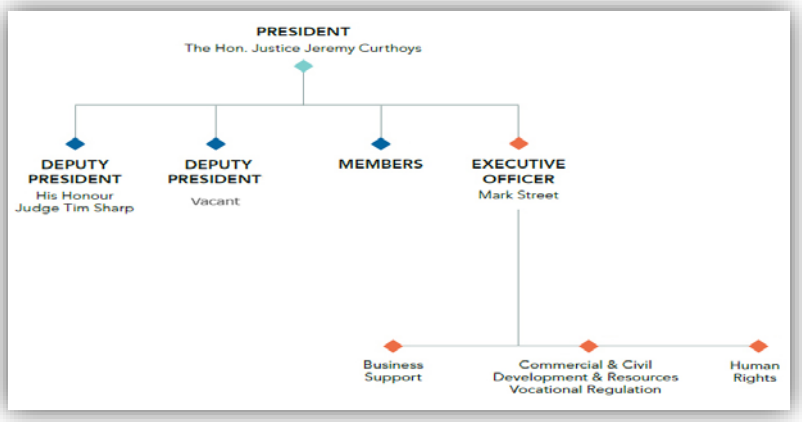

Figure 5 – The Structure of the SAT

[197] Bertus De Villiers, 'The State Administrative Tribunal of Western Australia – Time to End the Inquisitorial/Accusatorial Conundrum' (2014), *The University of Western Australia Law Review, Volume 37, Issue 2*, 206.
[198] Ibid 208.
[199] Ibid.
[200] Ibid 210.
[201] Ibid 203.
[202] Philip Evans and Auke Steensma, 'The *Construction Contracts Act 2004* (WA); Its Application and Effectiveness' *(*2013) *79 Arbitration, Issue 4 2013 Chartered Institute of Arbitrators* 5, 380.
[203] *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394.
[204] The State Administrative Tribunal – Website - Judicial Profiles < http://www.sat.justice.wa.gov.au/J/judicial_profiles.aspx?uid=2999-1380-3219-9533>

Source: SAT Website

As at 18 October 2016, the SAT has four full-time Senior Members, 14 full-time Members, 65 Sessional Members – Senior (as required), and 49 Sessional Members - Ordinary (as required).[205]

Nineteen SAT personnel,[206] have been involved in the reviews of adjudicators' determinations, pursuant to s 46 of the Act.[207] The most accredited person involved in the reviews has been Senior Member Raymond. In the 12 year period 2005 to 2017, Senior Member Raymond became the most prolific reviewer of determinations by adjudicators. He was involved in 29 reviews (or about 22% of all reviews undertaken), and independently reviewed 17 determinations. He was the Senior Member for eight and on four occasions would preside next to three different Judges; the honourable Justice J A Chaney (President), the honourable Justice T Sharp (Deputy President), and twice with the honourable Justice E M Corboy (Supplementary President). He would be part of the procedure that will make a decision on six occasions (or 21% of the reviews that he conducted or was involved with). He would dismiss 17 (or 70% of the reviews that he conducted or was involved with), and withdraw six (or 21% of the reviews that he handled or was involved with).

DCWA

On 1 April 1970, the District Court of Western Australia (DCWA), was founded. As Perth's population began to grow; 'the rapid expansion of Western Australia's population required the establishment of an intermediate system of courts'.[208] Its establishment was required to help alleviate the 'pressure and avoid a backlog of cases in the other courts, especially the Supreme Court'.[209]

The DCWA was established as a result of the *District Court of Western Australia Act 1969* (WA) that gained assent on 17 November 1969 and commenced operation on 01 April 1970.

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[205] The State Administrative Tribunal – Website – SAT Members < http://www.sat.justice.wa.gov.au/J/judicial_profiles.aspx?uid=2999-1380-3219-9533>

[206] Of interest, of the 19 SAT personnel involved in reviews pursuant to the *Construction Contracts Act 2004* (WA), 13 (or 68%) were conducted by men. The remaining six (or 32%) were women. The women only conducted 18 (or 23%) of the 77 reviews conducted. Member Hawkins as conducted the most with five reviews of which she conducted three solo and two with a judge. Of interest member Owen-Conway, is the only female who is a qualified adjudicator pursuant to the *Construction Contracts Act 2004* (WA), but no longer practices as an adjudicator as she holds a full-time position in the SAT, which prevents her from taking up any appointments.

[207] *Construction Contracts Act 2004* (WA) s 46.

[208] The District Court of Western Australia, Website – History <http://www.districtcourt.wa.gov.au/H/history.aspx?uid=3824-4637-2117-4118>

[209] Ibid.

The DCWA was granted both criminal jurisdiction and civil jurisdiction.[210] In undertaking its civil procedure, the DCWA states that; ' Two-thirds of the civil caseload are personal injury claims arising from motor vehicle and workplace accidents, and the remaining one third is commercially related'.[211]

The DCWA is made up of 24 Judges of the court, and some of those roles and responsibilities are entrusted to five Registrars, pursuant to the *District Court of Western Australia Act 1969* (WA).

The DCWA can deal with claims of up to $750,000.[212]

The DCWA declares that:

> Each year less than 3% of civil actions commenced in the District Court are finalised by the parties going to trial. While some actions are resolved through a party obtaining default judgment or summary judgment, most of the remainder are resolved by agreement between the parties.[213]

The DCWA supervises some 150 formal mediation conferences.[214]

WASC

The Supreme Court of Western Australia (WASC) is the highest court in the State of Western Australia.[215] It is by virtue of its legislation, the State of Western Australia's 'main court of appeal'.[216]

The WASC was established as a result of the *Supreme Court Act 1935*, which gained assent on 3 March 1936 and commenced on 1 May 1936 and gives the WASC 'unlimited jurisdiction in civil matters'.[217] The hierarchy of WASC consists of 'the Chief Justice of Western Australia, 19 Judges, one Master, the Principal Registrar and eight Registrars'.[218]

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[210] The District Court of Western Australia, Website – History <http://www.districtcourt.wa.gov.au/H/history.aspx?uid=3824-4637-2117-4118>
[211] The District Court of Western Australia, Website – Civil Procedure < http://www.districtcourt.wa.gov.au/C/civil_procedure.aspx?uid=1638-9835-4454-3597>
[212] Ibid.
[213] The District Court of Western Australia, Website – Court Mediation.< http://www.districtcourt.wa.gov.au/C/court_mediation.aspx?uid=3580-1537-1161-3464>
[214] Ibid.
[215] The Supreme Court of Western Australia, website – About the Court, < http://www.supremecourt.wa.gov.au/A/about_the_court.aspx?uid=4231-4653-6722-6063>
[216] Ibid.
[217] The Supreme Court of Western Australia, website – Court Structure, http://www.supremecourt.wa.gov.au/C/court_structure.aspx?uid=7989-8647-2900-2500>
[218] The Supreme Court of Western Australia, website – About the Court, < http://www.supremecourt.wa.gov.au/A/about_the_court.aspx?uid=4231-4653-6722-6063>

When dealing with civil matters, the WASC may hear matters that are greater than $750,000.[219]

The WASC also provides mediation as a mechanism for parties to resolve their issues.[220]

The High Court of Australia cases of; *Craig v South Australia*,[221] and *Kirk v Industrial Relations Commission*,[222] as will be discussed later in this research, will both play a momentous role in the supervisory role of the Supreme Court of Western Australia. The consequence of *Kirk* and the supervisory role has led to much discussion by adjudicators, with one anonymous old and bold adjudicator[223] categorically stating that; 'This is not a trough that the little piggies (the Courts) should be sticking their noses in'.

WASCA

On 01 February 2005, the Court of Appeal Division of the Supreme Court (WASCA) was founded. The Court of Appeal Division came about through the 'proclamation of the Acts *Amendment (Court of Appeal) Act* 2004'.[224] The Court of Appeal is delegated to hear all the appeals from decisions made by a 'single Judge of the Supreme Court and from Judges of the District Court as well as various other courts and tribunals'.[225]

In the Court of Appeal Division, matters are customarily heard and determined by a panel of three Judges, although some matters will be heard by two Judges or by a single Judge',[226] pursuant to s 57 of the *Supreme Court Act 1935*.

The Court of Appeal Division obtains its jurisdiction pursuant to s 58 of the *Supreme Court Act 1935*.[227] Regarding this research, the cases before the Court of Appeal Division, relating to the *Construction Contracts Act 2004* (WA), and are specifically, pursuant to s 58(1)(a) of the *Supreme Court Act 1935*.

Since 2005, there have been three cases that have gone before the Court of Appeal Division.

Of some interest to the practice of alternative dispute resolution is the statement made about the webpage of the Court of Appeal Division,[228] which states that the Court of Appeal Division

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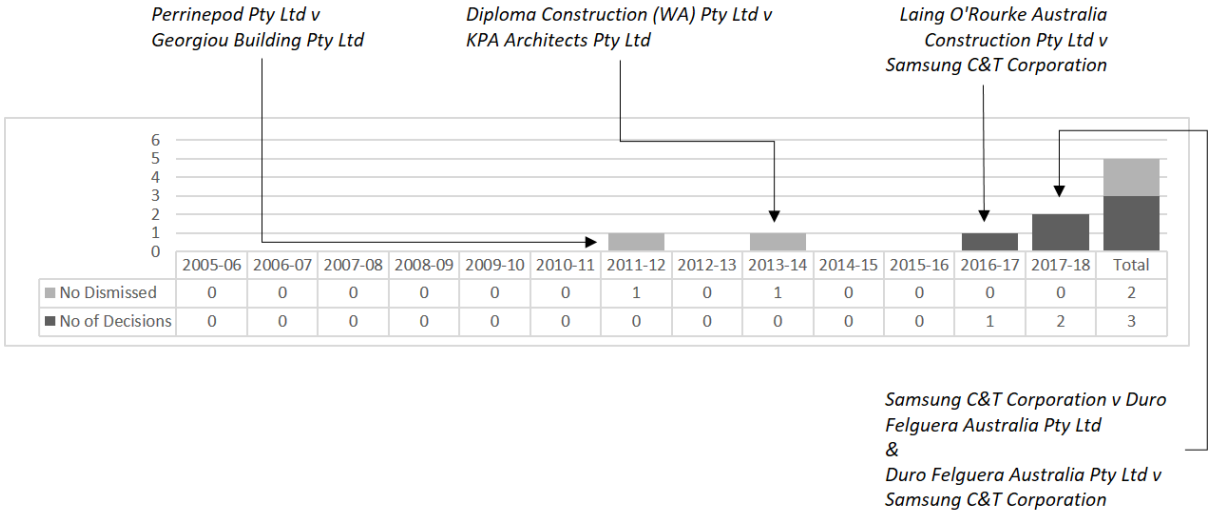
[219] Ibid.
[220] The Supreme Court of Western Australia, website – Medaition, < http://www.supremecourt.wa.gov.au/M/mediation.aspx?uid=3185-1016-0071-6102>
[221] (1995) 184 CLR 163.
[222] (2010) 239 CLR 531; [2010] HCA 1.
[223] An anonymous 'old and bold' Adjudicator, who felt it most prudent to remain anonymous.
[224] Supreme Court of Western Australia, Website – Court of Appeal. < http://www.supremecourt.wa.gov.au/C/court_of_appeal.aspx?uid=8140-2366-1663-9123>
[225] Ibid
[226] Ibid
[227] *Supreme Court Act 1935* (WA).
[228] < http://www.supremecourt.wa.gov.au/C/court_of_appeal.aspx?uid=8140-2366-1663-9123>

promotes mediation as a mechanism to resolve disputes that are of a civil nature. Parties seeking to resolve their differences in the arena of mediation, need simply contact the Registrar of the Court of Appeal Division.

Since 2005, there have been 1822 adjudicators' determinations and of those 141 (or 8%) that have come before the Courts and the State Administration Tribunal, for review or enforcement. Of those 141, five (or 4%) would find their way into the WASCA.

Of the five cases that were appealed, one (20%) came from the SAT, the other four (80%) were on appeal for decsions of the WASC.



	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	Total
No Dismissed	0	0	0	0	0	0	1	0	1	0	0	0	0	2
No of Decisions	0	0	0	0	0	0	0	0	0	0	0	1	2	3

In 2011, the first case before the WASCA, being, *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*,[229] was heard by the strong and Honourable Coram of Martin CJ, McLure P, Murphy JA. The case was on appeal from the SAT in the case of *Perrinepod Pty Ltd and Georgiou Building Pty Ltd*,[230] which had previous been heard by his Honour Justice Sharp and Member Carey.

Appeals have taken an average of 161days from hearing to delivery; the longest, both *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd*[231] and *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation*,[232] would take 204 days. The cases give his Honour Justice Beech, the dubious honour of being appealed twice.

The decisions made by the WASCA will be discussed throughout this study, as they effect different issues and matters in this research.

[229] [2011] WASCA 217.
[230] [2010] WASAT 136.
[231] [2018] WASCA 27.
[232] [2018] WASCA 28.

2.12. Wheels of change

In 2009, a young PhD Candidate, Jeremy Coggins, from the Law School, Faculty of the Professions, The University of Adelaide, would present a paper at the 2009 Construction and Building Research Conference of the Royal Institution of Chartered Surveyors that was held at the University of Cape Town. The subsequent paper, 'A Review of Statutory Adjudication in the Australian Building and Construction Industry, and a Proposal for a National Approach'[233] would see Coggins become not only an 'Eastern Stater' who supported the WA Act, but also one of the 'shining lights' of the harmonisation of security of payment legislations throughout Australia.

Coggins felt that a national approach was warranted and recommended the approach taken by the Cole report in 2003. He believed that, 'the inconsistencies which exist in the security of payment legislation in Australia are detrimental to the competitiveness of the building and construction industry, particularly for those firms conducting business interstate'.[234]

Coggins remains a prolific writer on the issues pertaining to the security of payment legislation throughout Australia. Since 2008 he has written some 14 journal articles, either independently or with other scholars. He has written five separate chapters in academic publications and regularly presents at conferences throughout the world.

In 2014, Coggins was involved in the drafting of the SOCLA *Report on Security of Payment and Adjudication in the Australian Construction Industry.*

SOCLA

In 2014, SOCLA released the *Report on Security of Payment and Adjudication in the Australian Construction Industry*. The report, drafted by the Australian Legislation Reform Sub-Committee,[235] recognised that each of the states had a security of payment legislation, but:

> Instead of being harmonised, each State has a different system. Western Australia and the Northern Territory followed international practice, and enacted an evaluative system which works well. All commentators have agreed that a single system should operate

[233] Jeremy Coggins, 'A Review of Statutory Adjudication in the Australian Building and Construction Industry, and a Proposal for a National Approach', (Paper presented at the RICS COBRA Research Conference, University of Cape Town, 10-11th September 2009).
[234] Jeremy Coggins, 'A Review of Statutory Adjudication in the Australian Building and Construction Industry, and a Proposal for a National Approach', (Paper presented at the RICS COBRA Research Conference, University of Cape Town, 10-11th September 2009), 1555.
[235] The SOCLA Australian Legislation Reform Sub-Committee was chaired by Robert Fenwick Elliott, and consisted of Members; Geoff Bartels, Ian Bailey SC, Jeremy Coggins, Scott Ellis, Alastair Oxbrough, Stephen Pyman, Sandra Steele, and Kara Vague.

> across all of Australia, but no progress has yet been made in achieving harmonisation.[236]

The comprehensive 163-page report would focus on the 2003 Cole report and put forward the proposed The *Building and Construction Industry Security of Payments Bill 2003*, drafted by Justice Cole.

The SOCLA report initially acquired some traction due to the high calibre of the subcommittee. However, some concerns were raised over the rehashing of the 2003 Bill proposed by Justice Cole, as an inordinate amount of time and case law had passed since 2003, and the view of some was that perhaps the Bill was now obsolescent. While the traction began to falter, the idea of harmonisation of all security of payment legislation began to gain some momentum.

Unfortunately, it would be the review of the act by Professor Evans that would further distance this report. However future developments, at a Federal level would again breathe some new life into this report.

Professor Philip Evans and the Review of the Act

The Discussion Paper - Statutory Review of the *Construction Contracts Act 2004* (WA).

In 2014, the Building Commissioner of Western Australia, Mr. Peter Gow, approached Professor Evans and the author, as to the feasibility of undertaking the Statutory Review of the *Construction Contracts Act 2004* (WA).

On 10 June 2014, the Building Commissioner of Western Australia, Mr. Peter Gow, announced:

> Professor Philip Evans of Curtin University has been appointed to review the *Construction Contracts Act 2004*.
>
> The Construction Contracts Act is part of a suite of new building legislation implemented in Western Australia over the past decade that has delivered significant reforms to building regulation in this state.+
>
> With the major reforms now behind us, and with a steady increase in the use of alternative dispute resolution in recent years, the time has come to take a good look at the operation of the Construction Contracts Act. The review will ensure the Act is providing the best

[236] The Society of Construction Law, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (Society of Construction Law - Australian Legislation Reform Sub-Committee, 2014), 8.

> possible protection for subcontractors, head contractors, and building owners.[237]

Building Commissioner Gow went on to say that:

> the review will consider the context in which the Construction Contracts Act now operates and whether amendments to it or other Acts are needed to improve its efficiency and effectiveness. The review is expected to commence this month (June 2014).[238] [239]

Professor Evans, a former Dean of the Murdoch Law School in Western Australia, a Barrister and Solicitor, and Civil Engineer, was more than qualified to undertake the review. In his opening letter to the Western Australian Attorney – General and Minister for Commerce, the Honourable Michael Mischin MLC, Professor Evans states:

> I have taken into account my own experience as a consulting engineer, chartered builder and construction law and construction management educator, mediator, arbitrator and registered adjudicator.[240]

Professor Evans would be assisted by two research consultants Professor Gabriël Moens, former Pro Vice-Chancellor of Murdoch University and the author of this research. The review team was also assisted by the Industry Development Directorate of the Building Commission within the Department of Commerce.

It was determined that the best way ahead was to draft a discussion paper, which would be released to the public and associated departmental offices for comment. In October 2104, the review team released the 'Discussion Paper Statutory Review of the *Construction Contracts Act 2004* (WA)'. The Discussion Paper sought written submissions by Friday 14 November

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[237] Review of Construction Contracts Act signed off <http://www.commerce.wa.gov.au/announcements/review-construction-contracts-act-signed>

[238] Review of Construction Contracts Act signed off <http://www.commerce.wa.gov.au/announcements/review-construction-contracts-act-signed>.

[239] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), 9. The terms of reference for the review were as follows:

1. The context in which the Act now operates;
2. Issues related to how the Act operates, including (but not exclusively):
   a. The scope of the Act;
   b. The mechanisms in the Act;
   c. Court rulings and interpretation;
   d. Adjudicators;
   e. Prescribed Appointors; and
   f. Other issues identified during stakeholder consultations.
3. Whether amendments to it or other related Acts are needed to improve its effectiveness and efficiency; and
4. Any negative impact or additional regulatory burden that may be foreseen with proposed amendments that may be subject to Regulatory Impact Assessment at a later date.

[240] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), i.

2015. The Building Commissioner would state:

> The release of this paper coincides with the public call for written submissions in which stakeholders can address all issues related to the operation of this legislation. The Building Commission is also arranging meetings in which key stakeholder groups can also express concerns directly to the Reviewer, Professor Phil Evans.[241]

Evans categorically affirmed:

> This Consultation Discussion Paper represents the first stage of the Review and is focussed on encouraging stakeholder input in regard to issues of concern and how they might be overcome.
>
> The paper aims to initiate discussion about the context in which the Act now operates. It also suggests some key issues with the Act that have been previously identified and to which a written submission to the Reviewer may choose to address. However, the questions or issues identified are by no means a limitation on matters that may be raised in a submission in relation to the Act's operation and its effectiveness to date.[242]

The government Regulatory Impact Assessment Requirements determined that the Review would be broken into three stages. They were:

- Stage 1 - Preliminary Impact Assessment (Stage 1 of the RIA process);
- Stage 2 - Consultation RIS (Stage 2 of the RIA process); and
- Stage 3 - Decision RIS (Stage 3 of the RIA process).[243]

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[241] Philip Evans, *Discussion Paper - Statutory Review of the Construction Contracts Act 2004 (WA)* (Department of Commerce - Building Commission, September 2014), 2.

[242] Philip Evans, *Discussion Paper - Statutory Review of the Construction Contracts Act 2004 (WA)* (Department of Commerce - Building Commission, September 2014), 8.

[243] Pursuant to Government, Regulatory Impact Assessment Requirements (RIA), the Review would be broken into three stages. The discussion paper was also broken into three parts. They were:

Part 1 – Introduction

Part 2 - Background information: The *Construction Contracts Act 2004* (WA).

Part 3 - Key issues to be examined. The key issues to be examined, probably the most important part of the discussion paper, was based on 13 questions, pertaining to the issues that were affecting the Act. These questions were:

Q 1 - Time limits in which an Application Can Be Made;
Q 2 - Timelines for Responses;
Q 3 - Timelines for Determinations;
Q 4 - Timelines for Extensions;
Q 5 - Underutilisation of the Act's Provisions for Payment Claims;
Q 6 - Alternative Dispute Resolution Mechanisms for Small Claims;
Q 7- Regulation of Adjudicators;
Q 8 - Exclusion of Damages;
Q 9 - Inclusion of Domestic Building Contracts;
Q 10 - Exclusion of Certain Mining Activities;
Q 11 - Construction of Plant for the Purposes of Extracting or Processing;

The Act, pursuant to s 26(1),[244] was firm that the Act had a time limit of 28 days, 'after the dispute arises', to seek to have a payment dispute adjudicated, and this provision was strictly adhered to. Many small businesses had voiced their opinions that 28 days was not sufficient for sub-contractors to negotiate or mediate a solution with the other party. It meant that a party (or their legal representatives) had to move with great haste to undertake the drafting of an application, and risk considerable adversity from the other party, who often held a considerable balance of power. An application is often seen as an 'act of aggression' by the respondent, and often leads to a breakdown of a relationship, and also, the failure of all parties to work together throughout the remainder of, or future contracts. It had been discussed that the period should reflect the approach taken by the NT, which allowed 90 days.[245]

Further, the time given for the respondent to formulate a response was limited to 14 days, pursuant to s 27(1) of the Act.[246] Given the complexity and large financial size of payment disputes (as we shall see later), many respondents have complained that 14 days is insufficient time to prepare a satisfactory response to the Application.[247]

Professor Evans would move towards the issue of the Regulation of adjudicators and seek to determine whether matters affecting adjudicators, such as qualifications of registration requirements and adjudicators fees, were suitable to meet the often complex nature of payment disputes.

The issue of whether damages such as liquidated damages should be excluded from the Act also arose. The Victorian *Building and Construction Industry Security of Payment Act 2002* (Vic) strictly prohibits claims for damages when construction contracts are breached.[248] Professor Evans acknowledged 'a similar exclusion in the Construction Contracts Act 2004

Q 12 - Exclusion of Artworks; and
Q 13 - National Uniformity and 'Harmonisation'.

[244] *Construction Contracts Act 2004* (WA), s 26(1).

[245] Amusingly, in a conversation between, the author and the Construction Contracts Registrar of Northern Territory, Mr Guy Riley, he felt that the 90 day was far too long and noted (as many Adjudicators do), that the potential applicant, would procrastinate and hold of with any potential 'acts of aggression' till the last minute, and often still miss the deadline of 90 days, as the potential Respondent's often with the assistance of their legal counsel, maintain the pretence of negotiation, and lure the less 'legally savvy' party into a false sense of security, and then renege at the last moment. There is no time left to apply for Adjudication.

[246] *Construction Contracts Act 2004* (WA), s 27(1).

[247] The author, in his own right as an Adjudicator, holds the record in WA for the physically largest adjudication, an application of 23 lever arch folders of A4 and A3 documents, which contained 7977 pages, and the response that was made up of 11 A4 size folders, and contained 3929 pages. The total quantum of the submissions by both parties was 34, A4 & A3 size folders, and contained 11906 pages. Due to the perceived complexity of the payment dispute, the Respondent on several occasions complained that 14 days was insufficient time to draft a response, and that the Act gave no provision to extend the period of time for the response.

[248] *Building and Construction Industry Security of Payment Act 2002* (Vic), s 10B(2)(c).

may be causing issues, but no evidence exists that this is the case'.[249] However, he felt it 'prudent' to consider whether 'amendments to disallow liquidated damages should be included in a progress payment or payment claim'.[250]

As previously discussed: issues surrounding the exclusion of certain mining activities, and the construction of a plant for the purposes of extracting or processing and artworks, both not included under the Act, pursuant to s 4(3),[251] should be included for consideration and should fall under the umbrella of the Act.

The final and probably the most controversial, was no doubt, question 13. The questionnaire laid out three key issues pertaining to whether WA should take a more 'national approach to security of payment legislation'[252] and consider (a) SOCLAs approach consider 'harmonisation' with the other states, or whether (b) WA should adopt the Northern Territory's '*Construction Contracts (Security of Payments) Act 2004* (NT) or alternatively, that (c) WA should continue with the current version of the Act, but consider making amendments.

The review team would receive some fifty-one written submissions resulting from the Discussion Paper. They included presentations from the Honourable Peter Abetz MLA,[253] the member for Southern River, the Honourable Mia Davies MLA Member for Central Wheat belt, representatives of the Small Business Commissioner and the Department of Housing and, at a local council level, the City of Perth. The legal fraternity was represented by the Law Society of WA, legal counsel from several different legal firms, SOCLA and representatives of Lawyers Engaged in Alternative Dispute Resolution (LEADR), the Institute of Arbitrators and Mediators of Australia (IAMA), practising and non-practising adjudicators and consultants.

There was a considerable response from official bodies and national industry associations, such as the Australian Institute of Building (AIB) and the National Electrical and Communications Association (NECA). There was also a strong representation from building companies and associated businesses, such as Pindan, Hodge Collard Preston Architects, and Dorian Engineering Consultants. Of note, and raising many concerns, was the Subcontractors for Fair

[249] Philip Evans, *Discussion Paper - Statutory Review of the Construction Contracts Act 2004 (WA)* (Department of Commerce - Building Commission, September 2014), 43.
[250] Ibid.
[251] *Construction Contracts Act 2004* (WA), s 4(3)(a-e).
[252] Philip Evans, *Discussion Paper - Statutory Review of the Construction Contracts Act 2004 (WA)* (Department of Commerce - Building Commission, September 2014), 46.
[253] Peter Abetz is an Australian former politician who was a Liberal member of the Western Australian Legislative Assembly from 2008 to 2017, representing Southern River and was previously ordained as a pastor in the Christian Reformed Churches of Australia.

Treatment group.

The review team conducted a Subcontractors Forum at the Building Commission on 14 November 2014 that was attended by 22 people. Throughout the period the review team would conduct 11 meetings, which included the Building Commissioner, Mr. Peter Gow, and the Master Builders Association (MBA), the Assistant Director of Building Policy and Procedures, Mr. Tony Halberg, of the Building Management and Works Division, Department of Finance. In November 2014, the review team conducted a meeting with a large contingent of registered adjudicators from IAMA, to seek their input into the review. Other groups included NECA, Master Plumbers & Gasfitters Association WA, and the Master Painters & Decorators Australia. Several small businesses attended as well as representatives from the 'Subcontractors for Fair Treatment'.

The final interview was with Mr. Laurie James AM, Senior In-House Counsel Kott Gunning Lawyers and Co-chair of the WA Chapter of IAMA and stalwart adjudicator, previously discussed in this chapter.

The review team would begin the long and arduous task of sifting through all the data and in August 2015, Professor Evans wrote to Attorney General and Minister for Commerce the Honourable Michael Mischin MLC, and stated 'I am pleased to submit to you herewith the report and recommendations'.

The Report on the Operation and Effectiveness of the *Construction Contracts Act 2004* (WA)

The long-awaited 145-page Report, was generally seen by most parties as being very positive and provided a future direction for the Western Australia Act.

Professor Evans would begin his report by acknowledging the favourable view held by many pertaining to *the* Construction Contracts Act 2004 *(WA).*[254] Professor Evans and his team[255] would receive some 50 written submissions from a wide variety of stakeholders, conduct 11 large meetings, and a Subcontractors Forum conducted at the Building Commission on 14 November 2014.

[254] There was clear consensus between all stakeholders that the *Construction Contracts Act 2004* (WA) 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.
[255] Professor Gabriel Moens, Curtin University and Mr Auke Steensma, PhD Candidate at Curtin University.

It was evident that in response to question 13 which pertained to whether WA should take a more 'national approach to security of payment legislation' found that:

> With respect to whether Western Australia should maintain the current West Coast model (albeit with minor amendments), 42% supported retention of the existing model, 4% did not support its retention, and 52% made no comment on this issue. There was thus very little support among the submissions for moving to a different model.

There is clearly no desire to adopt the East Coast Model or the NT Act.

Evans would look toward the work of a young lawyer, Philip Marquet, whose comments on the 'East Coast Model' in his 2015 paper, 'Judicial Review of Security of Payment Adjudications: Key Doctrinal Uncertainties and Proposals for Reform',[256] Evans would quote:

> In addition, much adjudication is overturned for jurisdictional error, suggesting that the east coast adjudication process generates flawed determinations. Under the west coast model, however, there are minimal judicial review applications, and very few of those applications result in the adjudications being quashed on the basis of jurisdictional error. Thus, the west coast system presents significant advantages, both in terms of time and cost, and the determination of claims in accordance with the lawful process.[257]

Professor Evans also stated:

> Given the marked advantages of the West Coast model (particularly with respect to the issue of procedural fairness and the comparatively lower number of grounds for review of determinations), if harmonisation were to take place it should be based on the West Coast model rather than the East Coast model. In the absence of such an approach to harmonisation, Western Australia should maintain its current model, subject to the amendments recommended in the Review.

He recommended that 'The *Construction Contracts Act 2004* (WA) should remain as the method of security of payment legislation in Western Australia subject to the amendments as suggested as a result of this Review.

[256] Philip Marquet, 'Judicial Review of Security of Payment Adjudications: Key Doctrinal Uncertainties and Proposals for Reform.' (2015) *Building and Construction Law Journal* 4.
[257] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 58.

The Senate Economics References Committee - Insolvency in the Australian construction industry

After the release of the aforementioned 'Evans Report', the matter of security of payment legislation and other associated matters relating to the construction industry, again came to the attention at a federal level.

On 04 December 2014, the Senate directed the Economics References Committee to report on the 'the matter of the scale and incidence of insolvency in the Australian construction industry'.[258]

In December 2015, the Senate Economics References Committee released the long-awaited report; *Insolvency in the Australian construction industry.*[259] Amongst those involved in responding to the public hearings was the aforementioned Professor Evans.

The report acknowledged 'the challenges the construction industry faces in dealing with its unacceptably high rate of business insolvency'.[260] The report noted that there was a 'completely unacceptable culture of non-payment of subcontractors for work completed on construction projects'.[261]

The first two recommendations made by the Committee recognise three central matters that play a significant part in this research. The committee recommended:

> The first of these is the recommendation that the Commonwealth enact uniform, national legislation for a security of payment regime and rapid adjudication process in the commercial construction industry.
>
> The second related major recommendation is that, commencing in July 2016, the Commonwealth commence a two year trial of Project Bank Accounts on construction projects where the Commonwealth's funding contribution exceeds ten million dollars.
>
> The committee further recommends that, following the successful completion of a trial of Project Bank Accounts on Commonwealth funded projects, the Commonwealth legislate to extend the use of a best practice form of trust account to private sector

[258] Senate Economics References Committee, *Insolvency in the Australian construction industry* (December 2015), 31.
[259] Senate Economics References Committee, *Insolvency in the Australian construction industry* (December 2015).
[260]Ibid, xvii.
[261] Ibid.

construction.[262]

The Executive Summary to the Report finishes with the Committee stipulating that the recommendations that were made 'must be implemented as soon as practicable to ensure a productive, properly functioning construction market in which people are paid for the work they do'.[263]

2.13. Conclusion

In 1994, Sir Michael Latham would report to the government of the day on the UK Construction Industry. He would highlight the failure of arbitration and would advocate a system of adjudication, to provide for the security of payment. The future legislation would be later coined by Lord Ackner as a 'quick and dirty fix'.[264] The Latham report would be of considerable influence in Australia.

Later the *Royal Commission into the Building and Construction Industry* conducted by the Honourable Justice Terence Rhoderic Hudson Cole RFD QC would find that within the Construction Industry in Australia Australia, there was 'urgent need for structural and cultural reform'.[265] Amongst his recommendations was the need to draft legislation pertaining to the 'security of payment' and the need for adjudication as a starting point to resolve payment claim disputes. He noted that Western Australia also had no legislation that would regulate the security of payment.

The *Construction Contract Act 2004* (WA) (the Act) was granted assent on 08 Jul 2004 and commenced on 01 January 2005. The *Construction Contract Regulations* 2004 (WA) (the Regs), were Gazetted on 14 December 2004 and like the Act, commenced on 01 January 2005.

Since the Act commenced in 2005, until the end of 2016-2017, there were 1822 cases, where adjudication was used to 'claw back' payment claims that did not require lengthy and expensive legal costs to resolve the dispute within the courts. In 2015, Professor Evans noted in his review; *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*: 'the Act has been successful both as a statutory scheme for the evaluation of payment claims and

[262] Ibid.
[263] Ibid xxvi.
[264] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >
[265] Ibid vol 1 [Summary.3].

in providing a quick and uncomplicated dispute resolution process'.[266]

The Act also provides parties to the dispute to seek the shelter of the courts in enforcing determinations made by an adjudicator, in either the DCWA or the WASC, offering a limited right of review of a determination/decision made by an adjudicator, or by the SAT, or provides for an aggrieved party to seek judicial review of a determination/decision in the Supreme Court of Western Australia.

[266] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 1.

Chapter 3

The statutory regime and what constitutes a payment claim and a payment dispute

> The resolution of construction disputes, especially those relating to payment claims, are notoriously time consuming and expensive. These disputes are often founded in or exacerbated by misunderstandings between the parties as to their respective rights and obligations. There is also often a significant power imbalance between principal and head contractor or head contractor and sub contractor.
>
> Dr Philip Evans
>
> The Resolution of Construction Contract Payment Disputes in the Western Australian Construction Industry through Security of Payment Legislation [267]

To understand 'the statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the SAT and the Courts,' the starting point is to determine what constitutes:

(a) a payment claim, and

(b) a payment dispute.

3.1. What is a payment claim?

The first case before the State Administrative Tribunal that would give a more precise indication of what constitutes a payment claim is the case of *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture:*[268]

> 1 The applicant applied for a review of an adjudicator's decision made under the *Construction Contracts Act 2004* (WA) (CC Act), in terms of which the adjudicator

[267] Philip Evans, 'The Resolution of Construction Contract Payment Disputes in the Western Australian Construction Industry through Security of Payment Legislation' (Paper presented at the 18th International Annual Conference - Building and Construction Contracts Between Traditional Legal Rules and Developed Legal Systems, Dubai United Arab Emirates 18-21 April 2010) (Printed in Proceedings),437.

[268] [2005] WASAT 269.

found that the contract between the parties did not fall within the scope of construction contracts to which the CC Act applied.[269]

The case centred on a letter of intent that was entered into by both the parties preceding a 'Works Contract entered into subsequent to the coming into operation of the CC Act on 1 January 2005',[270] and therefore there was no payment claim.

When the Act came into operation, only ten months earlier, pursuant to s 3 of the Act,[271] it defined a payment claim as:

> 3. Interpretation - ***payment claim***
>
> (a) means a claim made under a construction contract —
>
> (i)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
>
> (ii)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;
>
> and
>
> (b) includes a payment claim that includes matters covered by a previous payment claim.

The construction contract to which the payment claim must apply was interpreted, also pursuant to s 3 of the Act,[272] as:

> 3. Interpretation
>
> ***construction contract*** means a contract or other agreement, whether in writing or not, under which a person (the ***contractor***) has one or more of these obligations[273] —
>
> (a) to carry out construction work;
>
> (b) to supply to the site where construction work is being carried out any goods that are related to construction work by virtue of section 5(1);

[269] *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture [2005]* WASAT 269, 4 [1].
[270] *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture [2005]* WASAT 269, 4 [2].
[271] *Construction Contracts Act 2004* (WA), s 3, payment claim.
[272] Ibid construction contract.
[273] *Construction Contracts Act 2004* (WA), s 3, Obligation; in relation to a contractor, means those of the obligations described in the definition of ***construction contract*** that the contractor has under the construction contract.

(c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2);

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b);

Senior Member Raymond acknowledged that the letter of intent fell within the 'falls within the so called fourth *Masters v Cameron* (supra) category, identified in *GR Securities v Baulkham Hills Private Hospita*l (supra).'[274] Senior Member Raymond found that the letter of intent did bind the parties, however, it did stipulate that the letter of intent would no longer function after the Works Contract came into play.

The Works Contract put the applicant in a different position, 'because that created a right, subject to the terms of the Works Contract, to complete the works.'[275] The letter of intent only allowed the respondent to grant payment for works they had directed. Further the letter of intent was agreed to prior to the commencement and operation of the Act, that occurred on 1 January 2005, therefore make it void.

The WASCA in *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd,*[276] would further look into this matter, and highlight the importance of the word 'Obligation'.

Section 3 of the Act,[277] states:

1. Terms used

obligations, in relation to a contractor, means those of the obligations described in the definition of **construction contract** that the contractor has under the construction contract.

The strong and Honourable Coram of Martin CJ, Buss P, Murphy JA, held that 'construction contract' is defined by reference to 'obligations' with respect to 'construction work'.[278] They held that the term itself was that held in the aforementioned s 3 interpretation.

His Honour Chief Justice Martin, was very clear on this issue:

25 As I have already noted, this definition assumes that a construction contract may

[274] *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture [2005]* WASAT 269, 19 [85].
[275] Ibid.
[276] [2018] WASCA 27.
[277] *Construction Contracts Act 2004* (WA), s 3, Obligation.
[278] *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27, 39 [109].

> impose an obligation upon a contractor to perform works described in the definition of construction contract and other works which are not so described. In that context, the effect of the definition is to limit the meaning of payment claim to a claim for payment for works described in the definition of construction contract, and to exclude from a payment claim any claim for payment for works that are not so described - either because they fall outside the primary definition of construction work, or because they are expressly excluded from the meaning of construction work by s 4(3) of the CCA.

Pursuant to s 4 the Act,[279] lists the activities that are acknowledged and associated with construction work. However, s 4(1) of the Act,[280] states that it must be 'a site in Western Australia, whether on land or offshore'. Section 4(3) declares that it does not include drilling,[281] mining,[282] constructing plant[283] and artworks.[284]

Section 4(4) affirms that 'construction work does not include constructing the whole or part of any watercraft'. [285]

The Act also applies to goods and services that are associated with construction work.[286]

The construction contract had to have been entered into after the Act came into operation after 1 January 2005.[287] The construction contract, to which the Act applied was:[288]

(a) irrespective of whether it is written or oral or partly written and partly oral;

(b) irrespective of where it is entered into; and

(c) irrespective of whether it is expressed to be governed by the law of a place other than Western Australia.

However, pursuant to s 7(3) of the Act,[289]

> (3) This Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply

[279] *Construction Contracts Act 2004* (WA), s 4.
[280] Ibid s 4(1).
[281] Ibid s 4(3)(a).
[282] Ibid s 4(3)(b).
[283] Ibid s 4(3)(c).
[284] Ibid s 4(3)(d).
[285] Ibid s 4(4).
[286] Ibid s 5.
[287] Ibid s 7(1).
[288] Ibid s 7(2).
[289] Ibid s 7(3).

> goods or services that are related to construction work, as an employee (as defined in the Industrial Relations Act 1979 section 7) of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.

The WASCA in *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd,*[290] would have far-reaching effects when dealing with payment claims. His Honour Justice Buss P and his Honour Justice Murphy JA, would contemplate what happens when the construction contract also contains 'obligations' for the performance of work not related to construction work. These matters would come under what they described as being under an 'umbrella contract'[291] of the construction contract.

Often large construction contracts contain contractual obligations that were not contemplated by the Act. These obligations may sometimes be incorporated into an 'application an unpaid 'payment claim' (as defined) for determination by the adjudicator, and (incorrectly) included a claim in the application for payment with respect to its other contractual duties, the duty to dismiss under s 31(2)(a)(i) would not arise'.[292]

They concluded ' that the umbrella contract is nevertheless a 'construction contract' within the meaning of the Act'.[293]

His Honour Chief Justice Martin determined that there will often be construction contracts, 'umbrella contracts' that contain non-construction work contemplated by the Act, but the 'jurisdiction of an adjudicator does not depend upon the payment dispute being limited to claims for payment for work of a kind described in the definition of construction contract'.[294]

This is certainly an issue that must be considered by an adjudicator when making a determination/decision.

The prohibited provisions

The contract in question, however, cannot contain prohibited provisions. When the Honourable Ms. Alannah J. MacTiernan introduced, on motion, the *Construction Contracts Bill 2004* - Introduction and First Reading & Second Reading (the Bill), she specified that:

> The Bill supports good payment practices in the building and construction industries by

[290] [2018] WASCA 27.
[291] *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27, 55 [172].
[292] *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27, 56 [174].
[293] Ibid. the
[294] Ibid 34 [90].

> prohibiting payment provisions in contracts that: slow or stop the movement of funds through the contracting chain; implying fair and reasonable payment terms into contracts that are not in writing; clarifying the right to deal in unfixed materials when a party to the contract becomes insolvent; and providing an effective rapid adjudication process for payment disputes.[295]

Further:

> The notorious "pay if paid" and "pay when paid" clauses will be banned. The financial health of the industry will improve when contractors and subcontractors know they will be paid on time and, equally, know that they have to pay on time.
>
> Apart from these specific unfair practices, the Bill does not unduly restrict the normal commercial operation of the industry. Parties to a construction contract remain free to strike whatever bargains they wish between themselves, as long as they put the payment provisions in writing and do not include the prohibited terms.[296]

Senior Member Raymond and Member Ward noted in *Georgiou Group Pty Ltd and MCC Mining (Western Australia) Pty Ltd*,[297] that:

> 61 While the legislation was expressed in the second reading speech as being to support the privity of the contract between the parties, the form and content of any construction contract under the CC Act is not left to the unfettered discretion of the parties. Various provisions are prohibited (s 9, s 10 and s 11).[298]

Had there been a contract, it is critical that the contract, pursuant to Division 1 - Prohibited provisions, of the Act[299] does not contain any of the following provisions:

> 9. Prohibited: pay if paid/when paid provisions
>
> A provision in a construction contract has no effect if it purports to make the liability of a party (***A***) to pay money under the contract to another party contingent, whether directly or indirectly, on A being paid money by another person (whether or not a party).

[295] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).
[296] Ibid.
[297] [2011] WASAT 120.
[298] *Georgiou Group Pty Ltd and MCC Mining (Western Australia) Pty Ltd* [2011] WASAT 120, 20 [61].
[299] *Construction Contracts Act 2004* (WA), Division 1 – Prohibited provisions, s 9-12.

10. Prohibited: provisions requiring payment to be made after 50 days

    A provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed is to be read as being amended to require the payment to be made within 50 days after it is claimed.

For example, the following was seen in an application for adjudication, which contained certain terms and conditions in a subcontract that read: '3. Payment terms: 45 days after the month end in which the invoice is received at XXX's office or in line with the payment terms of the Principal Contract'.

The subcontractor was required to submit invoices on 24 August. This indicates that seven days have passed until 31 August plus 45 days, which equals 52 days; therefore it becomes a prohibited provision, pursuant to s 10 of the Act. The respondent had claimed that a payment dispute had not arisen as the period determined by the terms and conditions had not been met. Section 10 determined otherwise.

Section 11 and 12 of the Act[300] make it clear as to what action should be taken against a prohibited provision and how it affects the remainder of the contract:

11. Prohibited: prescribed provisions

    A provision in a construction contract has no effect if it is a provision that is prescribed by the regulations to be a prohibited provision.

12. Other provisions of contract not affected

    A provision in a construction contract that has no effect because of section 9 or 11 or that is modified under section 10 does not prejudice or affect the operation of other provisions of the contract.

Professor Evans would note in his review that:

> It is unlikely that the inclusion of s 9, 10 or 11 CCA clauses in a construction contract would substantiate a building services complaint or an HBWC complaint.
>
> However it is possible that inclusion of a s 9, 10 or 11 clause in a contract would provide a basis for a disciplinary complaint under s 53 (1) (e) of the Building Services (Registration) Act 2011 (WA) on the grounds that a registered building service provider has been negligent or incompetent in connection with carrying out a building service

[300] *Construction Contracts Act 2004* (WA), Division 1 – Prohibited provisions, s 11 &12.

(where the clauses are included through ignorance).[301]

However, the prohibited clauses have, for the most part, improved the financial health of the industry.

The implied provisions

The Act provides pursuant to Division 2 - Implied provisions that put in place provisions where no written provisions exist. The Honourable Ms. MacTiernan expressed the requirement for these provisions in the *Construction Contracts Bill 2004.* She asserted:

> When there is no written provision covering the basic payment provisions of the right to be paid, how to deal with variations, how to claim payment and how to dispute it, or the rate of interest on late payments, the Bill provides for fair and effective terms to be implied into the contract. The Bill also provides implied terms to deal with the contentious issues of ownership of unfixed goods or materials when a contractor becomes insolvent, as well as the status of retention moneys. This means the parties should have clear contractual payment rights and obligations so that misunderstanding and disputes are minimised.[302]

The provisions that were later inserted into the Act, are as follows:

> 13. Variations of contractual obligations
>
> The provisions in Schedule 1 Division 1 are implied in a construction contract that does not have a written provision about variations of the contractor's obligations under the contract.[303]

Schedule 1 Division 1 Variations, of the Act,[304] states:

> Division 1 **— Variations**
>
> 1. Variations must be agreed
>
> The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on —
>
> (a) The nature and extent of the variation of those obligations; and

[301] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 71.
[302] Ibid.
[303] *Construction Contracts Act 2004* (WA), Schedule 1 Division 1 Variations.
[304] Ibid.

(b) the amount, or a means of calculating the amount, that the principal is to pay the contractor in relation to the variation of those obligations.[305]

Further, s 14 of the Act,[306] is quite clear that:

14. Contractor's entitlement to be paid

The provisions in Schedule 1 Division 2 are implied in a construction contract that does not have a written provision about the amount, or a means of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.

Schedule 1 Division 2 states:

Division 2 — Contractor's entitlement to be paid

2. Contractor entitled to be paid

(1) The contractor is entitled to be paid a reasonable amount for performing its obligations.

(2) Subclause (1) applies whether or not the contractor performs all of its obligations.

And that pursuant to s 15 of the Act:[307]

15. Contractor's entitlement to claim progress payments

The provisions in Schedule 1 Division 3 are implied in a construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed.

Schedule 1 Division 3 states:

Division 3 — Claims for progress payments

3. Entitlement to claim progress payments

The contractor is entitled to make one or more claims for a progress payment in relation to those of the contractor's obligations that the contractor has performed

[305] *Construction Contracts Act 2004* (WA), s 13.
[306] Ibid s 14.
[307] Ibid s 15.

and for which it has not been paid by the principal.

4. When claims for progress payments can be made

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) The making of a claim for a progress payment does not prevent the contractor from making any other claim for moneys payable to the contractor under or in connection with this contract.

16. Making claims for payment

The provisions in Schedule 1 Division 4 are implied in a construction contract that does not have a written provision about how a party is to make a claim to another party for payment.

17. Responding to claims for payment

The provisions in Schedule 1 Division 5 about when and how a party is to respond to a claim for payment made by another party are implied in a construction contract that does not have a written provision about that matter.

18. Time for payment

The provisions in Schedule 1 Division 5 about the time by when a payment must be made are implied in a construction contract that does not have a written provision about that matter.

Schedule 1 Division 5 states:

Division 5 — Responding to claims for payment

6. Interpretation in Division 5

In this Division —

payment claim means a claim —

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

19. Interest on overdue payments

The provisions in Schedule 1 Division 6 are implied in a construction contract that does not have a written provision about interest to be paid on any payment that is not made at the time required by the contract.

20. Ownership of goods

The provisions in Schedule 1 Division 7 are implied in a construction contract that does not have a written provision about when the ownership of goods that are —

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations,

passes from the contractor.

21. Duties as to unfixed goods on insolvency

The provisions in Schedule 1 Division 8 are implied in a construction contract that does not have a written provision about what is to happen to unfixed goods of a kind referred to in section 20 if either of the following persons becomes insolvent —

(a) the principal; or

(b) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work.

22. Retention money

The provisions in Schedule 1 Division 9 are implied in a construction contract that does not have a written provision about the status of money retained by the principal for the performance by the contractor of its obligations.

Division 9 — Retention money

11. Retention money to be held on trust

If the principal retains from an amount payable by the principal to the contractor for the performance by the contractor of its obligations a portion of that amount

(the ***retention money***), the principal holds the retention money on trust for the contractor until whichever of the following happens first —

(a) the money is paid to the contractor;

(b) the contractor, in writing, agrees to give up any claim to the money;

(c) the money ceases to be payable to the contractor by virtue of the operation of this contract; or

(d) an adjudicator, arbitrator, or other person, or a court, tribunal or other body, determines that the money ceases to be payable to the contractor.

23. Implied provisions: interpretation etc.

The *Interpretation Act 1984* and sections 3 to 6 of this Act apply to the interpretation and construction of a provision that is implied in a construction contract under this Part despite any provision in a construction contract to the contrary.

The first payment claim under reviewable scrutiny

Senior Member Raymond would be the first to look towards the Act and further give advice to those seeking guidance as to what is a payment claim. In making his decision, Senior Member Raymond merely indicated that payment was defined as:

37 a claim under a construction contract by either a contractor against the principal or *vice versa* relating to performance or non-performance by the contractor of its obligations, as the case might be.[308]

He went on to say:

38 Section 6 then provides that a payment dispute arises if, relevantly, 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. By s 7, the CC Act applies to construction contracts entered into after the Act comes into operation.[309]

3.2. What else constitutes a payment claim?

[308] *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture [2005]* WASAT 269, 10 [37].
[309] Ibid [38].

There has always been much discussion as to what constitutes a payment claim. During the early years of the Act, there was a belief that 'only claims for debts being the price for work done and materials supplied could be the subject of a payment claim'.[310]

Senior Member Raymond noted in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture,*[311]

> 80 In my view, the reference to a claim being made under a construction contract is intended to be descriptive only. The object of the adjudication is to determine whether the rejection of a payment claim, in whole or in part, is justified. The interpretation contended for leads to a circuitous inquiry. I consider that all that the legislature intended was to convey that the claim must be one which arises under a construction contract. It is a means to confine adjudication to construction contract claims.[312]

Despite much discussion on this issue since *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture*, Senior Member Raymond is right; the argument does lead to 'circuitous inquiry', but is one that arises under a construction contract, and must, therefore, be considered as a genuine payment claim. Genuine payment claims could, pending on the draft of a construction contract, include:

- Quality of work
- Quantity of work completed or yet to be completed
- The scope of work under a contract
- Variations
- Valuing variations
- Rectification of defective work
- Cost of delays/extension of time
- Liquidated damages and set off; and
- Payment for work done

[310] Laurie James, 'When is a payment claim not a payment claim', (The Institute of Arbitrators & Mediators Australia (IAMA) CDP, 18 February 2013), 3.
[311] [2005] WASAT 269.
[312] *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* [2005] WASAT 269, 18 [80].

This research will look only at variations, delay damages, and liquidated damages and later will investigate set off.

Variations, delay damages, and liquidated damages

The issue of variations has been one that frequents the Courts and the SAT. As an adjudicator, the first thing that one should do is to look at the contract and, in the words of Professor Evans, look and ask; 'what does the contract say?' The contract will provide guidance on the processes and obligations of a variation, such as an agreement on the variation, the obligation, and consideration for the performance. Where a construction contract remains silent on variations, s 13 of the Act,[313] is implied.

Delay damages is another issue. In *O'Donnell Griffin Pty Ltd v. Davis & Ors*,[314] the second defendant, Siemens Ltd, Thiess Services Pty Ltd, t/as STCJV Services for Telecommunications Joint Venture argued that 'a claim for delay damages is within the definition of 'payment claim', because it arises 'in relation to' the performance of its obligations under the subcontract'.[315]

The second defendant argued that it was viable for a party to claim delay damages and interest. The second defendant would refer to the NSW cases of; *Coordinated Construction Co Pty Ltd v J M Hargreaves* (NSW) Pty Ltd [2005] NSWCA 228 and *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 which held that they could both be claimed under the *Building and Construction Industry Security of Payment Act 1999* (NSW).[316]

The plaintiff, O'Donnell Griffin Pty Ltd, declared that:

> the second defendant's entitlement to delay damages arises only when an extension of time has been granted, and that no such extension has been granted in relation to the present dispute, the claim is not 'a payment claim' and the adjudicator, therefore, has no jurisdiction to entertain it.[317]

Templeman J held; 'that all that was required was an amount in relation to the performance by the contractor in its obligations under the Contract. Thus, a claim for delay damages was a payment claim for the purposes of the Act'.[318]

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[313] *Construction Contracts Act 2004* (WA), s 13.
[314] (2007) WASC 215.
[315] *O'Donnell Griffin v. Davis & Ors* [2007] WASC 215, 6 [18].
[316] Ibid [19].
[317] Ibid.
[318] Laurie James, 'When is a payment claim not a payment claim', (The Institute of Arbitrators & Mediators Australia (IAMA) CDP, 18 February 2013), 3.

Also being considered at that time, by the Courts and the SAT, was liquidated damages.[319]

In 2008, in the District Court of Western Australia, in the case of *Wormall Pty Ltd v Marchese Investments Pty Ltd*,[320] the applicant sought an application of leave to enforce a judgement, pursuant to s 43 of the Act.[321] The respondent contended that the application should be disallowed as it related to 'an alleged debt of $55,000'[322] and that the 'amount allegedly represents liquidated damages for failure to complete on time, about which some negotiations had apparently taken place. Given the objects of the Act and the inevitability of further determinations, then the adjudicator's determination should stand'.[323]

Fenbury DCJ disagreed and simply stated: 'I do not think the circumstances articulated on behalf of the respondent are special in the sense or to the degree envisaged by the section, especially having regard to the object of the legislation'.[324] He granted the application. It was clear now to adjudicators, that liquidated damages can be considered in determining payment claims.

Five years later, Senior Member Raymond would set aside and reverse a decision of Adjudicator Michael Charteris. Senior Member Raymond make an order for Adjudicator Charteris to determine the merits.

The dispute, *Croker Construction (WA) Pty Ltd and Stonewest Pty Ltd*,[325] centred on a claim for the payment of liquidated damages and had been referred to adjudication. Adjudicator Charteris dismissed the application, for reasons other than liquidated damages. The agreement between the parties made provision for liquidated damages; however, Fenbury DCJ perceived that there were no provisions written into the agreement as to how the claim for liquidated

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[319] Of note is that pursuant to s 10B(2)(c) of the *Building and Construction Industry Security of Payment Act 2002* (Vic), prohibits any damages, such as liquidated damages, that are associated with calculating payments for claims in breach of a construction contract.
The Victorian Act also excludes; any amounts that relate to a non-claimable variation,[319] any amount claimed for compensation due to events such as; latent conditions,[319] time-related costs,[319] and changes in regulatory requirements.[319]
It is my view that the legislators of the Victorian Act, erred in the drafting of this section. They failed to take into consideration, the ability of most adjudicators, in many cases, have had vast experience in the construction industry and the associated contracts, and are well qualified in making 'quick and dirty decisions' about any damages, such as liquidated damages.
[320] [2008] WADC 140.
[321] *Construction Contracts Act 2004* (WA), s 43.
[322] *Wormall Pty Ltd v Marchese Investments Pty Ltd* [2008] WADC 140, 6 [12].
[323] Ibid.
[324] Ibid 7-8 [15].
[325] [2014] WASAT 19.

damages could be made. He merely affirmed the implied terms pursuant to s 16 of the Act,[326] which referred to Schedule 1, Division 4, clause 5 of the Act,[327] and which, as shall established later, provides for how to make claims for payment.

Adjudicator Charteris re-determined the application and granted the liquidated damages.

While most businesses have their methods of dealing with things on a daily basis, much consideration will need to be given to what a payment claim looks like.

What does a payment claim look like?

The Act provides considerable guidance as to the requirements and layout of a payment claim. Further to s 3, interpretation – payment claim, the Act provides at Schedule 1, Division 4, clause 5,[328] the requirements laid out when making a payment claim. It states:

Division 4 — Making claims for payment

5. Claim for payment, content

(1) In this clause —

payment claim means a claim —

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

(2) A payment claim must —

(a) be in writing;

(b) be addressed to the party to which the claim is made;

(c) state the name of the claimant;

(d) state the date of the claim;

(e) state the amount claimed;

[326] *Construction Contracts Act 2004* (WA), s 16.
[327] Ibid Schedule 1, Division 4, cl 5.
[328] Ibid.

(f) in the case of a claim by the contractor — itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;

(g) in the case of a claim by the principal — describe the basis for the claim in sufficient detail for the contractor to assess the claim;

(h) be signed by the claimant; and

(i) be given to the party to which the claim is made.

(3) In the case of a claim by the contractor, the amount claimed in a payment claim —

(a) must be calculated in accordance with this contract; or

(b) if this contract does not provide a means of calculating the amount, must be —

(i) if this contract says that the principal is to pay the contractor one amount (the ***contract sum***) for the performance by the contractor of all of its obligations under this contract (the ***total obligations***) — the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations;

(ii) if this contract says that the principal is to pay the contractor in accordance with rates specified in this contract — the value of the obligations performed and detailed in the claim calculated by reference to those rates; or

(iii) in any other case — a reasonable amount for the obligations performed and detailed in the claim.

(4) Paragraph (b) of subclause (3) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subparagraphs (i), (ii) and (iii) of that paragraph.

In *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture*, Senior Member Raymond remarked on what he called 'careful and well-constructed argument'[329] by counsel

[329] *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture [2005]* WASAT 269, 13 [53].

of the respondent, Mr. Richard Wilinski, where he brought to the attention of the SAT that there could be no claim 'if supporting documentation to a progress claim was required as a condition precedent' but was not presented. This was confirmed by the NSW Court of Appeal in *Beckhaus Civil Pty Ltd v Council of the Shire of Brewarrina*.[330]

Having supporting documents is critical; however, what constitutes the construct of the payment claim?

In 2012, a decision made by McKechnie J was, to date, the most practical and common sense decision made about the construct of a payment claim. In *DPD v McHenry,*[331] his Honour Justice McKechnie held that all that was a requisite for a payment claim was a list of items of work setting out the amounts of money claimed in respect of each item and containing sufficient detail for the Principal to assess the claim. Legal counsel for the applicant had stated that the payment claims provided were not payment claims pursuant to the Act.

McKechnie J [at 27-28] held:

> 27 On 14 February 2011 an email electronically signed Lawrence Olivier, consultant project manager begins:
>
> Please find attached Claim 2 summary sheet as discussed.
>
> [...]
>
> If you can please remember to forward me the invoicing details for both
>
> Claim 1 and this claim, so Pamela at our office can email me your tax invoices for immediate payment as agreed with Daren.[332]
>
> 28. Attached was, what I regard as a sufficiently itemised claim to describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim.
>
> For example:

		Claim 1	**Claim 2**
Tiling - supply	$11,820.00	$3,546.00	$8,274.00

[330] SCNSW 18 October 2002, BC 2002 06167 (unreported).
[331] [2012] WASC 140.
[332] *DPD v McHenry* (2012) WASC 140, 10 [27].

Labour wall tiles & associated	$15,083.00	$15,083.00
Labour floor tiles & screed/water proof	$11,432 .00	$11,432.00[333]

McKechnie J,

> 29 Other items such as practical products, carpentry, demolition/general labour, cabinetmaker, mirrors, plumbing, wallpaper/painters, supervision are also detailed.[334]

McKechnie J then went on further to assert:

> 32 Contrary to the DPD submission, the claims of 17 February 2011 are clearly payment claims within the definition of s 5.[335]

The next question to ask is whether the payment claim needs to be signed.

Division 4, cl 5(2), does state that a claim for payment must be signed by the claimant.

However, the *Electronic Transactions Act 2011* (WA), which had gained assent on 25 October 2011, *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, would be delivered on 01 March 2012, 128 days after assent.

Pursuant to s 3 of the *Electronic Transactions Act 2011* (WA),[336] the objective of the Act is to provide a regulatory framework that:

(a) recognises the importance of the electronic communication of information to the future economic and social prosperity of Western Australia; and

(b) facilitates the use of electronic communication as a way of entering into transactions; and

(c) promotes business and community confidence in the use of electronic communication as a way of entering into transactions; and

(d) enables business and the community to use electronic communication in their

[333] *DPD v McHenry* (2012) WASC 140, 10-11 [28].
[334] Ibid 11 [29].
[335] Ibid [32].
[336] *Electronic Transactions Act 2011* (WA), s 3.

dealings with government.[337]

Pursuant to s 4(2)(b) of the *Electronic Transactions Act 2011* (WA),[338] states:

> (b) that things that can or have to be done under a law of the State in relation to any of the following matters can generally be done by electronic communication —
>
> (i) giving information in writing;
>
> (ii) providing a signature;
>
> (iii) producing a document;
>
> (iv) recording information; and
>
> (v) retaining a document.[339]

The *Electronic Transactions Act 2011* (WA), states at s 10(1), Signatures[340] that:

> (1) If under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if —
>
> (a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and
>
> (b) the method used was either —
>
> (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
>
> (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence;
>
> and
>
> (c) the person to whom the signature is required to be given consents to that requirement being met by the use of the method mentioned in paragraph (a).

To date, in Western Australia, no case has been heard before the Courts pertaining to the *Electronic Transactions Act 2011* (WA). However, the Full Court of the Supreme Court of

[337] Ibid s 3.
[338] Ibid s 4(2)(b).
[339] *Electronic Transactions Act 2011* (WA), s 4(2)(b).
[340] Ibid s 10.

South Australia made a judgement in *the Corporation of the City of Adelaide v Corneloup & Ors*.[341] The Full Court Bench, made up of the Honourable Coram of Doyle CJ, White and Kourakis JJ, held that:

> 28. An unsigned certificate was provided by a legal practitioner in electronic form. The *Electronic Transactions Act 2000* (SA) provides that, in prescribed circumstances, an electronic communication may satisfy a requirement in law that a document be signed to be effective. The Judge found that the electronic provision of the certificate did not meet the prescribed circumstances of the *Electronic Transactions Act 2000* (SA).[342]

Pursuant to Division 4, cl 5(2)(h) of the Act, when drafting a claim for payment, the content must be signed by the claimant.

> 29. Both the negative command "must not" and the context of s 249(4) of the 1999 Act, strongly suggest that a certificate is an essential condition of validity. I would so hold and, in particular, I am unable to find any basis upon which the requirement for a signature can be exempted from the apparent essentiality of the other conditions imposed by s 249 of the 1999 Act. However, in my view, the statutory requirement that the certificate be signed was satisfied by reason of s 9 of the *Electronic Transactions Act 2000* (SA). The certificate was provided by an email in circumstances which allowed the identification of the legal practitioner and unequivocally showed that he subscribed to the view expressed in the certificate even though he did not sign it.[343]

His Honour Justice Kourakis (as he was then) held in *Corporation of the City of Adelaide v Corneloup & Ors*, that:

> 150. In my view, the provision of the electronic certificate from the Microsoft Outlook email box of the legal practitioner together with the statement of his name, sufficiently identified him. The accompanying email made it clear to P that the legal practitioner expected that the certificate of validity of the by-law would be printed by P and put before the council for the purpose of making the by-laws. Plainly then the provision of the certificate, albeit unsigned, unequivocally

[341] [2011] SASCFC 84.
[342] *Corporation of the City of Adelaide v Corneloup & Ors* [2011] SASCFC 84 [28].
[343] Ibid [29].

signified that the named legal practitioner held the view that the by-law was valid and subscribed to the opinion required by the certificate, although he had not signed it.

151. The judge was concerned that the form in which the certificate was provided allowed for it to be altered before a hard copy of the certificate was made and, for that reason, the judge concluded that the method of electronic communication used was therefore not "reliable".

152. In my view, the *Electronic Transactions Act 2000* (SA) is not concerned with the possible forgery of documents. Unfortunately, forgery is a risk with hard copy or electronic documents. The purpose of The *Electronic Transactions Act 2000* (SA) is to assimilate the position of subscription to a view or position by electronic communication with subscription to it by handwritten signature. In that context, the reliability with which s 9(1) of the *Electronic Transactions Act 2000* (SA) is concerned is the reliability of the indication of subscription in electronic communications. The form of communication used in this case was an appropriate and reliable method for that purpose.

Section 10 of the *Electronic Transactions Act 2011* (WA) would have given rise to the indication of parties' intention. It would be reliable as appropriate for the purpose for which the electronic communication was generated, and the party to whom the signature is required to be given consents to that requirement being met by the use of the method.

Given the vast changes made to commerce since 2004, when the Act gained assent, there has been a greater reliance on electronic communication. Electronic communication is becoming a critical issue for an adjudicator, judicial officer, or legal practitioners, to take this into consideration, as will be seen later in this research.

3.3. How to respond to a payment claim

The Act also provides that there is a process for the response to a payment claim. Schedule 1, Division 5, clauses 6&7 of the Act,[344] provide the answer. It states:

Division 5 — Responding to claims for payment

6. Interpretation in Division 5

[344] *Construction Contracts Act 2004* (WA), Schedule 1, Division 5, cl 6-7.

In this Division —

payment claim means a claim —

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

7. Responding to a payment claim

(1) If a party that receives a payment claim —

(a) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(b) disputes the whole or part of the claim,

the party must, within 14 days after receiving the claim, give the claimant a notice of dispute.

(2) A notice of dispute must —

(a) be in writing;

(b) be addressed to the claimant;

(c) state the name of the party giving the notice;

(d) state the date of the notice;

(e) identify the claim to which the notice relates;

(f) if the claim is being rejected under subclause (1)(a) — state the reasons for the belief that the claim has not been made in accordance with this contract;

(g) if the claim is being disputed under subclause (1)(b) — identify each item of the claim that is disputed and state, in relation to each of those items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(3) Within 28 days after a party receives a payment claim, the party must do one of the following, unless the claim has been rejected or wholly disputed in accordance with subclause (1) —

(a) pay the part of the amount of the claim that is not disputed;

(b) pay the whole of the amount of the claim.

(4) If under this contract the principal is entitled to retain a portion of any amount payable by the principal to the contractor —

(a) subclause (3) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of any amount retained under the entitlement.

It is critical to note that the response must be made within 14 days after the receipt of the payment claim. Also critical to these clauses dealing with the 'notice of dispute', Member Dr De Villiers held in *Moroney & Anor and Murray River North Pty Ltd;*[345] confirmed that:

> 56 The notice of dispute "must" be in writing; it "must" state the date of the notice; and it "must" specify the reasons for the refusal to pay. These requirements are "implied" in order to ensure certainty as to the nature of the dispute, the identity of the parties and the date upon which the payment dispute arose. It also provides the claimant an opportunity to be informed why the claim is being challenged. Such information is essential for an applicant to decide if it wants to lodge an application all before an adjudicator.

Member Dr De Villiers found that a notice given orally did not comply with the statutory provisions of the Act, as 'the notice of the dispute was not in writing, the date of the dispute was not in writing, and the reasons for rejecting the demand were not given in writing'.[346]

3.4. What happens if there is no written contract or agreement?

Section 3 Interpretation of the Act states that a construction contract need not be in writing. If this is the case, the parties can look towards the Act, which provides a set of implied provisions. As Member Dr De Villiers stated in the case of *Moroney & Anor and Murray River North Pty*

[345] [2008] WASAT 111.
[346] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 14 [58].

Ltd,[347] 'If no written contract exists, the implied provisions of the CC ACT apply'.[348]

He went on to affirm:

> 52 This legal regime of implied terms was designed to ensure certainty and consistency in dealing with disputes that arise from construction contracts. The implied terms are therefore consistent with the objectives of the CC Act to deal with payment disputes "fairly and as quickly, informally and inexpensively as possible" (s 30 of the CC Act).[349]

Dr De Villiers' statement that the implied terms should be harmonious with the intrinsic worth has merit. A failure to look towards the implied terms leaves the parties open to seek from the Courts the most appropriate action, which would take considerable time in dragging out the dispute and would lead to the high costs of legal counsel when pursuing a dispute.

Several years later, Commissioner Gething, would state in *Michael Ebbott t/as South Coast Scaffolding and Rigging Services v Hire Access Pty Ltd:*[350]

> 32 …by using the language of implied provisions; Parliament has drawn on an established common law contractual concept. Parliament has not used the language of a statutory direction. At common law '[…] for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract': *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266, 283.

Therefore; if there is no written contract, and the party is required to submit a payment claim, the implied provisions detail how. Section 16 of the Act[351] holds that:

> 16. Making claims for payment
>
> The provisions in Schedule 1 Division 4 are implied in a construction contract that does not have a written provision about how a party is to make a claim to another

[347] [2008] WASAT 111.
[348] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 9 [33].
[349] Ibid 13 [52].
[350] [2012] WADC 66.
[351] *Construction Contracts Act 2004* (WA), s 16.

party for payment.

The provisions in Schedule 1 Division 4 (clause 5) are those that have been previously mentioned in this chapter.

The reverse also applies. The Act also provides for how a party is to respond to a payment claim when there is no written contract. Section 17 of the Act, states:

17. Responding to claims for payment

The provisions in Schedule 1 Division 5 about when and how a party is to respond to a claim for payment made by another party are implied in a construction contract that does not have a written provision about that matter.

The provisions in Schedule 1 Division 5 (clauses 6&7) are simply those that have been previously mentioned in this chapter.

The complexity of the issue arose in the case of *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd.*[352] Senior Member Raymond and Member Carey noted that a contract between the two parties did not provide a mechanism 'as to how and when to respond to a progress claim'[353] and therefore the implied provisions of the Act were applied. The provisions gave rise to the requirement of the respondent to 'give notice within 14 days of receipt of the payment claim if it disputed the claim'.[354] While the respondent had given notice it was not prepared within the 14-day timeframe provided by the Act.

Senior Member Raymond and Member Carey refused the application for review and affirmed the decision of the adjudicator.

3.5. When a payment claim is not a payment claim

Senior Member Raymond in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* [355] would first answer the question when a payment claim is not a payment claim. Raymond held at [80] that: 'indirectly related claims, which might arise under statute or, for instance, under quantum meruit, would not be included'.

The issue of quantum meruit is a suitable position to start when determining a payment claim

[352] [2009] WASAT 133.
[353] *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd*, [2009] WASAT 133, 3 [2].
[354] Ibid.
[355] [2005] WASAT 269.

is not a payment claim.

Quantum Meruit

In the matter of *Delmere Holdings Pty Ltd v Green*[356] that came before the Supreme Court of Western Australia. The plaintiff, Alliance Infrastructure Pty Ltd, sought to quash the determination made by the first respondent, the Adjudicator Barry Green.

Kenneth Martin J would allow the application and the certiorari was issued.

The Act does not give rise as to whether quantum meruit lies within the grasp of the adjudicator.

The letter of demand does not constitute a payment claim

A payment claim must be the subject of a payment dispute,[357] but what constitutes a payment dispute?

In August 2012, Member Aitken, of the SAT, in *Howard and Farrell,*[358] determined on the documents, a review of an adjudicator's decision to dismiss the application. The application was dismissed by Member Aitken. Member Aitken would identify that a letter sent by the applicant's legal counsel 'demanding payment of the balance owing under the quote and the amount of the 20 June 2011 invoice, being a total of $32,252.64',[359] did not constitute a payment claim.

James stated at an IAMA meeting on 25 June 2013, that:

> Member Aitken held, no doubt correctly, that although a letter of demand for the balance due in respect of a number of previous invoices, not paid in full, was a claim for payment, it was not a payment claim for the purposes of the Act. Previous invoices, wholly or partly paid, were payment claims which had not been the subject of adjudication applications, whereas the letter is seeking payment of the balance, although a claim for payment, was not a payment claim for this purpose.[360]

The Statutory Regime and what constitutes a payment dispute?

> Building contracts are pregnant with disputes […] The disputes frequently arise in the context of the contractor suing for the price and

[356] *Delmere Holdings Pty Ltd v Green* [2015] WASC 148.
[357] Ibid 1.
[358] [2012] WASAT 169.
[359] *Howard and Farrell* [2012] WASAT 169, 4 [12].
[360] Laurie James, 'When is a payment claim not a payment claim', (The Institute of Arbitrators & Mediators Australia (IAMA) CDP, 18 February 2013), 2.

> being met by a claim for abatement of the price or cross-claims founded on an allegation that the performance of the contract has been defective.
>
> Lord Browne-Wilkinson
> *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [361]

Page one of the *Construction Contracts Act 2004* (WA), states that [the Act] is, amongst other things, 'to provide a means for adjudicating payment disputes arising under construction contracts'.[362]

The crux of that issue is payment disputes arising under construction contracts.

But when and how does a payment dispute arise?

3.6. When does a payment dispute arise?

The Act provides, pursuant to s 6 that:[363]

> 6. Payment dispute
>
> For the purposes of this Act, 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.

James would later state, at a presentation before the Institute of Arbitrators and Mediators – Australia:

> In passing, I might say that I have never been able to understand the difference between wholly or partly disputing a claim, on the one hand, or rejecting the claim on the other. However, it is clear that the amount concerned must be claimed in the payment claim.[364]

[361] [1994] 1 AC, 6 [48].
[362] *Construction Contracts Act 2004* (WA), 1.
[363] Ibid, s 6.
[364] Laurie James, 'When is a payment claim not a payment claim', (The Institute of Arbitrators & Mediators Australia (IAMA) CDP, 18 February 2013), 1.

This would also be the view of her Honour Justice McLure (P) in the Appeal Division of the Supreme Court of Western Australia case of *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation.*[365] The case was on appeal from the Supreme Court of Western Australia, *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation*,[366] which had been heard by her Honour Justice Mitchell.

Amongst the issues before the most Honourable Coram of Martin CJ, McLure P, and Newnes JA, was to seek a 'Statutory interpretation - Proper construction of s 6(a) of the *Construction Contracts Act 2004* (WA) when 'payment dispute' arises'. Her Honour Justice McLure (P) would state: 'That brings me to the proper construction of s 6 of the Act'.

Her Honour, clarified that there are two characteristics to s 6 of the Act.[367] They are: being the stand-alone concept of a 'payment dispute' (used in s 30[368] and s 31(2)(b))[369] and a temporal aspect, being when a payment dispute arises.[370] The emphasis is on the word 'arises', which Her Honour further identified to have two facets, simply in reverse: 'the second (when picked up in s 25[371]) informs the necessary 'connection' between the payment dispute and the construction contract in question';[372] the first, her Honour states, is temporal (relating to time). McLure P states that it 'is evident from the expression 'by the time' in each paragraph of s 6. The temporal requirement in s 6(a) is 'by the time when the amount claimed is due to be paid under the [construction] contract'.[373] This time the emphasis is on the word due. In her Honour's opinion 'the word 'due' in s 6(a) means 'earned', in the sense of having an entitlement under a construction contract to lodge a payment claim as defined in the Act'.[374] The issue of entitlement for payment against a payment claim is as her Honour states, 'the very issue the

[365] [2016] WASCA 130.
[366] [2015] WASC 237.
[367] *Construction Contracts Act 2004* (WA), s 6.
[368] s 30. Object of the adjudication process: The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.
[369] s 31(2)(b) An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a) — (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.
[370] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2016] WASCA 130, 67-68 [200].
[371] s 25. Who can apply for adjudication: If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless —
(a) an application for adjudication has already been made by a party, whether or not a determination has been made, but subject to section 37(2); or
(b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.
[372] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2016] WASCA 130, 68 [202].
[373] Ibid.
[374] Ibid [204].

adjudicator is required to determine if his jurisdiction in s 31(2)(b) is enlivened, being whether any party to the payment dispute is liable to make a payment'. Her honour states that any failure to pay an amount in full will trigger a payment dispute, or when it is rejected or was wholly or partly disputed.[375] Her Honour's final words on the matter directly and succinctly articulate:

> 206 This construction of what is a payment dispute and when it arises leaves the determination of the substance of the payment dispute (being the application of the construction contract to the facts) to the adjudicator under s 31(2)(b) of the Act.[376]

An adjudicator can get on with their role.

3.7. When does a payment dispute arise? - Post amendments to the Act

It is critical in this section to look at the amended changes that were made to the Act. In the final Report, Evans stated:

> It does not appear to be practical to amend s 6 of the Act to additionally define when a dispute arises where the parties initially choose to pursue a resolution of the payment dispute through negotiation as part of the contract's dispute resolution clause in that it has the potential to further delay resolution and is, therefore, inconsistent with the object of the Act to resolve the payment dispute in a timely manner.[377]

The Attorney General in the Second Reading Speech asserted otherwise, by stating that the bill would include:

> clarifying when a payment dispute commences for the purposes of section 6(1) of the Construction Contracts Act, to make it clear to the parties when an application for adjudication of the dispute should be made.[378]

The Act, pursuant to s 6 of the Act,[379] was amended to reflect the following changes and now reads:

> 6. Payment dispute

[375] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2016] WASCA 130, 69 [205].
[376] Ibid [206].
[377] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 23.
[378] Western Australia, *Second Reading - Construction Contracts Amendment Bill 2016*, Tues 08 November 2016, 2 (Michael Mischin).
[379] *Construction Contracts Act 2004* (WA), s 6.

(1) For the purposes of this Act, a payment dispute arises if —

(aa) a payment claim is rejected or wholly or partly disputed; or

(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

(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.

(2) Despite subsection (1), a payment dispute does not arise under subsection (1)(aa) or (a) to the extent to which the payment claim includes matters that were the subject of an application for adjudication that has been dismissed or determined under section 31(2).[380]

(3) If a payment dispute arises under both subsection (1)(aa) and (a) in relation to a payment claim then, for the purposes of this Act, the dispute arises on the earlier of the 2 occurrences.

The Explanatory Memorandum *Construction Contracts Amendment Bill* 2016, make clear that:

> In the past there has been some uncertainty on the proper construction to be given to the current section 6(1) of the Act and whether a party has to wait until when a payment claim due had not been paid in full, even if a notice had been issued under the contract disputing the whole or part of the payment claim, before applying for adjudication of the dispute. This clause inserts a new section 6(3) which clarifies that a payment dispute arises on the earliest of either occurrence.[381]

[380] Western Australia, Explanatory Memorandum *Construction Contracts Amendment Bill 2016.* The memorandum, explained that [at 7-8]:

> The new section 6(2) makes it clear that where a payment claim includes matters covered in a previous payment claim, and the payment claim is disputed, then for the purposes of the Act a payment dispute arises, but not if the matters in the previous payment claim have been the subject of an application for adjudication that has been dismissed or determined.
>
> The exclusion inserted by the new section 6(2) prevents the potential for 'adjudicator shopping' that could arise from allowing the adjudication of disputes over payment claims that include matters previously disputed and adjudicated upon.
>
> The new section 6(2) will operate in conjunction with the requirement in section 31(2)(a)(iii) that the adjudicator must dismiss an application for adjudication if an arbitrator, court, other person or body has already made an order, judgement or other finding about the dispute that is the subject of the application.

[381] Western Australia, Explanatory Memorandum *Construction Contracts Amendment Bill 2016*, 6.

The legislators have correctly interpreted the position of the WASCA in the decision in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation.*[382] The amendment to s 6 of the Act,[383] clearly gives proper construction in the clarification of what constitutes a payment dispute.

The WASCA in *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd,*[384] would further look into this matter. Pivotal to this decision lies in accordance with s 6 and the use of the word 'obligation'.[385] His Honour Justice Buss P and his Honour Justice Murphy JA, qualified in the terms of s 6 that a payment dispute arises if (their emphasis is in Bold/Italic):

(a) by the time when a 'payment claim' ***(of an amount in relation to the performance or non-performance of the contractor's 'obligations')*** is due to be paid under the construction 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 principal (or other party) under the construction contract ***(for the performance of the contractor's 'obligations')*** is due to be paid under the construction contract, the money has not been paid; or

(c) by the time when any security held by a principal (or other party) under the construction contract ***(for the performance of the contractor's obligations)*** is due to be returned under the construction contract, the security has not been returned.[386]

[382] [2015] WASC 237.
[383] *Construction Contracts Act 2004* (WA), s 6.
[384] [2018] WASCA 27.
[385] *Construction Contracts Act 2004* (WA), s 3, Obligation; in relation to a contractor, means those of the obligations described in the definition of ***construction contract*** that the contractor has under the construction contract.
[386] *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27, 52 [159].

PART 2

Part 2 – The Jurisdiction of the Courts and the State Administrative Tribunal and the *Construction Contracts Act 2004* (WA).

The aim of part two of this research is to look at the jurisdiction of the Courts in enforcing an adjudicator's determination as an order of the Court, and the limited right of review of an adjudicator's determination by the Courts of Western Australia and the State Administrative Tribunal.

Part two has three chapters, they are:

- Chapter 4: Section 43 – Determinations may be enforced as orders of court
- Chapter 5: Section 46 (Review, limited right of) of the *Construction Contracts Act 2004* (WA) and the jurisdiction of the State Administrative Tribunal of Western Australia.
- Chapter 6: Jurisdictional error, judicial review of the *Construction Contracts Act 2004* (WA) and the jurisdiction of the Supreme Court of Western Australia.

Chapter 4

Section 43 - Determinations may be enforced as orders of the court

> The plaintiff applies for leave pursuant to s 43 of the Construction Contracts Act 2004 (WA) to enforce a determination under that Act in the same manner as a judgment of this court.
>
> His Honour Justice Beech
> *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*[387]

> It is a 'pay now, argue later' system: *Multiplex Constructions Pty Ltd v Lui Kans* [2003] NSWSC 1140 [96] (Palmer J), with the primary aim of keeping the money flowing by enforcing timely payment: *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217; (2011) 43 WAR 319 [87].
>
> His Honour Justice Pullin
> *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd*[388]

> It is not surprising that this subcontractor feels abandoned by, and angry with, the system.
>
> Mr David Eaton
> Small Business Commissioner of Western Australia[389]

4.1. Introduction

As already discussed, the Honourable Justice Terence Rhoderic Hudson Cole RFD QC noted that whilst he was conducting the Royal Commission into the Building and Construction Industry, it became quite clear that many small subcontractors were ‘suffering and hardship was caused to subcontractors by builders who are unable or unwilling to pay for work from

[387] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 3 [1].
[388] [2014] WASCA 91.
[389] David Eaton, *Final Report - Small Business Commissioner Construction Subcontractor Investigation*, March 2013, 48.

which they have benefited'.[390]

His Honour recognised that those affected did not have the financial resources to engage in protracted litigation or have the 'expertise to enforce those legal rights,' unlike the often larger and far better-resourced companies that they faced in trying to enforce those rights. In his final report, His Honour recognised that:

> Consequently, subcontractors that have operated profitably and well for many years can be forced into liquidation through no fault of their own, often with devastating consequences for the owners of these businesses, their families, their employees and their creditors.[391]

His Honour would later become instrumental in the commencement of security of payment legislation within Australia. In Western Australia, that was made possible with the legislating of the *Construction Contracts Act 2004* (WA).

In most cases in the Construction Industry, once an adjudicator's determination is published, the parties will simply pay the debt that is due and payable. However, there are occasions when the party owing the debt refuses to pay. The Act provides a mechanism where a party can, in the same way as an order or a judgment of the court, enforce a determination. That right is given pursuant to s 43 of the Act,[392]

Section 43 of the Act has been problematic concerning the enforcement of adjudicators' determinations. This chapter comments on how in the early years of the Act, many key players failed to have a comprehensive understanding of what was required to enforce the determination, and as a result, those seeking enforcement were left without payment that was due to them. One such case is the District Court of Western Australia decision in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*.[393] The Small Business Commissioner of Western Australia, Mr David Eaton, would later comment; '[i]t is not surprising that this subcontractor feels abandoned by and angry with, the system.' [394]

4.2. The aim of this chapter

[390] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry, Final Report* (2003) vol 8, [115]. (Justice Terence Rhoderic Hudson Cole).
[391] Commonwealth of Australia, *The Royal Commission into the Building and Construction Industry, Final Report* (2003) vol 8, [115]. (Justice Terence Rhoderic Hudson Cole).
[392] *The Construction Contracts Act 2004* (WA), s 43.
[393] [2012] WADC 27.
[394] David Eaton, *Final Report - Small Business Commissioner Construction Subcontractor Investigation*, March 2013, 48.

This chapter aims to overview the enforcement of adjudicators' determinations, pursuant to s 43 of the Act,[395] by the courts of Western Australia and the jurisdiction in dealing with the recovery of debts that are due and payable.

This chapter will analyse the decision made in the case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*,[396] and the subsequent cases that would further affect this seeking of enforcement.

The chapter will look at cases post *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, the amendments to the Act in 2016, some of the cases that occurred post-amendments, and the future of the enforcement of adjudicators' determinations, pursuant to s 43 of the Act.

4.3. What does the Act say?

Before the amendments made in 2016 to the Act, it provided that, pursuant to s 43:

> 43. Determinations may be enforced as judgments
>
> (1) In this section —
>
> **court of competent jurisdiction**, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.
>
> (2) A determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect, and if such leave is given, judgment may be entered in terms of the determination.
>
> (3) For the purposes of subsection (2), a determination signed by an adjudicator and certified by the Registrar as having been made by a registered adjudicator under this Part is to be taken as having been made under this Part.[397]

The critical component in this section of the Act is the seeking of 'the leave of a competent court' as per s 43(1)'. On many occasions, leave was not sought, and the process became a

[395] Ibid.
[396] [2012] WADC 27.
[397] *Construction Contracts Act 2004* (WA), s 43.

long, difficult and expensive journey, to seek that enforcement.

4.4. Background

Since the commencement of the *Construction Contracts Act 2004* (WA), there have been, on 27 occasions, applications to both the WASC and the DCWA, to enforce the judgment of an adjudicator's determination.

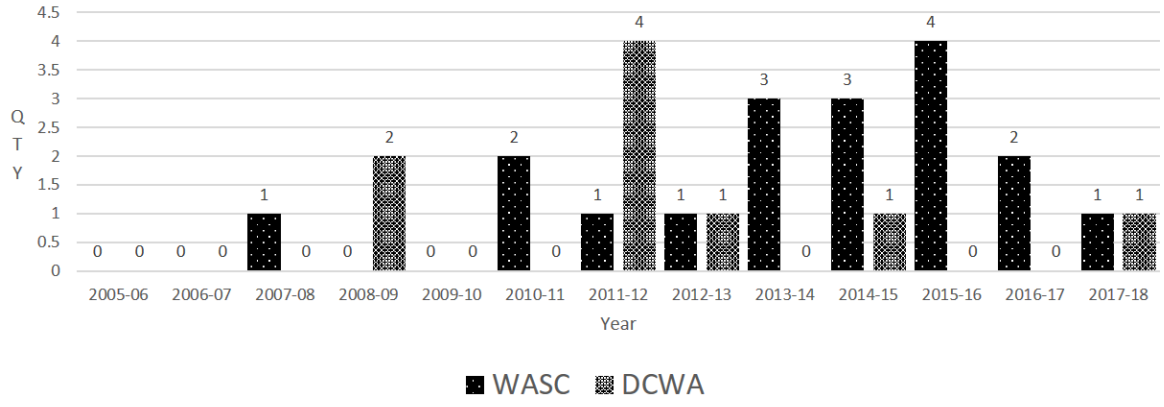


Figure 6 – The number of applications of enforcement in the WASC and the DCWA.

Of the 27 applications that have been sought for the enforcement of an adjudicator's determination, pursuant to s 43 of the Act,[398] 13 (or 48%) have been enforced, 11 (or 41%) have been refused, and 3 (or 11%) have been stayed or adjourned as pending, results from cases being heard in superior courts.

As can be seen above in **Figure 6**, it was not until 2007-2008 that the first application for enforcement of an adjudicator's judgment was made. The first case that sought enforcement of an adjudicator's determination was the WASC case of *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*.[399] Beech J held that a determination made by an adjudicator is not irrevocable to the 'parties' rights and obligations'[400] and that it does not prejudice the rights and obligations.[401] Templeman J would later confirm this in *O'Donnell Griffin Pty Ltd v Davis & Ors*[402] when he stated that pursuant to s 45 of the Act,[403] 'even an erroneous adjudication would

[398] Ibid..
[399] [2008] WASC 58.
[400] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 14 [58].
[401] Ibid.
[402] [2007] WASC 215.
[403] *Construction Contracts Act 2004* (WA), s 45.

not deprive the plaintiff of its contractual rights.'[404]

The WASC has had a total of 18 applications for the enforcement of an adjudicator's determination. Of the 18 applications sought pursuant to s 43 of the Act,[405] 8 (or 44%) were granted, 9 (or 50%) were refused, and 1 (or 6%) were stayed.

The breakdown of cases in the WASC is as illustrated below in **Figure 7**.

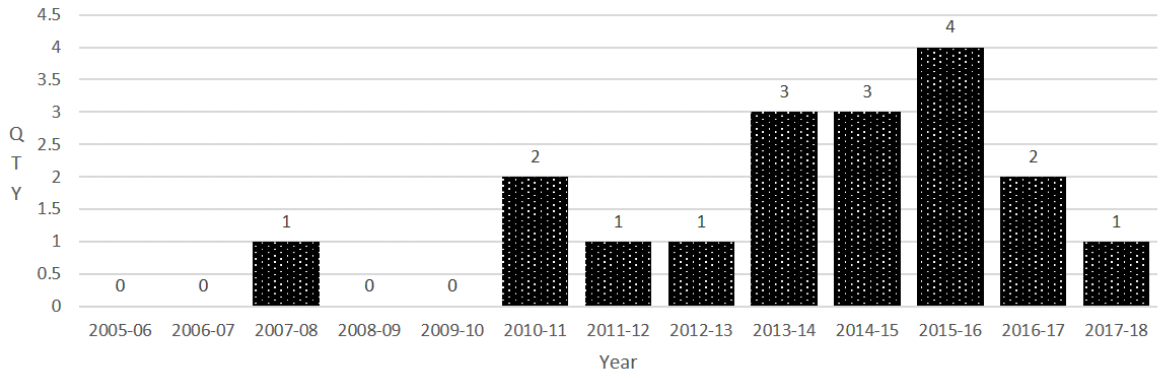
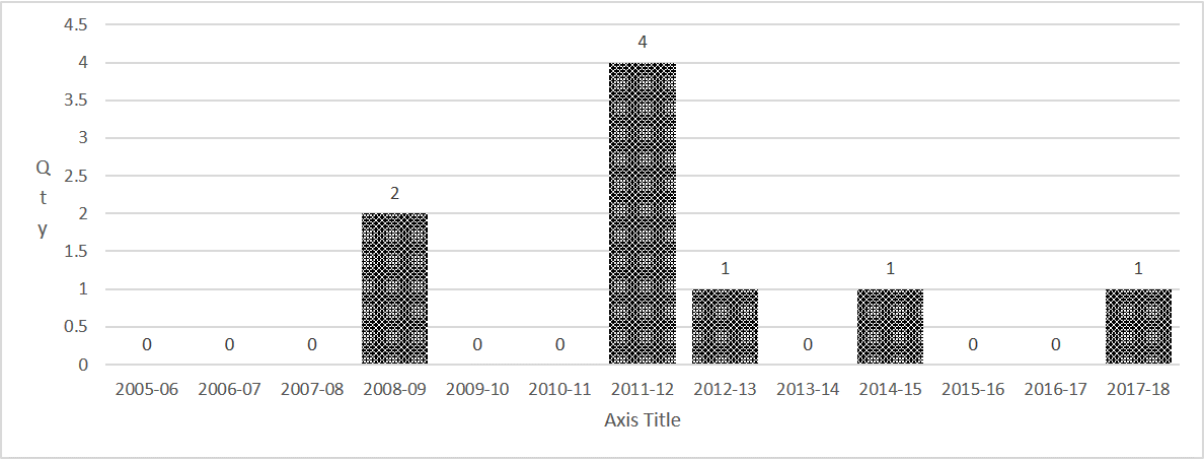


Figure 7 – s 43 and the WASC

The greatest number of applications for enforcement was in 2015-2016, when four applications were made to the WASC. The DCWA has had a total of nine applications for the enforcement of an adjudicator's determination. Of the nine applications sought pursuant to s 43 of the Act,[406] 5 (or 63%) were granted, 2 (or 22%) was refused, and 2 (or 22%) were stayed.

The breakdown of cases in the DCWA is as illustrated below in **Figure 8**.



[404] *O'Donnell Griffin Pty Ltd v Davis & Ors* [2007] WASC 215, 9 [36].
[405] *Construction Contracts Act 2004* (WA), s 43.
[406] *Construction Contracts Act 2004* (WA), s 43.

Figure 8 – Enforcement of s 43 and the DCWA

The first case in the DCWA, *Wormall Pty Ltd v Marchese Investments Pty Ltd*,[407] was brought before the DCWA for enforcement. The applicant, Wormall, made 'application for leave to enforce a determination made under the *Construction Contracts Act 2004* (WA) in the same manner as a judgment of the District Court'. The greatest number of applications for enforcement was in 2011-2012, when four were made to the District Court.

It can be seen above that 90% (or 9 out of 10 cases) of the cases pertaining to the Act have sought leave to enforce the determination as a judgment of the DCWA. Of these two, both BMW- BER projects *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* and *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [No 2] were adjourned as the respondent had sought review by the Supreme Court of Western Australia. Both cases would 'die a quiet death' as the respondent would fall into receivership, leaving the applicant owed about $380,000. The BMW would later make a one-off payment of about $92k to the contractor.[408]

The subsequent report prepared by the Small Business Commissioner of Western Australia, Mr David Eaton, would highlight this case, and not positively.

4.5. Section 43 and the Courts

In 2008, his Honour Justice Beech, in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*,[409] would be the first to hear a case that would seek enforcement of an adjudicator's determination, pursuant to s 43 of the Act.[410] His Honour would grant the enforcement. Adjudicator Roger Davis had made a determination in favour of *O'Donnell Griffin Pty Ltd* for an amount of $14,515,018.30 with interest. On 4 March 2008, *O'Donnell Griffin Pty Ltd* commenced the proceedings for the enforcement of that amount.

His Honour opined that leave would be granted pursuant to s 43(2), in consideration of 'a proper construction'[411] of the Act; however, enforcement would be reliant on the grounds of

[407] [2008] WADC 140.
[408] Private Communication – author and the Contractor – 11 Nov14.
[409] [2008] WASC 58.
[410] *Construction Contracts Act 2004* (WA), s 43.
[411] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 4 [12(a)].

which the leave should be denied, by what could be established by the respondent.[412]

His Honour noted that pursuant to s 43(2) of the Act, did 'not expressly identify the matters relevant to whether leave should be granted.'[413] However when 'exercising' that power, consideration must be given, 'to the context, objects, purpose and policy of the legislation.'[414] These he noted would be found in the *Construction Contracts Act* itself, and any secondary materials, such as explanatory memorandum for the bill or the Second Reading Speech.

His Honour would identify that the language used in s 43(2) of the Act was most similar to s 33 of the then *Commercial Arbitration Act,*[415] which stated:

> 33. An award made under an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect, and where leave is so given, judgment may be entered in terms of the award.[416]

His Honour concluded of both s 43(2) of the *Construction Contracts Act 2004* (WA), and s 33 of the *Commercial Arbitration Act 1985* (WA) 'were of valuable assistance in the exercise of discretion under s 43(2)'.[417] However his Honour would refer to the High Court of Australia case of *Re Alcan Australia Ltd; ex parte Federation of Industrial, Manufacturing & Engineering Employees,*[418] citing, that when Parliament legislates the words which on previous

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[412] Ibid.
[413] Ibid 4 [13].
[414] Ibid.
[415] *Commercial Arbitration Act 1985* (WA).
[416] Ibid s 33.
[417] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 10 [43].
[418] [1994] HCA 34; (1994) 181 CLR 96, (1994) 68 ALJR 626, (1994) 123 ALR 193. Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and Mchugh JJ all agreed [at 20]; that There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already "judicially attributed to (them)" ((28) Barras v. Aberdeen Steam Trawling and Fishing Co. (1933) AC 402 at 446 per Lord Macmillan. See also D'Emden v. Pedder (1904) [1904] HCA 1; 1 CLR 91 at 110; Pillar v. Arthur [1912] HCA 51; (1912) 15 CLR 18 at 22, 25, 29-30; Platz v. Osborne [1943] HCA 39; (1943) 68 CLR 133 at 141, 146, 146-147.), although the validity of that proposition has been questioned ((29) Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation [1952] HCA 4; (1952) 85 CLR 159 at 174, 182; Reg. v. Reynhoudt [1962] HCA 23; (1962) 107 CLR 381 at 388; Flaherty v. Girgis [1987] HCA 17; (1987) 162 CLR 574 at 594.). But the presumption is considerably strengthened in the present case by the legislative history of the Act.

occasions have been construed judicially, then 'Parliament may be taken to have intended them to bear the meaning already judicially attributed to them.'[419]

His Honour would also look towards the New South Wales case of *Cockatoo Dockyard Pty Ltd v Commonwealth of Australia [No 3]*.[420] His Honour discussed the view held by his Honour Justice Rolfe that in his opinion, the words of s 33 of the *Commercial Arbitration Act 1984* (NSW), which he confirmed were 'identical terms to s 33 of the *Commercial Arbitration Act 1985* (WA)',[421] and intended that if leave was being sought, it was not a reason to scrutinise the correctness of an arbitrator's award[422] and that the opposing party would need to ascertain why the award made by an arbitrator should not be enforced.[423]

His Honour sought consolation in the Explanatory Memorandum, and ratified the view that '[t]he adjudicator's decision determines only whether a payment must be made pending the determination (by agreement, arbitration or litigation) of any substantive dispute.'[424] As Ms MacTiernan stated in the Second Reading of the *Construction Contracts Bill 2004*, '[i]ts primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.'[425] The Act does not prevent the parties to the payment dispute from instigating proceedings before an arbitrator or other person or a court or other body.'[426]

It is at this point that his Honour fittingly looked towards what is considered the single most important part of the *Constructions Contracts Act 2004* (WA), that being s 30. Section 30 declares the 'The object of an adjudication of a payment dispute is to determine the dispute

[419] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 9 [43].
[420] (1994) 35 NSWLR 689.
[421] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 10 [44].
[422] Ibid.
[423] Ibid.
[424] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 11 [47].
[425] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).
[426] *Construction Contracts Act 2004* (WA), s 45.

fairly and as quickly, informally and inexpensively as possible',[427] and the object would be subjugated if a review were conducted on an adjudicator's determination, as to its correctness.

His Honour corroborated this often forgotten object and his next words make it clear '[t]he evident purpose of the adjudication process would be defeated if an application for leave to enforce a determination permitted a review of the correctness of the adjudicator's determination.'[428]

Since the commencement of the Act in 2005, there have been only three cases that have gone before the Western Australian Supreme Court of Appeal. The first case would be *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*,[429] which was on appeal from the SAT. The case, *Perrinepod Pty Ltd,* and *Georgiou Building Pty Ltd* had previously been heard by his Honour Justice Sharp and Member Carey. The case concerned itself over a determination made by Adjudicator Davis, who determined that the respondent should pay the applicant an amount of $1,575,912.57.[430]

The respondent applied for a review to the SAT, asserting that Adjudicator Davis should have dismissed the application, as it was too complex, pursuant to s 31(2)(a) of the Act.[431] The SAT stated that those decisions are not reviewable under s 46(1) of the Act,[432] and subsequently dismissed the application. The respondent sought an appeal pursuant to s 105(1) of the SAT Act.[433]

While the appeal was not centred on s 43 and enforcement, his Honour Justice Murphy would confirm that a determination made by an adjudicator is amenable to judicial review if there is

[427] Ibid s 30.
[428] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 11 [47].
[429] [2011] WASCA 217.
[430] *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, 11 [26].
[431] *Construction Contracts Act 2004* (WA), s 31(2)(a).
[432] Ibid s 46(1).
[433] *State Administrative Tribunal Act 2004* (WA), s 105(1).

jurisdictional error. His Honour indicated, 'at the point at which application is made to enforce the determination by a court of competent jurisdiction, under s 43'.[434]

His Honour asserted that there could be no determination, again on the basis that there could be 'determination at all', as the adjudicator would have exceeded one's jurisdiction.[435]

Some 140 days later a case would come before DCWA, seeking enforcement, pursuant to s 43 of the Act.

4.6. The case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd.*

On 16 February 2012, Deputy Registrar Hewitt, of the DCWA heard the case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*.[436] On 1 March 2012, the Deputy Registrar would adjourn an application, pending resolution by WASC proceedings. Until that date, the DCWA had only had three applications for enforcement pursuant to s 43,[437] as had the WASC.[438] The Act had no ancillary legislation, to support the rapid enforcement of the determinations made. There was only a limited amount of case law providing guidance, to those dealing with the applications for enforcement.

In *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*,[439] a small electrical firm, State Side Electrical Services Pty Ltd (State Side), undertook work as a sub-contractor for WA Commercial Constructions Pty Ltd (KMC Group). The work was part of the now infamous Building Education Revolution (BER) program conducted in Western Australia between 2009 and March 2012.

On 8 June 2009, State Side was asked to provide quotes for the KMC Group for electrical work to be carried out under the BER program. State Side provided the following quotes:;

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[434] *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, 29 [92].
[435] *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, 29 [92].
[436] [2012] WADC 27.
[437] The DCWA cases were; *Wormall Pty Ltd v Marchese Investments Pty Ltd* [2008] WADC 140, *Wormall Pty Ltd v Marchese Investments Pty Ltd* [2008] WADC 173, and *Witham v Raminea Pty Ltd* [2012] WADC 1.
[438] The WASC cases were; *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, and *Thiess Pty Ltd v Mcc Mining (Western Australia) Pty Ltd* [2011] WASC 80. Coincidently, the WASC case of *Georgiou Building Pty Ltd v Perrinepod Pty Ltd* [2012] WASC 72, was delivered on the same day, 3 March 2012.
[439] [2012] WADC 27.

1. Quote - Shelley Primary School - Early Childhood Block 2 Rooms totalling $98,000.00 ex GST;
2. Quote - Shelley Primary School - Covered Assembly & Music Art Block totalling $137,000 ex GST; and
3. Quote - Mt Pleasant Primary School - 2 Classroom Music &Art Block totalling $172,800 ex GST.

The parties, WA Commercial Constructions Pty Ltd and State Side Electrical Services Pty Ltd, entered a legal verbal agreement for electrical work to be carried out at the two Primary Schools. The verbal agreement would bind the parties to the implied provisions of the Act, to carry out construction work.

State Side later contended that:

> They were contracted by the respondent to perform electrical works at Shelley Primary School and Mt Pleasant Primary School. The jobs consisted of two parts – Building Works, for which quotes were supplied, and Ground Works, costs for which were based on a bill of rates supplied by KMC Group and for which Sub Contract Purchase Orders were supplied.[440]

State Side completed the tasks, and on 1 July 2011 began to make provision to submit payment claims to the KMC Group. In a letter from KMC Group to the applicant's legal Counsel dated 18 July 2011, it stated that they had been "doing business amicably for the past 3 (sic) years). They said that: 'We advise that it is not KMC's intention to not to pay invoices forwarded by its suppliers' and then maintained that 'many of the invoices listed in your correspondence have been subject of numerous communications between Stateside (sic) and KMC.'[441]

On 24 July 2011, a reconciliation meeting was conducted between the parties. KMC Group suggested that the parties meet and resolve the issue of the invoices, declaring that 'this would be the most efficient way to expedite a resolution to this matter.'[442]

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[440] Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 16(a).
[441] letter from KMC Group (Mr Ron Indrisie) to Talbot Olivier Lawyers dated 18 Jul 2011
[442] Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 4, taken from a letter KMC Group Ref: k11146PF/SU002172/RI/RI dated 18 Jul 2011.

A reconciliation was conducted of all the invoices, and it was revealed that 'work had been completed the previous financial year but had not been added to the financials of the company.'[443]

As a result of the Reconciliation, State Side issued the following payment claims to the KMC Group, by email dated 24/08/2011, against the following deficiencies:

1) No IV00000660, for $100,856.00 Incl GST, for Building Works completed at Shelley Primary School;
2) No IV00000581, for $25,000.00 Incl GST, for Building Works completed at Mt Pleasant Primary School;
3) No IV00000661, for $41,249.25 Incl GST, for Building Works completed at Mt Pleasant Primary School;
4) No IV00000663, for $20,000.00 Incl GST, for Building Works completed at Mt Pleasant Primary School;
5) Total amount due: $187,105.25 (incl GST).

The adjudicator noted:

> 35c. Thirdly, for reconciliation purposes, on 18 Aug 2011, the respondent supplied the applicant with a KMC Group - Purchases [Supplier Details] from 01/07/2009 through 18/08/2011. The document acknowledges the work done by the applicant at Mt Pleasant (Mt Pleasant Primary School) and Shelley (Shelley Primary School) during that period and the amount paid.[444]

State Side was advised to submit payment claims electronically to the KMC Group as had previously been the method of choice for the delivery of payment claims. State Side prepared the payment claims and converted the invoices into PDFs. The bundled and PDF'd Invoices that had been agreed to, were sent by email to KMC Group on 24 August 2011, for the

[443] Ibid 16(d).
[444] Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 35(c).

deficiencies.

State Side received an amount of $56,209.52 (incl GST) against one invoice and $9,404.00 against another, but this left $121,491.73 outstanding. Thirty days passed and no further payment was forthcoming.

On the 21 September 2011, State Side called the Australian Institute of Building (AIB), a prescribed appointer, pursuant to Regulation 11 of the *Construction Contracts Regulations 2004* (WA), 'to advise of an impending application and confirming the process to adopt.'[445]

On 28 September 2011, the dispute arose; State Side had not been paid in full. Being unable to resolve their differences, State Side submitted that the dispute be resolved by adjudication pursuant to the *Construction Contracts Act 2004* (WA).

The AIB Appointing Adjudicator Standard Nominating Form, noted that at 'Approx. 0952hrs' on '6th October 2011 application received'.[446]

On 06 October 2011, a registered adjudicator was appointed under Part 3 of the *Construction Contracts Act 2004 (WA)*, by the prescribed appointor, Australian Institute of Building (AIB) as the adjudicator.[447] The AIB Appointing Adjudicator Standard Nominating Form noted that; the appointment was made at '1015hrs on 06-10-2011'.[448]

The AIB Appointing Adjudicator Standard Nominating Form also noted that when asked by the Prescribed Appointer; '[The Adjudicator] confirmed that he hasn't any conflict of interest with the two parties and has the capacity to take the matter.'[449] This was later executed within the adjudicator's determination,[450] pursuant to s 29 of the Act.[451]

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[445] Australian Institute of Building (AIB), Appointing Adjudicator Standard Nominating Form, Step 1, last modified on 11/11/2011 by Mr Jerry Masaryk, the Duty Appointer for the AIB. Mr Masaryk supplied the author with the document on 21 Mar 2017.
[446] Australian Institute of Building (AIB), Appointing Adjudicator Standard Nominating Form, Steps 1.1 & 1.2.
[447] Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 6.
[448] Australian Institute of Building (AIB), Appointing Adjudicator Standard Nominating Form, Steps 7.
[449] Ibid Step 6.
[450] Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 8(h).
[451] *Construction Contracts Act 2004* (WA), s 29.

Once State Side had served the application, KMC Group had 14 days to respond in writing, and serve that response on State Side and the adjudicator, pursuant to s 27(1) of the Act.[452]

KMC Group had until the close of business, on 20 October 2011, to submit a response to the applicant and the adjudicator.

Concurrently, both parties were informed by the AIB of the adjudicator's appointment.[453] A letter from the adjudicator was sent to both the parties on 10 October 2011, confirming the adjudicator's appointment, detailing procedures, the adjudicator's fees, etc. The adjudicator invited the parties to confirm that pursuant to s 31(2)(iii) of the Act,[454] to:

> [a]dvise me by email, as to whether there had been any order, judgment or other finding by an arbitrator or other person or court or other body about the dispute that is subject to the application. The applicant confirmed that there had been no order, judgment or other findings about the dispute.[455]

The letter to the parties confirmed that KMC Group had 14 days, from the receipt of the application, to respond in writing, and serve that response on State Side and the adjudicator, pursuant to s 27(1) of the Act.[456]

KMC Group replied by letter to the Legal Representative of State Side and the adjudicator, in a letter dated 11 October 2011, and stated that:

> On or about 7 September 2011, your client registered a complaint with the Department of Building Management and Works regarding what your client then asserted was approximately $300,000.00 owing to it for electrical works it claims to have undertaken.[457]

The adjudicator later determined that:

> [t]he Department of Building Management and Works has no statutory or judicial function in dealing with a matter arising under a construction contract. The

[452] *Construction Contracts Act 2004* (WA), s 27(1).
[453] Australian Institute of Building (AIB), Appointing Adjudicator Standard Nominating Form, Steps 7.
[453] Ibid Step 8.
[454] *Construction Contracts Act 2004* (WA), s 31(2)(iii). It states that; an appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a), dismiss the application without making a determination of its merits if (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contact makes an order, judgment or other finding about the dispute that is the subject of the application.
[455] Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 8(i).
[456] *Construction Contracts Act 2004* (WA), s 27(1).
[457] Ibid para 8(i)(1).

> Department is the Principal (and a) contracting party. The complaint with the Department of Building Management and Works is not the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.[458]

Therefore 'no other court has made a finding on this issue'. Further, on 11 October 2011, in a letter from KMC Group's legal counsel, dated 11 October 2011, they contended that they were, 'under no obligation to participate in the adjudication recently demanded by Stateside (sic) Electrical Services Pty Ltd.' [459]

Later in the second letter sent on 11 October 2011, KMC Group's legal counsel stated that:

> [m]y client regards itself as having no obligation to agree or participate in the adjudication sought by your client, and instead will continue to liaise directly with the Department of Building Management and Works, in order to resolve what it regards as your client's baseless complaint.[460]

Pursuant to s 53 of the Act,[461] of the Act, there is no contracting out of the Act, and that it is required by legislation that a responding party cannot exclude or stipulate any purported waiver that restricts the operation of the Act. KMC Group were informed of s 53 of the Act.

By the end of the 20 October 2011, the adjudicator received no response from the KMC Group. On Monday 24 October 11, four days after the expiry date for the response, the legal counsel for KMC Group contacted the parties and requested an extension for the response. The reply from State Side was instant and as follows:

> Thank you for your email received earlier today.
>
> I have given serious consideration to the points you raised and consider that:
>
> Ample time and resources have been allocated, and discussion made at great length with the builder in a courteous and conciliatory manner.
>
> Every opportunity for this matter to be settled has been made to no avail. Stateside

[458] Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 8(i).
[459] Letter to State Side's Legal Counsel, from KMC Goup's Legal Counsel Letter NJ:PW:sln:09188 (09188) dated 11 Oct 2011. Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 17(a).
[460] Letter to State Side's Legal Counsel, from KMC Goup's Legal Counsel Letter NJ:PW:sln:09188 (09188) dated 11 Oct 2011. Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 17(b).
[461] *Construction Contracts Act 2004* (WA), s 53.

> have fully complied with the time and evidence requirements set by the adjudicator.
>
> I, therefore, request on behalf of Stateside Electrical that consent be denied for an extension to this adjudication.[462]

The adjudicator informed KMC Group's legal counsel and directed him to *Witham v Raminea Pty Ltd,*[463] where Commissioner Gething (as he was then), declared:

> 59 In my view, CCA s 27 does not allow the adjudicator a discretion to consider a response prepared and served otherwise than in accordance with CCA s 27. The CCA sets out a tight timeframe within which parties are to apply and respond. The intent of the legislature in using the word 'must' is to set mandatory timeframes. The legislative scheme does not contemplate a fluid flow of documents backwards and forwards in order to comprehensively define the issues; there is not even the right of an applicant to file a reply to a response. The adjudicator is to 'if possible' determine the claim on the application and the response: CCA s 32(1)(a).[464]

Commissioner Gething went on to state:

> The adjudicator may alleviate some of the strictness of the timeframe by inviting parties to file further materials (as was done in *O'Donnell* (2) [36]).[465]

Therefore, referring to *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd,*[466] Beech J held [36]:

> The adjudicator referred to the width of the power of an adjudicator under s 32(2)(a). That power is to be exercised by an adjudicator 'in order to obtain sufficient information to make a determination.' The adjudicator stated that this power could be exercised to remedy the deficiency in the information contained in the application.[467]

Section 32(2)(a) of the Act,[468] states that an adjudicator may request that a party provide further information or a written submission (by a set deadline) so that the adjudicator has the satisfactory information to make a decision/determination.

Later this would be confirmed in *BGC Construction Pty Ltd v Citigate Properties Pty Ltd,*[469]

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[462] Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 25.
[463] [2012] WADC 1.
[464] *Witham v Raminea Pty Ltd* [2012] WADC 1, 23-4 [59].
[465] Ibid.
[466] [2009] WASC 19.
[467] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, 12 [36].
[468] *Construction Contracts Act 2004* (WA), s 32(2)(a).
[469] [2016] WASC 88.

where his Honour Justice Tottle held '[I]n permitting BGC to make responsive submissions, I consider that the adjudicator was acting within the power conferred upon him by s 32(2)(a) of the Act'.

The adjudicator, declined an extension, pursuant to *Witham v Raminea Pty Ltd*, *as* at this stage, four days of the adjudicator's allowed fourteen days (or 29%) had passed. Consideration may have been given to seeking an extension of time, pursuant to s 32(3)(a) of the Act.[470] State Side had declined consent as required. KMC Group argued by email that evening:

> The above makes clear that the adjudication is presently being conducted in a procedurally unfair manner, which, if maintained, could result in a substantive injustice to my client.[471]

They also stated:

> If despite the above, the adjudication proceeds without regard to the procedural fairness it is entitled (sic) to, my client will then be left with no option than to protect itself by issuing proceedings for orders to restrain the adjudication proceeding further and/or to determine the matters in issue between the parties.[472]

The response to KMC Group stated what Commissioner Gething held in *Witham v Raminea Pty Ltd*:

> 60 Consequently, I am of the view that even if judicial review for a denial of procedural fairness was a factor that I am able to take into account in the exercise of the discretion in CCA s 43, I would not have found judicial review on this ground as being arguable.[473]

The adjudicator did not breach his jurisdiction.

On 3 November 2011, the adjudicator then determined in favour of State Side. The adjudicator determined that the parties 'bear their own costs' pursuant to s 34(1) of the Act.[474] State Side had pursuant to s 44(8) of the Act,[475] provided a reasonable deposit (security fee) which adequately covered the adjudication. The adjudicator then ordered that the KMC Group pay half the costs to State Side.

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[470] *Construction Contracts Act 2004* (WA), s 32(3)(a).
[471] KMC Group email dated Monday, 24 October 2011 7:50 PM.
[472] Ibid.
[473] *Witham v Raminea Pty Ltd* [2012] WADC 1, {59&60].
[474] *Construction Contracts Act 2004* (WA), s 34.
[475] Ibid s 44(8).

State Side then, pursuant to s 43 of the Act,[476] sought enforcement by the District Court of Western Australia (a *court of competent jurisdiction)* of the adjudicator's determination.

State Side had, however, failed under s 43 of the *Construction Contracts Act 2004* to obtain the leave of the court as a precursor to the process of execution. The consequence of this failure was that without the granting of leave, the Court is unable to enforce the adjudicator's determination as it is not enlivened. To those not familiar with the legal system of having the leave of court, this seems overly bureaucratic; Acting Master Gething would later say in *Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd,*[477] that failing to first seek leave of the court (s 43(2)), is an abuse of the statutory demand process.[478] Consequently, State Side sought leave of the court to enforce the determination, a considerable additional cost.

Deputy Registrar Hewitt was right in his construction of s 43 of the Act.[479] He would affirm that the Plaintiff (sic) (State Side) had failed to gain the leave of the court of competent jurisdiction, 'as a precursor to the process of execution.'[480] That leave, he stated, was never 'sought nor granted'[481] and therefore a 'means inquiry which was issued under the provisions of the *Civil Judgment Enforcement Act 2004* was set aside'.[482]

The Deputy Registrar went on to say that State Side did eventually bring an application before the court; 'seeking leave to have the determination enforced as a judgment. That application was opposed.[483]

Perhaps, the Deputy Registrar may have been satisfied that KMC may have later had the determination overturned in litigation or perhaps arbitration, due to a standard of 'almost certainty.'

The decision of State Side and the Deputy Registrar

The opposition of the application and the handling by the Deputy Registrar of the decision continues to be the subject of much conjecture by many associated with the *Construction Contracts Act 2004* (WA).

The Deputy Registrar would cast doubt on the determination made by the adjudicator and

[476] Ibid, s 43.
[477] [2014] WASC 206.
[478] *Kellogg Brown & Root Pty Ltd v Doric Contractors Pty Ltd* [2014] WASC 206, 18 [45].
[479] Ibid.
[480] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [2012] WADC 27, 3 [1].
[481] Ibid.
[482] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [2012] WADC 27, 3 [1].
[483] Ibid.

would state:

> 5 This application, therefore, requires me to form a view as to whether the issues which are raised by the writ of certiorari which has been filed by the respondent raises points of sufficient strength to justify a refusal of leave to issue execution on the adjudication which has been filed in this court.[484]

Some 140 days before the Deputy Registrar delivered his outcome, the WASCA would deliver the first case that pertained to the *Construction Contracts Act 2004* (WA), *Perrinepod Pty Ltd v Georgiou Building Pty Ltd.*[485] His Honour Justice Murphy would find that a determination made by an adjudicator, under the Act, could be challenged either by judicial review, by virtue of an adjudicator falling into jurisdictional error, as his Honour pointed out 'at the point at which application is made to enforce the determination by a court of competent jurisdiction, under s 43.'[486] However, this was only if the adjudicator had fallen into jurisdictional error, hence there 'was not a 'determination' at all.'[487]

The Deputy Registrar decided to conduct what can only be construed as a de facto judicial review of the adjudicator's determination. Fifty-seven days after the Deputy Registrar adjourned the application, an appeal, *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]*,[488] would be heard by Commissioner Gething (as he was then). Commissioner Gething would conclude that:

> 11 The registrar identified that the application required him to form a view as to whether the issues which are raised by the Supreme Court judicial review proceedings raised points of sufficient strength to justify a refusal of leave to issue execution on the adjudication which has been filed in the District Court.[489]

This indicates that, despite not ensuring that the money would be kept flowing, the Deputy Registrar had been forming a view as to whether refusal should be given. The issue is that when the adjudicator made his determination, the respondent, KMC Group, had categorically refused to respond, as required pursuant to s 27 of the Act.[490]

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[484] Ibid 4 [5].
[485] [2011] WASCA 217.
[486] *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, 29 [92].
[487] Ibid.
[488] [2012] WADC 60.
[489] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]* [2012] WADC 60, 6 [11].
[490] *Construction Contracts Act 2004* (WA), s 27.

The KMC Group had commenced proceedings in the WASC seeking a judicial review of the adjudicator's determination, by way of a writ of certiorari. The KMC Group also put before the Deputy Registrar, a submission and all available information that had not been put before the adjudicator, therefore denying the adjudicator the opportunity to see the merits or demerits of their case and denying the primary decision maker his fundamental part of this process. The decision made by the Deputy Registrar was formed in 'de novo consideration' and as his Honour Justice Kenneth Martin would later state in *Certa Civil Works Pty Ltd v Ghosh*,[491] '[t]hat was a wholly misconceived idea'.[492] A de novo consideration is not the right of the District Court, and as will be seen later, there can be no de novo merits review against an adverse adjudication determination.

Meanwhile at the District Court, on 10 Apr 2102, in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]*,[493] Commissioner Gething, after the listing by a Registrar before a judge, and the judge agreeing that 'the appeal commenced on 8 March 2012 should proceed without waiting for the determination of the Supreme Court proceedings'[494] concluded: 'It is this issue that is before me for decision. It is not the hearing of the substantive appeal'.[495]

Commissioner Gething acknowledged Deputy Registrar Hewitt and confirmed that the Deputy Registrar had 'identified four issue of concern from the respondent's submissions'.[496] These he claimed were:

1. The invoices the subject of the adjudication did not comply with the requirements of CCA;
2. The application was not prepared in accordance with CCA s 26(2)(b);
3. One of the amounts claimed was out of time; and
4. The application was not in proper form because it bundled up claims for a number of invoices over a number of jobs in a manner which is not contemplated or permitted by the CCA.[497]

[491] [2017] WASC 327.
[492] Ibid.
[493] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]* [2012] WADC 60.
[494] Ibid, 3, [6].
[495] Ibid.
[496] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [No 2] [2012] WADC 60, 6 [12].
[497] Ibid.

However, Commissioner Gething did state that, 'The registrar identified that certain critical information was not provided to the adjudicator.'[498]

Furthermore, Commissioner Gething would state:

> 27 To my mind, it is undesirable for there to be two hearings on the same issue whether the Determination is tainted by jurisdictional error - with the potential for the two judicial officers to make contrary findings.[499]

The adjudicator's determination was 'tainted by jurisdictional error.'

Therefore, it should give rise that the four issues of concern raised by the WADC be dissected and determine whether the determination made by the adjudicator, was indeed tainted by jurisdictional error.

Issue 1 - The process of adjudication was not properly entered into

The first issue of concern before the Deputy Registrar was that the process of adjudication was not properly entered into because the invoices which were the subject of the adjudication did not comply with the requirements of Act.

The Act, states, that pursuant to Division 4, cl 5(2),[500] when drafting a claim for payment, the content must be as follows:

(a) be in writing;

(b) be addressed to the party to which the claim is made;

(c) state the name of the claimant;

(d) state the date of the claim;

(e) state the amount claimed;

(f) in the case of a claim by the contractor — itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;

(g) in the case of a claim by the principal — describe the basis for the claim in sufficient detail for the contractor to assess the claim;

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[498] Ibid.
[499] Ibid 9 [27].
[500] *Construction Contracts Act 2004* (WA), Schedule 1, Division 4, clause 4.

(h) be signed by the claimant; and

(i) be given to the party to which the claim is made.

The Deputy Registrar stated that:

> 6 The first ground which is raised is that the process of adjudication was not properly entered into because the invoices which were the subject of the adjudication did not comply with the requirements of *Construction Contracts Act* because each was not signed, did not specify the date of the claim and did not contain sufficient information to allow the respondent to assess them.[501]

Division 4, cl 5(2), does state that a claim for payment must be signed by the claimant.

However, State Side was informed by KMC Group to submit payment claims electronically as this had been the previous method of choice. State Side prepared the payment claims and converted the invoices into PDFs. The bundled and PDF'd Invoices that had been agreed to, were sent by email to KMC Group,[502] for the deficiencies'.

Neither party was sophisticated enough or had electronic software that would be able to utilise electronic signatures. In the three years that the parties had been 'doing business amicably,' it became the standard operating procedure to prepare the invoices and then to PDF the invoices and send them by email to the KMC Group.

Some 985 days earlier, again in the SAT case of *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd*,[503] Senior Member Raymond and Member Carey established that any payment claim made under a construction contract, 'is intended to be descriptive only.'[504] They surmised:

> [t]hat the object of the adjudication is to determine whether the rejection of the payment claim, in whole or in part, is justified. Further, all the legislation intended to convey was that the claim must be one which arises under a construction contract. It is a means to confine adjudication to construction contract claims.[505]

It had previously been confirmed in *Marine & Civil Bauer Joint Venture and Leighton*

[501] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27, 4 [6].
[502] Email State Side, dated 24/08/2011.
[503] (2009) WASAT 133.
[504] *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* (2009) WASAT 133, 17 [68].
[505] Ibid.

Kumagai Joint Venture,[506] by Senior Member Raymond was that, 'the emphasis is there on a payment claim for performance of the obligations under the contract, rather than the claim itself.'[507]

On the 24 April 2012, 54 days after Deputy Registrar Hewitt and three days before Commissioner Gething, made their decisions in both *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd (and No 2),* his Honour Justice McKechnie, in *DPD Pty Ltd v McHenry*, [508] unreservedly declared that:

> 28 Attached was, what I regard as a sufficiently itemised claim to describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim. For example:
>
> | | | Claim 1 | Claim 2 |
> |---|---|---|---|
> | Tiling – supply | $11,820.00 | $3,546.00 | $8,274.00 |
> | Labour wall tiles & associated | $15,083.00 | $15,083.00 | |
> | Labour floor tiles & screed/water proof | $11,432.00 | $11,432.00 | |
>
> 29 Other items such as practical products, carpentry, demolition/general labour, cabinetmaker, mirrors, plumbing, wallpaper/painters, supervision are also detailed.[509]

His Honour, went on further to assert:

> 32 Contrary to the DPD submission, the claims of 17 February 2011 are clearly payment claims within the definition of s 5.[510]

Had the case gone before his Honour Justice Hall in the WASC in June 2012, as planned, it is likely that his Honour would have had to take the view held by his Honour Justice McKechnie, and this would have been crucial in State Side's defence.

Secondly, the matter of the electronic signatures could likely have been resolved promptly had

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[506] *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* [2005] WASAT 269.
[507] *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* (2009) WASAT 133, 18 [69]. Senior Member would refer to the comments he made in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture*, [72] – [82].
[508] [2012] WASC 140.
[509] *DPD Pty Ltd v McHenry* [2012] WASC 140, 10-11 [28-29].
[510] *DPD Pty Ltd v McHenry* [2012] WASC 140, 11 [32].

the Deputy Registrar considered the *Electronic Transactions Act 2003* (WA).[511]

Pursuant to s 3 of the *Electronic Transactions Act 2003* (WA), the objective of the Act is to provide a regulatory framework that:[512]

(a) recognises the importance of the electronic communication of information to the future economic and social prosperity of Western Australia; and

(b) facilitates the use of electronic communication as a way of entering into transactions; and

(c) promotes business and community confidence in the use of electronic communication as a way of entering into transactions; and

(d) enables business and the community to use electronic communication in their dealings with government.

The note at the bottom of Section states:[513]

(b) that things that can or have to be done under a law of the State in relation to any of the following matters can generally be done by electronic communication —

(i) giving information in writing;

(ii) providing a signature;

(iii) producing a document;

(iv) recording information;

(v) retaining a document;

The *Electronic Transactions Act 2003* (WA), states at s 9(1), Signatures, that:[514]

(1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if —

[511] The *Electronic Transactions Act 2003* (WA) and was superseded by the *Electronic Transactions Act 2011* (WA). The *Electronic Transactions Act 2011* (WA), had gained assent on 25 Oct 2011, but was not yet in operation, though inspection of Version (dated) as at 25 October 2011, whilst published, stated in 'Provisions that have not come into operation' footnote 2 - On the date as at which this compilation was prepared, the *Electronic Transactions Act 2011* s. 3-7 and Pt. 2-4 had not come into operation. They read as follows, the information awaiting proclamation, including the section pertaining to electronic signatures (s 10).
[512] *Electronic Transactions Act 2003* (WA) s 3.
[513] Ibid [note].
[514] Ibid, s 10(1).

(a) a method is used to identify the person and to indicate the person's approval of the information communicated;

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated; and

(c) the person to whom the signature is required to be given consents to that requirement being met by the use of the method mentioned in paragraph (a).[515]

To date, in Western Australia, no case has been heard before the Courts pertaining to the *Electronic Transactions Act 2003* (WA) issues of section 9 and signatures, and at the time, case law could not have given relief to the Deputy Registrar.

This issue did, however, come before the Full Court of the Supreme Court of South Australia, and later the High Court of Australia, made a judgement in *the Corporation of the City of Adelaide v Corneloup & Ors*.[516] The case was heard by the honourable Corum of Doyle CJ, White J and Kourakis J (as he was then) and was delivered on 10 August 2011 (long before State Side). It was related to an appeal by the Corporation of the City of Adelaide that came about in opposition to a decision that had been attained 'in the special jurisdiction conferred on the District Court by s 276 of the *Local Government Act 1999*, declaring invalid, in part, one of its by-laws'.[517]

The Coram of the Full Court Bench of Chief Justice Doyle, and Justices White, and Kourakis held that:

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[515] The *Electronic Transactions Act 2003* (WA) was repealed in 2011 and replaced by the The *Electronic Transactions Act 2011* (WA). The section 9(1) pertaining to signatures was altered to section 10(1), which is as follows:

(1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if —
  (a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and
  (b) the method used was either —
    (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
    (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence;
    and
  (c) the person to whom the signature is required to be given consents to that requirement being met by the use of the method mentioned in paragraph (a).

[516] [2011] SASCFC 84.

[517] *Corporation of the City of Adelaide v Corneloup & Ors* [2011] SASCFC 84, 1 [3].

> 28. An unsigned certificate was provided by a legal practitioner in electronic form. The *Electronic Transactions Act 2000* (SA) provides that, in prescribed circumstances, an electronic communication may satisfy a requirement in law that a document be signed to be effective. The Judge found that the electronic provision of the certificate did not meet the prescribed circumstances of the *Electronic Transactions Act 2000* (SA).[518]

Pursuant to Division 4, cl 5(2)(h) of the Act, when drafting a claim for payment, the content must be signed by the claimant. The Full Court Bench found that:

> 29. […] However, in my view, the statutory requirement that the certificate be signed was satisfied by reason of s 9 of the *Electronic Transactions Act 2000* (SA). The certificate was provided by an email in circumstances which allowed the identification of the legal practitioner and unequivocally showed that he subscribed to the view expressed in the certificate even though he did not sign it.[519]

The case would in 2013, after *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, go before the High Court of Australia for Appeal, in *Attorney-General (SA) v Corporation of the City of Adelaide*.[520] The strong and honourable Corum of Chief Justice French, and Justices Hayne, Heydon, Crennan, Kiefel and Bell, which would allow the Appeal, confirmed that the email made it clear and evident that the legal practitioner was identified and that he had indeed approved the certificate, despite not having signed it.[521] They upheld the view of the Full Court, that 'provision of the certificate signified that the named legal practitioner held the view that the by-law was valid and subscribed to the opinion required by the certificate albeit that he had not signed it.'[522]

The Deputy Registrar could have given some consideration to the Full Court of the Supreme Court of South Australia case of *the Corporation of the City of Adelaide v Corneloup & Ors*.[523]

In *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, the invoices were sent to the KMC Group electronically, and in PDF format, as the accepted modus operandi, throughout the three years that the parties had been 'doing business amicably.' The

[518] Ibid 7 [28].
[519] Ibid 7 [29].
[520] [2013] HCA 3 (27 February 2013).
[521] *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, [127].
[522] Ibid [194].
[523] [2011] SASCFC 84.

email address stated 'State Side Electrical Services, as did the payment claims.

Section 9 of the *Electronic Transactions Act 2003* (WA) would have given rise to the indication of the applicant's intention. It would be reliable as appropriate for the purpose for which the electronic communication was generated, and the respondent to whom the signature is required to be given consents to that requirement being met by the use of the method.

The Deputy Registrar would have been able to consider *Electronic Transactions Act 2003* (WA) and the recognition of Section 9, utilise the case study available out of South Australia that could have assisted him in this issue. In 2012, in an age where global commerce and global awareness of environmental consideration is the norm, it is difficult to believe that reliance was still placed on a signature to complete a payment claim.

By 1 August 2012, the *Electronic Transactions Act 2011* (WA), had commenced and further strengthened the recognition of electronic transactions within the commercial marketplace. By 27 February 2013, the High Court of Australia had confirmed *Attorney-General (SA) v Corporation of the City of Adelaide*.[524] This proposition would have further strengthened the position taken by his Honour Justice McKechnie, in *DPD Pty Ltd v McHenry*.[525]

At the time, that is between 2005 to April 2012, the average number of days for the WASC to deliver a case pertaining to the *Construction Contracts Act 2004* (WA), was 49.7 days, with a standard deviation of 67 days.[526] It is likely that the earliest day that his Honour Justice Hall could have entered the matter for hearing was the beginning of June 2012'.[527] Add 50 days, this could mean that it could have been delivered on 21 July 2012, 10 days before the commencement of the *Electronic Transactions Act 2011* (WA). Though this is purely speculative, it is likely that his Honour may have considered the outcome of the South Australian case of *the Corporation of the City of Adelaide v Corneloup & Ors*.[528]

Issue 2 - The application was not prepared in accordance with CCA s 26(2)(b)

The second issue of concern before the Deputy Registrar was that the application was not prepared in accordance with CCA s 26(2)(b). The Deputy Registrar identified that there

[524] [2013] HCA 3.
[525] [2012] WASC 140.
[526] Calculations made by the author, using the delta between the date heard and the date delivered of all 10 cases pertaining to the *Construction Contracts Act 2004* (WA) from commencment in 2005till Apr 2012. The Standard Deviation is 68 days, the max is 173 days.
[527] Ibid 8 [22].
[528] [2011] SASCFC 84.

was critical information that was not provided to the adjudicator.

The Deputy Registrar asserted in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* that:

> 7 The next complaint which is made is that the application was not prepared in accordance with s 26(2)(b) of the Construction Contracts Act. That section requires any application for adjudication to have attached to it or set out details of the construction contract involved or relevant extracts of it.

Section 26(2)(b) of the Act,[529] states that the application:

> (b) must set out the details of, or have attached to it —
>
> (i) the construction contract involved or relevant extracts of it; and
>
> (ii) any payment claim that has given rise to the payment dispute.

The Deputy Registrar affirmed:

> 9 Nothing is put before me as to the payment terms of the principal contract but it seems to me that it is absolutely critical for the adjudicator to be able to form an opinion as to when the monies claimed by the applicant were due and payable.[530]

Therefore, the view of the Deputy Registrar would be that it should fall because it failed to meet the strict requirements of s 26(2)(b)(i), as it did not have attached 'the construction contract involved, or relevant extracts of it.'

The Deputy Registrar then stated:

> 10 In the present circumstances, the failure to provide the contractual documentation was more than a technical oversight. It went to the heart of the adjudication because there could be no payment dispute upon which the adjudicator was entitled to adjudicate unless there had been default.

On 24 October 2011, the adjudicator, by email, asked both the parties to provide the following:

> Can I please have a copy of the written contract between the parties IAW s32(2)(a) Adjudication procedure; In order to obtain sufficient information to make a determination, an appointed adjudicator may — request a party to make a, or a further, written submission or to provide information or documentation, and may set

[529] *Construction Contracts Act 2004* (WA), s 26(2)(b).
[530] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27, 5 [9].

> a deadline for doing so. I shall need it for my determination.[531]

The following response came from State Side by Email:

> [t]here was never any signed agreement or other contracts, besides the ones issued by KMC Group attached to their purchase orders to us" (these were supplied in the application).[532]

There was no response from the KMC Group. The KMC Group did not provide the 'contract,' or any document resembling a contract or purchase orders. Later in a letter from the legal counsel of the KMC Group, four days after the due Response, which was not provided, the legal counsel for the KMC Group stated:

> Given that SSES has not yet provided you with a copy of the relevant contract or contracts my client and I would regard your email letter of 10 Oct 2011 as a restatement…etc.
>
> SSES's request/demand for adjudication does not identify which contract or contracts it wishes to rely upon. Until SSES identify the relevant contract or Contracts, my client will be unable to respond to your recent queries.[533]

KMC Group could not claim that "request/demand for adjudication does not identify which contract or contracts it wishes to rely upon" as this is made very clear in the Application brief provided by State Side on 6 October 2011.

At the time of determination by the adjudicator, all that was available to the adjudicator was what was made available by State Side on 18 October 2011, and this was only the generic terms attached to the purchase orders.

The Deputy Registrar would later state of a purchase order that was provided in the affidavit of Ms Angela Tatulli (KMC Group) and that '[T]hose materials were not provided to the adjudicator. In my view those materials were clearly relevant',[534] and this 'purchase order' would later be taken into consideration, by a Deputy Registrar of the DCWA.

State Side argued that 'there was never any signed agreement or other contracts'[535] many were merely; 'oral agreements.'

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[531] Email from the Adjudicator, dated Thu 13/10/2011 5:25 PM.
[532] Email from State Side, dated Tue 18/10/2011 7:19 PM.
[533] Letter from Legal Counsel KMC Group, NJ:PW:slm:09188 dated 24 Oct 2011.
[534] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd,* [2012] WADC 27, 5 [8].
[535] Email from State Side, dated Tue 18/10/2011 7:19 PM.

The Act states, pursuant to s 7(2):[536]

> (2) This Act applies to a construction contract —
>
> (a) irrespective of whether it is written or oral or partly written and partly oral.

The Act provides that it applies to 'whether it is written or oral or partly written and partly oral.' Professor Evans in his final report would state of this case: 'an oral agreement entered into by telephone was held to be a construction contract for the purposes of the Act.'[537] State Side had on 8 June 2009 been asked to provide quotes for the KMC Group for electrical work to be carried out under the BER program, and they were provided. Work was conducted, invoices were progressively issued and paid.

There is no need to quote verbatim what elements are required for the formation of a contract. However, the actions and comments made by both parties indicate that at the minimum, an oral contract existed, pursuant to s 7(2) of the Act.[538] It is most unlikely that no agreement was made between the parties, and that State Side had merely turned up for three years. It is disturbing that the Deputy Registrar then stated that 'the failure to provide the contractual documentation was more than a technical oversight.'[539] He stated that this 'went to the heart of the adjudication because there could be no payment dispute upon which the adjudicator was entitled to adjudicate unless there had been default.'[540]

The Deputy Registrar did not consider the SAT case of *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd*.[541] Senior Member Raymond and Member Carey held:

> However, as the contract in question did not have a provision as to how and when to respond to a progress claim, the implied provisions set out in Sch 1 Div 5 to the *Construction Contracts Act 2004* (WA) applied. Those provisions obliged the respondent to give notice within 14 days of receipt of the payment claim if it disputed the claim.[542]

The Deputy Registrar did not consider Sch 1 Div 5 to the *Construction Contracts Act 2004*

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[536] *Construction Contracts Act 2004* (WA), s 7(2), Construction contracts to which this Act applies.
[537] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 87 [footnote 302].
[538] *Construction Contracts Act 2004* (WA), s 7(2), Construction contracts to which this Act applies.
[539] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27, 5 [10].
[540] Ibid.
[541] (2009) WASAT 133.
[542] *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* (2009) WASAT 13, 3 [2].

(WA) the implied provisions. On 24 July 2011, reconciliation between both the parties was conducted and found that there was work that had been completed the previous financial year but had not been added to the financials of KMC Group. As a result of the Reconciliation, on 24 August 2011, State Side issued the following payment claims to KMC Group, against the following deficiencies:

1) No IV00000660, for $100,856.00 Incl GST, for Building Works completed at Shelley Primary School.
2) No IV00000581, for $25,000.00 Incl GST, for Building Works completed at Mt Pleasant Primary School.
3) No IV00000661, for $41,249.25 Incl GST, for Building Works completed at Mt Pleasant Primary School.
4) No IV00000663, for $20,000.00 Incl GST, for Building Works completed at Mt Pleasant Primary School.
5) Total amount due: $187,105.25 (incl GST).[543]

The works were identified at the reconciliation and would be the amounts that would become subject to an application for adjudication.

The applicant had received an amount of $56,209.52 (incl GST) against No IV00000660 and $9,404.00 against No IV00000581 from the respondent. This left an amount of $121,491.73 outstanding, and no payment was forthcoming.

If Schedule 1 Division 5 Clause 7(1) of the *Construction Contracts Act 2004* (WA),[544] the implied provisions had been considered, the KMC Group could have considered giving a notice of dispute to State Side, but chose instead to pay $65,613.52 (or 35% of the amount due and payable), and no notice of dispute was offered, within the 28 days after receiving the payment claims, pursuant to Schedule 1 Division 5 Clause 7(1) to the *Construction Contracts Act 2004* (WA).[545] The total amount due was required to have been paid by the KMC Group. However, there was an outstanding amount of $121,491.73.

The payment claims were submitted on 24 August 2011, and were due and payable by 21 September 2011 (28 days). A payment dispute, pursuant to s 6 of the Act,[546] arose on the 22

[543] State Side email to KMC Group dated 24/08/2011.
[544] *Construction Contracts Act 2004* (WA), Schedule 1, Division 5, Clause 7(1)s 7(2),
[545] *Construction Contracts Act 2004* (WA), Schedule 1, Division 5, Clause 7(1)s 7(3),
[546] Ibid s 6.

September 2011, pursuant to an entitlement under s 25 of the Act[547] applied. The applicant had 28 days to submit an application, pursuant to s 26(1) of the Act.[548] It did so on 06 October 2011, which was within 15 days, though as shall be seen, this would come into conflict with the Deputy Registrar.

On the prima facie, it is likely that there was no 'principal contract'. The behaviour of the parties would clearly indicate that there was an oral construction contract, which should have been subject to s 7(2) of the Act[549] and the associated implied provisions accorded to the Act, though the Deputy Registrar believed otherwise.

In the alternative, the Deputy Registrar could have considered the 1988, New South Wales Court of Appeal case of *Empirnall Holdings Pty Ltd v Machon Paull.*[550] The case centred on a property developer, Empirnall Holdings Pty Ltd (Empirnall) who engaged the services of architects Machon Paull Partners Pty Ltd (Machon), to undertake the appointment of a project manager. Machon agreed and conducted some work. Later Machon sought a progress payment. At the same time, they pursued a contract to formalise their agreement. Machon were informed that the director and controller of Empirnall, Mr Eric Jury; 'does not sign contracts'. Though one was produced, no contract was signed. The issue became whether there was, in fact, a contract.

His Honour, Justice Kirby, noted that progress payments were made throughout the project until Empirnall descended into some financial difficulties. A dispute arose, and the court held that Machon was due an amount of $83,542.72 under the oral contract. Empirnall appealed.

His Honour concluded that Machon was executing their performance as agreed, though Empirnall claimed there was no contract as it had not been signed.

His Honour dismissed the appeal, applying the 19th-century case of *Brogden v Metropolitan Railway Co*, in which Lord Hatherley held:

> My Lords, Mr Herschell [...] put the case on a very proper foundation, when he says that he will not contend that this agreement is not to be held to be a binding and firm agreement between the parties, if it should be found that, although there has been no formal recognition of the agreement in terms by the one side, yet the course of dealing

[547] *Construction Contracts Act 2004* (WA), s 25 – Who can apply for adjudication; If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated,
[548] Ibid 26(1).
[549] *Construction Contracts Act 2004* (WA), s 7(2), Construction contracts to which this Act applies.
[550] (1988) 14 NSWLR 523.

> and conduct of the party to whom the agreement was propounded has been such as legitimately to lead to the inference that those with whom they dealt were made aware by that course of dealing, that the contract which they had propounded had been in fact accepted by the persons who so dealt with them.[551]

Likewise, Stateside also executed their performance.

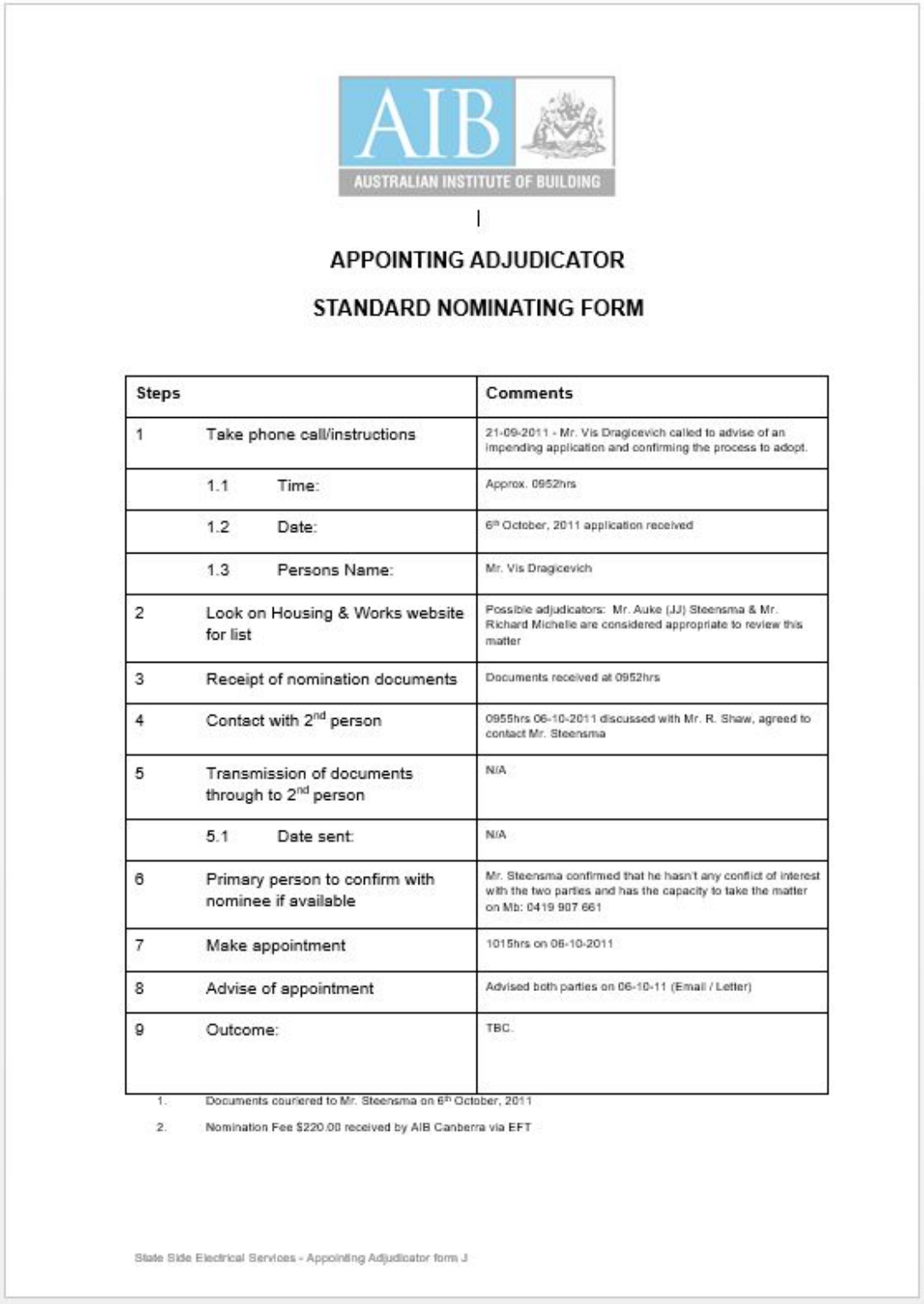
His Honour, Justice Kirby, hinted that it might have been conceivable that the same conclusion could have been reached by estoppel, though no pleading was invoked.[552]

The Deputy Registrar commented that '[T]he information which is provided by the respondent includes a copy of the application for adjudication form. That form is dated 23 September 2011'.[553] The Deputy Registrar would state that the invoices that had been submitted to KMC Group were dated 28 August 2011, and according to the Deputy Registrar, a 'purchase order' specified payment was due '30 days after the month end in which the invoice was received at the respondent's office'.[554] This would indicate that payment was due by 30 September 2011, and a dispute would have arisen the following day, on 1 October 2011.

However, the Deputy Registrar maintained that the application for adjudication form is dated 23 September 2011, and therefore no dispute has yet arisen, and then State Side had, pursuant to s 26(1) of the Act,[555] been premature in its 28 days to submit an application for adjudication.

A copy of the AIB – Appointing Adjudicator Standard Nominating Form, as shown in **Figure 9** that was provided to the adjudicator by the prescribed appointor, the AIB.

[551] *Empirnall Holdings Pty Ltd v Machon Paull* (1988) 14 NSWLR 523, Conclusion, quoting *Brogden v Metropolitan Railway Co*(1877) 2 App Cas 666 at 674.
[552] That same year, the High Court of Australia case had made its decision in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
[553] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd,* [2012] WADC 27, 5 [10].
[554] Ibid.
[555] *Construction Contracts Act 2004* (WA), s 26(1).



AUSTRALIAN INSTITUTE OF BUILDING

APPOINTING ADJUDICATOR

STANDARD NOMINATING FORM

Steps		Comments
1	Take phone call/instructions	21-09-2011 - Mr. Vis Dragicevich called to advise of an impending application and confirming the process to adopt.
	1.1 Time:	Approx. 0952hrs
	1.2 Date:	6th October, 2011 application received
	1.3 Persons Name:	Mr. Vis Dragicevich
2	Look on Housing & Works website for list	Possible adjudicators: Mr. Auke (JJ) Steensma & Mr. Richard Michelle are considered appropriate to review this matter
3	Receipt of nomination documents	Documents received at 0952hrs
4	Contact with 2nd person	0955hrs 06-10-2011 discussed with Mr. R. Shaw, agreed to contact Mr. Steensma
5	Transmission of documents through to 2nd person	N/A
	5.1 Date sent:	N/A
6	Primary person to confirm with nominee if available	Mr. Steensma confirmed that he hasn't any conflict of interest with the two parties and has the capacity to take the matter on Mb: 0419 907 661
7	Make appointment	1015hrs on 06-10-2011
8	Advise of appointment	Advised both parties on 06-10-11 (Email / Letter)
9	Outcome:	TBC.

1. Documents couriered to Mr. Steensma on 6th October, 2011
2. Nomination Fee $220.00 received by AIB Canberra via EFT

State Side Electrical Services - Appointing Adjudicator form J

Figure 9 – The AIB – Appointing Adjudicator Standard Nominating Form

The AIB – Appointing Adjudicator Standard Nominating Form states: '21-09-2011 - Mr Vis Dragicevich called to advise of an impending application and confirming the process to adopt'. The document goes on to state that at 'Approx. 0952hrs, 6 October 2011 application received.

The appointment was made at 1015hrs on 06-10-2011'. The Act, pursuant to s 28(1),[556] states:

> (1) If an application for adjudication is served on a prescribed appointor the appointor, within 5 days after being served, must —
>
> (a) appoint a registered adjudicator to adjudicate the payment dispute concerned;
>
> (b) send the application and any response received by it to the adjudicator;
>
> (c) notify the parties in writing accordingly; and
>
> (d) notify the Registrar in writing accordingly.

The adjudicator was appointed approximately 24 minutes later, and accepted the appointment as the registered adjudicator (under Part 3 of the *Construction Contracts Act 2004* (WA)), to determine the matter between State Side Electrical Services v KMC Group. The adjudicator then wrote to the parties on the 10 October 2011 pertaining to his appointment.

Had the date been 23 September 2011, as claimed by the Deputy Registrar, the Deputy Registrar would have been right, and no dispute would have yet arisen. Had the application for adjudication been submitted on 23 September 2011, 13 days would also have passed, and it would have been void, as the prescribed appointor, AIB, had not appointed a registered adjudicator within five days pursuant to s 28(1) of the Act.[557] The application was couriered and received by the adjudicator on that day. The KMC Group also received the application on 6 October 2011.

The Deputy Registrar then expressed, at his conclusion of this issue:

> 11 I am told that this point has not been raised in the writ of certiorari which has been filed but nonetheless I think it a point which could be allowed as an amendment, and on the materials before me would establish that the adjudication had miscarried seriously because there was no payment dispute upon which an adjudication could be made.[558]

The comments made by the Deputy Registrar: 'this point has not been raised in the writ' and 'I think it a point which could be allowed as an amendment' are staggering. Yes, the Deputy Registrar's duty lies before the Courts, but not in carrying out the role of the respondent's legal

[556] *Construction Contracts Act 2004* (WA), s 28(1), Appointment of adjudicator in absence of agreed appointment.
[557] Ibid.
[558] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27, [11].

counsel. A Deputy Registrar is an 'umpire' not a 'combatant' for the other side. While it appears that the comment was likely made in obiter dicta, the role of the Registrar as a Judicial Officer does not have immunity from a complaint about misconduct (not involving suspected criminal behaviour (or rudeness, professional negligence, unethical behaviour, etc.).[559] One must question whether this amounts to unethical behaviour?

Issue 3 - One of the amounts claimed was out of time

The next issue of concern before the Deputy Registrar was that 'one of the amounts claimed was out of time.'

It is clear that on 24 July 2011 a reconciliation was conducted and found that there was work that had been completed the previous financial year but had not been added to the financials of KMC Group. As a result of the Reconciliation on 24 August 2011, State Side issued the following payment claims to KMC Group, against the deficiencies. These payment claims were not 'recycled claims' but consolidated works that had previously not been claimed.

KMC Group paid $64,613.52 (or 35%) of the amount due and payable, and no notice of dispute was offered, within the 28 days after receiving the payment claims, pursuant to Schedule 1 Division 5 Clause 7(1) to the *Construction Contracts Act 2004* (WA).[560] The total amount due was required to have been paid by the KMC Group by 21 September 2011 (28 days). A payment dispute, pursuant to s 6 of the Act,[561] arose on the 22 September 2011, pursuant to an entitlement under s 25 of the Act[562] applied. The applicant had 28 days to submit an application, pursuant to s 26(1) of the Act.[563]

The claims were those identified at the reconciliation; and all were within time.

Deputy Registrar Hewitt would go on to decide that it would be appropriate to:

> 13 In those circumstances, I think the proper outcome is to adjourn this application sine die with leave to relist it upon the determination of the respondent's writ of certiorari currently proceeding before the Supreme Court of Western Australia. I would also consider it premature to order costs against either party until that

[559] District Court of Western Australia, Protocol for Complaints Against Judicial Officers In Western Australian Courts 27 August 2007, dated 27 August 2007, 5 [18(2)].
[560] *Construction Contracts Act 2004* (WA), Schedule 1, Division 5, Clause 7(1)s 7(3),
[561] Ibid s 6.
[562] *Construction Contracts Act 2004* (WA), s 25 – Who can apply for adjudication; If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated,
[563] Ibid 26(1).

decision has been handed down.[564]

The Deputy Registrar had heard evidence and information that had been denied to the adjudicator and had heard this evidence 'de novo.' He failed to recognise that there was no 'principal contract'; the behaviour of the parties would indicate that there was an oral construction contract that should have been subject to s 7(2) of the Act[565] and the associated implied provisions accorded to the Act, and should have been recognised. He was misinformed when he said that the application form was dated, yet the AIB – Appointing Adjudicator Standard Nominating Form states categorically that the appointment was made at 1015hrs on 06-10-2011.' The adjudicator would have had to dismiss the application pursuant to s 28(1) of the Act,[566] which states that it must be served within five days on a prescribed appointor.

At no stage did the Deputy Registrar consider the implications of the reconciliation that was conducted on 24 July 2011, and that there was work that had been completed the previous financial year. However, this work was not added to the financials of KMC Group. This resulted in payment claims to KMC Group, against the deficiencies. These payment claims were not 'recycled claims,' but consolidated works that had previously not been claimed and all submitted on 24 August 2011, all of which could not make any of them out of date.

At no time did the Deputy Registrar look towards the *Electronic Transactions Act 2011* (WA) and section 10 and signatures, nor did he consider the Full Court of the Supreme Court of South Australia, and the judgement made in *the Corporation of the City of Adelaide v Corneloup & Ors.*[567] He failed to consider what had been validated in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture,*[568] by Senior Member Raymond, that the weight of a payment claim depends on how the contractual obligations of performance and not the payment claim itself.[569]

The decision to adjourn, rather than enforce, appears to have been procured through a lack of knowledge and understanding of the *Constructions Contract Act 2004* (WA) and its mechanisms.

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[564] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27, 6 [13].
[565] *Construction Contracts Act 2004* (WA), s 7(2), Construction contracts to which this Act applies.
[566] *Construction Contracts Act 2004* (WA), s 28(1), Appointment of adjudicator in absence of agreed appointment.
[567] [2011] SASCFC 84.
[568] *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* [2005] WASAT 269.
[569] *Blackadder Scaffolding Services (Aust) Pty Ltd and Mirvac Homes (WA) Pty Ltd* (2009) WASAT 133, 18 [69]. Senior Member would refer to the comments he made in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture,* [72] – [82].

Issue 4 – The bundling of claims and consent

The fourth issue that concerned the Deputy Registrar was that the application for adjudication had 'bundled up claims for a number of invoices over a number of jobs in a manner which is not contemplated or permitted by the Act save with the consent of the respondent which was not forthcoming.'[570]

The Act, pursuant to s 32(3)(b), states:[571]

> (3) An appointed adjudicator may —
>
> (b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties.

The Deputy Registrar declared that no consent had been forthcoming, which would have made void the application, as the adjudicator had not sought consent from the parties to adjudicate the bundled up claims that pertained to several jobs.

There are two issues to be considered.

Firstly, on 18 July 2011, a letter was sent from KMC Group (Mr Ron Indrisie) to State Side's legal counsel, declaring 'many of the invoices listed in your correspondence have been subject of numerous communications'.[572] On the same day the KMC Group, supplied State Side with a KMC Group - Purchases [Supplier Details] from 01/07/2009 through 18/08/2011. The document acknowledges the work was done by the applicant at Mt Pleasant (Mt Pleasant Primary School) and Shelley (Shelley Primary School) during that period and the amount paid.

On 24 July 2011, a reconciliation meeting was conducted between the parties. At the completion of the reconciliation meeting, having agreed that State Side should submit to KMC Group all the payment claims that had been determined by both parties at the reconciliation meeting; in other words, 'bundle up the payment claims.' On 24 August 2011, State Side issued, by email, the four payment claims to the KMC Group, totalling an amount due: $187,105.25 (incl GST) against the deficiencies.

State Side received an amount of $56,209.52 (incl GST) against one invoice and $9,404.00 against another, but this left $121,491.73 outstanding.

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[570] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27, 6 [12].
[571] *Construction Contracts Act 2004* (WA), s 32(3)(b), Adjudication procedure.
[572] Letter KMC Group Ref: k11146PF/SU002172/RI/RI dated 18 Jul 2011, Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 35(b).

It is incredible that KMC Group would instruct State Side to 'bundle up the payment claims' and submit them all, after the conduct of the reconciliation meeting. Their conduct and instruction alone would have indicated consent.

Secondly, what makes this issue more preposterous, is that once the application for adjudication was submitted by State Side, the legal counsel for the KMC Group, had on 11 October 2011 (five days after the application for adjudication had been submitted), in a letter contended that they were, 'under no obligation to participate in the adjudication recently demanded by Stateside (sic) Electrical Services Pty Ltd'. [573] Later in the second letter on that same day, KMC Group's legal counsel stated that:

> [m]y client regards itself as having no obligation to agree or participate in the adjudication sought by your client, and instead will continue to liaise directly with the Department of Building Management and Works, in order to resolve what it regards as your client's baseless complaint.[574]

The second letter blatantly declines any involvement in the resolution of this disputed payment claim. Once KMC Group's legal counsel submitted these letters to State Side and the adjudicator, they had fundamentally voided their right to decline consent, pursuant to s 32(3)(b) of the Act.[575] On Monday 24 October 11, or four days after the expiry date for the response, or lack of, and the decline of the requested extension pursuant to the DCWA case of *Witham v Raminea Pty Ltd*,[576] the KMC Group continued to decline consent.

Astonishingly, the Deputy Registrar, whilst recognising that the 'materials were not provided to the adjudicator',[577] and in his view; 'those materials were clearly relevant',[578] and the fact that the KMC Group had not entered the 'arena', he allowed the admission of evidence into the DCWA 'de novo' from KMC Group, opposing the enforcement of the adjudicator's determination by State Side, pursuant to s 43 of the Act.[579]

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[573] Letter to State Side's Legal Counsel, from KMC Goup's Legal Counsel Letter NJ:PW:sln:09188 (09188) dated 11 Oct 2011. Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 17(a).
[574] Letter to State Side's Legal Counsel, from KMC Goup's Legal Counsel Letter NJ:PW:sln:09188 (09188) dated 11 Oct 2011. Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 17(b).
[575] *Construction Contracts Act 2004* (WA), s 32(3)(b), Adjudication procedure.
[576] [2012] WADC 1.
[577] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27, 5 [8].
[578] Ibid.
[579] *Construction Contracts Act 2004* (WA), s 43.

Later in 2016, s 32(3)(b) of the Act,[580] pertaining to the granting of consent by the parties for an adjudicator to determine more than one dispute, would be amended after the recommendations made by Professor Evans and his team[581] in the '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*.[582]

The Issue of hearing de novo

Though speculative, the four issues highlighted indicate that there were discrepancies in the outcome in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd.* However, the outside environment was changing. But this still leaves the issue of De Novo. Coggins recognised that the Act, 'does not preclude a defendant to such proceedings from bringing a cross-claim or raising a defence under the contract.'[583]

What if that cross-claim, were to be issued de novo. Section 46 of the Act,[584] allows that a person who is aggrieved by a decision made by an adjudicator, under s 31(2)(a) of the Act [585] may apply to the SAT, for a limited right of review.

As shall be considered in the next Chapter of this research, the SAT pursuant to s 27 of the *State Administrative Tribunal Act 2004* (WA), provides that a review of decision is by way of de novo and may consider new material.[586] It does not matter if the newly presented material did not exist at the time the decision of the decision maker was made.[587] The review intends to 'produce the correct and preferable decision at the time of the decision upon the review.'[588]

In 2011, his Honour Justice Corboy found in *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd*,[589] that s 27 of the SAT Act, allowed for 'material that was not before the decision-maker may be considered'[590] at a hearing de novo. The hearing de novo is heard over, from the beginning, and may consider material not previously considered. The decision maker, it is said, 'stands in the shoes' of the original decision maker, and in the case pertaining to the Act,

[580] *Construction Contracts Act 2004* (WA), s 32(3)(b), Adjudication procedure.
[581] The author of this research was part of the team, and lobbied hard for its dismantling. Section 32(3)(b), will be discussed later in this research.
[582] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015).
[583] Jeremy Coggins, *A Proposal for Harmonisation of Security of Payment Legislation in the Australian Building and Construction Industry*, (PhD Thesis, the University of Adelaide, 2012),195.
[584] *Construction Contracts Act 2004* (WA), s 46.
[585] Ibid s 31(2)(a).
[586] Ibid.
[587] Ibid.
[588] Ibid s 27(2).
[589] [2011] WASC 80.
[590] *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80, 8 [16].

the adjudicator. The SAT only conducts a merits review. [591] That merits review allows the decision maker to analyse the whole case before them and determine the case on its merits, that being that it concerns fact-finding in the matter, as opposed to legality and legal correctness. The SAT Act makes it very clear that the Tribunal can either affirm or vary the decision or set that decision aside and substitute their own decision (De Novo) or send the matter back to the adjudicator for amendment. There can, however, be no hearing on the merits where the proceedings are want of jurisdiction, or if there has been a failure to comply with a procedural step, or a defect in the information.[592]

Unlike the Supreme Court of Western Australia, the District Court only has limited jurisdiction and therefore cannot take on matters of judicial review, unless there has been specific legislation conferred on the inferior court. Withnall and Evans found that if there is a matter before the inferior court 'which it does have jurisdiction to hear and there is a subsidiary matter involving administrative law,' they may have jurisdiction 'to resolve such a subsidiary matter.' The case was not such a matter.

When State Side sought to enforce the adjudicator's determination, a cross-claim was made by KMC Group. KMC Group had not entered the 'arena' by responding, and then admitted evidence into the DCWA, 'de novo,' opposing the enforcement. Neither the *District Court of Western Australia Act 1969* (WA) or the *District Court Rules 2005* (WA) provide guidance on this issue, as to whether a Deputy Registrar may hear a cross-claim de novo.

His Honour Justice Beech, in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*,[593] confirmed that he did 'not expressly identify the matters relevant to whether leave should be granted under s 43(2)'.[594] However, his Honour expressed that, 'in exercising the power to grant leave, regard must be had to the context, objects, purpose and policy of the legislation, so far as these may be discerned from the legislation and relevant secondary materials.[595]

His Honour would go further and held that when a party seeks enforcement, pursuant to s 43(2), enforcement lays before the defendant to justify why the repudiation to enforce should be granted.[596] Said his Honour, 'Absent such circumstances, leave will be granted. I accept that

[591] There is however no jurisdiction for the SAT to deal with enforcement, pursuant to s 43 of the Act.
[592] Peter Butt, *et al*, *LexisNexis – Concise Australian Legal Dictionary*, (LexisNexis Butterworths, Chatswood NSW, 4th Ed, 2011), hearing on the merits [272].
[593] [2008] WASC 58.
[594] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 4 [13].
[595] Ibid.
[596]Ibid, 9 [41].

submission'.[597]

Later her Honour Justice McLure, in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*,[598] confirmed that s 46(3) does not exclude judicial review of a decision or determination of an adjudicator made under s 31(2)(a) or (b) of the Act'.[599] The decision of Kirk confirmed judicial review is the right of the Supreme Court.

The Deputy Registrar chose not to look at 'the context, objects, purpose, and policy of the legislation'.[600] Instead he choose to discuss issues such as: the adjudication did not comply with the requirements of *Construction Contracts Act 2004* (WA), The application was not prepared in accordance with CCA s 26(2)(b), an amount claimed was out of time, and the bundling of claims and consent. These are matters that lie before the Supreme Court for judicial review. The Deputy Registrar then enters the 'arena,' and what could be considered as unethical, he assists the respondent's legal Counsel and suggests that aspects of the matter have not been introduced into the writ of certiorari, but according to the Deputy Registrar, 'could be allowed as an amendment.'[601] The previous dissection of issues could indicate that the chance of those issues being successful was somewhat limited, and as will be established later, this was done by hearing de novo.

If de novo had not been conferred by the Deputy Registrar, as was warrented, and the failure of KMC Group to enter the 'arena' negating their perceived rights, it should have played out into what his Honour Justice Beech stated in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*, '[a]bsent such circumstances, leave will be granted'.[602]

The Deputy Registrar could have argued that pre-trial directions were made and given, and following the decision made by his Honour Chief Justice Martin, in the case of *Barclay Mowlem Construction Ltd v Dampier Port Authority & Anor*,[603] held that pre-trial directions would include, and are better served in their entirety:

> Firstly, a direction for the preparation of a trial bundle identifying the documents that are to be adduced in evidence in the course of the trial; secondly, the exchange well prior to trial of non-expert witness statements so that non-expert witnesses will

[597] Ibid.
[598] [2011] WASCA 217.
[599] *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, 6-7 [7].
[600] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 4 [13].
[601] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27, [11].
[602] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 9 [41].
[603] (2006) 33 WAR 82.

> customarily give their evidence-in-chief only by the adoption of that written statement; thirdly, the exchange of expert reports well in advance of trial and a direction that those experts confer prior to trial; fourthly, the exchange of chronologies; and fifthly the exchange of written submissions.[604]

His Honour would state of pre-trial directions that the 'processes leave very little opportunity for surprise or ambush at trial.'[605] It most certainly must have felt like an 'ambush' for State Side at the pre-trial, that the Deputy Registrar was allowing a cross-claim.

But whatever the legal intricacies may be, the Deputy Registrar had denied the primary decision maker his legislated role in making the first decision on the evidence that was not put before him and later before the DCWA.

The Deputy Registrar wrote by page six:

> 13 In those circumstances, I think the proper outcome is to adjourn this application sine die with leave to relist it upon the determination of the respondent's writ of certiorari currently proceeding before the Supreme Court of Western Australia. I would also consider it premature to order costs against either party until that decision has been handed down.[606]

The Deputy Registrar could have declared in several paragraphs that on the prima facie, there may be a possible claim, without entering the 'arena' to set aside the matter by judicial review. However, the Deputy Registrar could have looked towards the context, objects, purpose, and policy of the legislation and note that consideration could have been given to enforce the amount, to keep the money flowing and then nothing in the Act prevents the other party from instituting procedures to reclaim that amount.

The Deputy Registrar chose to conduct the cross-claim, in a manner that could only be construed as a judicial review', but for which he had no jurisdiction. The case of Kirk indicates that the supervisory jurisdiction lies at the feet of the Supreme Court of Western Australia, where State Side would later find themselves. The applicant, State Side, was left with no choice but to give notice of appeal to the District Court against the decision of the Deputy Registrar.

State Side and the DCWA [No 2]

On 8 March 2012, State Side, by notice of appeal, appealed the decision of the Deputy

[604] *Barclay Mowlem Construction Ltd v Dampier Port Authority & Anor* (2006) 33 WAR 82, 4 [5].
[605] Ibid 4 [6].
[606] Ibid 6 [13].

Registrar. Commissioner Gething (as he was then) noted that the appeal had been listed for a directions hearing, but this was adjourned to 10 April 2012. In *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]*,[607] the legal counsel for State Side, Mr Robert Shaw, submitted to the Commissioner that the Act was crucial that the flow of money be allowed to continue to flow in the contracting chain.[608] This had been one of the fundamental premises of the proposed Act when *The Construction Contracts Bill 2004* (WA) was laid before the Parliament by the then Minister for Planning and Infrastructure, Ms MacTiernan.

The legal counsel representing KMC Group argued that the appeal should be stayed, 'pending the outcome of the Supreme Court judicial review proceedings.'[609]

Commissioner Gething did note that '(the applicant in the Supreme Court proceedings), will not be able to enter the matter for hearing until the beginning of June 2012'.[610] However, he felt that as an order nisi had been made in the WASC by his Honour Justice Hall, 'it was appropriate that the present application be stayed'.[611]

Commissioner Gething was right in staying the matter as an order nisi had been made. He cited that there were 'issues which are raised by the Supreme Court judicial review proceeding' that justified the repudiation of the leave to enforce the adjudicator's determination.[612] He then cited the four issues of concern.[613]

Commissioner Gething does not raise the issue as to whether the Deputy Registrar had overstepped his jurisdiction and allowed the cross-claim before him to be heard de novo, therefore denying the original decision maker his legislated right. The Deputy Registrar had chosen to enter the arena as a 'combatant', not as an 'umpire' which is what is demanded from a judicial officer.

Again, State Side is forced to spend considerable amounts in pursuit of their claim. The case of State *Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* heads for the hallowed halls of the Supreme Court, as Commissioner Gething states: 'it is appropriate that

[607] [2012] WADC 60.
[608] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]* [2012] WADC 60, 6 [14].
[609] Ibid 6 [13].
[610] Ibid 8 [22].
[611] Ibid 10 [31]
[612] Ibid 6 [11].
[613] Ibid 6 [12].

any further hearing of that application takes place before a judge.'[614] Again the burden of legal costs, time and emotion fell on State Side.

State Side and the WASC

On 01 March 2012, at the same time as the Deputy Registrar delivered his decision in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd;*[615] KMC Group had commenced judicial review and had brought a writ of certiorari to the Supreme Court, seeking orders to quash the determination made by the adjudicator. They sought orders from the District Court to adjourn the application; based on the fact that there was a pending motion of judicial review proceedings by the Supreme Court on the matter. The Deputy Registrar adjourned the application 'pending resolution of the Supreme Court proceedings.'[616]

It is at this point of procedures that serious errors are made through lack of understanding and expertise in the enforcement of the adjudicator's determination. As the commenced judicial review by the KMC Group seeking orders to quash the determination, went through the Supreme Court of Western Australia, State Side appealed the decision by Deputy Registrar Hewitt. In the Supreme Court; 'On 2 April 2012, his Honour Justice Hall granted an order nisi[617] in relation to the respondent's application for judicial review of the Determination'.[618]

The order nisi ordered that:

1. The First respondent [The adjudicator, Auke Steensma] do show cause before this Honourable Court on or before the date determined by this Honourable Court why a Writ of Certiorari should not be issued against the First respondent quashing the Determination.

Pursuant to *R v Australian Broadcasting Tribunal; Ex parte Hardiman,*[619] and following the words of his Honour Justice Templeman in *O'Donnell Griffin Pty Ltd v Davis & Ors;*[620] the adjudicator wrote to the Supreme Court on 4 April 2012, that in relation to the Order Nisi, 'I do not intend to enter an appearance. I will abide by whatever decision the Supreme Court

[614] Ibid 10 [31].
[615] [2012] WADC 27.
[616] Ibid [1].
[617] The Supreme Court of Western Australia, Order Nisi - CIV 1088 of 2011 dated 02 Apr 2012.
[618] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [No 2] [2012] WADC 60, 3 [5].
[619] [1980] HCA 13; (1980) 144 CLR 13.
[620] [2007] WASC 215, 4 [1], 'The first defendant, who is an adjudicator appointed under that Act, took no part in the proceedings other than to notify me that he intended to abide the outcome'.

makes. Please inform the Court of my intention'.[621] His Honour Justice Hall accepted the intention.

The legal counsel for State Side, Mr R. Shaw, would later say that 'once we got before a Judge who would properly consider and apply the legislation, we could enforce the determination.' It is interesting that consideration was given by his Honour Justice Hall to grant an order nisi. The KMC Group had at no stage, provided the adjudicator with a written response, pursuant to s 27 of the Act.[622] This would indicate that the WASC would hear 'de novo' any information provided by the KMC Group, which defies *Kirk* and the right of the court to undertake the judicial review.

In 2017, the WASC would finally hold that if a party failed to submit a response to an application for adjudication, and then by writ of certiorari, to seek judicial review, contending that the adjudicator had made a jurisdictional error, then this action must fail.

In the case of *Certa Civil Works Pty Ltd v Ghosh*,[623] his Honour Justice Kenneth Martin heard that the applicant, *Certa Civil Works Pty Ltd*, (Certa), had submitted no evidence and made no submissions, and submitted no evidence concerning the merits or demerits to the applicant's application for adjudication of Mr Logue's payment claims. In 'stark contrast to the stance'[624] that they had previously taken to the application for adjudication before adjudicator Ghosh, Certa now sought by way of writ of certiorari, judicial review, contending that adjudicator Ghosh had made a jurisdictional error.

His Honour, Justice Kenneth Martin, held in *Certa Civil Works Pty Ltd v Ghosh*,[625] that any attempt to provide the court with any material that had been denied to an adjudicator was 'in effect, a de novo consideration'[626] and '[t]hat was a wholly misconceived idea',[627] and he categorically stated that '[t]here is no de novo merits review to this court against an adverse adjudication determination upon newly assembled facts not put before the primary decision-maker'.[628]

His Honour noted that; 'Certiorari or judicial review relief akin thereto under the Rules of the

[621] Letter Steensma / Out / 111 – 2011-12 dated 4 April 2012.
[622] *Construction Contracts Act 2004* (WA), s 27.
[623] [2017] WASC 327.
[624]
[625] [2017] WASC 327.
[626] *Certa Civil Works Pty Ltd v Ghosh* [2017] WASC 327, 21 [121].
[627] Ibid.
[628] Ibid.

Supreme Court O 56 r 2, is ultimately discretionary, 'even if a jurisdictional error emerged.'[629] His Honour was critical of the fact that the applicant had not provided any submission or evidence before the primary decision-maker, and the dispute had 'evolved towards becoming some sort of contested factual joust - by rival submissions over suggested new evidence about facts never put before Mr Ghosh in the first place.'[630]

His Honour dismissed the application and refused certiorari and ordered that the Certa pay, on an indemnity basis, the costs of the other party of each of the four applications that they submitted.[631]

In State Side, the primary decision-maker had been denied his fundamental part of this process and then been criticised for the decision that he had made, yet the DCWA and the Deputy Registrar determined otherwise.

His Honour would relentlessly assert, and rightly, that '[t]his misconceived approach to judicial review in this court should not be repeated.'[632]

Unfortunately, this defence was not available to State Side some five years earlier. It will never be known if his Honour Justice Hall would have considered this issue, when KMC had commenced judicial review and had bought a writ of certiorari to the Supreme Court, seeking orders to quash the determination made by the adjudicator that was tainted by Jurisdictional error.

Since the case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*,[633] there had been continued discussion amongst the adjudicators as to whether a party that had failed to respond to an application for adjudication could seek judicial review. The legal counsel for the respondent in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* had been adamant in their contention that they were 'under no obligation to participate in the adjudication'[634] they chose not to 'enter the arena' and then sought judicial review. However, as the case of *Certa Civil Works Pty Ltd v Ghosh*[635] has established, access to judicial review is then denied.

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[629] *Certa Civil Works Pty Ltd v Ghosh* [2017] WASC 327, 20 [114].
[630] *Certa Civil Works Pty Ltd v Ghosh* [2017] WASC 327, 22 [122].
[631] Ibid 23 [127(2)].
[632] Ibid 22 [122].
[633] [2012] WADC 27.
[634] Letter to State Side's Legal Counsel, from KMC Goup's Legal Counsel Letter NJ:PW:sln:09188 (09188) dated 11 Oct 2011. Adjudicators Determination No 48-11-03, Adjudicator No 48, Auke Steensma, dated 03 Nov 2011, para 17(a).
[635] [2017] WASC 327.

Anecdotally, there is an argument that an adjudicator, upon being served an order nisi by the court, should attend proceedings. His Honour Justice Kenneth Martin would state in *Delmere Holdings Pty Ltd v Green*[636] that Adjudicator Green had '(properly) indicated his agreement to abide by the court's decision in these proceedings'.[637] By letter,[638] he indicated that he would not be 'entering the arena' playing an active part in the proceedings.[639] His Honour Justice Kenneth Martin confirmed and obviated the need for an adjudicator to be part of the proceedings.

The question remains as to, whether his Honour, Justice Hall would have held the same view as his Honour Justice Kenneth Martin.[640] When the adjudicator was making the determination, as per *Certa Civil Works Pty Ltd v Ghosh*, there was no evidence or submissions concerning the merits or demerits of State Side's payment claims. KMC Group would have attempted to put to the WASC a significant array of affidavit material for, in effect, a de novo consideration, but as his Honour Justice Kenneth Martin affirmed, '[T]here is no de novo merits review to this court against an adverse adjudication determination upon newly assembled facts not put before the primary decision-maker'.[641]

There were other contentious behaviours, about which complaints will never arise; however, if one looked towards the old halls and rules of equity, one would see written that 'whoever comes into equity must come with clean hands.'[642] Though equity was not considered in this case, had this been an issue of equity some would likely have come to this case with their hands being somewhat soiled.

What was the aftermath of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*?[643] Notably, with KMC frustratingly being unable to enter the matter for hearing until the beginning of June 2012,[644] a period of at least 211 days would have passed before a determination as to the flow of money being made. Two hundred and eleven days is

[636] [2015] WASC 148.
[637] *Delmere Holdings Pty Ltd v Green* [2015] WASC 148,5 [5].
[638] Letter from Adjudicator Green to the Supreme Court dated 23 January 2015.
[639] *Delmere Holdings Pty Ltd v Green* [2015] WASC 148,5 [5].
[640] In Obiter, said one very experienced, Barrister, Solicitor, Adjudicator, and Mentor, without out any thought, stated; 'of course he would have, but he was not given the opportunity', that opportunity would fall on His Honour Justice Kenneth Martin,five years later'. (I like to think that he is right).
[641] *Certa Civil Works Pty Ltd v Ghosh* [2017] WASC 327, 21 [121].
[642] Harvard Law Review, 'The Meaning of "Clean Hands" in Equity' (1922), The Harvard Law Review Association, 754. <http://www.jstor.org/stable/1328898>
[643] [2012] WADC 27.
[644] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]* [2012] WADC 60, 8 [22].

not what had been considered by the Legislators when the *Construction Contracts Bill 2004* (WA) lay before the Parliament, and the intent was clearly 'to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.'[645]

For State Side, the decision made by his Honour Justice Kenneth Martin came far too late. No decision was ever made by the Supreme Court of Western Australia. KMC Group, also known as WA Commercial Constructions, had gone into liquidation, on the eve of the hearing before the Court. Later State Side Electrical Services Pty Ltd would be paid a small amount of compensation by the State Government, an amount of about $92,000. State Side would be left with a $60,000 bill for legal fees, which were elicited by the frustrating tactics of the KMC Group, their legal counsel, archaic legislation and the management of the BER program by the BMW.

Commissioner Eaton acknowledged that the BMW had 'knowledge of financial difficulties of some insolvent head contractors.'[646] The Commissioner noted that none of these concerns were passed on to others outside of BMW.'[647] Commissioner Eaton would state that 'Workflow' processes to trigger the investigation of complaints made by subcontractors regarding non-payment are lacking at BMW.'[648]

The state of affairs was confirmed by the Small Business Commissioner, Mr David Eaton, in his Final Report, where he would state of this case:

> This subcontractor sought and obtained an adjudication on a portion of the monies owed to his business by KMC Group ($128,000). However, KMC Group failed to pay the adjudicated sum, or its portion of the adjudication fee, so the subcontractor was required to try to enforce the adjudication in the District Court.
>
> On the day before the hearing, KMC Group went into administration. The subcontractor was left with an unsatisfied adjudicated amount, the costs of adjudication and around $60,000 in legal fees.
>
> Because the process of obtaining an order was frustrated, BMW could not pay the subcontractor directly.

[645] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).
[646] Ibid 53 [Section 9(k)].
[647] Ibid [l].
[648] Ibid 57 [(b)].

> It is not surprising that this subcontractor feels abandoned by and angry with, the system.[649]

When the *Construction Contracts Bill 2004* (WA), lay before the Parliament, it stated that 'the rapid adjudication process is a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other';[650] instead, the process becomes complicated by legal counsel and perhaps by the judiciary.

The plight of sub-contractors and the events of the case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* would play a considerable part in the review by Professor Evans and his team during the *review of the Construction Contracts Act 2004* (WA). Professor Evans would note:

> The issue was raised in the meetings and submissions by the stakeholders as to how adjudication determinations can be better protected and parties prevented from using the courts in order to delay the payment process.[651]

He would go on to state that:

> [i]t would appear at first sight that, where a successful adjudication party applies for leave to enforce its determination, it can expect that the court will exercise its discretion and grant leave, but there have been exceptions.[652]

He would directly reference the cases of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [2012] WADC 27 and *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd [No 2]* [2012] WADC 60. Professor Evans wrote:

> It appears that the adjudicator chose to undertake the two payment claims simultaneously and 'determine the dispute fairly and as quickly, informally and inexpensively as possible'.
>
> The court noted that the adjudicator did not seek the consent of the parties, although it appears that the respondent had insisted that they were not going to participate in the

[649] David Eaton, *Final Report - Small Business Commissioner Construction Subcontractor Investigation*, March 2013, 48.
[650] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).
[651] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 69.
[652] Ibid.

payment claim dispute, were not going to give consent to hearing the payment claim disputes simultaneously and had decided not to submit a response.

The decision by the District Court appears to have failed to consider s 30.[653] The cost to the parties would have increased as a consequence of the two separate determinations.[654]

The ruling of his Honour Justice Kenneth Martin, in *Certa Civil Works Pty Ltd v Ghosh*,[655] has now changed the landscape for those seeking judicial review of an adjudicator's determination on the grounds of Jurisdictional Error. The rules has been somewhat tightened and the decision makes it clear that 'there is no de novo merits review to this court against an adverse adjudication determination upon newly assembled facts not put before the primary decision-maker'.[656]

As for the adjudicator, he once commented on the case to Professor Evans about how there was no justice, in essence, to State Side. He then asked Professor Evans, 'what is the difference between Justice and the Law?' 'That', responded the good Professor, 'is the $64,000 question'. Said the adjudicator, 'Even that wouldn't compensate the loss to State Side'.

4.7. Section 43 and the post-*State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*

The legal environment did not change as a result of what happened in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd.* However the Deputy Registrar would, one year later, in *KPA Architects Pty Ltd v Diploma Constructions (WA) Pty Ltd*,[657] grant leave, but would wisely look to the conclusion made by his Honour Justice Beech (though the Deputy Registrar wrongly attributes these words to his Honour Justice Hall), in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*,[658] where his Honour stated that it was up to the 'defendant to point to circumstances which justified a refusal to grant leave. Absent such

[653] *Construction Contracts Act 2004* (WA), s 30 Object of adjudication process; The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.
[654] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA)', (Parliament of Western Australia, 2015), 87.
[655] [2017] WASC 327.
[656] *Certa Civil Works Pty Ltd v Ghosh* [2017] WASC 327, 21 [121].
[657] [2013] WADC 106.
[658] [2008] WASC 58.

circumstances leave will be granted'.[659] The Deputy Registrar recognised that '[t]he difficulty that I have with that submission is that there was no judicial process initiated by the respondent seeking to have the determinations reviewed',[660] and that any appeal against an adjudicator's determination is 'beyond the power of this court.'[661]

In July 2016, the strong Coram of Martin CJ, Mclure P, and Newnes JA delivered the long-awaited Court of Appeal decision of *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation.*[662] His Honour Chief Justice Martin would state that an application for leave to enforce an adjudicator's determination 'involves more than merely ascertaining whether a determination has been made, but does not involve a de facto appeal from, or review of, the relevant determination.'[663]

His Honour would maintain that the process of seeking leave to enforce was not amenable to 'the resolution of issues with respect to the validity of the relevant determination.'[664] His Honour expressed, that this was available only through judicial review, and indicated that an adjudicator's determination be taken as authoritative unless otherwise challenged.[665]

Disappointingly, his Honour went on to say that '[i]t is, therefore, neither practicable nor desirable to attempt to define the metes and bounds of the court's jurisdiction or the ambit of the discretion available to a court.'[666] There were many who felt that this issue had some resolution, and the case of *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* would be a good case to ensure this.

Nearly three months later, in October 2016, four years after the case of *State Side Electrical*

[659] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, 9 [41].
[660] *KPA Architects Pty Ltd v Diploma Constructions (WA) Pty Ltd* [2013] WADC 106, 3 [3].
[661] Ibid.
[662] [2016] WASCA 130.
[663] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130, 50 [141].
[664] Ibid.
[665] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130, 50 [141].
[666] Ibid 50-51 [141].

Services Pty Ltd v WA Commercial Constructions Pty Ltd,[667] his Honour Justice Beech, had previously dealt with the issue of s 43(2) of the Act in the Supreme Court on four occasions, (see; *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2008] WASC 58, *RE Scott Johnson; Ex Parte Decmil Australia Pty Ltd* [2014] WASC 348, *Hamersley Iron Pty Ltd v James* [2015] WASC 10, *Hamersley HMS Pty Ltd v Davis* [2015] WASC 14, *Samsung C&T Corporation v Loots* [2016] WASC 330). His Honour would then in *Samsung C&T Corporation v Loots*,[668] write the most definitive commentary, about s 43(2) of the Act. His Honour held:[669]

> 431 The following principles regarding an application for leave to enforce under s 43(2) are well established:
>
> (1) The role of the court on an application for leave to enforce is not purely mechanical but requires the court to itself determine, in all the circumstances, that the relevant determination should be enforced as a judgment of the court.
>
> (2) Section 43 confers a discretion upon the court in that regard.
>
> (3) Given that the Act does not expressly identify the matters to which regard should be had on the question of leave, consideration must be given to the context, objects, purpose, and policy of the Act. The object of the Act is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.
>
> (4) That object gives rise to a predisposition in favour of the grant of leave. It is for the party obliged to pay to show a reason why the determination should not be enforced.
>
> (5) The fact that a party resisting enforcement alleges that it has other pending claims which could be set-off against the adjudicated amount will not ordinarily justify the refusal of leave.

[667] [2012] WADC 27.
[668] [2016] WASC 330.
[669] I felt that it be prudent that the principles be written verbatim, and not summarised, to ensure that the reader, whether a Judicial Officer, Legal Practitioner or an Adjudicator, understands the what has been wrttien by His Honour.

(6) An application for leave to enforce a determination is not an occasion to challenge the correctness of the determination or, in the absence of a pending application for judicial review, its validity.

(7) There are no closed categories of circumstances that may be relevant to the question of whether leave should be granted.[670]

By 2016, there was a considerable greater amount of case history and obiter in dealing with s 43(2) of the Act. Sadly, the views of his Honour Chief Justice Martin and his Honour Justice Beech, where not available to the Deputy Registrar and then Commissioner Gething, when they made their subsequent decisions in the case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* and *(No2).*[671]

4.8. Section 43 and the Amendments to the Act

In his final Report, Professor Evans noted that there were significant costs associated with enforcement which might deter smaller industry participants from utilising the Act.[672] Though he found that there was no conclusive data available to determine the costs attributed to the enforcement of an adjudicator's determination, submissions made by stakeholders and associations such as HIA, and AIB, highlighted that there are considerable legal costs associated with the preparation of enforcing a determination in the courts.

Professor Evans found that there were genuine concerns with the current process and considered that to hasten the process for registration of enforcement as court orders, 'consideration should be given to the introduction of complementary regulations of the courts.'[673]

[670] *Samsung C&T Corporation v Loots* [2016] WASC 330, 107-108 [431].
[671] [2012] WADC 27 & [2012] WADC 60.
[672] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 69.
[673] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 69.

He recommended that:

> Alternatively it is recommended that power be conferred by regulation on the Building Commissioner to permit the Commissioner to approve the enforcement of the adjudicator's determination. This would significantly reduce the current legalistic burden associated with the enforcement of determinations.[674]

The Response of the Western Australian Government to the Report on the Operation and Effectiveness of the *Construction Contracts Act 2004* (WA) May 2016 recommended that:

> **Recommendation 15(a):**
>
> Consideration should be given to the introduction of complementary regulations of the Courts, or a statutory amendment to section 46 in order to allow speedy registration ·of the adjudication determinations by court order.
>
> Accept Recommendation - requires legislative change
>
> Further work will be undertaken by the Building Commission and others to determine how best to achieve the desired outcome; either through amendment to court rules, section 49 of the CC Act, or both.[675]

An alternative was also given:

> **Recommendation 15(b);**
>
> Alternatively, it is recommended that a power be conferred by regulation on the Building Commissioner to permit the Commissioner to approve the enforcement of the adjudicator's determination.
>
> Accept Recommendation - requires legislative Change

[674] Ibid.
[675] Western Australia, *The Response of the Western Australian Government to the Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA), May 2016, 13.

> However, the Government will pursue Recommendation 15(a) in favour of this recommendation.[676]

On 15 December 2016, the amendments to the Act commenced, and among the changes was the amendment to s 43 of the Act, which now reads as follows:[677]

> 43. Determinations may be enforced as orders of court
>
> (1) In this section —
>
> ***court of competent jurisdiction***, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.
>
> (2) A party entitled to be paid an amount under a determination may enforce the determination by filing in a court of competent jurisdiction —
>
> (a) a copy of the determination that the Building Commissioner has certified to be a true copy; and
>
> (b) an affidavit as to the amount not paid under the determination.
>
> (3) On filing under subsection (2), the determination is taken to be an order of the court, and may be enforced accordingly.

The explanatory memorandum stated:

> This clause gives effect to the recommendation by inserting a new process for the registration of determinations that is similar to the registration process provided by section 50 of the *Building Services (Complaint Resolution and Administration) Act 2011*. Section 50 of this Act provides a speedy process for building remedy and HWBC orders made by the Building Commissioner, or the SAT, to be filed with the courts and enforced as an order.

[676] Western Australia, *The Response of the Western Australian Government to the Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA), May 2016, 13.
[677] *Construction Contracts Act 2004* (WA), s 43.

> This clause deletes sections 43(2) and (3) of the Act and replaces it with new subsections (2) and (3), which provide that a party entitled to be paid an amount under a determination may enforce the determination by filing in a court of competent jurisdiction both a copy of the determination that the Building Commissioner has certified to be a true copy, and an affidavit as to the amount not paid under the determination. Once the documents are filed with the court, the determination is taken to be an order of the court.[678]

The amendment to s 43 of the Act came to pass, and cases seeking the enforcement of adjudicators' determination would eventually find their way into the Courts.

4.9. The cases post-amendments to the Act

It would be her Honour Justice Pritchard who would make the first decision about the enforcement of a determination made by an adjudicator pursuant to the newly amended s 43 of the Act.[679] In *Total Eden Pty Ltd v ECA Systems Pty Ltd,*[680] her Honour ordered the suspension of enforcement until a decision had been made pertaining to an application for the seeking of a judicial review of the adjudicator's determination.

In the first instance, her Honour recognised that the Act had been revised to allow for a more streamlined approach to have the determination enforced by the court and that the adjudicator's determination should be regarded as a judgment of the court[681] and 'taken to be an order of the court.' [682]

The application for enforcement was originally made pursuant to s 15 of the *Civil Judgments Enforcement Act 2004* (WA). However, the claimant, Total Eden Pty Ltd, sought to suspend the enforcement. Her Honour recognised that special circumstances existed, in that the proper

[678] Explanatory Memorandum Construction Contracts Amendment Bill 2016, 12.
[679] *Construction Contracts Act 2004* (WA), s 43.
[680] [2017] WASC 58.
[681] *Total Eden Pty Ltd v ECA Systems Pty Ltd* [2017] WASC 58, 4 [8].
[682] Ibid.

process had not been observed by the DCWA, and that the claimant had not been granted an 'opportunity to be heard.'[683] This, however, as seen in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*,[684] has the propensity to become an opportunity for a de facto 'judicial review' over which the DCWA does not have the jurisdiction to conduct, and could result in those lacking experience making decisions that continue to affect people's lives.

Her Honour Justice Pritchard did not take into consideration the words of his Honour Justice Beech, that enforcement would be reliant on the grounds of which the leave should be denied, by what could be established by the respondent.[685] However, when 'exercising' that power, consideration must be given, he stated, 'to the context, objects, purpose, and policy of the legislation'.[686] Beech J also noted that this would be found in the *Construction Contracts Act* itself, and any secondary materials, such as explanatory memorandum for the bill or the Second Reading Speech.

Her Honour would remark that the claimant had 'reasonable prospects of success in respect of the application for judicial review.'[687] There were two issues that Counsel for the claimant considered had grounds for seeking jurisdictional error. They were; 1. The adjudicator had failed to consider an entitlement for set off; and 2. the claimant also challenged the determination that the adjudicator awarded the cost of the adjudication to Total Eden, by their refusal to pay the amount due was vexatious and frivolous, pursuant to s 34(2) of the Act.[688]

Though her Honour was quick to counter that 'nothing in that comment, or the observations I am about to make, is in any way intended to suggest that I have predetermined that

[683] *Total Eden Pty Ltd v ECA Systems Pty Ltd* [2017] WASC 58, 6 [15].
[684] [2012] WADC 27.
[685] Ibid.
[686] Ibid.
[687] *Total Eden Pty Ltd v ECA Systems Pty Ltd* [2017] WASC 58, 7 [18].
[688] *Construction Contracts Act 2004* (WA), s 34(2), which states; 'If an appointed adjudicator is satisfied that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs'.

application.'[689] No doubt a little better than the comment made by the Deputy Registrar in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd,*[690] when he declared, 'I am told that this point has not been raised in the writ of certiorari which has been filed, but nonetheless I think it a point which could be allowed as an amendment'.[691]

Her Honour then turned towards the balance of convenience. Counsel for the claimant stated that Total Eden Pty Ltd was 'a large company with significant business interests and assets'[692] and that the respondent, 'was not nearly so financially robust'[693] which then led to the assumption that the claimant may not be able to recover the amount, if the determination is paid, but the determination is quashed by Judicial Review. The Counsel for the defendant then moved towards the comment made by his Honour Justice Le Miere in *Re Graham Anstee-Brook; Ex parte Karara Mining Ltd.*[694] However, her Honour took the view expressed in the 2003 WASCA case of *Eastland Technology Australia Pty Ltd v Whisson,*[695]where the Coram of his Honour Justice Murray and his Honour Justice Parker held:[696]

> 9 In the light of the authorities, we may attempt to distill what we take to be the generally applicable relevant principles –
>
> - The successful litigant at first instance will ordinarily be entitled to enforce the judgment pending the determination of any appeal.
> - It is for the applicant for a stay to move the court to a favourable exercise of its discretion.
> - It will not do so unless special circumstances are shown justifying the

[689] Ibid.
[690] [2012] WADC 27.
[691] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd,* [2012] WADC 27, [11].
[692] *Total Eden Pty Ltd v ECA Systems Pty Ltd* [2017] WASC 58, 9 [25].
[693] Ibid.
[694] Re Graham Anstee-Brook; Ex parte Karara Mining Ltd [2012] WASC 129 [2012] WASC 129, 10 [19]. His Honour stated that 'the mere existence of a risk that [a party] may not be able to refund any amount paid ... in satisfaction of the [d]etermination is not sufficient of itself to justify a stay of the [d]etermination'.
[695] [2003] WASCA 307.
[696] It is imperitive that the complete quotation was made, so to demonstrate how the decision was made.

departure from the ordinary rule.

- The central issue will be whether the grant of a stay is perceived to be necessary to preserve the subject matter or the integrity of the litigation, or where refusal of a stay could create practical difficulties in respect of the relief which may be granted on appeal. It is often put shortly that it will first and foremost be necessary to establish that without the grant of a stay, the right of appeal, whether upon the grant of leave or special leave or not, will be rendered nugatory.
- If that can be demonstrated, the stay will generally still be refused unless it can be established that the appeal process, whether upon the grant of leave or special leave or not, has ultimately reasonable prospects of success so as to result in the grant of relief to the appellant.
- If that hurdle can be overcome, the stay may still be refused where it appears that the balance of convenience does not lie in favour of the applicant; where, for example, the grant of a stay will occasion hardship to the respondent which may not be alleviated by the terms upon which the stay may be granted.[697]

The Honourable Coram then stated that 'it was by the application of these principles that the Court determined the applications to which these reasons relate.[698]

Her Honour stated the granting of the suspension order was weighted by the balance of convenience which deemed that there was a high risk of the repayment (if it did eventuate) not occurring. Her Honour then stated that if this occurred then 'judicial review application would be rendered nugatory, and Total Eden would be denied the opportunity to pursue its rights

[697] *Eastland Technology Australia Pty Ltd v Whisson* [2003] WASCA 307, 7-8 [9].
[698] Ibid 8 [10].

through the judicial review application.'[699]

Subsequently, her Honour granted the application and suspended the enforcement.

What is somewhat disappointing, is not the fact that her Honour looked towards the 'balance of convenience' or a well-recognised and relevant case that occurred before the *Constructions Contract Act 2004* (WA) and the *Civil Judgments Enforcement Act 2004* (WA) had both commenced. It is that her Honour failed to note the words of his Honour Justice Beech, who in *Samsung C&T Corporation v Loots*,[700] wrote the most definitive commentary pertaining to s 43(2) of the Act, and stated that consideration must be given to the context, objects, purpose, and policy of the Act. The object of the Act is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.[701] This echoed the words of Ms MacTiernan when she made the Second Reading of the *Construction Contracts Bill 2004*, and went on further to say that the Act does not prevent the parties of the payment dispute from seeking 'instituting proceedings before an arbitrator or other person or a court or other body'.[702] A fact confirmed by his Honour Justice Pullin in *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd*[703] when he quoted that 'It is a 'pay now, argue later' system: *Multiplex Constructions Pty Ltd v Lui Kans* [2003] NSWSC 1140 [96] (Palmer J), with the primary aim of keeping the money flowing by enforcing timely payment*: Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217; (2011) 43 WAR 319 [87].[704] Lastly, his Honour could have given consideration to the often forgotten, yet proverbial s 30 of the Act,[705] determine payment disputes as fairly and quickly and informally and inexpensively as possible.

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[699] *Total Eden Pty Ltd v ECA Systems Pty Ltd* [2017] WASC 58, 10 [28].
[700] [2016] WASC 330.
[701] *Samsung C&T Corporation v Loots* [2016] WASC 330, 107-108 [431].
[702] *Construction Contracts Act 2004* (WA), s 45.
[703] [2014] WASCA 91.
[704] Ibid 55.
[705] *Construction Contracts Act 2004* (WA), s 30.

While the WASC has made it clear, as to issues of 'set off' and when they should be dealt with, as was the allegation made in *Total Eden Pty Ltd v ECA Systems Pty Ltd*, this is an issue for Judicial Review, not for enforcement.

At the very least, ECA has been denied the economic benefit of the money, and any amount of interest that would have accrued if that amount had been placed in a banking institution. Instead the claimant has the benefit of that amount.

An adjudicator, being the primary decision maker, makes a determination/decision, rightly or wrongly. A person that is aggrieved by that decision may seek a limited review by the SAT, pursuant to s 46 of the Act,[706] or seek judicial review. However, when a party seeks enforcement of the determination, that party should not be subject to the heavy-handedness of Judicial Officers. This heavy-handedness flies in the face of what the legislators had put forward when the Act was drafted. The money must flow, and if a party is aggrieved, they can fight it later.

In the next case dealing with enforcement, his Honour Allanson would make the next decision pertaining to the amendments to the Act, which came about on 15 December 2016. In *Easy Stay Mining Accommodation Pty Ltd v Faigen*,[707] his Honour noted that 'it is no longer necessary for a party to obtain leave of a court to enforce a determination.'[708] The filing of the adjudicator's determination, he noted 'is taken to be an order of the District Court and may be enforced accordingly.'[709]

In July 2017, the applicant, Easy Stay Mining Accommodation Pty Ltd, would bring an application for judicial review before the WASC, an injunction to restrain enforcement of four

[706] Ibid s 43.
[707] [2017] WASC 266.
[708] *Easy Stay Mining Accommodation Pty Ltd v Faigen* [2017] WASC 266, 5 [8].
[709] *Easy Stay Mining Accommodation Pty Ltd v Faigen* [2017] WASC 266, 5 [8].

determinations made by Adjudicator Phillip Faigen, and a declaration of invalidity. The applicant claimed that they had found six grounds to bring before the court, although, his Honour noted that the applicant's Counsel only argued over the first four, which included: 1. there was no construction contract, pursuant to the Act; 2. the claim was invalid as it was a quantum meruit claim; 3. failing to give reasons for finding a contract existed; and 4. failing to provide reasons, as that term is used in s 36(d) of the Act.[710]

There were two additional errors that were claimed by the respondent, but consequently not argued. They included: that the adjudicator had not considered the 'complexity of the applicant's claim,' and '6. [The Adjudicator] made four (4) simultaneous determinations without agreement of the parties and contrary to the *Construction Contracts Act 2004*',[711] which had pertained to s 32(3)(b) of the Act.[712] As will be discussed later in this research, the Act had been amended to allow the adjudicator to simultaneously adjudicate multiple disputes if the adjudicator is satisfied that it will not affect their capacity to adjudicate pursuant to s 30 of the Act.[713] Quite rightly, this was not pursued further, though what is somewhat disturbing is that this application for relief was brought before the Court seeking relief on 31 July 2017,[714] though the amendment to this section was valid from 15 December 2016. One must wonder if legal counsel charged for the amount pertaining to this issue?

On 14 August 2017, on the four matters, debt appropriation orders were obtained with the intent of seeking enforcement. While recognising the more legalistic approach of the balance of convenience, his Honour wisely opined: '[i]n my opinion, both the balance of convenience and wider discretionary considerations require the court to have regard to matters going beyond

[710] Ibid 3 [3].
[711] Ibid 4 [3(6)].
[712] *Construction Contracts Act 2004* (WA), s 32(3)(b).
[713] *Construction Contracts Act 2004* (WA), s 30. Section 30 Object of adjudication process, 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.
[714] *Easy Stay Mining Accommodation Pty Ltd v Faigen* [2017] WASC 266, 3 [1].

the two parties.'[715] His Honour recognised the scheme of the Act, the proverbial s 30, and that the aim of the Act was to keep the money flowing.[716] His Honour refused the application for interlocutory relief and the case was handed back to the DCWA as Easy Stay (and OCS),[717] as both objected to the appropriation orders and 'applied for an order that the objection be allowed.'

His Honour, District Court Justice Staude, held in *Grounded Construction Group Pty Ltd v Easy Stay Mining Accommodation Pty Ltd*[718] noted that there was no longer a requirement to file a determination for enforcement. His Honour went on to say that '[I]n this case, only the Supreme Court, by judicial review, can invalidate the determinations. Unless, and until, that occurs, they stand as enforceable judgments of this court'.[719] However his Honour did rightly note that whilst Easy Stay did 'reprise' their argument, the 'determinations are infected with jurisdictional error and must be set aside'.[720] His Honour stated that Easy Stay did not provide an arguable case, and his Honour declared that he was 'certainly not persuaded on the balance of probabilities that the adjudicator erred', though he felt that it was 'inappropriate' for him to further comment as the matters of Judicial Review belong in the Supreme Court.

The question then posed to his Honour was whether the application by East Stay to seek 'special circumstances to justify a suspension'[721] was apt, as it required the re-litigation of the relief sought before his Honour Justice Allanson, and this would likely be an abuse of the process.[722]

This his Honour found to be the case and dismissed the applications, but not before quoting

[715] Ibid 12 [40].
[716] Ibid 12 [41].
[717] OCS is related to Easy Stay to the extent that it has the same registered office, principal place of business, director and secretary.
[718] [2017] WADC 136.
[719] *Grounded Construction Group Pty Ltd v Easy Stay Mining Accommodation Pty Ltd* [2017] WADC 136, 14 [37].
[720] Ibid 14 [38].
[721] Ibid 14 [39].
[722] Ibid.

what his Honour Lord Halsbury LC had asserted in *Reichel v Magrath,*[723] that 'it would be a scandal to the administration of justice' if this court were to grant relief that the Supreme Court has refused.

Again, many await the outcome of the matter of judicial review before the WASC, though one must ponder, that in both the above cases, a considerable amount of time has passed since the determination was made by the adjudicator. It appears that the Judiciary and the legal fraternity have forgotten the principal object 'of keeping the money flowing by enforcing timely payment',[724] which as his Honour Justice Murphy agreed was substantiated in the Second Reading Speech, by the Honourable Ms MacTiernan on 3 March 2004, and that '[I]t is a 'pay now, argue later' system', as deliberated by the Honourable Justice Palmer. The burden of the financial cost of seeking legal counsel to enforce and, far too often, defend, and the long periods of time of litigation, defines what the principles of the Act were. There appears to be the misconception that continued case law will resolve this matter, instead of common sense.

4.10. The future

In 2012, Queens Counsel and author Marcus Jacobs wrote of s 43 of the Act,[725] 'nothing is stated as to the grounds upon which the leave may be opposed. Presumably, as cross-claims are not excluded, they may be raised in opposition to an application to have the determination enforced.' [726]

Marcus Jacobs is right. Despite the amendments to the Act, the work conducted on the question of enforcement by his Honour Justice Beech, and the simple words of s 30 of the Act,[727] there is only the rather expensively gained case law to determine the grounds to oppose. Perhaps the

[723] (1889) 14 App Cas 665.
[724] *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217; (2011) 43 WAR 319, 28 [87].
[725] *Construction Contracts Act 2004* (WA), s 43.
[726] Marcus Jacobs, *Security of Payment in the Australian Building and Construction Industry* (Thomson Reuters, 4th Ed, 2012) 819.
[727] *Construction Contracts Act 2004* (WA), s 30.

new Government, could step in and form a working group to deal with this matter or propose ancillary legislation, both of which could be achieved at a considerably cheaper and quicker rate.

The McGowan government announced on 23 February 2018 that it will commence a second review on the Act, 'a review to improve security of payments for subcontractors in Western Australia's building and construction industry and the establishment of an Industry Advisory Group (IAG).'[728] The IAG has, amongst other issues, being tasked to evaluate, 'introducing trust arrangements to protect funds owed down the contracting chain, in case a head contractor experiences financial difficulty.'[729]

The introduction of trust arrangements to protect funds (or project bank accounts), is a very complex issue that while it is not discussed at great length in this research, certainly warrants further research.

The Government could also consider that those that will be administering s 43 of the Act be given specialist training courses, to ensure that they correctly understand the Act and address any opposition to the enforcement, and do not find themselves dangerously crossing the thin line of jurisdiction, by the conduct of a 'de facto judicial review', which at last reading of certain laws of the courts did not exist.

4.11. Conclusion

The enforcement of an adjudicator's determination, pursuant to s 43 of the Act,[730] has come a

[728] The Government of Western Australia, Media Statement – Improving security of payment for subcontractors gets approval dated Friday, 23 February 2018. <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/02/Improving-security-of-payment-for-subcontractors-gets-approval.aspx>

[729] The Government of Western Australia, Media Statement – Improving security of payment for subcontractors gets approval dated Friday, 23 February 2018. <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/02/Improving-security-of-payment-for-subcontractors-gets-approval.aspx>..

[730] *Construction Contracts Act 2004* (WA), s 43.

considerable way since the case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd.*[731] The amendments to the Act, in 2016, through the work of Professor Evans, and the work of his Honour Justice Beech, have helped streamline the process of enforcement. The process of enforcement still continues to be a long drawn out and expensive process, with often smaller sub-contractors not having the financial resources to engage in protracted litigation or the 'expertise to enforce those legal rights'.[732]

Sadly, the subcontractor who applied for enforcement before the DCWA in *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, continues to feel 'abandoned by and angry with, the system'. After all, what did the Sub-contractor get for his $60,000?

[731] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27.
[732] Ibid.

Chapter 5

Section 46 (Review, limited right of) of the *Construction Contracts Act 2004* (WA) and the jurisdiction of the State Administrative Tribunal of Western Australia

> The role of the SAT is to determine if the adjudicator dismissed the adjudication incorrectly.
>
> John Patrick Fisher
> Adjudicator No 2 & Senior Sessional Member SAT

5.1. Introduction

Senior Sessional Member Fisher was asked what the role of the SAT was. His response was, as can be seen above and will be discussed in this chapter.

5.2. The aim of this chapter

This chapter aims to overview the limited right of review by the State Administrative Tribunal of Western Australia and its Jurisdiction.

This chapter will examine the background to s 46 of the Act, s 17 of the SAT Act,[733] s 21 of the SAT Act,[734] and s 29 of the SAT Act.[735] This section will conduct a limited statistical analysis of the reviews of adjudicators' determinations, the decisions made, the dismissals, and the withdrawals, by the SAT.

The chapter will discuss the first case before the SAT, *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture,*[736] and how decisions made by the SAT in reviewing an adjudicator's determination, such as the reckoning of time, have affected other adjudicators' determinations.

[733] *State Administrative Tribunal Act 2004* (WA), s 17(1).
[734] *State Administrative Tribunal Act 2004* (WA), s 21.
[735] *State Administrative Tribunal Act 2004* (WA), s 29.
[736] [2005] WASAT 269.

This Chapter will scrutinise the cases of *Moroney & Anor and Murray River North Pty Ltd,*[737] Adjudicator Riley, Member Dr De Villiers and s 31(2)(a) of the Act. The Chapter will also explore the WASCA, the case of *Perrinepod Pty Ltd v Georgiou Building Pty Ltd,* and s 46 of the Act.

This Chapter will consider issues such as The *Construction Contracts Act 2004* (WA) and:

- Section 31(2)(a)(i) of the Act,[738] an adjudicator's function when dealing with a contract is not a construction contract and the Mining Exclusion Clauses;
- Section 31(2)(a)(ii) of the Act,[739] an adjudicator's function when dealing with an application not served in accordance with s 26 of the Act. The chapter will consider the case of; *the MCIC Nominees Trust t/As Capital Projects & Developments and Red Ink Homes Pty Ltd,*[740] and the reckoning of time prescribed by the Act;
- Section 31(2)(a)(iii) of the Act,[741] an adjudicator's function when dealing with a matter under dispute that is subject to an order, judgment or other finding before an arbitrator or other person or a court or other body Section 31(2)(a)(iii) and the cases of *Moroney & Anor and Murray River North Pty Ltd,* [742] and *BGC Contracting Pty Ltd and Ralmana Pty Ltd T/A RJ Vincent & Co*;[743] and
- Section 31(2)(a)(iv) of the Act,[744] an adjudicators function when dealing with complexity.

The chapter will also explore the question of whether an adjudicator can deal with the matter of fraud. The chapter will look at how the amendments to the Act have affected s 46 of the Act.

5.3. What does the Act say?

46. Review, limited right of

(1) A person who is aggrieved by a decision made under section 31(2)(a) may

[737] [2008] WASAT 36 and [2008] WASAT 111.
[738] *The Construction Contracts Act 2004* (WA), s 31(2)(a)(i).
[739] *The Construction Contracts Act 2004* (WA), s 31(2)(a)(ii).
[740] [2013] WASAT 177.
[741] *The Construction Contracts Act 2004* (WA), s 31(2)(a)(iii).
[742] [2008] WASAT 111.
[743] [2015] WASAT 128.
[744] *The Construction Contracts Act 2004* (WA), s 31(2)(a)(i).

apply to the *State Administrative Tribunal* for a review of the decision.

(2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 14 days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

(3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

5.4. Background

Once an aggrieved party has decided that they are going to pursue s 46 of the *Construction Contracts Act 2004* (WA), and that grievance pertains to a decision made by an adjudicator, pursuant to s 31(2)(a),[745] the SAT has the jurisdiction to review that decision, pursuant to s 17 of the SAT Act.[746] Section 17 states:

17. What comes within review jurisdiction

(1) If the matter that an enabling Act gives the Tribunal jurisdiction to deal with is a matter that expressly or necessarily involves a review of a decision, the matter comes within the Tribunal's review jurisdiction.

Pursuant to s 21 of the SAT Act,[747] an aggrieved party to a payment dispute has a right under an enabling act, in this case, the *Construction Contracts Act 2004* (WA), and can apply to have a decision reviewed. The request must be made in writing and must be made; 'at any time

[745] *The Construction Contracts Act 2004* (WA), s 31.
[746] *State Administrative Tribunal Act 2004* (WA), s 17(1).
[747] *State Administrative Tribunal Act 2004* (WA), s 21.

within 28 days after the day on which the decision was made'.[748]

The SAT Act states, pursuant to s 27,[749] that:

> 27. Nature of review proceedings
>
> (1) The review of a reviewable decision is to be by way of a hearing de novo, and it is not confined to matters that were before the decision-maker but may involve the consideration of new material whether or not it existed at the time the decision was made.
>
> (2) The purpose of the review is to produce the correct and preferable decision at the time of the decision upon the review.
>
> (3) The reasons for decision provided by the decision-maker, or any grounds for review set out in the application, do not limit the Tribunal in conducting a proceeding for the review of a decision.

Senior Member Raymond in *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture*[750] confirmed that 'a decision or determination of an adjudicator on adjudication cannot be appealed or reviewed'.[751] Senior Member Raymond affirmed:

> The review of the reviewable decision is by way of a hearing de novo, and is not confined to matters that were before the decision-maker, but may involve the consideration of new material, whether or not it existed at the time the decision was made. The purpose of the review is to produce the correct and preferable decision at the time of the decision upon review (s 27).[752]

[748] *State Administrative Tribunal Act 2004* (WA), s 21(3)(a).
[749] *State Administrative Tribunal Act 2004* (WA), s 27.
[750] [2005] WASAT 269.
[751] *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture* [2005] WASAT 269, 12 [47]. Senior Member Raymond was refering to *Construction Contracts Act 2004* (WA), s 46(3); Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed..
[752] Ibid 12 [49].

Marcus Jacobs, wrote of s 46 of the Act[753] that 'the whole scheme' of the Act, the notion of De Novo is not uniform with the meaning of s 27(1) of the SAT Act,[754] and should be read down; to do away with the inconsistency. To not do so, would necessitate 'any material provided to the tribunal that was not before the adjudicator would be disregarded'.[755]

Dr De Villiers would note: '[T]he review tribunal is in effect placed in the shoes of the original decision-maker'.[756]

The SAT has the prerogative to exercise its review jurisdiction through the SAT Act, and this affects the Act. The SAT Act states, pursuant to s 29,[757] that:

> 29. Tribunal's powers in review jurisdiction
>
> (1) The Tribunal has when dealing with a matter in the exercise of its review jurisdiction, functions and discretions corresponding to those exercisable by the decision-maker in making the reviewable decision.
>
> (2) Subsection (1) does not limit the powers given by this Act or the enabling Act to the Tribunal.
>
> (3) The Tribunal may —
>
> (a) affirm the decision that is being reviewed; or
>
> (b) vary the decision that is being reviewed; or
>
> (c) set aside the decision that is being reviewed and —

[753] *Construction Contracts Act 2004* (WA), s 46.
[754] *State Administrative Tribunal Act 2004* (WA), s 217(1).
[755] Marcus Jacobs, *Security of Payment in the Australian Building and Construction Industry* (Thomson Reuters, 4th Ed, 2012) 822.
[756] Bertus De Villiers, 'The State Administrative Tribunal of Western Australia – Time to End the Inquisitorial/Accusatorial Conundrum' (2014), *The University of Western Australia Law Review, Volume 37, Issue 2*, 199.
[757] *State Administrative Tribunal Act 2004* (WA), s 29.

(i) substitute its own decision; or

(ii) send the matter back to the decision-maker for reconsideration in accordance with any directions or recommendations that the Tribunal considers appropriate,

and, in any case, may make any order the Tribunal considers appropriate.

The SAT Act makes it very clear that they can either affirm or vary the decision; or set that decision aside and substitute their own decision (De Novo) or is also is a case, and as we shall see later, send the matter back to the adjudicator for amendment.

The SAT has indicated in its decisions that it will only set aside an adjudication determination where there has been a failure to comply with the provisions of 31(2)(a) and will not review a decision on the merits only on jurisdiction.

Reviews of adjudicators' determinations

Since 2005, of the 1822 applications for adjudication, only been 78 reviews (or 4.3%) have been submitted to the SAT. To date, the highest number of reviews of adjudicators' decisions have been 11 in both 2011-2012 and 2014-2015. The lowest number was in the first year 2005-2006, 2006-2007, and ironically 2016-2017, where each displayed only three reviews, although, in the second half of 2017, only one review came before the SAT.

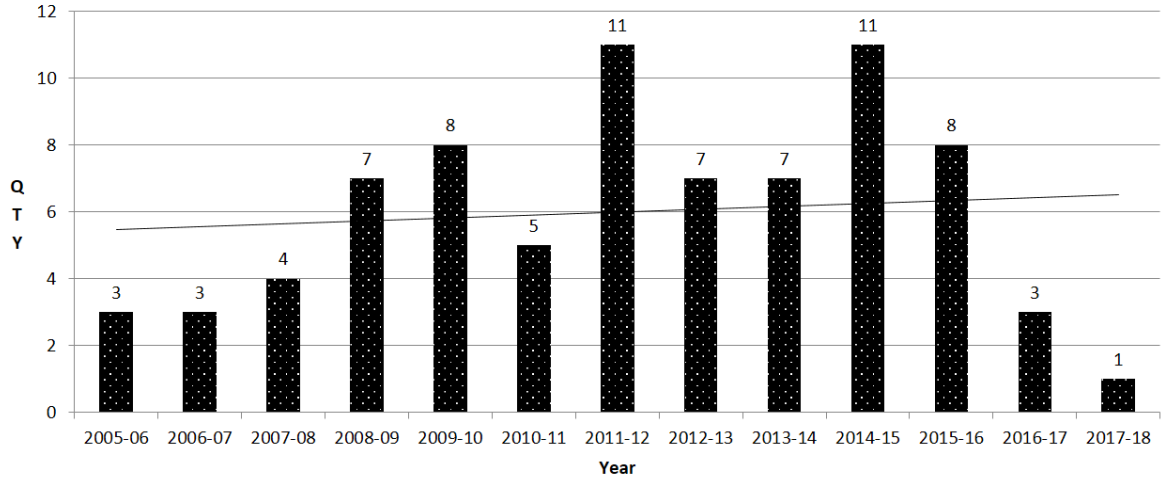


Figure 10 – Number of Reviews (2005-2018)

As can be seen above in **Figure 10**, from 2014-2015 to the present, there has been a considerable reduction in the number of reviews conducted by the SAT.

As discussed in chapter 3, the first case for review before the State Administrative Tribunal was on 4 October 2005, when Senior Member Raymond would deliver the first decision pertaining to the Act by the SAT. In the case of *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture,*[758] the applicant, Marine & Civil Bauer Joint Venture had sought to have decision made by an adjudicator reviewed pursuant to s 46 of the Act.[759]

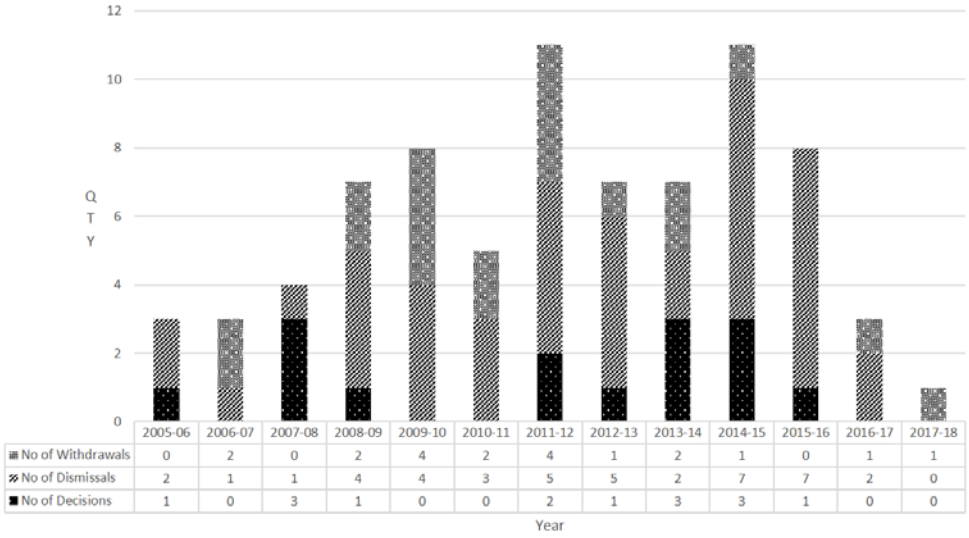
Decisions made and the Dismissals

As can be seen in **Figure 11**, since 2005, of the 78 reviews conducted on decisions made by adjudicators, decisions were made on 15 (or 19%) occasions. Forty three (43 or 55%) dismissed for various reasons. The first review application to be dismissed was on 9 January 2006 in; *Crouch Developments Pty Ltd ACN 008 897 676, Christian White & Angie Marik T/AS Christian Kane's Business Services,*[760] where Member Dr B De Villiers, dismissed the application on the grounds of a lack of jurisdiction. That dismissal was published many years

[758] [2005] WASAT 269.
[759] *The Construction Contracts Act 2004* (WA), s 46.
[760] CC:3773/2005.

later and does not explain as to the lack of jurisdiction.

The greatest number of decisions made by the SAT was three in both 2013-2014 and 2014-2015. The greatest number of dismissals was seven in both 2014-2015 and 2015-2016.



	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
No of Withdrawals	0	2	0	2	4	2	4	1	2	1	0	1	1
No of Dismissals	2	1	1	4	4	3	5	5	2	7	7	2	0
No of Decisions	1	0	3	1	0	0	2	1	3	3	1	0	0

Figure 11 - Decisions, Dismissals and Withdrawals (2005-2017)

Overall how do the 78 reviews of adjudicators' determinations compare to the total of 1822 applications for adjudications tally? The 78 out of 1822 applications indicate that only 4.28% of applications for adjudication made during the 12 year period from 2005-2017, came before the SAT.

Only 15 of the 1822 applications ended before the SAT with a decision being made pursuant to s 46 of the Act.[761] Adjudicators are erring 0.82% of the time. The remaining 63 out of 1822 (or 3.46%) applications for adjudication were either dismissed or withdrawn by the parties.

Withdrawals

The *State Administrative Tribunal Act 2004* (WA), pursuant to s 46 of the SAT Act,[762] provides that a party or the parties may agree to withdraw proceedings in the SAT. The SAT Act

[761] *The Construction Contracts Act 2004* (WA), s 46.
[762] *State Administrative Tribunal Act 2004* (WA), s 46.

provides:

Since 2005, of the 78 reviews conducted by the SAT, 20 (or 26%) of those reviews have been withdrawn by agreements between the parties. As can be seen below in **Figure 12**, in 2009-2010 and 2011-2012, in both those years, four applications for review were withdrawn by the parties.

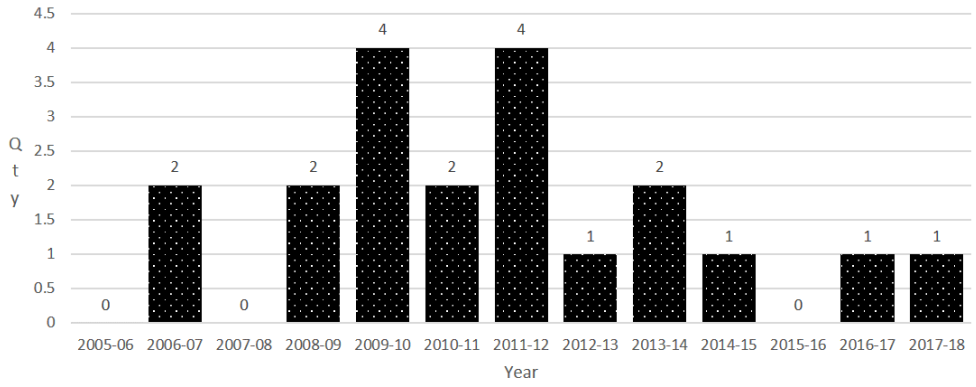


Figure 12 – SAT Withdrawals (2005-2017)

The first case in the SAT to be withdrawn was *Midwest Corporation Ltd, Merit Engineers Pty Ltd CC: 1734/2006* on 15 November 2006, by Member Hawkins. Member Hawkins ordered that:

4. Leave is granted for the application to be withdrawn.

5. The application is withdrawn.

To date, only the SAT has published the reviews that have been withdrawn by a party or parties. It should be noted that all of the 20 reviews that were withdrawn and published were only entered on the SAT website in early 2017. The reason for this has never been disclosed by the SAT. However, it does show absolute transparency by the SAT.

5.5. The first adjudicator's determination for review

On 4 October 2005, Senior Member Raymond, would deliver the first decision pertaining to

the Act that was directed before the State Administrative Tribunal, in the case of *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture.*[763] The applicant, Marine & Civil Bauer Joint Venture, had sought review pursuant to s 46 of the Act,[764] to determine whether the decision made by an adjudicator, that the contract made between the two parties was not a construction contract pursuant to the requirements of the Act.

For there to be a construction contract, one must look towards s 3 of the Act.[765] In this case, for the Act to apply, consideration was needed to determine that the construction contract had been entered into by the parties, after the Act came into operation, pursuant to s 7 of the Act,[766] on 1 January 2005.

Senior Member Raymond remarked that 'on or about 7 September 2005, the applicant commenced an application for adjudication against the respondent pursuant to the CC Act'.[767] The application for adjudication concerned a Works Contract dated 16 February 2005,[768] but 'both parties confirmed that work had commenced under the letter of intent in July 2004'.[769] Senior Member Raymond said that 'the payment dispute related to delay/disruption costs, industrial action costs, preliminaries and variation costs'.[770]

The adjudicator made his decision and subsequently dismissed the application for the payment claim. He reasoned that the construction contract had been entered into before the Act had come into operation.

Senior Member Raymond observed:

> 51 The applicant's case was simply the Works Contract, as a construction contract, was entered into after the CC Act came into operation, and that a payment dispute arose when the amount claimed in progress payment claim no 11 was not paid in full on 6 July 2005 and the application for adjudication was made within 28 days thereafter, having been made on 28 July 2005.[771]

The applicant claimed that the adjudicator had been wrong in failing to determine that the

[763] [2005] WASAT 269.
[764] *Construction Contracts Act 2004* (WA), s 46.
[765] Ibid s 3, construction contract. See Chap 2, 2.2 The Statutory Regime and what constitutes a payment claim?
[766] *Construction Contracts Act 2004* (WA), s 7.
[767] *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture* [2005] WASAT 269, 8 [25].
[768] Ibid 8 [26].
[769] Ibid 9 [33].
[770] Ibid 8 [27].
[771] Ibid 12 [51].

contract that was under contention was, in fact, a construction contract, pursuant to the Act. The respondent tendered that there had been a contract between the parties that was dated 20 April 2004,[772]

Senior Member Raymond concluded that the adjudicator had erred in his belief that the construction contract had come into effect before the Act had come into operation. Senior Member Raymond would later reverse the decision.[773]

Senior Member Raymond refered to 12 cases, 1 sections within the Act and one schedule, two sections of the *Interpretation Act 1984* (WA) and nine sections of *the State Administrative Tribunal Act 2004* (WA).

Senior Member Raymond would, 12 days later, deliver a 21-page decision that set aside and reversed the decision of the adjudicator. In the orders of the SAT stated pursuant to s 46(2) of the Act[774] the decision was reversed and remitted back to the adjudicator to make a determination, pursuant to s 31(2)(b) of the Act, within 14 days,[775] or any consented extension given by the parties.[776]

Senior Member Raymond also as noted by author Marcus Jacobs, wrote of s 46 of the Act[777] that pursuant to the principles of the open administration of Justice, and procedures before the SAT should be held in public.[778]

The adjudicator complied with the orders of the SAT.

5.6. Adjudicator Riley, Member Dr De Villiers and s 31(2)(a) of the Act

The issue was first raised in the SAT case of *Moroney & Anor and Murray River North Pty Ltd*,[779] heard by Member Dr De Villiers on 8 February 2008, and delivered on 19 February

[772] *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture* [2005] WASAT 269, 14 [56].
[773] Ibid 20 [93].
[774] *Construction Contracts Act 2004* (WA), s 46.
[775] Ibid s 31(2)(b).
[776] *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture* [2005] WASAT 269, 4 [3].
[777] *Construction Contracts Act 2004* (WA), s 46.
[778] Marcus Jacobs, *Security of Payment in the Australian Building and Construction Industry* (Thomson Reuters, 4th Ed, 2012) 822. Senior Member Raymond wrote in *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture* [at 12]; Section 61(1) provides that, unless another provision of the Act provides otherwise, hearings of the Tribunal are to be held in public. That requirement reflects the longstanding and fundamental principle of, and public interest in, the open administration of justice: see, for example, *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, per Kirby J; also *Re Bromfield; ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153, Malcolm CJ 164 165; *ADI Ltd and Ors and Equal Opportunity Commission and Ors* [2005] WASAT 49.
[779] [2008] WASAT 36.

2008. Adjudicator Riley had dismissed an application for adjudication, but had failed to provide adequate reasons for his decision. Both the SAT and the parties found the decision to be 'ambivalent, vague, and even inconsistent, regarding whether he had jurisdiction to deal with the dispute.'[780] The Tribunal sent the matter back to Adjudicator Riley for remittance and ordered that he should provide the reasons for the decision.

On 20 May 2008, Member Dr De Villiers delivered *Moroney & Anor and Murray River North Pty Ltd*.[781] Member Dr De Villiers would scrutinise the arguments put forward by Adjudicator Riley. Adjudicator Riley presented the view that it was his interpretation that if an adjudicator dismisses an application established by, for example to s 31(2)(a)(ii), then there is no requirement to make a finding in regard to the 'remaining grounds for dismissal.'[782] This, argued Adjudicator Riley, was based on the singular, two-letter word "or".

Adjudicator Riley argued that there was no further reason for him to determine that there was a 'construction contract, or another person or court (etc.),[783] or it was too complex.[784]

Member Dr De Villiers stated that the 'the reasoning of Mr Riley seems to be logical.'[785] However, Member Dr De Villiers reasoned that there were two reasons why the argument of Adjudicator Riley were contradictory to the Act. The first, reasoned Member Dr De Villiers, was that when deciding on the grounds of dismissal about s 31(2)(a)(i-iv), those grounds for dismissal must be read in full 'with the entire review process pursuant to s 46 of the CC Act.'[786] Sections 31(2)(a)(i-iv) are reviewable when the matter is dismissed without considering the merits.[787] An adjudicator must consider all four.

Member Dr De Villiers argued that Adjudicator Riley had, pursuant to s 46(2) of the Act, 'only one chance to consider a summary dismissal without consideration of the merits.'[788]

There is more than a modicum of truth in the view of Member Dr De Villiers.

Member Dr De Villiers stated that based on the views of Adjudicator Riley, this would lead to

[780] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 36, 4 [7].
[781] [2008] WASAT 111.
[782] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 17 [79].
[783] Ibid (iii).
[784] Ibid (iv).
[785] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 4 [7].
[786] Ibid 17 [84].
[787] Ibid..
[788] Ibid 18 [86]. In the same paragraph, Member Dr De Villiers rightly stated that This is consistent with the objectives of a speedy resolution of disputes under the CC Act.

'two unsustainable and unintended consequences.'[789] The first is that if an adjudicator considers only one ground for dismissal, and that decision is reversed by the SAT, the adjudicator may have to consider the other three, and these could then potentially be reviewed. Member Dr De Villiers felt that this would be contradictory to the objects of the Act (s 30) and the Act does not support such an interpretation.[790]

The second consequence, is this would also imply that if it was 'lodged out of time',[791] and overturned. The adjudicator would now have to 'deal with the matter on merit without having considered the other grounds for dismissal in s 31(2)(b)(i), s 31(2)(b)(iii) or s 31(2)(b)(iv) of the CC ACT. That would be an illogical and unintended outcome.'[792]

Three years later, this matter would again arise. Her Honour Justice McLure, in *Perrinepod Pty Ltd and Georgiou Building Pty Ltd,*[793] stated: '[S]ixthly, there is no express statutory requirement that an adjudicator provide reasons for not dismissing an application under s 31(2)(a) of the Act'.[794]

Her Honour would then state:

> 9 Proposition 6 is uncontentious. However, it leaves open the question whether an adjudicator who does not dismiss an application under s 31(2)(a) is obliged to give reasons for the findings/conclusions on the matters in subpars (i) - (iv) of s 31(2)(a) in his or her reasons for determination on the merits. Based on my view of the proper construction of s 31, there is much to be said in favour of an affirmative answer, at least where the matters are in dispute. However, that is a question for another day.[795]

Sadly, that day has not yet arrived.

It is, however, the second reason given by Member Dr De Villiers, and that pertained to the word "or". Member Dr De Villiers stated; 'The "or" is not to be interpreted that only one ground needs to be considered, but rather that if any one of the grounds for dismissal is satisfied, the matter must be dismissed. That, however, does not obviate the obligation on Mr Riley to

[789] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 18 [87].
[790] Ibid 18-9 [87(a)].
[791] Ibid 19[87(b)].
[792] Ibid.
[793] [2011] WASCA 217
[794] *Perrinepod Pty Ltd and Georgiou Building Pty Ltd* [2011] WASCA 217, 7 [7].
[795] Ibid 7 [9].

consider each of the grounds.'[796]

The word 'or' has for most part been employed to link other possibilities, e.g. "an apple or an orange". Sections 31(2)(a)(i-iv) are linked by "or". Section 17 of the *Interpretations Act 1984* (WA)[797] states categorically:

> 17. Disjunctive construction of "or."
>
> In relation to a written law passed or made after the commencement of this Act, but subject to section 3(3), ***or***, ***other***, and ***otherwise*** shall be construed disjunctively and not as implying similarity unless the word "similar" or some other word of like meaning is added.

Section 17 of the *Interpretations Act 1984* (WA) indicates that s 31(2)(a)(i-iv) must be considered disjunctively. Therefore the adjudicator must dismiss if (i) or (ii) or (iii) or (iv). Further, the *Construction Contracts Act 2004* (WA) is written in chronological order. Part 3 – Adjudication of Disputes, gives the adjudicator the process to follow. Section 25, who can apply for […} s 26, applying for […] s 27 Responding to […] etc. Section 31(2)(a) states that an adjudicator must dismiss if (i or ii or iii or iv). Later comes s 46, limited right of review. An adjudicator does not care about s 46. Section 46 is the domain of the parties and the SAT. If they got it wrong, it is remitted back to the adjudicator for alteration. If 14 days (or now ten business days) have passed, and no review has been sought, the adjudicator is functus officio.

By insisting that an adjudicator publish a copious decision, justifying s 31(2)(a)(i-iv) only goes against the grain of s 30 of the Act. The problem on this point did not lie before adjudicator Riley. The issue lies before the legislators or the interpretations made by the Courts or the SAT. Many adjudicators, however, do continue to draft voluminous decisions when justifying s 31(2)(a)(i-iv). The volume no doubt contributes to why the costs of adjudications has risen exponentially since 2004.

5.7. The WASCA, the case of *Perrinepod Pty Ltd v Georgiou Building Pty Ltd*, and s 46 of the Act

[796] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 19 [91].
[797] *Interpretations Act 1984* (WA), 17. The Australian Pocket Oxford Dictionary (1976), states that 'disjunctive' means disjoining; alternative; involving or expressing choice between two statements. (p 237).

In 2011, a case *Perrinepod Pty Ltd v Georgiou Building Pty Ltd,*[798] came on appeal from the SAT, before the Honourable Coram of Chief Justice Martin, Justices McLure and Murphy. The appeal was challenging a decision made by his Honour Justice Sharp and Member Carey.[799]

The Appellant sought whether, s 46(1) of the Act:[800] afforded the right of review of an adjudicator's decision, before the SAT, where the adjudicator did not dismiss the application before him. The Court of Appeal would grant leave for appeal but would dismiss the appeal, as they held that there was no amenable right to do so. The SAT did not exercise the jurisdiction to contest a decision made by the adjudicator to consider an application before them.

The case, and subsequent discussion made by her Honour Justice McLure, would assist in confirming that, other than pursuant to s 46(1):[801]

1. There 'is no SAT review (or any appeal) from a decision or determination of an adjudicator;'[802]
2. There is no review of an adjudicator's determination, pursuant to s 31(2)(b) of the Act;[803]
3. Section 46(3) does not disregard judicial review of a determination or decision made by an adjudicator pursuant to s 31(2)(a) or (b) of the Act.[804]

On this point, her Honour said that in the case of Kirk[*805*] 'principles of statutory construction applying to privative clauses compels the conclusion.'[806]

Her Honour went further:

4. When making a determination, pursuant to s 31(2)(b) of the Act, an adjudicator, must, pursuant to s 36 give their reasons for the determination;[807]
5. Pursuant to s 37 of the Act, an adjudicator must give reasons for dismissing an

[798] [2011] WASCA 217.
[799] *Perrinepod Pty Ltd and Georgiou Building Pty Ltd* [2010] WASAT 136.
[800] *Construction Contracts Act 2004* (WA), s 46(1).
[801] Ibid.
[802] *Perrinepod Pty Ltd and Georgiou Building Pty Ltd* [2011] WASCA 217, 6 [7].
[803] Ibid.
[804] Ibid 6-7 [7].
[805] *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.
[806] *Perrinepod Pty Ltd and Georgiou Building Pty Ltd* [2011] WASCA 217, 7 [8].
[807] Ibid 7 [7].

application for adjudication, pursuant to s 31(2)(a) of the Act;[808]

Lastly, though interesting, 'there is no express statutory requirement that an adjudicator provide reasons for not dismissing an application under s 31(2)(a) of the Act'.[809]

Her Honour stated that: '[B]oth parties agreed that the matters in s 31(2)(a)(i) - (iv) are jurisdictional facts.'[810] Disappointedly, her Honour acknowledged that the appeal before the Corum did not require 'consideration or determination of the full scope of the expression 'jurisdictional fact.'[811] His Honour Justice Murphy (with the agreement of his Honour Chief Justice Martin) were obligatory in the enlivenment of an adjudicator's jurisdiction pursuant to s 31(2)(a). Murphy J concluded that 'it is unhelpful to confine the construction issues raised in this appeal by reference to whether s 31(2)(a), or its constituent elements, are 'jurisdictional facts' for the purpose of the exercise of the power conferred under s 31(2)(b).'[812] His Honour went on to say that a jurisdictional fact, only 'condition the exercise of power under s 31(2)(b) and tend to distract attention, in my opinion, from the nature and scope of the function independently existing and exercisable under s 31(2)(a).[813]

A year later, in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd,*[814] her Honour Justice Pritchard would say that the issue of jurisdictional fact and the Act had previously not been raised before in the WASC, but now it was, and as will be seen later in this chapter, 'squarely raised by Austral's submissions in this case.'[815]

5.8. Section 31(2)(a)(i) Adjudicator's function dealing with when a contract is not a construction contract

The matter

The first issue arises before the SAT when an adjudicator decides to dismiss an application for adjudication because the contract before the adjudicator is not a Construction Contract.

The aggrieved party believes that the contract between the parties is a Construction Contract, pursuant to the Act. The aggrieved party, pursuant to s 46(1) of the Act, 'may apply to the

[808] *Perrinepod Pty Ltd and Georgiou Building Pty Ltd* [2011] WASCA 217, 7 [7].
[809] Ibid.
[810] Ibid 7 [10].
[811] Ibid.
[812] Ibid 38 [112].
[813] Ibid.
[814] [2012] WASC 304.
[815] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304.

State Administrative Tribunal for a review of the decision'.[816]

Upon review, The SAT may set aside the decision,[817] or reverse the decision and order the adjudicator to make a new determination within 14 days of the SAT decision.[818]

What does the Act say?

Section 31(2)(a)(i) of the Act,[819] states:

> 31. Adjudicator's functions
>
> (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 —
>
> (i) the contract concerned is not a construction contract.

The *Construction Contracts Act 2004* (WA) and the Mining Exclusion Clauses

When Professor Evans drafted the '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, he wrote of the exclusions of certain mining activities and what does not constitute construction work pursuant to s 4(3):[820]

> This has been a somewhat complex and controversial issue (with respect to the origins of and rationale for the exclusion) and it has been necessary to consider the issue in some detail.[821]

In Western Australia, mining, oil and gas and the construction of processing plants play a significant role in the Western Australian economy. When the *Construction Contracts Act 2004* (WA) was drafted, there was much pressure put on the government of the day to exclude these areas within the Act.

Coggins would state:

> Doubtless there are reasons which the relevant Parliaments found compelling as to the

[816] *Construction Contracts Act 2004* (WA), s 46(1).
[817] *State Administrative Tribunal Act 2004* section 29(3)(c)(i).
[818] Ibid 29(3)(c)(ii).
[819] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iv).
[820] *Construction Contracts Act 2004* (WA), s 4(3).
[821] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 48.

> extent to which legislative intervention is needed, especially within the WA process plant, mining and oil and gas industries.[822]

Professor Evans noted:

> Not all construction work is included in the Act. Work in discovering or extracting oil or natural gas is excluded as well as the mining for minerals and the constructing of plant for the purpose of extracting oil or minerals.[823]

Ultimately; the interpretation of construction work would not include these areas.

What does the Act say?

The Act states, pursuant to s 4(3) of the Act,[824] that:

> 4. Construction work
>
> (3) Despite subsection (2) construction work does not include any of the following work on a site in WA —
>
> (a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;
>
> (b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;
>
> (c) 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;
>
> (d) constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations, and murals;
>
> (e) work prescribed by the regulations not to be construction work for the

[822] Jeremy Coggins, Robert Fenwick Elliott, and Matthew Bell,'Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia – plus Addendum' (2010) *Australasian Journal of Construction Economics and Building*, 10 (3) 14-35, 20.
[823] Philip Evans, 'The Resolution of Construction Contract Payment Disputes in the Western Australian Construction Industry through Security of Payment Legislation' (Paper presented at the 18th International Annual Conference - Building and Construction Contracts Between Traditional Legal Rules and Developed Legal Systems, Dubai United Arab Emirates 18-21 April 2010) (Printed in Proceedings), 440.
[824] *Construction Contracts Act 2004* (WA), s 4(3).

purposes of this Act.

The exclusions of s 4(3) are, as recognised by Cruse and Boyle 'colloquially referred to as the "mining exclusion".'[825] They noted that 'given the number of contracts in Western Australia which relate directly or indirectly to mining projects, it is helpful to consider the extent of the "mining exclusion".'[826]

In this research I shall only deal with s 4(3)(a-c).

s 4(3)(a) – Oil & Gas and s 4(3)(b) – Mining Exclusion Clauses

Steensma and Evans found that within WA:

> The number of adjudication applications arising from the mining industry is nevertheless significant. In 2010 – 11, mining related activities which did not fall within the exemptions in the Act, constituted only 12 (or 1.92 percent) of the 625 adjudication applications since 2005. Since 2010-2011 mining related activities numbered 40 (or 3.96%). However, the 40 applications, account for the highest total dollar values of adjudications payment claims and determinations.[827]

They further found that:

> Since the commencement of the Act mining-related activities accounted for $173.9m (or 30.61per cent) of the total of the then $568.2m value of adjudications, has been attributed to claims in the mining industry generally. Mining related activities now account for $268.7m (or 24 per cent) of adjudication claims. This is a percentage change of an increase of 55 per cent.[828]

Mining/Gas Infrastructure accounts for only 97/1822 payment claims (or 5.3%) in terms of the number of payment claims since 2005. However, Mining/Gas Infrastructure recorded an astonishing amount of $964,439,944.67 (or 33%) of the total amount claimed since 2005. In the past four years regional parts of Western Australia made up 41% of payment claim disputes. The Pilbara accounted for 246 (or 75%) of payment claim disputes in the regional area. The

[825] Carine Cruse, and Stephen Boyle *The Construction Contracts Act 2004 (WA) may not apply to your contract after all*, [2000]. <http://www.claytonutz.com/publications/edition/16_february_2012/20120216/the_construction_contracts_act_2004_wa_may_not_apply_to_your_contract_after_all.page>.
[826] Ibid.
[827] Auke Steensma and Philip Evans, 'The *Construction Contracts Act 2004* (WA); Trends and Issues 2005 to 2013' *IAMA New Horizons 2014 Conference Canberra 2-4 May 2014*, 3.
[828] Ibid.

work is clearly around the oil and gas/mining industries.

It is clear that security of payment legislation plays a significant role in the oil and gas/mining industries in several states within Australia. All include specific 'mining exclusion' clauses that have led to the intervention of the Courts and Tribunals in Western Australia, Northern Territory and Queensland Courts and Tribunals and are how the 'mining exclusion' clauses have affected those states.

The Mining Exclusions and the Courts

Research conducted for this study fundamentally found that relating to s 4(3)(a-b) of the Act, and the equivalent in the *Construction Contracts (Security of Payments) Act 2004* (NT), s 6(2)(a-b), and the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA), at s 10(3)(a-b), has found that reviews of adjudicators' determinations pertaining to oil & gas, and mining in WA and NT there has been insufficient judicial guidance available pertaining to s 4(3)(a) & s 4(3)(b).

In Queensland, however, as Heading would write:

> Before 2011, most thought that the intention of the carve-out was to remove from the operation of the Security of Payment Acts construction work carried out in the mining industry.[829]

It would be in Queensland where the first case would come before the courts. That case was *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor.* [830] The case related to an application before the Supreme Court of Queensland by Thiess to determine whether an adjudicator had jurisdiction to make a determination for the security of payment under the BCIPA for earthmoving works at two open cut coal mines in central Queensland.

Heading commented:

> The adjudicator's decision was made in favour of a subcontractor for works involved in the construction of a mine, including the construction of dams and drains, stripping, hauling, excavating and storing topsoil, and clearing and grubbing. Because those works were not actually for the extraction of minerals (in this case coal), the Court held that

[829] Tom Heading, *Australia: Do the Security of Payment Acts Apply to Mining Activities?*, Norton Rose Fulbright Australia 14 October 2012. <http://www.mondaq.com/australia/x/201158/Building+Construction/Do+the+Security+of+Payment+Acts+Apply+to+Mining+Activities>.

[830] *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor* [2011] QSC 345.

> Security of Payment Act applied.[831]

The Counsel for the applicant argued that 'whether and to what extent, if any, the *Building and Construction Industry Payments Act* 2004 applies to the subcontracts'.[832]

They would argue that:

> Thiess submitted that the focus of the definition of construction contract was on the undertaking, not the work actually carried out, but it did not suggest that the contract or arrangement alone could determine the issue presently under consideration.[833]

His Honour Justice Fryberg stated:

> I have already held that the construction of dams and drains and excavating topsoil and removing and storing it are the carrying out of construction work within the meaning of the Act. That is sufficient to dispose of this case, for it means that the excavators were planned for use in connection with the carrying out of construction work. Consequently, both subcontracts were construction contracts.[834]

His Honour held:

> All of the subcontracts were construction contracts. The Act applied to them. The adjudicator had jurisdiction to determine the matters before him. Consequently, the application must be dismissed with costs.[835]

Heading would later conclude:

> [t]he exemption given by s 10(3)(b) is not expressed to apply to work done for the purpose of opening or as preparatory to operating a mine. The words used are much more limited than that. They focus purely on the process of extraction.[836]

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[831] Tom Heading, *Australia: Do the Security of Payment Acts Apply to Mining Activities?*, Norton Rose Fulbright Australia 14 October 2012. <http://www.mondaq.com/australia/x/201158/Building+Construction/Do+the+Security+of+Payment+Acts+Apply+to+Mining+Activities>.
[832] *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor* [2011] QSC 345, 2 [2].
[833] Ibid 20 [76].
[834] Ibid 21 [79].
[835] Ibid 21 [81].
[836] Tom Heading, *Australia: Do the Security of Payment Acts Apply to Mining Activities?*, Norton Rose Fulbright Australia 14 October 2012. <http://www.mondaq.com/australia/x/201158/Building+Construction/Do+the+Security+of+Payment+Acts+Apply+to+Mining+Activities>.

Crawford[837] observed of *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor as*:

> [t]he most significant development of 2012 was consideration of the mining exclusion. The Queensland Court of Appeal has interpreted the exclusion of work relating to drilling for, and extraction of, certain minerals (section 10(3)) narrowly.[838]

Queensland again would turn towards a narrower interpretation. In HM *Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor*[839], The Honourable Coram of McMurdo P, Fraser JA, and Gotterson JA held that a contract 'to provide certain earthmoving services to Thiess for the Burton Coal Mine. For this purpose, HM hired four dump trucks and a wheel loader from National Plant and Equipment Pty Ltd'[840] 'was a "construction contract".

The primary judge was right to hold that the adjudication was not outside the jurisdiction conferred by the Act'.[841] Further, they held that 'at "preparatory" works for a mining project, like clearing land, are not covered by the mining exemption'.[842]

The case of HM *Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor* had brought much speculation that parties to a contract might now have inadvertently entered into what would be held as a 'construction contract'. Niemann and Gelic noted that 'for mining principals and head-contractors, they will need to be aware of the requirements of the Act and its implications',[843] but for 'contractors and sub-contractors, the decision should be good news. The decision further supports the view that courts are willing to allow contractors and subcontractors to have their recourse to the Act'.[844]

The decision would validate the earlier case of *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd and Anor.*

In June 2013, again in Queensland, in *Agripower Australia Ltd v J&D Rigging Pty Ltd*,[845] Her

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[837] Richard Crawford; Minter Ellison - Partner – Construction Engineering & Infrastructure.
[838] Richard Crawford (Ed), *Minter Ellison - Security of Payment Roundup 2012*, Minter Ellison (2013), 7. <http://www.minterellison.com/files/uploads/Documents/Publications/Reports%20Guides/RG2013_SecurityOfPayment%5bSYD130091%5d.pdf>.
[839] *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor* [2013] QCA 6.
[840] Ren Niemann and Goran Gelic, Focus: *Security of Payment – The 'Mining Exclusion' Considered Again!*, <http://www.allens.com.au/pubs/const/foconst22feb13.htm>.
[841] *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd & Anor* [2013] QCA 6, 11 [30].
[842] Allens Linklaters, 'Mining and Security of Payment Legislation - Is your work 'construction work'?', (2012) Allens Breaking Ground. <http://allensbreakingground.blogspot.com.au/2012/09/mining-and-security-of-payment.html>.
[843] Ren Niemann and Goran Gelic, Focus: *Security of Payment – The 'Mining Exclusion' Considered Again!*, <http://www.allens.com.au/pubs/const/foconst22feb13.htm>.
[844] Ibid.
[845] *Agripower Australia Ltd v J&D Rigging Pty Ltd* [2013] QSC 164.

Honour Justice Wilson held that 'a contract for the dismantling of mining plant that had been brought onto site for the purposes of a mining lease was not a contract for "construction work" within the meaning of the BCIPA'.[846]

Her Honour held the decision of the adjudicator void, citing 'mining leases are not "land" for the purposes of the BCIPA and while the mining plant may have formed part of the mining leases, it did not "form part of the land" within the meaning of section 10 of the BCIPA'.[847] Her Honour held that 'common law rules relating to personal property and fixtures were relevant to deciding whether the mining plant formed part of the land'.[848]

The case would go to the Queensland Court of Appeal in *J & D Rigging Pty Ltd v Agripower Australia Ltd & Ors*. The Honourable Coram of Holmes JA, Applegarth J, Boddice J, would unanimously overturn the decision of her Honour Justice Wilson. The Honourable Coram held that:

> 'issues of legal ownership of land or other legal interests are not relevant to the application of the BCIPA if the structure or work forms part of the land' and further 'the common law principles of fixtures are not relevant, and a practical assessment of the physical relationship of the item and the land and the degree of annexation is the correct test'.[849]

There is no doubt that there is a vast difference between the rationale of the WA Courts and those of Queensland. In WA there is a broad view taken on the mining exclusions. The broad view has given those making decisions far greater flexibility. In Queensland, the narrow interpretations add greater complexity to decisions and makes for less flexible in its interpretation. This is one of the inherent issues against the states adopting a more 'harmonised' approach to the security of payment. This subject will always be the common divide between what is often referred to as the 'West Coast' and 'East Coast' models.

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[846] Paul Bradley and Stephen Boyle, '*Does the Construction Contracts Act 2004 (WA) apply to construction work on mining tenements?*', (01 August 2013), (Clayton Utz Insights), <http://www.claytonutz.com.au/publications/edition/01_august_2013/20130801/does_the_construction_contracts_act_2004_wa_apply_to_construction_work_on_mining_tenements.page>.

[847] Jeremy Chenoweth and Donovan Ferguson "Construction work on mining leases - Case Alert - *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2013] QCA 406', (2014) *Construction Update - Ashurst Australia*, 1.

[848] Ibid.

[849] Jeremy Chenoweth and Donovan Ferguson "Construction work on mining leases - Case Alert - *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2013] QCA 406', (2014) *Construction Update - Ashurst Australia*, 2.

The real issue that has been laid before the courts in Western Australia, pertaining to the mining exclusions has been s 4(3)(c) – Process Plants Exclusion Clauses.

Section 4(3)(c) – Process Exclusion Clauses

Since 2004, s 4(3)(c) – Process Plants Exclusion Clauses[850] has been the most used of the mining exclusion clauses. There have been six cases before the WASC and two before the SAT.

Firstly what needs to be determined in the issue of the process exclusion clauses is what constitutes 'civil works' for the purpose of the Act. The Act states, pursuant to s 4(1)[851], that:

> 4. Construction work
>
> (1) In this section —
>
> ***civil works*** includes —
>
> (a) a road, railway, tramway, aircraft runway, canal, waterway, harbour, port or marina;
>
> (b) a line or cable for electricity or telecommunications;
>
> (c) a pipeline for water, gas, oil, sewage or other material;
>
> (d) a path, pavement, ramp, tunnel, slipway, dam, well, aqueduct, drain, levee, seawall or retaining wall; and
>
> (e) any works, apparatus, fittings, machinery or plant associated with any works referred to in paragraph (a), (b), (c) or (d).
>
> ***site in WA*** means a site in Western Australia, whether on land or offshore.

Conneq

The first case in Western Australia to deal with the process plants exclusion clauses was the SAT case of *Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd.*[852] His Honour Justice Corboy and Senior Member Raymond would make a decision pertaining to 'work and provide services in connection with a desalination plant that was to form part of the

[850] *Construction Contracts Act 2004* (WA), s 4(3)(c).
[851] Ibid s 4(1).
[852] *Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd* [2012] WASAT 13.

Sino Iron ore project'.[853]

His Honour Justice Corboy and Senior Member Raymond took a broad view. They found that 'the Contract was not a construction contract'.[854] The Tribunal held that the function of a desalination plant was 'to extract salt, which was a mineral. It would, therefore, fall within the 'mining exclusion' in section 4(3)(c) of the WA Act'.[855] The adjudicator's conclusion to 'dismiss the adjudication application was affirmed';[856] but 'concluded that the Contract was not a construction contract but for different reasons to those given by the adjudicator'.[857]

The Conneq case would find that what would constitute 'constructing the plant' would be 'work constructing any plant 'encompasses work forming part of the process of constructing a plant', but not the installation of an already completed plant'.[858] His Honour Justice Corboy and Senior Member Raymond would find that putting together modules was to be construed as 'constructing' as required by the Act.

Cruse and Boyle noted that:

> The SAT also found that the application of section 4(3)(c) turned on the **purpose of the construction of the plant**, rather than the purpose of extracting and processing the mineral bearing substance. What was important was the primary purpose of the plant, rather the use that might be made of any product created by that plant or its association with the resources industry.[859]

Cruse and Boyle concluded:

> It is now clear that the "mining exclusion" in section 4(3) of the Act applies more broadly than just to mining – it can also apply to the construction of a plant, which is not used for

[853] Ibid 3 [1].
[854] Ibid 3 [4].
[855] Richard Crawford (Ed), *Minter Ellison - Security of Payment Roundup 2012,* Minter Ellison (2013), 43. <http://www.minterellison.com/files/uploads/Documents/Publications/Reports%20Guides/RG2013_SecurityOfPayment%5bSYD130091%5d.pdf>.
[856] *Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd* [2012] WASAT 13,3 [5].
[857] Ibid 3 [4].
[858] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), 54.
[859] Carine Cruse, and Stephen Boyle *The Construction Contracts Act 2004 (WA) may not apply to your contract after all*, [2000]. <http://www.claytonutz.com/publications/edition/16_february_2012/20120216/the_construction_contracts_act_2004_wa_may_not_apply_to_your_contract_after_all.page>.

mining.[860]

Karara

Two months later, the Supreme Court of Western Australia (WASC) would further look at the issue of the 'mining exclusions' in *Re Graham Anstee-Brooke; Ex parte Karara Mining Ltd.*[861] The applicant, Karara, repudiated a claim by the respondent for the construction of 'pipeline and associated works'.[862] Karara claimed that the work 'is work constructing a plant for the purposes of extracting or processing a mineral bearing substance'.[863]

Karara sought an *order nisi* 'for a writ of certiorari to quash a determination by Anstee-Brook',[864] Karara put forward three grounds for order nisi; the third stated that the adjudicator had:

> [c]ommitted a jurisdictional error in that the works to be performed under the Pipeline Contract were for the construction of a plant for the purposes of processing a mineral bearing substance within the meaning of s 4(3)(c) of the Act and therefore the Pipeline Contract was not a 'construction' contract for the purposes of the Act and the Act does not apply to that contract.[865]

His Honour Justice Le Miere held:

> [t]he function of the pipeline is to transport the water from the bore field to the campsite and mine site. The water, or most of it, is then subsequently used for the purposes of extracting or processing iron ore. However, no extraction, concentration, filtering or other processes that form part of the extraction or processing of the iron ore takes place in the pipeline.[866]

The case had fallen outside the mining exclusion pursuant to s 4(3)(c) of the Act. This decision, asserts Crawford, is:

> [i]n contrast, the State Administrative Tribunal in Western Australia interpreted the mining exclusion broadly in *Conneq Infrastructure Services (Australia) Pty Ltd and Sino Iron Pty Ltd* to extend to construction of facilities that were not directly used for mining

[860] Ibid.
[861] *Re Graham Anstee-Brooke; Ex parte Karara Mining Ltd* [2012] WASC 129.
[862] Ibid 3 [3].
[863] Ibid 7 [15].
[864] *Re Graham Anstee-Brooke; Ex parte Karara Mining Ltd* [2012] WASC 129, 3 [1].
[865] Ibid 4 [5].
[866] Ibid 7-8 [16].

purposes.[867]

His Honour observed:

> 16 …The evidence does not establish the function performed by the pipeline, or the relationship between the pipeline and any part of the plant that directly extracts or processes iron ore, is such that the pipeline might be properly regarded as part of any plant for the purposes of extracting or processing any mineral bearing substance. Ground 3 of Karara's case has no reasonable prospect of success.

Enerflex

In November 2015, his Honour Justice Le MiereJ would again look at the operation of s 4(3), in *Enerflex Process Pty Ltd v Kempe Engineering Services (Australia) Pty Ltd.*[868] His Honour must have been most satisfied when he observed that 'both parties referred to my reasons for judgment in *Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd.*[869] The plaintiff declared that the work that the defendant was conducting was not construction work as it was; 'for the purposes of extracting or processing natural gas'.[870]

The dispute had gone before Adjudicator Doherty, and the plaintiff had, by way of a 'writ of summons, claimed an injunction restraining Kempe from progressing the application for adjudication and an injunction restraining Adjudicator Doherty from determining the application for Adjudication'.[871]

The plaintiff argued that the 'meter station', included a 'filtration and flow regulation unit' and an 'instrument gas unit', and claimed that 'these steps involve the 'processing' of natural gas'.[872] The defendant countered that the metering station is not 'part of the processing of natural gas' and 'the filtering and extracting of impurities is not 'processing' for the purposes of the Act'.[873]

His Honour Justice Le Miere heeded:

> 9 I find that there is a serious question to be tried whether the work performed by

[867] Richard Crawford (Ed), *Minter Ellison - Security of Payment Roundup 2012*, Minter Ellison (2013), 4. <http://www.minterellison.com/files/uploads/Documents/Publications/Reports%20Guides/RG2013_SecurityOfPayment%5bSYD130091%5d.pdf>.
[868] [2013] WASC 406.
[869] *Enerflex Process Pty Ltd v Kempe Engineering Services (Australia) Pty Ltd* [2013] WASC 406, 4-5 [5].
[870] Ibid 4 [4].
[871] Ibid 3 [2].
[872] Ibid 5 [7].
[873] Ibid 5-6 [8].

> Kempe under the contract is construction work. It is unnecessary and inappropriate to say anything further about that issue at this stage of the proceedings.[874]

He dismissed the interlocutory injunction of the plaintiff and in doing so did not restrain the adjudicator from his work and deny his jurisdiction.

The adjudicator would go on to dismiss the application pursuant to s 31(2)(a)(i), without merit consideration, citing that the plant is for mineral processing specifically excluded vide s 4(3)(c).

Alliance

In October 2014, 33 months after his Honour Justice Corboy laid down his ruling in *Conneq*, the SAT would again observe the question surrounding s 4(3)(c) of the Act. Member Aitken, in *Alliance Contracting Pty Ltd and Tenix SDR Pty Ltd*,[875] heard a case which concerned the carrying out of earthworks for the respondent, who was tasked with the upgrade of a wastewater treatment plant. The adjudicator had dismissed the payment claim without determining the merits, and the subject application fell pursuant to s 31(22)(b)(ii).

The applicant contended that the exclusion clauses set out in s 4(3)(c) do not apply, while the respondent claimed that they do.

Member Aitken questioned: does the exclusion in s 4(3)(c) of the CC Act apply to the subcontract? He set about his argument stating:

> 46 There are two aspects to the first question which need to be decided:
>
> Firstly, are the subcontract works the constructing of plant?
>
> Secondly, if that is the case, is the purpose of the wastewater treatment plant to extract or process any 'mineral bearing or other substance' as part of the water treatment? There is no suggestion that the wastewater treatment plant will extract or process oil, natural gas or any derivative of natural gas.

Member Aitken found on the first aspect that when ‘applying the reasoning in *Conneq*, the subcontract works are work constructing plant for the purposes of s 4(3)(c) of the CC Act’.[876]

However, when applying the second aspect, Member Aitken found that he was ‘unable to find that the purpose of the wastewater treatment plant is to extract or process any mineral or other

[874] Ibid 6 [9].
[875] [2014] WASAT 136.
[876] *Alliance Contracting Pty Ltd and Tenix SDR Pty Ltd* [2014] WASAT 136, 17 [56]

substance for the purposes of s 4(3)(c) of the CC Act'.[877] Member Aitken found that the exclusion clauses did not operate in this case as the wastewater treatment plant 'was not for the purpose of extracting or processing any mineral bearing or other substance within the meaning of those terms in s 4(3)(c) of the Act'.[878] Member Aitken found that the dispute was not a payment dispute for the purposes of the Act and affirmed the decision made by the adjudicator to dismiss pursuant to s 31(2)(b)(ii). However his logic in determining the exclusion clauses remains valid.

Field Deployment Solutions

It would be 2015 before the next real case came before the WASC seeking determination pursuant to S 4(3). His Honour Justice Mitchell heard *Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd*.[879] The case was on appeal from the SAT, where the Tribunal had held that the contract was not a construction contract for work pertaining to a gas pipeline.

His Honour conveyed the view of the court that the work of installing a pipeline is construction work for the purpose of the Act and includes tasks such as backfilling and trenching, and any rehabilitation that may be required.[880]

Samsung

His Honour Justice Beech would later take a very integrated approach. In *Samsung C&T Corporation v Loots,*[881] the work was concentrated on the Roy Hill Iron Ore Project, with Samsung being the head contractor. The works centred on 'four packages of works under the head contract, termed: 'Package 1 - the Mine Process Plant Works'; 'Package 2 - the RailWorks'; 'Package 3 - the Port Landside Works'; and 'Package 4 - the Port Marine Works''.[882]

His Honour acknowledged that:

> 354 In determining whether s 4(3)(c) applies, the question is whether the relevant work is the construction of any plant for the purpose of processing iron ore. In assessing whether that is so, a particular item of work is not to be viewed in isolation from its contractual context, including whether it is an element of one or more of

[877] Ibid 18 [61].
[878] Ibid 5 [3].
[879] [2015] WASC 60.
[880] *Field Deployment Solutions Pty Ltd v SC Projects Australia Pty Ltd* [2015] WASC 60, 23-24 [78].
[881] [2016] WASC 330.
[882] *Samsung C&T Corporation v Loots* [2016] WASC 330, 13 [6(3)].

> packages 1, 2, 3 or 4. The character and purpose of the package(s) of works as a whole may reveal the character and purpose of the component item of work in question.[883]

His Honour found that 'the provision of the Data Centre was the constructing of plant for the purpose of processing iron ore in that the Data Centre is one of many elements of the integrated mine process plant the subject of Package 1'.[884] His Honour stated hat the 'provision of the switch room steel structures is excluded work and not Construction Work or Related Obligations'.[885] His Honour found that three built feeders were supplied for the works, and whilst they were not joined to the processing, he indicated that; 'each individual component of the integrated mine process plant the subject of Package 1 should be viewed in isolation to assess the purpose of its construction under section 4(3)(c)'[886] and is therefore an 'element of the construction of the mine process plant, and is the constructing of plant for the purpose of processing iron ore. Thus, it is excluded work within section 4(3)(c)'.[887]

His Honour later specified that laboratories, used to test and monitor the iron ore, also were 'an element of an integrated mine process plant'[888] and therefore; 'fall within the mining exclusion in s 4(3)(c)'.[889] He found the same for 'resistance temperature detectors'.[890] Interestingly, Beech J, quantified:

> 401 I find that the provision of the DHHI Machines,[891] and associated works and services, for Package 1, at the site of the mine process plant, are part of the constructing of plant for the purpose of processing iron ore, and so are excluded work under s 4(3)(c). However, I am not satisfied that this is the position in relation to the DHHI Machines for Package 3 and Package 4, to be located at the port.[892]

His Honour Justice Beech most certainly did not view the works in isolation.

So how does this all fit in for the adjudicator? James told those attending a Resolution Institute

[883] Ibid 93-94 [354].
[884] Ibid 95 [363].
[885] Ibid 96 [370].
[886] Ibid 97 [377].
[887] Ibid [378].
[888] *Samsung C&T Corporation v Loots* [2016] WASC 330, 99 [391].
[889] Ibid [392].
[890] Ibid 102 [410].
[891] DHHI (Dalian Huarui Heavy Industry Group Co Ltd).
[892] *Samsung C&T Corporation v Loots* [2016] WASC 330, 101 [401].

presentation that:

> (f) From the above cases, the following principles can be identified:
>
> (i) To fall within the exemption in question, the work must be for the construction of the plant and be an integral part of it.
>
> (ii) Civil work in the usual sense of the term will not fall within the exemption.
>
> (iii) Piping will not fall within the exemption if it is simply used to move gas rather than process or extract it, but it may fall within the exemption if it is an integral part of the plant employed to process or extract mineral bearing substance.
>
> (iv) Whether a particular operation is to be considered as processing a mineral bearing substance depend on the facts of the case, determined by an informed general usage and avoiding an interpretation which, although technically justifiable, would not be in accordance with common usage and sound odd and incongruous.
>
> (v) The expression "other substance" is to be given a narrow interpretation, in light of the words used in the preceding part of the section.[893]

His Honour Justice Beech held in *Samsung C&T Corporation v Loots*:

> In determining whether s 4(3)(c) applies, the question is whether the relevant work is the construction of any plant for the purpose of processing iron ore. In assessing whether that is so, a particular item of work is not to be viewed in isolation from its contractual context.[894]

The view of his Honour should be added to the list of James as clause (vi).

When Professor Evans presented his final report on the operation and effectiveness of the Act in 2016, on this subject he stated:

> The issue has been considered both by the academic writers and in the Western Australian jurisdiction. It appears that the exclusion has also been narrowly interpreted, but this issue

[893] Laurie James, 'Notes – Re Field Deployment', (Resolution Institute, CDP, Nedlands WA, 2016), 2-3. <https://www.resolution.institute/documents/item/1453.>
[894] *Samsung C&T Corporation v Loots* [2016] WASC 330, 93-94 [354].

is far from settled.[895]

This matter remains unsettled.

5.9. Section 31(2)(a)(ii) Adjudicator's function dealing with an application not served in accordance with s 26 of the Act

The matter

The second matter arises before the SAT when an adjudicator decides to dismiss an application for adjudication because the application for adjudication before the adjudicator was not prepared and served in accordance with s 26.[896]

The aggrieved party believes that the application for adjudication was prepared and served in accordance with s 26 to the Act. The aggrieved party, pursuant to s 46(1) of the Act, 'may apply to the State Administrative Tribunal for a review of the decision'.[897]

Upon review, The SAT may set aside the decision,[898] or reverse the decision and order the adjudicator to make a new determination within 14 days of the SAT decision.[899]

What does the Act say

Section 31(2)(a)(ii) of the Act,[900] states:

> 31. Adjudicator's functions
>
> (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 —
>
> (ii) the application has not been prepared and served in accordance with section 26;

Section 26 of the Act,[901] states:

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[895] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 53.
[896] *Construction Contracts Act 2004* (WA), s 26.
[897] Ibid 46(1).
[898] *State Administrative Tribunal Act 2004* section 29(3)(c)(i).
[899] Ibid 29(3)(c)(ii).
[900] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iv).
[901] Ibid s 26.

26. Applying for adjudication

(1) To apply to have a payment dispute adjudicated, a party to the contract, within 28 days after the dispute arises or, if applicable, within the period provided for by section 37(2)(b), must —

(a) prepare a written application for adjudication;

(b) serve it on each other party to the contract;

(c) serve it —

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, on the adjudicator;

(ii) if the parties to the contract have appointed a prescribed appointor, on that appointor;

(iii) otherwise, on a prescribed appointor chosen by the party;

and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or the prescribed appointor requires under section 44(8) or (9).

(2) The application —

(a) must be prepared in accordance with, and contain the information prescribed by, the regulations;

(b) must set out the details of, or have attached to it —

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute;

and

(c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

(3) A prescribed appointor that is served with an application for adjudication made under subsection (1) must comply with section 28.

The Act states that pursuant to s 26(2)(a), the application ‘must be prepared in accordance with,

and contain the information prescribed by, the regulations.'[902] The *Construction Contracts Regulations 2004* (WA), pursuant to Reg 4,[903] states that when the details of a person are required, the following must be deemed:

> 4. Giving a person's contact details
>
> If a person is required by these regulations to give the contact details of a person, the person required to give the details must give the address, telephone and facsimile numbers and ABN of the person or the person's business (or ACN of the person if there is no ABN) to the extent to which the person required to give the details knows those details.

Further, the Regulations, pursuant to Reg 5,[904] stated that the following prescribed was mandatory:

> 5. Prescribed information in application for adjudication
>
> For the purposes of section 26(2)(a) of the Act, an application to have a payment dispute adjudicated must, in addition to the other information required by section 26(2) of the Act, contain —
>
> (a) the name of the appointed adjudicator or prescribed appointor and the adjudicator's or appointor's contact details;
>
> (b) the applicant's name and contact details; and
>
> (c) the respondent's name and contact details.

Dealing with s 31(2)(a)(ii) of the Act

The first case before the SAT to deal with the matter of s 31(2)(a)(ii), was in 2008. Member Dr De Villiers, in *Moroney & Anor and Murray River North Pty Ltd*[905] would reverse a decision made by Adjudicator Riley, for dismissing an application for adjudication before him, on the 'grounds of s 31(2)(a)(ii)'.[906] The SAT sought from Adjudicator Riley supplementary reasons for his dismissal. He responded that the application before him had not been prepared and

[902] *Construction Contracts Act 2004* (WA), s 26(2)(a).
[903] *Construction Contracts Regulations 2004* (WA), Reg 4.
[904] *Construction Contracts Regulations 2004* (WA), Reg 5.
[905] [2008] WASAT 111.
[906] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 31 [Orders 10(1)].

served within the 28 days pursuant to s 26(1) of the Act.[907]

Member Dr De Villiers found that 'the application for adjudication was prepared and served in accordance with s 26 of the CC Act.'[908] The matter was sent back to Adjudicator Riley to make a determination pursuant to s 31(2)(b) of the Act.[909]

In 2012, the matter of s 31(2)(a)(ii) would eventually find its way into the WASC. In *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd*,[910] her Honour Justice Pritchard would note that 'much of the argument, in this case, concerned whether the adjudication application complied with s 26 of the CC Act.'[911]

The case centred around a payment dispute over subcontracted electrical work conducted by the plaintiff, Cape Range, at the Rio Tinto Koodaideri Mine in Western Australia. The defendant, Austral, argued that the application for adjudication had not been 'prepared and served pursuant to s 26 of the Act, as the plaintiff had failed to apply for adjudication within the 28 days after the payment dispute between the parties occurred.

The plaintiff would argue that Adjudicator Oon had misinterpreted the Act, 'in concluding that a jurisdictional fact (upon which his jurisdiction to make the Determination depended) existed, namely that the application was prepared and served in accordance with s 26 of the CC Act.' The plaintiff argued that a matter pertaining to s 31(2)(a)(ii) 'was a jurisdictional fact in what may be described as the 'narrow sense.'[912] They also ran an alternative case pertaining to s 31(2)(a)(ii), that 'constituted a jurisdictional fact in the 'broad' sense.'[913]

Her Honour noted what had been said in the WASCA case of *Perrinepod Pty Ltd and Georgiou Building Pty Ltd*,[914] and set her mind to answer the questions about which the Honourable Corum of Martin CJ, McLure P and Murphy had not directed a decision.

Her Honour stated that:

> 64 The term 'jurisdictional fact' is generally used to identify a criterion the satisfaction of which enlivens the exercise of a statutory power or discretion. If the criterion is

[907] *Construction Contracts Act 2004* (WA), s 26(1).
[908] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 30 [152(c)].
[909] Ibid s 31(2)(b).
[910] [2012] WASC 304.
[911] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 12 [21].
[912] Ibid 24 [61].
[913] Ibid 30 [77].
[914] [2011] WASCA 217.

> not satisfied then the decision purportedly made in the exercise of the power or discretion will have been made without the necessary statutory authority required by the decision-maker.[915]

Her Honour would hold that s 31(2)(a)(ii) of the Act must be interpreted as a jurisdictional fact in a 'broad sense'. Her Honour reasoned that Parliament would not have proposed that any of the matters in s 31(2)(a) 'be characterised as jurisdictional facts in the 'narrow' sense and others in the 'broad' sense.'[916]

Her Honour concluded that when considering s 32(2)(a)(ii) for the purpose of an adjudicator exercising their jurisdiction, it is a jurisdictional fact.[917] Her Honour held that in order to oust an adjudicator's decision or determination that pertains to the opinion of the adjudicator's of whether s 31(2)(a)(ii) has been sustained. The Court must find that the supposition of the adjudicator:

a. be so unreasonable that no reasonable decision-maker would have reached that conclusion,
b. was reached by misconstruing the CC Act,
c. took into account irrelevant considerations or failed to take into account relevant considerations, or
d. manifested serious irrationality or illogicality.[918]

Her Honour Justice Pritchard held that Austral had not established adequate grounds in this case and the adjudicator's determination was enforced.

Changes to s 26 of the Act

In 2014 came one of the most significant changes to s 31(2)(a)(ii), when dealing with s 26 of the Act, came from the WASC.

Before this case, many adjudicators noted that the application for adjudication before them was tainted as it failed to give the ABN or ACN, or the telephone and facsimile number of the respondent, as required, pursuant to s 26(2)(a). Section 26(2)(a) made it mandatory that pursuant to Reg 5 of the Regulations,[919] the correct contact details were required, further

[915] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 25 [64].
[916] Ibid 31 [81].
[917] Ibid 44 [125(i)].
[918] Ibd 44 [125(iii].
[919] Ibid.

pursuant to Reg 4 of the Regulations.[920] The adjudicator, by statutory requirements, had only one option but to dismiss an application for adjudication because the application before the adjudicator was not prepared and served in accordance with s 26.[921]

Many adjudicators were frustrated by this seemingly pointless statutory requirement, as the process of finding and confirming an ABN is a short and simple process using the Australian Government tools such as *ABN Lookup*.[922] What becomes even more frustrating, and defies s 30 of the Act,[923] is that a considerable amount of money has often been spent by the applicant on legal assistance in drafting such an application, only for this to be wasted by the dismissal of the application. It is often discussed, between adjudicators, that when this issue has arisen, many have added the missing ABN or ACN, rather than dismiss, in what some have stated is 'statutory bureaucracy gone mad.'[924] The truth of the matter is that the ABN or ACN is almost always found attached to the application of the construction contract involved, as required by s 26(2)(b)(i) of the Act.[925]

Finally in 2014, his Honour Justice Chaney, the former President of the SAT, put resolution to this issue in W*Qube Port Dampier v Philip Loots of Kahlia Nominees Ltd.*[926] His Honour noted that an application was not properly 'prepared in accordance with s 26, if, for example, it did not set out the details of, or have attached to it, the matters referred to in s 26(2)(b)(i) and (ii) or the information described in s 26(2)(c).' However, his Honour did not believe that the same could be said for s 26(2)(a) of the Act.[927] His Honour held:

> 100 …If a detail such as an ABN or ACN, or some other contact detail, is not shown on the application, it is open to an adjudicator to infer that that detail is not known to the applicant. That is especially so if compliance with s 26 is not in issue. The fact that inclusion of all of the contact details is not, because of the words 'to the extent to which the person ... knows those details', an absolute requirement, shows that the legislature did not intend that the adjudication process required that all details be included in the application in all cases. It would be contrary to the object

[920] Ibid Reg 4.
[921] *Construction Contracts Act 2004* (WA), s 26.
[922] https://abr.business.gov.au/
[923] *Construction Contracts Act 2004* (WA), s 30, which states that; The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.
[924] Anonymous Adjudicators, whom all felt it prudent to remain nameless.
[925] *Construction Contracts Act 2004* (WA), s 26(2)(b)(i).
[926] [2014] WASC 331.
[927] *Construction Contracts Act 2004* (WA), s 26(2)(a).

> of the CC Act to provide a quick informal adjudication, on an interim basis, of payment disputes, to construe s 31(2) as requiring an adjudicator to embark upon an enquiry as to an applicant's state of knowledge in relation to a matter that has no bearing on either the process of adjudication or its merits.

Most agree that the decision made by his Honour is one of the most common sense decisions made. Professor Evans in his report recommended the time limits of s 26 remain at 28 days.[928] He noted that the decision made by his Honour Justice Chaney, had 'assisted the issue',[929] but 'Section 26 and reg 4 should be amended to state that the application should be valid, and not dismissed, if there has been substantial compliance with the Regulations.'[930]

It appears that the legislators took heed of the wise decisions made by her Honour Justice Pritchard and his Honour Justice Chaney, and s 31(2)(a)(iia) of the Act[931] was amended so that an adjudicator must dismiss the application where:

> (iia) the application has not been prepared in accordance with section 26(2)(a) unless the adjudicator is satisfied that the application complies with section 26(2)(a) sufficiently for the adjudicator to commence adjudicating the dispute;

At an IAMA seminar held on 22 July 2015, the matter of paragraph 100 was discussed by the guest speaker Mr Lee Panotidis.[932] The general view held by most adjudicators and associated legal practitioners attending, except the more punctilious members of the bar, was satisfaction with this amendment and how a more common sense approach has been taken.

In a move that would create much surprise, the Act, pursuant to s 26(1) of the Act,[933] was amended to reflect the following:

> 26. Applying for adjudication
>
> (1) To apply to have a payment dispute adjudicated, a party to the contract, within 90 business days after the dispute arises or, if applicable, within the period provided for by section 37(2)(b),

The Explanatory Memorandum *Construction Contracts Amendment Bill* 2016, rationalised

[928] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 23.
[929] Ibid 74.
[930] Ibid.
[931] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iia).
[932] Partner at Tottle Partners.
[933] *Construction Contracts Act 2004* (WA), s 26(1).

that:

> This clause removes the reference in section 26(1) to 28 days and inserts 90 business days. This will increase the time period a party to a construction contract has for making the application to have a payment dispute adjudicated and serving it on the other parties.[934]

Ninety business days? Potentially this could lead out to 160 days. It does contradict what Lord Ackner would coin as the 'quick and dirty fix.'[935] Or what the Honourable Ms Alannah J. MacTiernan stated when she introduced the *Construction Contracts Bill 2004 - Introduction and First Reading & Second Reading,* when she declared that the bill would provide 'an effective rapid adjudication process for payment disputes'.[936] Despite this, the logic was that the parties might be able to use this time to negotiate or even mediate, to resolve the payment claim. However, it does not prevent a party from applying long before the 90 business day period.[937]

The issue of the number of days has always been an arguing point between adjudicators and often involved members of the legal fraternity. It would be the work of SAT Member Owen-Conway in *The MCIC Nominees Trust t/As Capital Projects & Developments and Red Ink Homes Pty Ltd,*[938] that would rightly give a definitive answer to the question.

The MCIC Nominees Trust t/As Capital Projects & Developments and Red Ink Homes Pty Ltd and the reckoning of time prescribed by the Act

Before the amendments to s 26(1) of the Act, the Act provides 28 days after the dispute arises'[939] to prepare and serve the application on the respondent and the prescribed appointor. This can be demonstrated by the use the reckoning of time calculations determined by Member Owen-Conway in *The MCIC Nominees Trust t/As Capital Projects & Developments and Red*

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[934] Western Australia, Explanatory Memorandum *Construction Contracts Amendment Bill 2016*, 7.
[935] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >
[936] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).
[937] There is a viewpoint that Professor Evans was erroneous in his recommendation that the time limits provided by the Act to the applicant's was insufficient. As has been discussed in this research; the size, nature, dollar value, and complexity of payment claim disputes has increased significantly. Many Adjudicators do not support a 90 day period, as three months (or 90 days) is far too long a period for a construction company to not have a cash flow. Several years ago, the Northern Territory Building Registrar, Mr Guy Riley, discussed the 90 day period that the Northern Territory Act provided. He felt that 90 days was far too long period of time, but 56 days was probably more reasonable a period of time. Many concur with his views.
[938] [2013] WASAT 177.
[939] *Construction Contracts Act 2004* (WA), s 26(1).

Ink Homes Pty Ltd.[940] Member Owen-Conway stated:

> 64 Reading s 26 and s 6 of the CC Act together, the Tribunal concludes that the adjudication must be made 'within' the 28 day period which is to run 'from' the precise moment 'when' the payment dispute arose; that is, from 00:00 on 27 April 2013. The identification of the moment when the payment dispute arose is only relevant, in the scope, object and purpose of the CC Act, to determine the 28 day period within which the adjudication may be made. The anchor point for the calculation is 'after' the specified event (or in this case the specified non-event). The CC Act does not provide for anything to be done on or during the day on which the payment dispute arose - its whole purpose is to provide a starting point for the calculation of the 28 day period to run in which an application for adjudication may be made. For this reason, the Tribunal concludes that the date on which the payment dispute arose is not to be excluded from the computation of the 28 day period within which an adjudication may be made pursuant to s 26 of the CC Act.[941]

This is shown diagrammatically in **Figure 13** below:

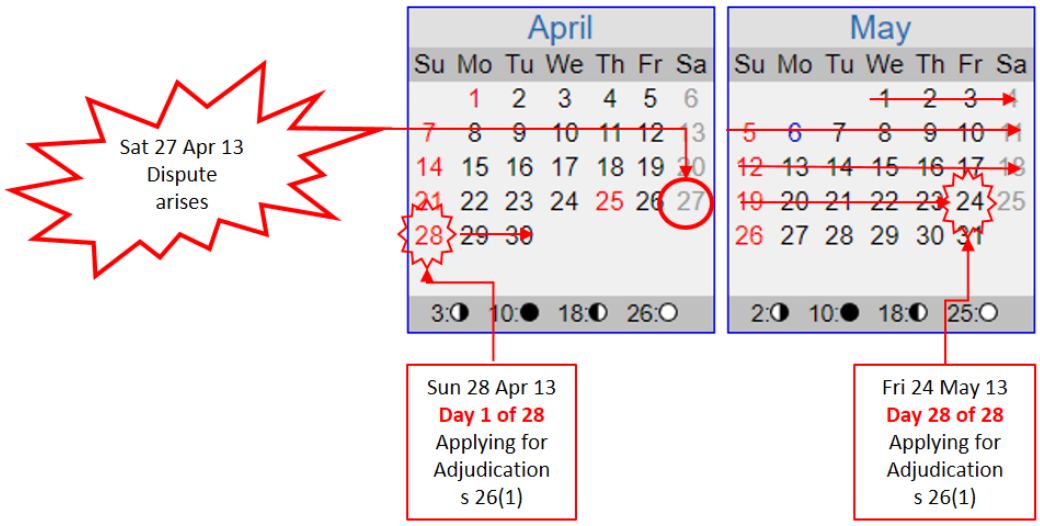


Figure 13 - *The MCIC Nominees Trust t/As Capital Projects & Developments and Red Ink Homes Pty Ltd and s 26 of the Act*

(Calendar source: https://www.timeanddate.com/calendar/?year=2013&country=29)

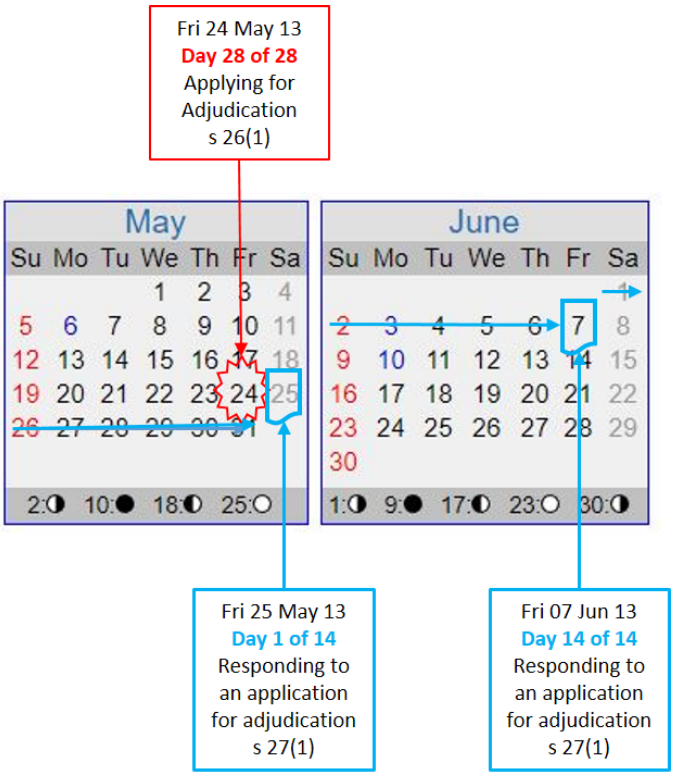
[940] [2013] WASAT 177.
[941] *The MCIC Nominees Trust t/As Capital Projects & Developments and Red Ink Homes Pty Ltd* [2013] WASAT 177, 20 [64].

As shown, the dispute arose on Saturday 27 April 2013. That day is excluded. The applicant has 28 days (s 26(1) of the Act), which starts on Sunday 28 April 2013, and day 28 falls on Friday 24 May 2013 within which the applicant has until midnight of that day.

The adjudicator must confirm that all that is laid before them, in writing, meets the requirements of the Act and therefore pursuant to s 31, within 14 days after the service or the response, either make a decision to dismiss the application, pursuant to s 31(2)(a), or pursuant to s 31(2)(b), on the 'balance of probability', make a determination.

During the review of the Act by Professor Evans many responding to the discussion paper felt that 28 days is not a sufficient duration of time for applicants to submit their application. However, that is what the Act stated. This would later be amended to 90 business days as a result of the review of Professor Evans.

The *Construction Contracts (Security of Payments) Act 2004* (NT), pursuant to s 28 of the NT Act, provides a party with 90 days after the dispute arises to prepare a written application,[942] as shown below in **Figure 14**.



[942] In a telephone conversation with the Northern Territory Registrar, Mr Guy Riley, he stated that in his view 90 days was too long and the 14 days provided by the Western Australian act was perhaps too short. He indicated that perhaps 45 days would be a sufficient compromise, and was looking to the review and outcome of the Western Australian Act, to provide some guidance for future discussion in the Northern Territory.

Figure 14 - *The MCIC Nominees Trust t/As Capital Projects & Developments and Red Ink Homes Pty Ltd and s 27 of the Act*

(Calendar source: https://www.timeanddate.com/calendar/?year=2013&country=29)

The respondent receives the application on Friday 24 May 2013, again that day is excluded, and the respondent has 14 days starting on Sunday 25 May 2013, until midnight Friday 7 June 2013 to respond.

The view of Member Owen-Conway in *The MCIC Nominees Trust t/As Capital Projects & Developments and Red Ink Homes Pty Ltd*[943] still attracts some debate between a few of the adjudicators, though most agree, and until this issue turns up in the Courts, adjudicators continue to apply this case.

5.10. Section 31(2)(a)(iii) Adjudicators function dealing with the matter under dispute is subject to an order, judgment or other finding before an arbitrator or other person or a court or other body

The matter

The third matter arises before the SAT when an adjudicator decides to dismiss an application for adjudication because the application before the adjudicator, the matter under dispute, is subject to an order, judgment or other finding before an arbitrator or other person or a court or other body.[944]

If the aggrieved party believes that the application for adjudication was not an order, judgment or other finding before an arbitrator or other person or a court or other body then, the aggrieved party, pursuant to s 46(1) of the Act, 'may apply to the State Administrative Tribunal for a review of the decision'.[945]

Upon review, The SAT may set aside the decision,[946] or reverse the decision and order the adjudicator to make a new determination within 14 days of the SAT decision.[947]

[943] [2013] WASAT 177.
[944] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iii).
[945] Ibid 46(1).
[946] *State Administrative Tribunal Act 2004* section 29(3)(c)(i).
[947] Ibid 29(3)(c)(ii).

What does the Act say

Section 31(2)(a)(iii) of the Act,[948] states:

> 31. Adjudicator's functions
>
> (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 —
>
> (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application;

Section 31(2)(a)(iii) and the case of *Moroney & Anor and Murray River North Pty Ltd*

The issue was first raised in the previously mentioned SAT case of *Moroney & Anor and Murray River North Pty Ltd*,[949] heard by Member Dr De Villiers. Member Dr De Villiers found that Adjudicator Riley had 'erred in his reasoning that it was not necessary for him to consider the grounds for dismissal found in s 31(2)(a)(i), s 31(2)(a)(iii) or s 31(2)(a)(iv) of the CC Act.'[950] Member Dr De Villiers found that the Tribunal must consider the remaining three grounds,[951] which included s 31(2)(a)(iii).

Member Dr De Villiers held that Adjudicator Riley had not provided any evidence that the provision had been met[952] and found that there was no reason to dismiss on this ground.[953]

Section 31(2)(a)(iii) and the case of *BGC Contracting Pty Ltd and Ralmana Pty Ltd T/A RJ Vincent & Co*

In 2015, Member Owen-Conway in *BGC Contracting Pty Ltd and Ralmana Pty Ltd T/A RJ Vincent & Co*[954] would set aside a decision to dismiss an application for adjudication and would direct the adjudicator to make a determination pursuant to s 31(2)(b) of the Act. Member

[948] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iv).
[949] [2008] WASAT 111.
[950] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 20 [94].
[951] Ibid 21 [101].
[952] Ibid 26 [123].
[953] Ibid 26 [124].
[954] [2015] WASAT 128.

Owen-Conway concluded that the dismissals, pursuant to s 31(2)(a)(ii) and (iii) were both incorrect.

The adjudicator believed an order for directions[955] by the WASC, though the adjudicator recognised that it was 'was an interim order and not a final order of the Supreme Court',[956] but failed to differentiate between the two, and consequently, dismissed the application. The order concerned a claim by the respondent for an amount due. The application for adjudication sought an amount from the respondent.

Member Owen-Conway concluded that pursuant to s 31(2)(a)(iii), and the Act itself, should be taken to mean a 'final dispositive order by a court'[957] and not an 'interlocutory order for directions.'[958] Member Owen-Conway provide the statement made by his Honour Justice Barwick in the High Court case of *R v Ireland*[959] where his Honour stated in 'dicta' that the established legal meaning of 'judgement' is 'the formal order made by a court which disposes of, or deals with, the proceeding then before it.'[960] Further, 'in a proper use of terms, the only judgment given by a court is the order it makes.'[961]

Member Owen-Conway rightly concluded that 'order, in the context of s 31(2)(a)(iii), does not include any 'interim or interlocutory orders.'[962] Interim or interlocutory orders are what Member Owen-Conway referred to as 'procedural in nature and effect and do not finally determine the rights and liabilities of both parties to the court proceedings.'[963]

The final issue deals with complexity.

5.11. Section 31(2)(a)(iv) Adjudicators function dealing with complexity

> Some cases are simply too complicated for judges and juries to manage. This complexity can arise for a wide variety of reasons. As Dickens realized long ago, the law itself can be the source of complexity. In dealing with most of these difficulties, there have been no formal tools available either to identify

[955] CIV 1156 of 2015 dated 2 April 2015.
[956] *BGC Contracting Pty Ltd and Ralmana Pty Ltd T/A RJ Vincent & Co* [2015] WASAT 128, 5 [3(b)].
[957] Ibid 14 [39].
[958] Ibid.
[959] [1970] HCA 21; (1970) 126 CLR 321.
[960] *BGC Contracting Pty Ltd and Ralmana Pty Ltd T/A RJ Vincent & Co* [2015] WASAT 128, 14 [39].
[961] Ibid 14 [40].
[962] *BGC Contracting Pty Ltd and Ralmana Pty Ltd T/A RJ Vincent & Co* [2015] WASAT 128, 15 [46].
[963] Ibid.

> tough cases or to help resolve them. We have simply trusted judges and juries to apply the law as best as they can.[964]
>
> Eric Kades

Kades[965] is no doubt right. However, one could believe that he failed to take the adjudicator into consideration.

He noted that in many anti-trust cases, complexity came down to 'voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions'.[966] He found that 'parties can submit evidence on a wide range of issues, and the judge and jury are left to sort out the factual mess'.[967]

The matter of complexity differs no less before an adjudicator. An adjudicator is often faced with legal, factual, and technical complexity, and must decide whether they can make a decision or dismiss.

The matter

The fourth matter arising before the SAT is the decision to dismiss an application for adjudication on the grounds that 'it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason.'[968]

If the aggrieved party believes that the application for adjudication was not too complex for the adjudicator to determine, the aggrieved party, pursuant to s 46(1) of the Act, 'may apply to the State Administrative Tribunal for a review of the decision'.[969]

Upon review, The SAT may set aside the decision,[970] or reverse the decision and order the

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[964] Eric Kades, 'The Laws of Complexity & the Complexity of Laws: The Implications of Computational Complexity Theory for the Law' (1997). College of William & Mary Law School, Faculty Publications. Paper, 404-5. ,< http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1546&context=facpubs>

[965] Kades proposed the Computational complexity theory ("CCT"), a mathematical theory of complexity developed by computer scientists over the last forty years, yields some provable limits to our capacity to find facts and apply legal rules to them.

[966] Eric Kades 'The Laws of Complexity & the Complexity of Laws: The Implications of Computational Complexity Theory for the Law' (1997). College of William & Mary Law School, Faculty Publications. Paper, 404,< http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1546&context=facpubs>

[967] Ibid 415.

[968] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iii).

[969] Ibid 46(1).

[970] *State Administrative Tribunal Act 2004* section 29(3)(c)(i).

adjudicator to make a new determination within 14 days of the SAT decision.[971]

What does the act say?

Section 31(2)(a)(iv) of the Act,[972] states:

> 31. Adjudicator's functions
>
> (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 —
>
> (iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason.

Dealing with complexity

Since the commencement of the Act, and the ensuing reviews of adjudicators' determinations, pursuant to s 46 of the Act[973] by the SAT and the Courts, the matter of complexity has been raised in 44 (or 35%)[974] of the 125 cases that were reviewed.

The matter of complexity would first be raised in the WASC by his Honour Justice Templeman in *O'Donnell Griffin Pty Ltd v Davis & Ors.*[975] His Honour expressed the that s 31(2)(a)(iv) of the Act has an obligation enforced on adjudicators to dismiss the matter if it is too complex and they are satisfied that it would not be possible for them to do so fairly.[976]

His Honour went to say: 'I wish to emphasise that I should not be taken as suggesting to the adjudicator that he adopt that course in the present case. It is entirely a matter for him to decide.'[977]

In other words, an adjudicator who is faced with a complex question of jurisdiction which he or she feels unable to resolve on the papers would be obliged to dismiss the application.

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[971] Ibid 29(3)(c)(ii).
[972] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iv).
[973] Ibid s 46.
[974] WASAT – 19 (OR 43%), WADC – 2 (OR 5%), WASC – 21 (or 48%), and WASCA – 2 (or 5%).
[975] [2007] WASC 215.
[976] *O'Donnell Griffin Pty Ltd v Davis & Ors* [2007] WASC 215, 8 [31].
[977] Ibid 9 [32].

The difficulty becomes what establishes complexity. The argument over complexity starts in the SAT. In 2008, Member Dr De Villiers in *Moroney & Anor and Murray River North Pty Ltd* [978] invited the adjudicator to make a determination and provide reasons for his decision. Adjudicator Riley had dismissed the application and referred to issues that he considered as complex but had failed to clarify why he had not sought, with the consent of the parties, an extension of time, pursuant to s 32(3)(a) of the Act.[979] Member Dr De Villiers also felt that it was 'not clear from the reasons for decision why the complexity of the contention that the applicants were employees was such that the jurisdictional question could not be dealt with definitively'.[980]

Member Dr De Villiers added that 'it is inevitable that in disputes under the CC Act, issues of legal complexity may arise. That in itself does not necessarily bring the matter within the "must dismiss" category'.[981]

Three days later, Senior Member Raymond and Senior Sessional Member Pinder, in *Silent Vector Pty Ltd t/as Sizer Builders and Squarcini*,[982] set aside another decision made by an adjudicator as he had found that due to complexity, he was unable to make a determination and consequently dismissed it.

Initially, both Senior Member Raymond and Senior Sessional Member Pinder agreed with the view held by the adjudicator when it was noticed that the application consisted of some 900 pages and contained no 'clear summary or statement of the claim'.[983] Both noted that a considerable amount of the claims that had been raised in progress claim 32, 'had been the subject of previous claims, and no application for adjudication had been made within the 28-day time limit of those claims being rejected.'[984]

Senior Member Raymond and Senior Sessional Member Pinder commented that there was a danger of an adjudicator too readily concluding that it is not possible to fairly make a determination because of the complexity of a matter. They went on to say that an experienced adjudicator would have recognised the issue before him and dealt with it without any trouble. They noted that even the Tribunal had faced a similar reaction at first glance; however, they

[978] [2008] WASAT 36.
[979] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 36, 10-11 [41].
[980] Ibid.
[981] Ibid 11 [42].
[982] *Silent Vector Pty Ltd t/as Sizer Builders and Squarcini* [2008] WASAT 39.
[983] *Silent Vector Pty Ltd t/as Sizer Builders and Squarcini* [2008] WASAT 39, 19-20 [69].
[984] Ibid 20 [70].

felt that 'with proper analysis and appreciation of the effect of the response',[985] any initial view or reaction would be 'expunged'.[986]

Slowly with the help of decisions made at the SAT, adjudicators were able to start finding bounds in determining their views on complexity.

The boundaries would be further defined in the case of *Moroney & Anor and Murray River North Pty Ltd*,[987] in which Member Dr De Villiers would reverse the decision of Adjudicator Riley. Member Dr De Villiers invited Adjudicator Riley to explain, pursuant to s 31 of the *State Administrative Tribunal Act 2004* (WA) 'whether the issues involved were of such complexity that the application had to be dismissed'.[988] Member Dr De Villiers also sought 'whether Adjudicator Riley utilised the mechanisms provided for in the CC ACT to obtain clarification on some of the issues that he regarded as complex'.[989]

Member Dr De Villiers noted the response of Adjudicator Riley that he had not made a determination pursuant to s 31(2)(a)(iv) of the Act,[990] and had only made observations on the matter of complexity, which he said, and recognised, 'may have caused some confusion'.[991]

Member Dr De Villiers further asserted:

> Mr Riley indicated in his supplementary reasons that although he anticipated some difficulties to make a determination since payment rates had not been agreed, such comments "were not determinative of the question of complexity of the issues" ([13] supplementary reasons). He went on to say he merely wanted to "flag the possible future complexity of issues raised in the adjudication application and response, they (initial reasons) made no attempt to deal with the substance of those issues" ([14] supplementary reasons).[992]

Member Dr De Villiers would further declare that the matter would have to be dismissed by Adjudicator Riley if he was 'satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not

[985] Ibid [71].
[986] Ibid.
[987] [2008] WASAT 111.
[988] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 4 [7].
[989] Ibid.
[990] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iv).
[991] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 20 [96].
[992] Ibid 20-21 [97].

sufficient for any other reason …' (s 31(2)(a)(iv) of the CC Act).[993]

However; Member Dr De Villiers was most scathing. He asserted that 'the Tribunal does not accept the contention that the matter was too complex to be determined'[994] and that 'the mere fact that some allegation of fraud or complexity is made, does in itself mean the matter must be dismissed. He argued that 'Mr Riley should have applied his mind to the application and all the information before it',[995] he could have sought an extension of time, pursuant to s 32(3)(a) of the Act,[996] or perhaps sought further information from the parties.[997]

Member Dr De Villiers, censuring Adjudicator Riley, found that Adjudicator Riley 'had confused "complexity" with "lack of information"'.[998] Member Dr De Villiers remarked that '[T]he mere fact that a payment claim is disputed or not supported by sufficient information does not automatically mean it is too complex to be determined.'[999] Member Dr De Villiers found that 'Mr Riley is required to make a decision "on the balance of probabilities whether any party to the payment dispute is liable to make a payment …" (s 31(2)(b) of the CC Act.'[1000]

Member Dr De Villiers, held that 'the Tribunal is not satisfied that the matter cannot be fairly determined because of complexity. There is insufficient reason for it to be dismissed on grounds of s 31(2)(a)(iv) of the CC Act'.[1001]

The decision by Adjudicator Riley to dismiss was reversed, and the matter was remitted back to him to make another determination.[1002]

Four years later, her Honour Justice Prichard, in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd,*[1003] would affirm the view held by most that:

> 55 Within that context, the role of an adjudicator in conducting an adjudication is intended to be relatively confined. The area of inquiry is confined to the subject of the payment dispute, and the questions for the adjudicator are similarly confined to whether a party to the dispute is liable to make a payment, and if so the amount and

[993] Ibid 26 [125].
[994] Ibid 27 [129].
[995] Ibid.
[996] *Construction Contracts Act 2004* (WA), s 32(3)(a).
[997] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 27 [131].
[998] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 28 [134].
[999] Ibid.
[1000] Ibid.
[1001] Ibid [135].
[1002] Ibid 31 [10 Orders]. Adjudicator Riley made an other determination.
[1003] [2012] WASC 304.

> due date of the payment. The fact that the adjudication determination does not preclude the parties from litigating about broader issues of dispute under their construction contract also reinforces the limited scope of the adjudicator's inquiry. That would tend to suggest that questions of how the particular payment claim fits into broader disputes arising under the contract in question should be pursued in other fora.[1004]

Her Honour would further recognise in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* that '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'.[1005]

Her Honour stated that the role of the adjudicator was more akin to 'dealing with arguments other than those expressly raised by the parties in relation to the construction of the contract the subject of the adjudication.'[1006]

Her Honour Justice Prichard was right. In 2016-2017, there were 80 registered adjudicators', 26 (or 33%) were legal practitioners, the remaining 54 (or 68%) were made up of practitioners of building construction industry'.[1007] Adjudicator Riley had studied law in his early 20s, but had never been admitted to the legal profession, and many years later he became an adjudicator. He made a decision to dismiss, and stated that, in his eyes, what lay before him deemed that decision; though the SAT differed in their views and informed him otherwise, it was his view and his view alone.

The Honourable Ms MacTiernan, stated, that the 'primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes'. [1008] She stated that it should be recognised that the adjudicators would be experienced and independent, but more than likely were not from the legal fraternity.

During the review of the Act, Professor Evans in the '*Discussion Paper on the Statutory Review*

[1004] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 23 [55].
[1005] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 43-44 [124].
[1006] Ibid [56].
[1007] In 2004, there were 23 Adjudicators, of which 13 (or 57%) were non-Lawyers and 10 (or 43%) were Lawyers. By 2010, there were 53 Adjudicators of which 38 (or 72%) were non-Lawyers and 15 (or 28%) were Lawyers. In 2015-16 there were 76 Adjudicators of which 55 (or 72%) were non-Lawyers and 21 (or 28%) were Lawyers. The 2016 results of 80 Adjudicators of which 54 (or 68%) were non-Lawyers and 26 (or 33%) were Lawyers, indicates that the ratio between Adjudicators that are non-Lawyers and Lawyers in declining.
[1008] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).

of the Act' made a particular comment on the qualifications of the registered adjudicators. He stated:

> The background of the adjudicators is consistent with the intention of the framers of the Act that the process was to be relatively free of issues requiring complex legal analysis and designed so that persons with basic legal training would be able to hand down a competent determination.[1009]

Later, his Honour Justice Kenneth Martin, in *Red Ink Homes Pty Ltd v Court*,[1010] while acknowledging her Honour Justice Prichard, countered that this 'was not an invitation towards an acceptance of arbitrary or irrational decisions'.[1011] [1012]

What would later on become evident; would be that the SAT is also amenable to the determinations of an adjudicator. In 2012, Senior Member Raymond would affirm the decision of an adjudicator. In the case of; *Classic Stone (Qld) Pty Ltd and Julie Mauretta Pitcher*,[1013] Senior Member Raymond held to what he would describe as a 'quagmire'.[1014] For the sake of brevity, the intrigues of the case will not be detailed; suffice it to say that Senior Member Raymond declared:

> The starting point for this quagmire lies at the feet of the applicant for the apparently unbusinesslike manner in which it allowed the contract to proceed without being properly documented. Then further, in making the adjudication application, the applicant has failed to address the obvious issues in relation to which there are deficiencies in the evidence as discussed above.[1015]

There was, amongst other things, missing evidence, no contract and a host of other matters that arose. After much consideration, Senior Member Raymond found that this case presented the kind of context contemplated by s 31(2)(a)(iv) of the Act, for the adjudicator to dismiss it as it would be seen as not fair to have continued.[1016] Senior Member Raymond remarked that the

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[1009] Philip Evans, *Discussion Paper - Statutory Review of the Construction Contracts Act 2004 (WA)* (Department of Commerce - Building Commission, September 2014), 32.
[1010] [2014] WASC 52.
[1011] *Red Ink Homes Pty Ltd v Court* [2014] WASC 52, 30-31 [144].
[1012] This point was also discussed by Professor Evans, in the '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 39. . As the research assistant to Professor Evans, for the discussion paper and the report, this issue was raised on several occasions as we worked to find common ground between the words of Prichard J and Kenneth Martin J.
[1013] [2012] WASAT 80.
[1014] *Classic Stone (Qld) Pty Ltd and Julie Mauretta Pitcher* [2012] WASAT 80, 21 [68].
[1015] Ibid.
[1016] Ibid [70].

absence of evidence made it impossible to make an objective determination on its merits, particularly as there was no evidence to establish that the parties had a 'contractual relationship', and there was confusion over the 'payment terms and the applicable rates.'[1017]

Subsequently, Senior Member affirmed the adjudicator's decision. This confirmed, in the eyes, of many adjudicators, that determining what is seen as 'complexity' is in itself very complex; however, case history was growing, though no definitive list or legal explanation has arisen.

The SAT would continue to see mention of 'complexity', however 'complexity' and the issues associated with it will find their way into the Courts.

There is no easy solution to the issue of complexity. Many adjudicators utilise the elements of size, legal complexity, factual complexity and technical complexity to decide whether to dismiss the application, pursuant to s 31(2)(a)(iv). Suffice it to say that the Act provides no real guidance for the cases before the SAT and the Courts; accepting that, there is potential for an adjudicator to abort an application without really having put his mind to the matter of complexity. Pursuant to s 36(a) of the Act[1018] an adjudicator's decision must be in writing, and the adjudicator must give reasons for the determination.[1019]

In this regard, it is pertinent to discuss complexity and other elements that can affect this matter.

Legal, factual and technical complexity

In 2008, Member Dr De Villiers of the SAT, in *Moroney & Anor and Murray River North Pty Ltd*,[1020] ordered that the matter be remitted back to Adjudicator Riley 'to make a clear and unequivocal determination with the necessary reasons to explain how he came to a particular conclusion.'[1021]

The adjudicator had dismissed an application because he was 'satisfied that it is not possible to fairly make a determination because of the complexity of the matter'.[1022] Member Dr De Villiers retorted that the adjudicator could have requested an extension of time, pursuant to s 32(3)(a) of the Act,[1023] but failed to do so. Member Dr De Villiers recognised that 'it is inevitable that in disputes under the CC Act, issues of legal complexity may arise. That in itself

[1017] Ibid [71].
[1018] *Construction Contracts Act 2004* (WA), s 36(a).
[1019] Ibid s 36(d).
[1020] [2008] WASAT 36.
[1021] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 36, 11 [43].
[1022] Ibid [40].
[1023] *Construction Contracts Act 2004* (WA), s 32(3)(a).

does not necessarily bring the matter within the "must dismiss" category'.[1024]

His Honour Justice Mitchell in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [1025] expressed the following opinion:

> 223 It was implicit in some of the submissions advanced by LORAC that some greater allowance was necessary for adjudicators who, generally lacking legal training, would not have the capacity to resolve disputes turning on the proper construction of complicated contracts according to law. Senior counsel said that an adjudicator could not be expected to know what Mason J said in Codelfa, or to understand the controversy relating to the reasons for refusing special leave to appeal in *Western Export Services Inc v Jireh International Pty Ltd.* So much may be accepted.[1026]

Of this statement by his Honour, Professor Evans would declare 'as an aside, with due respect to counsel, on the basis of my experience as a construction law educator, I would argue that the majority of adjudicators would be aware of his Honour Justice Mason's statement in Codelfa'.[1027]

Professor Evans also would note in his '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA)', that the issue of legal complexity should not always fall foul in the hands of the adjudicator, but should be equally laid before the legal fraternity. He asserted that 'the widespread use of legal practitioners in the process appears to have introduced a degree of legal complexity in adjudications which was not anticipated in the planning of the adjudicator training courses'.[1028] The view of Professor Evans on this issue is widely supported. It is unlikely that Lord Ackner in his consideration of a 'quick and dirty fix', would have considered 14 days to make legally complex decisions, often by an

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[1024] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 36, 10-11 [41].
[1025] [2015] WASC 237.
[1026] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, 59 [223].
[1027] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), 30. I agree with Professor Evans. All adjudicators have tertiary qualifications, and most of those within the areas of civil engineering, architecture, or project or contract management, where they study contract law and construction law. Resolution Institute Adjudicators are required to attend continuing professional development programs several times a year, where often; Adjudicators whose primary occupation are listed as barrister and lawyers, teaching case law relating to the Act. Before becoming a lawyer, I was a project, contract and logistics manager, with both Bachelor and Masters level qualifications. I also was awarded a graduate certificate in building and construction law from Murdoch University, as have many other adjudicators, applicants and respondents, all under the tutelage of Professor Evans.
[1028] Ibid 46.

adjudicator, who in most cases did not have that level of legal training; to make a decision.

In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*,[1029] his Honour Justice Beech opined, that when an adjudicator is deciding questions of law, that 'adjudication does not determine the parties' substantive rights'[1030] and that the 'adjudicator has authority to decide questions of law authoritatively and wrongly.'[1031]

Adjudicator James stated that when an adjudicator from the Resolution Institute is dealing with the issues of Legal, Factual and Technical complexity', there has always been a mentoring program, available within the Institute.[1032] The mentoring program allows adjudicators to seek the advice of the more senior and often, from those with a strong legal background, to assist and give guidance. It is a common-sense approach in determining the complex issues of Legal, Factual and Technical complexity.

The size and the quantum of the claim

The sheer volume of information does not in itself create complexity. Local court transcripts provide no real way of determining size. The UK legislation, *the Housing Grants (Construction and Regeneration) Act 1996* (UK), while somewhat different, was the basis for the Act and provided some guidance in the UK courts.

In *Enterprise Managed Services Limited v Tony McFadden Utilities Limited*,[1033] his Honour Justice Coulsen held that an application for adjudication was far too complex for the adjudicator to make a decision when the application consisted of 40 lever arch folders and the response was equally as significant. His Honour commented that 'this was a claim or a dispute which, because of its sheer size, may well have not been appropriate for the summary statutory adjudication process in any event.'[1034]

His Honour found that the claim before him was not appropriate for the adjudication process and that adjudication could not fairly deal with the process, and was 'inappropriate as a matter of law.'[1035]

[1029] [2009] WASC 19.
[1030] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, 31 [102].
[1031] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, 31 [102].
[1032] Discussion between Mr James and the author, during the review of the Construction Contracts Act 2004 (WA), in early 2016.
[1033] [2009] EWHC 3222.
[1034] *Enterprise Managed Services Limited v Tony McFadden Utilities Limited* [2009] EWHC 3222, [92].
[1035] *Ibid*, [97].

Later Professor Evans would comment that issue of complexity 'or the quantum of the claim may be poor indicators of the appropriate response time because simple disputes may involve complex issues and large claims may be relatively straightforward.'[1036]

During the research into this matter, the author has been unable to find any correlation between the size of the claim and the quantum of the claim. Throughout this research, the author read many of the 1822 determinations/decisions made by adjudicators in the period between 2005-2017. The view of Professor Evans stands.[1037]

The author found from his own experience that the issue of size can lead an adjudicator to dismiss the application due to complexity.

In 2014, as an adjudicator to a payment claim dispute, the author received an application for adjudication that sought over $1 million, and was encumbered by some 23 lever arch folders of A4 and A3 documents. It contained 7977 pages. The total quantum of the submissions by both parties was 34, A4 & A3 size folders, and included 11906 pages.

The author dismissed the application on the grounds that the proposed variation to the Contract was not a valid variation and therefore all other issues, such as the payment claim, would fall as there are then no other matters to consider.

However, had the author not dismissed the application due to the non-validity of the variation, the author would have dismissed the application without making a determination of the merits pursuant to s 31(2)(a)(iv) of the Act due to the large quantum of both the application and response and its complexity, 'the devil lies in the detail, not the quantum.'

In 2015-2016, Adjudicator Loots[1038] received an application for the adjudication of payment claim valued at around $170 million. To date, this has been the most substantial dollar value claim pursuant to the Act. Adjudicator Loots completed the application within 11 days, and when asked about the quantum of the claim or the size of the claim he denied that it was complex. What in his view made it complex was the legal principles associated with the

[1036] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 24.
[1037] the Queensland government has taken a different view in the *Building and Construction Industry Payments Act 2004* (Qld), as noted in Schedule 2 - Dictionary, which states that a; **complex payment claim** means a payment claim for an amount more than $750,000 (exclusive of GST) or, if a greater amount is prescribed by regulation, the amount prescribed and a **standard payment claim** means a payment claim that is not a complex payment claim. My view is that this is a far too simplistic formula to determine complexity.
[1038] Building and Construction lawyer and counsel, arbitrator, adjudicator and author.

contract and their interpretation.

This issue of size and the quantum of a claim and the correlation with complexity was further discussed in conversation with Adjudicator James. Adjudicator James conducted several adjudications where the values of the payment claim ranged between $50 million, $80 million, to another at about $82 million. He has maintained that the issue of complexity is subjective. The size and the quantum of the claim made no difference to his ability to complete his determination/decision within 8 to 13 days, with the $80 million claim, in 21 days after requesting an extension of time.

On a side note on Thursday 1 June 2017, the Building Commission of Western Australia, sought a call for expressions of interest of fixed/low-fee adjudications/advisory services. The maximum dollar value of applications is set at $100,000. It appears no real consideration has been given to the view held by many and reiterated by Professor Evans, and it may see a rise in dismissals as adjudicators may not find it economically viable to conduct low value, high complexity applications, that could take considerable time for little financial gain.

Time

There is a fifth element that an adjudicator should take into consideration when deciding whether to dismiss an application on the grounds of complexity, and that is the issue of time.

His Honour Justice Kenneth Martin in *Red Ink Homes Pty Ltd v Court*[1039] further observed:

> 63 Hence, the overall scheme of the CC Act sets up something of an interim 'triage' arrangement enabling a contractor to seek and obtain a swift payment so as, in effect, not to be 'bled dry' by what could prove to be a drawn-out process of litigation attrition. An interim outcome is obtained by allowing a speedy access to an appointed adjudicator who will quickly assesses the dispute and provides a reasoned decision within a very limited time frame.

Despite what Member Dr De Villiers had commented on in *Moroney & Anor and Murray River North Pty Ltd,* that the Act envisages that an adjudicator may provide for an extension of time for complex matters to be addressed through further submissions, or even a conference',[1040] this too is open to abuse or misinterpretation. Research has provided evidence that the longest extension granted, 336 days, is a very considerable extension beyond the 14 days provided by

[1039] [2014] WASC 52.
[1040] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 36, 10 [40].

the Act. In the previous year, 2014-2015, the longest period to undertake adjudication was 36 days.

This extension of time defies the Act and the view held by the Judiciary in that the scheme is an interim 'triage' arrangement, not the long-term outcome faced by many when undertaking litigation. In both cases, the adjudicators should have dismissed the application for complexity pursuant to s 31(2)(a)(iv), but for whatever reason, chose to continue.

When considering the application for adjudication, that had 34 folders and contained 11906 pages, the author was guided by the words of his Honour Justice Chaney and Senior Member Raymond in *Match Projects Pty Ltd and Arccon (WA) Pty Ltd,*[1041] in *Silent Vector Pty Ltd t/as Sizer Builders and Squarcini.*[1042] They stated that it is not going to take much resourcefulness and imagination to submit applications and responses for which 'the complexity is such that the application should be dismissed and to create an impression of complexity by swamping the adjudicator with volumes of paper.'[1043]

The adjudicator concluded that this case despite what Kades referred to as 'voluminous documentary',[1044] stood alone and did not display the other three elements to complexity, that is; legal, factual and technical complexity.

The adjudicator heeded the words of Senior Member Raymond and Senior Sessional Member Pinder in *Silent Vector Pty Ltd t/as Sizer Builders and Squarcini,*[1045] and felt that the 'complexity' issue had not raised its head.

Had the adjudicator thought differently, and had the 'voluminous documentary' before him, also displayed uncharacteristic amounts of the other three elements of complexity, the adjudicator would simply have dismissed the application, pursuant to s 31(2)(a)(iv).[1046]

In 2016, his Honour Justice Kelly held in the NT Supreme Court case of *CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor,*[1047] that despite making 'an order in the nature of *certiorari* under O 56 of the *Supreme Court Rules* quashing a determination of an

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[1041] [2009] WASAT 134.
[1042] [2008] WASAT 39.
[1043] *Match Projects Pty Ltd and Arccon (WA) Pty Ltd* [2009] WASAT 134, [52].
[1044] Eric Kades, 'The Laws of Complexity & the Complexity of Laws: The Implications of Computational Complexity Theory for the Law' (1997). College of William & Mary Law School, Faculty Publications. Paper, 415. ,< http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1546&context=facpubs>
[1045] [2008] WASAT 39.
[1046] *Construction Contracts Act 2004* (WA), S 31(2)(a)(iv).
[1047] [2016] NTSC 42.

adjudicator'[1048] the adjudicator; declined the argument from the Plaintiff that 'the issues in dispute between the parties in adjudication are so obviously too complex for the adjudicator to have fairly dealt with them'.[1049]

The plaintiff argued that the 'volume of material, that being more than a dozen folders'[1050] and the fact that adjudicator requested, and was granted an extension of an additional five working days,[1051] made it too complex for the adjudicator to deal with the matter. They argued that the adjudicator, a quantity surveyor, and not a lawyer, did not have the 'expertise'[1052] to deal with the 'Legal issues'[1053] to make a fair determination.

His Honour Justice Kelly held otherwise. His Honour stated that he did 'not think that the volume of the material is a necessary indicator that the decision to proceed to a determination on the merits was unreasonable.'[1054] His Honour maintained that despite the adjudicator not being a lawyer, he had dealt with the 'quantity surveying aspects'[1055] without objection and his Honour felt that the legal issues before the adjudicator were not 'particularly complex'[1056] and would not require the 'expertise of a lawyer'.[1057]

Five Months later, in the SAT, Member Le Miere, took a different approach. In *Bocol Constructions Pty Ltd and Keslake Group Pty Ltd,*[1058] Adjudicator Taylor 'dismissed the applicant's claim pursuant to s 31(2)(a) of the CC Act without making a determination on the merits'.[1059] In a hearing de novo, Member Le Miere found that the matter was too complex 'to enable the arbitrator [sic] to fairly make a determination'.[1060]

Member Le Miere found that 'the applicant's claim against the respondent is not either factually or legally clear',[1061] and that in the 'expert evidence from both the applicant and respondent the factual basis of both reports is not the same',[1062] and there was competing evidence

[1048] *CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor* [2016] NTSC 42, 56 [120].
[1049] Ibid 22 [49].
[1050] Ibid.
[1051] *CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor* [2016] NTSC 42, 22 [49].
[1052] Ibid 23 [51].
[1053] Ibid.
[1054] *CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor* [2016] NTSC 42, 23 [50].
[1055] Ibid.
[1056] Ibid [51].
[1057] Ibid.
[1058] [2017] WASAT 15.
[1059] *Bocol Constructions Pty Ltd and Keslake Group Pty Ltd* [2017] WASAT 15, 4 [2].
[1060] Ibid 29 [137].
[1061] Ibid [132].
[1062] Ibid [133].

provided. Member Le Miere found that, when it came to factual matters, it appeared that no conclusive expert evidence was obtainable, as to whether or not; 'the weather on the day [that] the seal was applied [was] relevant or may be relevant in determining the reason the works failed'.[1063]

Finally, Member Le Miere noted that the quantum of damages, was not clear-cut as 'two methods of remedying the purported defective work were originally advanced by the applicant's expert, and no reason was given for choosing one over the other or evidence as to the differing costs of the two methods'.[1064]

There is no right or wrong answer for how an adjudicator can deal with the issue of complexity. If the adjudicator is confident that they can deal with the issues at hand, the adjudicator can, pursuant to s 31(2)(b) of the Act,[1065] determine the payment dispute on the balance of probabilities within the prescribed time, or make the decision to dismiss the application without determining its merits pursuant to s 31(2)(a)(iv) of the Act,[1066] and utilise the paragraph provided below, within the decision:

> However, in light of my reasoning set out above as to the volume of materials, and the number and interaction of the legal, factual and technical issues involved, I am satisfied that it is not possible to fairly determine the payment dispute on the balance of probabilities under section 31(2)(b) within the prescribed time.[1067]

The Court recognises that in many cases an adjudicator does not have a legal background, and takes this into consideration (Prichard J).[1068] It recognises that an adjudicator has the 'authority to decide questions of law authoritatively and wrongly' (Beech J),[1069] but holds highly the view that this is 'not an invitation towards an acceptance of arbitrary or irrational decisions' (Kenneth Martin J).[1070] Complexity should not be feared; after all it is recognised that a decision made by an adjudicator is as Wallace says, is 'decision is an interim one and is often

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[1063] Ibid [135].
[1064] Ibid [136].
[1065] *Construction Contracts Act 2004* (WA), s 31(2)(b).
[1066] Ibid s 31(2)(a)(iv).
[1067] My thanks go to the very experienced lawyer/arbitrator/adjudicator, who wished to remain anonymous, but provided me with very sound advice. Thank you.
[1068] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 43-44 [124].
[1069] *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19, 31 [102].
[1070] *Red Ink Homes Pty Ltd v Court* [2014] WASC 52, 30-31 [144].

made in a "pressure cooker" environment under extremely tight timeframes.[1071] Therefore must; pursuant to s 36(a) of the Act,[1072] the adjudicator must ensure that the decision is in writing; and give reasons for the determination.[1073]

Alternatively; there is no harm in dismissal, as his Honour Justice Mitchell stated in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation*:

> If an adjudicator is faced with a payment dispute raising legal problems he or she is not able to resolve within the limited time for which the Act provides, the proper approach would be to dismiss the application without determining its merits under s31(2)(a)(iv). That is the mechanism provided for dealing with a complex payment dispute of the present character.[1074]

Perhaps the last word should be left to Dr Samer Skaik et al.:

> Apparently, the legislatures in Western States are content to leave the decision about complexity of a payment dispute up to the adjudicator. Having said that, an adjudicator must provide adequate reasons for dismissal due to complexity and "not to too readily form a view that a matter is too complex to be fairly determined." Notably, in the English High Court decision of *CIB Properties Ltd v Birse Construction*[1075], the court preferred that the suitability of a matter for adjudication not be assessed on whether it was too complicated, but whether the adjudicator was able to reach a fair decision within the statutory timeframes.[1076]

5.12. Fraud

The jurisdiction of an adjudicator has never included fraud.

The first time the issue of fraud arose in an adjudicator's determination that was reviewed, pursuant to s 46 of the act, was in the previously mentioned case of *Moroney & Anor and Murray River North Pty Ltd*,[1077] in which Member Dr De Villiers would reverse the decision

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[1071] Andrew Wallace, *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry* (Building Services Authority, 2013), 221.
[1072] *Construction Contracts Act 2004* (WA), s 36(a).
[1073] Ibid s 36(d).
[1074] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2015] WASC 237, 36 [125].
[1075] [2004] EWHC 2365 (TCC); [2005] BLR 173 ; [2005] 1 WLR 2252.
[1076] Samer Skaik, Jeremy Coggins and Anthony Mills, 'The Big Picture: Causes of Compromised Outcome of Complex Statutory Adjudications In Australia', (2016) *The International Construction Law Review the International Construction Law Review* Part 2, 132.
[1077] [2008] WASAT 111.

of Adjudicator Riley. Member Dr De Villiers had sought from Adjudicator Riley, amongst other things 'whether the issue was too complex to determine in light of claims of fraudulent action'.[1078]

Member Dr De Villiers later remarked that the Counsel for the applicant contended that 'the allegations of fraud were not supported by any evidence other than the general claim made by the respondent in written submissions',[1079] as had been found with the issue of complexity. Member Dr De Villiers recorded 'the mere fact that some allegation of fraud or complexity is made does in itself mean the matter must be dismissed. Adjudicator Riley should have applied his mind to the application and all the information before it'.[1080] The evidence did not support the allegations of fraud.

Four years later, in the supplementary case of *Classic Stone (Qld) Pty Ltd and Julie Mauretta Pitcher*,[1081] in which an indemnity costs order was being sought, Senior Member Raymond would find himself dealing with allegations of fraud brought on by one of the parties. The applicant subsequently discarded the accusations of fraud.

The Senior Member wrote:

> 28 Insofar as the fraud allegations are concerned, it is evident that the entire basis upon which the application was founded was abandoned promptly and at an early stage in the proceedings as soon as the applicant had the benefit of advice from its current legal representatives.

The Senior Member concluded that 'on the balance of probability'[1082] there was no 'contractual relationship between the parties' and application should have been dismissed pursuant to s 31(2)(a)(ii) as it had therefore not been properly served.[1083] The Senior Member went further and found that it is 'not possible to identify the written terms of the contract between the parties'.[1084] He stated that it was 'not possible to determine whether the statutory implied terms had any application'[1085] and therefore the application for adjudication would fail, due to complexity and should be dismissed pursuant to s 31(2)(a)(iv) of the Act.

[1078] *Moroney & Anor and Murray River North Pty Ltd* [2008] WASAT 111, 6 [13].
[1079] Ibid 26 [126].
[1080] Ibid 27 [131].
[1081] [2012] WASAT 80 (S).
[1082] *Classic Stone (Qld) Pty Ltd and Julie Mauretta Pitcher* [2012] WASAT 80, 3-4 [4].
[1083] Ibid.
[1084] Ibid.
[1085] Ibid.

The decision under review was affirmed.[1086] The basis of the application, namely fraud, was very quickly, and wisely, dropped very early on in the proceedings before the SAT, on the advice of their legal counsel.[1087]

A compelling case arose in 2015 when an adjudicator's determination lay before the SAT. The case *GRC Group Pty Ltd and Kestell,*[1088] would see Senior Member Spillane set aside the decision made by Adjudicator Glynn Logue and refer the matter back to the adjudicator for determination pursuant to s 31(2)(b) of the Act.[1089]

Senior Member Spillane would determine that an adjudicator has no entitlement, pursuant to s 31(2)(a) of the Act, to dismiss an application where the payment claim is not considered as 'bona fide'. He held that 'bona fides' are only relevant when a determination is made on the merits, pursuant to s 31(2)(b) of the Act.

The case centred on a payment claim submitted on 14 March 2014, for work done by the applicant. On 17 March 2014, the payment claim was rejected, and on 11 April 2014, an application for adjudication was submitted.

On 15 April 2014, Adjudicator Logue took up his appointment as adjudicator.

In the response to the applicant, the principal argument made was 'that the applicant had fraudulently inflated the labour costs in payment claim 18 and that it was not a bona fide payment claim for the purposes of the Act, and, accordingly, should be dismissed without consideration of its merits'.[1090]

The applicant stringently denied the allegations of fraud, and claimed to have witnesses that were 'prepared to swear statutory declarations denying the allegations of fraud now made by the respondent'.[1091]

The respondent then wrote to the adjudicator seeking 'opportunity to respond to the matters raised in our client's response'. Senior Member Spillane noted that Adjudicator Logue had not responded to the request, in response to the allegations of fraud.

Senior Member Spillane would write: 'The question that arises in this Review Application is

[1086] Ibid 22 [75(1)].
[1087] *Classic Stone (Qld) Pty Ltd and Julie Mauretta Pitcher* [2012] WASAT 80(S), 9 [28].
[1088] [2015] WASAT 11.
[1089] *Construction Contracts Act 2004* (WA), s 31(2)(b).
[1090] *GRC Group Pty Ltd and Kestell* [2015] WASAT 11, 4 [6].
[1091] Ibid [7].

whether claims that are not bona fide and are fraudulent, fail a threshold jurisdictional issue or simply affect the merits of the claims'.[1092]

Senior Member Spillane would look to the Northern Territory Supreme Court case of *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Another,*[1093] where his Honour Justice Southwood, came to the opinion that for a payment claim to be valid it 'it must be a bona fide claim and not a fraudulent claim'.[1094] Senior Member Spillane, while recognising that *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Another* related to the NT Act, said he would look towards the Victorian Supreme Court case of *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd and Phillip Martin.*[1095]

In *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd and Phillip Martin,* his Honour Justice Vickery held:

> '[T]here is no implied precondition to the making of a valid payment claim under s 14 of the Act that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed or that otherwise the claim is made in good faith'.[1096]

Senior Member Spillane came to the view that the preference of the Tribunal leaned more towards the view of his Honour Justice Vickery and held that:

> [a] payment claim is bona fide is not a requirement of a valid payment claim under either the contract or the Act. Such an additional test of criteria should not be imposed as a threshold jurisdictional issue to be decided at the time of considering whether to dismiss an application pursuant to s 31(2)(a) without making a determination on its merits.[1097]

Senior Member Spillane concluded that 'payment claims that are not bona fide and may be

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[1092] Ibid 7 [18].
[1093] [2008] NTSC 42.
[1094] *GRC Group Pty Ltd and Kestell* [2015] WASAT 11, 7 [20(2.4)]. In *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Another,* Southwood J stated [at 67]; 'In my opinion the essential requirements of a valid payment claim are as follows:

1. The payment claim must be made pursuant to a construction contract and not some other contract;
2. The payment claim must be in writing;
3. The payment claim must be a bona fide claim and not a fraudulent claim;
4. The payment claim must state the amount claimed;
5. The payment claim must identify and describe the obligations the contractor claims to have performed and to which the amount claimed relates in sufficient detail for the principal to consider if the payment claim should be paid, part paid or disputed.'

[1095] [2012] VSC 235.
[1096] *GRC Group Pty Ltd and Kestell* [2015] WASAT 11, 27 [68].
[1097] Ibid [71].

fraudulent do not fail a threshold jurisdictional test, but it may affect the merits of the claim'.[1098] He ordered that the decision by Adjudicator Logue be set aside[1099] and sent back to Adjudicator Logue, and within 14 days after Senior Member Spillane made his decision, re-determine the matter, pursuant to s 31(2)(b) of the Act.[1100]

Adjudicator Logue, as directed by the SAT, re-determined the application for adjudication and subsequently dismissed the application and determined costs in favour of the respondent.

5.13. Post Amendments to the Act

When the amendments to the Act were made, s 46 (2) was amended to reflect that if a decision made by an adjudicator is set aside, 'the adjudicator is to make a determination under section 31(2)(b) within 10 business days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.'[1101]

As previously discussed, the legislators took heed of the decision made in *WQube Port Dampier v Philip Loots of Kahlia Nominees Ltd.*[1102] and amended s 31(2)(a)(iia) of the Act.[1103]

Another significant change also came in s 31(2)(a)(iia) of the Act.[1104]

> (2) An appointed Adjudicator must, …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.

Section 31(2)(a)(iia) now confirmed that the parties to a dispute could withdraw the application.

Unlike the Northern Territory *Construction Contracts (Security of Payments) Act 2004*, the Western Australian *Construction Contracts Act 2004* did not make provision for an applicant to withdraw its written application. Notwithstanding, applicants in practice often withdraw their written application for some sound reasons, which include receipt of payment or a

[1098] Ibid 30 [82].
[1099] Pursuant to s 29(3)(c)(ii) of the *State Administrative Tribunal Act 2004* (WA) and s 46(2) of the *Construction Contracts Act 2004* (WA).
[1100] *GRC Group Pty Ltd and Kestell* [2015] WASAT 11, 30 [83].
[1101] *Construction Contracts Act 2004* (WA), s 46.
[1102] [2014] WASC 331.
[1103] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iia).
[1104] Ibid s 31(2)(a).

negotiated settlement.

The *NT Act*, pursuant to s 28A allows for the application for adjudication to be withdrawn either 'before an adjudicator has been appointed'[1105] or 'if an adjudicator has been appointed, the party may withdraw the application by giving written notice'.[1106]

As there was no mechanism to withdraw, adjudicators would draft lengthy, convoluted determinations, justifying their jurisdiction and dismissing the payment claim, and charge the parties, which is often costly, when ironically, they have already resolved the dispute.

However, other adjudicators merely draft a one-page letter to the parties, communicating that the parties had both agreed in writing to withdraw the adjudication. The method was far cheaper than going through the process of dismissing an application that the parties have themselves resolved, but legislation prevents the withdrawal but requires a decision of dismissal.

The veracity and legality of the letter of withdrawal were never challenged within the judicial system and the courts were unlikely to do so, as it would be farcical for one of the parties to challenge a decision that they agreed upon in writing, and in essence, saved them considerable finances.

After the release of the 'Discussion Paper Statutory Review of the *Construction Contracts Act 2004* (WA)' by Professor Evans in 2014, one organisation responded and categorically stated:

> Parties frequently compromise payment disputes and want to "withdraw" the application. However, the Act does not contain a process by which an application for adjudication can be withdrawn. An adjudicator is not entitled to payment under s 44 of the Act unless the application is dealt with determination or dismissal under s 31(2). This creates a tension, which should be resolved by the introduction of a mechanism for applications to be withdrawn.[1107]

The Evans Report confirmed the support from all respondents for the Discussion Paper; it is clear that the mechanism to withdraw needs to be amended. Professor Evans noted that:

> On the basis of the submissions and from the information reported in the Registrar's Annual Reports, there is a need for a provision in the Act which allows for applications

[1105] *Construction Contracts (Security of Payments) Act 2004* (NT), s 28A(1).
[1106] *Construction Contracts (Security of Payments) Act 2004* (NT), s 28(2).
[1107] The Party wished to stay anonymous.

> to be withdrawn. The Discussion Paper at page 33 identified that in the period 2005–2013 some 183 or 18% of applications were discontinued.[1108]

Professor Evans acknowledged the *Construction Contracts (Security of Payments) Act 2004* (NT) which provided the ability to withdraw.[1109] He recommended[1110] that the Act should be amended to allow the adjudicator to withdraw an application for adjudication, where it was agreed in writing to do so by both parties to the dispute, but ensure that the adjudicator was still paid for the work done.[1111]

The Review of Professor Evans argued that consideration should be given to instituting the ability to withdraw, as per Northern Territory *Construction Contracts (Security of Payments) Act 2004.* The recommendation was put forward and the Legislators agreed to the mechanism for parties and the adjudicator to withdraw a payment claim. This was legislated.

Peculiarly, it is most unlikely that s 31(2)(a)(iia) of the Act[1112] will find itself before the SAT. This would mean that the respondent does not concur with the decision to dismiss after the respondent has received a 'get out of jail card' or has come to an agreement with the other party.

Still, many adjudicators and those utilising the Act, are happy to have the ability to withdraw.

The word "or" still links the other possibilities in its disjunctive construction of s 31(2)(a).

5.14. Conclusion

The Act, pursuant to s 46,[1113] has always accorded an aggrieved party a limited right of review. In the first case heard before the SAT, *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture,*[1114] Senior Member Raymond would reverse the decision. He would remit it back to the adjudicator to make a determination, pursuant to s 31(2)(b) of the Act, within 14 days,[1115] or any consented extension given by the parties.[1116]

[1108] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 73.
[1109] Ibid.
[1110] Ibid Reccomendation No 5 – Withdrawal of Application, 73.
[1111] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 7.
[1112] Ibid s 31(2)(a).
[1113] *Construction Contracts Act 2004* (WA), s 46.
[1114] [2005] WASAT 269.
[1115] Ibid s 31(2)(b).
[1116] *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture* [2005] WASAT 269, 4 [3].

Since *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture*, there have been 78 reviews against the 1822 applications for adjudication (or 4.3%) submitted to the SAT. There were 15 (or 19%) occasions where the decisions were made to reverse and remit the determinations, and 43 (or 55%) occasions where the submissions were dismissed for various reasons. The parties agreed on 20 (or 26%) occasions for those reviews to be withdrawn by agreements between the parties. The statistics show that in most cases, the adjudicators have made the right decision.

As case law continues to grow, amendments to the Act are implemented, and a better understanding of matters such as complexity is established, there is a reduction in the number of cases that are before the SAT, pursuant to s 46 of the Act.

There are, however, still matters that require legal interpretation pertaining to s 46. Her Honour Justice McLure, in *Perrinepod Pty Ltd and Georgiou Building Pty Ltd*,[1117] stated that 'there is no express statutory requirement that an adjudicator provides reasons for not dismissing an application under s 31(2)(a) of the Act.[1118] Her Honour affirmed that 'this was a question for another day,'[1119] though this question continues to remain unanswered.

[1117] [2011] WASCA 217
[1118] *Perrinepod Pty Ltd and Georgiou Building Pty Ltd* [2011] WASCA 217, 7 [7].
[1119] Ibid 7 [9].

Chapter 6

Jurisdictional error, judicial review of the *Construction Contracts Act 2004* (WA) and the jurisdiction of the Supreme Court of Western Australia.

> It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error.
>
> *Kirk v Industrial Relations Commission*[1120]

> The basic question on this appeal concerned whether the Security of Payment Act had excluded judicial review for non-jurisdictional error of law.
>
> *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[1121]

6.1. Introduction

When the *Construction Contracts Act 2004 (WA)* was legislated and came into being in 2004, it contained a provision, s 46[1122] that allowed for a party to have a decision made by an adjudicator reviewed by the State Administrative Tribunal if the application was dismissed by the adjudicator, pursuant to s 31(2)(a) of the Act.[1123]

Other than where a review is invoked, pursuant to s 46(1), the Act states unconditionally that 'a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed'.[1124]

Chapter 4 discussed the significance of s 46(2) of the Act,[1125] and the limited right of the SAT. However; there is no mention of the Supreme Court in s 46[1126] of the Act. Section 46(3) of the

[1120] (2010) 239 CLR 531; [2010] HCA 1, 34 [71].
[1121] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4, 46 [107].
[1122] *Construction Contracts Act 2004* (WA), s 46.
[1123] Ibid s 31(2)(a).
[1124] Ibid s 46.
[1125] *Construction Contracts Act 2004* (WA), s 46(2).
[1126] Ibid s 46.

Act, states:

> (3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

From an adjudicator's point of view, the thinking in the early stages of the Act suggested a belief that the Supreme Court of Western Australia should not have the right of intervention and have a supervisory role.

In 2004, 60% or (12 out of 20) adjudicators qualified in the first year came from the 'rough and tough and hard-line building construction industry of the seventies, eighties and nineties. Two of the eight lawyers came from engineering and building backgrounds. The other six lawyers had legal roles in building and construction. Most maintained the view put forward by Lord Ackner that this was a 'quick and dirty fix',[1127] and this is where it stays. Leave the Courts to deal with the things that they could deal with, murder, drug importation and a myriad of other criminally related issues that are consistently bought up by those offering that emotive argument.

However, Courts had a different view. The High Court of Australia would indicate otherwise. Hence, the third manner by which a determination of an adjudicator can find itself before a Court is by way of the adjudicator erring by failing to have jurisdiction to make that decision.

6.2. The aim of this Chapter

This chapter aims to consider the impact that the cases of *Craig v South Australia*,[1128] and *Kirk v Industrial Relations Commission*[1129] had on the Act, and the effect that jurisdictional error had on *the Construction Contract Act 2004* (WA), and on an adjudicator's determination.

[1127] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >
[1128] (1995) 184 CLR 163.
[1129] (2010) 239 CLR 531; [2010] HCA 1.

This chapter will discuss:

a) Jurisdictional error and the *Construction Contracts Act 2004* (WA);

b) Falling into Jurisdictional Error;

c) Natural Justice and Procedural Fairness;

d) Specific Western Australian matters relating to jurisdictional reviews, such as;

   (1) Section 32(3)(b) Adjudication procedure dealing with consent to adjudicate two or more payment disputes simultaneously;

   (2) Set off and counterclaims;

   (3) Dealing with quantum meruit;

e) East Coast Model – Judicial review matters; and

f) The *Construction Contracts Act 2004* (WA), the creeping legislation and the continued supervisory role of the Supreme Court of Western Australia.

The chapter will finally discuss the matter of non-jurisdictional error of law on the face of the record and the cases before the High Court of Australia of P*robuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor*, and *Maxcon Constructions Pty Ltd v Vadasz & Ors* [2017] HCATrans 226, and the potential effect on the *Construction Contracts Act 2004* (WA).

6.3. Background

WASC

The *LexisNexis – Concise Australian Legal Dictionary*,[1130] describes jurisdictional error as 'the purported exercise by the tribunal or court of jurisdiction in excess of that which has been conferred upon it, or the failure to exercise its proper jurisdiction.'[1131]

The adjudicator is not immune to jurisdictional error.

[1130] Peter Butt, *et al*, *LexisNexis – Concise Australian Legal Dictionary*, (LexisNexis Butterworths, Chatswood NSW, 4th Ed, 2011).
[1131] Peter Butt, *et al*, *LexisNexis – Concise Australian Legal Dictionary*, (LexisNexis Butterworths, Chatswood NSW, 4th Ed, 2011), jurisdictional error, 330.

An error of jurisdiction made by an adjudicator in the determination, by virtue of the *Rules of the Supreme Courts 1971* (WA), is a reviewable decision, better known as judicial review.

The *LexisNexis – Concise Australian Legal Dictionary*, continues:

> The determination by Courts of the legality of exercises of power by administrative decision-makers. Judicial review does not extend to review of the merits of administrative action. The High Court of Australia, the Federal Court of Australia, the Federal Magistrates Court and the superior courts of the States and Territories have the final authority to determine the scope of administrative decision-makers' powers.[1132]

The Rules provide that, pursuant Rule 1 to Order 56 – judicial review, reviewable decision includes 'any decision that the Court, under the common law or in equity, has jurisdiction to review and to grant relief in respect of by way of a writ, a declaration or an injunction.'[1133]

To do so, pursuant Rule 1 to Order 56 – Judicial Review, there is a limited period for which the chance for review remains open:

> *limitation period —*
>
> (a) for an application for judicial review of a reviewable decision, means 6 months after the later of —
>
> (i) the date on which the decision is made; or
>
> (ii) the date on which the applicant became aware of it.

The most usual manner for an aggrieved party to seek relief through the judicial review

[1132] Peter Butt, *et al*, *LexisNexis – Concise Australian Legal Dictionary*, (LexisNexis Butterworths, Chatswood NSW, 4th Ed, 2011), 330.
[1133] *Rules of the Supreme Court 1971*(WA), Order 56, Division 1 – General, Rule 1 Terms used, reviewable decision.

proceedings is through the granting of certiorari,[1134] which affects to quash the decision of the adjudicator.

It would be 1345 days since the Act came into operation and 703 days since the decision was made in the SAT in *Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture* before the first case before the Courts of Western Australia for review, *O'Donnell Griffin Pty Ltd v Davis & Ors,*[1135] was delivered.

Ironically, the first defendant in *O'Donnell Griffin Pty Ltd v Davis & Ors*, is Adjudicator Davis, independent barrister, arbitrator, mediator and adjudicator. Adjudicator Davis, a very experienced adjudicator, found himself as the first defendant. Unperturbed, Adjudicator Davis, simply wrote a letter to the Court declaring that he would not be entering the 'arena' and would abide by any decision made by the Court.

His decision to 'not enter the arena' was acknowledged by his Honour Justice Templeman, who observed: 'The first defendant, who is an adjudicator appointed under that Act, took no part in the proceedings other than to notify me that he intended to abide by the outcome'.[1136]

In *O'Donnell Griffin Pty Ltd v Davis & Ors*, the Plaintiff sought an application for an interlocutory injunction to counteract the adjudication made by Adjudicator Davis under the *Construction Contracts Act 2004* (WA). The original payment claim dispute arose when the second defendant sought 'entitlement to damages to compensate it for the cost of delays in the project for which the second defendant contends it was not responsible'.[1137] His Honour Justice

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[1134] The *LexisNexis – Concise Australian Legal Dictionary* describes *Certiorari* as; 'a type of prerogative remedy issued by a court to bring before it the decision or determination of a tribunal or inferior court to quash it on the ground of non-jurisdictional error of law on the face of the record, or for jurisdictional error or denial of procedural fairness. It is available once a tribunal [or inferior court] has completely determined the matter (being then *functus officio*). Formally issued by writ, certiorari is now granted by order or judgement a general law. [at page 83].

[1135] [2007] WASC 215.

[1136] *O'Donnell Griffin Pty Ltd v Davis & Ors* [2007] WASC 215, 4 [1].

[1137] Ibid 4 [5].

Templeman would dismiss the application for an interlocutory injunction and hand down his decision 'ex tempore'.[1138] Remarkably, his Honour would write:

> I was then asked by senior counsel for the second defendant to publish my reasons, there being little authority on the operation of the *Construction Contracts Act*. Regrettably, the proceedings were not recorded. I, therefore, set out my reasons anew. The substance of those reasons will be the same as those I gave ex tempore, but not the form. I am grateful for the assistance of counsel who has provided me with their notes.

To that date, this had been the first case before the Supreme Court of Western Australia. The senior counsel for the second defendant, was right to seek the publishing of the proceedings and the decision as the failure to do so would have prevented adjudicators and legal counsel having access to decisions by the Courts and used as guidance. Had his Honour Justice Templeman not published the proceedings, he would have been in breach of Order 43 of the *Rules of the Supreme Court 1971*, which unconditionally states:

> 1. Drawing up etc. judgments etc.
>
> (1) Subject to these rules and to any order of the Court all judgments or orders whether given or made in Court or in chambers or by default, shall be drawn up under the direction of the registrar or other officer to whom such duty may be assigned.[1139]

It was lucky that the legal counsel had kept notes. It would be 223 days till the next determination/decision made by an adjudicator would enter and be delivered in the Supreme

[1138] Peter Butt, *et al, LexisNexis – Concise Australian Legal Dictionary*, (LexisNexis Butterworths, Chatswood NSW, 4th Ed, 2011), Ex Tempore, 219. The Lexis Nexis Concise Australian Legal Dictionary defines Ex Tempore as; By reason of time; an Ex Tempore judgement is given without preparation, for example where the judgement is urgent.

[1139] *Rules of the Supreme Court 1971*, Order 43.

Court.

Since 2005, there have been 49 applications to the Supreme Court seeking to overturn determinations made by adjudicators in the course of their role, pursuant to the *Construction Contracts Act 2004* (WA).

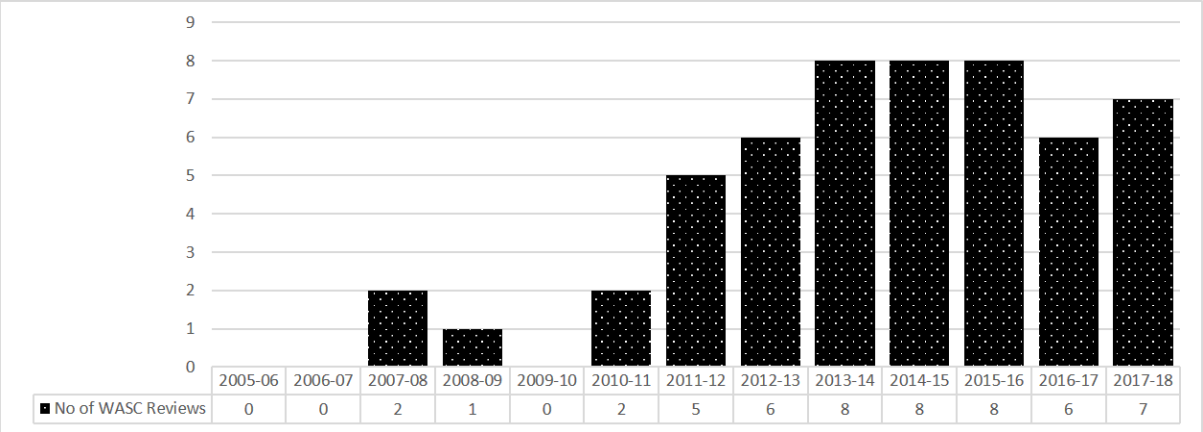


Figure 15 - the number of WASC reviews (2005-2018)

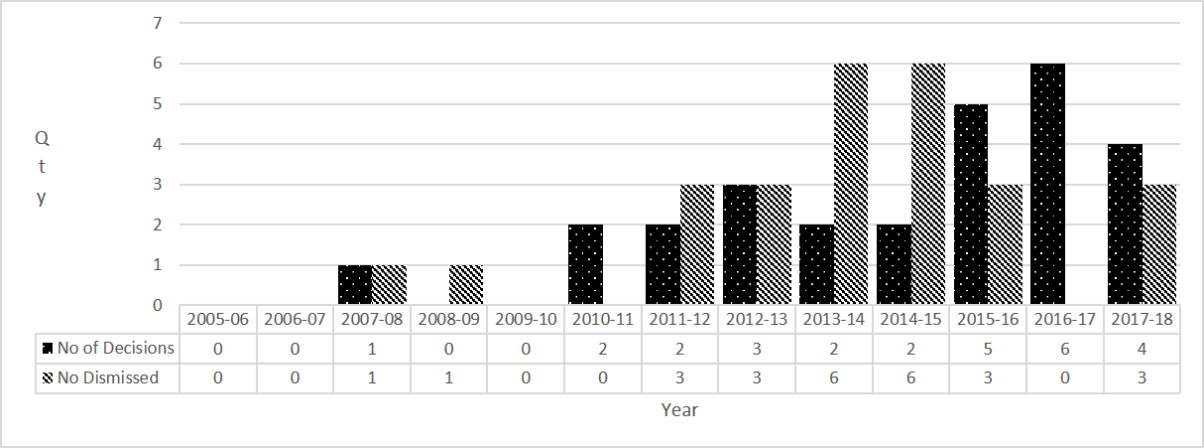
As can be seen above in **Figure 15**, there have been three successive years where there have been eight applications for reviews of adjudicators' determinations. Those years were between; 2013-2014 to 2015-2016 inclusive.

What must be considered is that of the 1822 adjudicators' determinations made in the period from 2005-2017, there were only 53 reviewable decisions made to the WASC. This equates to only 2.91% of adjudicators' determinations. This statistic completely contradicts the comments made by the Honourable Justice Kenneth Martin QC, when he declared that:

> The *Construction Contracts Act 2004* (WA) appears to be a somewhat unexpected, but bountiful, source of work for the Supreme Court in recent times, particularly by applications for prerogative relief to quash decisions by adjudicators. From my perspective as a Commercial and Managed Cases (CMC) List judge, there appear to be

plentiful challenges against decisions of adjudicators.[1140]

Two point nine one percent (2.91%) is not statistically a significant number. Considering also that as we can see below at **Figure 16**, of the 53 reviews of adjudicators' determinations the WASC would on 26 occasions (or 49%) dismiss the applications, and 27 times (or 51%) make a decision. 1.48% of the 1822 adjudicators' determinations are upheld, and 1.43% of the 1822 adjudicators' determinations are later I know will I



	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
No of Decisions	0	0	1	0	0	2	2	3	2	2	5	6	4
No Dismissed	0	0	1	1	0	0	3	3	6	6	3	0	3

Figure 16 - the breakdown of WASC reviews (2005-2018)

There have been 16 judicial members of the WASC involved in the review of adjudicators' determinations.[1141]

The average number of days for the WASC to deliver a decision is 62 days. The most number of days to deliver a decision was by her Honour Justice Pritchard in *Total Eden Pty Ltd v Charteris.*[1142] The case was heard on 6 April 2017 and delivered on 22 February 2018 and took 322 days to deliver.

The most prolific judicial member of the WASC involved in the reviews has been Justice Le

[1140] Justice Kenneth Martin QC 'Speaking Points', Institute of Arbitrators and Mediators of Australia, St Catherine's College, Wednesday 14 May 2014, 1.
[1141] Interestingly, of the 16 judicial members involved, 15 (or 94%) are males and one (or 6%) are females. Pritchard J has undertaken three (or 7%) of the 45 cases.
[1142] [2018] WASC 60.

Miere. In the 12 year period, 2005 to 2017, Justice Le Miere has heard nine (or 18%) out of the 49 cases for review. He has dismissed five (or 56%) and decided the remaining four cases. The second most prolific judicial member of the WASC is Justice Beech, who has undertaken seven cases (or 14%) in this area. He has dismissed four (or 57%).

Fifty three (53) adjudicators' determinations were reviewed by the WASC, in the 14 years between the periods 2005-2017, which would indicate on average this equates 3.79 reviews per year.

6.4. The cases of Craig, Kirk, the Inferior Court and the *Construction Contracts Act 2004* (WA)

In 2010, the High Court of Australia, the most Honourable Coram of French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ would, in the now famous case of *Kirk*,[1143] allow an appeal and 'set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 3 July 2008'.[1144] The implication of this ruling would have a fundamental effect on s 46(1) and would confirm that the Supreme Court had a supervisory role and oversee Judicial Review.

The decision of *Kirk* would have consequences for the Act. Firstly the issue of jurisdiction and secondly whether a 'privative provision' contained within a state's legislation could deny a Supreme Court 'to grant relief'.[1145] Both need to be discussed.

When the Constitution of Australia was in the draft, the constitutional forefathers, deemed that under s 75(v),[1146] the High Court of Australia would have unfettered jurisdiction regarding 'a writ of Mandamus or prohibition or seeking an injunction against an officer of the Commonwealth'.[1147]

In itself, certiorari is the starting point. In the pivotal High Court case of *Craig v South*

[1143] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1.
[1144] Ibid [1].
[1145] Ibid [100].
[1146] *Australian Constitution*, s 75(v).
[1147] Ibid.

Australia,[1148] a Mr Craig was charged with three offences and consequently sought a 'Dietrich Order'[1149] (granted in the High Court case of *Dietrich v The Queen),* seeking 'that the proceedings against him be stayed until such time as he could be "provided with representation by counsel at public expense".[1150] Russell J granted the stay order. The State of South Australia 'sought an order in the nature of certiorari quashing the order staying the proceedings. The summons also sought an order in the nature of mandamus directed to his Honour Justice Russell requiring him "to try the matter according to law"'.[1151] The Full Court of the Supreme Court of South Australia made an order to quash the stay order.

Special leave was sought to appeal the judgement made by the Full Court. Special leave was granted to appeal, but it contained a restriction. The restriction to the appeal was that it be 'limited to the question of jurisdictional error and error of law on the face of the record'.[1152]

The High Court would conclude that 'certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal'.[1153] The Lexis Nexis Concise Australian Legal Dictionary defines an Inferior Court as 'any Court which is not a superior court; that is, a court of lesser status than the Supreme Court of a State or Territory […] an inferior Court has no inherent powers and must always source their power to the statute which establishes them.'[1154]

Craig makes it easy to recognise the difference between an inferior court and a tribunal. The High Court would espouse the view that 'inferior courts of this country are constituted by persons with either formal legal qualifications or practical legal training' while 'tribunals other than courts which are amenable to certiorari are commonly constituted, wholly or partly, by

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[1148] *Craig v South Australia* (1995) 184 CLR 163.

[1149] *Dietrich v The Queen* [1992] HCA 57. In Dietrich v The Queen, Mason CJ and Mchugh J held: [1&2]

1. In our opinion, and in the opinion of the majority of this Court, the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.
2. The applicant is entitled to succeed because his trial miscarried by virtue of the trial judge's failure to stay or adjourn the trial until arrangements were made for counsel to appear at public expense for the applicant at the trial with the consequence that, in all the circumstances of this case, he was deprived of his right to a fair trial and of a real chance of acquittal.

[1150] *Craig v South Australia* [1995] 184 CLR 163, 1 [2].

[1151] Ibid 3 [5].

[1152] Ibid.

[1153] Ibid 3 [8].

[1154] Peter Butt, *et al*, *LexisNexis – Concise Australian Legal Dictionary*, (LexisNexis Butterworths, Chatswood NSW, 4th Ed, 2011), Inferior Court, 304.

persons without formal legal qualifications or legal training'.[1155]

For certiorari to be conceded an inferior court would have had to either, have made a jurisdictional error, or an error of law on the face of the record, that being; 'when the error is contained in the document that comprises the record of the decision'.[1156] The issue of jurisdiction is a difficult one. It is not 'black and white' and has continuously raised its head in our courts.

The High Court held that for jurisdictional error to exist, a decision maker, by way of misconstruction, declares or repudiates that jurisdiction may exist, or pays no regard to, or misconstrues the thresholds and scope of their powers, or by way of misguided belief in the process of making a decision, fails to or repudiates, the limits of their jurisdiction.[1157] The last would be highlighted by the failure of an inferior court to recognise a jurisdictional fact, fail to consider a material that the 'relevant statute requires' and misconstrue that statute, and the scope of its power.[1158]

In November 2000, his Honour Justice Hayne, in the High Court, in *Re Refugee Review Tribunal; Ex parte Aala*,[1159] when discussing whether certiorari should be accorded, said:[1160]

> a distinction is drawn between jurisdictional error and error within jurisdiction. This Court has not accepted that this distinction should be discarded. As was noted in *Craig v South Australia*, that distinction may be difficult to draw. The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

[1155] *Craig v South Australia* [1995] 184 CLR 163, 4 [10].
[1156] Sarah Withnall and Michelle Evans, *Administrative Law*, (LexisNexis, 1st Ed, 2010), 159.
[1157] *Craig v South Australia* [1995] 184 CLR 163, 4 [11].
[1158] *Craig v South Australia* [1995] 184 CLR 163, 177–178, cited in Kirk, 35 [72].
[1159] [2000] HCA 57.
[1160] Ibid 62 [163].

But in 2008, his Honour Justice Kirby in *Commissioner of Taxation v Futuris Corporation Limited*,[1161] in a typically practical manner, would say of Jurisdictional error:[1162]

> I have previously criticised the so-called "jurisdictional error" category despite the support it derives from the current doctrine of this Court. The classification is conclusory. It is very difficult to define and to apply. In recent years it has been substantially discarded by English legal doctrine. Jurisdictional error is nearly impossible to explain to lay people even though the Constitution (including the central provisions in s 75(v)) belongs to them. Most non-lawyers would regard it as a lawyer's fancy.

Two years later, in *Kirk*, the High Court would look towards the case of *Craig v South Australia*[1163] and would highlight the view held by the High Court that there was considerable 'difficulty of distinguishing between jurisdictional and non-jurisdictional errors, but maintained the distinction'.[1164] They would admit that; 'it is important to recognise that the reasoning in *Craig* that has just been summarised is not to be seen as providing a rigid taxonomy of jurisdictional error'.[1165]

The issue of the difference between Jurisdictional Error or Non-Jurisdictional Error or Error within Jurisdiction or Intra-Jurisdictional Error, in all its wordiness and complexity and judicial nuances, was best described by the former Deputy Head of School at the Curtin Law School, Associate Professor Michelle Evans,[1166] who so simply stated:

> Jurisdictional Error occurs when a Decision Maker exceeds their jurisdiction, and Non-Jurisdictional Error or Error within Jurisdiction or Intra-Jurisdictional Error or occurs when a Decision Maker is acting within jurisdiction, but exceeds their power.[1167]

However, *Kirk* would still ensure the retention of the 'Lawyers Fancy'. The issue is still debated amongst adjudicators, lawyers and those sitting in the Courts and Tribunals as to whether adjudicators are an inferior court or a Tribunal, but that will be discussed later in this research.

[1161] [2008] HCA 32.
[1162] Ibid 42 [129].
[1163] [1995] 184 CLR 163.
[1164] *Kirk v Industrial Relations Commission* [2010] 239 CLR 531; [2010] HCA 1, 31 [66].
[1165] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1, 35-6 [73].
[1166] Associate Professor Michelle Evans**,** BA, LLB, LLM (Murdoch), PhD (Curtin, Commendation), former lecturer, co-author of aforementioned book, 'Administrative Law', and current Senior Member of the Administrative Appeals Tribunal (AAT).
[1167] Dr Michelle Evans, Lecture *Jurisdictional Error* (Part 2), Administrative Law, Trimester 2, 2015, Week 7, [4].

Kirk itself would go further in sealing the fate of s 46. It was noted by the High Court that contained within the *Industrial Relations Act* 1996 (NSW) (the IR Act), which was central to the matter, there was provision of that Act and found at s 179(1), which stated:

> a decision of the Industrial Court "is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal". The provision extends to proceedings for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, injunctions, declaration or otherwise.[1168]

Such clauses, known as 'privative clauses, ouster clauses, privative provisions or finality provisions' have 'been a prominent feature in the Australian legal landscape for many years. The existence and operation of provisions of that kind are important in considering whether the decisions of particular inferior courts or tribunals are intended to be final'.[1169]

A privative clause made by the Commonwealth, in essence, denies a Supreme Court the fundamental right to confer relief of a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, pursuant to s 75(v) of the Constitution. The Honourable Coram of Gaudron J, McHugh J, Gummow J, Kirby J, and Hayne J all agreed in *Plaintiff S157/2002 v Commonwealth of Australia,*[1170] that there were general principles associated with any Commonwealth legislation, and that:

> It is important to emphasise that the difference in understanding what has been decided about privative clauses is real and substantive; it is not some verbal or logical quibble. It is real and substantive because it reflects two fundamental constitutional propositions, both of which the Commonwealth accepts.[1171]

They held that:

> First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed.*[1172]*

[1168] Dr Michelle Evans, Lecture *Jurisdictional Error* (Part 2), Administrative Law, Trimester 2, 2015, Week 7, [42].
[1169] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1, 41-2 [93].
[1170] [2003] HCA 2.
[1171] *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, 36 [98].
[1172] *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, 36 [98]

Further;

> Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.[1173]

These points did not go unnoticed in *Kirk.* It was held in *Kirk*, that when contemplating the drafting of any State legislation, consideration is given to Ch III of the Constitution and ensure that:

> [t]here be a body fitting the description "the Supreme Court of a State", and the constitutional corollary that "it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description".[1174]

They were adamant that 'the supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts[1175] and failure to do so would, in their view:

> [d]eprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint.[1176]

After all:

> There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia.[1177]

As Evans would later write in the Statutory Review of the *Construction Contracts Act 2004* (WA); 'the Courts of Appeal of several states have affirmed that the *Kirk* principles constitutionally guarantee Supreme Court judicial review for jurisdictional error in

[1173] Ibid.
[1174] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1, 42 [96].
[1175] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1, 42 [96], 43-4 [98].
[1176] Ibid 44 [99].
[1177] Ibid.

adjudication determinations under the state security of payment legislation'.[1178]

One of the issues that continued to be argued by the Courts was whether an adjudicator is an inferior court or an Administrative Tribunal. In Apr 2007, his Honour Justice (Appeal) Murphy, in *Perrenipod*,[1179] commented in obiter:[1180]

> 118 Finally, although it is unnecessary to resolve in this appeal the scope of judicial review in respect of determinations under s 32(1)(b), I agree with Beech J in O'Donnell [102], with whom Corboy J has also expressed agreement in *Thiess v MCC* [59], that an appointed adjudicators' determination under s 31(2)(b) is not amenable to judicial review for non-jurisdictional error of law. I agree that the scheme and purpose of the Act, which, as the long title indicates, is 'to provide a means for adjudicating payment disputes arising under construction contracts', is more consistent with an appointed adjudicator being akin to an inferior court rather than an administrative tribunal for certiorari purposes, when exercising the power to make a determination under s 31(2)(b).

Nine years later, in 2016, the Chief Justice of the Supreme Court, his Honour Chief Justice Martin AC, in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation,* just said of the comment made by Murphy JA 'with whom I agreed'.[1181] This would confirm the view held by WASCA and other the Courts and Tribunals of Western Australia.

His Honour recognised the difficulties of this argument, and held in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation,* that:[1182]

> 90 As the plurality observed in *Kirk v Industrial Court of New South Wales*:
>
> It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error.
>
> The High Court has referred on a number of occasions to '[t]he difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction'.
>
> 91 Any attempt to define the boundaries between jurisdictional and non-jurisdictional

[1178] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), 67.
[1179] [2011] WASCA 217.
[1180] *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, 39-40 [118]
[1181] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130, 36 [93].
[1182] Ibid 34-5 [90-91].

> error by reference to verbal formulations of general application is likely to be bedevilled by an inevitable inexactitude of language and the risk that any particular formulation will be vulnerable to the perception of differing nuances of meaning when any such formulation is applied to the particular circumstances of any individual case.

His Honour went on to say that:[1183]

> 93 In *Craig v The State of South Australia*, the High Court held that despite the difficulty of defining the boundary between jurisdictional and non-jurisdictional error of law with precision, guidance could be derived from the characterisation of the decision-maker as either akin to an inferior court or an administrative tribunal. Such characterisation is most pertinent in cases in which the decision-maker is said to have exceeded his or her jurisdiction by making an error of law, because it is well accepted that, generally speaking, inferior courts have jurisdiction to make errors of law, whereas an error of law on the face of the record of an administrative decision-maker may provide grounds for the issue of the writ of certiorari. It was in that context that Murphy JA61 observed (in obiter) in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* that the jurisdiction of an adjudicator under the Act was more akin to that of an inferior court than that of an administrative tribunal, while noting that it was not necessary to resolve the scope of judicial review of determinations made by an adjudicator for the purposes of that appeal.

The whole approach to this issue is complex. As seen earlier in this research, the majority of adjudicators do not have a legal background, but in most cases, have a more practical construction background. Arguments of whether an adjudicator is akin to an inferior court or a Tribunal are not that important after all; adjudication is about that 'quick and dirty fix'.[1184] His Honour Chief Justice Martin was right in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation*, where he observed [at 95]:

> Rather, the current approach focuses upon identification of the boundaries of the jurisdiction conferred upon a decision-maker by a process of construction of the statute conferring jurisdiction, and then assessing whether the particular acts of the decision-

[1183] Ibid 36 [93].
[1184] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >

> maker have taken him or her beyond jurisdiction. In other words, the identification of jurisdictional error in any particular case will depend critically upon the proper construction of the particular statute conferring jurisdiction, and the findings made with respect to the particular acts which are said to have taken the decision-maker beyond jurisdiction.

In other words, one size does not fit all, but it should be determined on a case by case basis.

6.5. Jurisdictional error and the *Construction Contracts Act 2004* (WA)

In essence, an aggrieved person can only seek review in the case where an adjudicator has dismissed an application for adjudication under s 31(2)(a) without the adjudicator making a determination on the merits. The Act provides, pursuant to s 31(2)(b), that if an adjudicator does not dismiss the application for adjudication, the adjudicator must:[1185]

> (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; 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.

This means that where a party is aggrieved by a decision made by an adjudicator, under s 31(2)(a), on the merits, the decision made by the adjudicator is not reviewable by the SAT.

His Honour Justice Kenneth Martin, of the Supreme Court of Western Australia, during a presentation to the Institute of Arbitrators and Mediators of Australia, would state:

> I also mention the High Court's decision in *Kirk*[1186] concerning the legislature's inability to exclude the State Supreme Court's oversight, where there is a detected jurisdictional error: (see s 46(3)).[1187]

It is only the Supreme Court of Western Australia that has, by virtue of the supervisory jurisdiction exercised by that court, the prerogative to review a determination made by an

[1185] *Construction Contracts Act 2004* (WA), s s 31(2)(b).
[1186] *Kirk v Industrial Court of NSW* [2010] HCA 1; (2010) 239 CLR 531.
[1187] Kenneth Martin 'Speaking Points', (Institute of Arbitrators and Mediators of Australia, St Catherine's College, Wednesday 14 May 2014), 4.

adjudicator, pursuant to s 31(2)(a). However the grounds for review are strictly limited to jurisdictional grounds.

Falling into Jurisdicional Error

There are many grounds for an adjudicator to fall into jurisdictional error. This research will only look at two. They are:

- Jurisdictional error and the Construction Contract; and
- Natural justice and procedural fairness and the adjudicator.

The first ground for judicial error is the failing of an adjudicator to take into consideration the pertinent provisions of a construction contract. In *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation*,[1188] His Honour Chief Justice Martin would state:

> 101 The provisions of the Act which I have identified, read in the context of the evident purpose and objective of the Act, lead inexorably to the conclusion that an adjudicator will not exceed the jurisdiction to make a determination conferred by the Act merely because he or she misconstrues the contract or makes an error in the application of its terms to the facts found. Samsung did not contend otherwise. At the other end of the spectrum, it can also be concluded with confidence that an adjudicator who expressly excluded from consideration the construction contract in respect of which the payment dispute arose, or who took no account whatever of that contract, would exceed the jurisdiction conferred by the Act to determine a payment dispute arising under a construction contract.
>
> 102 […] Rather, in cases which do not fall within either of the two categories I have identified (within which categories it can be said with clarity and certainty that jurisdiction has, or has not, been exceeded), the preferable course when judicial review of a determination is sought is to ascertain with as much clarity as possible precisely what the adjudicator has done, and then determine whether his or her actions constitute a determination of the kind for which the Act makes provision. If the answer to that question is in the affirmative, the adjudicator will have acted within the jurisdiction conferred by the Act and any application for judicial review must be dismissed.

[1188] [2016] WASCA 130.

However, in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation*, his Honour would not be required to take that course of action. The same could not be said of his Honour Justice Chaney in *John Holland Pty Ltd v Chidambara,*[1189] who found that the adjudicator had determined an issue of liquidated damages using the overarching contract rather than the provisions of the subcontract, which was a basis of its application for adjudication.

His Honour held that the adjudicator had exceeded his jurisdiction by his failure 'to have proper regard to the terms of the Subcontract and misunderstanding his proper functions under the CC Act'.

There is considerable merit in the decision of his Honour. His Honour recognises that pursuant to s 25 of the Act[1190] for a payment dispute to arise it must be under a construction contract; in *John Holland Pty Ltd v Chidambara,* it was against the wrong contract. Thus the adjudicator exceeded his jurisdiction and consequently made a jurisdictional error.

Natural Justice and Procedural Fairness

The second ground for judicial error pertains to the failure of an adjudicator to give regard to natural justice and procedural fairness. In 2017, his Honour Justice Buss (P), in the WASCA case of *Suleiman v The State of Western Australia,*[1191] stated:

> 40 The rules of procedural fairness are concerned with processes rather than outcomes. They are therefore rules which govern what a court must do in the course of deciding how a power should be exercised. That is, the rules of procedural fairness apply to the processes by which a decision pursuant to the exercise of power will be made.[1192]

His honour stated that 'fairness is essentially a practical concept. It is not abstract in nature. The rules of procedural fairness are concerned to avoid practical injustice.'[1193] This should serve as a reminder to all adjudicators about their responsibilities.

Earlier, his Honour Justice Kenneth Martin in *Re Graham Anstee-Brook; Ex Parte Mount*

[1189] Ibid.
[1190] *Construction Contracts Act 2004* (WA), s 25.
[1191] [2017] WASCA 26.
[1192] *Suleiman v The State of Western Australia* [2017] WASCA 26, 23-4 [40]. Also See applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 72; (2005) 225 CLR 88 [16] (Gleeson CJ, Gummow, Kirby, Hayne & Heydon JJ).
[1193] Ibid 24 [41].

Gibson Mining Ltd,[1194] observed:

> 62 Again, the process envisaged before an adjudicator under the Construction Contracts Act presents more as the workings of a tribunal, rather than following the curial method. Rules of evidence do not apply (s 32(1)(b)). The process is very much in the nature of quick, remedial and informal triage intervention.[1195]

His Honour was correct in his observation. The Act, pursuant to s 32(1),[1196] states:

> 32. Adjudication procedure
>
> (1) For the purposes of making a determination, an appointed adjudicator —
>
> (a) must act informally and if possible make the determination on the basis of —
>
> (i) the application and its attachments; and
>
> (ii) if a response has been prepared and served in accordance with section 27, the response and its attachments;
>
> and
>
> (b) is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.

The flexibility provided to the adjudicator does not, however, provide that an adjudicator is arbitral in one's manner and above all, by the Act, is bound by natural justice and procedural fairness. If abused, adjudicators are open to judicial review, as his Honour Justice Mitchell in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation,*[1197] remarked:

> 102 Other rules of statutory construction concern what are often referred to as grounds of judicial review. For example, common law rules of statutory construction will assume that the rules of procedural fairness condition the valid exercise of certain statutory powers.[1198]

Those studying law, particuarly administrative law, would often have found themselves

[1194] [2011] WASC 172.
[1195] *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* [2011] WASC 172, 20 [62].
[1196] *Construction Contracts Act 2004* (WA), s 32(1).
[1197] [2015] WASC 237.
[1198] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, 31 [102].

confronted with the Latin terms 'nemo iudex in causa sua' and 'audi alteram partem', or the old English law of the 'rule against bias' and 'the right to a fair hearing'. They were collectively known as natural justice, and simply meant that 'all have a right to be heard and that matter being heard be determined in a manner that is free of impartiality'. Procedural fairness is not concerned about an outcome reached by a decision-maker, but the procedure exercised by a decision-maker and ensuring that the process was fair and proper when making a decision.

The concept of natural justice and procedural fairness seems somewhat foreign to adjudicators, most of whom, as we have, do not have a legal background.

When undertaking a course in adjudication, one is confronted with the opinion held by, his Honour Justice Hodgson JA (Mason P and Giles JA both agreeing), in the New South Wales Court of Appeal case of; *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*,[1199] where his Honour opined:

> What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf ***R v Hickman; Ex parte Fox and Clinton*** (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.[1200]

His Honour's words, while they may have seemed somewhat verbose to the average adjudicator; made it quite clear that any denial of natural justice would void a

[1199] [2004] NSWCA 394; (2004) 61 NSWLR 421.
[1200] *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421, [55].

determination/decision made by an adjudicator.

As common law cases pertaining to the issue of natural justice and procedural fairness within the adjudication process began to develop, his Honour Justice Barr of the Northern Territory Supreme Court would state in *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor*;[1201] that:

> [33] …where there has been a substantial denial of natural justice. This is a distinct ground of review to review on the basis of jurisdictional error.
>
> [34] In my opinion, a purported determination would be void (or 'not a determination under the Act'), if there were a substantial denial of natural justice.[1202] [1203]

His Honour Justice Kenneth Martin in *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd*,[1204] made note that: 'these observations as to natural justice may be taken as being akin to the more contemporary terminology of procedural fairness, or more correctly, a denial thereof'.[1205]

What is certainly clear is that a breach of procedural fairness, or as His Honour stated, 'a denial thereof', will lead to a review of jurisdictional error.

In *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd*, the defendant argued that they were denied procedural fairness on a decision made by the adjudicator, pertaining to ostensible authority. The defendant was of the view that they were denied the 'opportunity to

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[1201] [2014] NTSC 20.

[1202] *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20, 20-21 [33-34].

[1203] His Honour went on to expand:

> [34] …I adopt, with respect, the view expressed by Southwood J in *Trans Australian Constructions Pty Limited v Nilsen (SA) Pty Ltd*; by Mildren J in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*; and by Kelly J in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd*. The commonly held view (albeit obiter in each of the judgments referred to) was explained by Southwood J in Nilsen as follows:
>
> > While the legislature intended that the determinations of adjudicators should have strong legal effect within their intended area of operation, it is equally important that the courts ensure that where an adjudicator strays outside the intended area of operation of the Act appropriate declaratory relief is available. Determinations of adjudicators might otherwise have potentially catastrophic effects. A purported determination will be void if the basic requirements of the Act are not complied with, or if a purported adjudication is not made bona fide, or if there is a substantial denial of natural justice.
>
> [35] Once it is accepted that the rules of procedural fairness apply to an adjudication under the Act, such that a purported determination would be void if there were a substantial denial of natural justice, the difficulty in each case is assessing what constitutes a substantial denial of natural justice to an affected party.

[1204] [2011] WASC 172.

[1205] *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* [2011] WASC 172, 18 [50].

put opposing submissions to the adjudicator on the point'.[1206]

His Honour understood that 'the actual requirements of procedural fairness need to be assessed specifically, in their unique presenting contexts'.[1207] In this case, that consideration be given that the process is 'informal, speedy, but interim, basis before a body more akin to a tribunal than a court' and held that there had been no denial of procedural fairness within the aforementioned context.[1208]

Twelve months later her Honour Justice Pritchard in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd,*[1209] was asked to consider whether an adjudicator was in breach of procedural fairness by failing 'to consider and make the Determination on the basis of the set-off claim',[1210] and whether this constituted a jurisdictional error.

Her Honour found that 'the set-off claim was inadequately articulated; I am not persuaded that the adjudicator's decision that Austral's claim was irrelevant constituted a denial of natural justice'.[1211]

As shall be seen later in this chapter, and recently confirmed in *Cooper & Oxley Builders Pty Ltd v Steensma,*[1212] his Honour Justice Le Miere held that an adjudicator must consider a set-off claim for liquidated damages; the position of her Honour must still stand where a claim for set-off is 'inadequately articulated'.

Her Honour held that; 'a breach of the rules of natural justice will not automatically invalidate a decision adverse to the party affected by the breach. This is because not every breach of the rules of natural justice will affect the making of a decision'.[1213]

In the decision by Commissioner Gething (as he was then) in the District Court case of *Witham*

[1206] Ibid 32 [98].
[1207] Ibid 33 [102].
[1208] Ibid 34 [105].
[1209] [2012] WASC 304.
[1210] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 44 [126].
[1211] Ibid 50 [144].
[1212] [2016] WASC 386.
[1213] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 50 [141]. Her Honour noted that: [at 141].

> 141 That having been said, a breach of the rules of natural justice will not automatically invalidate a decision adverse to the party affected by the breach. This is because not every breach of the rules of natural justice will affect the making of a decision. The general rule is that a breach of natural justice must be material to the decision if the breach is to render the decision invalid. However, it can be very difficult to exclude the possibility that the breach of natural justice made no difference to the result which was reached, and accordingly, it will be an unusual case where relief for a breach of natural justice will be refused on this basis.

v Raminea Pty Ltd,[1214] he declared that 's 27 does not allow the adjudicator a discretion to consider a response prepared and served otherwise than read in accordance with CCA s 27'.[1215]

His Honour Justice Le Miere in *Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd [No 2];*[1216] agreed with Commissioner Gething (as he was then). There was no denial of procedural fairness by the adjudicator failing to have regard to material furnished by the applicant outside of the 14 day period required by s 27 of the Act',[1217] after the respondent requested an extension of time, which an adjudicator has no discretionary power to make. His Honour stated: 'It is contrary to the scheme of the Act that it be part of the function of the adjudicator to consider whether or not to have regard to a response served out of time'.

In *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering And Infrastructure Pty Ltd*,[1218] his Honour Justice Le Miere quashed the determination of an adjudicator on the grounds of denial of procedural fairness. The plaintiff claimed that the adjudicator had failed by not giving notice of the intent; 'to determine the dispute on a basis not contended for by either of the parties' and therefore depriving the plaintiff of the 'opportunity to make submissions on that matter'.

To have avoided making this judicial error, the adjudicator should have considered s 32 of the Act.[1219] Section 32(1)(b) of the Act[1220] provides that the adjudicator; 'is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit'. The adjudicator may, pursuant to s 32(2)(a) of the Act,[1221] obtain further information from both the parties by requesting the parties provide submissions or further information. In order to not exceed the 14-day deadline for submission of the determination/decision, the adjudicator could have sought consent from the parties for an extension of time to consider the issue before him, pursuant to s 32(3)(a) of the Act.[1222] It is unlikely in this case that either party would have denied their consent.

Alternatively, the adjudicator may, pursuant to s 32(2)(b) of the Act,[1223] request that the parties

[1214] [2012] WADC 1.
[1215] *Witham v Raminea Pty Ltd* [2012] WADC 1, 23-4 [59].
[1216] [2013] WASC 59.
[1217] *Re Graham Anstee-Brook; Ex Parte Karara Mining Ltd [No 2]* [2013] WASC 59, 13 [33].
[1218] [2014] WASC 40.
[1219] *Construction Contracts Act 2004* (WA), s 32.
[1220] Ibid s 32(1)(b).
[1221] Ibid s 32(2)(a).
[1222] *Construction Contracts Act 2004* (WA), s 32(2)(a&b).
[1223] Ibid s 32(2)(b).

attend a conference with the adjudicator, though his Honour Justice Beech in *Hamersley Iron Pty Ltd v James* [2015] WASC 10, disagreed with this. He supported the view that:

> 87 I do not accept that procedural fairness required that the adjudicator hold an oral hearing to choose between the conflicting material before him in relation to the estimated cost of completing the work under the Contract. The content of the requirements of procedural fairness depends upon the statutory framework and all the circumstances of the case. Regard must be had to the character and consequences of an adjudication in determining whether procedural fairness required an oral hearing to determine a conflict. An adjudication determination does not finally determine substantive legal rights. It does not preclude the parties from commencing litigation or arbitration. Under s 31(2), an adjudicator is required to give the decision, with reasons, within 14 days of service of the response. In all the circumstances, it was open to the adjudicator to determine the application consistently with the requirements of procedural fairness, without holding an oral hearing.[1224]

His Honour would later in *Hamersley HMS Pty Ltd v Davis*,[1225] hold the view that procedural fairness did not require the facilitation of an oral hearing.[1226]

The author's experience is that it is likely that most adjudicators concur with the position of his Honour Justice Beech. It is challenging having the parties before an adjudicator in conference. The strict control mechanisms of mediation, arbitration or litigation do not exist. It is the author's view that it is far more conducive to undertake further submissions, and make those determinations 'on the papers,' rather than face a potential barrage between the parties.

Several years later, in 2017, in *John Holland Pty Ltd v Chidambara,*[1227] the applicant sought judicial review of an adjudication, seeking to have the adjudication quashed or declared invalid. The first ground that the applicant asserted was a denial of procedural fairness that arose:

> 52 […] because the adjudicator determined the question of set-off of liquidated

[1224] *Hamersley Iron Pty Ltd v James* [2015] WASC 10, 33 [87].
[1225] [2015] WASC 14.
[1226] Again, Beech J held in *Hamersley HMS Pty Ltd v Davis* [2015] WASC 14, 28 [65],
> 65 I am not persuaded that procedural fairness required that the adjudicator hold an oral hearing before determining whether the material relied upon by Hamersley was sufficient to satisfy him in relation to its claimed set-off. The content of the requirements of procedural fairness depend upon the statutory framework, and all of the circumstances of the case.

[1227] [2017] WASC 179.

> damages on a basis not contended for, nor capable of anticipation by, either party, thereby depriving John Holland of the opportunity to address that basis of the decision.[1228]

His Honour Justice Chaney held:

> 61 …John Holland was deprived of the opportunity of addressing the concept of 'abandonment' as that expression is used in a contractual sense. In the circumstances, I am not satisfied that had the opportunity been provided to John Holland to address these issues with the adjudicator, its submissions may not have affected the adjudicator's decision. In the circumstances, I consider that there has been a substantial denial of natural justice and the adjudicator's decision should be set aside on that basis.

It would appear that convening a conference was somewhat futile, as the issue was not brought up or considered.

The provisions of the Act which have been identified, read in the context of the evident purpose and objective of the Act, lead inexorably to the conclusion that an adjudicator will not exceed the jurisdiction to make a determination conferred by the Act merely because he or she misconstrues the contract or makes an error in the application of its terms to the facts found. Samsung did not contend otherwise. At the other end of the spectrum, it can also be concluded with confidence that an adjudicator who expressly excluded from consideration the construction contract in respect of which the payment dispute arose, or who took no account whatever of that contract, would exceed the jurisdiction conferred by the Act to determine a payment dispute arising under a construction contract. Although, as her Honour Justice Pritchard articulated, 'not every breach of the rules of natural justice will affect the making of a decision'.[1229]

It is critical for an adjudicator to keep in mind the underlying current that is procedural fairness

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[1228] *John Holland Pty Ltd v Chidambara* [2017] WASC 179, 24 [52].

[1229] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 50 [141]. Her Honour noted that: [at 141].

> 141 That having been said, a breach of the rules of natural justice will not automatically invalidate a decision adverse to the party affected by the breach. This is because not every breach of the rules of natural justice will affect the making of a decision. The general rule is that a breach of natural justice must be material to the decision if the breach is to render the decision invalid. However, it can be very difficult to exclude the possibility that the breach of natural justice made no difference to the result which was reached, and accordingly, it will be an unusual case where relief for a breach of natural justice will be refused on this basis.

and natural justice, or otherwise face a party to the dispute seeking a writ of certiorari to quash the determination.

6.6. Specific Western Australian matters relating to jurisdictional reviews

Section 32(3)(b) Adjudication procedure dealing with consent to adjudicate two or more payment disputes simultaneously

The Act provides that if an adjudicator is faced with adjudicating two or more payment disputes between the parties that are running concurrently, the adjudicator must seek the consent of both parties, pursuant to s 32(3)(b) of the Act.[1230] It has often been the tactic of unscrupulous legal counsel, representing usually the respondent, to deny the consent. The result is that the applicant will now have to have a second or more applications drafted to seek a resolution to the payment dispute, at considerably more cost for preparation, and ensure that it still makes the mandatory timeframes laid down within the Act.

What does the Act say?

The Act states:

> 32. Adjudication procedure
>
> (3) An appointed adjudicator may —
>
> …
>
> (b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties;
>
> [...]

Section 34(3)(b) of the *Construction Contracts (Security of Payments) Act 2004* (NT)[1231] also makes it mandatory for the adjudicator to seek the consent of all the parties, to adjudicate simultaneously two or more payment disputes.

Most adjudicators have, at some stage, been faced with this dilemma and no consent was given. The 'great abomination' gives no leeway to circumvent this issue.

It has already been discussed in Chap 3 in 2012 in the District Court of Western Australia case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd,*[1232] where

[1230] *Construction Contracts Act 2004* (WA), s 32(3)(b).
[1231] *Construction Contracts (Security of Payments) Act 2004* (NT), s 34(3)(b).
[1232] [2012] WADC 27.

Deputy Registrar Hewitt asserted 'save with the consent of the respondent which was not forthcoming.'[1233] For reasons discussed in Chap 3, at no stage did the adjudicator seek from the parties consent, pursuant to s 32(3)(b).

What must be asked is how could the respondent give consent when on two occasions, the respondent had declared that they would not be 'entering the arena' and had failed to provide a response? Surely by their actions alone or lack of, it would indicate that by their refusal to enter the arena, their point, and the view of Deputy Registrar Hewitt, should have remained mute. Within 12 months, s 32(3)(b) of the Act[1234] would find its way into the Supreme Court of Western Australia. In *RNR Contracting Pty Ltd v Highway Constructions Pty Ltd,*[1235] Master Sanderson cautioned adjudicators who sought to adjudicate over several disputes without seeking the consent of the parties, that they would undoubtedly be committing jurisdictional error.

The Master concluded:

> 9 On the proper construction of s 32(3) of the Act read in conjunction with s 25 and s 26, the adjudicator has jurisdiction to determine only one payment dispute at a time, unless his jurisdiction is expanded by agreement of the parties under s 32(3) of the Act.[1236]

The Master noted:

> 12 …While there was one contract between the parties, there were three invoices which were not paid and it is arguable that there were three separate payment disputes. So, it is at least arguable the adjudicator has made a jurisdictional error.[1237]

The following year, in the Northern Territory Supreme Court, her Honour Justice Kelly in *Gwelo Developments Pty Ltd v Brierly Ltd*[1238] held that, when two payment claims are consolidated into one adjudication, the consequence is fatal and prevents the applicant from filing any more applications.

[1233] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd* [2012] WADC 27, 6 [12].
[1234] *Construction Contracts Act 2004* (WA), s 32(3)(b).
[1235] [2013] WASC 423.
[1236] *RNR Contracting Pty Ltd v Highway Constructions Pty Ltd*, [2013] WASC 423, 4 [9].
[1237] Ibid 5 [12].
[1238] [2014] NTSC 44.

Her Honour stated:

> [48] …The law is clear – an adjudicator may not adjudicate two or more payment disputes simultaneously without the consent of the other party – and the defendant chose to take the risk of making an application for adjudication containing two distinct payment disputes without first asking the plaintiff if it would consent to this course. (It must also be borne in mind that the loss of the opportunity to adjudicate a payment dispute under the Act does not entail the loss of any substantive rights.)
>
> [49] In my view, s 27 does apply to preclude the defendant from making the second and third applications. They have not, therefore, been validly made and are of no effect under the Act.[1239]

Interestingly the Northern Territory Act, unlike the Western Australian Act does facilitate, pursuant to s 28A of the NT Act,[1240] for a party that has applied for adjudication to withdraw the application, though it makes no mention of the part withdrawal of an application.

Her Honour noted:

> 'This submission also assumes that the plaintiff's solicitors were correct in stating in their letter of 20 September 2014 that it would not have been possible for the defendant to withdraw that part of the first application relating to one of the payment claims. That matter was not argued before me and I express no opinion on it'.[1241]

Her Honour also makes no mention of s 26 of the NT Act,[1242] which statesthat: 'the object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible'. The 'quick and dirty fix'[1243] envisaged by Lord Ackner, was becoming diluted by a more 'purist approach' to the law.

His Honour Justice Beech in *Samsung C&T Corporation v Loots*[1244] later explained:

> 281 The scheme of the Act is founded on the fact that contractors under construction contracts will often make regular claims for progress payments. Generally, each progress claim will be a separate payment claim, the rejection or non-payment of

[1239] *Gwelo Developments Pty Ltd v Brierly Ltd* [2014] NTSC 44, 18-19 [48-49].
[1240] *Construction Contracts (Security of Payments) Act 2004* (NT), s 28A.
[1241] *Gwelo Developments Pty Ltd v Brierly Ltd* [2014] NTSC 44, 19 [footnote 15].
[1242] *Construction Contracts (Security of Payments) Act 2004* (NT), s 26.
[1243] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >
[1244] [2016] WASC 330.

> which gives rise to a separate payment dispute. It is an element of the scheme of the Act that disputes in respect of each payment claim are kept separate; each dispute has its own time limit under s 26(1) and each is to be the subject of a separate adjudication, unless the parties consent under s 32(3)(b).[1245]

However; parties to payment claim disputes and the adjudicators were becoming more frustrated by the tactics of unscrupulous legal counsel and their use of s 32(3)(b). The denial of consent defied the wise words of the legislators of the Act, when they introduced s 30.[1246] Once consent is denied, the difficulty lies before the adjudicator in determining which payment claim to deal with, as the Act provides no guidance on this matter. This would later become apparent in the case of *Cooper & Oxley Builders Pty Ltd v Steensma.*[1247]

The applicant, AM Land Pty Ltd, applied for adjudication, seeking payment for two claims for progress payments which were not paid by Cooper & Oxley, against a contract to build the Sage Hotel in Hay Street, West Perth. The respondent, Cooper & Oxley Builders Pty Ltd, 'asserted that it was entitled to set off its entitlement to liquidated damages and damages for rectification work against any amount claimed by AM Land'.[1248]

As there were two claims for progress payments, Adjudicator Steensma[1249] sought consent from the parties, pursuant to s 32(3)(b) of the Act,[1250] but was denied the consent by the respondent. In their adjudication response dated 31 December 2015, the respondent stated that the application for adjudication was two payment disputes, and consent was not given by the respondent to adjudicate both.

Later, in the case of *Cooper & Oxley Builders Pty Ltd v Steensma*,[1251] his Honour Justice Le Miere observed:

> [t]he adjudicator decided to adjudicate the payment dispute in relation to one of AM Land's progress claims but not the other progress claim and not Cooper & Oxley's claim

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[1245] *Samsung C&T Corporation v Loots* [2016] WASC 330,73 [281].
[1246] *Construction Contracts Act 2004* (WA), s 30, which states:
30. Object of the adjudication process
The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.
[1247] [2016] WASC 386.
[1248] *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386, 4 [1].
[1249] The author of this research.
[1250] *Construction Contracts Act 2004* (WA), s 32(3)(b).
[1251] [2016] WASC 386.

> to set off damages due to it against the amounts claimed by AM Land.[1252]

Later 'AM Land then applied to have the dispute about its second progress claim adjudicated under the Act'.[1253]

His Honour held:

> In any event, the adjudicator found that s 32(3)(b) of the Act estopped him from determining payment claim 6 and from determining the assessment of Cooper & Oxley's set off claim. The adjudicator proceeded to determine the merits of progress claim 5.[1254]

His Honour would assert that the adjudicators had both erred. The first adjudicator did not consider the merits of Cooper & Oxley's claim for set-off, and therefore the adjudicator erred,[1255] and the second adjudicator had 'exceeded his authority and fell into jurisdictional error by misconstruing s 17 of the Act and thereby misconceived the limits of his functions or powers'.[1256] A writ of certiorari was issued quashing both determinations. His Honour made no mention of the statement pertaining to *s 32(3)(b) of the Act.*

His Honour would deliver his findings on 30 November 2016.

Previously in August 2015, Professor Evans, in his review of the Act, recommended that 'the Act should be amended to allow an adjudicator in his or her discretion to adjudicate simultaneously two or more payment disputes'.[1257] Professor Evans would comment on the two State Side cases and stated in the review of the Act, pertaining to the case 'the decision by the District Court appears to have failed to consider s 30.[1258] The cost to the parties would have

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[1252] *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386, 4 [2].
[1253] Ibid 4 [3].
[1254] Ibid 7 [16].
[1255] However: had the respondent in the first instance granted the consent, for me to determine all the issues before me, there can have been no doubt, that I would have dismissed the application and ensured that the respondent was paid the amount owing and due for set-off. By denying consent, two adjudications were conducted, a review was conducted by the Supreme Court of Western Australia, at great legal expense.
The 'great abomination', in my view, is akin to swinging a large two-handed claymore sword. There is always a considerable danger of hurting oneself on the back swing.
In my work as the research assistant to Professor Evans in his review of the act, I proposed that s32(3)(b) of the Act should be amended to allow an adjudicator in his or her discretion to adjudicate simultaneously two or more payment disputes.
[1256] *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386, 15 [40].
[1257] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), 87.
[1258] *Construction Contracts Act 2004* (WA), s 30, which states:
30. Object of the adjudication process
The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.

increased as a consequence of the two separate determinations'.[1259] Professor Evans noted that 'the matter proceeded to the Supreme Court, however by this time one of the parties had gone into administration.

The Government agreed with Professor Evans. The Explanatory Memorandum Construction Contracts Amendment Bill 2016 stated:

> This clause gives effect to the recommendation by amending section 32(3)(c) to provide that an adjudicator may adjudicate a payment dispute simultaneously with one or more other payment disputes if satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the disputes in accordance with section 30.[1260]

On 15 December 2016, 15 days after delivering his findings in *Cooper & Oxley Builders Pty Ltd v Steensma*,[1261] the Act would be amended. Section 32(3)(b&c) of the Act,[1262]

> (3) An appointed adjudicator may —
>
> (b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties;
>
> (c) adjudicate a payment dispute simultaneously with one or more other payment disputes if satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the disputes in accordance with section 30.

The 'great abomination', the tactic often used by unscrupulous legal counsel, was revoked. An adjudicator now no longer requires the consent to adjudicate two or more payment disputes simultaneously. The adjudicator need only look towards, what is considered by many; as the 'linchpin' of the Act, s 30. The adjudicator need only ensure that the adjudication process is carried out fairly, quickly, informally and as inexpensively as possible.' No longer will the often smaller party, with less deep pockets, be subjected to questionable decisions that give no consent, but put them in a position where they are forced to pay for two or more applications for adjudication.

The amendment does allow for an astute adjudicator, if he or she sees fit, to seek the consent

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[1259] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), 87.
[1260] Western Australia, Explanatory Memorandum *Construction Contracts Amendment Bill 2016*, 10 [Clause 13].
[1261] [2016] WASC 386.
[1262] *Construction Contracts Act 2004* (WA), s 32(3).

of the parties if they so wish, pursuant to s 32(3)(b) of the Act.[1263] It is not known how many are likely to take the parties up on this opportunity.

Interestingly, the NT Act, sometimes considered as somewhat more dynamic in some areas, does not give this discretion to an adjudicator, to determine whether two payment disputes can be adjudicated simultaneously. Time will tell if the NT will follow.

MinterEllison partner, Kip Fitzsimon, stated in a MinterEllison Construction Law Update that 'since this decision, section 32(3)(c) of the Act has been amended, allowing the adjudicator to use his or her own discretion in determining whether or not to simultaneously adjudicate more than one payment dispute, subject to restrictions.'[1264]

This is well put. However, Adjudicator Steensma would still have fallen into jurisdictional error, not over the issue of consent, but in erring when he failed to consider the question of set-off and liquidation costs.

In February 2018, the Western Australia Industry Advisory Group released a discussion paper on Security of payment reform:

> 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.[1265]

On 3 November 2016, the author wrote a letter to the then Attorney General and Minister for Commerce, the Honourable Michael Mischin MLC, noting that Professor Evans in the review had erred in his reference, stating s 32(4)(b) not s 32(3)(b). The author also voiced concern that the Amendment Bill (2016), had reflected this as the changes came under s 32 (3)(c), as discussed above.

The Attorney General responded:

[1263] Ibid s 32(3)(b).
[1264] MinterEllison, Construction Law Update (January-February 2017), 32. The author of this case review was MinterEllison Partner Kip Fitzsimon, head of the Perth Projects, Infrastructure and Construction team.
[1265] Western Australia Industry Advisory Group, '*Discussion Paper – Workshop 1 Security of payment reform*' (IAG February 2018), 22.

> The Bill amends amongst other things, section 32(3)(b) of the Act to remove the requirement for consent of the parties to adjudicate other payment disputes, provided the adjudicator is satisfied the requirements of section 30 of the Act can be satisfied.[1266]

Later the issue was discussed and confirmation was given that the correct interpretation related to an adjudicator not requiring consent between the parties if it satisfied the requirements of s 30 of the Act.

It would appear that the Building Commission has misinterpreted the amendments.

In Practice Guidance Note 7, released by the Department of Mines, Industry Regulation and Safety dated December 2017, it states:

> Despite the amendments, it is important to be aware that in cases where there are two or more payment disputes between the same parties (for example party A and B), section 32(3)(b) of the Act still requires the adjudicator to obtain the consent of both parties to adjudicate the payment disputes simultaneously.[1267]

It would appear that there is somewhat of a disconnect between the Attorney General of Western Australia and the Building Commission. During the review of the Act, this issue was discussed at great length between all parties, government departments and those using the Act. The author of this research was particularly vocal in ensuring that the issue of section 32(3)(b), amended the 'great abomination'.

Thankfully; two months later, the matter was put before his Honour Justice Tottle in *Clough Projects Australia Pty Ltd v Floreani*.[1268]

His Honour noted that Clough contended that the second respondent had tried to 'to wrap up nine disputed payment claims into a single application and this [was] fatal to the application'.[1269] They asserted that the adjudicator had not sought consent from the parties and had mistakenly construed s 32(3)(c) of the Act,[1270] and he had 'erroneously exercised his power in relation to that sub-section'.[1271] Clough maintained that the subsection was limited to

[1266] Personal Communication – Attorney General; Minister for Commerce, the Honourable Michael Mischin MLC, to the author dated 22 November 2016.
[1267] Department of Mines, Industry Regulation and Safety, Practice Guidance Note 7 *Adjudicating two or more payment disputes simultaneously between the parties*, dated December 2017.
[1268] [2018] WASC 101.
[1269] *Clough Projects Australia Pty Ltd v Floreani* [2018] WASC 101, 6 [11].
[1270] *Construction Contracts Act 2004* (WA), s 32(3)(c).
[1271] *Clough Projects Australia Pty Ltd v Floreani* [2018] WASC 101, 10 [27].

disputes with other parties, and would, if allowed, make s 32(3)(b) 'superfluous'.[1272] Section 32(3)(c) of the Act states:

> 32. Adjudication procedure
>
> (3) An appointed adjudicator may —
>
> (c) adjudicate a payment dispute simultaneously with one or more other payment disputes if satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the disputes in accordance with section 30.

Section 32(3)(c) had been amended as a result of the recommendations made in the *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'* by Professor Evans.

His Honour held:

> 37 In my opinion s 32(3)(c) of the Act gives an adjudicator the discretion to adjudicate a payment dispute simultaneously with one or more other payment disputes between the same parties if the adjudicator is satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the dispute in accordance with s 30.[1273]

He then gave five reasons for his decision. His Honour's reasons can be seen below in the footnotes.[1274]

[1272] *Clough Projects Australia Pty Ltd v Floreani* [2018] WASC 101, 13 [37].

[1273] Ibid 13 [39].

[1274] Ibid 13-15 [38-42].

> 38 First, there are no words in s 32(3)(c) that limit its application to payment disputes between different parties. There is no textual foundation for the construction for which Clough contends.
>
> 39 Second, I do not accept that construing s 32(3)(c) as applicable to payment disputes between the same parties renders s 32(3)(b) superfluous. The subsections are directed to different circumstances, s 32(3)(b) is the source of an adjudicator's jurisdiction to determine more than one payment dispute between the same parties simultaneously where the parties consent. Section 32(3)(c) is the source of an adjudicator's jurisdiction when the consent of one party is not forthcoming. In the latter case the adjudicator must be satisfied that adjudicating more than one payment dispute simultaneously will not adversely affect his or her ability to adjudicate the dispute in accordance with s 30. The structure of the section follows a logical order. Subsections 32(3)(a) and (b) are concerned with circumstances in which the parties consent and, as one would expect, the adjudicator's discretion is not subject to any express limitation. Consent is not mentioned in s 32(3)(c). When the consent of one of the parties to simultaneous adjudications is not forthcoming, in order to safeguard the interests of the non-consenting party, it is logical that an adjudicator's discretion should be constrained by the necessity that the adjudicator be satisfied the dispute can be adjudicated in accordance with s 30.

The matter of 'consent', the 'great abomination', has hopefully been expunged from the Act, when due consideration is given to the words of Section 30 of the Act. The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.[1275] This is a most pertinent issue that should not be forgotten by all those using the Act.

Set off and counterclaims

His Honour Justice Le Miere in *Cooper & Oxley Builders Pty Ltd v Steensma*,[1276] indicated that an adjudicator must consider liquidated damages, and that those liquidated damages are not considered as separate payment claims, even where consent is not given by parties to 'adjudicate simultaneously 2 or more payment disputes between the parties,' pursuant to s 32(3)(b) of the Act.[1277]

In *Alliance Contracting Pty Ltd v James*,[1278] his Honour Justice Beech noted:

> (8) the adjudicator set out his calculations of the net balance, leading to a sum in favour

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40 Third, it is reasonable to approach the construction of s 32(3)(c) on the basis that adjudicating payment disputes between the same parties simultaneously is less likely to adversely affect an adjudicator's ability to adjudicate in accordance with s 30 than adjudicating payment disputes between different parties simultaneously. It is unlikely that the legislature intended to confer a discretion on an adjudicator to undertake simultaneous adjudications between different parties but not simultaneous adjudications between the same parties.

41 Fourth, the object of the adjudication scheme created by the Act is to determine payment disputes arising out of construction contracts 'fairly and as quickly, informally and inexpensively as possible' with the primary aim of keeping the money flowing down the contractual chain. [12] Construing s 32(3)(c) as conferring a discretion on an adjudicator to adjudicate simultaneously more than one payment dispute between the same parties in the absence of the consent of one party promotes the object of the Act. Multiple payment disputes between the same parties often arise out of the same project. Frequently such payment disputes will be governed by the same contract and the y will have a common factual substratum. The potential for savings in time and costs if one adjudicator deals with more than one payment dispute is readily apparent. To require payment disputes of this kind to be adjudicated by different adjudicators in the absence of the consent of one party would be likely to generate increased costs and protract the dispute resolution process. The risk of inconsistent findings would be increased. There is considerable potential for one party to frustrate the object o f the Act as stated in s 30 by insisting on separate adjudications when simultaneous adjudications of payment disputes would otherwise achieve that object. The construction contended for by Clough would not serve the purpose of the Act. Section 32(4) recognises and facilitates the efficiencies that may be achieved by having one adjudicator adjudicate multiple payment disputes simultaneously by permitting an adjudicator to take into account information which the adjudicator receives in relation to the othe r payment disputes.

42 Fifth, the preferred interpretation of s 32(3)(c) is supported by relevant extrinsic materials. Those materials are a report prepared by Professor P Evans following the statutory review of the operation and effectiveness of the Act in 2015, as well as the explanatory memorandum to the *Construction Contracts Amendment Bill 2016*.

[1275] *Construction Contracts Act 2004* (WA), s 30.

[1276] [2016] WASC 386.

[1277] *Construction Contracts Act 2004* (WA), s 32(3)(b).

[1278] [2014] WASC 212.

of Alliance of $6,242.232.90;20

(9) the adjudicator stated that 'it is not possible for me in this determination to order any sum to be paid by Tenix to Alliance. What the above calculations shows is that there is no balance in favour of Tenix against Alliance and therefore there is on my assessment no sum payable by Alliance to Tenix'; and

(10) the adjudicator determined that the adjudicated amount was nil.[1279]

His Honour further stated:

65 As I have said, in my view, the definition of payment dispute directs attention to the payment claim, the rejection of which constitutes the payment dispute. In my view, where, as here, party B's response to a payment claim by party A is to assert a counterclaim that contends that party A is liable to party B, although the merits of the counterclaim will be considered in determining whether B is liable to make a payment on A's payment claim, that counterclaim is not itself subsumed into the payment dispute constituted by B's rejection of A's payment claim. Rather, B's counterclaim is itself a separate payment claim, the rejection of which will give rise to and constitute another payment dispute. Although factually overlapping, indeed intertwined, there are, in my view, nevertheless two payment disputes and two payment claims for the purposes of pt 3 of the Act.[1280]

His Honour Justice Beech would confirm that the respondent to a payment dispute, pursuant to the Act, is not eligible to submit, a counterclaim, as a defence, and this does not entitle the respondent to recuperate that amount, but it may be used to deny the claim of the applicant. An adjudicator is by virtue of the Act limited to either dismissing or determining a payment claim, but not conferring a counter-claim. The counterclaim will give rise to a new payment dispute. Where there is a net balance, and as Adjudicator James stated above where ‘'it is not possible for me in this determination…’, this must lead to a separate payment dispute. Had the amount in balance being greater in the payment claim, the excess would come into play for the next payment claim.

In 2016, the decisions of two adjudicators would come before the Supreme Court. Both adjudications pertained to a payment dispute between the same parties.

[1279] *Alliance Contracting Pty Ltd v James* [2014] WASC 212, 8 [22(10)].
[1280] Ibid, 17 [65].

In the previously mentioned case of *Cooper & Oxley Builders Pty Ltd v Steensma*,[1281] his Honour Justice Le Miere held that the first adjudicator, Adjudicator Steensma, had erred and had made a jurisdictional error and therefore his determination was quashed.

The first adjudicator had been estopped from determining the payment claims laid before him, pursuant to s 32(3)(b) of the Act,[1282] and proceeded to determine the merits of progress claim 5.[1283] The adjudicator 'determined that Cooper & Oxley was liable to AM Land and that Cooper & Oxley should pay to AM Land $182,047.44'.[1284]

The adjudicator fell into jurisdictional error, when he perceived that the two payment claims and 'the assessment of set off claim against liability to pay liquidated damages are three separate payment claims and disputes'.[1285] Of that view, His Honour simply stated: 'that is incorrect'.[1286]

His Honour found that pursuant to s 31(2)(b) of the Act,[1287] the adjudicator must, on its merits, make a determination on the balance of probabilities about 'the amount to be paid or returned'. His Honour stated that the payment dispute did not include the set-off claim made by Cooper & Oxley that they were due liquidated damages and rectification damages.[1288] His Honour gave two reasons for this: firstly, the set-off claim came 'as a shield, but not a sword'[1289] and the set-off claim was a defence but they did not seek payment; secondly, any payment sought by Cooper & Oxley must be seen as a separate payment claim and therefore; 'give rise to a separate payment dispute'.[1290]

His Honour looked to the decision made by his Honour Justice Beech in *Alliance Contracting Pty Ltd v James.*[1291] His Honour held that s 31(2)(b) of the Act[1292] 'does not empower the

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[1281] [2016] WASC 386.
[1282] *Construction Contracts Act 2004* (WA), s 32(3)(b).
[1283] *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386, 7 [16].
[1284] Ibid 4 [2].
[1285] Ibid 7 [16].
[1286] Ibid.
[1287] *Construction Contracts Act 2004* (WA), s 32(2)(b), which states;
> An appointed adjudicator must…(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

[1288] *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386, 9 [21].
[1289] Ibid.
[1290] Ibid.
[1291] [2014] WASC 212.
[1292] *Construction Contracts Act 2004* (WA), s 32(2)(b), which states;
> An appointed adjudicator must…(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

adjudicator to determine a payment dispute unless the claimant has made a separate adjudication application in respect of that payment dispute'.[1293]

However, his Honour Justice Le Miere pointed out that:

> A respondent to an application for adjudication may use its counterclaim or set off as a defence to the claim made against it. The adjudicator is required to take into account the respondent's response, including the merits of any counterclaim or set off, in reaching his determination.[1294]

There can be no doubt that the first adjudicator erred in his view that the set-off claim was a separate payment claim. However, a small issue that was highlighted in the second adjudication was the comment by his Honour Justice Le Miere.

His Honour stated that 'Cooper & Oxley informed AM Land that it had engaged a different ceiling and wall contractor to complete AM Land's works and set out the amount *estimated* it would cost to complete the works'.[1295] The first adjudicator, on receipt of the response, noted an email,[1296] which stated; 'As per clause 17 .10 of our Subcontract Agreement,[1297] Cooper and Oxley will set-off the above costs to complete AM Land's works against any outstanding claims in relation to this Subcontract'.[1298]

The respondent stated 'please see below for an approximate breakdown of the costs Cooper and Oxley now face in order to complete AM Land's original scope of works'.

Of concern are the words 'estimated' and 'approximate breakdown'.

Would any prudent person go into a contract where the consideration was 'estimated' or 'approximate'? Whilst this recognised that adjudications are by their nature interim, there is no propensity for a party to question the veracity of the 'estimated' or 'approximate' amounts.

Firstly, are the 'estimated' or 'approximate' amounts of the set off claim, 'inadequately

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[1293] *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386, 9 [21].
[1294] Ibid [22].
[1295] Ibid 6 [12].
[1296] Email from the Respondent dated Friday, 11 December 2015 3:58 PM.
[1297] Clause 17.10-Set-Off reads as follows:

> The Contractor may set-off from any monies due, or reasonably anticipated by the Contractor to become due, to the Subcontractor pursuant to this Subcontract (including any Retention Amount or security) any debt, amount, claim for damages or any other entitlement (including under an indemnity) the Contractor may have against the Subcontractor.

[1298] Response - 48-15-05 (Matter 80925) - A.M. Land Pty Ltd v Cooper & Oxley Builders Pty Ltd, Annexure 28, email dated Friday, 11 December 2015 3:58 PM.

articulated' given the opinion of her Honour Justice Pritchard in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd*[1299] or, if they are considered by an adjudicator, does it constitute a denial of natural justice?[1300]

His Honour Justice Pullin (with Newnes JA and Murphy JA both agreeing) in *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd,*[1301] correctly held that: 'A dispute must be genuine and an offsetting claim must also be genuine. To be genuine, they must be bona fide. They must not be 'spurious, hypothetical, illusory or misconceived'.[1302] His Honour went on to say that if the claim is indeed genuine 'it should result in the reduction of the amount of the demand'.[1303]

The applicant is given no recourse to the defence set off claim made by the respondent. There has been much discussion on this issue with some views declaring this is a breach of natural justice or procedural fairness.

In Queensland an interesting prospect was put forward by his Honour Justice Burns in *Ostwald Bros Pty Ltd v Jaylon Pacific Pty Ltd & Ors,*[1304] [6] where his Honour stated:

> [a]lthough an adjudicator is not required to provide an opportunity to the parties to be heard on every point, there is a clear obligation to do so where the point is material to the outcome of the adjudication, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result.[1305]

As the first adjudicator, there was much concern about the 'estimated' or 'approximate' amounts, but no consideration was given, as it was mistakenly identified as a separate payment claim.

One course of action that was open to the adjudicator would be to seek, pursuant to s 32(3)(a) of the Act[1306] an extension of time. As an adjudicator is not 'bound by the rules of evidence

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[1299] [2012] WASC 304.
[1300] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 50 [144].
[1301] [2014] WASCA 91.
[1302] *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91, 16 [52]. His Honour then quoted: *Durkan v Sandbank Holdings Pty Ltd* [2008] WASCA 249; *Edge Technology Pty Ltd v Lite-On Technology Corporation* [2000] NSWSC 471; (2000) 34 ACSR 301, 307; *Createc Pty Ltd v Design Signs Pty Ltd* [2009] WASCA 85 [45]; *Central City Pty Ltd v Montebento Holdings Pty Ltd* [2011] WASCA 5 [9] - [15].
[1303] *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91, 21 [72].
[1304] [2016] QSC 240.
[1305] *Ostwald Bros Pty Ltd v Jaylon Pacific Pty Ltd & Ors* [2016] QSC 240, 3-4 [6].
[1306] *Construction Contracts Act 2004* (WA), s 32(3)(a), which states;
> An appointed adjudicator may: with the consent of the parties, extend the time prescribed by section 31(2) for making a determination.

and may inform himself or herself in any way he or she thinks fit' (per s 32(1)(b) of the Act)[1307], and the adjudicator could have, in order to obtain additional information, or further clarify the 'estimated' or 'approximate' amounts, pursuant to s 32(2)(a) of the Act,[1308]. However, in the above case, the downfall of this procedure lies with consent, and no consent had previously been given by the respondent.

Dealing with quantum meruit and the payment claim

In 2015, an adjudicator determined that an applicant was due an amount. He determined that there was a claim in Quantum Meruit, and made his determination accordingly.

By writ of certiorari, the matter of *Delmere Holdings Pty Ltd v Green*[1309] came before the Supreme Court of Western Australia. The plaintiff, Alliance Infrastructure Pty Ltd, sought to quash the determination made by the first respondent, the Adjudicator Green.

His Honour Justice Kenneth Martin would allow the application and the certiorari was issued.

The Act does not give rise as to whether quantum meruit lies within the grasp of the adjudicator.

The answer lies in common law.

Firstly we must determine what quantum meruit is. Graw wrote that the term quantum meruit purports to be 'as much as he has earned'.[1310] His Honour Justice Deane noted in *Pavey and Matthews Pty Ltd v Paul*[1311] that there were two classes pertaining to claims. They are:[1312]

> one to recover a debt arising under a genuine contract, whether express or implied; the other to recover a debt owing in circumstances where the law itself imposed or imputed an obligation or promise to make compensation for a benefit accepted.

Quantum meruit comes about when Party A undertakes some form of work from which Party B then derives some form of benefit, but Party A is unable to seek remuneration for the work provided as there is no contract between the Party A and Party B.

[1307] Ibid s 32(1)(b), which states;
> An appointed adjudicator; is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.

[1308] Ibid s 32(2)(a), which states;
> An appointed adjudicator may: request a party to make a, or a further, written submission or to provide information or documentation, and may set a deadline for doing so;

[1309] *Delmere Holdings Pty Ltd v Green* [2015] WASC 148.
[1310] Stephen Graw, *An Iintroduction to the Law of Contract* (Thomson Reuters, 7th Ed, 2012), 553.
[1311] *Pavey and Matthews Pty Ltd v Paul [1987]* 162 CLR 221.
[1312] Ibid [13].

In 1939, His Honour Chief Justice Jordan held in *Horton v Jones (No.2)*[1313] that in the case where there was no contract between Party A and Party B, quantum meruit might arise in the following circumstances:[1314]

> (1) if persons purport to enter into a special contract for services, but the special arrangement between them does not amount to a contract because the remuneration, although referred to, is not sufficiently defined to be ascertainable, and if services are in fact afterwards rendered and accepted pursuant to the arrangement in circumstances which indicate that it is not intended by the parties that they are to be gratuitous, the law implies a contract of employment at a quantum meruit: *Way v. Latilla*. (l) (2) If persons attempt to contract for services by a purported contract which is for some reason void in law, and services are rendered and accepted under the void contract, the law imposes on the party who has had the benefit of the services an obligation to pay a quantum meruit. This obligation is imposed by law and does not depend on an inference of an implied promise: *Craven-EUis v. Canons Ltd*.(2).

His Honour perceived that:[1315]

> On the other hand, if the relation between the parties was never intended to be a business relation at all-if the services were rendered without any intention on either side of any charge being made for them, in the hope, on the part of the person who rendered them, that the recipient might be moved thereby to some ex gratia benevolence when making his will no basis exists for a claim to a quantum meruit.

In 1987, in the High Court, the Honourable Coram of Mason, Wilson, Brennan, Deane and Dawson JJ, held in *Pavey and Matthews Pty Ltd v Paul*[1316] that quantum meruit evolves from an equitable agreement and not as had been previously thought, out of contract. In *Pavey and Matthews Pty Ltd v Paul*, the appellants sought recompense for construction work that they had carried out for the respondent. The court found that the contract between the appellants and the respondent was unenforceable pursuant to s 45 of the *Builders Licensing Act 1971* (NSW), as the contract was not made in writing and signed by the parties as established

[1313] *Horton v Jones (No.2)* (1939) 39 SR NSW 305, NSW StRp 35; (1939) 39 SR (NSW) 305 (21 September 1939).
[1314] Ibid 319-20.
[1315] *Horton v Jones (No.2)* (1939) 39 SR NSW 305, NSW StRp 35; (1939) 39 SR (NSW) 305 (21 September 1939), 320.
[1316] *Pavey and Matthews Pty Ltd v Paul [1987]* 162 CLR 221.

by the provisions of the *Builders Licensing Act 1971* (NSW). The appellants were granted the retrieval of the sought recompense on a quantum meruit claim.

His Honour Justice Goff in *British Steel Corp v Cleveland Bridge and Engineering Co Ltd,*[1317]noted that, quantum meruit 'straddles the boundaries of what we now call contract and restitution'.

In the matter of *Delmere Holdings Pty Ltd v Green,*[1318] *t*he first respondent Adjudicator Green, in the words of his Honour Justice Kenneth Martin, 'played no part in these proceedings. By letter to the Supreme Court on 23 January 2015, he has (properly) indicated his agreement to abide by the court's decision in these proceedings'.[1319]

The plaintiff challenged the determination by the adjudicator and asserted that the adjudicator had made a jurisdictional error in that he:[1320]

> misconstrued the definition of 'payment claim' in s 3 of the [CC Act], wrongly proceeding on the basis that 'payment claim' includes a claim for unjust enrichment or in equity [Ground 1].

His Honour observed that pertaining to paragraphs 60 – 70 of the adjudicator's determination:

> Mr. Green's Determination proceeds to analyse the basis of Delmere's response to Alliance's claim that an implied term should be inserted into the Contract, which provides for 'reasonable remuneration' to be paid to Alliance for any 'change in methodology' (see par 61). Delmere's response, in short, was to argue that no basis for an implied term existed, owing to the express provisions of the Contract (see par 62).[1321]

His Honour Justice Martin further remarked:

> Mr Green then proceeds to analyse this 'contention', but not according to the analysis that would be expected if considering the possibility of an implied term but, rather, by an analysis more befitting consideration of whether or not a claim in quantum meruit existed - referring to the decision *ASIC v Edwards* [2005] NSWSC 831; (2005) 220 ALR 148 (which appears to be wholly unrelated to the issue of the existence of an implied term in

[1317] *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504.
[1318] *Delmere Holdings Pty Ltd v Green [2015]* WASC 148.
[1319] *Delmere Holdings Pty Ltd v Green* [2015] WASC 148, 5 [5].
[1320] Ibid 8 [15(1)].
[1321] Ibid 31 [114].

a contract) three times (including a large extract, see par 64).[1322]

His Honour recognised that 'a quantum meruit claim is not a claim for a liquidated amount falling due under a contract. In law, it is a creature of a very different character'.[1323] He concluded that Mr Green had made a jurisdictional error by the inclusion of a claim for 'unjust enrichment or a right in equity'[1324] under a construction contract, pursuant to the Act.

His Honour held:

> 120 First, the concept of unjust enrichment (see *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 583 (Deane J)) does not provide any stand-alone cause of action capable of being independently sued upon under Australian law.[1325]

His Honour; would then list the authoritative cases used in support of that proposition. [1326] He then stated:

> 122 Second, a quantum meruit claim by Alliance for a reasonable amount would only arise, if it did, outside of these parties' construction contract, and not under it, as is required under part 3 of the CC Act, as we have now seen.[1327]
>
> 123 Third, a claim in quasi-contract seeking a quantum meruit is also not a claim to a

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[1322] Ibid.

[1323] Ibid 31-33 [115].

[1324] Ibid 34 [118].

[1325] *Delmere Holdings Pty Ltd v Green [2015]* WASC 148, 34 [120]. His Honour went on to say at 34 [120]:

> As most recently restated by the High Court in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; (2014) 307 ALR 512 [74] (Hayne, Crennan, Kiefel, Bell and Keane JJ), by reference to *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; (2012) 246 CLR 498 [30] (French CJ, Crennan and Kiefel JJ) the position is:
>
> > More recently, *Equuscorp Pty Ltd v Haxton* confirmed that unjust enrichment does not found or reflect any 'all-embracing theory of restitutionary rights and remedies' … As this Court acknowledged in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* [1988] HCA 17; (1988) 164 CLR 662 at 673 per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ], 'contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience'.

[1326] Authority in support of that proposition under Australian law is overwhelming and extensive: see *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516 [70] - [75] (Gummow J); *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353 [46] (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ) and [89] (Dawson J); *Pavey & Matthews Pty Ltd v Paul* [54] (Deane J); *Muschinski v Dodds* [49] (Deane J); *Lumbers v W Cook Builders Pty Ltd (in liq)* [2008] HCA 27; (2008) 232 CLR 635 [85] (Gummow, Hayne, Crennan and Kiefel JJ); *Bofinger v Kingsway Group Ltd* [2009] HCA 44; (2009) 239 CLR 269 [85] - [98] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); and in Western Australia specifically, see *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 [45] - [55] (Edelman J); *Ideas Plus Investments Ltd v National Australia Bank Ltd* [2006] WASCA 215; (2006) 32 WAR 467 [62] - [67] (Steytler P); *Saraceni v Mentha* [2011] WASC 94 [45] (Corboy J); and *ABB Power Generation Ltd v Chapple* [2001] WASCA 412; (2001) 25 WAR 158 at [9] - [18] (Murray J).
I have included the above cases as a reference for adjudicators to utilise and have further understanding when faced with the issue of unjust enrichment and quantum meruit.

[1327] *Delmere Holdings Pty Ltd v Green [2015]* WASC 148, 35 [122].

> 'right in equity' - such causes of action are wholly common law claims. Again, some (unspecified) type of equitable claim would not seem to be for an 'amount', arising under the parties' contract.[1328]

His Honour concluded 'upon Grounds 1[1329] to 4 being established, with fundamental jurisdictional errors having been demonstrated, I would issue orders absolute for certiorari quashing Mr Green's Determination.[1330]

Two months later, his Honour Justice Mitchell in *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation,* [1331] would reconfirm the words of his Honour Justice Kenneth Martin. His Honour held that an adjudicator; 'may lack power to make a determination under s 31(2)(b) of the Act even when he or she is not required to dismiss an application under s 31(2)(a)',[1332] and highlighted by example that; 'where the claim is in substance a quantum meruit claim which does not arise under the construction contract'.[1333]

There can be no doubt that his Honour Justice Kenneth Martin was right. For there to be a payment dispute, pursuant to section 6 of the Act, there must be a 'construction contract' (pursuant to s 3) for 'Construction work' (pursuant to s 4) or 'goods and services related to construction work' (pursuant to s 5) for work which has taken place in a 'site in Western Australia' (pursuant to s 4(1). All need to be met to allow an adjudicator to have jurisdiction.

An adjudicator should dismiss the application for adjudication, pursuant to s 31(2)(a)(i) of the Act,[1334] as the contract concerned is not a construction contract. There is no contract.

6.7. East Coast Model – Judicial review matters

In the past twelve months, there have been two East Coast model legislation cases that have been brought before the Courts that potentially have consequences not only for the Act, but all adjudicators' in Australia. While the cases relate to East Coast Models, the subject matter of both are relevant to all adjudicators'. The cases highlight that rules and regulations must be strictly adhered to, otherwise there is potential for judicial review, and adjudicators' determinations being quashed by the court. The cases are as follows:

[1328] Ibid [123].
[1329] Ground 1: 'unjust enrichment' and 'a right in equity'.
[1330] *Delmere Holdings Pty Ltd v Green [2015]* WASC 148, 39 [143].
[1331] [2015] WASC 237.
[1332] *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation* [2015] WASC 237, 51 [192].
[1333] Ibid.
[1334] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iv).

- The NSW case of *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group*;[1335] and the issue pertaining to the preparation of an application, and
- The ACT case *of St Hilliers Property Pty Limited v ACT Projects Pty Ltd and Simon Wilson,*[1336] and the issue of the failure by an adjudicator to do the determination himself.

***Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* and the preparation of an application**

The matter for the Court here pertained to the preparation of an application and the use of a 'Cloud-based system' and a USB flash drive.

Pursuant to s 26(2)(a) of the Act,[1337] the application must be 'prepared in accordance with, and contain the information prescribed by the regulations. In the case of an application, the applicant must look towards Reg 5 of the Regulations,[1338] which states:

> Reg 5. Prescribed information in application for adjudication
>
> For the purposes of section 26(2)(a) of the Act, an application to have a payment dispute adjudicated must, in addition to the other information required by section 26(2) of the Act, contain —
>
> (a) the name of the appointed adjudicator or prescribed appointor and the adjudicator's or appointor's contact details;
>
> (b) the applicant's name and contact details; and
>
> (c) the respondent's name and contact details.

When giving contact details, the applicant must ensure that they abide by Reg 4 of the Regulations,[1339] which states:

> Reg 4. Giving a person's contact details
>
> If a person is required by these regulations to give the contact details of a person, the person required to give the details must give the address, telephone and

[1335] [2017] NSWSC 194.
[1336] [2017] ACTSC 177.
[1337] *Construction Contracts Act 2004* (WA), s 26(2)(c).
[1338] *Construction Contracts Regulations 2004* (WA), reg 5.
[1339] *The Construction Contracts Regulations 2004* (WA), reg 4.

> facsimile numbers and ABN of the person or the person's business (or ACN of the person if there is no ABN) to the extent to which the person required to give the details knows those details.

Interestingly, in a recent NSW Supreme Court case, his Honour Justice Hammerschlag, in *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group,*[1340] takes a more 'purist' approach to compliance.

The case highlighted that where an applicant uploaded an application for adjudication onto the 'Cloud-based storage system, such as in this case 'Hightail'[1341] of the ANA and then also downloaded a copy unto a USB Flash Drive, and sent it to the respondent, the NSW Act requires 'the service of a written copy'.

His Honour held:

> 51 Punctilious compliance with provisions of the Act upon which the effectiveness of the decision making process under it depends is required: *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at will not only will-[48], [96] and [213]-[229].[1342]
>
> 52 Non-compliance with such a provision will have the consequence that an essential prerequisite to an adjudicator's jurisdiction is not met, and an adjudication determination made in the face of such non-compliance will be vitiated.[1343]

His Honour stated that Section 21(1) of the *Interpretation Act 1987* (NSW) provides that within any Act or instrument in NSW '"writing" includes printing, photography, photocopying, lithography, typewriting and any other mode of representing or reproducing words in visible form.'[1344]

Further:

> 75 Absent some relevant statutory expansion or limitation of the notion (and there is none here), a document will, in the ordinary meaning of the word, be served if the efforts of the person who is required to serve it have resulted in the person to be

[1340] [2017] NSWSC 194.
[1341] Hightail is an internet based data storage or 'Cloud' provider.
[1342] *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194,[51].
[1343] Ibid [52].
[1344] *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194, 13 [74].

> served becoming aware of the contents of the document: *Capper v Thorpe* (1998) 194 CLR 342 at 352. In the case of an email transmission, or where documents are uploaded to a site such as Hightail, it cannot be said that they have been served until they have been accessed: *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1Qd R 265 at 271 [32]-[34].[1345]

His Honour Justice Hammerschlag, held: 'A fortiori,[1346] delivery of a USB stick will not suffice',[1347] and granted certiorari and quashed the determination.[1348]

How does this fare for Western Australia? Section 5 of the *Interpretation Act 1984 (WA)* defines writing as:

> ***writing*** and expressions referring to writing include printing, photography, photocopying, lithography, typewriting and any other modes of representing or reproducing words in visible form;

In 2014, as previously discussed, the author, as an adjudicator to a payment claim dispute, received an application for adjudication that was encumbered by some 23 lever arch folders of A4 and A3 documents. It contained 7977 pages. The total quantum of the submissions by both parties was 34, A4 & A3 size folders, and contained 11906 pages. There would have been three complete copies made of the 34 folders: one for the adjudicator, one for the applicant, and one for the respondent. This would have equated to 11,906 pages. A waste of paper and scarce natural resources.[1349]

The Act and the law is not clear on this issue though there may be some merit in looking towards the *Electronic Transaction Act 2011* (WA) and the *Construction Contracts Act 2004* (WA), and make amendments to further recognise the use of electronic communications, such as the 'Cloud' and data storage devices, such as 'USB' devices, that would prevent the re-

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[1345] *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194, 13 [75].

[1346] a fortiori - *adverb & adjective*. Used to express a conclusion for which there is stronger evidence than for a previously accepted one. "they reject all absolute ideas of justice, and a fortiori the natural-law position" <https://www.google.com.au/search?q=77+A+fortiori&rlz=1C1GGRV_enAU751AU751&oq=77+A+fortiori&aqs=chrome..69i57.1102j0j8&sourceid=chrome&ie=UTF-8#q=A+fortiori>

[1347] *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194, 14 [77].

[1348] Ibid 15 [84].

[1349] I am a lawyer, I have always invested in top of the range and powerful PDF software, such as Adobe Acrobat DC, and a good scanner, and upon receipt of the application and later the response, I scan all the documents and convert them to PDF. Utilising the software with the PDF documents, allows me to cut and paste parts of the application or response, and also use the advanced search functions to more easily navigate around the copious quantities of data that make up the applications and responses of a payment claim dispute.

occurrence of having 34 folders.

The Prescribed Appointers

The Act states, pursuant to s 26(1)(c)[1350] that when applying for adjudication, the applicant must serve the application on a prescribed appointor, that had been appointed in the contract[1351] or one that is 'chosen by the party'.[1352] The Act, pursuant to s 3,[1353] defines a prescribed appointor as 'a person prescribed as such by the regulations'. The Regs, pursuant to r 11, states:

> 11. Prescribed appointors
>
> For the purposes of the definition of "prescribed appointor" in section 3 of the Act, the persons listed in the Table to this regulation are prescribed.[1354]

Under the East Coast models of security of payment legislation, the prescribed appointors are referred to as authorised nominating authorities (ANA).

The Act provides no real definition. Professor Evans describes a prescribed appointor as 'a body registered by the Registrar and prescribed in the regulations as having the authorization to appoint an adjudicator for the adjudication of the payment dispute'.[1355]

The role of the prescribed appointors is to receive the application for adjudication from the applicant, review the application submitted by the applicant and ensure that the application meets the guidelines laid down within the Act, assist the parties on the adjudication process and nominate an adjudicator to deal with the adjudication of the payment claim. However, as Coggins reveals, it is worth noting that no 'for profit' prescribed appointors exist in the West Coast jurisdictions, all being professional bodies or associations'.[1356]

[1350] *Construction Contracts Act 2004* (WA), s 26(1)(c).
[1351] Ibid s 26(1)(c)(ii).
[1352] Ibid s 26(1)(c)(iii).
[1353] Ibid s 3 prescribed Appointor.
[1354] The Table of Prescribed Appointors found in Reg 11 is:

Table

The Australian Institute of Building
Australian Institute of Project Management
The Australian Institute of Quantity Surveyors
Electrical and Communications Association of Western Australia (Union of Employers)
The Institute of Arbitrators and Mediators Australia
Master Builders Association of Western Australia (Union of Employers)
RICS Australasia Pty Ltd
The Royal Australian Institute of Architects

[1355] Philip Evans, 'The *Construction Contracts Act 2004* (WA):What Engineers Need to Know' 2005, *The Engineering Industry* - Vol 7, 6.
[1356] Jeremy Coggins, *A Proposal for Harmonisation of Security of Payment Legislation in the Australian Building and Construction Industry*, (PhD Thesis, the University of Adelaide, 2012), 238.

The prescribed appointors may seek appointment fees for the nomination of an adjudicator.

An applicant must serve the application for adjudication, pursuant to s 26(1)(b&c) of the Act,[1357] on the respondent and the prescribed appointor. Later from the adjudicator's perspective; the adjudicator must determine whether the written application was prepared in accordance with the information contained in the Regulations and the 'payment claim that has given rise to the payment dispute'. Any failure to meet the strict compliance of s 26 and regs 4 and reg 5, is amenable to jurisdictional error, which occurs when the adjudicator exceeds one's jurisdiction. Consequently, an adjudicator should dismiss the application, pursuant to s 31(2)(a)(ii) of the Act,[1358] which will be discussed later in this chapter.

The adjudicator must believe that all that is laid before them, in writing, meets the requirements of the Act. Therefore; pursuant to s 31, within 14 days after the service or the response, either make a decision to dismiss the application, pursuant to s 31(2)(a), or pursuant to s 31(2)(b), on the 'balance of probability' make a determination.

Many utilising the Act felt that 28 days was not a sufficient duration of time to submit their application, however that is what the Act states. Professor Evans found that during the drafting of his report of the Act, this issue with was regularly mentioned.

The *Construction Contracts (Security of Payments) Act 2004* (NT), pursuant to s 28 of the NT Act, provides a party with 90 days after the dispute arises to prepare a written application.[1359]

St Hilliers Property Pty Limited v ACT Projects Pty Ltd and Simon Wilson and the failure to DIY

The issue here before the Court was the delegation by an adjudicator, to another person, to prepare and draft his determination for him.

In July 2017, his Honour Acting Justice Walmsley of the Supreme Court of the Australian Capital Territory, delivered a decision that related to the *Building and Construction Industry (Security of Payment) Act 2009* (ACT). The case, *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor*,[1360] involved a payment claim. The Appellant, St Hilliers Property

[1357] *Construction Contracts Act 2004* (WA), s 26(1)(b&c).
[1358] Ibid s 31(2)(a)(ii).
[1359] In a telephone conversation with the Northern Territory Registrar, Mr Guy Riley, he stated that in his view 90 days was too long and the 14 days provided by the Western Australian act was perhaps too short. He indicated that perhaps 45 days would be a sufficient compromise, and was looking to the review and outcome of the Western Australian Act, to provide some guidance for future discussion in the Northern Territory.
[1360] [2017] ACTSC 177.

Pty Ltd, sought three grounds on which to criticise the determination made by Adjudicator Wilson. They included that the payment claim was served too late,[1361] and a reference date was missing at the time of service.[1362]

The third reason for the criticism of the determination was that Adjudicator Wilson, had 'in effect, delegated the preparation of his adjudication by having someone else prepare it, a course not permitted by the Act.'[1363]

After completing the adjudication, Adjudicator Wilson had invoiced the parties and it was noted that about half the work pertaining to the adjudication had been undertaken by another adjudicator, Adjudicator Turner.

Adjudicator Wilson had stated that his work had been 'very busy' and he was unable to do it, so he asked Adjudicator Turner to do it for him.[1364] Said his Honour Acting Justice Walmsley; 'Mr Turner prepared a draft adjudication, (the draft) containing many expressions of view and draft findings about matters in issue, Mr Wilson took it into account and incorporated it in his own adjudication, which he inappropriately put forward as all his own work.'[1365]

Section 42 of the ACT Act,[1366] states what an adjudicator can consider, that being:

> (2) In deciding an adjudication application, the adjudicator must only consider the following:
>
> (a) this Act;
>
> (b) the construction contract to which the application relates;
>
> (c) the payment claim to which the application relates, together with any submission, including relevant documentation, properly made by the claimant in support of the claim;
>
> (d) the adjudication application;
>
> (e) the payment schedule, if any, to which the application relates, together with any submission, including relevant documentation, properly made by the

[1361] *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor* [2017] ACTSC 177, 4 [25].
[1362] *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor* [2017] ACTSC 177, 4 [25].
[1363] Ibid.
[1364] Ibid 12 [84].
[1365] Ibid 12 [85].
[1366] *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 42(2).

respondent in support of the schedule;

(f) the adjudication response, if any;

(g) the result of any inspection by the adjudicator of any matter related to the claim.

The s 42(2) of the ACT Act, did not contemplate the consideration of the role of Adjudicator Turner by assisting in the drafting, and therefore would be strictly prohibited.

His Honour Acting Justice Walmsley turned towards the words of his Honour Justice McDougall in *Laing O'Rourke v H and M*, [1367] who argued that it should involve 'an active process of intellectual engagement.'[1368] His Honour reasoned that there is an obligation on an adjudicator. He maintained that an adjudicator could refuse any nomination put before them and they are 'not forced to accept the nomination,'[1369] and with that obligation comes the statutory preconditions. His Honour also stated that 'the outcome of the adjudicator's consideration may have very significant consequences.'[1370]

His Honour Acting Justice Walmsley did not deny that an adjudicator can have assistance. His Honour turned to the case of *Minister for Local Government v South Sydney City Council*[1371] and inferred that if a statute gives rise to 'a power to inquire'[1372] having support would not be suitable, as it is their role to inquire. His Honour accepted that some assistance was acceptable. However, his Honour was quick to state 'the parties were entitled to have their dispute decided by the person who had agreed to decide it. They did not have that.'[1373]

His Honour Acting Justice Walmsley asserted the determination made by Adjudicator Wilson was void and be set aside. However; his Honour did not finish there. In awarding costs, though the opinion of his Honour was that 'costs should follow the event,'[1374] and that there was no order for costs made against Adjudicator Wilson, he deemed that Adjudicator Wilson 'should share some of the costs liability.'[1375]

His Honour Acting Justice Walmsley also looked towards the Tasmania Supreme Court (Full

[1367] [2010] NSWSC 818.
[1368] *Laing O'Rourke v H&M Engineering & Construction* [2010] NSWSC 818, 14 [39].
[1369] Ibid.
[1370] Ibid.
[1371] [2002] NSWCA 288; 55 NSWLR 381.
[1372] *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor* [2017] ACTSC 177, 17 [131].
[1373] Ibid 17 [134].
[1374] Ibid 26 [220].
[1375] Ibid.

Court) case of *Fernando v Medical Complaints Tribunal.*[1376] The strong and honourable bench of Crawford, Slicer and Evans JJ, rejected the principle that it was 'not appropriate that orders for costs of the appeals be made against it,'[1377] and 'the statutory protection afforded to members of the Tribunal.'[1378]

His Honour held 'that because most of the costs were incurred by the first defendant's defence of the proceedings, Mr Wilson should bear 20% of the plaintiff's costs and the first defendant 80%.'[1379]

For the Act, there are two issues at hand. The first being whether the delegation by an adjudicator for the preparation of an adjudication by another party would breach the Act, and secondly, the issue of costs.

What are the implications of *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor* on the *Construction Contracts Act 2004* (WA)? This becomes an ethical issue, more so than a legal one.

The Act is not as stringent as is the NSW Act (East Coast models). The Act, pursuant to s 32(1)(a),[1380] states that an adjudicator 'must act informally' and pursuant to s 32(2)(b),[1381] 'is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.'[1382] A good barrister might argue the meaning of the word inform, and accordingly the Australian Pocket Oxford Dictionary defines it as; 'knowing the facts, enlightened.'[1383]

If an adjudicator is, as was in the case of Adjudicator Wilson is very busy, they can, pursuant to s 32(3)(a) of the Act, with the consent of the parties, seek an extension of time.[1384] If the matter is too complex, dismiss the application, pursuant to s 31(2)(a)(iv) of the Act,[1385] and potentially face the limited right of review, pursuant to s 46 of the Act,[1386] and the potential reverse of a decision and remitted back to make another determination. Alternatively, the

[1376] [2007] TASSC 44; 16 TAS R 237.
[1377] *Fernando v Medical Complaints Tribunal*, [2007] TASSC 44; 16 TAS R 237, [21].
[1378] Ibid [22].
[1379] *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor* [2017] ACTSC 177, 26 [221].
[1380] *Construction Contracts Act 2004* (WA), s 32(1)(a).
[1381] Ibid s 32(1)(b).
[1382] Ibid.
[1383] The Australian Pocket Oxford Dictionary (1976), Inform, 415.
[1384] *Construction Contracts Act 2004* (WA), s 32(3)(a). This research, while analysing all the available determinations/decisions, found that the longest extension of time consented by the parties was a staggering additional 352 days. I do believe this is what the legislators had in mind, but the parties consented.
[1385] *Construction Contracts Act 2004* (WA), s 31(2)(a)(iv).
[1386] *Construction Contracts Act 2004* (WA), s 46.

adjudicator could simply decline the appointment.

One could always argue that pursuant to s 30 of the Act,[1387] delegating work to another, either adjudicator or lawyer, was ensuring that it was done in a manner that was 'fair and quick, informal and inexpensive.'

The views of his Honour Justice McDougall in *Laing O'Rourke v H and M*, [1388] and his Honour Acting Justice Walmsley in *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor*,[1389] must hold. Within the Resolution Institute (WA Chapter), there has always been a core group of Senior Mentors, available to assist an adjudicator, in giving advice for some of the more complex issues that may arise before a more junior adjudicator. Many may have had their secretaries or PAs type out lengthy determinations, in ensuring the efficiency of s 30.

The reality is as his Honour Acting Justice Walmsley stated that 'the parties were entitled to have their dispute decided by the person who had agreed to decide it. They did not have that.'[1390]

To date, this issue has not arisen in the Courts of Western Australia, though one can only speculate if this does occur within Western Australia, as there has been no anecdotal evidence to suggest that this occurs. However, it is more than likely that due consideration would be given by practising adjudicators, to ensure that they undertake the preparation and drafting themselves.

6.8. The *Construction Contracts Act 2004* (WA), the creeping legislation and the continued supervisory role of the Supreme Court of Western Australia

When Professor Evans had undertaken the review of the Act, the issue of the judicial review of adjudications was put to him. Submissions included one from a Member of the Legislative Assembly of Western Australia, the Honourable Peter Abetz MLA, who discoursed over the Supreme Court case of *WQube Port of Dampier and Loots of Kahlia Nominees*.[1391] The Reverend asserted:

> The fact that an aggrieved person can still apply to the Supreme Court for a judicial review of the decision effectively creates a right of appeal, which as this case shows, is

[1387] Ibid s 30.
[1388] [2010] NSWSC 818.
[1389] [2017] ACTSC 177.
[1390] Ibid 17 [134].
[1391] [2014] WASC 331.

> often blatantly exploited by unscrupulous operators.[1392]

Professor Evans would categorically declare:

> A number of submissions put this issue, candidly if not bluntly, in terms of; 'how can we stop interference with adjudication determinations?' Whilst perhaps a simple question, nevertheless the answer is necessary complex.[1393]

Professor Evans recommended:

> It is not considered constitutionally possible to amend the Act to further restrict the review of adjudicators' determinations. The Courts of Appeal of several states have affirmed that the Kirk principles constitutionally guarantee Supreme Court judicial review for jurisdictional error in adjudication determinations under the state security of payment legislation. The Western Australian Court of Appeal has held that in making a determination, an adjudicator was exercising a statutory power that could affect the rights of the parties and was subject to the supervisory jurisdiction of the Supreme Court, including the writ of certiorari.[1394]

Being an adjudicator who felt the full weight of a judicial review by his Honour Justice Le Miere in *Cooper & Oxley Builders Pty Ltd v Steensma*,[1395] (and potentially before his Honour Justice Hall in *State Side* had the applicant not gone into administration), served as a reminder of the words that his Honour Justice McKechnie spoke at the first Institute of Arbitrators and Mediators – Australia that the author attended back in late 2006.

His Honour stood before a group of hardened and experienced adjudicators, some four years before *Kirk*, and opined that (or words to the effect of): 'As young lawyers, most find themselves before the Court, dealing with appeals often as a result of their mistakes. The same happens to Judges. Why should it not be the same for adjudicators, this is the role of the Supreme Court.' He went on to say that; 'this is a fact of life so get used to it, we lawyers have learnt this early in our careers (or words to this effect).'[1396]

[1392] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), 64.
[1393] Ibid 64.
[1394] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), 69.
[1395] [2016] WASC 386.
[1396] I cannot remember the date, nor the subject of his Honour's speech, and was myself not a Lawyer, nor an Adjudicator, but the subject of his words came home. It was difficult, scary, 'why would someone take on an appointment as an Adjudicator, have 14 days to make a determination, make an error, a find ones self before a

The cold reality would come ten years later. The adjudicator had erred, and in his Honour's supervisory role, informed the adjudicator of his error. It did not sit well as the judgement was read. However, his Honour in his judgement, was right, his Honour Justice John Roderick McKechnie, equally, if not more so.

The Supreme Court has been granted the right to perform the supervisory role, as this was granted to the Supreme Courts of each of the States and Territories, compliments of the High Court of Australia and the case of *Kirk v Industrial Relations Commission.*[1397] The only way around is that someone takes the case of *Kirk v Industrial Relations Commission* to task in the High Court and it is overturned.

6.9. Non-jurisdictional error of law on the face of the record and the cases before the High Court of Australia

> There is no real immediate prospect of non-jurisdictional error of law sufficing as a ground for challenge under the West Coast model any more than the East Coast model.
>
> Construction Law Barrister Robert Fenwick Elliott
>
> 3 January 2017 [1398]

To date, no Western Australian case pertaining to the Act has found its way before the High Court of Australia. This does not mean that, even after 13 years in operation, this could not happen. However, there are two cases, one from NSW, that being; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor,*[1399] and the other from SA, that being; *Maxcon Constructions Pty Ltd v Vadasz (No 2),*[1400] that lay combined before the High Court of Australia, and whose presence in that most worthy Court, may have a fundamental impact on the Act.

The issue that lay before the High Court was whether security of payment legislation bars judicial review on the grounds of an error of law on the face of the record. The conclusion of the appeal could have a substantial effect on all the East Coast model legislations, and spill

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Judge, who puts people before them, into prison, for the crimes they have commited.' His Honour was right, the review of an Adjudicator's determination, is a fact of life that all daring to enter the arena face.

[1397] (2010) 239 CLR 531; [2010] HCA 1, 34 [71].
[1398] Robert Fenwick Elliott, Maxcon in The Shade, (03 Jan 2017), https://feconslaw.wordpress.com/2017/01/03/maxcon-in-the-shade/#_ftnref2
[1399] [2016] NSWCA 379.
[1400] [2017] SASCFC 2.

over the West Coast model. The two separate appeals were made to the High Court contrary to decisions made by the New South Wales Court of Appeal and the South Australian Supreme Court.

The case of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor*, addresses a payment claim made on Probuild. The claim went to adjudication, and the adjudicator determined Shade Systems. Probuild then sought a review and alleged denial of procedural fairness and that the adjudicator had made an error of law in the determination. The primary Judge, his Honour Justice Emmett, held that 'the Court's supervisory jurisdiction was still available to review non-jurisdictional errors of law on the face of the record'[1401] and the determination.

Shade Systems subsequently appealed and argued 'that there was no power to intervene in a case where the only errors identified were non-jurisdictional errors of law.'[1402] Shade Systems maintained that the binding authorities were still the cases of *Brodyn Pty Ltd v Davenport*[1403] and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*.[1404]

On 23 December 2016, The Honourable Coram of Bathurst CJ, Beazley P, Basten, Macfarlan & Leeming JJA, of the NSW Supreme Court - Court of Appeal, handed down their judgement and unanimously agreed, and the Honourable Coram held that 'the Security of Payment Act did not permit a review of an adjudicator's decision other than for jurisdictional error.'[1405]

Probuild sought leave to appeal in the High Court, stating that:

> The NSW Court of Appeal erred in holding that the NSW Supreme Court's power to make orders in the nature of certiorari for error of law on the face of the record is ousted in relation to determinations under the Security of Payment Act.[1406]

On 8 February 2017, two months after the judgement of Probuild, the Full Court of the Supreme Court of South Australia, dismissed an appeal sought by Maxcon Constructions Pty Ltd. The case pertained to a payment claim that had gone against them, and favoured, Mr Vadasz at the time an undischarged bankrupt, though this was not known by Maxcon Constructions Pty Ltd

[1401] High Court of Australia, 'Short particulars, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor* (S145/2017), http://www.hcourt.gov.au/assets/cases/08-Sydney/s145-2017/Probuild_SP.pdf, 1.
[1402] Ibid.
[1403] [2004] NSWCA 394.
[1404] (2010) 78 NSWLR 393; [2010] NSWCA 190.
[1405] High Court of Australia, 'Short particulars, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor* (S145/2017), http://www.hcourt.gov.au/assets/cases/08-Sydney/s145-2017/Probuild_SP.pdf, 1.
[1406] Ibid.

at the time of the contract agreement. The contract was for the 'design and construct piling for an apartment building.'[1407]

The adjudicator came to the conclusion that the contract between the parties included retention provisions that the adjudicator determined were 'pay when pay provisions' and were ineffectual pursuant to s 12(1) and s 12(2)(c) of the *Building and Construction Industry Security of Payment Act 2009* (SA).[1408] The provisions were to be considered as void. Maxcon did not have an entitlement to the retention sum that they believed they were due.

Maxcon Constructions Pty Ltd commenced proceedings in the Supreme Court of South Australia. However, his Honour Justice Stanley held 'that there was no jurisdictional error (or other error of law) made by the adjudicator.'[1409] Maxcon Constructions Pty Ltd commenced an Appeal before the Full Court of the South Australian Supreme Court.

The Full Court consisting of the Honourable Coram of Blue J, Lovell JJ and Hinton J, dismissed the appeal (with Hinton J dissenting). It was held that there was no jurisdictional error. However, all three Justices found that there had been an error, but that error was an error of law on the face of the record. The Honourable Coram held that the authority for 'proposition that the remedy of certiorari was impliedly excluded under the Act'[1410] was no other than the above-mentioned case.

[1407] High Court of Australia, 'Short particulars, *Maxcon Constructions Pty Ltd v Michael Christian Vadasz (Trading As Australasian Piling Company) & Ors* (A17/2017), http://www.hcourt.gov.au/assets/cases/01-Adelaide/A17-2017/Maxcon_SP.pdf, 1.

[1408] *Building and Construction Industry Security of Payment Act 2009* (SA), s 12 which states:

> **12—Effect of "pay when paid" provisions**
>
> (1) A pay when paid provision of a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract.
>
> (2) In this section—
>
> ***money owing***, in relation to a construction contract, means money owing for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract;
>
> ***pay when paid provision*** of a construction contract means a provision of the contract—
>
> (a) that makes the liability of 1 party (the ***first party***) to pay money owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or a part of that money; or
>
> (b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or a part of that money is made to the first party by the third party; or
>
> (c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

[1409] High Court of Australia, 'Short particulars, *Maxcon Constructions Pty Ltd v Michael Christian Vadasz (Trading As Australasian Piling Company) & Ors* (A17/2017), http://www.hcourt.gov.au/assets/cases/01-Adelaide/A17-2017/Maxcon_SP.pdf, 1.

[1410] High Court of Australia, 'Short particulars, *Maxcon Constructions Pty Ltd v Michael Christian Vadasz (Trading As Australasian Piling Company) & Ors* (A17/2017), http://www.hcourt.gov.au/assets/cases/01-Adelaide/A17-2017/Maxcon_SP.pdf, 1.

Maxcon Constructions Pty Ltd commenced proceedings to appeal on the following grounds that the Full Court had made an error by adhering to the NSW case of *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No.2)* and coming to the conclusion that the *Building and Construction Industry Security of Payment Act 1999* (NSW) prevented the issue of judicial review on the ground of error of law on the face of the record.

The decision as to whether the Acts allowed the issue of judicial review on the ground of error of law on the face of the record, would move into the hallowed grounds of the High Court of Australia.

Both cases were granted special leave, enjoined on 12 May 2017. On 9 November 2017, a hearing took place and at 3.30 pm the matter was adjourned until 10.15 am on Tuesday, 14 November 2017.

Many adjudicators throughout Australia hoped that the High Court of Australia would take a common sense approach to this issue and determine otherwise. There can be no doubt that the cases of Craig and Kirk have rightly granted the supervisory roles to the Supreme Courts of the States and Territories, and this role has given them the right of jurisdictional review.

Non-jurisdictional error of law on the face of the record

However, the issue of non-jurisdictional error of law on the face of the record and adjudication is another matter.

A critical matter before the High Court of Australia was whether the Supreme Courts had a supervisory role. Adjudication has always been considered by what Lord Ackner stated as a 'quick and dirty fix'.[1411] It is what the Honourable Ms Alannah J. MacTiernan stated when she introduced the Bill and declared that the Bill would provide 'an effective rapid adjudication process for payment disputes'.[1412] His Honour Justice Kenneth Martin in *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd,*[1413] observed: 'the Construction Contracts Act presents more as the workings of a tribunal, rather than following the curial method. Rules of evidence do not apply (s 32(1)(b)). The process is very much in the nature of quick, remedial and informal triage intervention.'[1414]

[1411] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >

[1412] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).

[1413] [2011] WASC 172.

[1414] *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* [2011] WASC 172, 20 [62].

It is a 'pay now, argue later' system (*Multiplex Constructions Pty Ltd v Lui Kans* [2003] NSWSC 1140 [96] (Palmer J)), with the primary aim of keeping the money flowing by enforcing timely payment (*Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217; (2011) 43 WAR 319 [87]). The environment is what Wallace termed as a; 'decision is an interim one and given that it is often made in a "pressure cooker" environment under extremely tight timeframes.[1415] This environment demands pursuant to s 31 of the Act that an adjudicator has 10 business days (plus any extension that is granted, pursuant to s 32(3)(a) of the Act)[1416], to either dismiss or on the balance of probability, make a determination. The adjudicator must make that decision alone, ensuring they keep to the view that their role is to inquire, (though *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor*,[1417] indicates that some assistance can be taken). The reality is that most do so independently, unlike the judicial officers that have the benefit of an Associate, and other staff, to help with their decisions.

The most protracted cases in the WASCA took 204 days,[1418] (the average is 161 days); in the WASC the most protracted case took 322 days,[1419] (the average is 62 days); in the WADC, the longest case took 67 days,[1420] (the average is 22 days); and in the SAT the longest case took 183 days,[1421] (the average is 42 days). All are considerably greater than the ten days provided to an adjudicator. The statistics provide a strong case that consideration should be given to give an adjudicator a more significant period than the ten business days provided by the Act.

Non-jurisdictional error of law on the face of the record would imply an expectation from the Judiciary that an adjudicator would have the same legal qualifications as a lawyer has. This is contradictory to what her Honour Justice Pritchard stated in *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd*,[1422] and pointing to the requirements of the *Construction Contracts Regulations* that 'it is not necessary that an adjudicator have legal qualifications, and adjudicators may instead have qualifications in a range of other fields, as well as experience in

[1415] Andrew Wallace, *Final Report of the Review of the Discussion Paper – Payment Dispute Resolution in the Queensland Building and Construction Industry* (Building Services Authority, 2013), 221.
[1416] Ibid s 32(3)(a).
[1417] [2017] ACTSC 177.
[1418] *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27 *and Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28.
[1419] *Total Eden Pty Ltd v Charteris* [2018] WASC 60.
[1420] *Kulleen Pty Ltd as trustee for the Gismondi Family Trust trading as Italsteel Structural Engineering WA v Rostruct Pty Ltd* [2013] WADC 172.
[1421] *Tormaz Pty Ltd v High Rise Painting Contractors Pty Ltd* [2012] WASAT 166.
[1422] [2012] WASC 304.

administering contracts or in dispute resolution in relation to construction contracts.[1423]

As previously discussed, of the 80 registered adjudicators, 54 (or 68%) are made up of practitioners of building construction industry, and the remaining 26 (or 33%) are legal practitioners.

To put such the expectation that an adjudicator would not fall foul of non-jurisdictional error of law on the face of the record, would be a travesty of justice. The Supreme Courts of all States should not be granted the power to review an adjudicators' determinations when dealing with non-jurisdictional error of law on the face of the record.

The Decision of the High Court of Australia and non-jurisdictional error of law on the face of the record

On 14 February 2018, the High Court of Australia delivered its judgements individually relating to the cases of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor,*[1424] and *Maxcon Constructions Pty Ltd v Michael Christopher Vadasz (Trading as Australasian Piling Company) & Ors*.[1425] For adjudicators, the cases have had a positive effect on Security of Payments Legislation throughout Australia, as had been the cases of *Craig v*

[1423] *Cape Range Electrical Contractors Pty Ltd v Austral Construction Pty Ltd* [2012] WASC 304, 21 [51], Reg 9(1-3) state:

9. Qualifications of registered adjudicators;
   (1) For the purposes of section 48(1) of the Act, an individual must have the qualifications and experience set out in subregulations (2), (3) and (4) to be eligible to be a registered adjudicator.
   (2) The individual must —
      (a) have a degree, from a university or other tertiary institution in Australia, in a course listed in the Table to this paragraph, or an equivalent qualification from an overseas university or tertiary institution;

Table

Architecture	Building
Engineering	Construction
Quantity surveying	Law
Building surveying	Project management

      (b) be eligible for membership of a professional institution listed in the Table to this paragraph;

Table

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

or

      (c) be a builder registered under the *Builders' Registration Act 1939*.
   (3) The individual must have had at least 5 years experience in —
      (a) administering construction contracts; or
      (b) dispute resolution relating to construction contracts.

[1424] [2018] HCA 4.

[1425] [2018] HCA 5.

South Australia,[1426] and *Kirk v Industrial Relations Commission,*[1427]

The strong and most honourable Coram of Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ dismissed both the appeals.

The High Court of Australia held that the decision held in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*, was consistent with *Maxcon Constructions Pty Ltd v Vadasz*. The High Court correctly held in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*,[1428] (and it should be printed in its entirety):

> 2 The only question in this appeal is whether the scheme established by the Security of Payment Act for claims for, and payment of, progress payments ousts the jurisdiction of the Supreme Court of New South Wales to make an order in the nature of certiorari to quash a determination by an adjudicator for error of law on the face of the record that is not a jurisdictional error. The answer is yes: the Security of Payment Act does oust that jurisdiction.[1429]

The High Court has made it clear that the Supreme Courts have the power to review an adjudicators' determination on the grounds of non-jurisdictional error of law on the face of the record.

At its conclusion, in the case of *Maxcon Constructions Pty Ltd v Vadasz*[1430] the High Court of Australia confirmed that the retention provisions contained within the contract between the parties were in fact 'pay when paid provisions' and on that count, the adjudicator was right. The decision by the adjudicator, in the eyes of the Full Court, 'to mischaracterise a provision of the construction contract as a "pay when paid provision,"'[1431] was wrong.

6.10. Conclusion

This Chapter has shown how the High Court of Australia cases of *Craig v South Australia,*[1432] and *Kirk v Industrial Relations Commission,*[1433] had a considerable effect on the *Construction Contracts Act 2004* (WA). The High Court confirmed the supervisory role of the Supreme

[1426] (1995) 184 CLR 163.
[1427] (2010) 239 CLR 531; [2010] HCA 1.
[1428] [2018] HCA 4.
[1429] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4, [2].
[1430] [2018] HCA 5.
[1431] *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5, 10 [36].
[1432] [1995] HCA 58; 184 CLR 163; 69 ALJR 873; 131 ALR 595; 82 A Crim R 359; 39 ALD 193.
[1433] (2010) 239 CLR 531; [2010] HCA 1, 34 [71].

Courts of the States and Territories. It gave the Supreme Court of Western Australia the power to conduct Judicial Review on a determination made by an adjudicator.

What was made indelibly clear was that despite what the *Construction Contracts Act* 2004 (WA) stated, the Supreme Court does in fact, have the right for judicial review, where there is a detected jurisdictional error: (see s 46(3)).[1434] This also includes breaches of natural justice and procedural fairness by the adjudicator.

The High Court of Australia was right in Kirk when it stated 'it is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error'.[1435] The list is endless. This chapter has analysed several jurisdictional errors, such as Section 32(3)(b) adjudication procedure dealing with consent to adjudicate two or more payment disputes simultaneously, dealing with set off and counterclaims and quantum meruit. It has also scrutinised two East Coast model legislation cases that have been brought before the Courts that potentially have severe ramifications for the Act.

Despite the comment made by the Honourable Justice Kenneth Martin, when he declared that 'The *Construction Contracts Act 2004* (WA) appears to be a somewhat unexpected, but bountiful, source of work for the Supreme Court in recent times, particularly by applications for prerogative relief to quash decisions by adjudicators,'[1436] the statistics prove otherwise. Since 2005 there have been 1822 adjudicators' determinations, of which only 53 were reviewable by the WASC. This is only to 2.91% of all the adjudicators' determinations. The resultant statistics contradict the views held by His Honour.

The statistics show that of the 53 reviews of adjudicators' determinations, the WASC would, on 26 occasions (or 49%), dismiss the applications, and 27 times (or 53%) make a decision. One point four eight percent (1.48%) of the 1822 adjudicators' determinations are upheld, and 1.43% of the 1822 adjudicators' determinations are later quashed by the court.

[1434] Kenneth Martin 'Speaking Points', (Institute of Arbitrators and Mediators of Australia, St Catherine's College, Wednesday 14 May 2014), 4.
[1435] (2010) 239 CLR 531; [2010] HCA 1, 34 [71].
[1436] Justice Kenneth Martin QC 'Speaking Points', Institute of Arbitrators and Mediators of Australia, St Catherine's College, Wednesday 14 May 2014, 1.

There can be no doubt that the High Court of Australia was right to grant the power of Judicial Review to the Supreme Courts when reviewing an adjudicator's determination. The High Court of Australia, summed up this issue in *Kirk*:

> There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia.[1437]

There lies the answer, though there are bounds that even the High Court of Australia recognises. The recent High Court of Australia decision cases of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor,*[1438] and *Maxcon Constructions Pty Ltd v Michael Christopher Vadasz (Trading as Australasian Piling Company) & Ors,*[1439] emphasise that the Supreme Courts do not have the power to review an adjudicator's determination for matters of non-jurisdictional error of law on the face of the record. The results prove that the author of the seminal work, *10 Days in Utopia,*[1440] Construction Law Barrister Robert Fenwick Elliott, was right; 'there is no real immediate prospect of non-jurisdictional error of law sufficing as a ground for challenge under the West Coast model any more than under the East Coast model'.[1441]

The Chapter has also indicated that changes should be made to the *Construction Contracts Act 2004* (WA) pertaining to matters relating to Judicial Review. These recommendations will be raised in the final chapter of this research.

[1437] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1, 44 [99].
[1438] [2018] HCA 4.
[1439] [2018] HCA 5.
[1440] Robert Fenwick Elliott, '10 Days in Utopia' (Proceedings of the Institute of Arbitrators & Mediators Australia, Glenelg, South Australia, 02 June 2007), 5.
[1441] Robert Fenwick Elliott, Maxcon in The Shade, (03 Jan 2017), https://feconslaw.wordpress.com/2017/01/03/maxcon-in-the-shade/#_ftnref2

PART 3

Part 3 – Conclusion – The statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the SAT and the Courts.

The aim of part three of this research is to conclude the statutory review of adjudicators' determinations under the *Construction Contracts Act 2004* (WA) by the SAT and the Courts, to propose changes, and to identify areas for further research.

Part 3 has one chapter, which is:

- Chapter 7: The future of the Act, Conclusion and a proposal for change.

Chapter 7

The future of the Act, conclusion, proposal for change, and areas for further research

> There have been substantially fewer applications to the courts in WA to have adjudicators' determinations set aside. Additionally, as the West Coast legislation gives primacy to any contractual interim payment scheme agreed by the parties, it does not generate the extra administrative burden associated with the East Coast model's dual payment system. Further, as the West Coast legislation places no restrictions on the right of either disputing party to present its case in adjudication, and the adjudicator may inform himself or herself about the dispute in any way he or she thinks fit, it is proposed that the West Coast model affords higher levels of procedural and substantive justice than the East Coast model.
>
> Dr Jeremy Coggins, Robert Fenwick Elliott and Matthew Bell
> Towards Harmonisation of Construction Industry Payment Legislation[1442]

7.1. The future of the Act

They say that 'history waits for no one', so what of the Act? The Act is no different. By 2015, and to in more recent times the present, the 'winds' of change were starting to come to fruition.

The *Construction Contracts Amendments Act* 2016 (WA)

In August 2015, Professor Evans released to the Attorney General and Minister for Commerce, the Hon Michael Mischin, his '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*.[1443]

Nine months later, in May 2016, the state government would release; 'The Response of the

[1442] Jeremy Coggins, Robert Fenwick Elliott, and Matthew Bell,'Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia – plus Addendum' (2010) *Australasian Journal of Construction Economics and Building*, 10 (3) 14-35, 32.

[1443] , '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015).

Western Australian Government to the Report on the Operation and Effectiveness of the *Construction Contracts Act 2004* (WA).[1444]

The Response noted that:

> The Government is pleased at the finding that the CC Act is achieving its objective. This confirms the Government's belief that the Act is an important tool for improving the flow of cash through rapid adjudication.[1445]

The government put forward three directions on key findings. They were:

(1) Addressing the lack of knowledge and awareness around the CC Act, (short-term: within the next 12 months);

(2) Amending the CC Act to improve its operation and use, (Medium term - priority); and

(3) Addressing security of payment and insolvency issues within the industry

(Medium term).[1446]

The first direction acknowledged what had come out of the preparation and eventual drafting of the review by Professor Evans; that is there was a 'widespread lack of awareness of the operation of the CC Act'.[1447] The government saw it as essential that all players within the industry became aware of the Act and how it could be utilised.

The second direction on the key findings pertained to improving the operation and the use of the Act. The State government stated that they accepted 'the majority of amendments to the CC Act recommended by Professor Evans and that they would make suitable amendments 'as soon as possible'. They recognised that they needed to take a more flexible approach to the process.[1448] Among other things, they would look at issues such as strict time limits[1449] and counting time in business days as opposed to calendar days.[1450]

The third direction on the key findings pertained to a more national awareness of the security

[1444] Western Australia, *The Response of the Western Australian Government to the Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA), May 2016.
[1445] Western Australia, *The Response of the Western Australian Government to the Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA), May 2016, 6.
[1446] Ibid 6-7.
[1447] Ibid 6.
[1448] Ibid.
[1449] Ibid.
[1450] Ibid.

of payment and insolvency issues within the construction industry.

> Nevertheless, the industry faces some unique challenges. Australian Securities and Investment Commission data from 2013-2015 shows that the construction industry suffered 19.4 percent of the overall insolvencies, and was the greatest contributor to insolvencies of any individual sector. The most common cause for insolvency was inadequate cash flow or high cash use, followed closely by poor strategic management of business.[1451]

The Government recognised the conclusion of Sir Michael Latham, The Hon Justice Cole RFD QC, and many associated with the building construction industry that:

> Inadequate cash flow or high cash usage is directly tied to security of payment issues. This unique challenge underpins the need for better security of payment in the industry.[1452]

Resulting from the fiasco of the BMW/BER matter, the government made mention that:

> Separately, the Western Australian Department of Finance, Building Management and Works Division (BMW) has been .trialling the use of Project Bank Accounts[1453] (or PBAs) since 2013. The trial is designed to determine the impact PBAs have on reducing the risks following contractor insolvencies.[1454]

The State government recognised that:

> Insolvency law is controlled by the Commonwealth and there is very limited scope for State Government intervention. The Government believes a national approach to improving insolvency outcomes for subcontractors is the best way forward.[1455]

[1451] Ibid 7.
[1452] Ibid.
[1453] The Department of Finance state that; PBAs are an alternative payment mechanism that use a dedicated trust account to facilitate payments directly and simultaneously from a principal through to the head contractor, and participating subcontractors, involved in a project. PBAs have a number of benefits, as they:

- enable subcontractors to better protect themselves in the event that a head contractor experiences financial difficulty (subject to certain conditions being met)
- speed up the payment process for parties lower down in the supply chain
- increase transparency and accountability in the payment process.

It is important to note that PBAs do not seek to alter the existing contractual rights and responsibilities of the parties to a traditional construction contract. Likewise, they will not prevent a head contractor from experiencing financial difficulty or managing the performance of subcontractors by withholding payments when contractual obligations are not met. Importantly, they do not constrain any party from seeking adjudication under the *Construction Contracts Act 2004*, or commencing legal proceedings in the event of a dispute.
< https://www.finance.wa.gov.au/cms/Building_Management_and_Works/New_Buildings/Project_bank_accounts.aspx>
[1454] Ibid.
[1455] Ibid 8.

However, they have encouraged the Commonwealth government:

> to consider reviewing the *Corporations Act 2001* (Cth) to identify ways for improving outcomes for subcontractors following head contractor insolvencies. The Government will also encourage the Commonwealth to consider adopting some of the recommendations made by the recent Senate Economics Reference Committee inquiry into insolvency in the Australian construction industry. This includes the recommendation for the Australian Law Reform Commission to inquire into statutory trusts for the construction industry to identify preferred models for both public and private sector construction work.[1456]

As will be seen later in this chapter, in Canberra consideration was underway to look towards a national solution to the perceived crisis. The response would put forward 28 key recommendations to be made on the Act.

On Thursday, 22 September 2016, the Minister for Small Business, the Hon S.K. L'Estrange, introduced on motion and did read a first time the *Construction Contracts Amendments Bill 2016* (WA), and presented the Explanatory memorandum. Later that day, he moved that the bill be read a second time. The bill, stated that:

> The Construction Contracts Amendment Bill 2016 brings in important reform to improve the operation of and access to the rapid adjudication process for resolving payment disputes under construction contracts. This bill comprises a first raft of amendments aimed at producing immediate improvements to the security of payment for subcontractors and other operators in the building and construction industry. A second raft of reforms, which requires further detailed work and consultation with the building industry, will be introduced at a later date.[*1457*]

The Minister, finished by saying:

> In summary, this bill will further improve the operation of the Construction Contracts Act by keeping the money flowing in the contracting chain in the building and construction industry in Western Australia. The bill also supports other key reforms this government is progressing that will improve the security of payment for operators in the building and construction industry. Having listened to the concerns of subcontractors and

[1456] Western Australia, *The Response of the Western Australian Government to the Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA), May 2016, 8.
[1457] Western Australia, *Construction Contracts Amendment Bill 2016,* Introduction and First Reading, 22 September 2016, 1, (Sean L'Estrange).

> other stakeholders, the Liberal-National government is taking effective action to encourage better industry behaviour and implement enhanced payment protection for subcontractors across the building and construction sector in this state.[1458]

He commended the bill to the house and the 'Debate adjourned, on motion by Ms S.F. McGurk'.[1459]

The second reading was agreed to in the amendments adopted on 19 October 2016 with the third reading on the following day. The Bill was introduced into the Legislative Council on 8 November 2016 and had the first and second reading on that same day by the Attorney General, the Hon Michael Mischin. The second and third reading was then made on 22 November 2016.

The *Construction Contracts Amendments Act 2016* (WA), gained assent on 29 November 2016 and s 1 and 2, commencing on 29 November 2016, all other sections, other than s 7 and 20, commencing on 15 December 2016. On 03 April 2017, s 7 and 20, commenced.

A copy of the *Amendments* Act can be found at **Appendix 3 – The *Construction Contracts Amendments Act 2016* (WA).**

It had been 4654 days since the Hon Ms. Alannah J. MacTiernan had introduced, on motion, the *Construction Contracts Bill 2004 - Introduction and First Reading & Second Reading* until the *Construction Contracts Amendments Act 2016* (WA) gained assent on 29 November 2016 after being introduced into the 'Lower House' by the Hon S.K. L'Estrange and passed through the 'Upper House' by the Hon Michael Mischin. There has been bipartisan majority support for the Act.

A copy of the Act can be found at **Appendix 4 – The *Construction Contracts Act 2004* (WA) (as at 17 April 2017).**

The Murray review on Security of Payments Laws

On Wednesday 21 April 2016, Senator, the Hon Michaelia Cash,[1460] announced that Mr John Murray AM was appointed to conduct a review of security of payments laws in the building and construction industry.

The Senator declared, that:

[1458] Ibid 2.
[1459] Ibid.
[1460] Minister for Employment, Minister for Women, Minister Assisting the Prime Minister for the Public Service and Senator for Western Australia.

> Mr Murray became a Member of the Order of Australia in 2014 for his service to the building industry. Specialising in building-contract disputations and security of payments legislation, Mr Murray is eminently qualified to undertake this review.[1461]

She stated that 'the Government is committed to exploring further ways in which security of payments rules can be strengthened to ensure the building industry is fair and productive for all participants'.

She confirmed that:

> The review will deliver a final report no later than 31 December 2017 and include a range of recommendations to be considered by Government.[1462]

In February 2017, Murray released the Review of Security of Payments laws: Issues Paper. In the background of the review, Murray stated that:

> The Review will seek to identify what measures can be taken to overcome the current fragmented nature of the security of payments laws and consider why subcontractors are either unwilling or reluctant to use the various security of payments legislation and avail themselves of their statutory rights.[1463]

In other words, the review conducted by Murray will take a non-federalist approach to the issue of security of payment laws in Australia. The Commonwealth's approach to this matter could see one Federal law in Australia that could ultimately fall under the jurisdiction of the Federal Court of Australia. As we have seen, there has to date been a more federalist approach to this matter, that has led to the delineation between the West Coast model and the East Coast model.

In February 2017, Murray released the 'Review of Security of Payments laws: Issues Paper'[1464] and identified the key issues.[1465]

[1461] Senator the Hon Michaelia Cash, 'John Murray AM appointed to review security of payments laws', Media Release, Wed 21 December 2016, 1.

[1462] Ibid. The Terms of Reference for the Review of Security of Payment Laws, given to Murray, will; examine security of payment legislation of all jurisdictions to identify areas of best practice for the construction industry; take into account any reviews and inquiries that have recently been conducted in relation to security of payment, including the December 2015 report by the Senate Economic References Committee on insolvency in the Australian construction industry and the draft legislation developed by the 2003 Cole Royal Commission into the Building and Construction Industry; consult with business, governments, unions and interested parties and the Security of Payments Working Group; and consider how to prevent various types of contractual clauses that restrict contractors in the construction industry from obtaining payments for work that has been completed.

[1463] Senator the Hon Michaelia Cash, 'John Murray AM appointed to review security of payments laws', Media Release, Wed 21 December 2016, 1.

[1464] John Murray AM, 'Review of Security of Payments laws: Issues Paper', February 2017,

[1465] John Murray AM identified the following key issues;

Chapter 3. Effectiveness of existing Security of Payments laws.

The great fear for the Western Australian adjudicators is twofold. There is that fear of what Frederick Hayek called other 'synoptic delusion'. Secondly, the fear that the non-federalist approach would introduce the 'East Coast model 'of legislation as the national model.

The future of the *Construction Contracts Act 2004* (WA) has now come to a crossroads. It has to date been the mainstay of many payment claims disputes since it commenced on 01 January 2005, over arbitration or litigation.

7.2. Western Australia 2018 and another 'review to improve security of payments for subcontractors in Western Australia's building and construction industry.'

For the building and construction industry of Western Australia, 2018 has not started well. On 31 January 2018, home builder Choice Living called in insolvency specialists and administrators Hall Chadwick. On 25 January 2018, the new Building Commissioner of Western Australia, Mr Ken Bowron, had suspended the registration of Choice Living and was taking action in the SAT.[1466] By mid-February 2018, the Jolimont based Coopers & Oxley Builders also appointed Hall Chadwick to take over the running and operations of the business. By 22 February 2018, BCL Group, the Wangara-based civil landscaping company, suspended business.

The following day, the McGowan Government of Western Australia, announced 'a review to improve security of payments for subcontractors in Western Australia's building and construction industry and the establishment of an Industry Advisory Group (IAG).'[1467] The review will be conducted by Barrister John Fiocco, and East Metropolitan Region MLC Matthew Swinbourn will assist Mr Fiocco.

Chapter 4. A two-tier system under the one legislation.
Chapter 5. Differences in timeframes on key process steps.
Chapter 6. The process for appointment of adjudicators.
Chapter 7. Quality of Adjudication Decisions.
Chapter 8. Exclusion of claims.
Chapter 9. Claims after termination of contract.
Chapter 10. Impact of Contract Time-Bars.
Chapter 11. Endorsement of Payment Claim.
Chapter 12. Publication of adjudicators' determinations.
Chapter 13. Court's power to sever and remit.
Chapter 14. Statutory Trusts to further protect subcontractors.
Chapter 15. Adjudication for domestic construction.
Chapter 16. Special mechanism for small business.
Chapter 17. Acts of intimidation and retribution.

[1466] Registered as Choiceliving (WA) Pty Ltd.

[1467] The Government of Western Australia, Media Statement – Improving security of payment for subcontractors gets approval dated Friday, 23 February 2018. <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/02/Improving-security-of-payment-for-subcontractors-gets-approval.aspx>

Amongst a multitude of issues, Mr Fiocco will look at amending the *Building Services (Registration) Act 2011* (WA) and 'introducing trust arrangements to protect funds owed down the contracting chain, in case a head contractor experiences financial difficulty.'[1468]

Interestingly, The Murray review on Security of Payments Laws being conducted by Mr John Murray AM has not been made public, but already the next review moves forward to try to resolve the issues.

While a handful of reports have been drafted over the years, at both a Federal and State level, the success of the implementation of the recommendations made 'sputters along' at an alarmingly slow rate, and businesses continue to go into insolvency, leaving many without payment for the work that they have done.

By May 2018, the Murray report had not been released to the public and appeared to have stalled, like the report by the Senate Economics References Committee on the *Insolvency in the Australian construction industry.*

Perhaps Sir Michael Latham was right: 'Nevertheless, disputes may arise, despite everyone's best efforts to avoid them.'[1469] Given the condition of the building and construction industry of Western Australia and the reliant economy, it is likely that there will again be a rise in the number of payment claim disputes, which, after the involvement of the adjudicators, could lead to more work for the SAT, DCWA, WASC and the WASC.

7.3. Conclusion

This research has shown that the *Construction Contracts Act 2004* (WA) and its application has been effective in Western Australia since 2005. The research has indicated that the current provisions of s 43, s 46 of the Act, and the judicial review of jurisdictional error, are effective. However like the building and construction environment and the Act itself, they are dynamic, and need constant attention to ensure that they change the industry, and their application remains effective.

Since its commencement on 1 January 2005, the *Construction Contracts Act 2004* (WA), has played a very significant role in the management of payment claim disputes within the Western

[1468] The Government of Western Australia, Media Statement – Improving security of payment for subcontractors gets approval dated Friday, 23 February 2018. <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/02/Improving-security-of-payment-for-subcontractors-gets-approval.aspx>.

[1469] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), 87.

Australian construction industry. When the Honourable Ms. Alannah J. MacTiernan, introduced, on motion, the *Construction Contracts Bill 2004 - Introduction and First Reading & Second Reading* (the Bill) before Parliament, it was unlikely that she would have concluded that the future Act would play host to about 1822 applications for payment claim disputes. It is unlikely that Ms. MacTiernan realised that the Act would produce a single dispute seeking $169,930,144.00 but alternatively, producing the smallest single payment claim in 2009-2010 at $1320. Perhaps Ms. MacTiernan would be most surprised to find that the total value of the payment claims from 2005-2017 is $2,945,419,432.36. These statistics highlight the prodigious work conducted by the now former Building Commissioner of Western Australia, Mr Peter Gow and the Commission's personnel that have allowed us to quantify the operational effectiveness of the *Construction Contracts Act 2004* (WA).

Regarding the operational effectiveness, the *Construction Contracts Act 2004* (WA) has most certainly been very successful and stood the test of time over the 12 year period, during which it worked as a cheap and effective payment claims dispute tool. The changes brought after by the *Construction Contracts Amendment Act 2016* (WA), as result of the work of Professor Evans (and his small team) in the drafting of the; '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*' have resulted in some very efficient and successful changes that will continue to see the Act, being utilised, hopefully, for the next 14 years.

Several months after the release of the Evans report, the security of payment legislation would again come under scrutiny when the Senate directed the Economics References Committee to examine the size and high prevalence of insolvency in the Australian construction industry. The report noted that there was a very high prevalence of insolvency in the industry, brought on namely by an 'unacceptable culture'[1470] within the industry. The report recommended harmonisation of all the security of payment legislations within Australia, and at a Federal level. The report also suggested the commencement of Project Bank accounts within the construction industry.

There is, however, the possibility many potential changes to the security of payment legislation throughout Australia may be made with the appointment of Mr John Murray AM by the Turnbull government, to conduct a review of security of payment legislation and perhaps look at whether a Commonwealth approach to this legislation may be the answer. Optimistically;

[1470] Senate Economics References Committee, *Insolvency in the Australian construction industry* (December 2015), xvii.

any Commonwealth approach to the future security of payment legislation does not entail the introduction of the East coast model or become what the classic liberalist philosopher and economist, Friedrich Hayek, termed a 'synoptic delusion'.[1471]

It appears that by May 2018, both the report from the Economics References Committee and the Murray Report had stalled, and most notably, the Murray Report has not been released publicly, five months after its submission.

In February 2018, the McGowan Government of Western Australia announced 'a review to improve security of payments for subcontractors in Western Australia's building and construction industry and the establishment of a Western Australian Industry Advisory Group (IAG).[1472]

The Act provides pursuant to s 43 of the Act that determinations may be enforced as judgments. Of the 27 applications that have been sought for the enforcement of an adjudicator's determination, pursuant to s 43 of the Act,[1473] 13 (or 48%) have been enforced, 11 (or 41%) have been refused, and 3 (or 11%) have been stayed or adjourned pending.

The WASC has had a total of 18 applications for the enforcement of an adjudicator's determination. Of the 18 applications sought pursuant to s 43 of the Act,[1474] 8 (or 44%) were granted, 9 (or 50%) were refused, and 1 (or 6%) was stayed.

The DCWA has had a total of nine applications for the enforcement of an adjudicator's determination. Of the nine applications sought pursuant to s 43 of the Act,[1475] 5 (or 63%) were granted, 2 (or 22%) were refused, and 2 (or 22%) were stayed.

To this end, s 43 of the Act[1476] has been successful and has come a considerable way since the case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd.*[1477] However, the owner of *State Side Electrical Services Pty Ltd* continues to feel 'abandoned by

[1471] Friedrich Hayek, *Law, Legislation and Liberty - A new statement of the liberal principles of justice and* political economy (Routledge, 1st Ed, 1998) vol 1, 14-15. A Synoptic delusion' is as Hayek stated; 'on the fiction that all the relevant facts are known to someone mind, and that it is possible to construct from this knowledge of the particulars a desirable social order. Sometimes the delusion is expressed with a touching naivete by the enthusiasts for a deliberately planned society, as when one of them dreams of the development of 'the art of simultaneous thinking: the ability to deal with a multitude of related phenomena at the same time, and of composing in a single picture both the qualitative and the quantitative attributes of these phenomena.'
[1472] The Government of Western Australia, Media Statement – Improving security of payment for subcontractors gets approval dated Friday, 23 February 2018.
[1473] Ibid
[1474] *Construction Contracts Act 2004* (WA), s 43.
[1475] Ibid.
[1476] Ibid.
[1477] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27.

and angry with, the system.'[1478]

The Act has ensured, pursuant to s 46,[1479] that parties aggrieved by a decision made by an adjudicator have the right to have that decision reviewed. Though the window is reasonably narrow, it must be a decision made under s 31(2)(a) of the Act,[1480] and the aggrieved person may apply to the State Administrative Tribunal.

In the first case heard before the SAT, *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture,*[1481] Senior Member Raymond would reverse the adjudicator's decision. He would remit it back to the adjudicator to make a determination, pursuant to s 31(2)(b) of the Act, within 14 days,[1482] or any consented extension given by the parties.[1483]

Since *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture*, there have been 78 reviews against the 1822 applications for adjudication (or 4.3%) submitted to the SAT. There were 15 (or 19%) occasions where the decisions were made to reverse and remit the determinations, and on 43 (or 55%) occasions they were dismissed for various reasons. The parties agreed on 20 (or 26%) occasions for those reviews to be withdrawn by agreements between the parties. The reviews conducted by the SAT have included issues dealing with the mining, oil and process plant exclusion clauses, fraud, complexity and a myriad of other issues that fall under s 31(2)(a) of the Act.[1484]

The statistics show that in most cases, the adjudicators have made the right decision.

The High Court of Australia cases *Craig v South Australia,*[1485] and *Kirk v Industrial Relations Commission,*[1486] had a considerable effect on the *Construction Contracts Act 2004* (WA). The High Court confirmed the supervisory role of the Supreme Courts of the States and Territories, and there is no doubt that the Supreme Courts do have the power to conduct Judicial Review on an adjudicator's determination. The High Court of Australia continues to hold this view firmly, and this includes jurisdictional error and the right of judicial review of the *Construction Contracts Act 2004* (WA) and therefore confirms the jurisdiction of the Supreme Court of

[1478] David Eaton, *Final Report - Small Business Commissioner Construction Subcontractor Investigation*, March 2013, 48.
[1479] *Construction Contracts Act 2004* (WA), s 46.
[1480] *Construction Contracts Act 2004* (WA), s 31(2)(a).
[1481] [2005] WASAT 269.
[1482] Ibid s 31(2)(b).
[1483] *Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture* [2005] WASAT 269, 4 [3].
[1484] *Construction Contracts Act 2004* (WA), s31(2)(a).
[1485] [1995] HCA 58; 184 CLR 163; 69 ALJR 873; 131 ALR 595; 82 A Crim R 359; 39 ALD 193.
[1486] (2010) 239 CLR 531; [2010] HCA 1, 34 [71].

Western Australia.

During this period, only some 131 determinations lay before the Courts and the State Administrative Tribunal. Of those 131, 89 (or 68%) would be dismissed or withdrawn. The Courts and the State Administrative Tribunal have played a significant role in guiding those using the *Construction Contracts Act 2004* (WA) and those mandated to act on its behalf.

The High Court of Australia has confirmed that the Supreme Court does not have the power to review an adjudicator's determination on the grounds of non-jurisdictional error of law on the face of the record.

The *Construction Contracts Act 2004* (WA), should always be what Lord Ackner coined in the House of Lords, the 'quick and dirty fix'.[1487] The Act should remain that way, though perhaps Sir Michael Latham was right: 'Nevertheless, disputes may arise, despite everyone's best efforts to avoid them.'[1488]

7.4. Proposal for change

The following proposals for change are recommended:

1. Section 43 - Determinations may be enforced as orders of court;
2. Section 46 (Review, limited right of) of the *Construction Contracts Act 2004* (WA) and the jurisdiction of the State Administrative Tribunal of Western Australia;
3. Jurisdictional error, judicial review of the *Construction Contracts Act 2004* (WA) and the jurisdiction of the Supreme Court of Western Australia.

Section 43 - Determinations may be enforced as orders of the Court

The first proposal deals with the enforcement of adjudicators' determinations. While the process has become far more streamlined and efficient due to the amendments made to the Act in 2016, it is critical that all those involved at the judicial level, particularly at the lower levels, be subject to training in the management of enforcement.

The case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd.*[1489] highlighted the consequences when judicial officers fail to understand their jurisdiction and believe that they have jurisdiction to undertake what can be only construed as a mini judicial

[1487] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >
[1488] Michael Latham, *Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO Publications, London, 1994), 87.
[1489] *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*, [2012] WADC 27.

review, which was not granted to the District Court pursuant to the case of *Kirk*.

It is critical that those playing a supervisory role or enforcing the Act undertake appropriate training to prevent such occurrences happening again. This will prevent subcontractors, such as the owner of State *Side Electrical Services Pty Ltd*, continuing to feel 'abandoned by and angry with, the system.'

Training should extend to not only judicial officers, but also to legal practitioners, to ensure that the correct processes are complied with.

Section 46 (Review, limited right of) of the *Construction Contracts Act 2004* (WA) and the jurisdiction of the State Administrative Tribunal of Western Australia

The second area for further research is probably the most contentious of this research. The proposal could be considered almost heretical in the view of many legal purists that equally feel contempt for the *Construction Contracts Act 2004* (WA).

The following is proposed;

Relinquishing the powers of the Supreme Court of Western Australia

In the High Court of Australia case of *Kirk*,[1490] the quorum of French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ unequivocally held:

> 95 In considering Commonwealth legislation, account must be taken of the two fundamental constitutional considerations pointed out in *Plaintiff S157/2002 v The Commonwealth*[1491]:
>
> > "First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction."

What is categorically known, since *Kirk*, is that s 46 of Act,[1492] does include the right, the

[1490] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1, 63 [95].
[1491] (2003) 211 CLR 476 at 512 [98].
[1492] *Construction Contracts Act 2004* (WA), s 46.

power and the jurisdiction to grant relief where a jurisdictional error has been made. The Constitution of Australia granted that right to the states.

Any changes to this view would have to be made by either a case in the High Court of Australia to relieve *Kirk* from its mantle, though it is probably unlikely that anyone could or would ever do so. Alternatively, attempting to change the Constitution of Australia could be considered, though highly unlikely; perhaps there is a need to look at the powers given to the States, particularly those to the Supreme Courts less stringently. Perhaps from an alternative perspective, anything that is given, may be given back, possibly returned or given to someone else.

Perhaps the right of jurisdiction to grant relief for a jurisdictional error, could be granted to the State Administrative Tribunal. In the case of the *Construction Contracts Act 2004* (WA), seeking review in the Supreme Court for the majority of cases is like 'cracking open a small peanut with a large mallet'.

The cost of seeking review in the Supreme Court is absurdly high. The expense includes the exceedingly high costs of barristers and solicitors to prepare the case, the high costs of a judge[1493] and their Associates, staff and the Court. There is also the issue of the lengthy protracted periods of time to conduct the reviews of jurisdictional error, and make it warrant careful consideration as to whether it would be economically rational to undertake such a course of action. It is widely known that the prohibitive costs of taking civil actions to the Supreme Court are much beyond the financial capacity of most people, especially small subcontractors, as they don't have the financial resources to take on a long and protracted battle. On the whole, any civil action often precludes those without 'deep pockets', and is often beyond the reach of most within society.

Consideration could be given by the Supreme Court of Western Australia to 'give' the right accorded by the Constitution and confirmed by *Kirk*, to the State Administrative Tribunal, for determinations under $5 million and of limited complexity, though determining what is complex creates its own problems. The Constitution of Australia had never considered the eventuality of the *Construction Contracts Act 2004* (WA) nor the State Administrative

[1493] The annual salary of a Judge in the Supreme Court is, according to the Report Of the salaries and allowances Tribunal Remuneration of Judges, District Court Judges, Masters of the Supreme Court, Magistrates and the Parliamentary Inspector of the Corruption and Crime Commission dated 01 June 2016, which states: Chief Justice - $508,591, Senior Puisne Judge - $454,511 and a Puisne Judge - $441,057. See: <https://www.sat.wa.gov.au/JudgesMastersAndMagistrates/Documents/Judicial%20Recommendation%20Report-%20June%202016.pdf

Tribunal, and therefore no consideration was ever given.

The administrative costs for an application in the SAT are considerably cheaper than the Supreme Court. The SAT currently has three positions for judges. There is a position for President and two positions for Deputy Presidents (one of which is currently vacant). Perhaps, the vacant position could be filled by a judge whose role would include undertaking the reviews and overseeing the senior members and ordinary members that also could be involved in undertaking the reviews for jurisdictional error.[1494] This would most certainly be a far cheaper, time efficient and more accessible option than what is currently available. Most of the work that would fall on the SAT is unlikely to be so complicated that it could not be handled by the President or one of the two Deputy Presidents.

In 2014 – 15, the SAT heard 11 cases pertaining to the Act. The following year this dropped down to eight, and by 2016 – 17, the number of hearings was reduced to only three. This current year the number appears to be further decreased.

By granting judicial review to the SAT, the workload for the SAT will increase, justifying the three positions for the President and the two Deputy Presidents.

This would still allow the Supreme Court of Western Australia to hear all appeals pertaining to the redirection of powers to the SAT. Given the current economic climate of Western Australia and the need to reduce the number of government departments and therefore available financial resources, consideration could be given to further research on the feasibility of the Courts relinquishing the powers to the SAT.

Alternatively, there could be a delineation over the dollar value of the judicial review. All reviews under $500,000.00 could come under the jurisdiction of the SAT, and all others under the jurisdiction of the WASC.

The matter is now less complicated as the High Court has decided that the decisions made by adjudicators are not open for review for errors of law on the face of the record. Perhaps it may be feasible for the SAT to deal with the less complex reviews rather than the WASC.

The WASCA would still retain the jurisdiction to hear appeals.

[1494] The annual salary of Senior Members in the SAT, according to the Determination of the remuneration of Senior and Ordinary Members of the State Administrative Tribunal dated 01 June 2016. is $327,486 and for Ordinary Members is $245,615. See: <https://www.sat.wa.gov.au/StateAdministrativeTribunal/Documents/Determination-SAT-Final%201%20June%202016.pdf>

Jurisdictional error, judicial review of the Construction Contracts Act 2004 (WA) and the jurisdiction of the Supreme Court of Western Australia

Calculation of Time Limits and the effect on Section 26 of the Act

There are several other areas of the Act that require changes brought about by the amendments that gained assent in December 2016. The first is that all time limits in the Act should be expressed in 'business days' rather than calendar days, and the effect of this change on s 26 of the Act.[1495] Previously, the applicant had only 28 days after the dispute arises to submit an application to have a payment dispute adjudicated. Now pursuant to s 26 of the Act,[1496] a party to the contract, must within 90 business days, after the dispute arises, apply to have a payment dispute adjudicated.

As was demonstrated in the previous chapter, potentially the process can now take up to 161 days from the time the dispute arose. This is not what Lord Ackner would consider as the 'quick and dirty fix'[1497] or what the Honourable Ms. Alannah J. MacTiernan, stated when she introduced, the *Construction Contracts Bill 2004 - Introduction and First Reading & Second Reading* (the Bill). She declared that the bill would provide 'an effective rapid adjudication process for payment disputes'.[1498]

One hundred and sixty one (161) days, plus any potential for extensions/review, is far too long a period for a small company in the building construction industry to go without a cash flow.

Perhaps the answer lies in allowing a period of 45 to 60 business days, and reducing the time allowed for the adjudication and review process to a more manageable period.

Responding to an Application for adjudication – Section 27

The second area of the Act that requires further amendment, since the amendments that gained assent in December 2016, is the unfairness of s 27 of the Act.[1499] Previously, the respondent had 14 calendar days to respond to an application for adjudication, and now the respondent is given ten business days.

Compared with the applicant, who has had an increase of about 104 days, no gain has been

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[1495] *Construction Contracts Act 2004* (WA), s 26.
[1496] Ibid.
[1497] Becky Davey, *Upcoming changes to the law applying to construction contracts*, (2011), website: <http://www.lexology.com/library/detail.aspx?g=b5b0f0e6-3a09-4fd0-866a-a6b5e00109d2 >
[1498] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 1 (Alannah MacTiernan).
[1499] *Construction Contracts Act 2004* (WA), s 27.

accorded the respondent. It remains at 10 working days.

This could be construed as a breach of natural justice and procedural fairness. It is, in the author's view, as his Honour Justice Kenneth Martin in *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd*,[1500] noted that: 'these observations as to natural justice may be taken as being akin to the more contemporary terminology of procedural fairness, or more correctly, a denial thereof'.[1501]

A denial lies in the applicant having ninety days to apply and yet a respondent only has a mere ten days to respond to what could perhaps be a $164 million application.

Perhaps the respondent could be accorded an additional ten days or granted the mechanism to request a limited extension.

Amend Section 26(1) of the Act and other associated Acts, to reflect the term 'serve' to include the bundling of documents into PDF, and to be sent by email or up/downloading to the 'cloud'

The decision by Hammerschlag J in *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group*,[1502] as to the 'punctilious compliance with provisions of the Act (NSW Act)',[1503] illustrates the need for consideration to be given to amend s 26(1) of the *Construction Contracts Act 2004* (WA).[1504] There is also a need to amend the *Interpretation Act 1984* (WA) and the *Electronic Transactions Act 2011*(WA) to reflect the term 'serve' to include the bundling of documents into PDF,[1505] and to be sent by email or up/down loading to the 'cloud'.

For the adjudicator who received an application for, and response to adjudication that contained

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[1500] [2011] WASC 172.
[1501] *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* [2011] WASC 172, 18 [50].
[1502] [2017] NSWSC 194.
[1503] *Parkview Constructions Pty Limited v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194, [51].
[1504] *Construction Contracts Act 2004* (WA), s 26(1), which states: Applying for adjudication, (1) to apply to have…must:

(a) prepare a written application for adjudication; and
(b) serve it on each other party to the contract; and
(c) serve it —
  (i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, on the adjudicator;
  (ii) if the parties to the contract have appointed a prescribed appointor, on that appointor;
  (iii) otherwise, on a prescribed appointor chosen by the party;

[1505] Portable Document Format - a file format for capturing and sending electronic documents in exactly the intended format.
<https://www.google.com.au/search?q=WHAT+DOES+PDF+STAND+FOR&oq=WHAT+DOES+PDF+STAND+FOR&aqs=chrome..69i57j0l5.8105j0j8&sourceid=chrome&ie=UTF-8>

a total quantum by both parties of 34 A4 & A3 size folders, which contained 11906 pages, the amount of time, money and 'trees' required to serve the application and response on the respondent/applicant, the prescribed appointer/adjudicator is appalling. The cost of junior solicitors producing 102 folders and printing 35718 pages sadly reflects a 'punctilious compliance' to the Acts that do not meet the purposes of the 'electronic age' and the 21st Century.

Requesting electronic (or PDF) copies or upon the receipt of the documents, to have them scanned and converted to PDF, enables one to quickly search through each document using the 'search mechanisms' within the software and to cut and paste as required to make a determination/decision, without spending inordinate amounts of time and associated costs for typing. (See s 30 of the Act.)[1506]

This would accord with modern business practice.

The suggestions for change will enhance the effectiveness of the *Construction Contracts Act 2004* (WA), and while the amount of adjudicators' determinations that come before the Courts and the State Administrative Tribunal are low, the changes should result in bringing those amounts even lower.

7.5. Areas for further research

There are several areas of this study that are open for further research. They are:

1. Section 4(3), the mining/process clauses;
2. Alternative tribunal for Small Claims;
3. Trust Funds/Retention Monies/Project Bank Accounts (PBA); and
4. Relinquishing the powers of the Supreme Court of Western Australia.

Section 4(3), the mining/process clauses

The first area for further research is to determine whether mining and oil and gas, should be considered to come under the umbrella of the Act.

In April 2017, the State Government of Western Australia revealed reforms to the public sector that would make it more efficient. Over two months later, the State Government announced:

> On 1 July, the Departments of Commerce and Mines and Petroleum combined to form

[1506] *Construction Contracts Act 2004* (WA), s 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.

> the new Department of Mines, Industry Regulation and Safety.
>
> The new department has three key business groups – Resources, Titles and Compliance; Safety; and Industry Regulation and Consumer Protection, and is working for a safe, fair and responsible future for the Western Australian community, industry and resources sector.[1507]

Now that the Building Commission has come under the umbrella of the Department of Mines, Industry Regulation and Safety, it would now seem that bringing the mining and oil and gas industry within the same legislation as the *Construction Contracts Act 2004* (WA) should be considered.

Consideration should also be given to setting up an Industry Advisory Group to advise the government on this matter.

Alternative tribunal for Small Payment Claims

The second area for further research is determining the viability of an alternative tribunal for the resolution of small payment claim disputes. Earlier in this research, it was found that small claims under $25,000 are now in decline. This would indicate that the costs associated with the process of adjudication are becoming cost prohibitive.

This research has highlighted how in the Northern Territory, there is access to the *Community Justice Centre Act 2011* (NT) (CJCA), which provides an alternative to the standard adjudication. Pursuant to s 22(1) of the CJCA, states:

> An adjudicator must not make a determination for a payment dispute under section 33(1)(b) of the *Construction Contracts (Security of Payments) Act 2004* (NT) that would result in the total of the amount to be paid, and the security to be returned, for the dispute equal to $10 000 or more.

The CJCA provides that, pursuant to s 22(2)(a), where a payment claim is less than $10,000, the Director may, pursuant to s 20(4), appoint a non-registered adjudicator to 'adjudicate the payment dispute.[1508]

This alternative was raised in the discussion paper by Evans; later in the final Report, Evans noted that 14 respondents to the survey (or 29%) supported an alternative low-cost adjudication

[1507] Department of Mines, Industry Regulation and Safety, **announcement,** Corporate Department News 01 July 2017 < https://www.commerce.wa.gov.au/node/7404/>
[1508] *Community Justice Centre Act 2011* (NT), s 20(4).

service for subcontractors seeking payment from principals in relation to construction industry payment claims under $25,000 in value. He found that nine responses (or 18%) did not support an alternative low-cost adjudication service for subcontractors seeking payment from principals in relation to construction industry payment claims under $25,000 in value and that 26 responses (or 53%) made no comment.[1509]

However, this idea gained no traction in the response by the Western Australian government. Certainly, with the current economic climate and the potential restructuring of government departments, it is unlikely that this suggestion would be taken up. It is critical to continue to safeguard the Act, so that it remains a suitable mechanism for payment disputes 'for all levels of applicants, not just those with 'larger and deeper pockets' and in a far greater position to seek the support of legal counsel. Further research should be considered for the establishment of a small 'tribunal' at the Building Commission, and made up of non-adjudicators and first-year adjudicators, to provide them with adequate experience to deal with the larger and more complex payment claims. The 'tribunal' would need legislative changes and would be capped at perhaps $50,000. This would most certainly be very attractive to the small players within the construction industry.

On Thursday 1 June 2017, an email from the Building Commission of Western Australia was sent to all registered adjudicators, seeking a call for expressions of interest of fixed/low-fee adjudications/advisory services. The email (with attached PDF advertisement), expressed:

> As part of its role in administering the *Construction Contracts Act 2004* (the Act) and promoting the use of rapid adjudication to resolve contractual payment disputes, the Building Commission is interested in providing information to construction industry participants on the availability of:
>
> - adjudicators who are willing to conduct adjudications under the Act at a fixed fee or low-cost rate; and
> - adjudicators who provide or are willing to provide advisory services to assist with preparing applications (or responses) in adjudication proceedings, and/or providing advice on contractual payment disputes.
>
> The Building Commission is mainly focused on providing information to parties involved in lower value contractual payment disputes (i.e. less than $100,000), as they

[1509] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 127-128.

> tend to be less familiar with using the adjudication process under the Act.
>
> The Building Commission is seeking expressions of interest from registered adjudicators who currently provide, or are interested in providing, adjudications and/or advisory services to parties on a fixed fee or low-cost basis for low-value payment disputes.

The idea has now gained traction, and will allow the Act to continue to be a 'quick and dirty fix' and ensure that adjudication is not being 'hijacked by the upper end of town'. There still remains considerable disquiet that no genuine attempt has been made to rectify this perception. Professor Evans asserted that 'the complexity of the issue or the quantum of the claim may be poor indicators of the appropriate response time because simple disputes may involve complex issues, and large claims may be relatively straightforward'.[1510] This may see a rise in dismissals as adjudicators may not find it economically viable to conduct low value, high complexity applications that could take considerable time, for little financial gain.

Trust Funds/Retention Monies/Project Bank Accounts (PBA)

The first issue that requires change is the setting up of Trust Funds/Retention Monies/Project Bank Accounts (PBA). The after-effects of the Department of Finance's Building Management and Works (BMW), Building the Education Revolution (BER) administered contracts, continue to haunt the subcontractors within the construction industry that were caught up by the damage caused by contractors going into receivership without paying monies due and payable.

When the Honourable Ms. Alannah J. MacTiernan, introduced the *Construction Contracts Bill 2004 - Introduction and First Reading & Second Reading* (the Bill) she said:

> This Bill cannot remedy every security of payment issue. Insolvency can be addressed only by Commonwealth legislation. Participants in the industry still have to look after their own commercial interests.[1511]

One only has to look through the newspapers and see the reports, and see what recently occurred with the Diploma Group in Western Australia in the past months. The West Australian wrote :

> Receivers and administrators were appointed to Australian Securities Exchange-listed

[1510] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*', (Parliament of Western Australia, 2015), 24.
[1511] Western Australia, *Second Reading - Construction Contracts Bill 2004*, Assembly - Wed, 3 March 2004, 274d-275a, 2 (Alannah MacTiernan).

> Diploma Group and two construction subsidiaries in December, leaving more than 500 subcontractors, suppliers and former employees claiming $53 million in outstanding payments.[1512]

When Professor Evans released the *Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA),* on this issue he stated:

> 8. Trust Funds/Retention Monies/Project Bank Accounts (PBA)
>
> Consideration should be given to amending div 9 s 11 of the Act in order to remove the requirement that 'the principal holds the retention money on trust for the contractor', with the trust money to be held instead by an independent third party. As with the Wallace recommendation, the funds could be held by the Building Commissioner.
>
> It is acknowledged that there may be practical administrative problems if the funds are to be held by a third party. At first sight it would appear that PBAs may not be suitable for smaller projects that fall within the jurisdiction of the Act. However it is recommended that these issues be considered by way of a separate future review by others.
>
> The Western Australian Government should consider the creation of a separate taskforce of major public sector construction agencies to address potential concerns about the consequences of insolvencies for major public sector projects or in the construction industry generally.[1513]

The Attorney – General and Minister for Commerce, the Hon. Michael Mischin MLC, replied to Professor Evans report in the state governments 'Response of the Western Australian Government to the Report on the Operation and Effectiveness of the *Construction Contracts Act 2004* (WA)'. The Government response stated:

> The Government acknowledges Professor Evans' consideration of insolvency and security of payment issues as part of the Review Report. While investigation of these issues was not part of the original terms of reference, the Government shares the concern expressed by many stakeholders, particularly subcontractors, on the impact insolvencies

[1512] Peter Williams, 'ASIC bid to liquidate builder Diploma', *The West Australian,* (Perth Western Australia) Sat, 22 April 2017, <https://thewest.com.au/business/construction/asic-bid-to-liquidate-builder-diploma-ng-b88452808z>.
[1513] Philip Evans, '*Report on the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)'*, (Parliament of Western Australia, 2015), 7.

> have across the · industry.[1514]

The response to the report further stated:

> Large scale inquiries have been undertaken by the Commonwealth, New South Wales and Queensland Governments into the causes and effect of insolvencies in the construction industry. Each of these inquiries has produced a number of recommended interventions for improving security of payment within the contracting chain. Queensland, New South Wales, South Australia and the Northern Territory have also undertaken, or are in the process of undertaking, reviews of their respective security of payment legislation.[1515]

The Attorney General and Minister would express:

> The Government will be encouraging the Commonwealth to take a national approach to improving outcomes for subcontractors in the event of head contractor insolvencies, including adopting many of the recommendations made by the Senate Economics Reference Committee inquiry into insolvency in the Australian construction industry.[1516]

At a state level, the Attorney General and Minister stated that:

> Separately, the Western Australian Department of Finance, Building Management and Works Division (BMW) has been trialling the use of Project Bank Accounts (or PBAs) since 2013. The trial is designed to determine the impact PBAs have on reducing the risks following contractor insolvencies.[1517]

The response to the report of Professor Evans put forward Recommendation 21(b):

> The Government supports the recommendation as it relates to a consideration of PBAs. A trial of PBAs has been undertaken by BMW. An evaluation of this trial is being finalised and will be considered by Government for future policy direction. The government does, however, note the finding that PBAs are more suitable for higher value or large one-off projects and generally unsuitable for the majority of the construction projects regulated by the CC Act.

At the Federal level, the 2015 the report by Senate - Economics References Committee,

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[1514] Western Australia, *The Response of the Western Australian Government to the Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA), May 2016, 7.
[1515] Western Australia, *The Response of the Western Australian Government to the Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA), May 2016, 7.
[1516] Ibid 2.
[1517] Ibid 7.

Insolvency in the Australian construction industry,[1518] also recommended the trial and introduction of PBA's.

The recommendation for mandatory introduction of PBA's is continually put forth at both a Federal and State level, yet continues to stall.

There is no evidence provided pertaining to the statement that PBAs are unsuitable for the majority of the construction projects regulated by the *Construction Contracts Act 2004* (WA). The research has indicated that the total amount of payment claims sought from 2005-2006 to 2015-2016 stands at about $2,757,866,407.52. The average for payment claims over that period is about $15,096,546.22 each.

The issue of insolvencies is nothing new within the construction industry. As the Honourable Ms. Alannah J. MacTiernan, stated 'participants in the industry still have to look after their own commercial interests'.[1519] All and sundry in any industry must always consider this fact. However, had the Department of Finance's Building Management and Works, during the Building the Education Revolution (BER) administered contracts period put into place Trust Funds or Project Bank Accounts, then the case of *State Side Electrical Services Pty Ltd v WA Commercial Constructions Pty Ltd*[1520] could have been averted, and maybe the Small Business Commissioner, Mr David Eaton, would not have had to state that 'it is not surprising that this subcontractor feels abandoned by and angry with, the system'.[1521]

The subcontractor was owed near on $400,000; he was compensated by the State Government, about $92,000.

[1518] Senate Economics References Committee, *Insolvency in the Australian construction industry* (December 2015).
[1519] Western Australia, *Second Reading - Construction Contracts Bill 2004,* Assembly - Wed, 3 March 2004, 274d-275a, 2 (Alannah MacTiernan).
[1520] [2012] WADC 27.
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Chief Justice Wayne Martin AC, at the Western Australian launch of the 'Australian Commercial Arbitration' by Hockley, Croft, Hickie and Ho at the Supreme Court of Western Australia on Tuesday, 3 June 2014

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Appendix 1 – The *Construction Contracts Bill 2004* (WA)

Extract from *Hansard*
[ASSEMBLY - Wednesday, 3 March 2004] p274d-275a
Ms Alannah MacTiernan

CONSTRUCTION CONTRACTS BILL 2004

Introduction and First Reading

Bill introduced, on motion by Ms A.J. MacTiernan (Minister for Planning and Infrastructure), and read a first time.

Second Reading

MS A.J. MacTIERNAN (Armadale - Minister for Planning and Infrastructure) [12.45 pm]: I move - That be Bill be now read a second time.

This Bill delivers the Government's commitment to introduce security of payment legislation for the building and construction industry. The building and construction industry is made up of many consultants, contractors, subcontractors and suppliers - all of whom work together to deliver buildings and infrastructure for the Western Australian economy. This interdependence makes security of payment a vital foundation for the industry. Failure to pay at any link in the contracting chain can be disastrous to those subcontractors and suppliers who are waiting to be paid in their turn and, until now, there has been little recourse available to those who are affected.

The Bill supports good payment practices in the building and construction industries by prohibiting payment provisions in contracts that slow or stop the movement of funds through the contracting chain; implying fair and reasonable payment terms into contracts that are not in writing; clarifying the right to deal in unfixed materials when a party to the contract becomes insolvent; and providing an effective rapid adjudication process for payment disputes.

The Bill draws on legislation already enacted in the United Kingdom, New South Wales and Victoria, but has been drafted to overcome a number of problems that have become apparent in those jurisdictions. In particular, it is based on enforcing the contract between the parties and does not introduce a separate, and possibly conflicting, statutory right to payment.

The Bill applies to contracts for the carrying out of construction work and related services. The Bill also covers contracts for the provision of related professional services and the supply of goods and materials to the construction site. To be covered by the Bill, contracts for services have to relate directly to construction work, and contracts for supply must require the materials or goods to be supplied to the site where the construction work takes place. The Bill does not cover the remote manufacture of components or their retail supply. Regulations can be used to clarify the scope of the Bill should any uncertainty arise in practice.

This legislation supports the privity of the contract between the parties. A party commissioning construction work must pay for the work. That party cannot make payment contingent on it being paid first, under some separate contract. The notorious "pay if paid" and "pay when paid" clauses will be banned. The financial health of the industry will improve when contractors and subcontractors know they will be paid on time and, equally, know that they have to pay on time.

Apart from these specific unfair practices, the Bill does not unduly restrict the normal commercial operation of the industry. Parties to a construction contract remain free to strike whatever bargains they wish between themselves, as long as they put the payment provisions in writing and do not include the prohibited terms.

When there is no written provision covering the basic payment provisions of the right to be paid, how to deal with variations, how to claim payment and how to dispute it, or the rate of interest on late payments, the Bill provides for fair and effective terms to be implied into the contract. The Bill also provides implied terms to deal with the contentious issues of ownership of unfixed goods or materials when a contractor becomes insolvent, as well as the status of retention moneys. This means the parties should have clear contractual payment rights and obligations so that misunderstanding and disputes are minimised.

When a party to a construction contract believes it has not been paid in accordance with the contract, the Bill provides a rapid adjudication process that operates in parallel to any other legal or contractual remedy. 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 contracting chain by enforcing timely payment and sidelining 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 a party is not satisfied, it retains its 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.

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[1]

Extract from *Hansard*

[ASSEMBLY - Wednesday, 3 March 2004] p274d-275a

Ms Alannah MacTiernan

The effectiveness of rapid adjudication depends on rapid access to capable adjudicators. To ensure the expert and independent status of adjudicators, they will be registered by a registrar appointed under this Bill. The parties to a contract may agree on an adjudicator at the outset of the project or when a dispute arises. If the parties have not agreed on an adjudicator, the party wishing to make a claim may go to a prescribed appointer who will appoint a suitable registered adjudicator. Prescribed appointers will typically be professional bodies active in the industry but free of sectional interests.

This Bill cannot remedy every security of payment issue. Insolvency can be addressed only by commonwealth legislation. Participants in the industry still have to look after their own commercial interests. This Bill will provide the industry with simple and effective tools to clarify rights to be paid and to enforce those rights. I commend the Bill to the House.

Debate adjourned, on motion by Mr R.F. Johnson.

Appendix 2 – The *Construction Contracts Act 2004* (WA)

The original

Western Australia

Construction Contracts Act 2004

As at 22 May 2009 Version 00-b0-00

Western Australia

Construction Contracts Act 2004

Western Australia

Construction Contracts Act 2004

CONTENTS

Western Australia

Construction Contracts Act 2004

An Act —

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

and for related purposes.

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Construction Contracts Act 2004*.

2. Commencement

(1) This Act comes into operation on a day fixed by proclamation.

(2) Different days may be fixed under subsection (1) for different provisions.

3. Interpretation

In this Act, unless the contrary intention appears —

adjudication means the adjudication of a payment dispute in accordance with Part 3;

applicant, in relation to an adjudication, means the person who, under section 26, makes the application for the adjudication;

appointed adjudicator, in relation to a payment dispute, means the registered adjudicator who, having been appointed under Part 3 to adjudicate the dispute, has been served with the application for adjudication;

construction contract means a contract or other agreement, whether in writing or not, under which a person (the ***contractor***) has one or more of these obligations —

(a) to carry out construction work;

(b) to supply to the site where construction work is being carried out any goods that are related to construction work by virtue of section 5(1);

(c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2);

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b);

construction work has the meaning given to that term in section 4;

contractor has the meaning given by the definition of "construction contract";

costs of an adjudication has the meaning given to that term in section 44;

determination means a determination, made on an adjudication under Part 3, of the merits of a payment dispute;

obligations, in relation to a contractor, means those of the obligations described in the definition of "construction contract" that the contractor has under the construction contract;

party, in relation to an adjudication, means the applicant and any person on whom an application for the adjudication is served;

party, in relation to a construction contract, means a party to the contract;

payment claim 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;

payment dispute has the meaning given to that term in section 6;

prescribed appointor means a person prescribed as such by the regulations;

principal, in relation to a construction contract, means the party to whom the contractor is bound under the contract;

registered adjudicator means an individual registered as such under section 48;

Registrar means the Construction Contracts Registrar designated under section 47.

4. Construction work

(1) In this section —

civil works includes —

(a) a road, railway, tramway, aircraft runway, canal, waterway, harbour, port or marina;

(b) a line or cable for electricity or telecommunications;

(c) a pipeline for water, gas, oil, sewage or other material;

(d) a path, pavement, ramp, tunnel, slipway, dam, well, aqueduct, drain, levee, seawall or retaining wall; and

(e) any works, apparatus, fittings, machinery or plant associated with any works referred to in paragraph (a), (b), (c) or (d);

site in WA means a site in Western Australia, whether on land or off-shore.

(2) In this Act —

construction work means any of the following work on a site in WA —

(a) reclaiming, draining, or preventing the subsidence, movement or erosion of, land;

(b) installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, any works, apparatus, fittings, machinery, or plant, associated with any work referred to in paragraph (a);

(c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form, whether permanently or not and whether in WA or not, part of land or the sea bed whether above or below it;

(d) fixing or installing on or in any thing referred to in paragraph (c) any fittings forming, or to form, whether permanently or not, part of the thing, including —

(i) fittings for electricity, gas, water, fuel oil, air, sanitation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing, and the safety of people; and

(ii) lifts, escalators, insulation, furniture and furnishings;

(e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any thing referred to in paragraph (c) or any fittings described in paragraph (d) that form part of that thing;

(f) any work that is preparatory to, necessary for, an integral part of, or for the completion of, any work referred to in paragraph (a), (b), (c), (d) or (e), including —

(i) site or earth works, excavating, earthmoving, tunnelling or boring;

(ii) laying foundations;

(iii) erecting, maintaining or dismantling temporary works, a temporary building, or a temporary structure including a crane or other lifting equipment, and scaffolding;

(iv) cleaning, painting, decorating or treating any surface; and

(v) site restoration and landscaping;

(g) any work that is prescribed by regulations to be construction work for the purposes of this Act.

(3) Despite subsection (2) construction work does not include any of the following work on a site in WA —

(a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;

(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;

(c) 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;

(d) constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations and murals;

(e) work prescribed by the regulations not to be construction work for the purposes of this Act.

(4) In this Act —

construction work does not include constructing the whole or part of any watercraft.

5. Goods and services related to construction work

(1) For the purposes of this Act, goods are related to construction work if they are —

(a) materials or components (whether pre-fabricated or not) that will form part of any thing referred to in section 4(2)(b) or 4(2)(c) or of any fittings referred to in section 4(2)(d);

(b) any fittings referred to in section 4(2)(d) (whether pre-fabricated or not);

(c) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of the construction work at the site of the construction work; or

(d) goods prescribed by the regulations to be related to construction work for the purposes of this Act.

(2) For the purposes of this Act, professional services are related to construction work if they are —

(a) services that are provided by a profession and that relate directly to construction work or to assessing its feasibility (whether or not it proceeds) —

(i) including surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying, and project management, services; but

(ii) not including accounting, financial, or legal, services;

or

(b) services that are provided by a profession that are prescribed by the regulations to be professional services related to construction work for the purposes of this Act.

(3) For the purposes of this Act, on-site services —

(a) are services other than professional services referred to in subsection (2); and

(b) are related to construction work if they are —

(i) services that relate directly to construction work, including the provision of labour to carry out construction work; or

(ii) services prescribed by the regulations to be on-site services related to construction work for the purposes of this Act.

(4) The regulations may prescribe goods, professional services or on-site services that are not related to construction work for the purposes of this Act.

6. Payment dispute

For the purposes of this Act, 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.

7. Construction contracts to which this Act applies

(1) This Act applies to a construction contract entered into after this Act comes into operation.

(2) This Act applies to a construction contract —

(a) irrespective of whether it is written or oral or partly written and partly oral;

(b) irrespective of where it is entered into; and

(c) irrespective of whether it is expressed to be governed by the law of a place other than Western Australia.

(3) This Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods or services that are related to construction work, as an employee (as defined in the *Industrial Relations Act 1979* section 7) of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.

(4) This Act, or a provision of this Act, does not apply to a construction contract, or a class of construction contracts, prescribed by the regulations as a contract or class of contracts to which this Act, or that provision, does not apply.

8. Application to Crown

This Act binds the Crown.

Part 2 — Content of construction contracts

Division 1 — Prohibited provisions

9. Prohibited: pay if paid/when paid provisions

A provision in a construction contract has no effect if it purports to make the liability of a party (***A***) to pay money under the contract to another party contingent, whether directly or indirectly, on A being paid money by another person (whether or not a party).

10. Prohibited: provisions requiring payment to be made after 50 days

A provision in a construction contract that purports to require a payment to be made more than 50 days after the payment is claimed is to be read as being amended to require the payment to be made within 50 days after it is claimed.

11. Prohibited: prescribed provisions

A provision in a construction contract has no effect if it is a provision that is prescribed by the regulations to be a prohibited provision.

12. Other provisions of contract not affected

A provision in a construction contract that has no effect because of section 9 or 11 or that is modified under section 10 does not prejudice or affect the operation of other provisions of the contract.

Division 2 — Implied provisions

13. Variations of contractual obligations

The provisions in Schedule 1 Division 1 are implied in a construction contract that does not have a written provision about variations of the contractor's obligations under the contract.

14. Contractor's entitlement to be paid

The provisions in Schedule 1 Division 2 are implied in a construction contract that

does not have a written provision about the amount, or a means of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.

15. Contractor's entitlement to claim progress payments

The provisions in Schedule 1 Division 3 are implied in a construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed.

16. Making claims for payment

The provisions in Schedule 1 Division 4 are implied in a construction contract that does not have a written provision about how a party is to make a claim to another party for payment.

17. Responding to claims for payment

The provisions in Schedule 1 Division 5 about when and how a party is to respond to a claim for payment made by another party are implied in a construction contract that does not have a written provision about that matter.

18. Time for payment

The provisions in Schedule 1 Division 5 about the time by when a payment must be made are implied in a construction contract that does not have a written provision about that matter.

19. Interest on overdue payments

The provisions in Schedule 1 Division 6 are implied in a construction contract that does not have a written provision about interest to be paid on any payment that is not made at the time required by the contract.

20. Ownership of goods

The provisions in Schedule 1 Division 7 are implied in a construction contract that does not have a written provision about when the ownership of goods that are —

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations,

passes from the contractor.

21. Duties as to unfixed goods on insolvency

The provisions in Schedule 1 Division 8 are implied in a construction contract that does not have a written provision about what is to happen to unfixed goods of a kind referred to in section 20 if either of the following persons becomes insolvent —

(a) the principal; or

(b) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work.

22. Retention money

The provisions in Schedule 1 Division 9 are implied in a construction contract that does not have a written provision about the status of money retained by the principal for the performance by the contractor of its obligations.

23. Implied provisions: interpretation etc.

The *Interpretation Act 1984* and sections 3 to 6 of this Act apply to the interpretation and construction of a provision that is implied in a construction contract under this Part despite any provision in a construction contract to the contrary.

Part 3 — Adjudication of disputes

Division 1 — Preliminary

24. Interpretation of "construction contract"

Without affecting the operation of section 9, 11 or 53, a reference in this Part to a

construction contract is a reference to the contract including any provision that is modified under section 10 or implied in the contract under Part 2 Division 2.

Division 2 — Commencing adjudication

25. Who can apply for adjudication

If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless —

(a) an application for adjudication has already been made by a party, whether or not a determination has been made, but subject to section 37(2); or

(b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.

26. Applying for adjudication

(1) To apply to have a payment dispute adjudicated, a party to the contract, within 28 days after the dispute arises or, if applicable, within the period provided for by section 37(2)(b), must —

(a) prepare a written application for adjudication;

(b) serve it on each other party to the contract;

(c) serve it —

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, on the adjudicator;

(ii) if the parties to the contract have appointed a prescribed appointor, on that appointor;

(iii) otherwise, on a prescribed appointor chosen by the party;

and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or the prescribed appointor requires under section 44(8) or (9).

(2) The application —

(a) must be prepared in accordance with, and contain the information prescribed by, the regulations;

(b) must set out the details of, or have attached to it —

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute;

and

(c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

(3) A prescribed appointor that is served with an application for adjudication made under subsection (1) must comply with section 28.

27. Responding to an application for adjudication

(1) Within 14 days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on —

(a) the applicant and on any other party that has been served with the application; and

(b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointor on which the application was served under section 26(1)(c).

(2) The response —

(a) must be prepared in accordance with, and contain the information prescribed by, the regulations;

(b) must set out the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and

(c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

28. Appointment of adjudicator in absence of agreed appointment

(1) If an application for adjudication is served on a prescribed appointor the appointor,

within 5 days after being served, must —

(a) appoint a registered adjudicator to adjudicate the payment dispute concerned;

(b) send the application and any response received by it to the adjudicator;

(c) notify the parties in writing accordingly; and

(d) notify the Registrar in writing accordingly.

(2) If a prescribed appointor does not make an appointment under subsection (1) the Registrar may appoint a registered adjudicator to adjudicate the payment dispute concerned.

(3) If the Registrar makes an appointment under subsection (2), the Registrar must —

(a) notify the prescribed appointor in writing accordingly and require the appointor to serve the application and any response received by it on the adjudicator appointed by the Registrar; and

(b) notify the parties in writing accordingly.

29. Adjudicators: conflicts of interest

(1) An appointed adjudicator who has a material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract is disqualified from adjudicating the dispute.

(2) If an appointed adjudicator is disqualified —

(a) the adjudicator must notify the parties in writing of the disqualification and the reasons for it;

(b) unless, within 5 days after the date of the adjudicator's notice, all of the parties in writing authorise the adjudicator to continue as the appointed adjudicator, the adjudicator's appointment ceases;

(c) the applicant may again apply for adjudication in accordance with section 26(1); and

(d) the period commencing on the date when the adjudicator was served with the application for adjudication and ending on and including the date when the

adjudicator notifies the parties under paragraph (a) does not count for the purposes of section 26(1).

(3) A party to a payment dispute may apply to the State Administrative Tribunal for a declaration that an appointed adjudicator is disqualified under subsection (1).

(4) The application must be made before the person is notified of a decision or determination made under section 31(2).

Division 3 — The adjudication process

30. Object of the adjudication process

The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.

31. Adjudicator's functions

(1) In this section —

prescribed time means —

(a) if the appointed adjudicator is served with a response under section 27(1) — 14 days after the date of the service of the response;

(b) if the appointed adjudicator is not served with a response under section 27(1) — 14 days after the last date on which a response is required to be served under section 27(1).

(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 —

(i) the contract concerned is not a construction contract;

(ii) the application has not been prepared and served in accordance with section 26;

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order,

judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;

(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; 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.

(3) If an application is not dismissed or determined under subsection (2) within the prescribed time, or any extension of it made under section 32(3)(a), the application is to be taken to have been dismissed when the time has elapsed.

32. Adjudication procedure

(1) For the purposes of making a determination, an appointed adjudicator —

(a) must act informally and if possible make the determination on the basis of —

(i) the application and its attachments; and

(ii) if a response has been prepared and served in accordance with section 27, the response and its attachments;

and

(b) is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.

(2) In order to obtain sufficient information to make a determination, an appointed adjudicator may —

(a) request a party to make a, or a further, written submission or to provide information or documentation, and may set a deadline for doing so;

(b) request the parties to attend a conference with the adjudicator;

(c) unless all the parties object —

(i) inspect any work or thing to which the payment dispute relates, provided the occupier of any place concerned consents to the entry and inspection;

(ii) arrange for any thing to which the payment dispute relates to be tested, provided the owner of the thing consents to the testing;

(iii) engage an expert to investigate and report on any matter relevant to the payment dispute.

(3) An appointed adjudicator may —

(a) with the consent of the parties, extend the time prescribed by section 31(2) for making a determination;

(b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties;

(c) with the consent of all the parties concerned, adjudicate the payment dispute simultaneously with another payment dispute.

(4) If an appointed adjudicator adjudicates simultaneously 2 or more payment disputes, the adjudicator may, in adjudicating one, take into account information the adjudicator receives in relation to the other, and vice versa.

(5) An adjudicator's power to make a determination is not affected by the failure of either or both of the parties to make a submission or provide information within time or to comply with the adjudicator's request to attend a conference with the adjudicator.

(6) To the extent that the practice and procedure in relation to adjudications is not regulated by this Part or the regulations, an appointed adjudicator may determine his or her own procedure.

33. Interest up to determination

(1) If an appointed adjudicator determines that a party to a payment dispute is liable to make a payment, he or she may also determine that interest is to be paid —

(a) if the payment is overdue under the construction contract, on the payment in accordance with the contract; or

(b) otherwise, on the whole or a part of the payment from the date the payment dispute arose at a rate not greater than the rate prescribed under the *Civil Judgments Enforcement Act 2004* section 8(1)(a),

until and including the date of the determination.

(2) Subsection (1) does not authorise the awarding of interest upon interest.

[Section 33 amended by No. 8 of 2009 s. 38(2).]

34. Costs of parties to payment disputes

(1) Subject to subsection (2), parties to a payment dispute bear their own costs in relation to an adjudication of the dispute.

(2) If an appointed adjudicator is satisfied that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.

(3) If an appointed adjudicator makes a decision under subsection (2) the adjudicator must —

(a) decide the amount of the costs and the date on which the amount is payable;

(b) give reasons for the decisions; and

(c) communicate the decisions and the reasons in writing to the parties.

(4) Divisions 4 and 5, with any necessary changes, apply to a decision made under subsection (2) as if it were a determination of an appointed adjudicator.

35. Certificates of completion etc., effect of

(1) This section applies if —

(a) the construction contract to which a payment dispute relates provides for a person to certify —

(i) that obligations under the contract have been performed; or

(ii) the amount of a payment that is to be made by a party;

and

(b) such a certificate is provided by a party to an adjudicator in the course of an adjudication.

(2) For the purposes of the adjudication —

(a) if the certificate relates to the final amount payable under the contract and has the effect of finalising the contract, the certificate is to be taken to be conclusive evidence of its contents;

(b) in any other case the certificate is to have such evidentiary weight as the appointed adjudicator thinks fit.

36. Determination, content of

An appointed adjudicator's decision made under section 31(2)(b) must —

(a) be in writing;

(b) be prepared in accordance with, and contain the information prescribed by, the regulations;

(c) state —

(i) the amount to be paid and the date on or before which it is to be paid; or

(ii) the security to be returned and the date on or before which it is to be returned,

as the case requires;

(d) give reasons for the determination;

(e) identify any information in it that, because of its confidential nature, is not suitable for publication by the Registrar under section 50;

(f) be given to the parties to the adjudication; and

(g) be given to the Registrar.

37. Dismissed applications

(1) If under section 31(2)(a) an appointed adjudicator dismisses an application for adjudication, he or she must —

(a) give reasons for doing so; and

(b) communicate the decision and the reasons in writing to the parties.

(2) If under section 31(3) an application for an adjudication of a payment dispute is taken to be dismissed —

(a) nothing in this Part prevents a further application being made under this Part for an adjudication of the dispute; and

(b) any further application must be made within 28 days after the previous application is taken to be dismissed under section 31(3).

Division 4 — Effect of determinations

38. Determinations have effect despite other proceedings

An appointed adjudicator's determination is binding on the parties to the construction contract under which the payment dispute concerned arose even though other proceedings relating to the payment dispute have been commenced before an arbitrator or other person or a court or other body.

39. Payment of amount determined and interest

(1) A party that is liable to pay an amount under a determination must do so on or before the date specified in the determination.

(2) Unless the determination provides otherwise, interest at the rate prescribed under the *Civil Judgments Enforcement Act 2004* section 8(1)(a) is to be paid on such of the amount as is unpaid after the date specified in the determination.

(3) The interest to be paid under subsection (2) forms part of the determination.

(4) If under section 43(2) a judgment is entered in the terms of a determination, interest under subsection (2) ceases to accrue.

[Section 39 amended by No. 8 of 2009 s. 38(3).]

40. Progress payments under determinations to be on account

If —

(a) an appointed adjudicator —

(i) determines a payment dispute concerning a claim by a contractor for payment for part performance of its obligations but not for a final payment by the principal; and

(ii) determines that the principal is to pay the contractor an amount in respect of the claim;

and

(b) the principal, in accordance with the determination, pays the amount,

the payment is to be taken to be an advance towards the total amount payable under the contract by the principal to the contractor.

41. Determinations are final

(1) If on the adjudication of a payment dispute the appointed adjudicator makes a determination —

(a) the adjudicator cannot subsequently amend or cancel the determination except with the consent of the parties; and

(b) a party to the dispute may not apply subsequently for an adjudication of the dispute.

(2) Despite subsection (1)(a), if an adjudicator's determination contains —

(a) an accidental slip or omission;

(b) a material arithmetic error; or

(c) a material mistake in the description of any person, thing or matter,

the adjudicator, on the application of a party or, after notifying the parties, on the adjudicator's own initiative, may correct the determination.

Division 5 — Enforcing determinations

42. Non-compliance by principal, contractor may suspend its obligations

(1) If a determination requires the principal to pay the contractor an amount and the principal does not pay in accordance with the determination, the contractor may give the principal notice of the contractor's intention to suspend the performance of its obligations.

(2) The notice must —

(a) be in writing;

(b) be prepared in accordance with, and contain the information prescribed by, the regulations;

(c) state the date on which the contractor intends to suspend the performance of its obligations; and

(d) be given to the principal at least 3 days before that date.

(3) If on the date stated under subsection (2)(c) in the notice the principal has not paid the contractor the amount in accordance with the determination, the contractor may suspend the performance of its obligations until no longer than 3 days after the date on which the amount is paid.

(4) Subsection (3) does not prevent the contractor from at any time resuming the performance of its obligations.

(5) A contractor that suspends the performance of its obligations in accordance with this section —

(a) is not liable for any loss or damage suffered by the principal or by any person claiming through the principal; and

(b) retains its rights under the contract, including any right to terminate the contract.

43. Determinations may be enforced as judgments

(1) In this section —

court of competent jurisdiction, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.

(2) A determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court to the same effect, and if such leave is given, judgment may be entered in terms of the determination.

(3) For the purposes of subsection (2), a determination signed by an adjudicator and certified by the Registrar as having been made by a registered adjudicator under this Part is to be taken as having been made under this Part.

Division 6 — General

44. Costs of adjudications

(1) For the purposes of this section the costs of an adjudication are —

(a) the entitlements of the appointed adjudicator under subsection (2); and

(b) the costs of any testing done, or of any expert engaged, under section 32(2)(c).

(2) If an appointed adjudicator, within the prescribed time in section 31(2), dismisses an application for adjudication or makes a determination of the dispute, he or she is entitled —

(a) to be paid for his or her work —

(i) at a rate agreed between the adjudicator and the parties that is not more than the maximum rate, if any, prescribed by the regulations; or

(ii) if a rate was not agreed, at the rate published under section 51 in respect of the adjudicator;

and

(b) to be reimbursed any expenses reasonably incurred in connection with that work.

(3) An appointed adjudicator who is disqualified under section 29 has the entitlements in subsection (2) in respect of any adjudication work done before the disqualification is notified to the parties.

(4) Despite subsection (2), an appointed adjudicator may refuse to communicate his or her decision or determination under section 31(2) or 34(2) or subsection (10) until he or she has been paid and reimbursed in accordance with subsection (2).

(5) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.

(6) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.

(7) Subsections (5) and (6) do not prevent a decision being made under section 34(2).

(8) An appointed adjudicator may at any time require one or more parties to provide a reasonable deposit, or reasonable security, for the, or any anticipated costs of the adjudication.

(9) A prescribed appointor, before appointing an adjudicator, may require the applicant for adjudication to provide a deposit, or reasonable security, for the, or any anticipated costs of the adjudication.

(10) If a party involved in a dispute has paid more than the party's share of the costs of an adjudication of the dispute, having regard to subsection (6), the appointed adjudicator may decide that another party must pay to the first-mentioned party such amount of the costs as would result in all the parties paying an equal amount of the costs.

(11) If an appointed adjudicator makes a decision under subsection (10) —

(a) the adjudicator must include in the decision the date on which the amount is payable; and

(b) Divisions 4 and 5, with any necessary changes, apply to the decision as if it were a determination of an appointed adjudicator.

(12) An appointed adjudicator may recover the costs of an adjudication from a person liable to pay the costs in a court of competent jurisdiction as if the costs were a debt due to the adjudicator.

45. Effect of this Part on civil proceedings

(1) This Part does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.

(2) If other such proceedings are instituted in relation to a payment dispute that is being adjudicated under this Part, the adjudication is to proceed despite those proceedings unless all of the parties, in writing, require the appointed adjudicator to discontinue the adjudication.

(3) Evidence of anything said or done in an adjudication is not admissible before an arbitrator or other person or a court or other body, except for the purposes of an application made under section 29(3) or an appeal made under section 46.

(4) An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract —

(a) must, in making any award, judgment or order, allow for any amount that has been or is to be paid to a party under a determination of a payment dispute arising under the contract; and

(b) may make orders for the restitution of any amount so paid, and any other appropriate orders as to such a determination.

46. Review, limited right of

(1) A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision.

(2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 14 days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

(3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

Part 4 — Administration

47. Registrar, appointment and functions

(1) There is to be an office called the Construction Contracts Registrar or such other name as the Minister declares by a notice in the *Gazette*.

(2) The Minister, by a notice in the *Gazette*, is to designate a public service officer (as defined in the *Public Sector Management Act 1994* section 3(1)) to be the Registrar.

(3) The Registrar's functions are those conferred on the Registrar by this Act.

(4) A document purporting to be signed by the Registrar is to be taken to have been signed by a person who was at the time duly appointed as the Registrar, in the absence of evidence to the contrary.

48. Registering adjudicators

(1) An individual is eligible to be a registered adjudicator if he or she has the qualifications and experience prescribed by the regulations.

(2) The Registrar may register an individual as a registered adjudicator —

(a) on the application of an individual; or

(b) on the nomination of a prescribed appointor.

(3) The regulations may prescribe a fee to be paid on making such an application or nomination.

(4) The Registrar must not register an individual as a registered adjudicator unless satisfied that the individual is eligible to be registered.

(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.

(6) The Registrar must keep a register of registered adjudicators and make it available for public inspection at no charge.

(7) A certificate by the Registrar stating that an individual was or was not at a time or in a period, or is or is not, a registered adjudicator is proof of the content of the certificate in the absence of evidence to the contrary.

49. Review of registration decisions

A person who is aggrieved by a decision of the Registrar made under section 48 may apply to the State Administrative Tribunal for a review of the decision.

50. Publication of adjudicators' decisions

(1) The Registrar may make available for public inspection the result, or a report, of the decisions of registered adjudicators.

(2) The Registrar is to ensure that there is not included in the result, or a report, of the determination made available under subsection (1) —

(a) the identities of the parties to the adjudication;

(b) any information in the determination that is identified under section 36(e) as being not suitable for publication because of its confidential nature.

(3) No charge is payable for inspecting the result, or a report, of a determination made available under subsection (1).

51. Appointors' and adjudicators' rates to be published

(1) A registered adjudicator is to ensure that the rate at which the adjudicator charges for his or her work under this Act is published in a manner approved by the Registrar.

(2) A prescribed appointor is to ensure that the rate at which the appointor charges for its work under this Act is published in a manner approved by the Registrar.

(3) Nothing in subsection (1) or (2) prevents any of the parties from agreeing the rate to be charged by a registered adjudicator or a prescribed appointor for work under

this Act.

(4) A published or agreed rate as referred to in this section is not to be more than the maximum rate, if any, prescribed by the regulations.

52. Annual report

Before 1 November in each year, the Registrar must give the Minister a written report about the operation and effectiveness of this Act in the financial year that ended in that year.

Part 5 — Miscellaneous

53. No contracting out

(1) A provision in an agreement or arrangement, whether a construction contract or not and whether in writing or not, that purports to exclude, modify or restrict the operation of this Act has no effect.

(2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.

(3) Any purported waiver, whether in a construction contract or not and whether in writing or not, of an entitlement under this Act has no effect.

54. Immunity from tortious liability

(1) In this section —

protected person means an appointed adjudicator, a prescribed appointor or the Registrar.

(2) In this section, a reference to the doing of anything includes a reference to an omission to do anything.

(3) An action in tort does not lie against a protected person for anything that the person has done, in good faith, in the performance or purported performance of a function

under this Act.

(4) The protection given by subsection (3) applies even though the thing done as described in that subsection may have been capable of being done whether or not this Act has been enacted.

(5) Despite subsection (3), the State is not relieved of any liability that it might have for the Registrar having done anything as described in that subsection.

55. Regulations

(1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

(2) Without limiting subsection (1), the regulations may regulate the practice and procedure in adjudications.

56. Review of Act

(1) As soon as practicable after the fifth anniversary of its commencement, the Minister must review the operation and effectiveness of this Act and prepare a report about the review.

(2) As soon as practicable after preparing the report, the Minister must cause it to be laid before each House of Parliament.

Schedule 1 — Implied provisions

[s. 13 to 22]

Division 1 — Variations

1. Variations must be agreed

The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on —

(a) the nature and extent of the variation of those obligations; and

(b) the amount, or a means of calculating the amount, that the principal is to pay the contractor in relation to the variation of those obligations.

Division 2 — Contractor's entitlement to be paid

2. Contractor entitled to be paid

(1) The contractor is entitled to be paid a reasonable amount for performing its obligations.

(2) Subclause (1) applies whether or not the contractor performs all of its obligations.

Division 3 — Claims for progress payments

3. Entitlement to claim progress payments

The contractor is entitled to make one or more claims for a progress payment in relation to those of the contractor's obligations that the contractor has performed and for which it has not been paid by the principal.

4. When claims for progress payments can be made

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) The making of a claim for a progress payment does not prevent the contractor from making any other claim for moneys payable to the contractor under or in connection with this contract.

Division 4 — Making claims for payment

5. Claim for payment, content

(1) In this clause —

payment claim means a claim —

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

(2) A payment claim must —

(a) be in writing;

(b) be addressed to the party to which the claim is made;

(c) state the name of the claimant;

(d) state the date of the claim;

(e) state the amount claimed;

(f) in the case of a claim by the contractor — itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;

(g) in the case of a claim by the principal — describe the basis for the claim in sufficient detail for the contractor to assess the claim;

(h) be signed by the claimant; and

(i) be given to the party to which the claim is made.

(3) In the case of a claim by the contractor, the amount claimed in a payment claim —

(a) must be calculated in accordance with this contract; or

(b) if this contract does not provide a means of calculating the amount, must be —

(i) if this contract says that the principal is to pay the contractor one amount (the ***contract sum***) for the performance by the contractor of all of its obligations under this contract (the ***total obligations***) — the proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations;

(ii) if this contract says that the principal is to pay the contractor in accordance with rates specified in this contract — the value of the obligations

performed and detailed in the claim calculated by reference to those rates; or

(iii) in any other case — a reasonable amount for the obligations performed and detailed in the claim.

(4) Paragraph (b) of subclause (3) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subparagraphs (i), (ii) and (iii) of that paragraph.

Division 5 — Responding to claims for payment

6. Interpretation in Division 5

In this Division —

payment claim means a claim —

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

7. Responding to a payment claim

(1) If a party that receives a payment claim —

(a) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(b) disputes the whole or part of the claim,

the party must, within 14 days after receiving the claim, give the claimant a notice of dispute.

(2) A notice of dispute must —

(a) be in writing;

(b) be addressed to the claimant;

(c) state the name of the party giving the notice;

(d) state the date of the notice;

(e) identify the claim to which the notice relates;

(f) if the claim is being rejected under subclause (1)(a) — state the reasons for the belief that the claim has not been made in accordance with this contract;

(g) if the claim is being disputed under subclause (1)(b) — identify each item of the claim that is disputed and state, in relation to each of those items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(3) Within 28 days after a party receives a payment claim, the party must do one of the following, unless the claim has been rejected or wholly disputed in accordance with subclause (1) —

(a) pay the part of the amount of the claim that is not disputed;

(b) pay the whole of the amount of the claim.

(4) If under this contract the principal is entitled to retain a portion of any amount payable by the principal to the contractor —

(a) subclause (3) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of any amount retained under the entitlement.

Division 6 — Interest on overdue payments

8. Interest payable on overdue payments

(1) Interest is payable on so much of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.

(2) The interest is to be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.

(3) The rate of interest at any time is equal to that prescribed for that time under the *Civil Judgments Enforcement Act 2004* section 8(1)(a).

[Clause 8 amended by No. 8 of 2009 s. 38(4).]

Division 7 — Ownership of goods

9. When ownership of goods supplied by contractor passes

The ownership of goods that are —

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations under this contract,

passes from the contractor when whichever of the following happens first —

(c) when the contractor is paid for the goods; or

(d) when the goods become fixtures.

Division 8 — Duties as to unfixed goods on insolvency

10. Duties of principal or landowner etc. as to unfixed goods on insolvency

(1) In this clause —

insolvent means —

(a) in relation to a natural person, an insolvent under administration as that term is defined in the *Corporations Act 2001* of the Commonwealth;

(b) in relation to a body corporate, an externally-administered body corporate as that term is defined in the *Corporations Act 2001* of the Commonwealth.

(2) If —

(a) goods that are related to construction work have been supplied to the site of the construction work by the contractor under its obligations under this contract;

(b) the contractor has not been paid for the goods;

(c) the goods have not become fixtures;

(d) ownership of the goods has not passed from the contractor;

(e) the goods are in the possession of or under the control of —

(i) the principal; or

(ii) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work;

and

(f) the principal or that person becomes an insolvent,

the principal and that person —

(g) must not, during the insolvency, allow the goods to become fixtures or to fall into the possession of or under the control of any other person, other than the contractor, except with the prior written consent of the contractor; and

(h) must allow the contractor a reasonable opportunity to repossess the goods.

Division 9 — Retention money

11. Retention money to be held on trust

If the principal retains from an amount payable by the principal to the contractor for the performance by the contractor of its obligations a portion of that amount (the ***retention money***), the principal holds the retention money on trust for the contractor until whichever of the following happens first —

(a) the money is paid to the contractor;

(b) the contractor, in writing, agrees to give up any claim to the money;

(c) the money ceases to be payable to the contractor by virtue of the operation of this contract; or

(d) an adjudicator, arbitrator, or other person, or a court, tribunal or other body, determines that the money ceases to be payable to the contractor.

Notes

[1] This is a compilation of the *Construction Contracts Act 2004* and includes the amendments made by the other written laws referred to in the following table.

Compilation table

Short title	Number and Year	Assent	Commencement
Construction Contracts Act 2004	16 of 2004	8 Jul 2004	1 Jan 2005 (see s. 2 and *Gazette* 14 Dec 2004 p. 5999)
Statutes (Repeals and Miscellaneous Amendments) Act 2009 s. 38	8 of 2009	21 May 2009	22 May 2009 (see s. 2(b))

Appendix 3 – The *Construction Contracts Amendments Act 2016* (WA)

Western Australia

Construction Contracts Amendment Act 2016

As at 29 Nov 2016 No. 55 of 2016

Western Australia

Construction Contracts Amendment Act 2016

Western Australia

Construction Contracts Amendment Act 2016

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Western Australia

Construction Contracts Amendment Act 2016

No. 55 of 2016

An Act to amend the *Construction Contracts Act 2004*.

[Assented to 29 November 2016]

The Parliament of Western Australia enacts as follows:

1. Short title

This is the *Construction Contracts Amendment Act 2016*.

2. Commencement

This Act comes into operation as follows —

(a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;

(b) the rest of the Act other than sections 7 and 20 — on 15 December 2016;

(c) sections 7 and 20 — on 3 April 2017.

3. Act amended

This Act amends the *Construction Contracts Act 2004*.

4. Section 3 amended

(1) In section 3 delete the definition of ***payment claim***.

(2) In section 3 insert in alphabetical order —

business day means a day other than —

(a) a Saturday, Sunday or public holiday; or

(b) a day in the period beginning on 25 December in a year and ending on 7 January in the following year;

payment claim —

(a) means a claim made under a construction contract —

(i) 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

(ii) 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;

and

(b) includes a payment claim that includes matters covered by a previous payment claim;

5. Section 4 amended

In section 4(3):

(a) in paragraph (c) delete "constructing any plant for the purposes of " and insert:

fabricating or assembling items of plant used for

(b) delete paragraph (d).

6. Section 6 amended

(1) In section 6:

(a) delete "For the purposes" and insert:

(1) For the purposes

(b) before paragraph (a) insert:

(aa) a payment claim is rejected or wholly or partly disputed; or

(c) in paragraph (a) delete "full, or the claim has been rejected or wholly or partly disputed; or" and insert:

full; or

(2) At the end of section 6 insert:

(2) Despite subsection (1), a payment dispute does not arise under subsection (1)(aa) or (a) to the extent to which the payment claim includes matters that were the subject of an application for adjudication that has been dismissed or determined under section 31(2).

(3) If a payment dispute arises under both subsection (1)(aa) and (a) in relation to a payment claim then, for the purposes of this Act, the dispute arises on the earlier of the 2 occurrences.

7. Section 10 amended

In section 10 delete "50 days" (each occurrence) and insert:

42 days

Note: The heading to amended section 10 is to read:

Prohibited: provisions requiring payment to be made after 42 days

8. Section 26 amended

In section 26(1) delete "28 days" and insert:

90 business days

9. Section 27 amended

In section 27(1) delete "14 days" and insert:

10 business days

10. Section 28 amended

In section 28(1) delete "5 days" and insert:

5 business days

11. Section 29 amended

In section 29(2)(b) delete "5 days" and insert:

5 business days

12. Section 31 amended

(1) In section 31(1) in the definition of ***prescribed time*** delete "14 days" (each occurrence) and insert:

10 business days

(2) In section 31(2)(a):

(a) after subparagraph (i) insert:

(ia) the applicant gives written notice, to the adjudicator and each other party to the dispute, that they wish to withdraw the application; or

(b) in subparagraph (ii) delete "26; or" and insert:

26(1) and (2)(b) and (c); or

(c) after subparagraph (ii) insert:

(iia) the application has not been prepared in accordance with section 26(2)(a), unless the adjudicator is satisfied that the application complies with section 26(2)(a) sufficiently for the adjudicator to commence adjudicating the dispute; or

(3) After section 31(2) insert:

(2A) Without limiting subsection (2)(b), an appointed adjudicator may, with the consent of the parties, make a determination under subsection (2)(b) in terms agreed to by the parties.

13. Section 32 amended

Delete section 32(3)(c) and insert:

(c) adjudicate a payment dispute simultaneously with one or more other payment disputes if satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the disputes in accordance with section 30.

14. Section 37 amended

In section 37(2)(b) delete "28 days" and insert:

20 business days

15. Section 39 amended

Delete section 39(4) and insert:

(4) Interest under subsection (2) ceases to accrue when a copy of the determination is filed in a court under section 43.

16. Section 42 amended

In section 42(2)(d) and (3) delete "3 days" and insert:

3 business days

17. Section 43 amended

Delete section 43(2) and (3) and insert:

(2) A party entitled to be paid an amount under a determination may enforce the determination by filing in a court of competent jurisdiction —

(a) a copy of the determination that the Building Commissioner has certified to be a true copy; and

(b) an affidavit as to the amount not paid under the determination.

(3) On filing under subsection (2), the determination is taken to be an order of the court, and may be enforced accordingly.

Note: The heading to amended section 43 is to read:

Determinations may be enforced as orders of court

18. Section 46 amended

In section 46(2) delete "14 days" and insert:

10 business days

19. Part 6 inserted

After section 56 insert:

Part 6 — Transitional provisions

Division 1 — Provisions relating to the *Construction Contracts Amendment Act 2016*

57. Resubmitted claims: previous adjudications

The reference in section 6(2) to an adjudication that has been dismissed or determined under section 31(2) includes a reference to an adjudication that was dismissed or determined under section 31(2) before 15 December 2016.

58. Extension of periods of time

(1) This section applies to a period of time, specified in section 26(1), 28(1) or 29(2)(b), that expired before 15 December 2016.

(2) If a thing that could be done, or was required to be done, within the period was not done, and the period, as extended by the amendment in the *Construction Contracts Amendment Act 2016* section 8, 10 or 11 (whichever is relevant), expires on or after 15 December 2016, the thing may be done within the period as extended.

59. Effect of notices under s. 42(1) after commencement and before 1 January 2017

A notice purportedly given for the purposes of section 42(1) on or after 15 December 2016 and before 1 January 2017, but which was not given in compliance with section 42(2)(d), is taken to be as valid and as effective as it would have been if section 42(2)(d) had not been amended by the *Construction Contracts Amendment Act 2016* section 16.

20. Section 60 inserted

After section 59 insert:

60. Payment periods: contracts entered into before 3 April 2017

Section 10 applies to a construction contract entered into before

By Authority: JOHN A. STRIJK, Government Printer

Appendix 4 – The *Construction Contracts Act 2004* (WA) (as at 17 April 2017)


Western Australia

Construction Contracts Act 2004

As at 03 Apr 2017 Version 01-d0-01

Western Australia

Construction Contracts Act 2004

Western Australia

Construction Contracts Act 2004

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Western Australia

Construction Contracts Act 2004

An Act —

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

and for related purposes.

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Construction Contracts Act 2004* [1].

2. Commencement

(1) This Act comes into operation on a day fixed by proclamation [1].

(2) Different days may be fixed under subsection (1) for different provisions.

3. Terms used

In this Act, unless the contrary intention appears —

adjudication means the adjudication of a payment dispute in accordance with Part 3;

applicant, in relation to an adjudication, means the person who, under section 26, makes the application for the adjudication;

appointed adjudicator, in relation to a payment dispute, means the registered adjudicator who, having been appointed under Part 3 to adjudicate the dispute, has been served with the application for adjudication;

Building Commissioner means the officer referred to in the *Building Services (Complaint Resolution and Administration) Act 2011* section 85;

business day means a day other than —

(a) a Saturday, Sunday or public holiday; or

(b) a day in the period beginning on 25 December in a year and ending on 7 January in the following year;

construction contract means a contract or other agreement, whether in writing or not, under which a person (the ***contractor***) has one or more of these obligations —

(a) to carry out construction work;

(b) to supply to the site where construction work is being carried out any goods that are related to construction work by virtue of section 5(1);

(c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2);

(d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b);

construction work has the meaning given to that term in section 4;

contractor has the meaning given by the definition of ***construction contract***;

costs of an adjudication has the meaning given to that term in section 44;

determination means a determination, made on an adjudication under Part 3, of the merits of a payment dispute;

obligations, in relation to a contractor, means those of the obligations described in the definition of ***construction contract*** that the contractor has under the construction contract;

party, in relation to an adjudication, means the applicant and any person on whom an application for the adjudication is served;

party, in relation to a construction contract, means a party to the contract;

payment claim —

(a) means a claim made under a construction contract —

(i) 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

(ii) 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;

and

(b) includes a payment claim that includes matters covered by a previous payment claim;

payment dispute has the meaning given to that term in section 6;

prescribed appointor means a person prescribed as such by the regulations;

principal, in relation to a construction contract, means the party to whom the contractor is bound under the contract;

registered adjudicator means an individual registered as such under section 48.

[Section 3 amended by No. 16 of 2011 s. 128(2)-(4); No. 55 of 2016 s. 4.]

4. Construction work

(1) In this section —

civil works includes —

(a) a road, railway, tramway, aircraft runway, canal, waterway, harbour, port or marina; and

(b) a line or cable for electricity or telecommunications; and

(c) a pipeline for water, gas, oil, sewage or other material; and

(d) a path, pavement, ramp, tunnel, slipway, dam, well, aqueduct, drain, levee, seawall or retaining wall; and

(e) any works, apparatus, fittings, machinery or plant associated with any works referred to in paragraph (a), (b), (c) or (d);

site in WA means a site in Western Australia, whether on land or off-shore.

(2) In this Act —

construction work means any of the following work on a site in WA —

(a) reclaiming, draining, or preventing the subsidence, movement or erosion of, land;

(b) installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, any works, apparatus, fittings, machinery, or plant, associated with any work referred to in paragraph (a);

(c) constructing the whole or a part of any civil works, or a building or structure, that forms or will form, whether permanently or not and whether in WA or not, part of land or the sea bed whether above or below it;

(d) fixing or installing on or in any thing referred to in paragraph (c) any fittings forming, or to form, whether permanently or not, part of the thing, including —

(i) fittings for electricity, gas, water, fuel oil, air, sanitation, irrigation, telecommunications, air-conditioning, heating, ventilation, fire protection, cleaning, the security of the thing, and the safety of people; and

(ii) lifts, escalators, insulation, furniture and furnishings;

(e) altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any thing referred to in paragraph (c) or any fittings described in paragraph (d) that form part of that thing;

(f) any work that is preparatory to, necessary for, an integral part of, or for the completion of, any work referred to in paragraph (a), (b), (c), (d) or (e), including —

(i) site or earth works, excavating, earthmoving, tunnelling or boring; and

(ii) laying foundations; and

(iii) erecting, maintaining or dismantling temporary works, a temporary building, or a temporary structure including a crane or other lifting equipment, and scaffolding; and

(iv) cleaning, painting, decorating or treating any surface; and

(v) site restoration and landscaping;

(g) any work that is prescribed by regulations to be construction work for the purposes of this Act.

(3) Despite subsection (2) construction work does not include any of the following work on a site in WA —

(a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;

(b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;

(c) fabricating or assembling items of plant used for extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance;

[(d) deleted]

(e) work prescribed by the regulations not to be construction work for the purposes of this Act.

(4) In this Act —

construction work does not include constructing the whole or part of any watercraft.

[Section 4 amended by No. 55 of 2016 s. 5.]

5. Goods and services related to construction work

(1) For the purposes of this Act, goods are related to construction work if they are —

(a) materials or components (whether pre-fabricated or not) that will form part of any thing referred to in section 4(2)(b) or 4(2)(c) or of any fittings referred to in section 4(2)(d); or

(b) any fittings referred to in section 4(2)(d) (whether pre-fabricated or not); or

(c) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of the construction work at the site of the construction work; or

(d) goods prescribed by the regulations to be related to construction work for the purposes of this Act.

(2) For the purposes of this Act, professional services are related to construction work if they are —

(a) services that are provided by a profession and that relate directly to construction work or to assessing its feasibility (whether or not it proceeds) —

(i) including surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying, and project management, services; but

(ii) not including accounting, financial, or legal, services;

or

(b) services that are provided by a profession that are prescribed by the regulations to be professional services related to construction work for the purposes of this Act.

(3) For the purposes of this Act, on-site services —

(a) are services other than professional services referred to in subsection (2); and

(b) are related to construction work if they are —

(i) services that relate directly to construction work, including the provision of labour to carry out construction work; or

(ii) services prescribed by the regulations to be on-site services related to construction work for the purposes of this Act.

(4) The regulations may prescribe goods, professional services or on-site services that are not related to construction work for the purposes of this Act.

6. Payment dispute

(1) For the purposes of this Act, a payment dispute arises if —

(aa) a payment claim is rejected or wholly or partly disputed; or

(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

(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.

(2) Despite subsection (1), a payment dispute does not arise under subsection (1)(aa) or (a) to the extent to which the payment claim includes matters that were the subject of an application for adjudication that has been dismissed or determined under section 31(2).

(3) If a payment dispute arises under both subsection (1)(aa) and (a) in relation to a payment claim then, for the purposes of this Act, the dispute arises on the earlier of the 2 occurrences.

[Section 6 amended by No. 55 of 2016 s. 6.]

7. Construction contracts to which this Act applies

(1) This Act applies to a construction contract entered into after this Act comes into operation.

(2) This Act applies to a construction contract —

(a) irrespective of whether it is written or oral or partly written and partly oral; and

(b) irrespective of where it is entered into; and

(c) irrespective of whether it is expressed to be governed by the law of a place other than Western Australia.

(3) This Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods or services that are related to construction work, as an employee (as defined in the *Industrial Relations Act 1979* section 7) of the party for whom the work is to be carried out or to whom the goods or services are to be supplied.

(4) This Act, or a provision of this Act, does not apply to a construction contract, or a class of construction contracts, prescribed by the regulations as a contract or class of contracts to which this Act, or that provision, does not apply.

8. Application to Crown

This Act binds the Crown.

Part 2 — Content of construction contracts

Division 1 — Prohibited provisions

9. Prohibited: pay if paid/when paid provisions

A provision in a construction contract has no effect if it purports to make the liability of a party (***A***) to pay money under the contract to another party contingent, whether directly or indirectly, on A being paid money by another person (whether or not a party).

10. Prohibited: provisions requiring payment to be made after 42 days

A provision in a construction contract that purports to require a payment to be made more than 42 days after the payment is claimed is to be read as being amended to require the payment to be made within 42 days after it is claimed.

[Section 10 amended by No. 55 of 2016 s. 7.]

11. Prohibited: prescribed provisions

A provision in a construction contract has no effect if it is a provision that is prescribed by the regulations to be a prohibited provision.

12. Other provisions of contract not affected

A provision in a construction contract that has no effect because of section 9 or 11 or that is modified under section 10 does not prejudice or affect the operation of other provisions of the contract.

Division 2 — Implied provisions

13. Variations of contractual obligations

The provisions in Schedule 1 Division 1 are implied in a construction contract that does not have a written provision about variations of the contractor's obligations under the contract.

14. Contractor's entitlement to be paid

The provisions in Schedule 1 Division 2 are implied in a construction contract that does not have a written provision about the amount, or a means of determining the amount, that the contractor is entitled to be paid for the obligations the contractor performs.

15. Contractor's entitlement to claim progress payments

The provisions in Schedule 1 Division 3 are implied in a construction contract that does not have a written provision about whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed.

16. Making claims for payment

The provisions in Schedule 1 Division 4 are implied in a construction contract that does not have a written provision about how a party is to make a claim to another

party for payment.

17. Responding to claims for payment

The provisions in Schedule 1 Division 5 about when and how a party is to respond to a claim for payment made by another party are implied in a construction contract that does not have a written provision about that matter.

18. Time for payment

The provisions in Schedule 1 Division 5 about the time by when a payment must be made are implied in a construction contract that does not have a written provision about that matter.

19. Interest on overdue payments

The provisions in Schedule 1 Division 6 are implied in a construction contract that does not have a written provision about interest to be paid on any payment that is not made at the time required by the contract.

20. Ownership of goods

The provisions in Schedule 1 Division 7 are implied in a construction contract that does not have a written provision about when the ownership of goods that are —

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations,

passes from the contractor.

21. Duties as to unfixed goods on insolvency

The provisions in Schedule 1 Division 8 are implied in a construction contract that does not have a written provision about what is to happen to unfixed goods of a kind referred to in section 20 if either of the following persons becomes insolvent —

(a) the principal; or

(b) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work.

22. Retention money

The provisions in Schedule 1 Division 9 are implied in a construction contract that does not have a written provision about the status of money retained by the principal for the performance by the contractor of its obligations.

23. Implied provisions: interpretation etc.

The *Interpretation Act 1984* and sections 3 to 6 of this Act apply to the interpretation and construction of a provision that is implied in a construction contract under this Part despite any provision in a construction contract to the contrary.

Part 3 — Adjudication of disputes

Division 1 — Preliminary

24. Interpretation of construction contract

Without affecting the operation of section 9, 11 or 53, a reference in this Part to a construction contract is a reference to the contract including any provision that is modified under section 10 or implied in the contract under Part 2 Division 2.

Division 2 — Commencing adjudication

25. Who can apply for adjudication

If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless —

(a) an application for adjudication has already been made by a party, whether or not a determination has been made, but subject to section 37(2); or

(b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.

26. Applying for adjudication

(1) To apply to have a payment dispute adjudicated, a party to the contract, within 90 business days after the dispute arises or, if applicable, within the period provided for by section 37(2)(b), must —

(a) prepare a written application for adjudication; and

(b) serve it on each other party to the contract; and

(c) serve it —

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents, on the adjudicator;

(ii) if the parties to the contract have appointed a prescribed appointor, on that appointor;

(iii) otherwise, on a prescribed appointor chosen by the party;

and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or the prescribed appointor requires under section 44(8) or (9).

(2) The application —

(a) must be prepared in accordance with, and contain the information prescribed by, the regulations; and

(b) must set out the details of, or have attached to it —

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute;

and

(c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

(3) A prescribed appointor that is served with an application for adjudication made under subsection (1) must comply with section 28.

[Section 26 amended by No. 55 of 2016 s. 8.]

27. Responding to application for adjudication

(1) Within 10 business days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare a written response to the application and serve it on —

(a) the applicant and on any other party that has been served with the application; and

(b) the appointed adjudicator or, if there is no appointed adjudicator, on the prescribed appointor on which the application was served under section 26(1)(c).

(2) The response —

(a) must be prepared in accordance with, and contain the information prescribed by, the regulations; and

(b) must set out the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute; and

(c) must set out or have attached to it all the information, documentation and submissions on which the party making it relies in the adjudication.

[Section 27 amended by No. 55 of 2016 s. 9.]

28. Appointment of adjudicator in absence of agreed appointment

(1) If an application for adjudication is served on a prescribed appointor the appointor, within 5 business days after being served, must —

(a) appoint a registered adjudicator to adjudicate the payment dispute concerned; and

(b) send the application and any response received by it to the adjudicator; and

(c) notify the parties in writing accordingly; and

(d) notify the Building Commissioner in writing accordingly.

(2) If a prescribed appointor does not make an appointment under subsection (1) the Building Commissioner may appoint a registered adjudicator to adjudicate the payment dispute concerned.

(3) If the Building Commissioner makes an appointment under subsection (2), the Building Commissioner must —

(a) notify the prescribed appointor in writing accordingly and require the appointor to serve the application and any response received by it on the adjudicator appointed by the Building Commissioner; and

(b) notify the parties in writing accordingly.

[Section 28 amended by No. 16 of 2011 s. 128(6); No. 55 of 2016 s. 10.]

29. Adjudicators: conflicts of interest

(1) An appointed adjudicator who has a material personal interest in the payment dispute concerned or in the construction contract under which the dispute has arisen or in any party to the contract is disqualified from adjudicating the dispute.

(2) If an appointed adjudicator is disqualified —

(a) the adjudicator must notify the parties in writing of the disqualification and the reasons for it; and

(b) unless, within 5 business days after the date of the adjudicator's notice, all of the parties in writing authorise the adjudicator to continue as the appointed adjudicator, the adjudicator's appointment ceases; and

(c) the applicant may again apply for adjudication in accordance with section 26(1); and

(d) the period commencing on the date when the adjudicator was served with the application for adjudication and ending on and including the date when the adjudicator notifies the parties under paragraph (a) does not count for the purposes of section 26(1).

(3) A party to a payment dispute may apply to the State Administrative Tribunal for a declaration that an appointed adjudicator is disqualified under subsection (1).

(4) The application must be made before the person is notified of a decision or determination made under section 31(2).

[Section 29 amended by No. 55 of 2016 s. 11.]

Division 3 — The adjudication process

30. Object of adjudication process

The object of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible.

31. Adjudicator's functions

(1) In this section —

prescribed time means —

(a) if the appointed adjudicator is served with a response under section 27(1) — 10 business days after the date of the service of the response;

(b) if the appointed adjudicator is not served with a response under section 27(1) — 10 business days after the last date on which a response is required to be served under section 27(1).

(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 —

(i) the contract concerned is not a construction contract; or

(ia) the applicant gives written notice, to the adjudicator and each other party to the dispute, that they wish to withdraw the application; or

(ii) the application has not been prepared and served in accordance with section 26(1) and (2)(b) and (c); or

(iia) the application has not been prepared in accordance with section 26(2)(a), unless the adjudicator is satisfied that the application complies with section 26(2)(a) sufficiently for the adjudicator to commence adjudicating the dispute; or

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;

(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; 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.

(2A) Without limiting subsection (2)(b), an appointed adjudicator may, with the consent of the parties, make a determination under subsection (2)(b) in terms agreed to by the parties.

(3) If an application is not dismissed or determined under subsection (2) within the prescribed time, or any extension of it made under section 32(3)(a), the application is to be taken to have been dismissed when the time has elapsed.

[Section 31 amended by No. 55 of 2016 s. 12.]

32. Adjudication procedure

(1) For the purposes of making a determination, an appointed adjudicator —

(a) must act informally and if possible make the determination on the basis of —

(i) the application and its attachments; and

(ii) if a response has been prepared and served in accordance with section 27, the response and its attachments;

and

(b) is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit.

(2) In order to obtain sufficient information to make a determination, an appointed adjudicator may —

(a) request a party to make a, or a further, written submission or to provide information or documentation, and may set a deadline for doing so;

(b) request the parties to attend a conference with the adjudicator;

(c) unless all the parties object —

(i) inspect any work or thing to which the payment dispute relates, provided the occupier of any place concerned consents to the entry and inspection;

(ii) arrange for any thing to which the payment dispute relates to be tested, provided the owner of the thing consents to the testing;

(iii) engage an expert to investigate and report on any matter relevant to the payment dispute.

(3) An appointed adjudicator may —

(a) with the consent of the parties, extend the time prescribed by section 31(2) for making a determination;

(b) with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties;

(c) adjudicate a payment dispute simultaneously with one or more other payment disputes if satisfied that doing so will not adversely affect the adjudicator's ability to adjudicate the disputes in accordance with section 30.

(4) If an appointed adjudicator adjudicates simultaneously 2 or more payment disputes, the adjudicator may, in adjudicating one, take into account information the adjudicator receives in relation to the other, and vice versa.

(5) An adjudicator's power to make a determination is not affected by the failure of either or both of the parties to make a submission or provide information within time or to comply with the adjudicator's request to attend a conference with the adjudicator.

(6) To the extent that the practice and procedure in relation to adjudications is not regulated by this Part or the regulations, an appointed adjudicator may determine his or her own procedure.

[Section 32 amended by No. 55 of 2016 s. 13.]

33. Interest up to determination

(1) If an appointed adjudicator determines that a party to a payment dispute is liable to make a payment, he or she may also determine that interest is to be paid —

(a) if the payment is overdue under the construction contract, on the payment in accordance with the contract; or

(b) otherwise, on the whole or a part of the payment from the date the payment dispute arose at a rate not greater than the rate prescribed under the *Civil Judgments Enforcement Act 2004* section 8(1)(a),

until and including the date of the determination.

(2) Subsection (1) does not authorise the awarding of interest upon interest.

[Section 33 amended by No. 8 of 2009 s. 38(2).]

34. Costs of parties to payment disputes

(1) Subject to subsection (2), parties to a payment dispute bear their own costs in relation to an adjudication of the dispute.

(2) If an appointed adjudicator is satisfied that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.

(3) If an appointed adjudicator makes a decision under subsection (2) the adjudicator must —

(a) decide the amount of the costs and the date on which the amount is payable; and

(b) give reasons for the decisions; and

(c) communicate the decisions and the reasons in writing to the parties.

(4) Divisions 4 and 5, with any necessary changes, apply to a decision made under subsection (2) as if it were a determination of an appointed adjudicator.

35. Certificates of completion etc., effect of

(1) This section applies if —

(a) the construction contract to which a payment dispute relates provides for a person to certify —

(i) that obligations under the contract have been performed; or

(ii) the amount of a payment that is to be made by a party;

and

(b) such a certificate is provided by a party to an adjudicator in the course of an adjudication.

(2) For the purposes of the adjudication —

(a) if the certificate relates to the final amount payable under the contract and has the effect of finalising the contract, the certificate is to be taken to be conclusive evidence of its contents;

(b) in any other case the certificate is to have such evidentiary weight as the appointed adjudicator thinks fit.

36. Determination, content of

An appointed adjudicator's decision made under section 31(2)(b) must —

(a) be in writing; and

(b) be prepared in accordance with, and contain the information prescribed by, the regulations; and

(c) state —

(i) the amount to be paid and the date on or before which it is to be paid; or

(ii) the security to be returned and the date on or before which it is to be returned,

as the case requires; and

(d) give reasons for the determination; and

(e) identify any information in it that, because of its confidential nature, is not suitable for publication by the Building Commissioner under section 50; and

(f) be given to the parties to the adjudication; and

(g) be given to the Building Commissioner.

[Section 36 amended by No. 16 of 2011 s. 128(6).]

37. Dismissed applications

(1) If under section 31(2)(a) an appointed adjudicator dismisses an application for adjudication, he or she must —

(a) give reasons for doing so; and

(b) communicate the decision and the reasons in writing to the parties.

(2) If under section 31(3) an application for an adjudication of a payment dispute is taken to be dismissed —

(a) nothing in this Part prevents a further application being made under this Part for an adjudication of the dispute; and

(b) any further application must be made within 20 business days after the previous application is taken to be dismissed under section 31(3).

[Section 37 amended by No. 55 of 2016 s. 14.]

Division 4 — Effect of determinations

38. Determinations have effect despite other proceedings

An appointed adjudicator's determination is binding on the parties to the construction contract under which the payment dispute concerned arose even though other proceedings relating to the payment dispute have been commenced before an arbitrator or other person or a court or other body.

39. Payment of amount determined and interest

(1) A party that is liable to pay an amount under a determination must do so on or before the date specified in the determination.

(2) Unless the determination provides otherwise, interest at the rate prescribed under the *Civil Judgments Enforcement Act 2004* section 8(1)(a) is to be paid on such of the amount as is unpaid after the date specified in the determination.

(3) The interest to be paid under subsection (2) forms part of the determination.

(4) Interest under subsection (2) ceases to accrue when a copy of the determination is filed in a court under section 43.

[Section 39 amended by No. 8 of 2009 s. 38(3); No. 55 of 2016 s. 15.]

40. Progress payments under determinations to be on account

If —

(a) an appointed adjudicator —

(i) determines a payment dispute concerning a claim by a contractor for payment for part performance of its obligations but not for a final payment by the principal; and

(ii) determines that the principal is to pay the contractor an amount in respect of the claim;

and

(b) the principal, in accordance with the determination, pays the amount,

the payment is to be taken to be an advance towards the total amount payable under the contract by the principal to the contractor.

41. Determinations are final

(1) If on the adjudication of a payment dispute the appointed adjudicator makes a determination —

(a) the adjudicator cannot subsequently amend or cancel the determination except with the consent of the parties; and

(b) a party to the dispute may not apply subsequently for an adjudication of the dispute.

(2) Despite subsection (1)(a), if an adjudicator's determination contains —

(a) an accidental slip or omission; or

(b) a material arithmetic error; or

(c) a material mistake in the description of any person, thing or matter,

the adjudicator, on the application of a party or, after notifying the parties, on the adjudicator's own initiative, may correct the determination.

Division 5 — Enforcing determinations

42. Non-compliance by principal, contractor may suspend its obligations

(1) If a determination requires the principal to pay the contractor an amount and the principal does not pay in accordance with the determination, the contractor may give the principal notice of the contractor's intention to suspend the performance of its obligations.

(2) The notice must —

(a) be in writing; and

(b) be prepared in accordance with, and contain the information prescribed by, the regulations; and

(c) state the date on which the contractor intends to suspend the performance of its obligations; and

(d) be given to the principal at least 3 business days before that date.

(3) If on the date stated under subsection (2)(c) in the notice the principal has not paid the contractor the amount in accordance with the determination, the contractor may suspend the performance of its obligations until no longer than 3 business days after the date on which the amount is paid.

(4) Subsection (3) does not prevent the contractor from at any time resuming the performance of its obligations.

(5) A contractor that suspends the performance of its obligations in accordance with this section —

(a) is not liable for any loss or damage suffered by the principal or by any person claiming through the principal; and

(b) retains its rights under the contract, including any right to terminate the contract.

[Section 42 amended by No. 55 of 2016 s. 16.]

43. Determinations may be enforced as orders of court

(1) In this section —

court of competent jurisdiction, in relation to a determination, means a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.

(2) A party entitled to be paid an amount under a determination may enforce the determination by filing in a court of competent jurisdiction —

(a) a copy of the determination that the Building Commissioner has certified to be a true copy; and

(b) an affidavit as to the amount not paid under the determination.

(3) On filing under subsection (2), the determination is taken to be an order of the court, and may be enforced accordingly.

[Section 43 amended by No. 16 of 2011 s. 128(6); No. 55 of 2016 s. 17.]

Division 6 — General

44. Costs of adjudications

(1) For the purposes of this section the costs of an adjudication are —

(a) the entitlements of the appointed adjudicator under subsection (2); and

(b) the costs of any testing done, or of any expert engaged, under section 32(2)(c).

(2) If an appointed adjudicator, within the prescribed time in section 31(2), dismisses an application for adjudication or makes a determination of the dispute, he or she is entitled —

(a) to be paid for his or her work —

(i) at a rate agreed between the adjudicator and the parties that is not more than the maximum rate, if any, prescribed by the regulations; or

(ii) if a rate was not agreed, at the rate published under section 51 in respect of the adjudicator;

and

(b) to be reimbursed any expenses reasonably incurred in connection with that work.

(3) An appointed adjudicator who is disqualified under section 29 has the entitlements in subsection (2) in respect of any adjudication work done before the disqualification is notified to the parties.

(4) Despite subsection (2), an appointed adjudicator may refuse to communicate his or her decision or determination under section 31(2) or 34(2) or subsection (10) until he or she has been paid and reimbursed in accordance with subsection (2).

(5) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.

(6) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.

(7) Subsections (5) and (6) do not prevent a decision being made under section 34(2).

(8) An appointed adjudicator may at any time require one or more parties to provide a reasonable deposit, or reasonable security, for the, or any anticipated costs of the adjudication.

(9) A prescribed appointor, before appointing an adjudicator, may require the applicant for adjudication to provide a deposit, or reasonable security, for the, or any anticipated costs of the adjudication.

(10) If a party involved in a dispute has paid more than the party's share of the costs of an adjudication of the dispute, having regard to subsection (6), the appointed adjudicator may decide that another party must pay to the first-mentioned party such amount of the costs as would result in all the parties paying an equal amount of the costs.

(11) If an appointed adjudicator makes a decision under subsection (10) —

(a) the adjudicator must include in the decision the date on which the amount is payable; and

(b) Divisions 4 and 5, with any necessary changes, apply to the decision as if it were a determination of an appointed adjudicator.

(12) An appointed adjudicator may recover the costs of an adjudication from a person liable to pay the costs in a court of competent jurisdiction as if the costs were a debt due to the adjudicator.

45. Effect of this Part on civil proceedings

(1) This Part does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.

(2) If other such proceedings are instituted in relation to a payment dispute that is being adjudicated under this Part, the adjudication is to proceed despite those proceedings unless all of the parties, in writing, require the appointed adjudicator to discontinue the adjudication.

(3) Evidence of anything said or done in an adjudication is not admissible before an arbitrator or other person or a court or other body, except for the purposes of an application made under section 29(3) or an appeal made under section 46.

(4) An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract —

(a) must, in making any award, judgment or order, allow for any amount that has been or is to be paid to a party under a determination of a payment dispute arising under the contract; and

(b) may make orders for the restitution of any amount so paid, and any other appropriate orders as to such a determination.

46. Review, limited right of

(1) A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision.

(2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 10 business days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

(3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

[Section 46 amended by No. 55 of 2016 s. 18.]

Part 4 — Administration

*[**47.** Deleted by No. 16 of 2011 s. 128(5)]*

48. Registering adjudicators

(1) An individual is eligible to be a registered adjudicator if he or she has the qualifications and experience prescribed by the regulations.

(2) The Building Commissioner may register an individual as a registered adjudicator —

(a) on the application of an individual; or

(b) on the nomination of a prescribed appointor.

(3) The regulations may prescribe a fee to be paid on making such an application or nomination.

(4) The Building Commissioner must not register an individual as a registered adjudicator unless satisfied that the individual is eligible to be registered.

(5) The Building Commissioner 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.

(6) The Building Commissioner must keep a register of registered adjudicators and

make it available for public inspection at no charge.

(7) A certificate by the Building Commissioner stating that an individual was or was not at a time or in a period, or is or is not, a registered adjudicator is proof of the content of the certificate in the absence of evidence to the contrary.

[Section 48 amended by No. 16 of 2011 s. 128(6).]

49. Review of registration decisions

A person who is aggrieved by a decision of the Building Commissioner made under section 48 may apply to the State Administrative Tribunal for a review of the decision.

[Section 49 amended by No. 16 of 2011 s. 128(6).]

50. Publication of adjudicators' decisions

(1) The Building Commissioner may make available for public inspection the result, or a report, of the decisions of registered adjudicators.

(2) The Building Commissioner is to ensure that there is not included in the result, or a report, of the determination made available under subsection (1) —

(a) the identities of the parties to the adjudication;

(b) any information in the determination that is identified under section 36(e) as being not suitable for publication because of its confidential nature.

(3) No charge is payable for inspecting the result, or a report, of a determination made available under subsection (1).

[Section 50 amended by No. 16 of 2011 s. 128(6).]

51. Appointors' and adjudicators' rates to be published

(1) A registered adjudicator is to ensure that the rate at which the adjudicator charges for his or her work under this Act is published in a manner approved by the Building Commissioner.

(2) A prescribed appointor is to ensure that the rate at which the appointor charges for its work under this Act is published in a manner approved by the Building Commissioner.

(3) Nothing in subsection (1) or (2) prevents any of the parties from agreeing the rate to be charged by a registered adjudicator or a prescribed appointor for work under this Act.

(4) A published or agreed rate as referred to in this section is not to be more than the maximum rate, if any, prescribed by the regulations.

[Section 51 amended by No. 16 of 2011 s. 128(6).]

52. Annual report

Before 1 November in each year, the Building Commissioner must give the Minister a written report about the operation and effectiveness of this Act in the financial year that ended in that year.

[Section 52 amended by No. 16 of 2011 s. 128(6).]

Part 5 — Miscellaneous

53. No contracting out

(1) A provision in an agreement or arrangement, whether a construction contract or not and whether in writing or not, that purports to exclude, modify or restrict the operation of this Act has no effect.

(2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.

(3) Any purported waiver, whether in a construction contract or not and whether in writing or not, of an entitlement under this Act has no effect.

54. Immunity from tortious liability

(1) In this section —

protected person means an appointed adjudicator, a prescribed appointor or the Building Commissioner.

(2) In this section, a reference to the doing of anything includes a reference to an omission to do anything.

(3) An action in tort does not lie against a protected person for anything that the person has done, in good faith, in the performance or purported performance of a function under this Act.

(4) The protection given by subsection (3) applies even though the thing done as described in that subsection may have been capable of being done whether or not this Act has been enacted.

(5) Despite subsection (3), the State is not relieved of any liability that it might have for the Building Commissioner having done anything as described in that subsection.

[Section 54 amended by No. 16 of 2011 s. 128(6).]

55. Regulations

(1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

(2) Without limiting subsection (1), the regulations may regulate the practice and procedure in adjudications.

56. Review of Act

(1) As soon as practicable after the 5th anniversary of its commencement, the Minister must review the operation and effectiveness of this Act and prepare a report about the review.

(2) As soon as practicable after preparing the report, the Minister must cause it to be laid before each House of Parliament.

Part 6 — Transitional provisions

[Heading inserted by No. 55 of 2016 s. 19.]

Division 1 — Provisions relating to the *Construction Contracts Amendment Act 2016*

[Heading inserted by No. 55 of 2016 s. 19.]

57. Resubmitted claims: previous adjudications

The reference in section 6(2) to an adjudication that has been dismissed or determined under section 31(2) includes a reference to an adjudication that was dismissed or determined under section 31(2) before 15 December 2016.

[Section 57 inserted by No. 55 of 2016 s. 19.]

58. Extension of periods of time

(1) This section applies to a period of time, specified in section 26(1), 28(1) or 29(2)(b), that expired before 15 December 2016.

(2) If a thing that could be done, or was required to be done, within the period was not done, and the period, as extended by the amendment in the *Construction Contracts Amendment Act 2016* section 8, 10 or 11 (whichever is relevant), expires on or after 15 December 2016, the thing may be done within the period as extended.

[Section 58 inserted by No. 55 of 2016 s. 19.]

59. Effect of notices under s. 42(1) after commencement and before 1 January 2017

A notice purportedly given for the purposes of section 42(1) on or after 15 December 2016 and before 1 January 2017, but which was not given in compliance with section 42(2)(d), is taken to be as valid and as effective as it would have been if section 42(2)(d) had not been amended by the *Construction Contracts Amendment Act 2016* section 16.

[Section 59 inserted by No. 55 of 2016 s. 19.]

60. Payment periods: contracts entered into before 3 April 2017

Section 10 applies to a construction contract entered into before 3 April 2017 as if the *Construction Contracts Amendment Act 2016* section 7 had not come into operation.

[Section 60 inserted by No. 55 of 2016 s. 20.]

Schedule 1 — Implied provisions

[s. 13 to 22]

Division 1 — Variations

1. Variations must be agreed

The contractor is not bound to perform any variation of its obligations unless the contractor and the principal have agreed on —

(a) the nature and extent of the variation of those obligations; and

(b) the amount, or a means of calculating the amount, that the principal is to pay the contractor in relation to the variation of those obligations.

Division 2 — Contractor's entitlement to be paid

2. Contractor entitled to be paid

(1) The contractor is entitled to be paid a reasonable amount for performing its obligations.

(2) Subclause (1) applies whether or not the contractor performs all of its obligations.

Division 3 — Claims for progress payments

3. Entitlement to claim progress payments

The contractor is entitled to make one or more claims for a progress payment in relation to those of the contractor's obligations that the contractor has performed and for which it has not been paid by the principal.

4. When claims for progress payments can be made

(1) A claim by the contractor for a progress payment can be made at any time after the contractor has performed any of its obligations.

(2) The making of a claim for a progress payment does not prevent the contractor from making any other claim for moneys payable to the contractor under or in connection with this contract.

Division 4 — Making claims for payment

5. Claim for payment, content

(1) In this clause —

payment claim means a claim —

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

(2) A payment claim must —

(a) be in writing; and

(b) be addressed to the party to which the claim is made; and

(c) state the name of the claimant; and

(d) state the date of the claim; and

(e) state the amount claimed; and

(f) in the case of a claim by the contractor — itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; and

(g) in the case of a claim by the principal — describe the basis for the claim in sufficient detail for the contractor to assess the claim; and

(h) be signed by the claimant; and

(i) be given to the party to which the claim is made.

(3) In the case of a claim by the contractor, the amount claimed in a payment claim —

(a) must be calculated in accordance with this contract; or

(b) if this contract does not provide a means of calculating the amount, must be —

(i) if this contract says that the principal is to pay the contractor one amount (the ***contract sum***) for the performance by the contractor of all of its obligations under this contract (the ***total obligations***) — the

proportion of the contract sum that is equal to the proportion that the obligations performed and detailed in the claim are of the total obligations; or

(ii) if this contract says that the principal is to pay the contractor in accordance with rates specified in this contract — the value of the obligations performed and detailed in the claim calculated by reference to those rates; or

(iii) in any other case — a reasonable amount for the obligations performed and detailed in the claim.

(4) Paragraph (b) of subclause (3) does not prevent the amount claimed in a progress claim from being an aggregate of amounts calculated under one or more of subparagraphs (i), (ii) and (iii) of that paragraph.

Division 5 — Responding to claims for payment

6. Term used: payment claim

In this Division —

payment claim means a claim —

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

7. Responding to payment claim

(1) If a party that receives a payment claim —

(a) believes the claim should be rejected because the claim has not been made in accordance with this contract; or

(b) disputes the whole or part of the claim,

the party must, within 14 days after receiving the claim, give the claimant a notice of dispute.

(2) A notice of dispute must —

(a) be in writing; and

(b) be addressed to the claimant; and

(c) state the name of the party giving the notice; and

(d) state the date of the notice; and

(e) identify the claim to which the notice relates; and

(f) if the claim is being rejected under subclause (1)(a) — state the reasons for the belief that the claim has not been made in accordance with this contract; and

(g) if the claim is being disputed under subclause (1)(b) — identify each item of the claim that is disputed and state, in relation to each of those items, the reasons for disputing it; and

(h) be signed by the party giving the notice.

(3) Within 28 days after a party receives a payment claim, the party must do one of the following, unless the claim has been rejected or wholly disputed in accordance with subclause (1) —

(a) pay the part of the amount of the claim that is not disputed;

(b) pay the whole of the amount of the claim.

(4) If under this contract the principal is entitled to retain a portion of any amount payable by the principal to the contractor —

(a) subclause (3) does not affect the entitlement; and

(b) the principal must advise the contractor in writing (either in a notice of dispute or separately) of any amount retained under the entitlement.

Division 6 — Interest on overdue payments

8. Interest payable on overdue payments

(1) Interest is payable on so much of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.

(2) The interest is to be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.

(3) The rate of interest at any time is equal to that prescribed for that time under the *Civil Judgments Enforcement Act 2004* section 8(1)(a).

[Clause 8 amended by No. 8 of 2009 s. 38(4).]

Division 7 — Ownership of goods

9. When ownership of goods supplied by contractor passes

The ownership of goods that are —

(a) related to construction work; and

(b) supplied to the site of the construction work by the contractor under its obligations under this contract,

passes from the contractor when whichever of the following happens first —

(c) when the contractor is paid for the goods; or

(d) when the goods become fixtures.

Division 8 — Duties as to unfixed goods on insolvency

10. Duties of principal or landowner etc. as to unfixed goods on insolvency

(1) In this clause —

insolvent means —

(a) in relation to a natural person, an insolvent under administration as that term is defined in the *Corporations Act 2001* of the Commonwealth;

(b) in relation to a body corporate, an externally-administered body corporate as that term is defined in the *Corporations Act 2001* of the Commonwealth.

(2) If —

(a) goods that are related to construction work have been supplied to the site of the construction work by the contractor under its obligations under this contract; and

(b) the contractor has not been paid for the goods; and

(c) the goods have not become fixtures; and

(d) ownership of the goods has not passed from the contractor; and

(e) the goods are in the possession of or under the control of —

(i) the principal; or

(ii) a person for whom, directly or indirectly, the principal is performing construction work or to whom, directly or indirectly, the principal is supplying goods and services that are related to construction work;

and

(f) the principal or that person becomes an insolvent,

the principal and that person —

(g) must not, during the insolvency, allow the goods to become fixtures or to fall into the possession of or under the control of any other person, other than the contractor, except with the prior written consent of the contractor; and

(h) must allow the contractor a reasonable opportunity to repossess the goods.

Division 9 — Retention money

11. Retention money to be held on trust

If the principal retains from an amount payable by the principal to the contractor for the performance by the contractor of its obligations a portion of that amount (the ***retention money***), the principal holds the retention money on trust for the contractor until whichever of the following happens first —

(a) the money is paid to the contractor; or

(b) the contractor, in writing, agrees to give up any claim to the money; or

(c) the money ceases to be payable to the contractor by virtue of the operation of this contract; or

(d) an adjudicator, arbitrator, or other person, or a court, tribunal or other body, determines that the money ceases to be payable to the contractor.

Notes

[1] This is a compilation of the *Construction Contracts Act 2004* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
Construction Contracts Act 2004	16 of 2004	8 Jul 2004	s. 1 and 2: 8 Jul 2004; Act other than s. 1 and 2: 1 Jan 2005 (see s. 2 and *Gazette* 14 Dec 2004 p. 5999)
Statutes (Repeals and Miscellaneous Amendments) Act 2009 s. 38	8 of 2009	21 May 2009	22 May 2009 (see s. 2(b))
Building Services (Complaint Resolution and Administration) Act 2011 s. 128	16 of 2011	25 May 2011	29 Aug 2011 (see s. 2(b) and *Gazette* 26 Aug 2011 p. 3475)
Reprint 1: The *Construction Contracts Act 2004* as at 12 Aug 2016 (includes amendments listed above)			
Construction Contracts Amendment Act 2016	55 of 2016	29 Nov 2016	s. 1 and 2: 29 Nov 2016 (see s. 2(a)); Act other than s. 1, 2, 7 and 20: 15 Dec 2016 (see s. 2(b)); s. 7 and 20: 3 Apr 2017 (see s. 2(c))

Defined terms

[This is a list of terms defined and the provisions where they are defined. The list is not part of the law.]

Defined term	Provision(s)
A	9
adjudication	3
applicant	3
appointed adjudicator	3
Building Commissioner	3
business day	3
civil works	4(1)
construction contract	3
construction work	3, 4(2), 4(4)
contract sum	Sch. 1 cl. 5(3)
contractor	3, 3
costs of an adjudication	3
court of competent jurisdiction	43(1)
determination	3
insolvent	Sch. 1 cl. 10(1)
obligations	3
party	3, 3
payment claim	3, Sch. 1 cl. 5(1), Sch. 1 cl. 6
payment dispute	3
prescribed appointor	3
prescribed time	31(1)
principal	3
protected person	54(1)
registered adjudicator	3
retention money	Sch. 1 cl. 11
site in WA	4(1)
total obligations	Sch. 1 cl. 5(3)