

Review of the performance of security of payment legislation in New South Wales

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Abstract

The *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) was introduced 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. In 2004, the authors undertook an empirical study of the Act to assess its performance, the results of which have been previously reported. In 2007, the authors conducted a follow-up empirical study of the Act to re-assess its performance. Data for the research was collected using a comprehensive multiple-choice questionnaire. In total, 1,360 questionnaires were mailed out to members of two peak trade associations operating in NSW. A total of 317 duly completed questionnaires were returned by mail directly to the authors for statistical analysis. Although the results show that the culture of making late payments remains well entrenched in the construction industry, there appears to be a modest downward trend in the frequency of late payments since the 2004 study. It is now reasonably certain that the act of endorsing payment claims encourages communication between the parties, thus providing an opportunity for early dispute avoidance or resolution. The level of knowledge of the Act amongst subcontracting organisations overall has not improved since the 2004 study and may have even declined. It is clear that contractors and subcontractors are not taking full advantage of the Act.

Keywords: performance, New South Wales, security of payment

1. Introduction

In 2004, the authors attempted to assess the performance of the *Building and Construction Industry Security of Payment Act* (1999) NSW ('the Act') through a survey administered to claimants (hereafter referred to as the '2004 study'). The data for the 2004 study was sought from a random sample of 400 members of The Master Plumbers & Mechanical Contractors Association of NSW. The 2004 study

was prompted by some significant changes made to the Act by the NSW Parliament.¹ The amendments commenced in March 2003. The details of the amendments may be found in Davenport (2004). The results of the initial research, including the 2004 study, have been disseminated through journal and conference papers; see for example Brand and Uher (2004a), (2004b), (2005) & (2007), and Uher and Brand (2005a), (2005b), (2007a), (2007b) (2008a) & (2008b). The main findings of the 2004 study were that knowledge of the Act amongst small contractors and subcontractors was low; claimants were generally successful at adjudication; and there was very low use of the adjudication process as a means of recovering payment.

Some four years after the Act was amended, and three years after the 2004 study, the authors initiated follow-up research in 2007 aiming to re-assess the performance of the Act in the light of strong demand for adjudication of payment claims in New South Wales (Brand and Uher 2007). It was expected that with the passage of time that small contractors and subcontractors would have better working knowledge of the Act and its operation. The purpose of this paper is to report on some of the findings of the follow-up research.

2. Background to the ‘security of payment’ issue

In August 2001, the Honourable Terence Cole was appointed a Federal Royal Commissioner to inquire into a range of matters relating to the Australian building and construction industry. This Royal Commission was the first national review of the conduct and practices in the Australian construction industry (Cole, 2003). One of the issues before the Commissioner was ‘security of payment’ in the Australian construction industry. In February 2003, the Commissioner presented his Final Report (comprising 23 volumes) to the Australian Governor-General. The Commissioner gave his recommendations in respect of the security of payment issue in Volume 8 of the Final Report. In sum, the Commissioner considered the security of payment issue to be one of national relevance.

In the present context ‘security of payment’ is a generic term used to describe “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” (NSW Government 1996, p. 41). Thus, the security of payment problem is 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” (Commonwealth of Australia 2002, p. 7). In general, the security of payment problem relates to the arbitrary devaluation, late payment and/or non-payment of progress claims. It is a persistent problem for those who perform construction work, or supply

¹ See *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW).

goods and services, in the construction industry. In the second reading speech, the NSW Minister for Public Works and Services, Hon. Morris Iemma (1999), stated:

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...The [New South Wales] Government is determined to rid the construction industry of such totally unacceptable practices (p. 103).

According to Brand and Uher (2004a), the tactic of principals and contractors in delaying payments, or unduly reducing the value of payments, is designed to enhance their positive cash flow at the expense of subcontractors and suppliers. To recover payments due under a contract, subcontractors and suppliers have generally relied on one or more of traditional dispute resolution processes, such as arbitration (if available under the contract) and/or litigation. However, the prohibitive costs and time delays involved in recovering payment under these processes has often led subcontractors and suppliers to simply abandon their right to payment and to move onto another projects in order to maintain cash flow.

The Act was introduced in an attempt to counter the security of payment problem in NSW. 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 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”.² To achieve this objective, the Act has introduced new statutory rights for claimants, such as: a right to progress payments;³ a right to interest on late payments;⁴ a right to suspend work;⁵ and a right of lien.⁶ The Act also renders void ‘payed-when-payad’ clauses in construction contracts,⁷ and the parties cannot contract out of the Act.⁸

In addition, the Act introduced a unique form of rapid adjudication of disputes over progress payment amounts whereby an independent adjudicator makes an interim determination as to the amount of progress payment to be paid to a claimant by a respondent. Only a claimant can initiate the adjudication process, however, both parties are entitled to make submissions to the adjudicator (subject to s. 20(2B) of the Act). An adjudicator can only be appointed by an Authorised Nominating

² *Building and Construction Industry Security of Payment Act* (1999) NSW s. 3.

³ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 8(1).

⁴ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 11(2).

⁵ *Building and Construction Industry Security of Payment Act* (1999) NSW ss. 15(2), 16(2), 24(1).

⁶ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 11(3).

⁷ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 12(1).

⁸ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 34.

Authority (ANA) chosen by the claimant.⁹ The procedures and timeframes in relation to the adjudication process are strict and governed solely by the Act. An adjudicator's determination, while not final, is binding on the parties¹⁰ until the dispute is resolved by private agreement, a court, or some other process. If the respondent does not pay the adjudicated amount by the relevant date,¹¹ the adjudicator's determination is then capable of being registered as a judgement in a court of competent jurisdiction via a relatively straightforward administrative process prescribed under the Act,¹² and is enforceable accordingly.¹³ If, subsequently, a respondent applies to the court to have the judgment set aside, the respondent will not be entitled to bring a cross-claim against the claimant,¹⁴ or to raise any defence in relation to matters arising under the construction contract¹⁵ or to challenge the determination by the adjudicator,¹⁶ (other than on grounds of an adjudicator's jurisdiction). In addition, the respondent must pay into court as security the unpaid portion of the adjudicated amount pending the outcome of that proceeding.¹⁷

New South Wales was the first Australian jurisdiction to introduce this form of legislation. At the time the Final Report was presented, only New South Wales and Victoria¹⁸ had construction industry specific security of payment legislation in operation. The Victorian legislation was closely modelled on the Act in its unamended form. However, since that time the Act and the corresponding Victorian legislation have undergone significant amendments.¹⁹ This has resulted in a significant divergence in the comparative operation and effect of these Acts, notwithstanding that both maintain virtually identical objectives. Since the Final Report was presented, Queensland,²⁰ Western Australia²¹ and the Northern Territory²² have all enacted construction industry specific security of payment legislation. The Queensland legislation is closely modelled on the Act (as amended). The Northern Territory legislation, on the other hand, is largely modelled on the Western Australia legislation, which, in turn, is largely modelled on the UK²³ and New Zealand²⁴ 'construction contracts' legislation. The uptake of security of payment legislation in Australia continues with the introduction of the Building and Construction Industry Security of Payment Bill 2007 into the Legislative Council of the South

⁹ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 17(3)(b).

¹⁰ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 23(2).

¹¹ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 23(1).

¹² See *Building and Construction Industry Security of Payment Act* (1999) NSW ss. 24, 25.

¹³ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 25(1).

¹⁴ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 25(4)(a)(i).

¹⁵ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 25(4)(a)(ii).

¹⁶ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 25(4)(a)(iii).

¹⁷ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 25(4)(b).

¹⁸ *Building and Construction Industry Security of Payment Act 2002* (Vic).

¹⁹ See *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW); and *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic).

²⁰ *Building and Construction Industry Payments Act 2004* (Qld).

²¹ *Construction Contracts Act 2004* (WA).

²² *Construction Contracts (Security of Payments) Act 2004* (NT).

²³ *Housing Grants, Construction and Regeneration Act 1996* (UK) pt. 2.

²⁴ *Construction Contracts Act 2002* (NZ).

Australian Parliament in September 2007. The Bill is closely modelled on the Act (as amended). At the time of writing, the remaining Australian jurisdictions of Tasmania, Australian Capital Territory and the Commonwealth have not introduced security of payment legislation.

In addition to the United Kingdom and New Zealand legislation previously mentioned, Singapore²⁵ has in operation security of payment legislation, which is largely modelled on the Act (as amended).

3. Sample composition

Given that the overriding objective of the Act is to provide improved security of payment, particularly for subcontracting firms, the authors decided to source data for this research from subcontracting organisations operating within the NSW construction industry. Two peak trade associations, namely, The Master Plumbers & Mechanical Contractors Association of NSW and the National Electrical & Communications Association (NSW Chapter) (NECA) agreed to participate in the research. While it was expected that, in the contractual sense, most sampled firms would be subcontractors (i.e., the firms being in a contract with a contractor), some firms, particularly larger ones, were also expected to be contractors under a contract as a result of sub-letting part of the scope of their works to other firms (i.e., subcontractors).

The data for this research was collected using a comprehensive multiple-choice questionnaire in March 2007. The questionnaire comprised 23 questions. The questionnaire was divided into two parts: the first part comprised five questions, which attempted to collect data on: the type of sampled organisations; the number of years in business; the size of organisations (in terms of the number of employees and annual turnover); and the types of project the responding firms typically worked on. The second part of the questionnaire attempted to assess the responding firm's working knowledge of the Act and hands-on experience with the adjudication process as claimants (i.e., a party making a payment claim under the Act).

The abovementioned Associations agreed to mail out survey questionnaires directly to their members. The questionnaire was tested on a selected sample of five claimants. In total, 1,360 questionnaires were mailed out of which 317 were duly completed and returned by firms identified as claimants (either subcontractors or contractors). This represents a response rate of about 23%, which is regarded by the authors as an acceptable rate for this type of survey. The volume of data obtained from the questionnaires was considered by the authors to be sufficiently large to permit a statistical analysis. The sample comprises about one-third 'Contractors' and two-thirds of 'Subcontractors', who indicated to have been claimants under the Act. The sample composition aggregated in terms of 'Years in

²⁵ *Building and Construction Security of Payments Act 2004* (Singapore).

Business', 'Number of Employees', 'Turnover' and 'Project Type' is given in Tables 1, 2, 3 & 4 below respectively.

Table 1 shows that just over three-quarters of the sample have more than 10 years of experience in the construction industry with the proportion of 'Contractors' and 'Subcontractors' in this category being about the equal (see below).

It was also found that the sampled firms with less than 10 years in business are relatively small firms in terms of the number of employees than those sampled firms having more than 10 years of business experience (Chi-sq = 9.516; 0.009, 2 df).

Table 1: Sample composition aggregated in terms of 'Years in Business'.

Type of firm	Years in business		Total
	Less than 10 years	More than 10 years	
Contractor	24 (21%)	88 (79%)	112
Subcontractor	49 (24%)	156 (76%)	205
Total	73 (23%)	244 (77%)	317

Furthermore, Tables 2 and 3 show that about three-quarters of the responding firms employ less than 10 people, and two-thirds of them have the annual turnover less than \$1million. Again, the proportion of 'Contractors' and 'Subcontractors' in the aggregated sample is about the same. The responding firms were found to be relatively small, both in terms of 'Number of People Employed' and 'Turnover'.

Table 2: Sample composition aggregated in terms of 'Number of Employees'

Type of firm	Number of employees			Total
	Less than 5	Between 5 to 10	Over 10	
Contractor	56 (50%)	28 (25%)	28 (25%)	112
Subcontractor	91 (44%)	56 (28%)	58 (28%)	205
Total	147 (46%)	84 (27%)	86 (27%)	317

Table 3: Sample composition aggregated in terms of 'Turnover'

Type of firm	Turnover			Total
	Less than \$500,000	Between \$500,000 and \$1,000,000	Over \$1,000,000	
Contractor	52 (46%)	20 (18%)	40 (36%)	112
Subcontractor	74 (36%)	48 (23%)	83 (41%)	205
Total	126 (40%)	68 (21%)	123 (39%)	317

Finally, Table 4 shows that in terms of 'Type of Project' the sampled firms predominantly work on either residential or commercial projects. As can be seen, the proportion of those projects in the sample is very similar.

Table 4: Sample composition aggregated in terms of ‘Type of Project’

Type of firm	Type of project			Total
	Residential	Commercial	Other	
Contractor	53 (47%)	50 (45%)	9 (8%)	112
Subcontractor	79 (39%)	99 (48%)	27 (13%)	205
Total	132 (42%)	149 (47%)	36 (11%)	317

4. Results

4.1 Level of knowledge of the Act

The sampled firms were asked to indicate their personal level of knowledge of the Act. Tables 5 and 6 below show the level of perceived personal knowledge of the Act by firm type and years in business respectively.

Table 5: Personal level of knowledge of the Act by firm type.

Type of firm	Personal level of knowledge				Total
	High	Moderate	Low	None	
Contractor	12 (11%)	45 (40%)	46 (41%)	9 (8%)	112
Subcontractor	30 (15%)	76 (37%)	82 (40%)	17 (8%)	205
Total	42 (13%)	121 (38%)	128 (41%)	26 (8%)	317

Table 6: Level of knowledge of the Act by years in business.

Years in business	Personal level of knowledge				Total
	High	Moderate	Low	None	
Less than 10 years	10 (14%)	24 (33%)	28 (38%)	11 (15%)	73
More than 10 years	32 (13%)	97 (40%)	100 (41%)	15 (6%)	244
Total	42 (13%)	121 (38%)	128 (41%)	26 (8%)	317

The results of the study showed that the more established firms (i.e., those in business for over 10 years) have marginally better knowledge of the Act than the less established firms (Chi-sq = 6.259; 0.100, df =3). Furthermore, the level of knowledge among the sampled firms is significantly different in regard to the size of the firm when measured in terms of the number of employees. It was found that small organisations (in terms of ‘Number of Employees’ and ‘Turnover’) have a significantly lower level of knowledge than larger organisations (Chi-sq = 24.325; 0.000, df =6 and Chi-sq = 29.735; 0.000, df =6 respectively). This suggests that the long-established and large firms have significantly better knowledge of the Act than smaller less established firms.

Finally, although the aggregation of the sample in terms of ‘Type of Project’ produces a small count for the purpose of statistics, the results indicate that the sampled firms working predominantly on

commercial projects have better knowledge of the Act than those working on residential and ‘other projects’.

The sampled firms also were asked to indicate their firm’s perceived level of knowledge of the Act. The results are given in Table 7 below.

Table 7: Your firm’s level of knowledge of the Act.

Type of firm	Firm’s level of knowledge			Total
	High	Moderate	Low/none	
Contractor	17 (17%)	33 (32%)	53 (51%)	103
Subcontractor	27 (14%)	75 (40%)	86 (46%)	188
Total	44 (15%)	108 (37%)	139 (48%)	291

They show that just over a half of the sampled firms have ‘Low/none’ level of knowledge. This result is similar to the personal level of knowledge of the Act reported in Table 5. Although the results suggest that ‘Contractors’ know less about the Act than ‘Subcontractors’, the results are not statistically significant to draw any firm inferences (Chi-sq = 1.763; 0.414, df =2).

The level of knowledge of the Act among the sampled firms measured in terms of ‘Number of People’ employed and ‘Turnover’ varies significantly and shows that larger organisations have generally better knowledge of the Act than smaller organisations (Chi-sq = 12.092; 0.017, df =4; Chi-sq = 11.412; 0.022, df =4).

In sum, considering the length of time the Act has been in operation, it is surprising to find that around half of the firms (almost in equal proportions between ‘Contractors’ and ‘Subcontractors’) admitted to having low or no knowledge of the Act. By comparison, the 2004 study indicated that around one-third of the sample rated their knowledge of the Act as ‘low’, ‘very low’ or ‘non-existent’. As a result of that finding, Brand and Uher (2004a) concluded that “it appears necessary to assist organisations such as subcontractors and suppliers in developing a sound knowledge of the operation of the Act and its potential benefits through a range of awareness and training programs”. A comparison of the pertinent results indicates that the level of knowledge of the Act amongst subcontracting organisations operating within NSW construction industry has, at best, not improved since the 2004 study, and has perhaps declined somewhat over the intervening period. Thus, the recommendation stated by Brand and Uher (2004a) remains valid.

4.2 Frequency of late payments

The responding firms were asked to indicate how often they receive late payments. The results are shown in Table 8 below.

Table 8: Frequency of late payments.

Type of firm	Late payment				Total
	Always	Often	Sometimes	Rarely/never	
Contractor	11 (10%)	44 (39%)	36 (32%)	21 (19%)	112
Subcontractor	22 (11%)	68 (33%)	65 (32%)	50 (24%)	205
Total	33 (11 %)	112 (35%)	101 (32%)	71 (22%)	317

The results indicate that 78% of firms generally experience late payment to varying degrees of severity, with almost half indicating that they receive late payment ‘often’ or ‘always’. The study showed that there is no significant difference in the incidence and degree of late payment as between ‘Contractors’ and ‘Subcontractors’, although ‘Subcontractors’ are shown to fair slightly better in this regard. It was also found that small firms with less than 5 employees, and firms with a turnover less than \$500,000 receive late payments more often than organisations employing more than 5 persons and those with a higher turnover (Chi-sq = 18.709; 0.005, df = 6 and Chi-sq = 18.731; 0.005, df = 6 respectively).

A comparison of the results of the 2004 study with those shown in Table 8 above indicates that there has been a decrease in the incidence of late payment. The 2004 study showed that: 13% of responding firms ‘always’; 38% of responding firms ‘often’; and 41% of responding firms ‘sometimes’ receive late payments. Thus, the follow-up study shows that a total of 14% fewer firms reported to have received late payments than in the 2004 study.

In addition, the study shows that 22% of responding firms report that that they ‘rarely/never’ receive late payment. A comparison of the results of the 2004 study with those shown in Table 6 shows that there has been an increase in the proportion of responding firms indicating that they ‘rarely/never’ receive late payments; the results of the 2004 study showed that: 8% of responding firms ‘rarely’; and 0% of responding firms ‘never’ receive late payment. Thus, the follow-up study shows that a total of 14% more firms reported to have received payments on time than in the 2004 study.

In sum, the results show that the culture of making late payments is well entrenched in the NSW construction industry. Nevertheless, the results indicate a modest downward trend in the frequency of late payments since the 2004 study. However, without further examination of this apparent trend, it is not possible to categorically attribute the decline in the frequency of late payments to the introduction of the Act. However, the authors consider this result to be adequately sizable to indicate that the introduction of the Act may have, at least in part, contributed to the decline in the frequency of late payments. Further study is recommended to monitor this apparent trend.

4.3 Impact of the Act on late payments

In addition to asking the sampled firms to indicate how often they receive late payments, they were also asked to indicate if, to their mind, the occurrence of late payment of progress claims has decreased since the introduction of the Act. The results are shown in Table 9 below.

Table 9: Impact of the Act on late payments.

Type of firm	Impact of the Act on late payment		Total
	Yes	No/not sure	
Contractor	16 (14%)	96 (86%)	112
Subcontractor	37 (18%)	168 (82%)	205
Total	53 (17%)	264 (83%)	317

A significant minority (i.e., 17%) of firms indicated they have experienced a decrease in the frequency of late payments since the introduction of the Act. It was also found that sampled firms employing more than 10 persons and those working in the commercial sector of the construction industry have experienced decline in the frequency of late payments since the introduction of the Act (Chi-sq = 7.351; 0.025, df =2 and Chi-sq = 5.141; 0.076, df = 2 respectively).

This result adds further to the suggestion (at 4.2 above) that the introduction of the Act may have, at least in part, contributed to the apparent decline in the frequency of late payments.

4.4 Frequency of endorsement of payment claim

Under section 13(2)(c) of the Act the claimant may only rely on the provisions of the Act in respect of a payment claim so long as the payment claim states that it is made under the Act. Consequently, the sampled firms were asked how often they endorse payment claims as being made under the Act. The results are shown in Table 10 below.

Table 10: Frequency of endorsement of payment claim.

Type of firm	Frequency of endorsement			Total
	Always	Usually	Never	
Contractor	37 (36%)	29 (28%)	37 (36%)	103
Subcontractor	88 (47%)	40 (21%)	60 (32%)	188
Total	125 (43%)	69 (24%)	97 (33%)	291

Although showing no statistical significance, the results nevertheless suggest that around one-third of the sampled firms ‘never’ endorse payment claims as being made under the Act. However, the size of the organisation, both in terms of ‘Number of People’ employed and ‘Turnover’, has a significant impact on the frequency of endorsement of payment claims (Chi-sq = 38.287; 0.000, df =4 and Chi-sq

= 47.269; 0.000, df =4 respectively); the results clearly show that the larger a firm is the greater the frequency of endorsement.

The results show that about two-thirds of respondent firms either 'always' or 'usually' endorse payment claims as being made under the Act. By comparison, the results of the 2004 study showed that about half of the respondent firms either 'always' or 'usually' endorse payment claims as being made under the Act. On the face of it, this is a noteworthy increase in the frequency of payment claim endorsement. This is thought to be attributable, at least in part, to a greater awareness of the requirement under the Act to endorse payment claims or, at a more general level, a higher acceptance of the Act by respondent firms as a viable means of payment recovery than that previously exhibited.

Significant differences in responses were also found with regard to 'Type of Project', whereby payment claims related to residential projects were found to be much less frequently endorsed as payment claims under the Act than commercial and 'other types' of projects (Chi-sq = 26.421; 0.000, df =4). The reason for this trend is not clearly obvious. However, it is speculated that because about two-thirds of organisations that have principally worked on residential projects are smaller firms, in terms of 'Number of People' employed and 'Turnover', so may not have been familiar with the Act and its requirement of endorsement of payment claims. The result may also be related to the fact that a contract formed between the contractor and the owner/occupier of a residential building work (within the meaning of the *Home Building Act 1989*) is expressly excluded from the Act.²⁶

Importantly, however, the Act does not exclude subcontractors from making valid payment claims under the Act against contractors who provide residential or domestic work to an owner/occupier, regardless of whether or not the contract between the contractor and owner/occupier is of a type excluded by the Act. Thus, subcontractors' misapprehension on this point might also be a reason for the trend.

4.5 Impact of endorsement of payment claim on the working relationship

An attempt was made to assess the impact (if any) of endorsement of payment claims on the working relationship of the parties to a claim, the sample firms were asked to indicate how often the endorsement of progress claims negatively impacted (if at all) on their organisation's working relationship with the other party. The results are given in Tables 11 & 12 below.

²⁶ *Building and Construction Industry Security of Payment Act* (1999) NSW s. 7(2)(b).

Table 11: Impact of endorsement on the working relationship aggregated by ‘Type of Firm’.

Type of firm	Negative impact of endorsement			Total
	Always/often	Rarely	Never	
Contractor	15 (24%)	16 (26%)	31 (50%)	62
Subcontractor	20 (16%)	43 (35%)	61 (49%)	124
Total	35 (19%)	59 (32%)	92 (49%)	186

Table 12: Impact of endorsement on the working relationship aggregated by ‘Years in Business’.

Years in business	Negative impact of endorsement			Total
	Always/often	Rarely	Never	
Less than 10 years	10 (26%)	11 (29%)	17 (45%)	38
More than 10 years	25 (17%)	48 (32%)	75 (51%)	148
Total	35 (19%)	59 (32%)	92 (49%)	186

Around half of responding firms felt that endorsement of payment claims negatively affects to some degree the working relationship between the parties to a payment claim, with around 20% responding that endorsement of payment claims negatively affects the working relationship ‘always/often’. By comparison, the 2004 study showed that almost 90% of the responding firms generally did not feel they experienced any adverse impact on their working relationship with the other contractual party as a result of endorsing progress claims. In addition, although not statistically significant, the results indicate that the negative impact of endorsement is felt more often by less established firms (in terms of ‘Years in business’) than more established firms.

Similarly, although not statistically significant, the results indicate that the negative impact of endorsement is felt more often by firms working in the residential sector of the construction industry than by those working on commercial projects. It was also found that smaller firms in terms of ‘Number of People’ employed experience the negative impact of endorsement more often than larger firms (Chi-sq = 8.085; 0.089, df =4).

The character of the ‘negative impact’ was not specified by the responding firms. However, Brand (2005) suggests that the negative impact might be the perceived commercial effects of victimisation, that is, “[a claimant’s] perceived concern that if a claim for payment is endorsed under the Act...then the [claimant] risks losing future work opportunities, or risks being treated unfairly in some other way, as a result” (p. 5).

In sum, the results show that there has been a shift in claimants’ perception of how the endorsement of payment claims affects the working relationship between the parties to a payment claim; the perception is clearly a more negative one than reported in the 2004 study. The reason for this shift in perception is not clear. A reason maybe that, since the Act has had a further three years in operation

since the 2004 study, respondents' have become more familiar with the operation of the Act, in particular, with the adjudication process, so perceiving endorsement of payment claims as a potential risk to their usual mode of dealing with payment claims. If so, it is reasonable to suggest that a negative reaction from respondents' may ensue in reply to an endorsed payment claim, conceivably along the line suggested by Brand (2005).

4.6 Endorsement of payment claims and the reduction, if any, of late payments

An attempt was made to assess whether endorsement of payment claims reduces occurrence of late payments. The results are given in Table 13 below.

Table 13: Endorsement of payment claims and the reduction, if any, of late payments.

Type of firm	Impact of endorsement on late payment			Total
	Yes	No	Not sure	
Contractor	12 (19%)	35 (57%)	15 (24%)	62
Subcontractor	32 (26%)	63 (51%)	29 (23%)	124
Total	44 (24%)	98 (53%)	44 (23%)	186

The results show that about one-quarter of the sampled firms indicated that endorsement of payment claims reduces occurrence of late payments. About the same proportion of responding firms indicated that they are not sure if endorsement of payment claims reduces occurrence of late payments.

In sum, the results suggest that the introduction of the Act has had a noteworthy impact in reducing the incidence of late payment of progress claims, and appears to add weight to the inferences considered at 4.2 and 4.3 above.

Furthermore, although no significant differences in responses were found in respect of the 'Type of Firm', the results suggest that 'Subcontractors' have experienced fewer delays in receiving payments when payment claims were endorsed under the Act than 'Contractors'. The reason for this result is unclear, however, it maybe that contractors are generally more familiar or more experienced with the operation of the Act than principals/clients, prompting fewer delays in receiving payments for 'Subcontractors'.

4.7 Impact of endorsement of payment claims on communication between the parties

An attempt was made to assess the extent to which endorsement of payment claims encourages communication between the parties to a payment claim. The reason for seeking responses on this point was to ascertain if the endorsement of payment claims provided a catalyst for communication between

the parties with the view that it may encourage an early opportunity for dispute avoidance or resolution. The results are given in Table 14.

Table 14: Impact of endorsement on communication between the parties.

Type of firm	Impact of endorsement on communication			Total
	Yes	No	Not sure	
Contractor	23 (37%)	23 (37%)	16 (26%)	62
Subcontractor	51 (41%)	50 (40%)	23 (19%)	124
Total	74 (40%)	73 (39%)	39 (21%)	186

Although not statistically significant, the results show that about 40 percent of the sampled firms have indicated that endorsement of payment claims as being made under the Act encourages communication. By comparison, the 2004 study showed that the views of the responding firms were evenly divided on this point. Thus, there appears to be little (if any) significant change in the response to the question asked on this point since the 2004 study. Nevertheless, it appears from the follow-up study that endorsement of payment claims is providing a catalyst for communication between the parties, thus the opportunity for early dispute avoidance or resolution.

4.8 Has the Act created a fair and balanced payment standard?

The sample firms were asked to indicate if, from their organisation’s perspective, the Act created a fair and balanced payment standard for construction contracts. The results are given in Table 15 below.

Table 15: Fair and balanced payment standard

Type of firm	Fair payment standard			Total
	Yes	No	Not sure	
Contractor	30 (29%)	30 (29%)	43 (42%)	103
Subcontractor	76 (40%)	45 (24%)	67 (36%)	188
Total	106 (36%)	75 (26%)	110 (38%)	291

The results indicate that most of the firms that gave an unambiguous response to this question (i.e., answered either ‘yes’ or ‘no’) are satisfied that the Act has created a fair and balanced payment standard. Interestingly, ‘Subcontractors’ appear more convinced that the Act has created a fair and balanced payment standard than ‘Contractors’, who appear evenly split on the issue. Around 40% of all responding firms appear undecided on the issue, which is consistent with the result of the 2004 study.

It was also found that smaller firms in terms of ‘Number of People’ employed and ‘Turnover’ are less satisfied that the Act has created a fair and balanced payment standard than larger firms (Chi-sq = 12.658; 0.013, df =4 and Chi-sq = 12.262; 0.016, df =4 respectively). There is no clear reason for this

result. However, it may be related to the finding (at 4.1 above) that larger organisations generally have better knowledge of the Act than smaller organisations.

5. Conclusions

In the light of current strong demand for adjudication of payment claims in New South Wales, the Act has arguably succeeded in gaining the support of the significant portion of the construction industry to which it applies. On this basis, it would appear that the object of the Act is generally being achieved.

As for the follow-up study, although the results show that the culture of making late payments remains well entrenched in the construction industry, there does appear to be modest downward trend in the frequency of late payments since the 2004 study. This finding appears to be supported by other results of the study in that a significant minority of firms indicated they have experienced a decrease in the frequency of later payments since the introduction of the Act. Specifically, it was found that larger firms, and firms working in the commercial sector, have experienced a decline in the frequency of late payments since the introduction of the Act. Nevertheless, since it is expected that such a behavioural shift (if any) would be gradual, the finding must be treated with some caution at this point. In order to draw any firm conclusion in relation to this apparent trend, further study is recommended.

Secondly, it is now becoming clear that the requirement under the Act of endorsing payment claims encourages communication between the parties, thus providing an opportunity for early dispute avoidance or resolution. Conversely, the results indicate a notable negative shift since the 2004 study in claimants' perception of how the endorsement of payment claims affects the working relationship between the parties. Further study is recommended to confirm, or otherwise, that early dispute avoidance or resolution comes about as a result of endorsing payment claims.

Finally, the results indicate that the level of knowledge of the Act amongst subcontracting organisations overall has not improved since the 2004 study, and may have even declined. Based on this result, it is clear that contractors and subcontractors are not taking full advantage of the Act, and the Act is being significantly under-utilised by those who have the most to benefit from it. Thus, it is recommended that those with a vested interest in improving contractors' and subcontractors' working knowledge of the Act must take the necessary steps to achieve that aim.

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