

ANALYSIS OF THE TRENDS IN ADJUDICATION IN NEW SOUTH WALES

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ABSTRACT: The *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) is a unique form of statutory regulation for the building and construction industry, which gives virtually all industry participants a statutory right to, and a means of recovering, payments for work done under a construction contract. The research aim is to examine current trends in adjudication applications and determinations under the Act. The research reveals: (a) that the adjudication process is encouraging parties to resolve disputes as to payment (b) that there is low level of awareness and understanding of the provisions of the Act, particularly amongst subcontractors; (c) that claimants making small claims experience a high rate of success at adjudication; and (d) that the indirect cost of adjudication is becoming problematic.

Key words: adjudication, New South Wales, security of payment.

1. INTRODUCTION

This paper is related to an on-going research project being undertaken by the authors into performance of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (hereafter referred to as ‘the Act’)

The Act commenced in March 2000 and introduced as part of the New South Wales Government’s policy to eradicate the practice of developers and contractors arbitrarily delaying payment to subcontractors and suppliers in the NSW building and construction industry [1]. The Act is the first comprehensive legislative scheme to be introduced in Australia to provide contractors, subcontractors and suppliers with a statutory right to, and a procedure to recover, progress payments. Similar legislative schemes have since been introduced in Victoria, Queensland, Western Australia, New Zealand and Singapore.

As a consequence of a formal review undertaken at the end of the Act’s first three years of operation, the Act was significantly amended by the *Building and Construction Industry Amendment Act 2002* (NSW) (hereafter referred to as ‘the Amendment Act’). Accordingly, ‘the Act’ referred to here is the Act as amended.

The aim of this paper is to examine the trends in adjudication determinations made under Act between March 2003 and August 2004. In particular, the paper will examine trends in relation to:

1. adjudication applications;
2. adjudication determinations;
3. the success of claimants at adjudication; and
4. the cost of adjudication.

Although the extent of the security of payment problem is unknown, it is generally accepted that it has been an

ongoing issue for those who carry out construction work, or supply related goods and services under a construction contract [2]; [3]. In the context of this paper, 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” [3].

In sum, the security of payment problem is the result of the practice by principals and contractors in the construction industry of unduly delaying and devaluing progress payments owed to subcontractors for work done under construction contracts. The tactic of principals and contractors in delaying payments or unduly reducing the value of payments is largely designed to enhance positive cash flow of at the expense of subcontractors [4].

It is generally agreed that security of payment problem has long been a major source of commercial hardship for those operating in the construction industry, particularly for the many small and often undercapitalised firms, which operate at or near the bottom of the contractual chain. It is suggested that, but for the systemically poor payment behaviour of principals and contractors, the problems of commercial hardship and failure amongst small firms in the construction industry would largely be avoided.

Furthermore, one must not overlook the potential for the unnecessary generation of societal problems, such as unemployment and welfare dependence, which often accompanies commercial hardship and failure. Thus, any debate concerning security of payment is one that must inevitably deal with the issues of social security.

The next section of the paper presents an overview of the Act followed by the description of the research method adopted in this study. This is then followed by the analysis and synthesis of the data, and the conclusive remarks.

2. OVERVIEW OF THE ACT

The object of the 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 contract is entitled to receive, and able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services” [5]. The Act is based on Part 2 of the *Housing Grants, Construction and Regeneration Act 1996* (UK) (hereafter referred to as ‘the UK scheme’). However, unlike the UK scheme the Act only applies to payment disputes and stipulates a compulsory process for adjudication.

The Act introduced revolutionary measures, such as: a fast process of notification and optional adjudication; a right to, and a process of recovery of payments; the nullifying of ‘pay when paid’ clauses in construction contracts; a statutory right to suspend work; and a statutory right to exercise a lien over unfixed materials [6]. Importantly, the parties to a construction contract cannot contract out of the Act, and any terms of contract that attempt to exclude a claimant’s right to progress payments are made void.

The scope of the Act is extensive. The Act applies to construction contracts in New South Wales, under which one party undertakes to carry out ‘construction work’, or to supply ‘related goods and services’, for another party. Apart from a small number of exceptions, the definition of ‘construction work’ and ‘related goods and services’ is extensive and embraces a wide range of activities normally associated with the delivery of building construction and engineering construction projects.

The Act defines a mechanism for making payment claims and a mechanism for responding to such claims. For the purpose of the Act, a ‘claimant’ is the organisation making a payment claim under the Act and a ‘respondent’ is the organisation responding to the payment claim. When the claimant makes a payment claim under the Act, and the respondent disputes the claimed amount, the respondent may provide the claimant with a ‘payment schedule’ within 10 business days of the claim being served. The payment schedule must detail the respondent’s reasons for paying an amount less than the claimed amount, or reasons for withholding payment. If the respondent chooses not to provide a payment schedule the respondent becomes liable under the Act to pay the whole of the claimed amount on the due date for payment. The claimant then has the option of either: (a) recovering the payment as a statutory debt due in a court of competent jurisdiction; or (b) to have the dispute determined by an adjudicator. However, if the respondent decides to provide a payment schedule, but the payment schedule indicates that the respondent is not prepared to pay the full amount of the claimed amount, the claimant has the option of either: (a) accepting the scheduled amount; or if the claimant disputes the scheduled amount (b) to have the dispute determined by an adjudicator. Importantly, if the respondent decides to provide a payment schedule for either the full amount claimed, or for some lesser amount, and the respondent

fails to pay the whole of any part of the scheduled amount by the due date for payment, the claimant will again have the option of either: (a) recovering the payment as a statutory debt due in a court of competent jurisdiction; or (b) to have the dispute determined by an adjudicator. In the event that the claimant decides to recover the unpaid portion of the scheduled amount payment in a court, the Act provides that the respondent is not, in those proceedings, entitled to bring any cross-claim against the claimant, or to raise any defence in relation to matters arising under the construction contract.

A key feature of the Act is the provision for optional adjudication. Adjudication under the Act is a relatively quick and inexpensive statutory procedure that allows for a dispute as to payment to be provisionally determined by a neutral adjudicator. If the claimant prefers a payment dispute to be determined by an adjudicator, the claimant must submit to the Authorised Nominating Authority (ANA) an adjudication application within the time specified in the Act. The adjudication application must also be served on the respondent. The ANA will then appoint an independent adjudicator to determine the payment dispute. The respondent may lodge with the adjudicator an adjudication response in support of a payment schedule, but may only do so if the respondent has provided a payment schedule (within the meaning of the Act) to the claimant. Furthermore, the respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant. The adjudicator must then determine an adjudication application within 10 business days after notifying the parties his or her acceptance of the application or within such further time as the claimant and the respondent may agree.

Importantly, the adjudicator’s determination as to the amount of a progress payment to be paid (if any) to a claimant is an interim decision only. Final determination of the dispute may arise later by agreement, perhaps as a result of a mediated negotiation between the parties, or as a result of the matter being decided by an arbitrator or a court. Nevertheless, until such time as the dispute as to payment is finally determined, the respondent is bound under the Act to pay the claimant the adjudicated amount determined by the adjudicator. Since adjudication under the Act is not intended to decide disputes as to payment, it is not a dispute resolution process in the strict sense. The purpose of adjudication is simply to ensure that if a dispute as to payment arises the matter can be determined independently, inexpensively and quickly to safeguard a claimant’s cash flow until the dispute is finally resolved. Observance of the strict time constraints in which a claimant, respondent and adjudicator are required to operate is the essence of the Act. The consequence of non-compliance with the time constraints may result in rights, otherwise available to claimants and respondents under the Act, being lost [7].

If the adjudicator’s determination is in favour of the claimant, and the respondent fails to pay the whole or any part of the adjudicated amount within 5 business days after being served the adjudicator’s determination, the claimant

may file the adjudication determination (in the form of an 'adjudication certificate' issued by the ANA) in a court of competent jurisdiction and obtain summary judgement for the adjudicated amount, without the need for a summons, a hearing or a lawyer. The respondent may apply to the court to have the adjudication determination set-aside on jurisdictional grounds. However, the Act does not permit the respondent to bring a cross-claim against the claimant or raise any defence in relation to matters arising under the construction contract, or to challenge the substance of the adjudicator's determination. If the respondent applies to a court to have the adjudication determination set-aside the respondent is required under the Act to pay into court in cash (as security) the unpaid portion of the adjudicated amount pending the outcome of that proceeding.

The Act also operates in tandem with the *Contractors Debts Act 1997* (NSW) (hereafter referred to as the Debts Act). Once the adjudication certificate is filed as judgement in court, the claimant may apply to the court under the Debts Act to be issued with a 'debt certificate'. Once a 'debt certificate' is issued, the claimant will be able to recover the adjudicated amount directly from the respondent's principal.

In addition to the above options for recovery of a payment claim, the Act provides a claimant with a right to suspend work pending payment, and a right to exercise a lien over unfixed plant or materials supplied by the claimant to the extent of the unpaid amount of the progress claim. However, these provisions are rarely used. This is possibly due to the lack of awareness of such provisions by claimants.

3. RESEARCH METHOD

The NSW Department of Commerce (hereafter referred to as the Department) requires all Authorised Nominating Authorities in NSW to report regularly on a variety of matters relating to adjudication applications and determinations in NSW. Reporting is required by the Department with a view of allowing the Department to "better monitor trends in adjudication". Data used for this research was the data collected by the Department as part of the aforementioned reporting régime. The data used covers the 18-month period from date of commencement of the Amendment Act (3 March 2003) to 31 August 2004 [8].

Since information relating to the composition of the participating Authorised Nominating Authorities and the parties to adjudication applications and determinations was not made available by the Department the authors were unable to determine what influence, if any, such compositions had on the outcome of adjudication applications and adjudications.

4. ANALYSIS OF DATA

4.1 Adjudication applications

The following data analysis is divided into three sub-sections: the first sub-section deals with general statistical data and observations in relation to adjudication in NSW;

the second sub-section deals with specific trends in relation to adjudication applications; and the third sub-section deals with specific trends in relation to adjudication determinations.

4.2 Adjudication applications

According to the Department [8], a total of 994 completed adjudication applications have been lodged with ANA's in NSW as at the 31 August 2004. The value of the total completed adjudication applications is in the order of 338.3 million Australian dollars (about 258.9 million US dollars). Of all the completed adjudication applications lodged, approximately 69 percent had been determined with only a small proportion (about 7 percent) pending determination.

4.2.1 Applications 'completed but not determined'

Interestingly, the Department [9] reported that about one-quarter of all completed adjudication applications lodged with ANA's were neither determined nor pending determination. Applications that are neither determined nor pending determination are classified by the Department as 'completed but not determined'. The reasons for, and corresponding frequencies of, 'completed but not determined' adjudication applications is given in Table 1 [8].

Table 1. Completed but not determined applications.

Reported reasons	Totals (%)
Withdrawn by claimant	39 (15.6%)
Dispute as to payment settled	74 (29.6%)
Invalid application under the Act	130 (52.0%)
ANA/adjudicator out of time	7 (2.8%)
TOTAL	250 (100%)

Table 1 shows that the rate of withdrawal of adjudication applications once lodged with an ANA is relatively low. However, the Department does not explain the reason for such withdrawals. It also shows that ANA's appear to be administering adjudication applications promptly and adjudicators are adhering to the strict time constraints placed upon them by the Act in accepting adjudication applications and delivering determinations.

Interestingly, Table 1 also shows that a significant minority of disputes as to payment are settled by the parties after lodgment of adjudication applications but before the application is determined by the adjudicator. Thus, the statistics provide prima facie evidence that the adjudication process is encouraging parties to resolve disputes as to payment between themselves without the need for third party interference. Furthermore, since claimants often use the adjudication process soon after a dispute as to payment arises, it is arguable that the adjudication process is a catalyst (albeit indirectly) for early dispute resolution between parties in the construction industry.

Disturbingly, however, Table 1 shows that more than half of all 'completed but not determined' applications (or 13 percent of all completed adjudication applications) are invalid under the Act. According to the Department [9],

the high proportion of invalid applications occurs “primarily due to [claimants] not understanding the timeframes and procedures of the Act”. The proposition given by the Department is supported by research undertaken by Brand and Uher [6], which concluded that there is low level of awareness and understanding of the provisions of the Act by industry participants, particularly amongst subcontractors.

4.2.2 Provision of payment schedules by respondents

The Department records three classifications of adjudication application: (a) ‘standard’; (b) ‘optional with schedule’; and (c) ‘optional without schedule’ [9].

The ‘standard’ application is one where the respondent provides an initial payment schedule to the claimant in accordance with the Act and the claimant either rejects the scheduled amount or the respondent does not pay the claimant in accordance with payment schedule on or before the due date for payment.

The ‘optional with schedule’ application is one where the respondent fails to provide an initial payment schedule to the claimant but does so once the claimant notifies the respondent of its intention to apply for adjudication under the Act.

The ‘optional without schedule’ application is one where the respondent fails to provide an initial payment schedule to the claimant and also fails to provide a payment schedule after the claimant notifies the respondent of its intention to apply for adjudication under the Act.

Table 2 shows the distribution of the three aforesaid classifications of adjudication application as at the 31 August 2004 [8].

Table 2. Classifications of adjudication applications.

Classifications	Totals (% of Total)
Standard	522 (52.5%)
Optional with payment schedule	127 (12.8%)
Optional without payment schedule	345 (34.7%)
TOTAL	994 (100%)

Table 2 shows that whilst most respondents (i.e., 52.5%) to payment claims are providing payment schedules to claimants without the need for further notification under the Act, there are almost as many (i.e., 47.5%) respondents failing to provide an initial payment schedule to the claimant.

Interestingly, around one-third of all completed adjudication applications are lodged in circumstances where the respondent has failed to provide a payment schedule. This result corresponds closely with the research results in Uher and Brand [10].

A reason suggested by the Department [9] for such a high proportion of respondents not submitting payment schedules is that “[respondents] invariably ignore payment claims to delay or escape payment”. However, if one also takes into account the consequences under the Act for not providing a payment schedule (i.e., the claimed amount becomes a statutory debt and the respondent is not permitted lodge an adjudication response to the claimant’s

adjudication application) then it is reasonable to conclude that poor understanding or working knowledge of the Act by respondents is likely to be a causative factor.

In any event, the Act appears effective in preventing respondents ignoring payment claims, arbitrarily devaluing and/or delaying payments by providing claimants with the means by which to have disputes as to payment dealt with by a neutral adjudicator.

In comparison to similar legislative schemes in Victoria and NZ, which have operated for the past three years and attracted in total around 100 and 60 adjudication applications respectively, the data in Table 2 suggests that the Act is effective in providing claimants with a means of referring payment disputes for adjudication.

4.3 Adjudication determinations

As at 31 August 2004, 682 of 994 completed adjudication applications had been determined at a value of about 224.5 million Australian dollars (approximately 171.8 million US dollars). As at the 31 August 2004, highest and lowest claimed amount is 39.4 million Australian dollars and 255 Australian dollars respectively [8].

4.3.1 Distribution of payment claims

The range and distribution of payment claims determined under the Act is shown in Figure 1 [8].

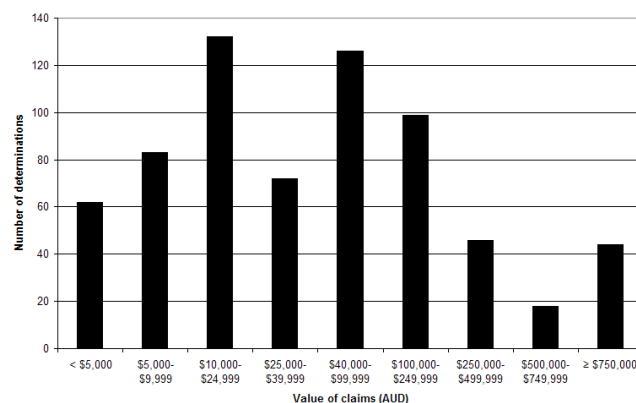


Figure 1. Range and distribution of payment claims determined.

Figure 1 shows that about 51 percent of all payment claims determined were less than \$40,000 while only about 16 percent were \$250,000 or greater.

The data in Figure 1 shows that the most frequently determined payment claims were those of the amount between \$10,000–\$24,000 and \$40,000–\$99,000. However, since the data in Figure 1 does not identify the type of claimants, it is not possible to determine whether small or large claimants made these payment claims.

4.3.2 Level of success of claimants at adjudication

A factor to be considered in determining the level of success of claimants at adjudication is the frequency of favourable outcomes in terms of the adjudicated amount. The distribution of outcomes measured as a percentage of claim determined is shown in Table 3 [8].

Table 3. Percentage of claim determined.

% of claim determined	Total number of determinations	% of total determinations
100%	298	43.7%
80%-99%	125	18.3%
60%-79%	46	6.8%
40%-59%	48	6.8%
20%-39%	52	7.6%
1%-19%	37	5.4%
0%	78	11.4%
TOTAL	682	100%

Table 3 shows that that in about 72 percent of reported adjudication determinations, claimants were awarded 50 percent or more of the claimed amount. Table 3 also shows that in about 44 percent of all determinations, the claimant was awarded the full amount claimed. Only in about 29 percent of adjudications were claimants awarded less than half of the claimed amount, and only about 11 percent of cases were claimants awarded nil. Interestingly, other data provided by the Department shows that, for 'optional without schedule' applications, claimants were awarded the full amount claimed in about 75 percent cases [8].

Thus, from the data provided in Table 3, it appears that claimants are being largely successful at adjudication in terms of the proportion of the claimed amount being determined.

Uher and Brand [10] reported a similar trend from their examination of 98 determinations. They found, that in about 80 percent of sampled adjudication determinations, claimants were awarded half or more of the claimed amount. Their study also revealed that in about 57 percent of determinations, the claimant was awarded the full amount claimed. Only in about 19 percent of adjudications were claimants awarded less than half of the claimed amount, and only about 8 percent of cases were claimant awarded nil.

Trends are also beginning to emerge in relation to the success of claimants at adjudication across a range of claim values. Table 4 shows the average claimed amount and the corresponding average adjudicated amount determined across a range of claim values [8].

Table 4. Average adjudicated amount determined across a range of claim values.

Range of claims determined (AUD)	Av. claimed (AUD)	Av. determined (AUD)
< \$5,000	\$2,969	\$2,828 (95.3%)
\$5,000-\$9,999	\$7,341	\$6,503 (88.6%)
\$10,000-\$24,999	\$16,901	\$13,125 (77.7%)
\$25,000-\$39,999	\$31,936	\$26,198 (82.0%)
\$40,000-\$99,999	\$63,322	\$39,121 (61.8%)
\$100,000-\$249,999	\$157,445	\$99,519 (63.2%)
\$250,000-\$499,999	\$339,214	\$192,017 (56.6%)
\$500,000-\$749,999	\$626,304	\$273,659 (43.7%)
≥ \$750,000	\$3,835,314	\$1,645,451 (42.9%)

Table 4 shows that claimants making small claims (i.e., claims less than \$40,000) are being awarded an average about 85 percent of the claimed amount at adjudication. It can be seen that claimants making small claims are more successful at adjudication than those making moderate to large claims in terms of the proportion of the claimed amount being awarded.

The reason for the downward trend of success for those making the larger claims is not clear. Through the author's direct involvement in the adjudication process the authors are aware of a proportional relationship between the value and complexity of claims.

Complexity in this context refers to: the volume and quality of documentation submitted by the parties to the adjudicator for determination; and the number and intricacy of issues raised by the parties in relation to a claim. It should be noted that the parties to complex adjudications often engage lawyers to prepare submissions on their behalf.

It is suggested that the complexity of claims may account, at least in part, for the apparent downward trend of success for those making the larger claims. Clearly, further research is necessary to understand the reasons for this trend.

4.3.3 Cost of adjudication

One of the salient objectives of the adjudication process is to provide claimants with a relative inexpensive method of having disputes as to payment determined by a neutral adjudicator.

The distribution of the average total direct fees for all adjudication determinations (i.e., the fees of the ANA and the fees and expenses of the adjudicator) as a 31 August 2004 is shown in Table 5 [8].

Table 5. Total direct fees for all adjudication determinations.

Range of claims determined (AUD)	Av. claimed (AUD)	Av. total direct fees (AUD)
< \$5,000	\$2,969	\$1,138 (38.3%)
\$5,000-\$9,999	\$7,341	\$1,365 (18.6%)
\$10,000-\$24,999	\$16,901	\$2,100 (12.4%)
\$25,000-\$39,999	\$31,936	\$2,614 (8.2%)
\$40,000-\$99,999	\$63,322	\$3,385 (5.3%)
\$100,000-\$249,999	\$157,445	\$5,279 (3.4%)
\$250,000-\$499,999	\$339,214	\$5,106 (1.5%)
\$500,000-\$749,999	\$626,304	\$6,317 (1.0%)
≥ \$750,000	\$3,835,314	\$17,956 (0.5%)

Whilst the amounts of total direct fees for adjudication are relatively modest, Table 5 also shows there is inverse relationship between the amount claimed and the total fee when expressed as a proportion of the amount claimed. Whilst Table 4 shows that claimants making small claims have a high success rate at adjudication, the direct fees (shown in Table 5) appear to absorb a high proportion of the determined amount, particularly for claims less than \$5,000.

However, whilst the direct costs of adjudication are

modest, the indirect costs (i.e., the cost of lawyers and other consultants fees) of adjudication are seen to be problematic.

According to Brand and Uher [4], the cost of preparing adjudication applications and adjudication responses by lawyers and other consultants is significant. They reported, that the direct cost to the claimant of preparing a simple payment claim for the amount of \$7,000 would be around \$1,000. However, with lawyers involved in preparing an adjudication application for the claimant and an adjudication response for the respondent, the overall cost of adjudication may be as high as \$20,000. Clearly, intervention of lawyers and other consultants in preparing submissions, particularly in relation to small claims, offsets the Acts objective of providing claimants with a relative inexpensive method of having disputes as to payment determined by a neutral third party. Further research is necessary to identify real costs and benefits of the Act when lawyers and other consultants are indirectly involved in the adjudication process in the way previously described.

5. CONCLUSION

The most important propositions of this paper are: (a) that the adjudication process is encouraging parties to resolve disputes as to payment between themselves without the need for third party interference; (b) that there is low level of awareness and understanding of the provisions of the Act by those in the NSW construction industry, particularly amongst subcontractors; (c) that claimants making small claims experience a higher rate of success at adjudication than those making larger claims; and (d) that the direct costs of adjudication are modest, but the indirect costs of adjudication are becoming problematic.

The high levels of success experienced by claimants at adjudication, and the level at which the adjudication process encouraging parties to privately resolve their payment disputes, suggests that the introduction of the Act, as a tool of industry reform, represents a significant step forward in alleviating a major source of commercial hardship and failure of small firms in the construction industry. However, despite this apparent success, the low level of understand of the Act by claimants remains a barrier not only to the Acts full utilisation, in keeping the adjudications process a relative inexpensive method of having disputes as to payment determined by a neutral third party.

The adjudication process is not so complex that it is incomprehensible to all but the lawyers and other consultants. This is not to say that lawyers and consultants have no role to play in the adjudication process, but if the Act and adjudication are going to have any practical significance to those in the construction industry, particularly subcontractors (which the Act was aimed at) then industry people must start learning how to use it. At present, the evidence suggests that the Act is being significantly under-utilised by those who have the most to benefit from it.

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