



Finance
& Services

Building and Construction Industry Security of Payment Act 1999

Adjudication Activity in New South Wales

ANNUAL REPORT
2015/16



© Crown in right of New South Wales 2016

You may copy, distribute, display, download and otherwise freely deal with this work for any purpose, provided that you attribute the Department as the owner.

However, you must obtain permission if you wish to:

- (1) charge others for access to the work (other than at cost)
- (2) include the work in advertising or a product for sale or
- (3) modify the work.

Any inquiries relating to consents and use of this publication, including by NSW Government agencies, must be addressed to the Strategic Communications Unit.

Coverage of this Report: This report contains adjudication activity statistics for the period commencing on 01/07/2015 and ending on 30/06/2016. This report should be read in conjunction with the 'Adjudication Activity Statistics: Quarterly Report – No. 4, 1 July 2015 to 30 June 2016'.

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 and autonomous empirical research and analysis. 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 NSW Government (through 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 *Quarterly Adjudication Activity Reports* on adjudication activity in New South Wales. These reports are based on data provided by the Authorised Nominating Authorities to the NSW Government.

Annual Adjudication Activity Progress Reports

In addition to providing *Quarterly Adjudication Activity Reports*, the ARRU provides to the NSW Government *Annual Adjudication Activity Reports*, which build on the results set out in the *Quarterly Adjudication Activity Reports*. The purpose of the *Annual Adjudication Activity Reports* is to highlight and provide key findings and commentary on adjudication trends emerging in the New South Wales construction industry.

To date, *Annual Adjudication Activity Reports* covering a total period of five consecutive financial years (commencing on 1 July 2011 up to, and including, 30 June 2016) have been delivered to the NSW Government by the ARRU.

This *Annual Adjudication Activity Report* is the last to be provided to the NSW Government by the ARRU under the partnership.

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. This 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 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.

Following the introduction of the 2013 Amendment Act, the *Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015* (NSW) ('the Regulation') commenced on 1 May 2015.

These amendments to the NSW Act aimed to deliver significant changes to strengthen the industry. Whilst these amendments appear to be working well, the NSW Government recognises there is always room for improvement [9].

In 2013, the NSW Government made a commitment to undertake a full review of the NSW Act and to conduct a thorough evaluation of the security of payment laws. In December 2015, the Minister for Better Regulation and Innovation released a Discussion Paper on the NSW Act. The Discussion Paper signalled the start of the NSW Government's full review of the NSW Act.

The purposes of the Discussion Paper are to: (1) prompt discussion and find out if the current security of payment laws are meeting the Government's objectives; (2) to determine if the NSW Act is operating as intended; and (3) to help guide and inform the review of the NSW Act. The Minister extended an invitation to interested parties to comment on the Discussion Paper via written submissions.

Adjudication Activity Data – 2015/16

Fig.1: Adjudication Applications by region (State-wide)[†] 2015/16

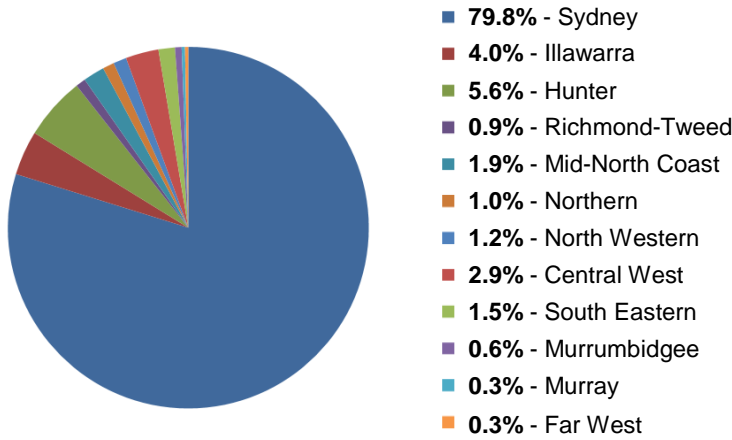
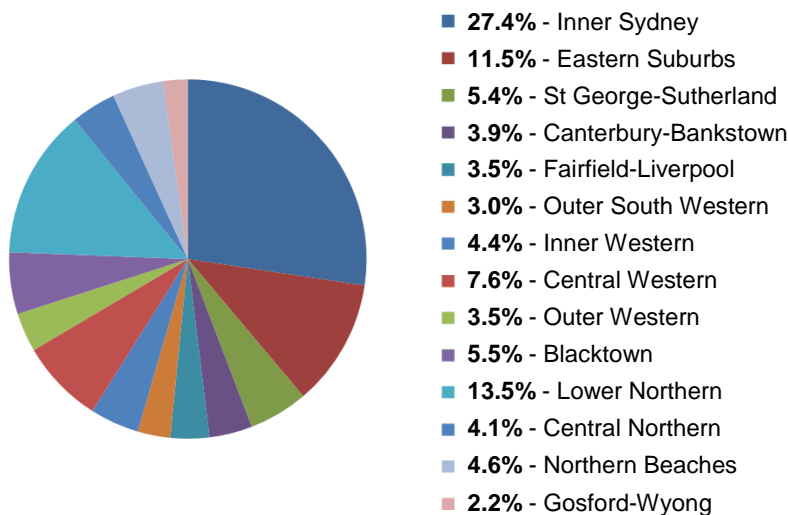


Fig. 2: Adjudication Applications by region (Sydney-wide)[†] 2015/16

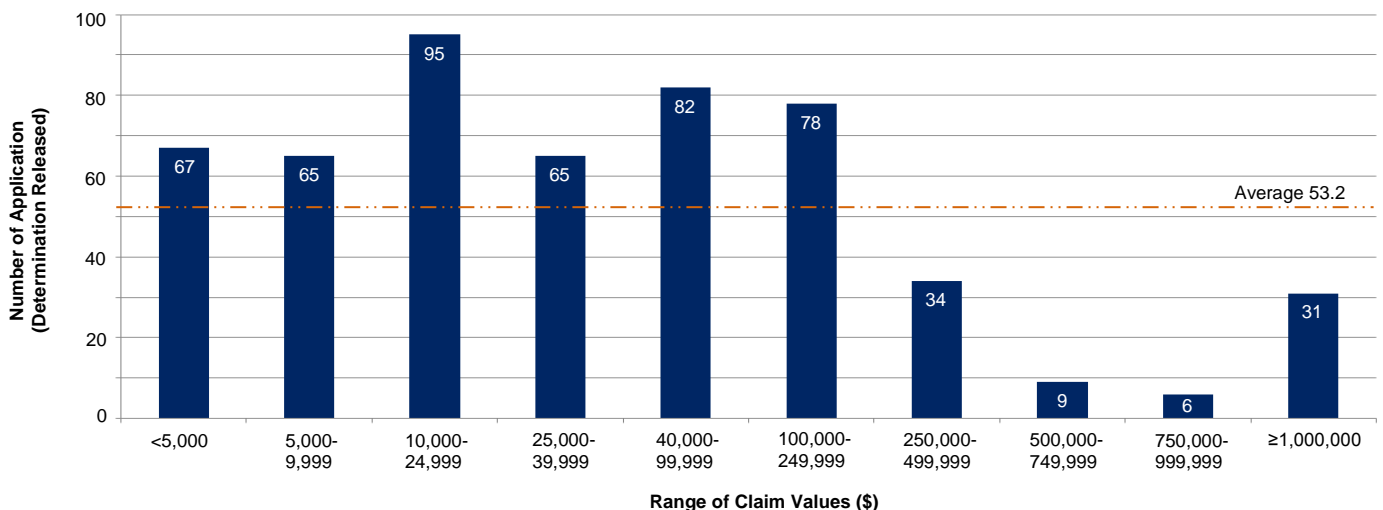


[†] Region classification based on the Australian Standard Geographical Classification (ASGC) for NSW and Sydney (Statistical Division & Statistical Subdivisions, ABS Cat. No.1216.0) and determined using reported project site address postcode information.

Key Activity Data

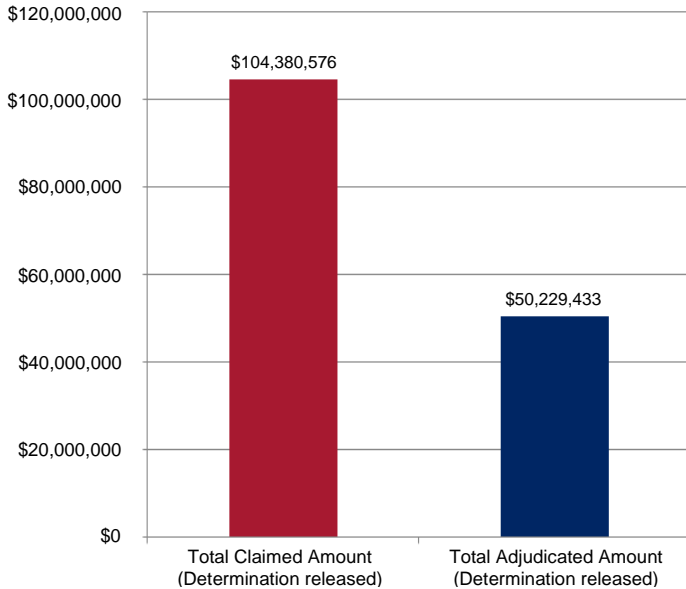
- A total of 794 adjudication applications were lodged, with 532 determinations released to the parties.
- All regions and sub-regions of NSW recorded adjudication activity (based on reported project site address postcode information).
- 70% of the total number of determinations released were made in respect of small-value claims (i.e., claims for less than \$100,000). In these cases, adjudicators awarded, on average, 85% of the claimed amount, with about 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, 65% of the claimed amount, with about 32% of claimants being awarded the full amount claimed.
- 9% 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, 45% of the claimed amount, with 4% of claimants being awarded the full amount claimed.

Fig. 3: Number of adjudication applications by payment claim value range 2015/16



Adjudication Activity Data – 2015/16

Fig. 4: Total claimed and adjudicated amounts 2015/16



Key Activity Data

- The total value of claimed amounts was in the order of \$165.9 million.
- The highest and lowest claimed amounts for the period was \$4.2 million and \$149 respectively (based on determinations released only).
- Adjudication is being used predominately by claimants making small to medium-value payment claims up to \$250,000. Within this range, applications are most frequently lodged for claimed amounts of \$10,000 to less than \$25,000.
- The total value of progress payments returned to claimants via the adjudication process was \$50.2 million.
- Overall, claimants were awarded about 48% of the claimed amount.

Table 1: Average claimed and determined amounts (by claim range) 2015/16

Claimed Amount (\$)	Number (YTD) [†]	Av. Claimed Amount (\$)	Av. Determined (\$) (% of Av. Claimed Amount)	Number awarded 100% of the claimed amount (% of Number)
< 5,000	67	2,845	2,604 (92%)	55 (82%)
5,000-9,999	65	7,195	6,377 (89%)	51 (78%)
10,000-24,999	95	16,232	13,907 (86%)	55 (58%)
25,000-39,999	65	32,155	25,051 (78%)	37 (57%)
40,000-99,999	82	64,575	50,906 (79%)	30 (37%)
100,000-249,999	78	156,160	109,904 (70%)	27 (35%)
250,000-499,999	34	358,916	212,703 (59%)	9 (26%)
500,000-749,999	9	636,769	362,527 (57%)	nil
750,000-999,999	6	899,251	355,839 (40%)	1 (17%)
≥ 1,000,000	31	1,912,418	721,236 (38%)	1 (3%)
Total number	532			

[†] Determination released

Fig. 5a: Claimant Type 2015/16

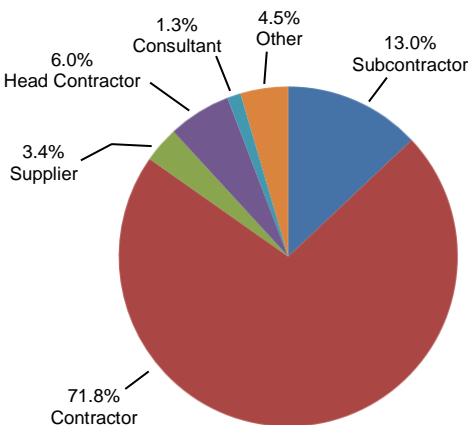
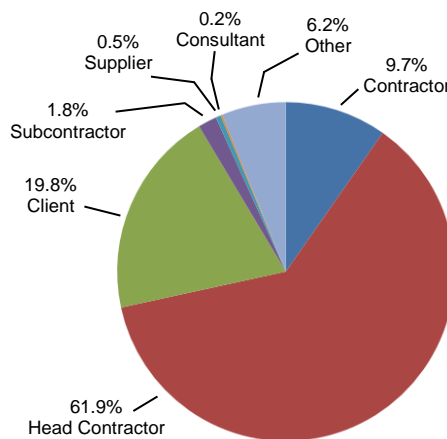


Fig. 5b: Respondent Type 2015/16



Key Activity Data

- Claimants are most commonly Contractors and Subcontractors.
- Respondents are most commonly Head Contractors and Clients

Adjudication Activity Data – 2015/16

Table 2: Adjudication fees (by claim range) 2015/16

Claimed Amount (\$)	Number (YTD) [†]	Av. Fees (\$)			Av. Fees (%)		
		Total	Respondent Share	Claimant Share	Total ¹	Respondent Share ²	Claimant Share ³
<5,000	67	932	883	49	32.7	94.8	5.2
5,000-9,999	65	1,121	1,043	78	15.6	93.1	6.9
10,000-24,999	95	1,690	1,542	148	10.4	91.3	8.7
25,000-39,999	65	2,697	2,331	366	8.4	86.4	13.6
40,000-99,999	82	4,019	3,542	477	6.2	88.1	11.9
100,000-249,999	78	6,182	5,029	1,153	4.0	81.3	18.7
250,000-499,999	34	9,956	7,175	2,781	2.8	72.1	27.9
500,000-749,999	9	15,786	13,155	2,631	2.5	83.3	16.7
750,000-999,999	6	14,347	9,565	4,782	1.6	66.7	33.3
≥ 1,000,000	31	19,026	10,925	8,102	1.0	57.4	42.6
Total number	532						

[†] Determination released

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

² Av. Respondent share expressed as a percentage of the Av. Total Adjudication Fee.

³ 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) 2015/16

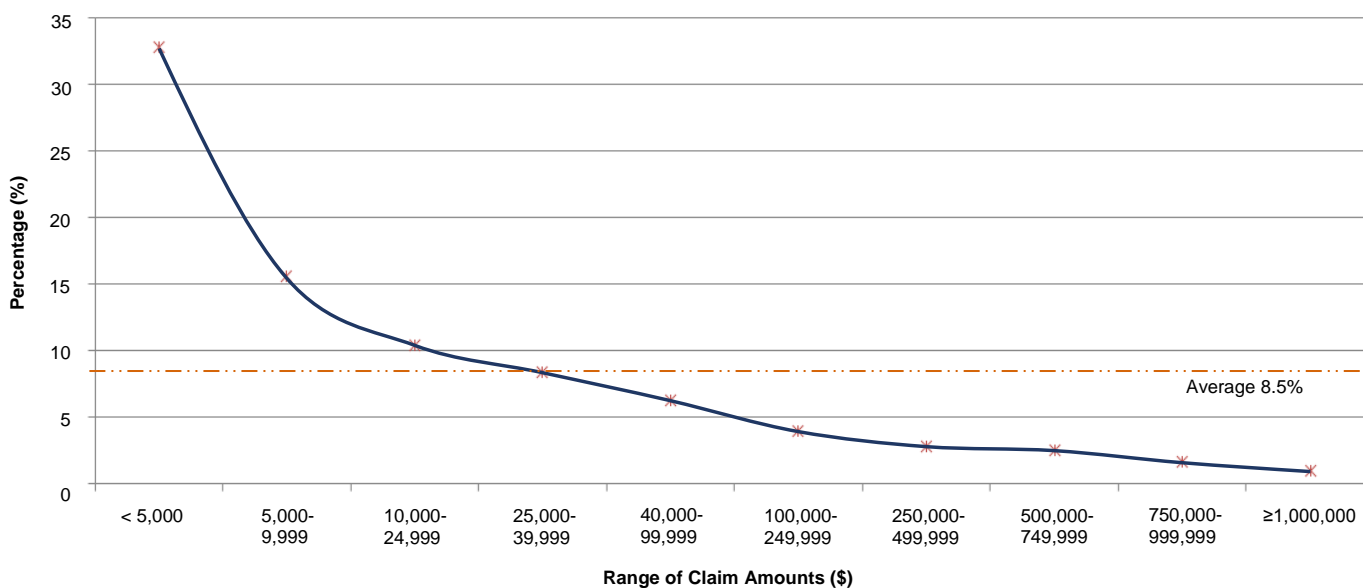


Table 3: Adjudication Fee Statistics 2015/16

Adjudication Fee Statistics [†]	Amounts (\$)
Total adjudication fees	2,439,395
Adjudicators share of total adjudication fees	1,697,210 (69.6%)
ANA share of total adjudication fees	742,185 (30.4%)
Av. total adjudication fee	4,585
Max. total adjudication fee	66,586
Min. total adjudication fee	nil

[†] Determination released

Key Activity Data

- Total adjudication fees (including the fees of Adjudicators and ANAs) for the 2015/16 period is \$2,439,395
- Average total adjudication fee is \$4,585

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 NSW Government ('the Government') to report regularly on a variety of matters relating to adjudication applications and determinations made in NSW.

Reporting is required by the Government to enable proper monitoring of trends in adjudication. The adjudication data used for this report was generated by the ANAs and provided to the Government as part of their obligations to the Minister.

The adjudication activity data used for this report covers the period from 1 July 2015 to 30 June 2016. This report builds on the Government's Quarterly Reports by attempting to 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 Government's 'Adjudication Activity Statistics: Quarterly Report – No. 4, 1 July 2015 to 30 June 2016' [4].

Adjudication Applications

For the period 1 July 2015 to 30 June 2016, the total number of adjudication applications lodged with ANAs was 794. The total value of claimed amounts for the period was in the order of \$165.9 million. The highest and lowest claimed amounts for the period was \$8.6 million and \$149, respectively.

Table A (below) shows the comparative status and total number of adjudication applications made for the 2011/12 to 2015/16 (inclusive) reporting periods.

Table A: Status and number of adjudication applications

Status	Number				
	FY 2015/16	FY 2014/15	FY 2013/14	FY 2012/13	FY 2011/12
Applications lodged	794	735	817	1009	1112
Determinations released	532	477	556	672	779
Determinations pending release	49	50	41	138	90
Completed but not determined [†]	213	208	220	199	243

[†] '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, of the total number of adjudication applications lodged, about 6% of the applications were pending release to the parties, and about 27% of adjudication applications were 'completed but not determined'.

Whilst the data collected by the Government does not indicate the reasons for individual applications being 'completed but not determined', it has been previously reported 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], [7].

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 claimant to give the respondent written notification of the claimant's intention to apply for adjudication under the NSW Act.

Discussion

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.

Table B (below) shows the comparative distribution of applications lodged (by section of the NSW Act) for the 2011/12 to 2015/16 (inclusive) reporting periods.

Table B: Adjudication applications lodged (by section of the Act)

Application (by Section)	Number				
	FY 2015/16	FY 2014/15	FY 2013/14	FY 2012/13	FY 2011/12
17(1)(a)(i)	403	403	414	492	604
17(1)(a)(ii)	8	17	2	8	22
17(1)(b)	383	315	401	509	486
Total	794	735	817	1009	1112

Table B shows that, for the all reporting periods, 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). This result is generally consistent with the results for the previous reporting periods. 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. However, as previously reported, 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.

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.

Adjudication Determinations

Of the total number of adjudication applications lodged with ANAs for the 2015/16 period, 532 adjudication determinations were released to the parties. The total adjudicated amount is \$50.2 million (see Fig. 4, p. 4 above).

The number of adjudication applications lodged by payment claim range for 2015/16 is shown in Fig. 3 (p. 3 above). Figure 3 shows that, of the total number of determinations released, adjudication applications made in respect claimed amounts of between <\$5,000 and \$249,999 exceeded the average number of applications made for the 2015/16 period. Adjudication applications made in this claim range accounted for about 85% of the total number applications made for the 2015/16 period.

Of the total number of determinations released, adjudication 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 9% of the total number of determinations released were made in respect of high-value claims (i.e., claims for \$500,000 or greater). This is generally consistent with the data collected for the 2011/12, 2012/13, 2013/14 and 2014/15 reporting 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 2015/16 reporting period. The average claimed and adjudicated (or determined) amounts by claim range for the 2015/16 period are shown in Table 1 (above).

Figure 4 shows that the total claimed and adjudicated amounts for the 2015/16 period were \$104.4 million and \$50.2 million, respectively. This data shows that, on average, adjudicators awarded to claimants 48% of the total amount claimed for 2015/16 period [8]. On that basis, the data indicate that claimants tend to have only modest success at adjudication in terms of the proportion of the claimed amount awarded by adjudicators. This is generally consistent with the data collected for the 2011/12, 2012/13, 2013/14 and 2014/15 reporting periods.

However, the data also indicate that proportion of the claimed amount awarded by adjudicators varies according to claim-range. Table 1 shows that about 70% 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, 85% of the claimed amount, with about 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, 65% of the claimed amount, with about 32% of claimants being awarded the full amount claimed.

Finally, Table 1 shows that 9% 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, 45% of the claimed amount, with 4% 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 the 2011/12, 2012/13, 2013/14 and 2014/15 reporting 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.

Discussion

However, previous research indicates that, generally, a claimant's success at adjudication declines when the respondent provides a payment schedule [5].

Cost of Adjudication

One of the important objectives of the adjudication process is to provide claimants and respondents 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 2015/16 reporting period were in the order of \$2.4 million. The average total adjudication fee was \$4,585. The largest adjudication fee was \$66,586. 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' shares of the average total adjudication fees (by claim range) for all adjudication determinations released for the 2015/16 period is given in Table 2 (p. 5 above). It can be seen from Table 2 that respondents are, generally, required to pay a greater proportion of the total adjudication fees across the spectrum of claim values. This is generally consistent with the data collected for the 2011/12, 2012/13, 2013/14 and 2014/15 reporting 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 as expressed as a percentage of the amount claimed. This is consistent with the data collected for the 2011/12, 2012/13, 2013/14 and 2014/15 reporting periods.

Table 2 and Figure 6 (above) show that, in relation to claimed amounts of less than \$100,000, the total adjudication fee equates, on average, to about 15% of the total claimed amount. This figure increases to just under 33% 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 the 2011/12, 2012/13, 2013/14 and 2014/15 reporting 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 2015/16 period is shown in Table 3, p.5 above. Table 3 shows that Adjudicators' overall share of the total adjudication fees is about \$1.7 million or about 70% of the total adjudication fees. ANAs' share accounts for the remaining 30% of the total adjudication fees. On average, Adjudicators' share of the total adjudication fees is about 71% for the 2011/12 to 2015/16 (inclusive) reporting periods.

The NSW Government 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 most or 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 NSW Government 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

As previously reported, a comparison of the data published by the NSW Government over the periods 2011/12, 2012/13, 2013/14 and 2014/15 showed that there had been a sustained downward trend in the number of applications lodged with ANAs since 2011/12. However, the data collected for the 2015/16 period indicate that this downward trend may have ended with a slight increase in the number of applications lodged in NSW during 2015/16 reporting period.

Nevertheless, there is insufficient data to establish if this is the start of a sustained upside reversal in adjudication activity in NSW or merely a short-term correction within an underlying downward trend. The NSW Government will continue to monitor trends in the number of applications lodged with ANAs.

The data show that about 70% of the total number of determinations released were made in respect of small-value claims (i.e., claims for less than \$100,000). Within this range, applications are most frequently lodged for claimed amounts of: (a) \$10,000 to less than \$25,000; and (b) \$40,000 to less than \$100,000. The results indicate that adjudication is being used predominately by claimants making small to medium-value payment claims up to about \$250,000. This is consistent with the intention of the Act and is generally consistent with the data collected for 2011/12, 2012/13, 2013/14 and 2014/15 reporting periods.

A total of \$50.2 million was awarded to claimants through the adjudication process for the 2015/16 reporting period. Overall, claimants were awarded 48% of the claimed amount for the 2015/16 reporting period. This is generally consistent with the data collected for 2011/12, 2012/13, 2013/14 and 2014/15 reporting periods. The result suggests that, overall, claimants are achieving modest success via adjudication under the NSW Act. From an outcome-orientated viewpoint, the data does not suggest that adjudication under the NSW Act is claimant-friendly [8].

The level of success of claimants varies by claim-range. 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 when making high-value claims (i.e., claims for \$500,000 or greater). This is consistent with the data collected for 2011/12, 2012/13, 2013/14 and 2014/15 reporting periods.

The average total adjudication fee (including the fees of Adjudicators and ANAs) is \$4,585. On this basis, 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. This is consistent with the intention of the Act and is consistent with the data collected for 2011/12, 2012/13, 2013/14 and 2014/15 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 Government (2016), 'Building and Construction Industry Security of Payment Act 1999 – Adjudication Activity Statistics, Quarterly Report No. 4, 1 July 2015 to 30 June 2016', 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 1st International Conference on Construction Engineering and Management*, Seoul, South Korea, 16-19 October, pp. 687-92.

[6] Carter, J W (2012), *Contract Law in Australia*, 6th edn., Butterworths, Sydney.

[7] The decision by the NSW Supreme Court in *Alucity Architectural Product Supply Pty Ltd v Australian Solutions Centre; Alucity Architectural Product Supply Pty Ltd v Paul J Hick* [2016] NSWSC 608 now places an obligation on Adjudicators to determine that no money is payable if the Adjudicator concludes that the payment claim is invalid under the Act.

[8] A cumulative total of \$324 million has been awarded to claimants via the adjudication process over the 2011/12 to 2015/16 (inclusive) reporting periods. On average, claimants were awarded 46% of the claimed amount over this period.

[9] NSW Government (2015) 'Building and Construction Industry Security of Payment Act 1999: Discussion Paper – December 2015', NSW Fair Trading, Parramatta, NSW.



Office of Finance & Services
McKell Building
2-14 Rawson Place Sydney NSW 2000
www.services.nsw.gov.au