ADJUDICATION DETERMINATIONS IN AUSTRALIA

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The *Building and Construction Industry Security of Payment Act 1999*(the Act) is a unique form of statutory regulation for the building and construction industry. The Act gives virtually all industry participants a statutory right to, and a means of recovering, payments for work done under a construction contract. The research objectives of the research are to assess the level of awareness of the Act amongst industry participants, to determine if the Act has improved security of payment, and to examine emerging trends in adjudication determinations and in decisions from the Supreme Court of New South Wales (NSWSC) in relation to adjudication determinations. The latter two objectives are the main focus of this paper. Data for this research is being collected through questionnaires, from a sample of past adjudication determinations, and recent decisions from the NSWSC. The research demonstrates that: adjudication gives claimants a high chance of obtaining the full or partial amount of a payment claim; and the adjudication process is being frustrated by lawyers seeking an injunctive relief and relief in the nature of 'certiorari'.

Keywords: adjudication, contract law, legislation, performance, security of payment.

INTRODUCTION

The aim of this paper is to examine the adjudication process in operation in New South Wales under *Building and Construction Industry Security of Payment Act 1999* (NSW) (hereafter referred to as *the Act*). The paper is related to an on-going research project being undertaken by the authors that focuses on the performance of the Act. By way of background, the paper provides a brief overview of the operation of the Act. It then provides the results of a preliminary assessment of a sample of adjudication determinations, and finally considers recent decisions of the Supreme Court of New South Wales (NSWSC) arising from legal challenges to adjudication determinations.

The term 'security of payment' refers to the entitlement of the construction industry participants, namely contractors, subcontractors, consultants and suppliers, to receive payment due under a construction contract. from the other party contractual party placed higher in the contractual chain. The 'security of payment' problem in the building and construction industry may be expressed as *"[T]he consistent failure…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"* (Commonwealth Australia 2002: 6).

Although the extent of the problem is unknown, the practice of purposefully delaying and arbitrarily devaluing contractors and subcontractors progress payments is common practice in the Australian construction industry. Organisations high up the contractual chain are motivated to employ such tactics in order to maximise positive cash flow in the pursuit of economic gain. Those most adversely affected by delays in

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payment are subcontracting and supply organisations, who are in the main small in size, often undercapitalised, and almost totally dependent on the supply of work from organisations higher up in the contractual chain (Uher 1992).

As a result of the prohibitive costs and time delays in taking legal action to recover payment, the apparent ineffectiveness of alternative dispute resolution processes (Simmonds, 2003), and the fear of future victimisation, many subcontractors choose to simply move on to another project in an attempt to generate new income instead of pursuing outstanding payments under the law (Commonwealth of Australia 2002).

In an attempt to stamp out poor payment practices with in the construction industry, the NSW Government introduced the Act, which commenced operation in March 2000. The object of the Act is to: *"[E]nsure 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 is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services"* (NSW Government 1999: 3).

The aim of the Act is to reduce or eliminate delay in payment through a relatively simple and inexpensive administrative process, which introduced a range of revolutionary measures such as: a statutory right to progress payment; the use of default provisions for progress payment in the absence of express contractual provision; nullifying the effect of 'pay when paid' and 'paid if paid' clauses in a contract; introducing a fast process of notification and adjudication where a claim is disputed; and giving a claimant a statutory right to suspend work (Cahill et al 2000).

The Act underwent its first amendment via the *Building and Construction Security of Payment Amendment Act 2002* (NSW). The amended Act, which commenced in March 2003, introduced new features and drafting changes in order to add support to its objective and to clarify its application as a consequence of several decisions in NSW courts (Iemma 2002).

RESEARCH METHOD

The research into the performance of the adjudication process in New South Wales is being undertaken in two stages. .: tThe first stage, which has largely been completed, attempted to assess the level of awareness of the Act among subcontractors and suppliers in the construction industry. The second stage, which is presently under way, attempts to assess whether or not the introduction of the Act has actually improved security of payment in the construction industry. Furthermore, it attempts to uncover trends in adjudication determinations and examine the circumstances that cause adjudication determinations to be challenged in the courts.

In the first stage of the research, 400 members of the Master Plumbers' Association of NSW were randomly sampled using a questionnaire served by mail. In total 85 duly completed questionnaires were returned, which represents an acceptable rate of 21.3%. A brief outline of the results will be presented later in this paper. The full summary of the outcomes can be found in Brand & Uher (2004).

Data for the second stage of the research is being collected in three ways: (i) from questionnaires administered to approximately 220 parties, namely clients, contractors and subcontractors who were actually involved in adjudication disputes in New South Wales; (ii) from a sample of the past adjudication determinations; and (iii) from a register of decision of the NSWSC.

OPERATION OF THE ACT

But for a small number of exceptions, the Act applies to any 'construction contract', under which one party undertakes to carry out 'construction work', or to supply 'related goods and services', for another party. The terms 'construction work' and 'related goods and services' are broadly defined and embrace many activities normally associated with building and engineering construction activities.

In the event of a dispute arising between parties to a construction contract over payment of a progress claim, the Act provides the claimant and respondent to the dispute with a quick and inexpensive statutory procedure to have the matter determined by a neutral adjudicator, and to recover payment. The adjudicator's determination as to the amount of progress payment to be paid by the respondent to the claimants is not a final resolution of the dispute. However, the respondent is legally bound to pay the claimant the adjudicated amount as interim payment pending final resolution of the dispute.

The most notable aspect of the operation of the Act is the strict time constraints in which a claimant, respondent and adjudicator have to operate. The consequence of non-compliance with the time constraints is of particular importance to a claimant and respondent, as it may result in rights, otherwise available to them under the Act, being lost (Davenport 2000).

Under § 8 of the Act, a claimant has a statutory right to progress payments. Construction contracts must provide for payment claims to be lodged, and payments to be made, at fixed intervals. If the contract makes no express provision with respect to these dates, the default provisions of the Act apply. The Act also deems 'paid-when-paid' clauses (as broadly defined under § 12) ineffective in relation to any contractual right to payment under a construction contract.

When the claimant makes a claim for payment, 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 elects not to provide a payment schedule to the claimant, the respondent becomes liable 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.

Where the claimant opts to recover the statutory debt due in a court, the respondent will not be permitted to bring a cross-claim against the claimant or raise any defence in relation to matters arising under the construction contract.

Where the claimant opts to have the dispute as to payment determined by an adjudicator, and the adjudicator's determination is in favour of the claimant, the claimant may file the adjudication determination in a court of competent jurisdiction and automatically obtain judgement for the adjudicated amount, without the need for a summons or a hearing. If the respondent applies to the court to have the judgement set-aside, the respondent will not be permitted to bring a cross-claim against the claimant or raise any defence in relation to matters arising under the construction contract or challenge the substance of the adjudicator's determination. The respondent will also be required to pay into the court (as security) the unpaid portion of the adjudicated amount pending the outcome of that proceeding.

Notwithstanding the options for recovery described above, 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.

Finally, whilst the Act itself does not provide a claimant with a right to recover a debt due from the respondent's principal, this is achievable through the recently amended *Contractors Debt Act 1997* (NSW). The *Contractors Debt Act 1997* has the effect of 'assigning' the principal's obligation to pay the respondent to the claimant, to the extent of the statutory debt due.

AWARENESS OF THE ACT BY THE CONSTRUCTION INDUSTRY PARTICIPANTS

The first stage of the research assessed the level of awareness of the Act from responses of 85 organisations who were largely small and large plumbing subcontractors.

Over 80% of the sampled firms were well established in the industry with over 10 years in business. However, they were largely small firms in terms of the number of employees and the annual turnover with less than 5 people and less than A$1 million turnover respectively. The remaining firms were larger organisations employing more than 20 people and turning over more than A$5 million. Most firms operated in either residential or commercial sectors of the construction industry.

Since the Act was designed to protect organisations, subcontractors in particular, from receiving late payments, it was surprising to find that 15% of the respondents had never heard of the Act. There were no significant differences in responses between small and large firms, although small firms tended to be more ignorant of the Act than larger firms.

Although two-thirds of the respondents claimed to have sound knowledge of the Act, curiously only about half of them endorsed progress claims as being made under the Act. And of those who did, only about one-sixth ever pursued recovery of progress claims through a formal adjudication process. This appears to contradict their belief in having sound knowledge of the Act. The findings tend to suggest that their knowledge of the Act is superficial only, and that they lack in-depth understanding of the processes formulated by the Act for the recovery of payment claims. In that light it is not surprising that they were only moderately satisfied with the Act. The lack of awareness and knowledge of the Act emerged as the key issues impeding successful operation of the Act and achieving its potential benefits. No significant differences in responses among different types of respondents (stratified in terms of number of employees, turnover and years in business) were found.

Organisations making more payment claims under the Act tended to know more about the Act. Organisations who had better knowledge of the Act were more convinced of its benefits in reducing the incidents of late and de-valued payments, and in creating a fair and balanced payment standard. More firms believed that the Act works better in reducing the frequency of arbitrary devaluation of payments than in reducing the incidence of late payments. Only about a half of the respondents endorsed payment claims as being made under the Act, and of those who did, only about 16% have pursued a payment claim through the formal adjudication process. The reluctance to pursue recovery of progress payment claims through a formal adjudication process

was perhaps the most surprising result. Organisations specialising in the non-residential sector made more claims under the Act than those who sourced their work from the residential sector.

The tendency of the sampled firms to by-pass adjudication is related to their belief that it provides no guarantee of securing a payment. They prefer, at least for the time being, to employ other means of payment recovery, for example withholding labour or relying on the provisions of the *Contractors' Debt Act 1997*.

The overall level of satisfaction of the respondents with the Act was assessed as only slightly above the average. With regards to specific features of the Act such as simplicity, speed of payment recovery, improving security of payment and value for money, the results varied between 2.1 – 2.9 on the scale from 5 to 0, where 5 represented the highest level of satisfaction and 0 the lowest (see Table 1).

Table 1: The degree of satisfaction with specific features of the adjudication process.

Features of the adjudication process	Average level of satisfaction
Simplicity of the process	2.5
Speed of payment recovery	2.1
Improving security of payment	2.6
Value for money	2.8
Fairness to the parties	2.9
Overall satisfaction with the outcome	2.7

A PRELIMINARY ASSESSMENT OF ADJUDICATION DETERMINATIONS

This section of the paper examines emerging trends in adjudication determinations. At the time of writing, the authors have collected a sample of 34 adjudication determinations from an authorised nominated authorities (ANA). An ANA is a statutory body created under the Act that receives adjudication applications, nominates adjudicators on its panel, and issues adjudication certificates.

The sample is not large enough to While the sample is rather small to be representative,representative; it nevertheless it provides useful information about outcomes of and the emerging trends in adjudication determinations in the construction industry in New South Wales.

The majority of sampled adjudication determinations (around 70% of cases) involved subcontractors (as claimants) and contractors (as respondents). The remainder involved contractors (as claimants) and principalsles/clients as (respondents). The amount of disputed payment claims ranged from $8,000 to $1.8 million.

The submission of a payment schedule is a significant step in the adjudication process. The failure to provide a payment schedule renders the respondent liable to pay the whole of the claimed amount as a statutory debt owed. In all but four cases respondents provided a payment schedule in accordance with the Act upon being served with a payment claim. It is not clear why four respondents did not provide a payment schedule. It may well be that they intended to pay the claim in full. It may also be that they were not prepared to pay the claim under the Act.

When the payment schedule was provided, the amount of a payment claim that respondents were willing to pay to claimants (ie. the scheduled amount) varied from 100% to 0%, with the 0% amount being most common (in around 70% of cases). In

20% of cases the scheduled amount in the payment schedule was less than the claimed amount.

It is interesting to note that in the three cases respondents, who were contractors, indicated in the payment schedule their willingness to pay the full amount of a payment claim but actually failed to pay the claimed amount by the due date. The first respondent's reason was not having cash on hand, the second respondent argued that the respondent has not yet received a payment from the principal/client and the third respondent's cheque bounced. Those are undoubtedly examples of respondents' tactics of delaying payments.

The most common reason given by respondents for paying a nil amount of a payment claim was that the payment claim was invalid under the Act. This was mainly because:

- it was not made on the date specified in the contract;
- it was submitted 12 months after the work under the contract has been completed (ii.e., after the expiration of the statutory period under the Act);
- it did not clearly identify the work under the contract;
- it was submitted on the wrong reference date;
- it referred to the work that did not fall under the contract;
- it was made after the respondent has terminated the contract;
- it did not include a statutory declaration or certification prescribed in the contract,; and
- the respondent has not yet received a payment from the principal/client.

When respondents stated in the payment schedule that they would pay a lesser amount of a payment claim, they attempted to justify deductions from payment claims for reasons such as:

- back-charges for defects and breach of contract;
- variations, delay costs and interest claimed by claimants but not yet approved or not authorised by respondents;
- liquidated damages and delay costs caused by claimants,; and
- incorrectly calculated variations.

The examination of the sample of adjudication determinations shows that claimants have largely been successful in obtaining either the full or partial amount of payment claims in adjudications. Only in three cases have adjudicators awarded a zero amount of a payment claim to claimants (see Table 2).

Table 2: Adjudicated amounts awarded by adjudicators.

The adjudicated amount	Percentage of determinations
Same as the claim	59
Smaller than the claim	4132
Nil	9

With regard to the apportioning of the adjudication fee, respondents were in most cases required to pay the full amount of fee, (see Table 3).

Table 3: Apportioning the adjudication fees.

Party	Percentage of cases
Respondent	85
Claimant	3
Both (50 percent each)	12

Adjudicators awarded claimants the full amount of their payment claims in 20 cases (around 60% of responses). In all cases, adjudicators made respondents to pay the full amount of an adjudication fee.

It is interesting to note that when adjudicators awarded a nil amount to claimants (in 3 out of 34 cases), only in one case was the claimant required to pay the full amount of the adjudication fee. In the other cases, the adjudicators determined that the fee to be shared apportioned equally between the claimant and the respondent. Due to the small sample size, the authors have found no apparent explanation of the conflicting adjudicators' decisions on the apportionment of the adjudication fee.

A similar disparity in apportioning the adjudication fees was found in those cases where the adjudicated amount was less than the claimed amount but greater than zero (in 32% of cases). In the vast majority of such cases adjudicators preferred the respondent to pay the adjudication fee. However, there were two cases in the sample where the fee was to be paid equally by the claimant and the respondent.

RECENT COURT CASES ARISING FROM ADJUDICATION DETERMINATIONS

This section of the paper examines recent decisions from the Supreme Court of New South Wales (NSWSC) in relation to the adjudication process. At the time of writing, the authors have collected a sample of 15 decisions.

Although small, the sample is nevertheless helpful in providing initial information about the approaches taken by legal advocates and the outcomes of judicial challenges of adjudication determinations, the judiciary's interpretation of the role of the adjudicator, and the emergence of trends. The sample of cases used by the authors is listed below (see Table 4).

Table 4: The sample of reported cases from the NSWSC.

Case	CITATION OF REPORTED CASES
1	*Bourke Road Pty Ltd v Boxster Constructions Pty Ltd* [2001] NSWSC 717
2	*Baulderstone Hornibrook Pty Limited v HBO+DC Pty Limited* [2001] NSWSC 821
3	*Hawkins Construction v Mac's Industrial Pipework* [2001] NSWSC 815
4	*Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395
5	*Tooma Constructions Pty Ltd v Eaton & Sons Pty Ltd* [2002] NSWSC 514
6	*Beckhaus Civil Pty Ltd v The Council of the Shire of Brewarrina* [2002] NSWSC 960
7	*Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266
8	*Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365
9	

***Paynter Dixson Constructions v JF & CG Tilston & Anor* [2003] NSWSC 869**

10 *Emag Constructions v Highrise Concrete Contractors (Aust.)* [2003] NSWSC 903

11

***Abacus Funds Management Ltd v Davenport & Ors* [2003] NSWSC 1027**

12

***Musico & Ors v Davenport & Ors* [2003] NSWSC 977**

13 *Brodyn Pty Ltd t/a Time Cost and Quality v Philip Davenport & Ors* [2003] NSWSC 1019

14

***Pasquale Lucchitti t/a Palluc Enterprises and Ors v Tolco and Anor* [2003] NSWSC 1070**

15

***Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140**

Around 85% of the cases sampled were related to disputes involving principals/clients, general contractors and subcontractors. The remaining cases involved consultants and suppliers.

The first seven cases in Table 4 (cases 1–7) involved payment claim disputes under the Act in which claimants did not proceed to adjudication. In the absence of adjudication determinations, those cases involved disputes over the imposition of statutory demands prescribed under the Act. All of those cases were decided prior to May 2003 and were related to the unamended version of the Act.

The remaining 8 cases in Table 4 (cases 8–15) were decided by the NSWSC since May 2003. They fall under the amended version of the Act, which was introduced in March 2003 and in all cases involved disputes over adjudication determinations.

Interestingly, the rise in cases involving disputes over adjudication determinations occurred only after the introduction of the amended Act, which commenced in March 2003. Therefore, it would appear that the introduction of the amended Act has opened the way for applying the adjudication process under the Act to its fullest extent. This in turn has given legal advocates and judges the opportunity to closely scrutinise the role of adjudicators and test the degree of compliance of adjudication determinations with the provisions of the Act.

Two significant trends have emerged from the examination of the sampled cases. The first and the preceding trend is related to an attempt by lawyers to frustrate the adjudication process by seeking injunctive relief from the NSWSC. The purposes for seeking an injunction has been to either: prevent an adjudicator from making a determination (as in case 9); prevent a claimant from obtaining an adjudication certificate from the respective authorised nominating authority (ANA) after an adjudication determination has been released by the adjudicator (as in cases 11 and 14); or prevent a claimant from enforcing judgement after lodging an adjudication certificate in a court of competent jurisdiction (as in case 12). However, the results show that a plaintiff's rate of success in being granted injunctive relief by the court for the purposes previously mentioned is relatively low (one in four cases). Although no specific conclusions should be drawn from such a small sample of cases, it

nevertheless seems that the court, at present, is reticent to interfere with the adjudication process, by not granting injunctive relief.

The second, and more recent trend, is related to an approach taken by lawyers to frustrate the adjudication process by seeking relief in the nature of 'certiorari' (a form of dicretionary relief) in order to have an adjudicator's determination quashed. The sampled cases (8, 10, 13 and 15) show that lawyers argue certiorari should be granted by the court on basis that the adjudicator has made a jurisdictional error in arriving at the determination, and that the plaintiff (usually the respondent to an adjudication) has been denied natural justice. The significance of this line of argument is the proposition that an adjudication determination of an adjudicator is susceptible to judicial review in much the same way as a court or tribunal. This proposition has been endorsed by the court. Therefore, it would appear that the court has catagorised the role of an adjudicator as 'quasi-judicial' rather than being that of a mere certifier (Davenport 2004).

Notwithstanding the quasi-judicial nature of the adjudicator's role under the Act, the NSWSC (in case 12) has made it clear that it does not wish to interfer with the original purpose of the Act and will not unduly intervene in its operation. With that in mind, it is interesting to note that of the four cases (cases 8, 10, 13 and 15) that dealt with the issue of certiorari, 50% have resulted in the adjudicator's determination being quashed. At this point in time it is unclear what direction the NSWSC will take on the issue of 'certiorari' with respect to adjudication determinations in the future.

DISCUSSION

Of particular interest, this research shows a high incidence of a nil amount of payment claims being scheduled by respondents in payment schedules. The unwillingness of respondents to pay, together with the large array of reasons given for declining to pay, suggests that respondents continue to draw on whatever means available to delay payments. This point was illustrated in the research sample where, in three cases, the respondents failed to pay the full amount of the respective claims by the due date despite agreeing to do so in their payment schedules.

The results show that the adjudication process gives claimants a high chance of obtaining the full or partial amount of a payment claim. In the research sample, claimants were awarded the full amount of payment claims in around 60% of cases.

The emerging trend in adjudications is that when the claimant is fully or partially successful in adjudication (i.e. the adjudicator awards the full or less than full amount of a payment claim to the claimant), the respondent is commonly required to pay the full amount of the adjudication fee. Interestingly, even when the claimant is unsuccessful and is awarded a nil amount by the adjudicator, the respondent may still be required to pay a half of the fee.

Investigation of the recent court cases arising from adjudication determinations indicates that judicial interpretation of the Act is still at a formative stage. This is not surprising given its relative newness and the novel character of the Act itself. The most controversial decisions thus far relate to certiorari, where its application to adjudication determinations is a point of contension amongst commentators. The authors direct involvement in the adjudication process suggests that the court, with respect, has incorrectly catagorised the role of the adjudicator as a tribunal for the purposes of granting certiorari. Unlike a tribunal, the adjudicator does not make final determination as to the rights of the parties, so is not a decider of disputes per se. The

role of the adjudicator is merely to make a determination as to the amount of progress payment due to the claimant (if any), and to make the determination within a limited time frame, without the power to call witnesses or receive submissions under oath.

It remains to be seen how the court will approach future applications for certiorari, and what effect this will have on the perfomance and popularity of the adjudication process in the minds of industry participants, particularly subcontractors. However, it is suggested that if the court does not use restaint with respect to the judicial review of adjudication determinations, it is likely that the object and performance of the Act will be undermined, and so diminish the value of the Act to industry participants.

CONCLUSIONS

The findings of stage one of the research show the lack of awareness of the Act and its potential benefits among subcontractors.

Analysis of the past adjudication determinations has shown that claimants have a high probability of success of in being awarded either the full or a partial amount of a payment claim, and that respondents are commonly required to pay the full adjudication fee, even when a claimant is only partially successful to adjudication.

While it appears that claimants have an excellent chance of being awarded the full or a partial amount of a payment claim, it is unclear whether or not they are actually successful in recovering payment under the Act. The authors are presently investigating this issue.

Examination of the recent court cases uncovered two significant trends. Firstly, applications for injunctive relief to frustrate the adjudication process have been largely unsuccessful. Secondly, a high proportion of applications in the nature of ‘certiorari’ are being granted to quash adjudicator’s determinations. The second of these trends has thus been identified as a potential threat to the object and the satisfactory performance of the Act.

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