

# **The Construction Contracts Act 2004 (WA): What Engineers Need to Know**

**Philip J Evans**  
Graduate School of Law  
University of Notre Dame, Fremantle

---

## **Abstract**

The *Construction Contracts Act 2004* (WA) ('the Act') came into operation on 1 January 2005. It provides for security of payment in the construction industry through the use of rapid adjudication processes to determine payment disputes. It applies to both written and oral contracts and provides for implied terms where contracts are silent on terms relating to payment for construction works. The Act further prohibits paid when paid clauses in construction contracts and excessive payment periods. This article describes the main provisions of and the application of the Act.

## **Introduction**

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

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

Prior to the introduction of the *Construction Contracts Act 2004*, when there has been a dispute over payment for work done or materials supplied, the person who has done the work or supplied the materials has been at a distinct disadvantage. They were faced with the

prospect of a lengthy and time consuming task in attempting to obtain payment for work for which they were legitimately entitled. In order to redress these difficulties the Western Australian government passed the *Construction Contracts Act 2004* which came into force on 1 January 2005. Similar legislation exists in New South Wales, Victoria and Queensland.<sup>1</sup>

## **The objectives of the Act**

The objectives of the Act are to:

- prohibit or modify certain provisions in construction contracts;
- imply provisions in construction contracts about certain matters if there are no written provisions about these matters in the contract;
- provide a means of rapid adjudication of payment disputes arising under the construction contract.

## **The main provisions of the Act**

---

<sup>1</sup> See *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).

The Act applies to all contracts for construction work undertaken in Western Australia. Construction work includes site preparation, actual construction, repair, renovation and design, drafting and management.<sup>2</sup> Where the contract is silent with respect to terms regarding payment provisions the Act will imply terms regarding the contractor's entitlement to be paid.<sup>3</sup>

Not all construction work is included in the Act. Work in discovering or extracting oil or natural gas is excluded as well as the mining for minerals and the constructing of plant for the purpose of extracting oil or minerals and wholly artistic work.<sup>4</sup> There is also an exclusion for watercraft.<sup>5</sup>

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

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

### **The Application of the Act**

#### *Construction work*

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

construction works and activities such as cleaning, painting, decorating, site restoration and landscaping.<sup>6</sup>

### **Goods and services related to construction work**

Contracts relating to the supply of plant and materials used in construction work are also subject to the Act.<sup>7</sup> Further contracts for services that are provided by professions that are related to construction work are subject to the Act. The services include surveying, planning, architectural design, plan drafting, engineering, quantity surveying and project management services.<sup>8</sup>

### **Work not designated as construction work**

The Act excludes a number of activities which one might normally associate with construction work,<sup>9</sup> in particular, work associated with mining and mineral exploration and extraction. For example:

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

Other work excluded under the Act is any work associated with wholly artistic works such as sculptures and murals<sup>10</sup> and constructing the whole or any part of watercraft.<sup>11</sup> A number of services are excluded from the provisions of the Act. These are accounting, financial and legal services, which are not considered to be services that relate to construction work.<sup>12</sup>

### **Payment Dispute**

<sup>6</sup> Section 4(2) (a) to (g) inclusive.

<sup>7</sup> Section 5.

<sup>8</sup> Section 5(2)(a)(i).

<sup>9</sup> Section 4(3)(a) to (e) inclusive.

<sup>10</sup> Section 4(3)(d).

<sup>11</sup> Section 4(4).

<sup>12</sup> Section 5(2)(b).

<sup>2</sup> See ss 4(1), (2).

<sup>3</sup> See Division 2-Implied provisions.

<sup>4</sup> See s 4(3).

<sup>5</sup> See s 4(4).

The Act only applies to a payment dispute arising out of a contract for construction work.<sup>13</sup> A payment dispute will arise if, by the time when:

- the amount claimed in a payment claim is due to be paid under the contract the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed;
- any money retained by a party under the contract, the money has not been paid if due to be released; or
- any security held by a party under the contract is due to be returned under the contract the security has not been returned.<sup>14</sup>

The phrase 'due to be paid' is significant. This presupposes that time for payment is expressly included in the contract. However not all contracts may contain an express term with respect to time for payment. In these cases the Act requires that the time for payment will be 28 days from receipt of the payment claim.<sup>15</sup>

The reference to money retained on security held relates to terms commonly found in construction contracts where there is provision for retention sums to be held by the principal for the purpose of ensuring the proper performance by the contractor or subcontractor of the contract.<sup>16</sup>

### Construction contracts to which the Act applies

Again the Act construes the definition of a construction contract broadly. Construction contracts are defined to mean a contract or other agreement whether in writing or not under which a person has an obligation to carry out construction work, to supply goods that are related to this construction work or to provide the professional services related to the construction work.<sup>17</sup>

In this respect the form of the contract differs from that required under the *Home Building Contracts Act 1991* (WA) which requires that for a contract for home building work, in order to be enforceable, must be in writing.<sup>18</sup>

### Prohibited provisions

Section 9 of the Act prohibits pay if paid or pay when paid provisions in construction contracts. These provisions provide for the liability of a party to pay money under the contract to the other party contingent on the first party being paid by another person. The typical situation is where a subcontractor will not be paid until the main contractor has been paid by the principal or the owner. A discussion of these clauses can be found in *Trade Indemnity Australia Ltd v Parkinson Air Conditioning Ltd*<sup>19</sup> and *Iezzi Constructions Pty Ltd v Currumbin Crest Development Pty Ltd*.<sup>20</sup>

### Time for payment

The Act further prohibits terms in construction contracts which require a payment to be made more than 50 days after the payment is claimed. Such terms are now to be read as being amended to require the payment to be made within 50 days after it is claimed.<sup>21</sup>

### Implied provisions

Where a construction contract does not contain written provisions with respect to matters such as variations, payment entitlement progress payments or the mode and manner of making payment claims, Part 2, Division 2 of the Act Schedule 1 will imply terms in these situations. For a discussion of implied terms in the context of construction contracts, see *Codelfa Constructions v State Rail Authority of NSW*.<sup>22</sup>

### Variations

<sup>13</sup> Section 6.

<sup>14</sup> Sections 6(a),(b),(c).

<sup>15</sup> Schedule 1, Division 5, section 7.

<sup>16</sup> For example, see General Conditions of Contract (AS 2124-1992), Clause 5.

<sup>17</sup> Section 3(a),(b),(c).

<sup>18</sup> Section 4 (1)(a).

<sup>19</sup> (1994) 11 BCL 39.

<sup>20</sup> (1994) 13 Aust Cons LR 29.

<sup>21</sup> Section 10.

<sup>22</sup> (1982) 149 CLR 337.

There are a large number of expressions in building contracts dealing with additions or alterations to the work. These include extras, alterations, additions, changes and substitutions. The most common expression which covers all of these is the term 'variation'.<sup>23</sup>

Section 1 of Schedule 1 of the Act provides that the contractor is not bound to perform any variation of its obligations under the contract unless the contractor and the principal have agreed upon the nature and extent of the variation of those obligations and the amount, or a means of calculating the amount to be paid for the variations. This provision will prevent principals issuing variation orders to the contractor for additional works which may fall outside the scope of the original obligations, as in *Wegan Constructions Pty Ltd v Wodonga Sewerage Authority*.<sup>24</sup>

#### **Entitlement to claim a progress payment**

A progress payment claim in the absence of an express contrary intention entitles the contractor to be paid for work done and materials supplied even though the whole work is not yet complete. Where a construction contract under the Act does not have a written provision regarding whether or not the contractor is able to make a claim to the principal for a progress payment for the obligations the contractor has performed, the provisions of Schedule 1 Division 3 entitle the contractor to make one or more claims for a progress payment in relation to those obligations.<sup>25</sup>

#### **Making claims for payment**

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

contractor has performed any of its obligations.<sup>26</sup> A payment claim is defined in section 3 and means a claim:

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

This payment claim must be in writing, addressed to the party to which the claim is made, and itemised with a description of the obligations performed by the party making the claim the amount of the claim.<sup>27</sup>

#### **Responding to claims for payment**

Where the written contract is silent on this issue, and where a party receives a payment claim and believes the claim should be rejected or disputes the whole or part of the quantum of the claim, the receiving party must within 14 days of the receipt of the claim give the claimant a notice of dispute. This notice of dispute must also be in writing and include the reasons for the belief that the claim has not been made in accordance with the contract.<sup>28</sup>

#### **Time for payment**

Where the construction contract does not have a written provision regarding the time when a payment must be made, within 28 days after a party receives a payment claim the party, where they do not reject or wholly dispute the claim, must pay the whole amount of the claim or pay the amount of the claim that is not disputed.<sup>29</sup>

<sup>23</sup> See J Dorter, 'Variations' (1990) 6 *Building and Construction Law* 156.

<sup>24</sup> [1978] VR 67.

<sup>25</sup> Section 15.

<sup>26</sup> Section 16.

<sup>27</sup> Schedule 1, Division 4, s 5(2).

<sup>28</sup> Schedule 1, Division 5, s 7.

<sup>29</sup> Schedule 1, Division 5, s 7(3).

### Interest on overdue payments

The Act provides that interest will be payable on any payment that is not made at the time required by the contract.<sup>30</sup> The rate of interest at any time is equal to that prescribed for that time under the *Supreme Court Act 1935*, Section 142.<sup>31</sup> The rate is currently 6% p.a.

### Ownership of goods

In the past, the issue of whether a subcontractor or supplier could recover materials previously delivered to site, and not subsequently paid for by the recipient, involved a legal consideration of when property passes.<sup>32</sup> At common law the property in materials brought to a site passed to the builder or building owner only when those materials were fixed into the construction.<sup>33</sup>

Under the Act, ownership of the goods which are supplied by the contractor will not pass from the contractor until the contractor is paid for the goods or until the goods become fixtures.<sup>34</sup>

### Duties as to unfixed goods on insolvency

At common law where a builder becomes insolvent and the subcontractor has delivered materials under a supply and installation of materials subcontract but has not yet received payment a proprietor does not have ownership of the materials until the materials are installed. For example see, *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd*.<sup>35</sup> Contracts will often contain retention of goods clauses and may prevent the passing to the builder and limit rights to materials supplied on site.<sup>36</sup>

Where a construction contract does not have a written provision about what is to happen to unfixed goods if

either the principal or the person for whom the principal is performing construction work becomes insolvent then the provisions of the Act imply that the principal or the other person must not during the insolvency allow the goods to become fixtures or to fall into the possession of any other person other than the contractor. Secondly the principal must allow the contractor a reasonable opportunity to repossess the goods.<sup>37</sup>

### Retention money

Many standard form subcontracts provide for the principal to deduct from payments otherwise due to the contractor a specified amount as security for proper performance of the contract.<sup>38</sup> The effect of such a provision is to oblige the principal to set aside these retention moneys in a trust fund for the contractor subject to the principal's entitlement to access these funds in the event of any non performance of the contractor's obligations.<sup>39</sup> Where a contract does not have a written provision concerning the status of money retained by the principal for the performance by the contractor of its obligations, the Act prescribes that the principal is to hold the money on trust for the contractor until the happening of a number of specified events.<sup>40</sup> For example, the money is paid to the contractor or the contractor in writing agrees to give up the claim to the money.

### Adjudication of disputes

The Act provides for what may be described as a rapid adjudication procedure for payment disputes, by registered adjudicators. Adjudicators must have a degree in a building or construction discipline such as Architecture, Building, Engineering, Quantity Surveying or Building Surveying and at least 5 years experience in the administration of construction contracts or dispute resolution relating to construction

<sup>30</sup> Section 19.

<sup>31</sup> Schedule 1, Division 6, s 8(3).

<sup>32</sup> *Hewith v Court* (1983) 149 CLR 639 at 65.

<sup>33</sup> *RJ Grills Pty Ltd v Dellias* [1988] VR 136 at 139.

<sup>34</sup> Schedule 1, Division 7, s 9.

<sup>35</sup> [1965] NSW 581.

<sup>36</sup> *North Western Shipping and Towage Company Pty Ltd v Commonwealth Bank of Australia Limited & G G Machine and Steel Construction (in liq)* (1993) 118 ALR 45.

<sup>37</sup> Schedule 1, Division 8, s 10.

<sup>38</sup> For example, see General Conditions of Contract (AS 2124-1992), Clause 42.3

<sup>39</sup> See *KBH Constructions Pty Ltd v Lidco Aluminum Products Pty Ltd* (1991) BCL 183 at 190.

<sup>40</sup> Schedule 1, Division 9, s 11.

contracts. Additionally, the adjudicator must have successfully completed an appropriate training course.<sup>41</sup>

### **Commencing an adjudication**

The adjudication process commences by the lodging of an application by either party to the payment dispute. However a party cannot apply if an application for adjudication has already been made or the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract.<sup>42</sup>

### **Applying for adjudication**

Within 28 days after the dispute arises, a party to the contract must prepare a written application for adjudication and serve it on each other party to the contract and the adjudicator if the parties have appointed an adjudicator.<sup>43</sup> This application must set out all the information documentation and the submissions on which the party making the application (the Applicant) relies.<sup>44</sup>

### **Responding to an application**

Within 14 days after service of the application the recipient (the Respondent) must prepare a written response to the application and serve it on the applicant and the adjudicator.<sup>45</sup> This response must set out the details of the rejection of the dispute and include all the information and documentation on which the Respondent will rely.<sup>46</sup>

It is important that both the Applicant and Respondent fully detail their submissions, as the adjudication will be based on the documents only. There is however provision in the Act for the adjudicator, in order to obtain sufficient information to make a determination to

request a party to make further written submissions or request the parties to attend a conference with the adjudicator.<sup>47</sup>

### **Appointment of an adjudicator**

The parties may agree to the appointment of adjudicator or a party may serve an application for adjudication upon a prescribed appointer. A prescribed appointer is a body registered by the Registrar and prescribed in the regulations as having authorization to appoint an adjudicator for the adjudication of the payment dispute.<sup>48</sup>

To date the following organizations have been approved as prescribed appointers; the Royal Australian Institute of Architects, Australian Institute of Building, Master Builders Association of WA, Australian Institute of Quantity Surveyors and the Institute of Arbitrators and Mediators Australia.

Within 5 days of being served with an application for adjudication, the prescribed appointer must appoint a registered adjudicator to adjudicate the payment dispute, send the application to the adjudicator and notify the parties accordingly.<sup>49</sup>

### **Conflicts of interest**

The object of an adjudication of a payment dispute is to determine the dispute fairly, quickly and inexpensively as possible.<sup>50</sup> Concepts of fairness not only involve each party being given the opportunity to prepare its submission and respond to the claim but the adjudication must be conducted by an independent, impartial third party. Put simply, not only must justice be done, it must be seen to be done.<sup>51</sup>

Consequently an appointed adjudicator who has a material personal interest in the payment dispute

<sup>41</sup> *Construction Contracts Regulations 2004* (WA), s 9.

<sup>42</sup> Section 25.

<sup>43</sup> Section 26(1).

<sup>44</sup> Section 26(2).

<sup>45</sup> Section 27(1).

<sup>46</sup> Section 27(2).

<sup>47</sup> Section 32(2).

<sup>48</sup> Section 55.

<sup>49</sup> Section 28.

<sup>50</sup> Section 30.

<sup>51</sup> See *Ridge v Baldwin* [1964] AC 40.

concerned or in the construction contract under which the dispute has arisen will be disqualified from adjudicating the dispute.<sup>52</sup>

Whilst a 'material personal interest' is not defined in the Act, some guidance may be obtained from appeals from decisions of arbitrations under the *Commercial Arbitration Act 1987* (WA). Section 42 of this Act allows an appeal where there has been misconduct on the part of the arbitrator. Misconduct is defined in section 4 of the Act to include 'reasonable apprehension of the possibility of bias'. For example where an arbitrator has failed to disclose that he has run a short course on building contracts for one of the parties,<sup>53</sup> or where an arbitrator failed to disclose that he had been a member of a statutory board which had cancelled the registration of a builder who was now appearing before him as a party to a construction dispute.<sup>54</sup>

### The adjudication procedure

The Act requires that the adjudicator must act informally and where possible make the determination on the documents.<sup>55</sup> Secondly the adjudicator is not bound by the rules of evidence and may inform himself in any way he or she thinks fit.<sup>56</sup> These provisions should however be applied with caution. While the Act provides that the dispute is to be determined informally there will be situations where the rules of evidence will apply. For example where a written contract purports to contain all of the terms of a contract, the parole evidence rule will prevent extrinsic evidence being led to contradict or vary the written terms of the contract.<sup>57</sup>

Also, informing oneself in any way one thinks fit is also subject to the rules of natural justice. Again guidance may be obtained from a consideration of the provisions

of the *Commercial Arbitration Act*. Section 19 of the Act contains a similar provision. However the courts have consistently held that where an arbitrator takes into account matters, that have not been raised by the parties, in determining the award, it is incumbent on the arbitrator to refer those matters to the parties for comment before handing down the award.<sup>58</sup>

The adjudicator may also, in order to obtain sufficient information, request the parties to make further written submissions and request the parties to attend a conference.<sup>59</sup> An adjudicator may also inspect any work or thing to which the payment dispute relates, arrange for things to which the payment dispute relates to be tested, or engage an expert to investigate and report on any matter relevant to the payment dispute, unless all the parties object.<sup>60</sup>

### Prescribed time

The Act requires the adjudicator to determine the dispute as quickly as possible and prescribes maximum periods for the determination.<sup>61</sup> Within 14 days of the service of the response to the application or if a response is not served within 14 days after the last date on which a response is required to be served, the adjudicator must either dismiss the application or otherwise determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment.<sup>62</sup>

There are a number of situations where the adjudicator must dismiss the application without making a determination of its merits.<sup>63</sup> For example, if the contract concerned is not a construction contract or there has already been an order made on the matter in dispute by an arbitrator, court or other person. The

<sup>52</sup> Section 29.

<sup>53</sup> *Giustiniano Nominees Pty Ltd v Minister for Works* (1995) 16 WAR 87.

<sup>54</sup> *Dutoit v Vale* (1993) 9 WAR 138.

<sup>55</sup> Section 32(1)(a).

<sup>56</sup> Section 32 (1)(b).

<sup>57</sup> *Mercantile Bank of Sydney v Taylor* (1891) 12 LR (NSW) 252.

<sup>58</sup> *Shirley Sloan Pty Ltd v Merrill Holdings t/a Airen Constructions* [2000] WASC 99.

<sup>59</sup> Sections 32(2)(a), 32(2)(b).

<sup>60</sup> Section 32(2)(c).

<sup>61</sup> Section 31(1).

<sup>62</sup> Section 31(1)(a), 31(1)(b).

<sup>63</sup> Section 31(2)(a).

adjudicator may also dismiss the application if satisfied that it is not possible to make a determination within the prescribed time because of the complexity of the matter.

### **Extension of time**

Where the adjudicator considers it is not possible to determine the application within the prescribed time the adjudicator may with the consent of the parties extend the time for making a determination.<sup>64</sup>

### **Payment of interest**

Having determined that a party to the dispute is liable to make a payment the adjudicator may determine that interest be paid. Where the payment is overdue under the construction contract the rate of interest will be that specified in the contract.<sup>65</sup> Otherwise the rate shall not be greater than that prescribed in section 142 of the *Supreme Court Act 1935* (WA).<sup>66</sup>

### **The parties' costs**

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

The term 'costs of an adjudication' is described in the Act as the entitlement of the appointed adjudicator and the costs of any testing done or expert engaged by the adjudicator.<sup>67</sup> However where the adjudicator is satisfied that a party to the dispute incurred costs of the adjudication because of unfounded claims or frivolous or vexatious conduct by the other party, the adjudicator may decide that the other party must pay some or all of the costs.<sup>68</sup>

Consequently the Act provides where the adjudicator makes an order with respect to costs, he or she must decide the amount of the costs, give reasons for the decision and communicate those reasons in writing to the parties.<sup>69</sup>

### **Form and content of the adjudicator's determination**

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

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

The decision must also identify any information in it of a confidential nature which is not suitable for publication by the Registrar.<sup>70</sup> The decision must then be given to the parties to the adjudication and to the Registrar.<sup>71</sup>

### **Effect of determinations**

The fact that an adjudication application has been made with respect to the payment dispute does not prevent the parties commencing proceedings on other issues arising out of the dispute before an arbitrator or court. However the adjudicator's determination of the payment dispute is binding on the parties.<sup>72</sup>

The adjudicator's determination is also final and the adjudicator cannot without the consent of the parties amend or cancel the determination<sup>73</sup> unless there has been some accidental slip or omission, arithmetic error or material mistake in the description of any person or thing.<sup>74</sup>

---

<sup>64</sup> Section 32(3)(a).

<sup>65</sup> Section 33(1)(a).

<sup>66</sup> Section 38(1)(b).

<sup>67</sup> Section 44 (1)(a), 44(1)(b).

<sup>68</sup> Section 34(2).

---

<sup>69</sup> Section 34(3)(c).

<sup>70</sup> Section 36(a).

<sup>71</sup> Sections 36(f), 36(g).

<sup>72</sup> Section 38.

<sup>73</sup> Section 41(1).

<sup>74</sup> Section 41(2).

### **Contractor may suspend its obligations**

At common law, a contractor is unable to suspend the performance of its obligations where the other party has not paid a progress payment on time unless the contract includes an express right to suspend work for non-payment.<sup>75</sup> This is consistent with the principle that unless there is a breach of a condition, the breach does not discharge the innocent party from performance of its unperformed obligations. However the Act provides a right to the contractor to suspend work if the other party does not pay in accordance with the determination, subject to the issuing of a notice in writing to suspend performance of its obligations.<sup>76</sup>

The Act further provides that a contractor that suspends the performance of its obligations in accordance with the above is not liable for any loss or damage suffered by the principal or any other person claiming through the principal and the contractor retains its rights under the contract.<sup>77</sup>

### **Determinations may be enforced as judgments**

An adjudicator's determination may, with the leave of a court of competent jurisdiction, be enforced in the same manner as a judgment or order of the court.<sup>78</sup> A court of competent jurisdiction in relation to a determination is defined in section 43(1) as a court with jurisdiction to deal with a claim for the recovery of a debt of the same amount as the amount that is payable under the determination.

Currently these amounts are: Local Court of WA (\$25,000 or less); District Court of WA (\$25,000 to \$250,000); Supreme Court of WA (over \$250,000).<sup>79</sup>

<sup>75</sup> See A May (ed), *Keating on Building Contracts* (5<sup>th</sup> ed, 1991) 157.

<sup>76</sup> Section 42(2).

<sup>77</sup> Sections 42 (5)(a), 42(5)(b).

<sup>78</sup> Section 43(2).

<sup>79</sup> On 1 May 2005, these amounts will change to: Local Court (\$30,000), District Court (\$30,000 to \$300,000), Supreme Court (in excess of \$300,000).

### **The adjudicator's costs**

The costs of an adjudication are essentially the costs of the adjudicator at a rate previously agreed between the adjudicator and the parties, and the costs of any testing done or expert engaged.<sup>80</sup> The Western Australian Department of Housing and Works website contains a list of registered adjudicators. Their rates range from \$180 to \$350 per hour depending on the amount of payment in dispute.<sup>81</sup>

As noted above, the parties involved are liable to pay the costs of an adjudication in equal shares and the parties are jointly and severally liable to pay the costs of the adjudication.<sup>82</sup> The costs of the adjudication may be recovered from a person liable to pay the costs in a court of competent jurisdiction as if the costs were a debt to the adjudicator.<sup>83</sup>

### **Concurrent Proceedings**

Concurrent proceedings are proceedings in a court, tribunal or arbitration, dealing with a dispute or other matter arising under the contract between the parties. The Act provides that an adjudication under the Act will not affect concurrent proceedings.<sup>84</sup> These proceedings can continue at the same time as the adjudication, unless all the parties, in writing, require the adjudicator to discontinue the adjudication.<sup>85</sup>

Consequently if litigation or arbitration of the dispute has already commenced, the applicant is still entitled to pursue payment under the Act. The Act provides that an arbitrator or court must take into account any amount determined under the Act.<sup>86</sup> Where proceedings have commenced in a court, tribunal or arbitration before the time of the adjudication, the adjudicator may still continue with the adjudication. However the adjudicator

<sup>80</sup> Section 44(1).

<sup>81</sup> See [www.dhw.wa.gov.au](http://www.dhw.wa.gov.au)

<sup>82</sup> Sections 44(5), 44(6).

<sup>83</sup> Section 44 (12).

<sup>84</sup> Section 45(1).

<sup>85</sup> Section 45(2).

<sup>86</sup> Section 45(4).

cannot have regard to those proceedings. Similarly anything said or done in an adjudication is not admissible before an arbitrator or any other body.<sup>87</sup>

Where a party is dissatisfied with the amount, if any, determined by the adjudicator, the party may still commence proceedings before an arbitrator or other person.<sup>88</sup>

### Review of adjudicator's determination

The intention of the Act is that grounds for a review of an adjudicator's decision be limited.<sup>89</sup> A person who is aggrieved by a decision made under s 31(2)(a) of the Act may apply to the State Administrative Tribunal (SAT) for a review of the decision. The SAT came into operation on 1 January 2005 and amalgamated most of the review, civil and disciplinary functions of nearly 50 industry and public sector boards and tribunals and a number of courts. SAT matters are divided into four streams that are appropriate to the matter under review. The forum which considers reviews of decisions of adjudicators is the Commercial & Civil stream which deals with strata title and retirement village disputes, commercial and other commercial and personal matters. Details regarding the operation of SAT can be found on the Tribunal's website.<sup>90</sup>

### Circumstances where an adjudication may be set aside

Section 31(2)(a) sets out the circumstances where an adjudication may be set aside by SAT. These are:

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

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

However it is considered that the court will not set aside an adjudicator's decision where the adjudicator has made a non-jurisdictional error, for example, in applying the law or in the interpretation of the contract. The court may set aside an adjudicator's decision if the adjudicator has not acted honestly or has breached the requirements of natural justice.<sup>91</sup> Put simply, the observance of natural justice requires the decision-maker to be unbiased and that each party must have the opportunity to prepare and present its case and respond to any allegations.

Where there is an appeal arising from an adjudicator's determination the adjudicator should not become involved in the appeal. If they do the adjudicator may end up paying the costs of the review.<sup>92</sup> However that the law relating to review of adjudicator's determinations, seems far from settled, following recent decisions by the NSW Court of Appeal relating to review of adjudications made under the *Building and Construction Security of Payments Act 1999* (NSW).<sup>93</sup>

<sup>87</sup> Section 45(3).

<sup>88</sup> Section 45(1).

<sup>89</sup> Section 46.

<sup>90</sup> See [www.sat.justice.wa.gov.au](http://www.sat.justice.wa.gov.au).

<sup>91</sup> For a discussion of the requirements of natural justice see *Ridge v Baldwin* (note 51 supra) and *Najjar v Haines* (1991) 25 NSWLR 224.

<sup>92</sup> See *Najjar v Haines* at 248.

<sup>93</sup> See *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport & Anon* [2004] NSWCA 394; and *Transgrid v Siemens Ltd & Anon* [2004] NSW CA 395.

### **Administration of the Act**

Part 4 of the Act details a number of administrative provisions. In particular, matters such as the appointment and functions of the registrar, the registration of adjudicators and the publication of adjudicator's decisions.<sup>94</sup>

### **Miscellaneous provisions**

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

#### *No contracting out*

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

#### *Immunity from tortious liability*

Section 54 provides adjudicators with immunity against an action in tort for anything done in good faith in the performance of a function under the Act. However if an adjudicator attempts to act outside the provisions of the Act, then the adjudicator will leave himself or herself subject to personal liability. The difficulty with this section is the lack of consensus or authority with respect to what exactly is meant by good faith.<sup>95</sup>

### **Conclusion**

The introduction of the Act has significantly altered the rights of parties seeking payment for work performed or materials supplied in connection with construction work in Western Australia. Prior to the introduction of the Act, persons with an obligation to pay contractors for work done or materials supplied had a distinct

advantage when a dispute arose, regarding payments under the contract. They held the money and the contractor was faced with the difficulties of time and cost in trying to lawfully recover payments through litigation or arbitration. The Act now provides for a quick, informal and hopefully inexpensive procedure for the resolution of these payment disputes. Additionally the Act enables an adjudication to be commenced either before or during arbitration or litigation in order to 'keep the money flowing'. The Act also abolishes pay when paid provisions in construction contracts and prohibits lengthy times for payment by the owner or principal.

Unfortunately while the principal objective of the Act is to provide a rapid adjudication process for the resolution of construction payment disputes, the NSW experience over the past 5 years since the introduction of similar legislation, is that there has been considerable litigation relating to the quashing of arbitrators' decisions on the basis of jurisdictional error.<sup>96</sup> We await the outcome in Western Australia of the first appeal against an adjudicator's decision.

### **Acknowledgement**

The author would like to thank Laurie James, Senior In-House Counsel, Kott Gunning Lawyers Perth for his comments on this article.

---

<sup>94</sup> Sections 47 to 52 inclusive.

<sup>95</sup> See *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *Perini Corporation v Commonwealth* [1969] 2 NSWLR 530; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

---

<sup>96</sup> K Tapsell 'Back to the Drawing Board with Security of Payments' *Australian Construction Law Newsletter*, (2005) #100 January/February 6.

