



Finance  
& Services

# Building and Construction Industry Security of Payment Act 1999

Adjudication Activity in New South Wales

ANNUAL REPORT  
2013/14



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Coverage of this Report: This report contains adjudication activity statistics for the period commencing on 01/07/2013 and ending on 30/06/2014. This report should be read in conjunction with the 'Adjudication Activity Statistics: Quarterly Report – No. 4, 1 July 2013 to 30 June 2014'.

Rounding: Where figures have been rounded, discrepancies may occur between sums of the component items and the totals shown.

Statistic shown in this annual report were prepared by



Adjudication Research + Reporting Unit

# Preamble

## The security of payment problem

The *Building and Construction Industry Security of Payment Act 1999* was enacted in New South Wales by the government in response to calls for a solution to a major problem that plagues the construction industry — not being paid in full and on time for work done on construction projects. In Australia, it was New South Wales that was ‘first to market’ with its own model of statutory adjudication for the building and construction industry.

The overarching purpose of the NSW Act was, and remains, to reform payment behaviour in the construction industry. But how does a government know whether its legislation is achieving its purpose? For the most part, this is achieved by empirically monitoring its effectiveness against pre-determined performance measures.

## Role of research

Governments are greatly assisted in their attempts to devise and implement effective policies by drawing upon reliable empirical research. Reliance on verifiable information based on sound research design and execution, rather than on unverifiable anecdotal-based assertions, is paramount.

It was with this in mind that, in August 2011, the Office of Finance & Services (formerly the Department of Finance & Services) formed a partnership with the Faculty of the Built Environment in The University of New South Wales to establish the Adjudication Research + Reporting Unit (‘the ARRU’).

The purposes of the ARRU are, firstly, to undertake and to report on research on key aspects of security of payment in the building and construction industry. And, secondly, to provide the Government with regular

progress reports on adjudication activity in New South Wales based on data provided by the Authorised Nominating Authorities to the Office. This partnership has so far enabled the Office to publish its Quarterly Adjudication Activity Reports covering the financial years ending June 2012, 2013 and 2014.

## Annual Adjudication Activity Progress Report

This *Annual Adjudication Activity Report* builds on the results set out in the Quarterly Reports by providing key findings and commentary on adjudication trends emerging in the New South Wales construction industry.

## Who will benefit from reported information?

The Government now has reliable data and analysis showing the detailed performance of the New South Wales statutory adjudication system.

The information should be of considerable interest to various construction industry stakeholders, including major contractors and subcontractors, trade and industry associations, as well as the many legal and adjudication practitioners and other industry professionals, and, of course, the international academic community.

Other States and Territories that have enacted their own versions of statutory adjudication may find the Report invaluable in developing their own model for adjudication activity reporting and for assessing differences and arguments over comparative legislative systems.

# Operation of the NSW Act

New South Wales was the first Australian jurisdiction to introduce industry-specific 'security of payment' legislation for the building and construction industry. The *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the NSW Act') was assented to on 5 October 1999 and commenced on 26 March 2000. As at 10 December 2011, all Australian States and Territories had commenced comparable legislation for the building and construction industry. All but two Australian jurisdictions have based their security of payment legislation on the NSW Act.

The term *security of payment* refers to 'the entitlement of contractors, subcontractors, consultants or suppliers in the contractual chain to receive payment due under the terms of their contract from the party higher in the chain' [1]. The *security of payment problem* refers to 'the consistent failure in the building and construction industry to ensure that participants are paid in full and on time for the work they have done, even though they have a contractual right to be paid' [2].

The purpose of the NSW Act is to counter the well-reported tactic of many in the industry unfairly and unduly devaluing, delaying or withholding payment due under a construction contract. According to the NSW Government: '[it] is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers do not get paid for their work. Many of them cannot survive financially when that occurs with severe consequences to themselves and their families' [3].

To recover payments due under a construction contract, the claiming party (called the 'claimant') has generally relied on one or more traditional dispute resolution processes, such as arbitration or litigation. However, the prohibitive costs and time delays involved in recovering payment under these processes has led many in the industry to abandon their right to payment and move onto other projects in order to maintain cash flow – as it is often said: 'cash flow is the lifeblood of the construction industry'.

The object of the NSW Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

The NSW Act introduced new statutory rights for claiming parties, such as: a right to progress payments; a right to interest on late payments; a right to suspend work; and a right of lien. The NSW Act renders void 'pay-when-paid' clauses in construction contracts and the parties cannot contract out of the Act. The NSW Act also introduced a unique and rapid form of 'adjudication', which is a speedy and a relatively inexpensive mechanism for resolving payment disputes on an interim basis. 'Adjudication' is a process that involves an independent third-party (called the 'adjudicator') making an interim determination as to the

amount of progress payment to be paid for work done, 'or related goods or services supplied, under a construction contract.

The adjudication procedures and timeframes are strict and governed solely by the NSW Act. An adjudicator's determination, whilst not final, is binding on the parties until the dispute is finally resolved, perhaps by private agreement or by a court.

In NSW, if the paying party (called the 'respondent') does not pay the adjudicated amount by the relevant date, the adjudicator's determination is capable of being registered as a judgement in a court of competent jurisdiction via a process prescribed under the NSW Act. Once registered, the adjudicator's determination is enforceable in the same way as a judgement of a court.

If at a later stage the respondent applies to the court to have the judgment set aside, the respondent will not be entitled to bring a cross-claim against the claiming party, or raise any defence in relation to matters arising under the construction contract, or challenge the determination by the adjudicator (other than on grounds allowed by a court). The respondent must pay into court as security the unpaid portion of the adjudicated amount pending the outcome of the court proceeding.

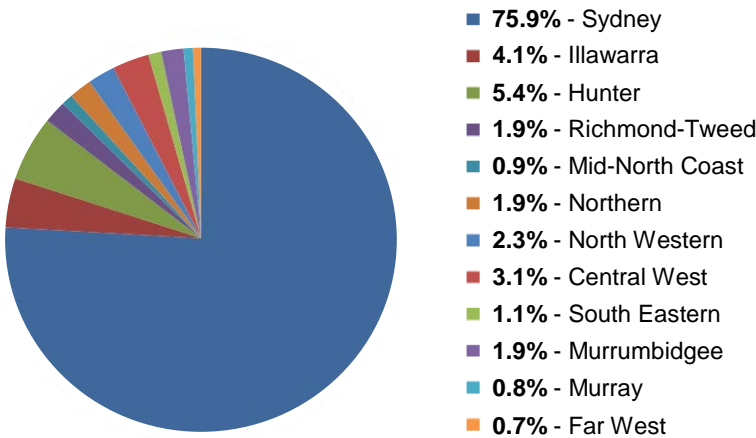
In August 2012, the NSW Minister for Finance and Services announced an inquiry into the construction industry. The announcement was prompted by the financial collapses of some prominent head contractor companies in NSW. Mr. Bruce Collins QC was appointed to conduct the Inquiry. The purpose of the Inquiry was to consider legislative response that could be taken to minimise the incidence and impact of insolvency in the construction industry, including the effectiveness of trusts in protecting subcontractors. The Final Report was released on 28 January 2013.

In response to the Final Report, the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW) ('2013 Amendment Act') was introduced by the NSW Parliament. The 2013 Amendment Act commenced on 21 April 2014 and only applies to a construction contract made on or after that date.

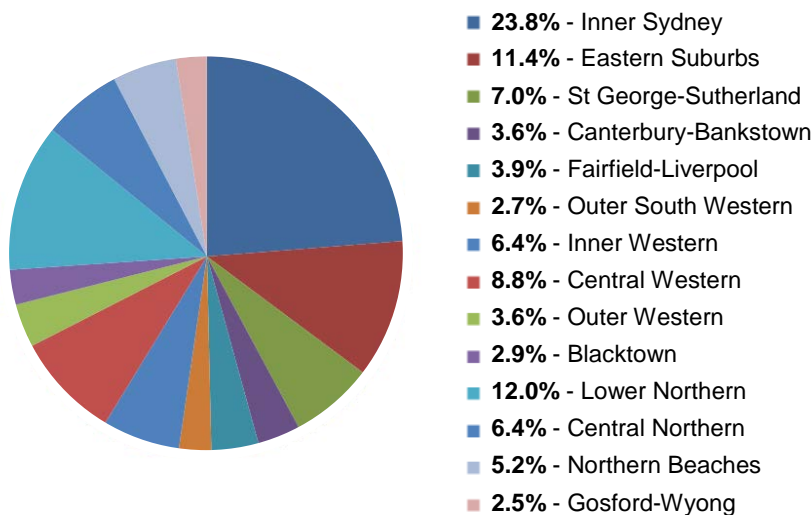
As a result of the 2013 Amendment Act, the NSW Act now applies differently to each category of claimant – 'head contractor' and 'subcontractor'. The NSW Act now requires that a payment claim be accompanied by a 'supporting statement' (in the case of the head contractor) to the effect that all subcontractors have already been paid amounts due to them. The 2013 Amendment Act has introduced new fixed deadlines for making progress payments as well as removed the requirement (in some cases) for an endorsement on the payment claim that the claim is made under the NSW Act. Finally, the NSW Act provides that regulations may make provision for requiring head contractors to pay retention moneys into a trust account. As at 30 June 2014, no regulations have commenced.

# Adjudication Activity Data – 2013/14

**Fig.1: Adjudication Applications by region (State-wide)<sup>†</sup> 2013/14**



**Fig. 2: Adjudication Applications by region (Sydney-wide)<sup>†</sup> 2013/14**

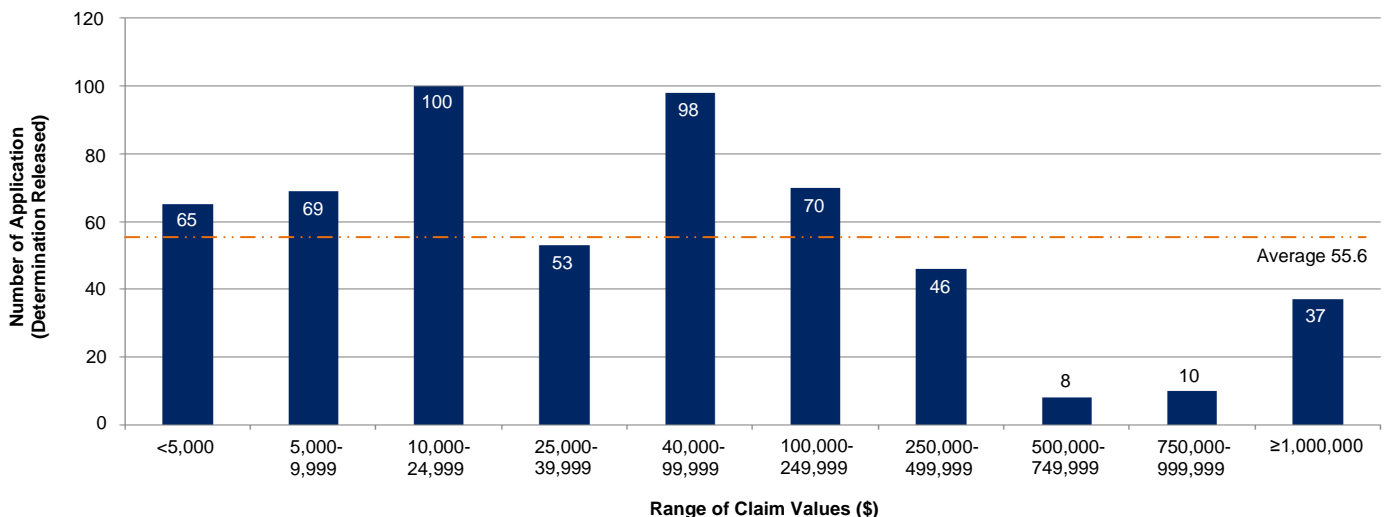


<sup>†</sup> Region classification based on the Australian Standard Geographical Classification (ASGC) for NSW and Sydney (Statistical Division & Statistical Subdivisions, ABS Cat. No.1216.0) and determined using reported project site address postcode information.

## Key Activity Data

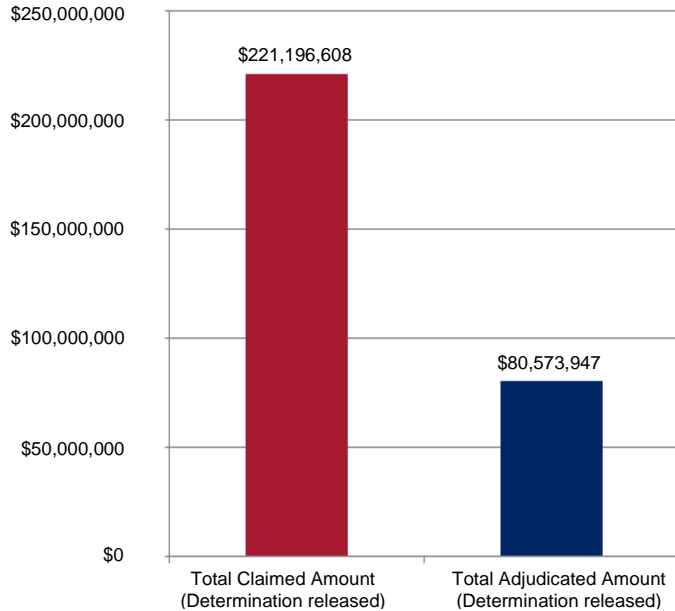
- A total of 817 adjudication applications were lodged, with 556 determinations released to the parties.
- All regions and sub-regions of NSW recorded adjudication activity during 2013/14.
- 69% of the total number of determinations released were made in respect of small-value claims (i.e., claims for less than \$100,000). In these cases, adjudicators awarded, on average, about 85% of the claimed amount, with 61% of claimants being awarded the full amount claimed.
- 21% of the total number of determinations released were made in respect of medium-value claims (i.e., claims for \$100,000 to less than \$500,000). In these cases, adjudicators awarded, on average, about 67% of the claimed amount, with 24% of claimants being awarded the full amount claimed.
- 10% of the total number of determinations released were made in respect of high-value claims (i.e., claims for \$500,000 or greater). In these cases, adjudicators awarded, on average, about 40% of the claimed amount, with 9% of claimants being awarded the full amount claimed.

**Fig. 3: Number of adjudication applications by payment claim value range 2013/14**



# Adjudication Activity Data – 2013/14

**Fig. 4: Total claimed and adjudicated amounts 2013/14**



## Key Activity Data

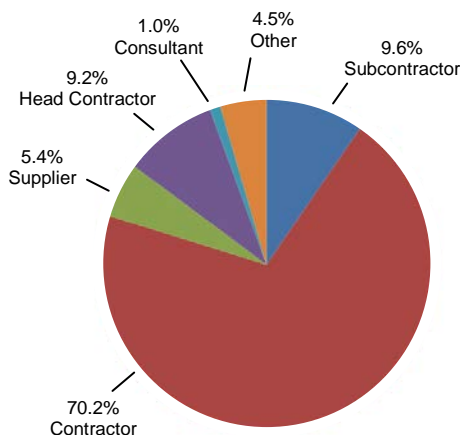
- The total value of claimed amounts was in the order of \$319.9 million.
- The highest and lowest claimed amounts for the period was \$65.2 million and \$347 respectively.
- Applications are most frequently lodged for claimed amounts of \$10,000 to less than 25,000 and \$40,000 to less than \$100,000.
- The total value of progress payments returned to claimants via the adjudication process was \$80.6 million.
- Overall, claimants were awarded about 36% of the claimed amount.

**Table 1: Average claimed and determined amounts (by claim range) 2013/14**

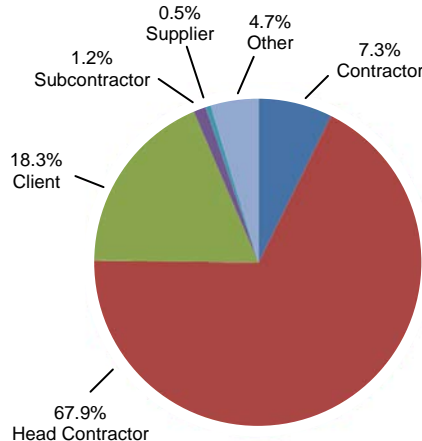
| Claimed Amount (\$) | Number of Applications <sup>†</sup> | Av. Claimed Amount (\$) | Av. Determined (\$) (% of Av. Claimed Amount) | Number awarded 100% of the claimed amount (% of Number) |
|---------------------|-------------------------------------|-------------------------|---|---|
| < 5,000             | 65                                  | 2,669                   | 2,499 (94%)                                   | 57 (88%)  |
| 5,000-9,999         | 69                                  | 7,353                   | 6,909 (94%)                                   | 55 (80%)  |
| 10,000-24,999       | 100                                 | 16,621                  | 13,279 (80%)                                  | 59 (59%)  |
| 25,000-39,999       | 53                                  | 31,191                  | 24,663 (79%)                                  | 27 (51%)  |
| 40,000-99,999       | 98                                  | 63,349                  | 48,997 (77%)                                  | 36 (37%)  |
| 100,000-249,999     | 70                                  | 162,347                 | 114,318 (70%)                                 | 19 (27%)  |
| 250,000-499,999     | 46                                  | 348,787                 | 223,430 (64%)                                 | 9 (20%)   |
| 500,000-749,999     | 8                                   | 630,103                 | 291,975 (46%)                                 | nil   |
| 750,000-999,999     | 10                                  | 830,035                 | 387,491 (47%)                                 | nil   |
| ≥ 1,000,000         | 37                                  | 4,601,157               | 1,297,493 (28%)                               | 5 (14%)   |
| <b>Total number</b> | <b>556</b>                          |                         |   |   |

<sup>†</sup> Determination released

**Fig. 5a: Claimant Type 2013/14**



**Fig. 5b: Respondent Type 2013/14**



## Key Activity Data

The most frequent users of adjudication to recover payment are Contractors and Head Contractors.

# Adjudication Activity Data – 2013/14

**Table 2: Adjudication fees (by claim range) 2013/14**

| Claimed Amount (\$) | Number of Applications <sup>†</sup> | Av. Fees (\$) |                  |                | Av. Fees (%)       |                               |                             |
|---------------------|-------------------------------------|---------------|------------------|----------------|--------------------|-------------------------------|-----------------------------|
|                     |                                     | Total         | Respondent Share | Claimant Share | Total <sup>1</sup> | Respondent Share <sup>2</sup> | Claimant Share <sup>3</sup> |
| <5,000              | 65                                  | 600           | 581              | 19             | 22.5%              | 96.9%                         | 3.1%                        |
| 5,000-9,999         | 69                                  | 908           | 850              | 58             | 12.3%              | 93.7%                         | 6.3%                        |
| 10,000-24,999       | 100                                 | 1,377         | 1,263            | 114            | 8.3%               | 91.8%                         | 8.2%                        |
| 25,000-39,999       | 53                                  | 2,072         | 1,853            | 219            | 6.6%               | 89.4%                         | 10.6%                       |
| 40,000-99,999       | 98                                  | 3,507         | 3,158            | 349            | 5.5%               | 90.1%                         | 9.9%                        |
| 100,000-249,999     | 70                                  | 5,608         | 4,836            | 772            | 3.5%               | 86.2%                         | 13.8%                       |
| 250,000-499,999     | 46                                  | 8,861         | 7,910            | 951            | 2.5%               | 89.3%                         | 10.7%                       |
| 500,000-749,999     | 8                                   | 10,426        | 9,123            | 1,303          | 1.7%               | 87.5%                         | 12.5%                       |
| 750,000-999,999     | 10                                  | 8,868         | 6,404            | 2,463          | 1.1%               | 72.2%                         | 27.8%                       |
| ≥ 1,000,000         | 37                                  | 18,634        | 12,473           | 6,161          | 0.4%               | 66.9%                         | 33.1%                       |
| Total number        | 556                                 |               |                  |                |                    |                               |                             |

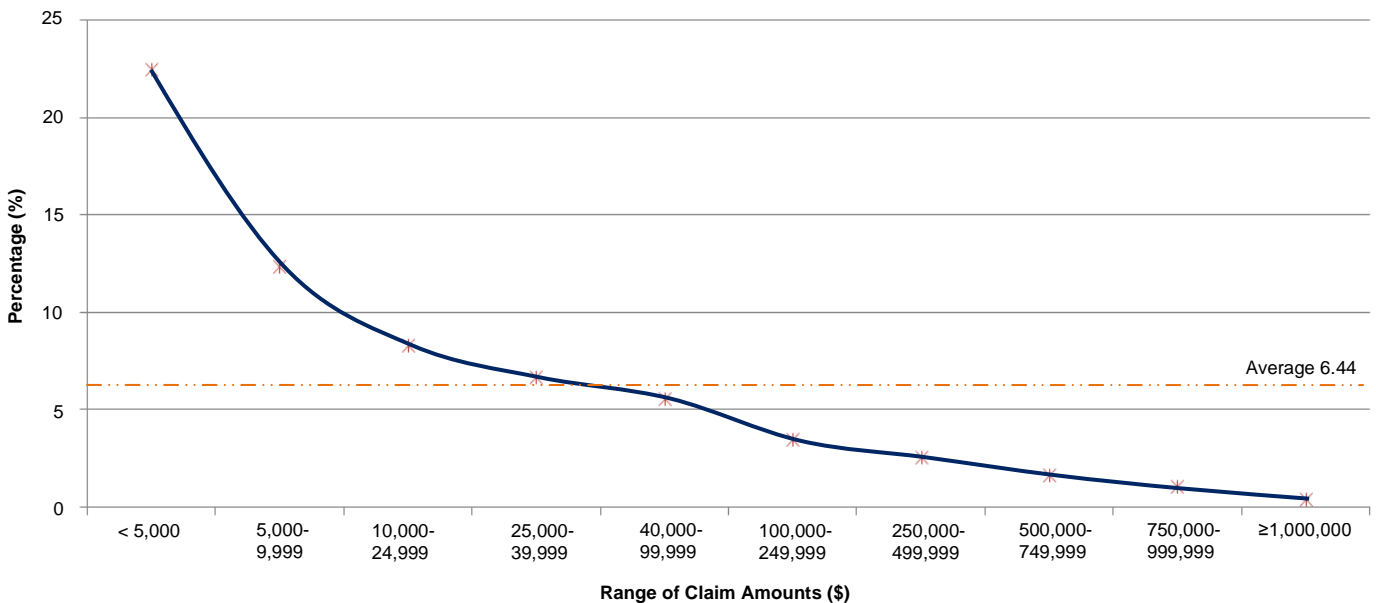
<sup>†</sup> Determination released

<sup>1</sup> Av. Total Adjudication Fee expressed as a percentage of the Av. Claimed Amount (shown in Fig.6 below).

<sup>2</sup> Av. Respondent share expressed as a percentage of the Av. Total Adjudication Fee.

<sup>3</sup> Av. Claimant share expressed as a percentage of the Av. Total Adjudication Fee.

**Fig. 6: Av. total adjudication fee expressed as % of the av. claimed amount (by claim range) 2013/14**



**Table 3: Adjudication Fee Statistics 2013/14**

| Adjudication Fee Statistics <sup>†</sup>      | Amounts (\$)      |
|---|-------------------|
| Total adjudication fees                       | 2,354,504         |
| Adjudicators share of total adjudication fees | 1,722,200 (73.1%) |
| ANA share of total adjudication fees          | 632,304 (26.9%)   |
| Av. total adjudication fee                    | 4,235             |
| Max. total adjudication fee                   | 143,190           |
| Min. total adjudication fee                   | nil               |

<sup>†</sup> Determination released

## Key Activity Data

- On average, the total adjudication fee is \$4,235.
- Adjudication provides a financially viable payment dispute process across all claim ranges.



# Discussion

## Background

The operation of the adjudication system set up under the security of payment legislation in NSW, is facilitated by Authorised Nominating Authorities (ANAs). Their functions are to accept adjudication applications, refer adjudication applications to adjudicators and issue, upon request, an adjudication certificate. Each ANA is required by the Office of Finance & Services (hereafter referred to as 'the Office') to report regularly on a variety of matters relating to adjudication applications and determinations made in NSW. Reporting is required by the Office to enable proper monitoring of trends in adjudication.

The adjudication data used for this report was generated by the ANAs and provided to the Office as part of their obligations to the Minister. The adjudication activity data used for this research covers the period from 1 July 2013 to 30 June 2014. This report builds on the Office's Quarterly Reports by attempting to subjectively interpret and give meaning to the data and to identify emerging trends in adjudication. Where appropriate, the findings of previous research into the performance of the adjudication process in NSW have been referred to in this report. This report should be read in conjunction with the Office's 'Adjudication Activity Statistics: Quarterly Report – No. 4, 1 July 2013 to 30 June 2014' [4].

## Adjudication Applications

For the period 1 July 2013 to 30 June 2014, the total number of adjudication applications lodged with ANAs was 817. The aggregate amount claimed for the 2013/14 period was in the order of \$319.9 million. The highest and lowest claimed amounts for the 2013/14 period was \$65.2 million and \$347 respectively. Table A (below) shows the comparative status and total number of adjudication applications made for the 2013/14, 2012/13 and 2011/12 reporting periods.

**Table A:** Status and number of adjudication applications

| Status                                    | Number         |                |                |
|---|----------------|----------------|----------------|
|   | YTD<br>2013/14 | YTD<br>2012/13 | YTD<br>2011/12 |
| Applications lodged                       | 817            | 1009           | 1112           |
| Determinations released                   | 556            | 672            | 779            |
| Determinations pending release            | 41             | 138            | 90             |
| Completed but not determined <sup>†</sup> | 220            | 199            | 243            |

<sup>†</sup> 'Completed but not determined' refer to applications where no determination has been released by the adjudicator and no determination is pending release. In such cases, the adjudication process has come to a premature end between lodgement of the application with the ANA and a determination being made by the adjudicator.

Table A (above), shows that there has been a moderate downward trend in the number of applications lodged with ANAs since 2011/12. Of the total number of adjudication applications lodged with ANAs for the 2013/14 period, a total of 556 determinations were released to the parties. Approximately 5% of the total number of adjudication applications lodged were pending release to the parties. About 27% of applications were 'completed but not determined'.

Whilst the data collected by the Office does not indicate the reasons for individual applications being 'completed but not determined', other research suggests that in about one-third of cases this will occur when the parties settle the payment dispute and seek to terminate the adjudication before a determination is made by the adjudicator. In about 50% of cases, the adjudicator may, after accepting the adjudication application, decide that the adjudicator lacks the requisite jurisdiction to determine the application and subsequently withdraws acceptance of the application [5].

In recognition of the absence of data on this aspect of the adjudication process, the Office is considering requesting ANAs to report on the reasons why applications are completed but not determined.

## Provision of Payment Schedules

Section 14(1) of the NSW Act provides that the respondent may reply to a payment claim by providing a 'payment schedule' to the claimant. A payment schedule is, in effect, a notice that may be served on a claimant if the respondent does not intend to pay the whole of the claimed amount by the due date for payment. If the respondent fails to provide a payment schedule within the time allowed under the NSW Act, the respondent becomes liable to pay the claimed amount to the claimant on the due date for payment.

A claimant may lodge an adjudication application under one of the following sections of the Act: s.17(1)(a)(i); s.17(1)(a)(ii); or s.17(1)(b).

Firstly, where the respondent provides a payment schedule for less than the full amount claimed, and the claimant does not accept the lesser amount, the claimant is entitled to lodge an adjudication application with an ANA under s.17(1)(a)(i) of the NSW Act.

Secondly, where the respondent provides a payment schedule for the full amount claimed but fails to pay the whole (or any part) of the scheduled amount by the due date for payment, the claimant is entitled to lodge an adjudication application with an ANA under s.17(1)(a)(ii) of the NSW Act. Alternatively, where the respondent provides a payment schedule for less than the full amount claimed, and the claimant accepts the lesser amount, but the respondent fails to pay that amount by the due date for payment, the claimant is also entitled to lodge an adjudication application with an ANA under s.17(1)(a)(ii) of the NSW Act.

Finally, where the respondent fails to provide a payment schedule and fails to pay the claimed amount by the due date for payment, the claimant is entitled to lodge an adjudication application with an ANA under s.17(1)(b) of the Act. It should be noted that if an adjudication application is intended to be lodged under s.17(1)(b) of the Act, and the respondent fails to provide a payment schedule in direct response to the payment claim, s.17(2) of the NSW Act requires the



# Discussion

claimant to give the respondent written notification of the claimant's intention to apply for adjudication under the NSW Act. This notification, in effect, gives the respondent a second opportunity to provide a payment schedule to the claimant in response to the payment claim where it has failed to provide a 'first opportunity' payment schedule.

The distribution of applications lodged (by section of the NSW Act) for 2013/14, 2012/13 and 2011/12 is shown in Table B (below).

**Table B:** Adjudication applications lodged (by section)

| Application<br>(by Section of the NSW Act) | Number         |                |                |
|--|----------------|----------------|----------------|
|  | YTD<br>2013/14 | YTD<br>2012/13 | YTD<br>2011/12 |
| 17(1)(a)(i)                                | 414            | 492            | 604            |
| 17(1)(a)(ii)                               | 2              | 8              | 22             |
| 17(1)(b)                                   | 401            | 509            | 486            |
| Total                                      | 817            | 1009           | 1112           |

Table B shows that, for the 2013/14 reporting period, respondents elected (in about half of cases) to provide a payment schedule at the first opportunity afforded by the NSW Act (i.e., to provide a payment schedule within 10 business days of receiving the payment claim). However, the data do not reveal how many of the remaining respondents elected to provide a payment schedule in reply to the notification made under s.17(2) of the NSW Act. Nevertheless, it may be that those respondents who elected not to provide a payment schedule after receiving notification are ignoring payment claims in order to delay or escape payment. Conversely, it may be that those respondents who elected to provide a payment schedule only after receiving notification are making use of the additional time allowed under the NSW Act to prepare the payment schedule.

However, no firm conclusions can be drawn as to the reasons why some respondents choose to provide 'first opportunity' payment schedules and others delay the provision of a payment schedule until a s.17(2) notice is served. The Office is considering whether additional data should be obtained to shed light on this aspect of the claiming process.

## Adjudication Determinations

For the period 1 July 2013 to 30 June 2014 a total of 556 adjudication determinations were released to the parties. The aggregate adjudicated amount is \$80.6 million (see Fig. 4, p. 4 above). This represents the total amount of progress payments returned to claimants using the adjudication process for the 2013/14 period. Fig. 4 shows that, overall, claimants were awarded about 36% of the total of claimed amounts.

The number of adjudication applications lodged by payment claim range for 2013/14 is shown in Fig. 3 (p. 3 above). Figure 3 shows that, of the total number of determinations released, adjudication applications made in the small (less than \$100,000) to medium-value (\$100,000 to less than \$500,000) claim ranges are the most frequently lodged applications by claim

range. Of the total number of determinations released, applications are most frequently lodged for claimed amounts of \$10,000 to less than \$25,000. This is closely followed by claimed amounts of \$40,000 to less than \$100,000. Only about 10% of the total number of determinations released were made in respect of high-value claims (i.e., claims for \$500,000 or greater). These figures are generally consistent with the data collected for the 2011/12 and 2012/13 periods.

One indicator of a claimant's success at adjudication is to measure the adjudicated amount as a proportion of the claimed amount. Figure 4 (p. 4 above) shows a comparison between the claimed and adjudicated amounts across all claim ranges for the period 1 July 2013 to 30 June 2014. The average claimed and adjudicated (or determined) amounts by claim range for the period are shown in Table 1 (above).

Figure 4 shows that the total claimed and adjudicated amounts for the 2013/14 period were \$221.1 million and \$80.6 million, respectively. This indicates that, overall, adjudicators awarded to claimants just over one-third of the total amount claimed for period. This supports the view that claimants tend to have only modest success at adjudication in terms of the proportion of the claimed amount awarded by adjudicators. However, when this is examined by claim-range, it is apparent that the level of success of claimants varies.

Table 1 shows that about 69% of determinations released were made in respect of small-value claims (i.e., claims for less than \$100,000). In these cases, adjudicators awarded, on average, about 85% of the claimed amount, with 61% of claimants being awarded the full amount claimed.

Table 1 also shows that about 21% of determinations released were made in respect of medium-value claims (i.e., claims for \$100,000 to less than \$500,000). In these cases, adjudicators awarded, on average, about 67% of the claimed amount, with 24% of claimants being awarded the full amount claimed.

Finally, Table 1 shows that 10% of determinations released were made in respect of high-value claims (i.e., claims for \$500,000 or greater). In these cases, adjudicators awarded, on average, about 40% of the claimed amount, with 9% of claimants being awarded the full amount claimed.

Overall, the data indicate that claimants making small to medium-value claims are notably more successful at adjudication than those making high-value claims, both in terms of the average proportion of the claimed amount determined and the frequency of the full amount claimed being awarded by adjudicators. This is generally consistent with the data collected for 2011/12 and 2012/13 periods.

It is not clear to what extent (if any) the provision of a payment schedule impacts on the level of success (in terms of the average proportion of the claimed amount determined) of claimants at adjudication. However, previous research indicates that, generally, a claimant's

# Discussion

success at adjudication declines significantly when respondents provide a payment schedule [5].

## Cost of Adjudication

One of the important objectives of the adjudication process is to provide claimants with a relatively rapid and inexpensive mechanism for determining (on an interim basis) payment disputes as they arise during a construction project. This is achieved through the nomination and appointment of independent adjudicators to determine adjudication applications.

Table 3 (above) shows that total adjudication fees (i.e., the fees of the ANA *plus* the fees and expenses of the adjudicator) for the period 1 July 2013 to 30 June 2014 were in the order of \$2.4 million. The average total adjudication fee was \$4,235. The largest adjudication fee was \$143,190. The smallest adjudication fee was \$nil.

Under the NSW Act, adjudicators have the discretion to determine the proportion of the adjudication fees each party is required to pay. Previous research shows that when adjudicators determine a \$nil adjudicated amount, claimants are generally required to pay 100% of the adjudication fees [5]. In the remainder of cases, the amount of the total adjudication fee that claimants are required to pay will vary.

The distribution of the parties' share of the average total adjudication fees (by claim range) for all adjudication determinations released for the 2013/14 period is given in Table 2 (p. 5 above). It can be seen from Table 2 that respondents are, generally, required to pay the greater proportion of the total adjudication fees across the spectrum of claim values. This is generally consistent with the data collected for 2011/12 and 2012/13 periods.

Figure 6 (p. 5 above) shows the average total adjudication fee expressed as a percentage of the average claimed amount (by claim range). Figure 6 shows that there is an inverse relationship between the amount claimed and the total adjudication fee when expressed as a percentage of the amount claimed. This is generally consistent with the data collected for 2011/12 and 2012/13 periods.

It is interesting to note from Table 2 and Figure 6 (above) that, in relation to claimed amounts of less than \$100,000, the total adjudication fee equates, on average, to only about 11% of the total claimed amount. This figure increases to about 23% for claims of less than \$5,000 and decreases to about 6% for claims between \$40,000 to \$99,000. This is generally consistent with the data collected for 2011/12 and 2012/13 periods.

When comparing adjudication with dispute resolution processes, such as arbitration and litigation, which are processes acknowledged as being costly [6], the data indicate that adjudication is providing a financially viable option to have payment disputes heard by an independent third party. This issue is of critical concern

to those making small-value claims (i.e., claims for less than \$100,000).

Adjudicators' and ANAs' share of the total adjudication fees for the period 1 July 2013 to 30 June 2014 is shown in Table 3, p.5 above. Table 3 shows that the Adjudicators' overall share of the total adjudication fees is about \$1.7 million (or about 73% of the total fees). The ANAs' overall share of the total adjudication fees amounted to about \$632,304 (or about 27% of the total fees). This is generally consistent with the data collected for 2011/12 and 2012/13 periods.

By way of commentary, the Office is aware that services provided by ANAs to adjudicators vary widely. For example, some ANAs go no further than nominating adjudicators for appointment and providing the adjudicator with the adjudication application. In such cases, the adjudicator is required to undertake the bulk, if not all, of the administrative functions in relation to each application (in addition to making the adjudication determination itself). Administrative functions may include establishing an office and keeping it open at all business hours on all business days, accepting service of documents, serving documents, corresponding with parties, dealing with telephone calls from parties, invoicing, proof reading, keeping accounts, collecting adjudication fees, serving adjudication determinations, dealing with challenges to the determination and filing submitting appearances in the Supreme Court. In most cases, the adjudicator will charge for this time.

Conversely, some ANAs offer adjudicators a service agreement. That is an agreement under which the ANA takes over all the administrative functions for the adjudicator. The services offered are effectively the services that a court registry might provide for a judge or magistrate. Sometimes, the ANA has to employ a considerable number of staff to provide these administrative services. Under a service agreement, the adjudicator usually agrees to pay about one-third of the adjudicator's fees to the ANA. This usually covers all disbursements and funds the administrative functions undertaken by the ANA on behalf of the adjudicator.

The Office is also aware that some ANAs also devote considerable time and resources to promoting the legislation, including providing speakers at university and industry courses, workshops for industry participants, and operating and maintaining dedicated websites.

## Conclusions

A comparison of the data published by the Office over the periods 2011/12, 2012/13 and 2013/14 shows that there has been a modest, yet sustained, downward trend in the number of applications lodged with ANAs since 2011/12. At this stage, there is insufficient data to establish if the downward movement is part of a long-term trend reversal in adjudication activity or merely part of a short-term downward correction within an underlying upward trend. Ongoing study of adjudication activity is recommended.

The data indicates that applications are most frequently lodged for claimed amounts of \$10,000 to less than \$25,000 and \$40,000 to less than \$100,000. This supports the proposition that adjudication is being employed by claimants predominately for making small-value payment claims. This is generally consistent with the data collected for 2011/12 and 2012/13 reporting periods.

The total of adjudicated amounts was in the order of \$80.6 million. This amount represents the total of progress payments returned to claimants through the adjudication process.

Overall, claimants were awarded only about 36% of the claimed amount. However, when this data is examined by claim-range, it is apparent that the level of success of claimants varies. Generally, the data show that claimants tend to be more successful at adjudication (both in terms of the average proportion of the claimed amount determined and the frequency of the full amount claimed being awarded by adjudicators) when making small to medium-value claims than for high-value claims. This is generally consistent with the data collected for 2011/12 and 2012/13 reporting periods.

The data indicate that the direct costs of adjudication (i.e., the adjudication fees) are generally modest both in terms of the average total adjudication fee and average total adjudication fee expressed as a percentage of the average claimed amount. Overall, the data suggest that adjudication provides the parties (across all claim ranges) with a relatively inexpensive and financially viable means of having disputed payment claims determined on an interim basis by an independent third party.

In summary, the empirical evidence suggests that the main aim of the NSW Act to improve security of payment in the building and construction industry is, to a large extent, being achieved. This is generally consistent with the data collected for 2011/12 and 2012/13 reporting periods.

## Endnotes

[1] NSW Government (1996), 'Green Paper: security of payment for subcontractors, consultants and suppliers in the New South Wales Construction Industry, Australian Construction Law Newsletter, (51), 41–51.

[2] Commonwealth of Australia (2002), 'Royal Commission into the Building and Construction Industry: Security of payment in the building and construction industry', discussion paper 12, Commonwealth of Australia, Canberra.

[3] NSW Government (1999) Building and Construction Industry Security of Payment Bill (No. 2), *Second Reading Speech*, Parliamentary Hansard, Legislative Assembly, Parliament of New South Wales, 8 September, p. 103–8.

[4] NSW Office of Finance & Services (2014), 'Building and Construction Industry Security of Payment Act 1999 – Adjudication Activity Statistics, Quarterly Report No. 4, 1 July 2013 to 30 June 2014', New South Wales Government, Sydney, Australia.

[5] Brand M C & Uher T E (2007) 'An examination of the performance of statutory adjudication in New South Wales after 2000 determinations', proceedings of *CME25 Construction Management and Economics: Past, present and future*, University of Reading, UK, 16–18 July, CD ROM, paper 0033; and Brand M C & Uher T E (2005) 'Analysis of the trends of adjudication in New South Wales', proceedings of the *ICCEM 2005 1<sup>st</sup> International Conference on Construction Engineering and Management*, Seoul, South Korea, 16–19 October, pp. 687–92.

[6] Carter, J., Peden, E. and Tolhurst, G. (2007), *Contract Law in Australia*, 5<sup>th</sup> edn, Butterworths, Sydney.

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Office of Finance & Services  
McKell Building  
2-14 Rawson Place Sydney NSW 2000  
[www.services.nsw.gov.au](http://www.services.nsw.gov.au)