



RESPONSE OF THE WESTERN AUSTRALIAN GOVERNMENT TO THE

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

May 2016

Message from the Minister



On 10 June 2014, I appointed Professor Philip Evans to lead an independent statutory review of the *Construction Contracts Act 2004* (the Act). The Act is an important piece of legislation in this State. Its principal objective is to improve security of payment by providing a rapid adjudication process for determining payment disputes under construction contracts.

The purpose of the statutory review was to evaluate the operation and effectiveness of the Act. The review was one of the recommendations made by the Small Business Commissioner in 2013, following his investigation into the non-payment of subcontractors on some State Government administered construction projects between 2008 and 2012. The Government strongly supported this recommendation.

In September 2015, Professor Evans provided the Government with a report on the review of the Act.

Professor Evans' report concludes that the Act has provided a very useful scheme for resolving payment disputes and improving contract management practices within the construction industry. It also concludes that the Act remains an important legislative tool for providing contractors, subcontractors and suppliers with a fundamental right to be paid for their work, and a rapid low-cost means of enforcing this right.

Professor Evans has identified 28 recommendations that could improve the effectiveness and the efficiency of the Act in achieving its objective.

The Government accepts the majority of Professor Evans' recommendations and will work to develop the necessary legislative changes as soon as possible. These changes will aim to further strengthen the Act's provisions and increase the utility of the rapid adjudication process for all participants in the construction industry.

The Government will also be taking steps to address broader issues of security of payment, insolvency and the financial health of the construction industry. This will include evaluation of the use of statutory retention trusts, and the recent trial of Project Bank Accounts on selected State Government construction projects.

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.

I would like to thank the many organisations and individuals who contributed to the review of the Act. I also thank Professor Evans and his team for their tireless work in providing the Government with recommendations for improving the operation of the Act.



Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

Contents

1.	Background	4
2.	Key Findings of the Review Report	5
3.	Government Direction on Key Findings	6
4.	Government Response to Recommendations	9

1. Background

Under section 56(1) of the *Construction Contracts Act 2004* (WA) (referred to interchangeably as the "CC Act" or "the Act"), the Minister for Commerce is required to review the Act and to lay the review before each House of Parliament as soon as practicable after receiving it. A review of the CC Act became due on 1 January 2010, but was held over until the implementation of the significant suite of new building legislation in Western Australia.¹

In 2013, Small Business Commissioner Mr David Eaton recommended that the CC Act be reviewed as a matter of priority following his investigation and report into the non-payment of subcontractors working on State Government administered projects between 2008 and 2012.²

In June 2014, the Government appointed Professor Philip Evans to lead an independent statutory review of the CC Act. The terms of reference for the review were to evaluate:

1. *The context in which the Act now operates;*
2. *Any issues related to how the Act operates, including, but not limited to –*
 - *The scope of the Act;*
 - *The mechanisms in the Act;*
 - *Court rulings and interpretation;*
 - *Adjudicators;*
 - *Prescribed Appointors; and*
 - *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.*

In September 2015, the *Report on the Operation and Effectiveness of the Construction Contracts Act 2004* (WA) (hereinafter referred to as the "Review Report") was finalised and submitted to the Government.

Based on consideration and evaluation of the feedback provided by stakeholders, the Review Report contains a list of recommendations designed to improve the efficacy of the rapid payment adjudication process provided by the CC Act, and address other concerns around the Act's operation. This includes the need for a concerted effort towards improving awareness within the construction industry of the Act's requirements.

Contained herein is the Government's response to the Review Report.

¹ See *Building Act 2011*, *Building Services (Registration) Act 2011*, and *Building Services (Compliant Resolution and Administration) Act 2011*.

² D Eaton (Small Business Commissioner), *Final Report: Investigation into the non-payment of subcontractors on construction projects administered by Building Management and Works between October 2008 and October 2012*, (March 2013) 71.

2. Key Findings of the Review Report

The principal objective of the CC Act is to improve security of payment by providing a rapid adjudication process for determining payments disputes under construction contracts. This adjudication process is a 'pay now, argue later' system, designed to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted and complex issues. The Act also provides statutory protections against 'paid when paid clauses', and lengthy payment terms.

The Review Report found that in a decade of operation the CC Act has provided a very useful statutory scheme for payment claim evaluation and a quick dispute resolution process. It has facilitated development of more efficient contract administration and business practices dealing with payment issues in the construction industry. As the report explains:

"Put simply, all the submissions and stakeholder meetings clearly indicated that the Act has had a very positive influence on payment issues."³

The Review Report determined that the Act continues to be an important legislative tool for providing contractors, subcontractors and suppliers with a fundamental right to be paid for their work and a rapid, low-cost means of enforcing this right.

However, the Review Report did find evidence that the CC Act's influence on resolving payment disputes at the lower end of the contracting chain has fallen short of expectations. There is also a general lack of knowledge and awareness within the construction industry as to the rights and responsibilities afforded by the Act.

The Review Report also concluded that security of payment and the impact of insolvencies remain pertinent issues within the construction industry.

The Review Report concludes that there is not a need for major reform to the CC Act, rather the report contains a list of 28 recommendations designed to improve the overall operation and effectiveness of the Act in achieving its objective.

³ P. Evans, *Report of the Operation and Effectiveness of the Construction Contracts Act 2004 (WA)*, (2015) 10.

3. Government Direction on Key Findings

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.

The Government intends to take a number of actions in the short-to-medium term to address the key findings of the Review Report:

(1) Addressing the lack of knowledge and awareness around the CC Act

(Short term: within the next 12 months)

The Government notes with great concern the finding in the Review Report that there is a widespread lack of awareness of the operation of the CC Act. It is imperative that all participants within the industry, be they owners, builders, subcontractors, specialists, or suppliers, are fully aware of the rapid adjudication process afforded by the Act, and the steps required to access this important statutory right.

Increasing industry awareness will be a priority for the Government in the immediate term.

The Department of Commerce - Building Commission Division (hereinafter referred to as the "Building Commission"), as the industry regulator, will in partnership with others commence work to increase the information resources available on the CC Act. This will include enhancements to the Building Commission's website, industry awareness sessions, and print and digital media advertisements. Progress will be maintained into the future and monitored on an ongoing basis.

(2) Amending the CC Act to improve its operation and use

(Medium term - priority)

The Government accepts the majority of amendments to the CC Act recommended by Professor Evans. The Government will work to develop the necessary amendments as soon as possible. These changes will aim to further strengthen the Act's provisions and increase its utility for all participants in the construction industry.

The Government understands the concerns expressed by many stakeholders on the strict 28 day time limit for seeking rapid adjudication of payment disputes. The time limit is designed to maintain the rapid nature of the adjudication process, however it is accepted that this may be impeding the ability of some claimants, particularly subcontractors, to access adjudication. It is imperative that all participants within the construction industry are afforded proper access to rapid adjudication.

The Government accepts that one way it can improve access is by introducing more flexibility to the process for seeking rapid adjudication of payment disputes. The Building Commission will undertake further consultation with stakeholders to identify a preferred option for improving the Act's time limits.

This will include an option to count time in business days rather than calendar days, as recommended by the Review Report. It will also include permitting adjudication on recycled payment claims to remove the absolute block that the time limit currently imposes, along with options to increase the 28 day time limit. The consultation will be undertaken as part of developing the package of recommended amendments to the CC Act.

(3) Addressing security of payment and insolvency issues within the industry *(Medium term)*

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 have across the industry.

The construction industry is vitally important to the Western Australian economy, contributing around 12 per cent of the State's Gross Domestic Product, and employs 10.6 per cent of the workforce. The industry operates as part of and in step with the broader economy, facing many of the same challenges as other sectors of the economy and operating within the same general framework of laws, finance, supply and demand.

Nevertheless, the industry faces some unique challenges. Australian Securities and Investment Commission data from 2013-2015 shows that the construction industry suffered 19.4 per cent of the overall insolvencies, and was the greatest contributor to insolvencies of any individual sector.⁴ The most common cause for insolvency was inadequate cash flow or high cash use, followed closely by poor strategic management of business.⁵

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.

Large scale inquiries have been undertaken by the Commonwealth,⁶ New South Wales⁷ and Queensland⁸ 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. Queensland⁹, New South Wales¹⁰, South Australia¹¹ and the Northern Territory¹² have also undertaken, or are in the process of undertaking, reviews of their respective security of payment legislation.

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.

To improve security of payment within the construction industry, the Government will take a number of actions, including, but not limited to:

1. Amending the CC Act to improve the rapid adjudication process.

⁴ ASIC Australian insolvency statistics series 1A July 2013-December 2015.

⁵ Submission by the Australian Securities and Investment Commission, *Senate Inquiry into Insolvency in the Construction Industry* (April 2015) 20.

⁶ Commonwealth of Australia, Senate Economics References Committee, *'I just want to be paid': Insolvency in the Australian construction industry* (December 2015).

⁷ B Collins QC, *Final Report: Inquiry into Construction Industry Insolvency in NSW* (November 2012).

⁸ A Wallace, *Final Report of the Review of the Discussion Paper – Payment dispute resolution in the Queensland building and construction industry* (May 2013).

⁹ Queensland Government, Department of Housing and Public Works, *Security of Payment: Discussion Paper* (December 2015).

¹⁰ New South Wales Government, Department of Fair Trading, *Building and Construction Industry Security of Payment Act 1999: Discussion Paper* (December 2015).

¹¹ A Moss, *Review of the Building and Construction Industry Security of Payments Act 2009 (SA)*, (March 2015).

¹² C Cureton, Squire Patton Boggs, *Review of Building Industry Regulatory Framework in the Northern Territory*, (November 2015).

2. Directing the Building Commission to evaluate the use of statutory retention trusts. This will include monitoring the experience in New South Wales of a limited retention trust scheme, and the forthcoming review on the scheme's 12 months of operation¹³.
3. Directing the Building Commission to evaluate interventions identified in other reviews and inquiries, and provide advice for future policy direction.
4. Evaluating the trial of PBAs to determine their effectiveness and potential for future application.
5. Considering the establishment of a reference group of government construction agencies to identify gaps in current practices for protecting subcontractors on State Government construction projects; and
6. Adopting any other measures that ensure a healthy and productive construction industry.

The Government is committed to identifying evidence-based policy responses for improving security of payment. The responses will aim to avoid imposing unnecessary and inefficient regulation on individuals, business, or government, but at the same time improve the health of the industry so contractors, subcontractors and suppliers can have confidence that they will be paid for the work they do.

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.

The Government will encourage the Commonwealth 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.¹⁴

¹³ Fair Trading NSW, *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2014: Regulatory Impact Statement* (December 2014).

¹⁴ Recommendation 31 in Commonwealth of Australia, Senate Economics References Committee, *'I just want to be paid': Insolvency in the Australian construction industry* (December 2015).

4. Government Response to Recommendations

The Government's response to each of the 28 recommendations of the Review Report is contained in the table below. The identified actions for implementation are also provided. These actions fall into the following seven categories:

1. **Accept Recommendation – suitable for immediate action**
Recommendations that the Government supports that have no significant funding or legislative requirements and can be commenced without significant delay. Primarily, these recommendations relate to agency level actions required to improve the operation of the CC Act. They are considered suitable for implementation in the short term.
2. **Accept Recommendation – requires legislative change**
Recommendations that the Government will implement through amended legislation. In some cases the recommendation may have consequences for industry and government that will require refinement before being introduced as legislation. These changes will be progressed following the normal legislative change process. Some changes may be progressed as an initial package of reforms prior to those that require more comprehensive policy development.
3. **Accept Recommendation – no legislative change required**
Recommendations made to maintain the current legislative provisions that the Government supports.
4. **Accept in Principle – further work required**
Government accepts the recommendation, noting that primary responsibility for actioning is at the agency level and further work is required to support the change.
5. **Note intent – further work required**
The principle of the recommendation is noted, but further evaluation is required to assess the impact of the change and determine future policy direction.
6. **Not Accepted – requires legislative change**
Recommendations where no legislative change has been suggested, but where the Government intends to legislate. Further work at the agency level will be undertaken to refine any legislative change and consult with relevant industry participants/interested parties. These changes are likely to be progressed in a second package of reforms to allow for comprehensive policy development.
7. **Not Accepted**
Recommendations that the Government does not support and will not pursue any further.

Recommendation	Response	Comments
<p>Recommendation 1(a): The time limits in which an Application can be made [under section 26] should remain at 28 days.</p>	<p>Note Intent – further work required</p>	<p>The Government notes the intent of the recommendation and the importance of the 28 day time limit in maintaining the rapid nature of the adjudication process. However, the Government understands the concerns expressed by many stakeholders that absolute effect of the time limit is impeding the ability of some claimants to access adjudication of payment disputes. The Government will explore legislative change to increase the time limit in section 26. Importantly, the Government will also explore legislative amendments to allow applicants to seek adjudication on the whole of each payment claim made under the contract, even though the claim may include matters that were unsuccessfully included or rejected in previous claims (recycled claims). This will give effect to the terms of many standard form contracts that permit reconsideration of payment claims by head contractors or contract superintendents and will mean the 28 day time limit is no longer an absolute bar to seeking adjudication.</p>
<p>Recommendation 1(b): There is an essential need for extensive awareness and educational programs to be provided by professional groups, contracting organisations and the Building Commission to ensure that all stakeholders are aware of their rights, obligations and procedures under the CC Act, particularly with respect to time limits.</p>	<p>Accept Recommendation – suitable for immediate action</p>	<p>The Government accepts this recommendation. The Government notes the work already undertaken by the Building Commission. The Government also notes that the Building Commission will be enhancing its information resources to subcontractors to facilitate their beneficial utilisation of the Act and foster a better understanding of their rights and obligations as contracting parties. The Government will also direct a focused effort in this respect, including identifying opportunities for co-delivery of workshops on CC Act adjudication through the Small Business Development Corporation.</p>
<p>Recommendation 2: The existing 14-day timeline for responses should not be amended.</p>	<p>Accept Recommendation – requires legislative change</p>	<p>The Government accepts the recommendation to retain the 14 day timeline for responses. However, as per the response to Recommendation 17 legislative changes may be progressed to express time in 'business days' rather than 'calendar days.'</p>
<p>Recommendation 3: The existing 14-day timeline for determinations should be retained.</p>	<p>Accept Recommendation – requires legislative change</p>	<p>The Government accepts the recommendation to retain the 14 day timeline for determinations. However, as per the response to Recommendation 17 legislative changes may be progressed to express time in 'business days' rather than 'calendar days.'</p>

Recommendation	Response	Comments
Recommendation 4(a): Section 32 of the Act should be amended to permit the adjudicator to extend the time for the determination for an additional seven business day period without the consent of the parties.	Note Intent – further work required	At this stage, the Government is not convinced that this amendment would accord with the spirit of rapid adjudication and maintaining the simplicity in the process. The current requirement that extensions be granted on consent of the parties is considered appropriate. Further work will be undertaken by the Building Commission to establish criteria for when extensions should be considered.
Recommendation 4(b): Any additional time should be permitted with the consent of both parties. Issues which could arise given the discretionary nature of such a decision could be minimised by way of regulation or advice from the Building Commissioner with respect to the relevant factors to be taken into account when exercising discretion.	Note Intent – further work required	At this stage, the Government does not support legislative amendment. Further work will be undertaken by the Building Commission to develop 'Practice Notes' to outline considerations for adjudicators who seek the parties' agreement to extend time.
Recommendation 4(c): The Building Commissioner should institute a monitoring process to track the progress of delayed determinations.	Accept in Principle – further work required	Government accepts the recommendation subject to the administrative capacity of the Building Commission.
Recommendation 5: Training and awareness programs should be conducted by the Building Commission and approved organisations to ensure that the provisions of the CC Act are understood.	Accept Recommendation – suitable for immediate action	Work will be undertaken by the Building Commission within the short term. Progress will be monitored on an ongoing basis.
Recommendation 6(a): The objectives of the Act will not be significantly improved by the creation of a separate (small claim) dispute service provided by the Building Commission.	Accept Recommendation	
Recommendation 6(b): The Building Commission should publish on its website the names of organisations and approved Alternative Dispute Resolution practitioners who provide such services to the industry.	Accept Recommendation	This service is already provided by dispute resolution organisations. A link to these organisations will be placed on the Building Commission's website.
Recommendations 6(c): Adjudicators' details of experience and expertise shown on the Building Commission's website should be expanded to provide additional information to parties seeking an adjudicator. Adjudicators should be requested to confirm they are willing to adjudicate smaller payment disputes or act for a fixed fee.	Accept Recommendation – suitable for immediate action	Work will be undertaken by the Building Commission and others to ensure this information is collected and provided.

Recommendation	Response	Comments
Recommendation 7: The current registration requirements for adjudicators do not require amendment and there is no need for formalised Continuing Professional Development requirements. However, the current content of approved adjudicator training programs should be expanded to include topics currently not covered or not adequately covered.	Not Accepted – requires legislative change	The Government considers that the current one-off lifetime registration for adjudicators does not accord with modern regulatory practice. The Government intends to explore legislative change to create a three year registration/renewal process for adjudicators, with fees set on a cost recovery basis. Further consultation will be undertaken with industry in respect to this change.
Recommendation 8: The CC Act should not be amended to exclude liquidated damages.	Accept Recommendation – no legislative change required	
Recommendation 9: The domestic building contracts inclusion should be retained.	Accept Recommendation – no legislative change required	
Recommendation 10: Section 4(3)(a) and (b) of the Act should be amended to bring excluded mining activities within the jurisdiction of the CC Act.	Note Intent – further work required	Without appropriate consultation with contractors and principals active in mining related construction work and evaluation of the outcomes, the Government is not convinced there is a compelling argument to expand the jurisdiction of the CC Act. Further consultation with industry participants will be undertaken by the Building Commission to identify any case for change.
Recommendation 11: Section 4(3)(c) should be amended to bring the construction of extracting and processing plant within the jurisdiction of the CC Act.	Note Intent – further work required	The Government does not accept this recommendation. The construction of processing plant is considered highly specialised and is not usually carried out under typical construction contracts. However, further work will be undertaken by the Building Commission to assess whether amendments could be made to better align the Act with judicial findings on the scope of the exempted activities.
Recommendation 12: Section 4(3)(d) of the Act should be amended in order to allow construction work associated with wholly artistic works to be deemed construction work for the purposes of the Act, and the term 'wholly artistic' should be defined in the Act.	Accept Recommendation – requires legislative change	Further work will be undertaken in ensuring that the amendment provides greater clarity as to what is 'wholly artistic work'.
Recommendation 13: The CC Act should remain as the method of security of payment legislation in Western Australia subject to the amendments suggested as a result of the Review.	Accept Recommendation – no legislative change required	

Recommendation	Response	Comments
Recommendation 14: The current governance issues relating to the prescribed appointor organisations are consistent with the aims and objectives of the dispute resolution functions of the Act and no amendments to the Act are required. It is recommended that a regulation be introduced to ensure that the 10% additional nomination fee, where levied, is borne by the association member and not the parties.	Accept Recommendation – requires legislative change	The Government will make amendments to the Construction Contracts Regulations 2004 (WA) to prohibit the charging of nomination fees. However, minor legislative changes are also needed to provide the Registrar with greater administrative oversight of prescribed appointor organisations. This includes the ability for the Registrar to request regular activity reports from appointor organisations. Further work will be undertaken in refining the legislative change.
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.
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	However, the Government will pursue Recommendation 15(a) in favour of this recommendation.
Recommendation 16(a): The Act should be amended to include penalties for failure to comply with its prohibitions. The liability should be strict and not subject to proof of intention.	Accept in Principle – further work required	The Government accepts this recommendation in favour of any naming and shaming. Further work will be undertaken in refining the operation of the offences to ensure they do not inadvertently impact on innocent parties to a contract. An evaluation is also needed as to the adequacy of powers currently available for investigation of unfair/illegal contract terms.
Recommendation 16(b): Alternatively, the Annual Reports of the Construction Contracts Act Registrar should include a section detailing instances, and naming the relevant parties, where failure to comply with the provisions has been proven.	Accept in Principle – further work required	At this stage, the Government will pursue Recommendation 16(a) in favour of this recommendation.
Recommendation 17: All time limits in the Act should be expressed in 'business days' rather than calendar days. The periods between 24 December and 7 January and Good Friday to Easter Monday should be excluded from the counting of days.	Accept Recommendation – requires legislative change	The Government accepts this recommendation. A move to 'business days' will automatically allow for the Good Friday to Easter Monday break. A special provision will be inserted into the Act to provide for the 24 December to 7 January break.

Recommendation	Response	Comments
Recommendation 18(a): The Act should be amended to allow the applicant to withdraw the application by writing to the prescribed appointor (where no adjudicator is appointed), the adjudicator or the other party.	Accept Recommendation – requires legislative change	The parties and the adjudicator will have incurred costs from an applicant commencing an adjudication and then withdrawing it. The adjudicator will still have to bring the adjudication to an end by issuing a determination that deals with costs.
Recommendation 18(b): Section 44(2) of the Act should be amended to allow adjudicators to be paid for their work undertaken up until the notice of the withdrawal of the application.	Accept Recommendation – requires legislative change	
Recommendation 19: Section 26 and regulation 4 should be amended to state that the application should be valid, and not dismissed, if there has been substantial compliance with the Regulations.	Accept Recommendation – requires legislative change	
Recommendation 20(a): The implied terms provisions should remain part of the Act.	Accept Recommendation – no legislative change required	
Recommendation 20(b): The State Administrative Tribunal has suggested that the apparent overlap of sections 17 and 18 could be remedied by following the approach of the Northern Territory legislation to those matters. This suggestion is worthy of further consideration.	Accept Recommendation – requires legislative change	Further work will be undertaken at an agency level to consider the appropriateness of this amendment and to assess any potential for adverse impact.
Recommendation 21(a): 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.	Note Intent – further work required	This recommendation would only apply to contracts that do not have a written provision about the status of retention money. At this stage the Government believes further evaluation is required to determine if the public benefit of having some retention money held in trust by the Building Commission or otherwise will place unnecessary or inefficient regulation on the public and private sector. The Government notes that, following the Collin's Inquiry in NSW, the Baird Government introduced a statutory retention trust scheme for non-residential construction contracts above \$20 million. ¹⁵ These funds are administered by the NSW Department of Fair Trading. An evaluation of this scheme is due after the 2015-16 financial year. ¹⁶ The Government will refer consideration of this recommendation, including the results of the NSW scheme, for further evaluation by the Building Commission.

¹⁵ The *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015* (NSW) commenced operation on 1 May 2015.

¹⁶ Above n 13 at 7.

Recommendation	Response	Comments
Recommendation 21(b): 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 should be considered by way of a separate future review by others.	Note Intent – further work required	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 of construction projects regulated by the CC Act.
Recommendation 21(c): 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.	Note Intent – further work required	The Government accepts the intent of this recommendation, noting the work already undertaken by BMW to address concerns in major public sector construction projects following the investigation by the Small Business Commissioner. The Government will consider directing the formation of an interagency reference group to evaluate current measures for protecting subcontractors on Government construction projects and identify any gaps or best practices that should be adopted. The composition and leadership of the reference group will be determined by relevant Ministers. However, the Government will, in the first instance, encourage the Commonwealth to refer consideration to the Australian Law Reform Commission of best models for statutory constructions trusts in the public and private sector.
Recommendation 22: Section 32(4)(b) of the Act should be amended to allow an adjudicator to adjudicate simultaneously two or more unrelated payment disputes.	Accept Recommendation – requires legislative change	
Recommendation 23: The Act should be amended so that construction contracts are to be in writing.	Not Accepted	The Government considers that amending the CC Act to require construction contracts to be in writing, would place unnecessary restriction on the freedom of parties to contract as they see fit. The Government is also concerned that, in instances where an oral contract is used, the statutory protections afforded by the CC Act to the parties would be removed. This is considered an undesirable outcome.
Recommendation 24: The Building Commission website should contain a link to sources of information relating to the unconscionable conduct provisions of the Australian Consumer Law.	Accept Recommendation – suitable for immediate action	

Recommendation	Response	Comments
Recommendation 25: The Building Commissioner, at his discretion, should publish those determinations, which in the Commissioner's opinion add to the body of law and practice relative to the administration of the CC Act. In addition to the exclusions in section 50(2), the name of the adjudicator should be removed.	Accept in Principle – further work required	Further work will be undertaken by the Building Commission to look at publishing determinations. Consideration will also be given to whether Practice Notes or regular bulletins would assist in raising awareness of changes to the body of law.
Recommendation 26: There should be no change to section 53 of the Act.	Accept Recommendation – no legislative change required	
Recommendation 27: Where the State Government is the principal in a contract or the contract administrator, the Australian Standards forms of contract should apply.	Not Accepted	While the Government generally supports the sentiment of this recommendation, the contract that will provide optimum outcomes for the Government is a matter for each public sector agency to determine based on the requirements of the individual project.
Recommendation 28: The Act should not be amended to require a claimant to provide a statutory declaration attesting to the payment of workers, subcontractors or suppliers as a precondition of a payment claim under the contract.	Accept Recommendation – no legislative change required	