



Finance
& Services

Building and Construction Industry Security of Payment Act 1999

Adjudication Activity in New South Wales

ANNUAL REPORT
2012/13



© Crown in right of New South Wales through the Department of Finance & Services 2013. 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 01/07/2012 and ending on 30/06/2013. This report should be read in conjunction with the 'Adjudication Activity Statistics: Quarterly Report – No. 4, 1 July 2012 to 30 June 2013'.

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 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 Department. This Partnership has so far enabled the Department to publish its [Quarterly Adjudication Activity Reports](#) covering the financial years ending June 2012 and 2013.

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). In addition, the respondent must pay into court as security the unpaid portion of the adjudicated amount pending the outcome of the court proceeding.

In September 2010, the New South Wales Government released a discussion paper for consideration by stakeholders in the NSW construction industry on the operation of the NSW Act. The discussion paper pointed to difficulties being experienced by claimants in securing payment from respondents after adjudication. This situation was seen as having the effect of defeating the object of the NSW Act by increasing the odds of claimants falling into insolvency.

As a result, the *Building and Construction Industry Security of Payment Amendment Act 2010* (NSW) ('2010 Amendment Act') was introduced by the NSW Parliament. The 2010 Amendment Act was assented to on 29 November 2010 and commenced on 28 February 2011. Under the 2010 amendments to the NSW Act, if a claiming party elects to go to adjudication, they may elect to serve a 'payment withholding request' on the respondent's client so as to 'freeze' sufficient moneys up the contractual chain pending the outcome of adjudication. The effect of this procedure is similar to obtaining an attachment order under s.14 of the *Contractors Debts Act 1997* (NSW).

The rationale behind the 2010 Amendment Act is that if the respondent's ability to use money received from the Principal on account of the claimant's work is removed then the incentive to wrongfully withhold payment is reduced and the chance of recovery of the adjudicated amount is increased. New South Wales is the first jurisdiction to introduce this protection.

Adjudication Activity Data – 2012/13

Fig.1: Adjudication Applications by region (State-wide)[†] 2012/13

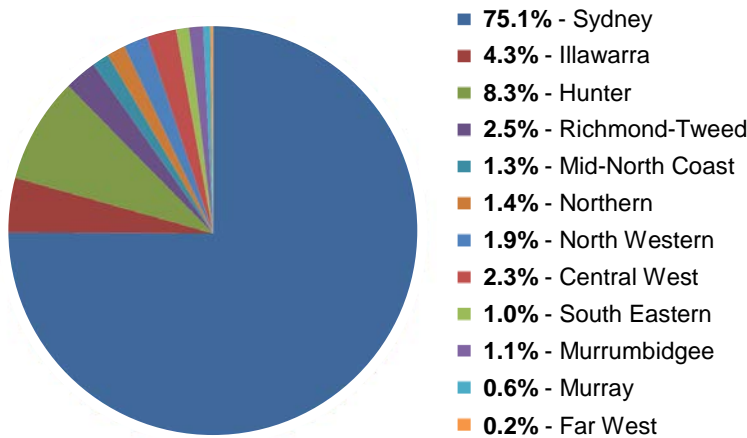
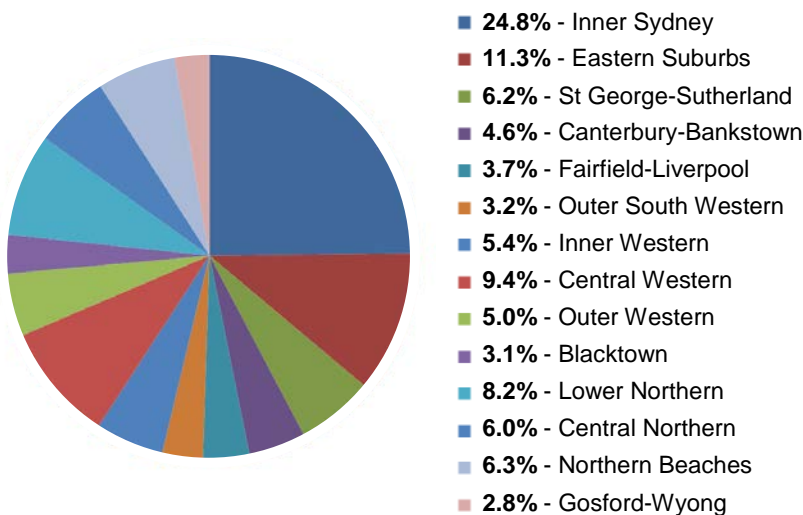


Fig. 2: Adjudication Applications by region (Sydney-wide)[†] 2012/13

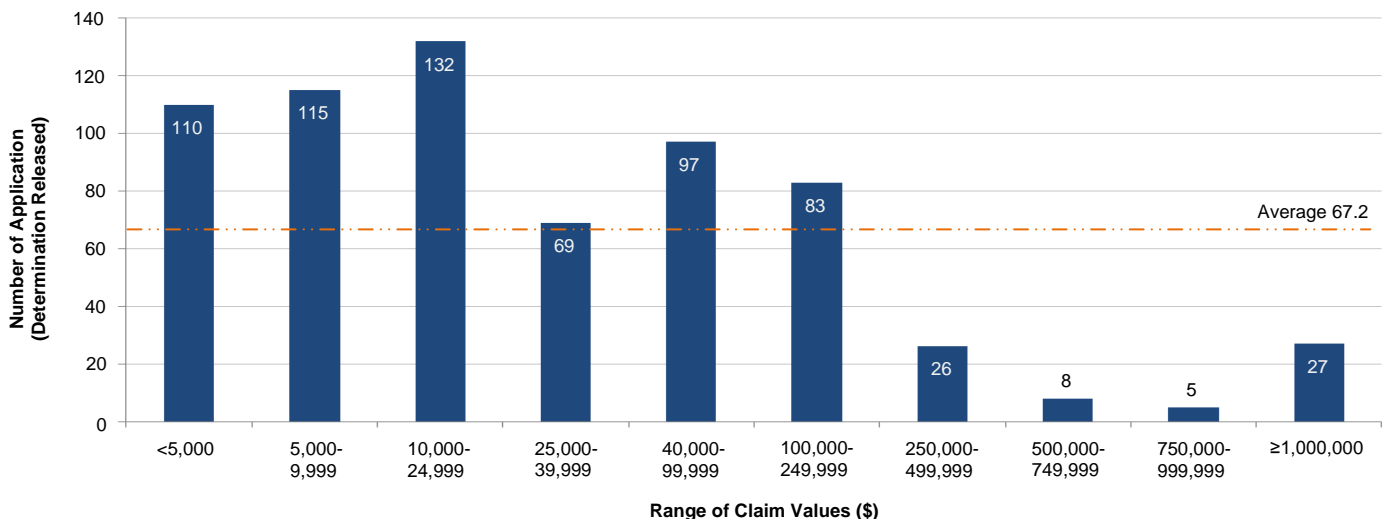


Key Activity Data

- A total of 1,009 adjudication applications were lodged, with 672 determinations released to the parties.
- All regions and sub-regions of NSW recorded adjudication activity during 2012/13.
- 78% 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 87% of the claimed amount, with 66% of these claimants being awarded the full amount claimed.
- 16% 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 62% of the claimed amount, with 27% of these claimants being awarded the full amount claimed.
- 6% 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 51% of the claimed amount, with 3% of these claimants being awarded the full amount claimed.

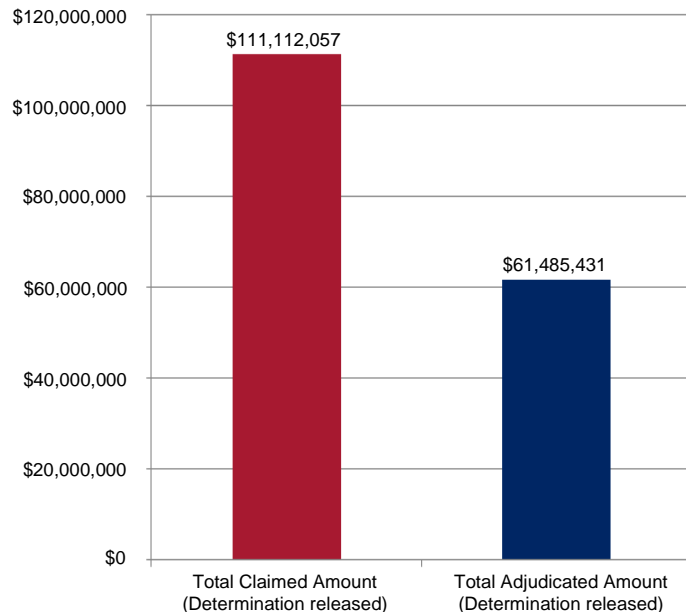
[†] Region classification based on the Australian Standard Geographical Classification (ASGC) for NSW and Sydney (Statistical Division & Statistical Subdivisions, ABS Cat. No.1216.0) and determined using reported project site address postcode information.

Fig. 3: Number of adjudication applications by payment claim value range 2012/13



Adjudication Activity Data – 2012/13

Fig. 4: Total claimed and adjudicated amounts 2012/13



Key Activity Data

- The total value of claimed amounts was in the order of \$186.3 million.
- The highest and lowest claimed amount for the period was \$10.5 million and \$97 respectively.
- Of the total number of determinations released, applications for claimed amounts of less than \$25,000 were the most frequently lodged applications.
- The total value of progress payments returned to claimants via the adjudication process was \$61.5 million.

Table 1: Average claimed and determined amounts (by claim range) 2012/13

Claimed Amount (\$)	Number of Applications [†]	Av. Claimed Amount (\$)	Av. Determined (\$) (% of Av. Claimed Amount)	Number awarded 100% of the claimed amount (% of Number)
< 5,000	110	2,724	2,641 (97%)	95 (86%)
5,000-9,999	115	7,452	7,020 (94%)	82 (71%)
10,000-24,999	132	16,217	13,698 (84%)	81 (61%)
25,000-39,999	69	31,527	27,637 (88%)	42 (61%)
40,000-99,999	97	65,758	56,061 (85%)	44 (45%)
100,000-249,999	83	153,112	109,804 (72%)	25 (30%)
250,000-499,999	26	339,645	193,675 (57%)	4 (15%)
500,000-749,999	8	603,000	344,395 (57%)	nil
750,000-999,999	5	821,324	478,775 (58%)	nil
≥ 1,000,000	27	2,547,822	1,186,892 (47%)	1 (4%)
Total number	672			

[†] Determination released

Fig. 5a: Claimant Type 2012/13

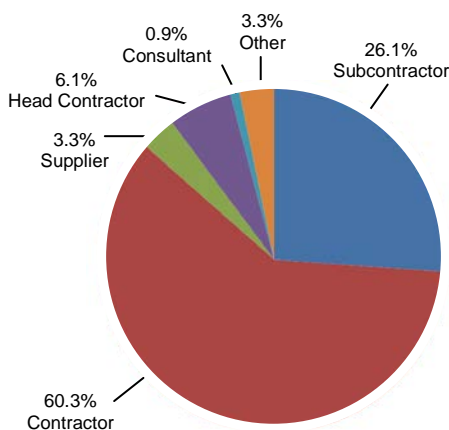
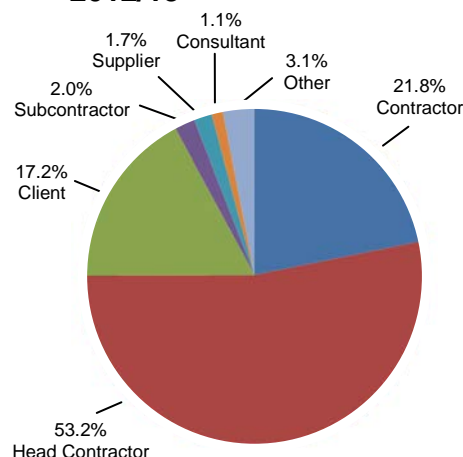


Fig. 5b: Respondent Type 2012/13



Key Activity Data

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

Adjudication Activity Data – 2012/13

Table 2: Adjudication fees (by claim range) 2012/13

Claimed Amount (\$)	Number of Applications [†]	Av. Fees (\$)			Av. Fees (%)		
		Total	Respondent Share	Claimant Share	Total ¹	Respondent Share ²	Claimant Share ³
<5,000	110	636	621	14	23.3%	97.7%	2.3%
5,000-9,999	115	988	951	37	13.3%	96.3%	3.7%
10,000-24,999	132	1,313	1,214	98	8.1%	92.5%	7.5%
25,000-39,999	69	1,813	1,655	158	5.8%	91.3%	8.7%
40,000-99,999	97	2,887	2,686	202	4.4%	93.0%	7.0%
100,000-249,999	83	5,623	4,852	771	3.7%	86.3%	13.7%
250,000-499,999	26	8,257	6,351	1,905	2.4%	76.9%	23.1%
500,000-749,999	8	7,043	5,723	1,321	1.2%	81.3%	18.8%
750,000-999,999	5	21,463	20,605	859	2.6%	96.0%	4.0%
≥ 1,000,000	27	16,048	12,468	3,580	0.6%	77.7%	22.3%
Total number	672						

[†] 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) 2012/13

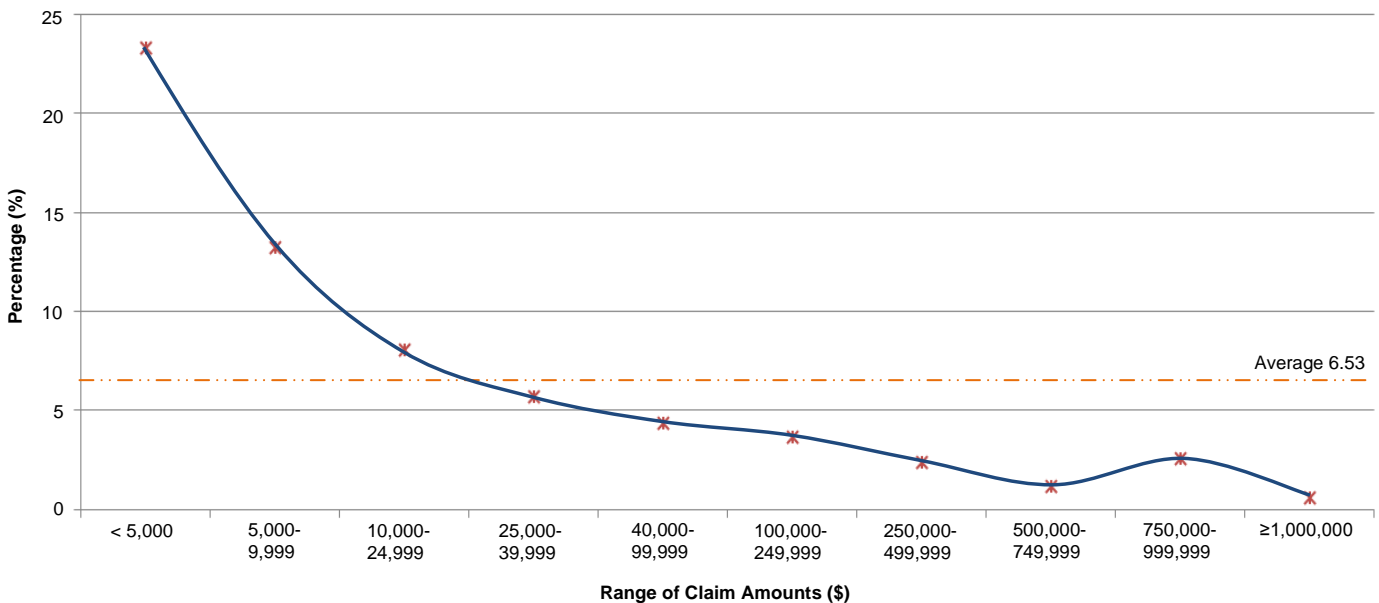


Table 3: Adjudication Fee Statistics 2012/13

Adjudication Fee Statistics [†]	Amounts (\$)
Total adjudication fees	2,040,327
Adjudicators share of total adjudication fees	1,418,919 (69.5%)
ANA share of total adjudication fees	621,408 (30.5%)
Av. total adjudication fee	3,036
Max. total adjudication fee	67,747
Min. total adjudication fee	nil

[†] Determination released

Key Activity Data

- On average, the total adjudication fee is about \$3,036.
- Adjudication provides a financially viable 'user pays' option for those making small and large claims alike to have the dispute heard and determined by an independent third party.

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 function is to accept adjudication applications, refer adjudication applications to adjudicators and issue, upon request, an adjudication certificate. Each ANA is required by the NSW Department of Finance & Services (hereafter referred to as 'the Department') to report regularly on a variety of matters relating to adjudication applications and determinations made in NSW. Reporting is required by the Department to enable proper monitoring of trends in adjudication.

The adjudication data used for this report was generated by the ANAs and provided to the Department as part of their obligations to the Minister. The adjudication activity data used for this research covers the period from 1 July 2012 to 30 June 2013. This report builds on the Department's Quarterly Reports by attempting to subjectively interpret and give meaning to the key findings in order 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. Finally, this report should be read in conjunction with the Department's 'Adjudication Activity Statistics: Quarterly Report – No. 4, 1 July 2012 to 30 June 2013' [4].

Adjudication Applications

For the period 1 July 2012 to 30 June 2013, the total number of adjudication applications lodged with ANAs was 1,009. The aggregate amount claimed for the period was in the order of \$186.3 million. The highest and lowest amounts claimed for the period are \$10.5 million and \$97 respectively. Table A (below) shows the status and total number of adjudication applications made as at the last day of the reporting period for 2012/13 and 2011/12 (last year).

Table A: Status and number of adjudication applications

Status	Number	
	YTD 2012/13	YTD 2011/12
Applications lodged	1009	1112
Determinations released	672	779
Determinations pending release	138	90
Applications completed but not determined [†]	199	243

[†]Applications completed but not determined are 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 appointed adjudicator.

From Table A above, it can be seen that, of the total number of adjudication applications lodged with ANAs for the 2012/13 period, a total of 672 determinations were released to the parties. Approximately 14% of the total number of adjudication applications lodged were pending determination or pending release to the parties. About 20% of applications are classified as 'completed but not determined'.

Whilst the data collected by the Department does not indicate the reasons for individual applications being 'completed but not determined', previous research suggests that, in just over one-third of cases, this will occur when the parties settle the claim and seek to terminate the adjudication before a determination is made by the adjudicator, and that in just over half of cases, the adjudicator may, after accepting the adjudication application, subsequently decide that the adjudicator lacks the jurisdiction to determine the application and subsequently withdraws acceptance of the application before making a determination [5].

In recognition of the absence of data on this aspect of the adjudication process, the Department is considering requesting ANAs to report on the reasons for adjudication applications not proceeding to determination.

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 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 they have failed to provide a 'direct-response payment schedule'.

The distribution of applications lodged (by section of the NSW Act) as at the last day of the reporting period for 2012/13 and 2011/12 (last year) is shown in Table B (below).

Table B: Adjudication applications lodged (by section)

Application by Section of the NSW Act	Number	
	YTD 2012/13	YTD 2011/12
17(1)(a)(i)	492	604
17(1)(a)(ii)	8	22
17(1)(b)	509	486
Total	1009	1112

Table B shows that, for the 2012/13 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., within 10 business days of receiving the payment claim). However, the data does 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. 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 for under the NSW Act to prepare the payment schedule.

Given the absence of data on this question, no firm conclusions can be drawn as to the reasons why some respondents choose to provide direct-response payment schedules and others delay the provision of a payment schedule until a s.17(2) notice is served. The Department is considering whether additional reporting data can be obtained to shed light on this aspect of the claiming process.

Adjudication Determinations

For the period 1 July 2012 to 30 June 2013 a total of 672 adjudication determinations were released to the parties. The aggregate of adjudicated amounts, for applications where a determination was released, is in the order of \$61.5 million (see Fig. 4, p. 4 above). This represents the aggregate amount of progress payments returned to claimants using the statutory adjudication process during 2012/13. The number of adjudication applications lodged by payment claim range is shown in Fig. 3 (p. 3 above).

Figure 3 shows, generally, that of the total number of 672 determinations released, adjudication applications made in the small to medium value claim bracket are

the most frequently lodged applications by claim range, with claims of less than \$250,000 being the most predominate. Figure 3 also shows that of the total number of determinations released, applications are most frequently lodged for claimed amounts of less than \$25,000. Figures 5a and 5b (p. 4 above) indicate that 'Subcontractors' and 'Contractors' are the most frequent users of adjudication to recover payment.

One indicator of the level of success of claimants at adjudication is the proportion of the claimed amount being determined by adjudicators as payable. Figure 4 (p. 4 above) shows the proportion of the aggregate claimed amount determined by adjudicators in favour of claimants for the period 1 July 2012 to 30 June 2013.

Figure 4 shows that, of the 672 determinations released, the aggregate of claimed amounts was \$111.1 million and the aggregate of adjudicated amounts in the order of \$61.5 million. These results show that adjudicators, overall, awarded claimants just over half of the aggregate amount claimed for the reporting period, supporting the view that claimants tend to have a modest level of success at adjudication in terms of the proportion of the claimed amount awarded by adjudicators. When these results are examined by claim-range, it is apparent that the level of success of claimants at adjudication varies noticeably.

For example, Table 1 (p. 4 above) shows, firstly, that about 78% of the total number of determinations released were made in respect of claims for less than \$100,000. In these cases, adjudicators determined, on average, about 87% of the claimed amount, with 66% of claimants having 100% of their claim determined in their favour.

Secondly, about 16% of the total number of determinations released were made in respect of claims in the range \$100,000 to \$500,000. In these cases, adjudicators determined, on average, about 62% of the claimed amount, with 27% of claimants having 100% of the claim determined in their favour.

Finally, about 6% of the total number of determinations released were made in respect of claims of \$500,000 or greater. In these cases, adjudicators determined, on average, about 51% of the claimed amount, with less than 3% of claimants having 100% of the claim determined in their favour.

Overall, the data indicate that claimants making claims up to about \$250,000 are notably more successful at adjudication than those making larger claims, both in terms of the average proportion of the claimed amount determined by adjudicators and the frequency of the full amount claimed being determined in favour of the claimant.

It is not clear, however, to what extent (if any) the provision of a payment schedule impacts on the level of success of claimants at adjudication in terms of the average proportion of the claimed amount determined

Discussion

by adjudicators or the frequency of the adjudicator determining the full amount claimed in favour of the claimant. Previous research shows that, generally, claimant success at adjudication declines sharply when respondents provide a payment schedule [5].

Cost of Adjudication

One of the most important objectives of the New South Wales statutory adjudication process is to provide claimants with a rapid and inexpensive mechanism for determining disputed progress payments. This is achieved by the utilisation of experienced and independent adjudicators.

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 2012 to 30 June 2013 were in the order of \$2 million. The average total adjudication fee was \$3,036. The largest adjudication fee was \$67,747. 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, respondents 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 direct fees (by claim range) for all adjudication determinations released for the period 1 July 2012 to 30 June 2013 is given in Table 2 (p. 5 above). It can be seen from Table 2 that respondents are, overall, required to pay the greater proportion of the total adjudication fees across the spectrum of claim values.

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.

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 a maximum of about 23% for the claims of less than \$5,000 and decreases to a minimum of about 4% for claims between \$40,000 to \$99,000.

When comparing adjudication with dispute resolution processes, such as arbitration and litigation, which are processes acknowledged as being costly [6], the data indicates that adjudication is providing a financially viable option, particularly for those making claims less than \$100,000, to have progress payment disputes heard and determined, albeit on an interim basis, by an independent third party. This conclusion is consistent

with the data in Table 1 (p. 4 above), which shows that almost 78% all of the adjudication applications made under the NSW Act were made in relation to claims less than \$100,000.

Adjudicators' and ANAs' share of the total adjudication fees for the period 1 July 2012 to 30 June 2013 is shown in Table 3, p.5 above. Table 3 shows that the Adjudicators' overall share of the total adjudication fees is about \$1.4 million (or about 70% of the total fees). The ANAs' overall share of the total adjudication fees amounted to about \$621,408 (or about 30% of the total fees).

By way of commentary, the Department 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 Department 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

The results shown in this Annual Report are comparable with the results shown in the Annual Report 2011/12 [7]. Whilst the results reported are unique to each period, no marked fluctuation in adjudication activity are observed over the 2011/12 and 2012/13 reporting periods. There is insufficient data collected by the Department at this time to identify any trends in adjudication activity in NSW.

With just over 1,009 adjudication applications having been made over the 2012/13, the data indicates that adjudication is being frequently utilised by stakeholders in the NSW building and construction industry as a means of progress payment recovery.

The data reveals, overall, that claimants were awarded about half of the total of claimed amounts. The data reveals that claimants are generally successful at adjudication in terms of the proportion of the claimed amounts determined in their favour. This is particularly so in relation to claims of less than \$100,000, which represents about 80% of the total applications made over the reporting period.

This result, read in the light of the data showing the proportion of the claimed amounts determined by adjudicators across the individual claim ranges, indicates, on its face, that adjudication is a rigorous process for securing progress payments in the construction industry.

The data indicates that adjudication fees are generally modest enough to conclude that adjudication provides claimants across all claim ranges with a relatively inexpensive means of having disputed progress payments determined by an independent adjudicator. For those making claims of less than \$250,000, adjudication is proving to be a popular choice.

The total of adjudicated amounts was in the order of \$61.5 million. This amount represents the total of progress payments returned to claimants through the adjudication process. It is reasonable to conclude that the NSW Act is making a significant and positive impact on the cash flow of many in the construction industry.

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.

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 Department of Finance & Services (2013), 'Building and Construction Industry Security of Payment Act 1999 – Adjudication Activity Statistics, Quarterly Report No. 4, 1 July 2012 to 30 June 2013', New South Wales Government Procurement, 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., Peden, E. and Tolhurst, G. (2007), *Contract Law in Australia*, 5th edn, Butterworths, Sydney.

[7] NSW Department of Finance & Services (2012) 'Building and Construction Industry Security of Payment Act 1999 Adjudication Activity in New South Wales – Annual Report 2011/12', NSW Government.



Department of Finance & Services
McKell Building
2-14 Rawson Place Sydney NSW 2000
T: 02 9372 8970 F: 02 9372 7070
www.services.nsw.gov.au

