

SECURITY OF PAYMENT IN THE TASMANIAN BUILDING AND CONSTRUCTION INDUSTRY

*Final Report for the Minister Administering the
Building Act 2000*

Version 1.0



DOCUMENT CONTROL

Document Location

This document is only valid on the day it was printed.

File Location:	C:\Documents and Settings\nick.STENNINGASSOC\My Documents\Current Projects\Security of Payment\Reports\Security of Payment - Draft Report Version 1.0.doc
-----------------------	---

Revision History

Date of next revision:

Version #	Author	Summary of Changes	Cleared by
1.0	Nick McShane	Final for acceptance	Nick McShane

Final Approvals

This document requires the following approvals for release to client.

Name	Signature	Title	Date of Issue	Version
Nick McShane	Released via email	Managing Director	12 Jun 2006	1.0

Distribution

This document has been distributed to:

Name	Purpose	Date of Issue	Version
G Hunt	Acceptance of Final	12 June 2006	1.0



STENNING *a n d* **ASSOCIATES**

Pty Ltd

*Office 1, 51 Salamanca Place
Hobart, Tasmania 7000*

*GPO Box 881
Hobart, Tasmania 7001*

Ph: 03 6223 8499 Fax: 03 6223 5760

Email: enquiries@stenning-assoc.com.au

CONTENTS

Executive Summary	1
1 Introduction	7
1.1 Purpose	7
1.2 Background	7
1.3 Methodology	8
2 Nature of the Problem	9
2.1 The Security of Payments Issue	9
2.2 National Policy Responses.....	12
2.3 Situation in Other Jurisdictions.....	13
3 The Situation in Tasmania	15
3.1 Current Arrangements.....	15
3.2 Evidence of a Problem.....	19
3.3 Relevant Legislative Developments in Tasmania.....	26
4 Options and Recommendations	27
4.1 Options	27
4.2 Analysis of Options.....	28
4.3 Summary	34
5 Legislative Responses in Australia	35
5.1 Legislative Models.....	35
5.2 Performance of Models.....	38
5.3 Recommended Model.....	39
6 Implementation Issues	41
6.1 Registration of Adjudicators.....	41
6.2 Alignment With Other Proposed State Legislation	41
6.3 Administrative Arrangements	42
6.4 Performance Assessment	42
6.5 Funding Support.....	43
7 Bibliography.....	45
Attachment A – Analysis of Jurisdictional Security of Payment Legislation	46
Attachment B – Survey Methodology	54
Attachment C – Tabulated Survey Results	60

GLOSSARY

APCC	Australian Procurement and Construction Council
APCMC	Australian Procurement and Construction Ministerial Council
AS	Australian Standard
BCIPA	Queensland Building and Construction Industry Payments Act
BSR	Building Standards and Regulation
CAFT	Consumer Affairs and Fair Trading
Cole Royal Commission	Royal Commission into the Building and Construction Industry by Justice, the Hon. Terence Rhoderic Hudson Cole RFD QC.
CPR	Contractor or Consultant Performance Report
DIER	Department of Infrastructure, Energy and Resources

DISCLAIMER

Stenning & Associates Pty Ltd has developed this report in association with The Work Lab Inc. This has required reliance on information sourced from various publications and websites, through and industry survey and through direct discussions and email communications with a range of stakeholders. While all due care has been taken in compiling this report, Stenning & Associates Pty Ltd and The Work Lab Inc accepts no responsibility for the accuracy or completeness of information gained from these sources and recommends that readers exercise their own skill and care with respect to its use. We will not be responsible for any loss, however arising, from the use of, or reliance on this information.

EXECUTIVE SUMMARY

In response to industry representations through the Tasmanian Building and Construction Industry Council, the Minister administering the *Building Act 2000* identified a need for a report in relation to the issue known within the building and construction industry as “Security of Payment”.

“Security of Payment” relates to the late payment or non-payment of firms within the building and construction industry by other contracting parties also within the industry.

This report provides analysis and recommendations to the Government on the extent of the problem in Tasmania, the experience in other States and Territories, possible legislative or other interventions to lessen the problem and the appropriate administrative responsibility for any intervention or communication program.

The building and construction industry traditionally operates on the basis of a “contracting chain”, where there can be a range of entities involved in completing a building or construction project, all linked by bilateral contracts. A feature of the chain is that the sub-contracting parties further down the chain (the “subbies”) are often much smaller in terms of financial size and resources than those further up the chain.

Importantly, the experience in the industry is that many of the participants in the chain are poorly or thinly capitalised, resulting on a significant reliance on cash flow to sustain their business operations.

In this context, the security of payments issue in the building and construction industry relates to poor payment practices between contracting parties within the contracting chain. Such practices include:

- **Late** payment – eg where the time taken to make payment is beyond the contracted payment period. This problem can range from the delayed payment of a single invoice, or habitual late payment of invoices.
- **Partial** payment of an invoice – where payment is withheld for any reason; or
- **Non-payment** of a building professional for **any part of the contracted building works** by end customers, developers or head contractors.

All these practices can result in participants in the building and construction industry not being paid in full and on time for work that they have completed, despite the fact that they have a contractual right to be paid.

These practices can be compounded by the use of contracts that include “Paid when paid” or “paid if paid” clauses. Such clauses can be inherently unfair as they can result in parties being denied payment for reasons that are out of their control.

Governments around Australia have addressed the security of payment issue through a number of approaches. These have included the adoption in 1996 by the Australian Procurement and Construction Ministers Council (APCMC) of national principles for addressing security of payment issues and the introduction by most mainland jurisdictions of legislation specifically designed to address the security of payment problem.

Unlike most mainland jurisdictions, Tasmania does not presently have legislation dealing with security of payments in the building and construction industry. Further, Tasmania is not a member of the APCMC and hence has not adopted all principles and guidelines agreed nationally by that Council.

Nevertheless, Tasmania has a range of policy settings in place that can reduce the extent of security of payments problems in the industry, principally in relation to government contracts. These include:

- Implementation of the APCC’s *National Code of Practice for the Construction Industry*, with the production in 1998 the Tasmanian Annexure to the National Code. This policy is only applicable to inner-Budget agencies. Government Business Enterprises, statutory authorities and State-owned companies are not obliged to comply with the Code as there are no legislative means available to

require them to comply with Government policy.

- A whole-of-government procurement policy, which includes the use of pre-qualification registration systems for contractors and consultants in the building and construction industry.
- The use of Australian Standard contracts for building and construction work.
- As part of the general contract conditions on contracts undertaken by pre-qualified contractors, a requirement that those contractors provide with each payment claim a statutory declaration that they have paid all monies owing to their sub-contractors and suppliers up to the date of that claim.
- The requirement that all Agencies actively assess the performance of contractors and consultants in order to manage risk through the preparation of Contractor or Consultant Performance Reports (CPRs). The performance of contractors in relation to their payment of sub-contractors is a performance criterion against which contractors can be rated when Agencies prepare CPRs.

Officers from the Department of Treasury and Finance and two of the major agencies involved in building and construction procurement (The Departments of Health and Human Services and Infrastructure, Energy and Resources) advised that they were not aware of any of payment problems relating to government building and construction contracts.

Despite these measures, the Tasmanian Building and Construction Industry Council has expressed serious concerns regarding security of payments problems within the industry. A survey of its peak body members undertaken by the Council in early 2005 revealed that, of the 15 industry peak bodies that responded, 9 of them indicated that security of payments problems was an issue for their members.

A range of activities undertaken as part of compiling this report confirmed that the Tasmanian building and construction industry does experience security of payment problems of a non-trivial nature. While the predominate type of security of payment problem experienced was late payment, the incidence of partial and non-payment problems were significant.

These activities included:

- Consultations with a representative range of peak industry organisations;
- A broad based industry survey that provided statistically significant findings; and
- Case study telephone interviews with seven respondents that had indicated they had experienced security of payment problems.

Results of the industry survey

- Some 43 percent of those surveyed reported experiencing security of payment problems over the last financial year.
- In the sample of businesses surveyed, security of payment problems affected over \$37 million dollars of revenue flow last financial year, with an average of 25 percent of the revenue being affected of those who indicated they experienced such problems.
- The most predominate form of security of payment problem experienced was late payment. Of those who experienced security of payment problems in the last financial year:
 - 81 percent experienced it in the form of late payments;
 - Around 48 percent experienced it in the form of partial payments; and
 - 43 percent experienced it in the form of non-payment.
- Of those businesses reporting security of payment issues last financial year:
 - 63 percent were engaged by the end customer,
 - 12 percent were engaged by another building professional; and,
 - 24 percent were engaged by both the end customer and another building professional.
- Whether or not a business experienced security of payment problems in the last financial year was unrelated to:
 - Whether work was conducted for the end customer or another building professional;
 - The region in which the business is based;

- The sector of the construction industry in which the business operates;
- The percentage of work undertaken in either the commercial or industrial sector.
- Whether or not a business experienced security of payment problems in the last financial year was found to be related to the percentage of work undertaken in the residential sector. Two trends were apparent.
 - Businesses that conducted between 26-50 percent of their work in the residential sector were more likely to report payment issues.
 - Businesses working almost exclusively in the residential sector (76% or more of their business) were less likely to report payment issues.
- For those businesses that experienced security of payment problems in the last financial year, the incidence of such problems was reported to be increasing when compared with four years previously.
- Although some businesses had not experienced security of payment problems over the last financial year, 81 percent of the sample reported significant payment problems in the past.
- The most common actions taken to recover outstanding payments involved 'chasing' end customers for outstanding monies. Legal action, mediation and collection agencies were also utilised, but to a far lesser degree, with court action the least favoured course of action.

These findings are realistic, as there is no real evidence or rationale to suggest that the Tasmanian building and construction industry is structurally or operationally significantly different from that in other jurisdictions, other than with respect to matters of industry scale. Further, it is in keeping with:

- The findings of the Cole Royal Commission into the Building and Construction Industry generally regarding the existence of security of payment problems in the building and construction industry nationally; and
- The assessment of nearly all mainland jurisdictions that have introduced legislative measures to assist in resolving the problem. Such legislation is primarily aimed at providing a speedy resolution mechanism for payment disputes. This is achieved through defining the rights of the parties and providing access to rapid adjudication for the resolution of payment disputes.

It is not possible to say from the survey results whether the situation is any worse or better than was experienced in other jurisdictions prior to their introduction of legislative responses to the security of payment problem. This is due to an absence of directly comparable survey data from interstate.

Nevertheless, the results suggest that, *prima facie*, the security of payments problem that exists in the Tasmanian building and construction industry is of a scale that warrants the Government's consideration of potential remedies.

As a result of an analysis of the options available for addressing the security of payments problem, including an examination of the legislative models used in mainland jurisdictions, the report makes the following recommendations:

Recommendation 1

It is recommended that the Tasmanian Government:

- Formally adopt the 8 national principles¹ of conduct applying to security of payment issues agreed by the APCMC in 1996.
- Incorporate these principles into its current procurement policy responses.

Recommendation 2

It is recommended that the Tasmanian Government, through the Building and Construction Industry Council, implement a training and information program to improve the industry's understanding of how to properly manage contractual arrangements and hence how to deal with or avoid security of payment problems.

¹ National Action on Security of Payment in the Construction Industry, APCC, Adelaide 1996.

Recommendation 3

It is recommended that the Tasmanian Government:

- Agree in-principle to introduce security of payments legislation along the lines of which has been introduced in other jurisdictions.
- Establish a consultative forum to assist in the development of the legislation. This forum should involve the Building and Construction Industry Council and Consumer Affairs and Fair Trading.
- Agree that the key principles that should be observed when developing the legislative response are that it should be:
 - Consistent with existing interstate security of payment legislative models (see also recommendation 4);
 - Easy to administer and low cost to maintain;
 - Fair and equitable to all contracting parties that are affected by the legislation;
 - To the extent possible, a sound basis for extending the concept of rapid adjudication to contractual issues other than those concerned with payment.
- Agree in-principle that the security of payments legislation should be linked to Building Practitioner Accreditation under the *Building Act 2000*.
 - This agreement should be followed by investigations as to the best way of achieving this link.

Recommendation 4

It is recommended that, when consulting with industry on the form of security of payment legislation that may be introduced, the Tasmanian Government indicate an initial preference for legislation based on that used by NSW, Queensland and Victoria.

Recommendation 5

It is recommended that, when developing security of payment legislation, alternative methods other than adjudicator registration be examined to determine mechanisms for ensuring that industry is able identify and engage appropriately skilled adjudicators.

Recommendation 6

It is recommended that, when developing security of payment legislation, discussions be held with Consumer Affairs and Fair Trading regarding the potential for security of payments legislation to provide the basis for a general alternative dispute resolution process for residential building contracts.

Recommendation 7

It is recommended that the administrative responsibility for security of payments legislation and the associated communications program should be given to Consumer Affairs and Fair Trading within the Department of Justice.

Recommendation 8

It is recommended, when developing security of payment legislation, that arrangements be put in place to enable the collection of relevant metrics relating to the performance of the legislation. These metrics should be consistent with those metrics collected by mainland jurisdictions that have security of payment legislation.

Recommendation 9

It is recommended that an initial review of the proposed security of payments legislation should be completed by the end of the first three years of operation of the legislation. Later reviews should take place at 5-year intervals.

Recommendation 10

It is recommended that:

- There be no user-pays funding mechanisms be imposed to fund the government administration of the proposed security of payments legislation for the initial three years of its operation.
- The potential be investigated for funding the development and ongoing operation of the legislation through the Building Administration Fund.



This page is intentionally blank

1 INTRODUCTION

1.1 Purpose

In response to industry representations through the Tasmanian Building and Construction Industry Council, the Minister administering the *Building Act 2000* identified a need for a Report to Government in relation to the issue known within the building and construction industry as “Security of Payment”.

This Report provides analysis and recommendations to the Government on the extent of the problem in Tasmania, the experience in other States and Territories, possible legislative or other interventions to lessen the problem and the appropriate administrative responsibility for any intervention or communication program.

In this report, the building and construction industry is taken to include all industry undertaking all residential and commercial building and all civil (government and private sector infrastructure construction and maintenance).

1.2 Background

“Security of Payment” relates to the late payment or non-payment of firms within the building and construction industry by other contracting parties also within the industry.

In 1996, the Australian Procurement and Construction Council (APCC) Ministers Council adopted 8 national principles² applying to security of payment issues. These principles were designed to form the foundation for the program of national action to be undertaken by all government jurisdictions to help resolve the security of payment issue.

As a consequence of this national agreement, state and territory governments have put in place a number of initiatives aimed at reducing the security of payment problem. One of the most significant initiatives has been the introduction by most jurisdictions of legislation specifically designed to address the security of payment problem. These legislative responses essentially focus on assisting the flow of money between contracting parties who are in dispute about the right to payment. This commenced with the introduction by NSW of the *Building and Construction Industry Security of Payment Act 1999*, followed by similar legislation that has been progressively implemented across all jurisdictions bar South Australia and Tasmania.

More recently, in 2003 the Royal Commission into the Building and Construction Industry by Justice Cole³ (Cole Royal Commission) also made significant findings on the need for national reforms to tackle the security of payment problems within the industry. These findings were based on extensive consultations with industry across all states and territories.

The Tasmanian Government, through the Building Standards and Regulation (BSR) section of Workplace Standards Tasmania, has for some time kept a watching brief on this issue. In March 2005 the Building and Construction Industry Council wrote to the Department of Infrastructure, Energy and Resources (DIER) expressing its support for a legislative scheme providing greater security of payments for contractors. Further, representatives of the plumbing industry met with the Minister in May 2005 to press the case for legislation and provided a significant research contribution.

As a consequence of these approaches, the Government decided to commission a report on the issue. Subsequently, the Department engaged Stenning & Associates Pty Ltd to provide a report to the Government on:

² *National Action on Security of Payment in the Construction Industry*, APCC, Adelaide 1996.

³ Honourable Terence Rhoderic Hudson Cole RFD QC

- The extent of the security of payments problem in the Tasmanian building and construction industry;
- The experience in other States and Territories in implementing legislative responses to this issue;
- Possible legislative or other interventions to lessen the problem; and
- The appropriate administrative responsibility for any intervention or communication program.

1.3 Methodology

The methodology employed in the development of this report has included:

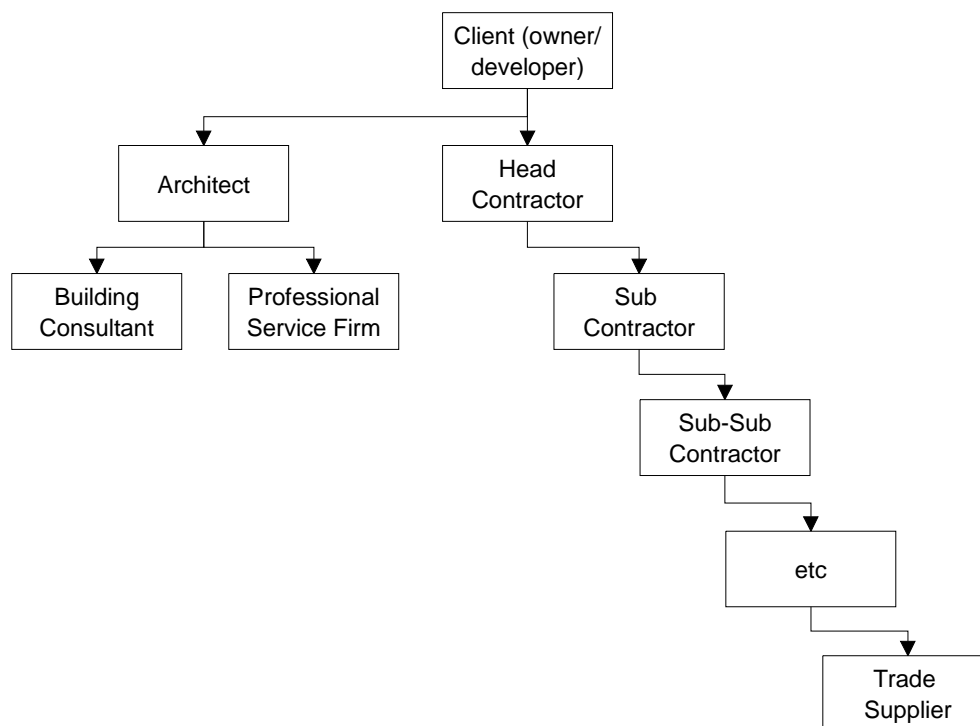
- An initial environmental scan – involving selected consultations with peak industry bodies and desktop research. This culminated in a Scoping Report that confirmed the scope of the report and the final project methodology.
- A quantitative survey of building and construction industry participants that gathered evidence on the extent of the security of payment problem in Tasmania.
- Desktop research and consultations with other jurisdictions to determine their approaches to resolving the security of payment problem.
- Consultations with a number of Tasmanian Government agencies regarding current policy and legislation and pending initiatives that are relevant to the security of payment problem.
- Developing a number of case studies that illustrate the nature and implications of security of payment problems in Tasmania.
- Preparing a Final Report detailing the outcomes of the project and containing recommendations and a Consultation Report outlining the consultation approach taken for the project.

2 NATURE OF THE PROBLEM

2.1 The Security of Payments Issue

The building and construction industry traditionally operates on the basis of a “contracting chain”, where there can be a range of entities involved in completing a building or construction project, all linked by bilateral contracts. Figure 1 illustrates the nature of this “contracting chain”.

Figure 1 Illustrative outline of the "contracting chain" in the building and construction industry



A feature of the chain is that the sub-contracting parties further down the chain (the “subbies”) are often much smaller in terms of financial size and resources than those further up the chain.

Importantly, the experience in the industry is that many of the participants in the chain are poorly or thinly capitalised, resulting on a significant reliance on cash flow to sustain their business operations.

These features were recognised by the Australian Procurement and Construction Council (APCC), which stated in 1996 that:

The structure of the construction industry is a multi-tiered hierarchy of principals, agents, contractors, sub-contractors and suppliers, with cascading payment obligations. The industry in Australia has quite low capital backing and a heavy reliance on cash-flows to sustain business.⁴

In this context, the security of payments issue in the building and construction industry relates to poor payment practices between contracting parties within the contracting chain. Such practices include:

- **Late** payment – eg where the time taken to make payment is beyond the contracted payment period. This problem can range from the delayed payment of a single invoice, or habitual late payment of invoices.
- **Partial** payment of an invoice – where payment is withheld for any reason; or

⁴ National Action on Security of Payment in the Construction Industry, APCC, Adelaide 1996.

- **Non-payment** of a building professional for **any part of the contracted building works** by end customers, developers or head contractors.

All these practices can result in participants in the building and construction industry not being paid in full and on time for work that they have completed, despite the fact that they have a contractual right to be paid.

These practices can be compounded by the use of contracts that include “Paid when paid” or “paid if paid” clauses. Such clauses can be inherently unfair as they can result in parties being denied payment for reasons that are out of their control.

Characteristics of the security of payment problem include:

- The problem can often take time to become apparent.
 - This can be illustrated by a hypothetical example. Say subcontractor X commits to a contract with contractor Y that is expected to run for 5 months, with provision for monthly progress payments with 30 day payment terms. At the end of 30 days, X submits a progress payment claim. Sixty days into the contract, the initial progress payment claim has not been paid – so X follows up with Y. At this stage, X also submits a second progress payment claim for work undertaken in the second month. It takes Y 10 days to respond to X, indicating that the payment for the first invoice will be forthcoming soon. X continues to fulfil the contract, hoping that diligent work will build a good rapport with Y. Y then makes a partial payment on the first progress payment. The remainder of the initial progress payment has not materialised by the beginning of the fourth month, at which time X realises that the same thing is happening with the second progress payment invoice. X is now more than half-way through the contract and only has partial payment of the first progress payment invoice to show for all the work that has been completed. It transpires at this stage that the cause of Y’s tardiness is delayed payments to Y by the end client, on the basis of disputes over variations to Y’s contract with the client – none of which have anything to do with the work being undertaken by X.
- There is an imbalance those parties seeking payment and those that have commissioned the work.
 - Subcontractors seeking payment can often be at a disadvantage as they have usually completed substantial work and have limited working capital, particularly compared to head contractors. As observed by the Cole Royal Commission⁵:

Frequently [subcontractors] do not have the expertise or resources to enforce their legal rights, because enforcement would require protracted litigation against much better resourced and more sophisticated companies.
 - In many cases, subcontractors simply keep working on a contract in the hope that they will be fully paid once the contract ends.
- Seeking resolution of security of payment problems can be costly and there is no guarantee of success.
 - In most cases, the only recourses that subcontractors have, apart from persuasive means, are to either withdraw their services, seek formal dispute resolution (if their contract provides for this option) or to seek redress through lawyers and the courts. The former course of action can have the adverse effect of delaying payment even further. Formal dispute resolution processes can help resolve the issue, but these are not always available. Even where they are, they can be time consuming exercises and the parties are not always bound by the outcomes. The latter course is expensive and time consuming, with the legal and court costs often exceeding the amount sought.

The Cole Royal Commission identified a number of potential causes of security of payment problems in the industry:

⁵ *The Final Report of the Royal Commission into the Building and Construction Industry*, Volume Eight, Reform – National Issues Part 2, February 2003, page 262

1. *The operation of 'rogue' builders, who deliberately delay or avoid the payment of subcontractors;*
2. *Builders using non-payment of existing claims as a bargaining tool to reduce subsequent claims;*
3. *Builders who are in financial difficulty and do not have the cash flow to pay subcontractors; and*
4. *Builders that become insolvent and cannot pay the full amounts owing to their creditors, including subcontractors.*⁶

Regardless of the cause of security of payment problems, the consequences of the problems within the building and construction industry is severe financial stress on subcontractors, sometimes leading to financial failure. The situation was neatly stated by the Hon. R. E. Schwarten, Queensland Minister for Public Works, Housing and Racing when introducing security of payments legislation in the Queensland Parliament in March 2004:

*While bad debts are not unique to the building and construction industry, the industry is particularly vulnerable to payment problems because it generally operates under a hierarchical chain of contracts. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow and in some cases insolvency.*⁷

As far back as 1996 the APCC recognised the significance of security of payment issues in the industry, commenting that:

*The inability to assure payments may occur at any level in the hierarchy. There is a popular perception however, that the worst problems occur with payments from head contractors to specialist sub-contractors and other suppliers further down the contractual chain. As sub-contractors and suppliers provide 80-90% of trade work associated with projects, their risk level of non-payment is high. The problems are worse when a participant higher in the contractual chain becomes insolvent, and when the sub-contractor is indebted to other sub-contractors and suppliers.*⁸

The fall-out of security of payment problems on a party in the contracting chain can also in turn affect that party's workers, who may not only lose employment, but also any entitlements. Finally, the financial failure of any enterprise affects other enterprises and suppliers and adds to the cost of building and risks to consumers.

The Cole Royal Commission was unequivocal in its assessment of the significance of the security of payment problem in the industry, stating:

*Security of payment was raised with the Commission during public hearings, in meetings that I held with interested parties, in interviews conducted by Commission investigators, and in submissions to the Commission. It quickly became apparent that it is an issue that critically affects the ability of participants in the industry to make a living and to be rewarded for work that they have performed. During the course of their investigations, Commission investigators have repeatedly been told of the suffering and hardship caused to subcontractors by builders who are unable or unwilling to pay for work from which they have benefited. The subcontractors who experience payment problems are often small companies or partnerships. Frequently they do not have the expertise or resources to enforce their legal rights, because enforcement would require protracted litigation against much better resourced and more sophisticated companies. Consequently, subcontractors that have operated profitably and well for many years can be forced into liquidation through no fault of their own, often with devastating consequences for the owners of these businesses, their families, their employees and their creditors.*⁹

⁶ *The Final Report of the Royal Commission into the Building and Construction Industry*, Volume Eight, Reform – National Issues Part 2, February 2003, page 231

⁷ Queensland Legislative Council Hansard, 18 May 2004, pages 71-72.

⁸ *National Action on Security of Payment in the Construction Industry*, APCC, Adelaide 1996.

⁹ *The Final Report of the Royal Commission into the Building and Construction Industry*, Volume Eight, Reform – National Issues Part 2, February 2003, page 229

2.2 National Policy Responses

The Australian Procurement and Construction Council Inc (APCC) is the peak council of departments responsible for procurement, construction and asset management policy for the Australian, State and Territory governments. New Zealand is an associate member. It should be noted that Tasmania is not a member of the APCC.

The APCC reports to the Australian Procurement and Construction Ministerial Council (APCMC), comprising Ministers with direct responsibilities for procurement and construction matters.

As indicated in Section 1.2, the APCMC agreed on 15 January 1996 to adopted 8 national principles¹⁰ of conduct applying to security of payment issues. These principles have been adopted by governments in their dealings with the construction industry¹¹. They focus on trying to address the underlying causes of security of payment problems, primarily through the role of governments as purchasers of construction and related services. The 8 national principles are:

1. Participants have the right to receive full payment as and when due;
2. All cash security and retention monies should be secured for the benefit of the party entitled to receive them;
3. Payment periods lower in the contractual chain should be compatible with those in the head contract;
4. Outstanding payments to participants, to the extent consistent with Commonwealth and State legislation, should receive priority over payments to other unsecured creditors;
5. All construction contracts should provide for non payment to be a substantial breach;
6. All construction contracts should make provision for alternative dispute resolution mechanisms;
7. Only those parties who have the financial and technical capacity and business management skills to carry out and complete their obligations should participate in the industry; and
8. All construction contracts in the contractual chain should be in writing.

APCMC member governments have been responsible for implementing these principles through a range of mechanism and initiatives. The national actions and strategies that have been applied across jurisdictions as a result of these principles include:

- Prequalification of contractors and consultants based on their financial, technical and management capacity.
- Implementing Codes of Practice and Codes of Tendering.
- Requiring prompt payment of subcontractors by head contractors.
- Requiring the use of back-to-back payment conditions between head and sub-contracts to ensure contracts conditions are compatible.
- Requiring head contractors to provide proof of payment down the contracting chain.
- Requiring that the use of alternative dispute resolution processes be a prerequisite to arbitration/litigation in head/sub-contracts.
- Excluding the use of payment restrictions (no “pay when paid” or “pay if paid” contracting provisions) in head/sub-contracts.

¹⁰ *National Action on Security of Payment in the Construction Industry*, APCC, Adelaide 1996.

¹¹ Tasmania was not a party to this decision. The Department of Treasury and Finance has advised that “This is not to say that Tasmania does not support the principles, but it should be noted that this policy has not been signed off by the Tasmanian Government.”

- Requiring head contractor performance guarantees.
- Practice cooperative contracting to prevent conflicts from escalating into claims or disputes.

Furthermore, security of payment receives significant focus in the *National Code of Practice for the Construction Industry*¹². The Code states that:

Security of Payments, in the context of Best Practice, means a:

- *Responsibility on claimants for accurate and timely preparation, documentation and submission of claims*
- *Responsibility on each party to consider, process, pay and finalise claims in a reasonable and timely manner*
- *Requirement on each party to a claim to address, negotiate and settle any dispute in a reasonable, timely and cooperative way, and*
- *Requirement by contractors, subcontractors, consultants and suppliers and employers to fulfil applicable industrial award and/or enterprise or workplace agreement or legislative requirements regarding their employees.*

Individual jurisdictions are responsible for applying the Code.

2.3 Situation in Other Jurisdictions

In recent years, the major responses in other jurisdictions to the security of payment problem in the building and construction industry have been legislatively based. **Error! Reference source not found.** summarises the situation.

Table 1: Current Legislative Initiatives in Other Jurisdictions

Jurisdiction	Current Legislation	Administration	Current Status
NSW	<i>Building and Construction Industry Security of Payment Act 1999</i>	Department of Commerce – Office of Fair Trading	Amendments to the Act in 2003 improved the operations of Act and its processes and have resulted in a significant increase in adjudications. A further review of the Act took place during 2004 - responses to the review were positive and supportive of the intentions and operation of the Act.
Victoria	<i>Building and Construction Industry Security of Payment Act 2002</i>	Building Commission of Victoria	The Victorian Act commenced on 31 January 2003, substantially following the NSW approach. A review of the Victorian Act was undertaken in 2005 and, as a consequence, an amending Bill was introduced into Parliament on 9 February 2006. The Bill is currently at 2 nd Reading Speech stage in the Legislative Council.
Queensland	<i>Building and Construction Industry Payments Act 2004</i>	Building and Construction Industry Payments Agency	The Act took effect in full in October 2004. The Act is based on the NSW model, but makes some significant enhancements.
Western Australia	<i>Construction Contracts Act 2004</i>	Department of Housing and Works	The Act commenced on 1 January 2005.
Northern Territory	<i>Construction Contracts (Security of Payment) Act 2004</i>	Department of Infrastructure, Planning and Environment	The Act commenced on 1 July 2005. The Act is modelled on the WA legislation.

¹² *National Code of Practice for the Construction Industry – Towards Best Practice Guidelines*, APCC, 1999

Jurisdiction	Current Legislation	Administration	Current Status
ACT	Nil	-	The ACT is considering the issues and options concerning SOP legislation, but has not made a commitment to introduce legislation.
South Australia	Nil	-	The South Australian Government is in the process of preparing a discussion paper to review the various SOP models. This will provide a basis for making recommendations concerning SOP legislation.
New Zealand	<i>Construction Contracts Act 2002</i>	Department of Building and Housing Ministry of Economic Development	The Act came into force on 1 April 2003.

Interestingly, Singapore also introduced the *Building and Construction Security of Payments Act 2004*, which is based on the New South Wales Act of the same name. This legislation came into operation on 1st April 2005.

It should be noted that a number of jurisdictions have additional legislation specific to contractors or subcontractors that is relevant to the security of payments issue – namely:

- NSW - *Contractors Debt Act 1977*
- Queensland - *Subcontractors' Charges Act 1974*¹³
- ACT – *Contractors Debts Act 1897*
- Northern Territory - *Workmen's Liens Act 1893*
- South Australia - *Worker's Liens Act 1893*

While these Acts vary in their operation, they essentially provide a mechanism for a contracting party to recover an unpaid debt from parties higher up the contracting chain. They do this by allowing an unpaid subcontractor to take a charge, lien or other form of security over payments to their principal contractor from the contractor or client that engaged the principal contractor. For example, if A contracts B to complete some construction work and if B owes C money for work completed relating to that work, then C can take action under the Act to recover from A the debt owed by B.

¹³ Persons are not able to take action to recover payments under both this Act and the Building and Construction Industry Payments Act.

3 THE SITUATION IN TASMANIA

3.1 Current Arrangements

Unlike most mainland jurisdictions, Tasmania does not presently have legislation dealing with security of payments in the building and construction industry. Nevertheless, there is a range of policy settings in place that can reduce the extent of security of payments problems in the industry, principally in relation to government contracts. These settings are outlined below.

3.1.1 Tasmanian Government Procurement Policy

The Tasmanian Government is a significant customer/purchaser within the Tasmanian building and construction industry. This is particularly the case in the non-residential sector in relation to building and construction activities related to health and community services, education, public administration and road construction. For example, over the past 10 years in Tasmania, the public sector has accounted for:

- Almost one third of the value of all non-residential building activity¹⁴.
- Around 64 percent of the value of engineering construction activity (excluding telecommunications activity)¹⁵.

As such, its procurement policies and practices can play a large part in influencing the general conduct of parties within the building and construction industry – particularly in relation to those involved in government contracts.

The Tasmanian Government has a range of procurement policies that are relevant to the securities of payment issue for **government** contracts. Relevant components of these policies are outlined below.

National Code of Practice for the Construction Industry

Tasmania is not a member of the APCC and, consequently, is not a direct party to APCC agreements relating to procurement practices generally or the need to take action to resolve security of payment issues specifically.

However, Department of Treasury and Finance officers advise that the Government does comply with the APCC's *National Code of Practice for the Construction Industry*, with the Tasmanian Government producing in 1998 the Tasmanian Annexure to the National Code. This annexure sets out the Tasmanian Government's commitment to the Code.

This is reflected in the Department's "Winning Government Business" website, which states that:

*The Tasmanian Government is committed to the implementation of the National Code of Practice for the Construction Industry, and the Tasmanian Annexure to the Code. Compliance is a condition of tender for all Tasmanian Government construction projects.*¹⁶

Note that this policy is only applicable to inner-Budget agencies. Government Business Enterprises, statutory authorities and State-owned companies are not obliged to comply with the Code as there are no legislative means available to require them to comply with Government policy. Rather, they operate in accordance with their own legislation (if applicable) and are responsible for implementing their own procurement policies and processes.

¹⁴ Source: ABS Cat. 8752.0 – Building Activity Australia - Value of Non-Residential Building Approved - Tasmania

¹⁵ Source: ABS Cat. 8762.0 Engineering Construction Activity Australia – Value of Work Done - Tasmania

¹⁶ Tasmanian Department of Treasury and Finance "Winning Government Business" website, <http://www.purchasing.tas.gov.au/winninggovernmentbusiness>, 17 Apr. 06.

Pre-qualification of Contractors

The Tasmanian Government has in place a range of policies regarding procurement practices of its budget sector Agencies. In this respect, The Department of Treasury and Finance is responsible for whole-of-government building and construction policy and DIER for specific policies regarding government road and bridge construction and maintenance.

A key strategy involves the use of pre-qualification registration systems for contractors and consultants in the building and construction industry. The Department of Treasury and Finance has put in place a pre-qualification system for building construction and maintenance services, with Treasury's website noting:

To undertake any Tasmanian government agency building construction and maintenance services that exceed \$100 000, contractors must be pre-qualified with the Department of Treasury and Finance.

.....

Contractors satisfying pre-qualification requirements become eligible to tender for works in their designated fields of expertise, up to a specified project cost.

*A register of pre-qualified consultants is maintained by the Department of Treasury and Finance*¹⁷.

A similar pre-qualification system is operated by the DIER for roads and bridges construction works undertaken by government.

The purpose of these pre-qualification arrangements is to assess the financial, managerial and technical resources and competence of firms to execute and complete building and construction work. Pre-qualified firms are classified according to their expertise and capability in specific work categories within a specific financial range and their track records are taken into account during registration reviews. Nominated subcontractors can be used by pre-qualified firms, if required.

Form of Contracts Used

Department of Treasury and Finance officers advise that, in accordance with Public Works Tender Board guidelines, Agencies use Australian Standard contracts for building and construction work. This is illustrated in Table 2.

Table 2: Standard Conditions of Contract Used by Tasmanian Government Agencies¹⁸

Conditions of Contract	Used for
Building and Construction Only Australian Standards conditions of contract may be used for Government contracts with the relevant preliminaries required to be approved by Crown Law	
AS 2124 -1992 General Conditions of Contract	Building contracts with a capital value greater than \$100 000
AS 4905-2002 – Minor Works Contract Conditions	Contracts valued between \$50 000 and under \$100 000
The actual commission brief and contract conditions AS 4122 - 1994, (General Conditions for Engagement of Consultants Australian Standard AS 4122 (INT)-1993)	Building Construction Consultant Contract

¹⁷ Tasmanian Department of Treasury and Finance website, <http://www.treasury.tas.gov.au/domino/df/df.nsf/b1f08d9414e28650ca256f250010a02e/b51b71fbc6ab849ca256fe1000f8f5f?OpenDocument>, 17 April 06

¹⁸ Tasmanian Department of Treasury and Finance website, <http://www.purchasing.tas.gov.au/winninggovernmentbusiness/getpage.jsp?uid=B3E3FF3514F89E07CA256AE6001F720A>, 17 Apr. 06.

Roads and/or Bridges	
Many different standard Conditions of Contract are used but the key ones are:	
Conditions of Contract...	Used for...
AS 4905-2002 Minor Works Contract Conditions	Minor Construction Works (less than \$250 000)
AS 2124-1992 General Conditions of Contract	Construction Works
AS 4300-1995 General Conditions of Contract for Design and Construct	Design and Construct Works
AS 4122-2000 General Conditions of Contract for Engagement of Consultants	Engagement of Consultants

Australian Standard contracts relevant to building and construction generally contain clear standard provisions for progress payments and dispute procedures. It should be noted that these AS contracts do not include “paid when paid” or “paid if paid” clauses.

AS 2124-1992 clauses 42 and 43 contain specific information relevant to payment claims for the contractor and the sub-contractors.

DIER has a Special Conditions of Contract whereby the approval of subcontracts valued over \$50,000 may be conditional on the use of AS 2545 or AS 4303 to mirror the Condition of Contract terms in the Head Contract.

Statutory Declarations on Payments to Sub-Contractors

Department of Treasury and Finance officers advise that, as part of the general contract conditions on contracts undertaken by pre-qualified contractors, those contractors are required to provide with each payment claim a statutory declaration that they have paid all monies owing to their sub-contractors and suppliers up to the date of that claim.

A superintendent may request that the Contractor supply a statutory declaration and documentary evidence, indicating that all moneys have been paid to all those that have been employed by the Contractor to work on the contract prior to the Contractor submitting a claim for payment. If the Contractor fails to provide the statutory declaration and evidence of payment, the Principal may withhold payment of moneys due to the Contractor until the statutory declaration and evidence is supplied.

If any subcontractor obtains and produces to the Principal a court order in respect to moneys owed, the Principal may pay the amount owed, together with the costs of the court order, which will then be considered a debt due from the Contractor to the Principal.

Where a contractor has made a false statement in the Statutory Declaration, this is not considered a breach of contract. Rather, it is a criminal matter under the *Oaths Act 2001*.

Contractor And Consultant Performance Reports

The Public Works Tender Board guidelines (administered by the Department of Treasury and Finance) require that Agencies actively assess the performance of contractors and consultants in order to manage risk.

In the first instance, the client superintendent or project manager should meet with the contractor or consultant to outline shortcomings in their performance under the contract and state the areas of concern. This enables the contractor or consultant an opportunity to rectify the problem. If contractor or consultant performance remains a concern, then Agencies should prepare a Contractor or Consultant Performance Report (CPR) and forward it to the Department of Treasury and Finance. In any event, a CPR should be completed for all contracts worth over \$100 000 for contractors and over \$10 000 for consultants that are either completed or terminated due to unsatisfactory performance.

The performance of contractors in relation to their payment of sub-contractors is a performance criterion against which contractors can be rated when Agencies prepare CPRs. This criterion is part of a broad range of performance criteria that Agencies must rate when preparing CPRs.

The information arising from CPRs is used on a whole-of-government basis to:

*...to assist with the assessment of the technical and management capabilities of contractors and consultants; the continuous evaluation of the public tendering system; the assessment of tenders; and the alerting of superintendents for future projects to areas of a contractor's or consultant's performance that need extra attention during the contract period.*¹⁹

The Department of Treasury and Finance has advised that the Public Works Tender Board Guidelines and Treasury's procurement website are currently being reviewed as part of the Building and Construction Review Project, with the guidelines expected to be replaced by Treasurer's instructions by July 2006. Treasury has noted that many changes are likely to the existing documentation that may alleviate some concerns in relation to security of payment.

DIER requires a Report on Contractor to be completed at Practical Completion of all its contracts. This assessment is to be signed by the Contractor and the results recorded in the Track Record database. The cumulative record for a contractor is used as an evaluation criterion in the next tender assessment that the Contractor is being assessed. Consequently, contractors risk the termination of their registration if there are continued poor performances recorded. Payment problems with subcontractors and suppliers would be actively noted.

3.1.2 Security of Payment Problems in Tasmanian Government Sector

Officers from The Department of Treasury and Finance and two of the major agencies involved in building and construction procurement (The Departments of Health and Human Services and Infrastructure, Energy and Resources) advised that they were not aware of any of payment problems relating to government building and construction contracts.

In their experience, complaints regarding security of payment problems from contractors and sub-contractors are rare and, where they are received, the capacity of Agencies to act is confined to communications and persuasion of the contractor involved, as they are not privy to the details of the contractual arrangements between contractors and sub-contractors. They advised that, nevertheless, given the significant size of the Government as a client in the Tasmanian building and construction industry, they considered such informal mechanisms are often effective in resolving problems relating to government contractors and their sub-contractors.

It is noted, however, that it is possible that the significant size of the Tasmanian Government as a customer/purchaser within the Tasmanian building and construction industry may actually reduce the propensity of its contractors and sub-contractors to lodge complaints about security of payment issues. That is, the high degree of dependency of contractors and their sub-contractors on an ongoing stream of government contracts may reduce their willingness to pursue security of payment complaints – particularly through lengthy dispute resolution procedures. It is considered that, even if this is the situation, the nature of any security of payment problem experienced would more than likely be late payment, rather than partial or non-payment, given that government generally is regarded as a reliable payer.

¹⁹ *Public Works Tender Board Guidelines*, Department Of Treasury And Finance, October 1997 (Update 10 - 09/03/2005), pp 46

3.1.3 Contractor's Debts Act

The *Contractor's Debts Act 1939* provides a legal mechanism "...for the better enforcement of payment of debts by contractors."²⁰ The Act appears to operate similarly to comparable legislation in other Australian jurisdictions as listed in Section 2.3. Specifically, the Act applies where a plaintiff (employee or subcontractor) wants to recover money owed to them by a defendant (contractor) in relation to work carried out by the defendant for an employer (ie, customer). The Act provides a mechanism for the plaintiff recover the money direct from the employer. The first step to achieving this under the Act is to apply for and then enforce an 'Attachment Notice'. The ultimate effect of such a Notice, if proven and upheld is to have the court "attach" to the plaintiff money that the employer would otherwise have to pay to the defendant.

Anecdotal evidence indicates that awareness of the Act is low. Further, neither the Supreme Court nor Magistrates Courts were aware of actions taken under the Act for an 'Attachment Notice'. Accordingly, it is concluded that the Act is in disuse, with actions under the Act rare.

3.2 Evidence of a Problem

In March 2005, the Building and Construction Industry Council advised the DIER that it has written to peak associations to attempt to determine the extent of security of payment problems faced by the Tasmanian building and construction industry. 15 industry peak bodies responded, with 9 of them indicating that security of payments was an issue for their members. The peak organisations that responded in the affirmative were:

- Tasmanian Glass and Aluminium Association
- Master Plumbers Association
- Tasmanian Building and Construction Industry Training Board
- Electrical Contracting Industry Association
- Air-conditioning and Mechanical Contractors Association
- Fire Protection Association
- Association of Professional Engineers, Scientists and Managers, Australia
- Construction, Forestry, Mining and Energy Union
- Communications, Electrical and Plumbing Union

Subsequent discussions with the two unions reveals that their interest in this issue is twofold:

- They have a number of members that are subcontractors who have raised this issue with them; and
- Their members can be directly affected by the fall-out that arises from security of payment problems and their aim is to address the cause of the problems as a means of avoiding the symptoms that arise from security of payment problems.

3.2.1 Industry Consultation

As part of compiling this report, consultation with a representative range of peak industry organisations revealed a range of views on the extent of security of payments problems in the Tasmanian building and construction industry.

²⁰ Tasmanian *Contractor's Debts Act 1939*, Long title

- In accordance with the advice provided by the Building and Construction Industry Council, a number of them considered security of payment problems to be significant within the Tasmanian industry. These organisations tended to be those whose members commonly acted as subcontractors and employee organisations.
- A few organisations recognised that there may be a problem, but were not aware of it significantly affecting their members. These organisations tended to be those that may have both principal contractors and subcontractors as members.
- A number of other organisations did not consider that security of payments problems existed in the industry, particularly in relation to their members. These organisations tended to be those higher up the contracting chain – particularly those representing head contractors.

To some extent, these differing perspectives can be explained by what part of the building contracting chain these organisation's members are drawn – with those organisations who consider security of payment problems to be significant mainly representing sub-contractors.

3.2.2 Industry Survey

To establish the extent of any security of payment problems in the Tasmanian building and construction industry, a broad based industry survey was conducted. The methodology used by the survey is outlined in Attachment B and the tabulated results are detailed in Attachment C.

The industry survey undertaken revealed that there is a security of payment problem within the Tasmanian industry. Specifically, an analysis of the tabulated survey results reveals that:

- Some 43 percent of those surveyed reported experiencing security of payment problems over the last financial year.
- In the sample of businesses surveyed, security of payment problems affected over \$37 million dollars of revenue flow last financial year, with an average of 25 percent of the revenue being affected of those who indicated they experienced such problems.
 - There was considerable variation in the percentage of revenue affected, however, with one business, for example, reporting that 70 percent of its revenue (\$14 million dollars) was effected by payment issues last financial year.
- The most predominate form of security of payment problem experienced was late payment. Of those who experienced security of payment problems in the last financial year:
 - 81 percent experienced it in the form of late payments;
 - Around 48 percent experienced it in the form of partial payments; and
 - 43 percent experienced it in the form of non-payment.
- Of those businesses reporting security of payment issues last financial year:
 - 63 percent were engaged by the end customer,
 - 12 percent were engaged by another building professional; and,
 - 24 percent were engaged by both the end customer and another building professional.
- Whether or not a business experienced security of payment problems in the last financial year was statistically unrelated to:
 - Whether work was conducted for the end customer or another building professional;
 - The region in which the business is based;
 - The sector of the construction industry in which the business operates;
 - The percentage of work undertaken in either the commercial or industrial sector.

- Whether or not a business experienced security of payment problems in the last financial year was found to be related the percentage of work undertaken in the residential sector. Two trends were apparent.
 - Businesses that conducted between 26-50 percent of their work in the residential sector were more likely to report payment issues.
 - Businesses working almost exclusively in the residential sector (76% or more of their business) were less likely to report payment issues.
- For those businesses that experienced security of payment problems in the last financial year, the incidence of such problems was reported to be increasing when compared with four years previously.
- Although some businesses had not experienced security of payment problems over the last financial year, 81 percent of the sample reported significant payment problems in the past.
- The most common actions taken to recover outstanding payments involved 'chasing' end customers for outstanding monies. Legal action, mediation and collection agencies were also utilised, but to a far lesser degree, with court action the least favoured course of action.

3.2.3 Case Study Interviews

To gain a more in-depth understanding of the impact that security of payment issues can have on business operations, telephone interviews were conducted with seven respondents that had indicated they had experienced security of payment problems and consented to outline their experiences to the research team. When selecting these respondents, care was taken to choose a range of circumstances in terms of the severity of the security of payments problem. A summary of the main findings is presented in Table 3.

The interviews indicate that, while there is a range of potential reasons why security of payment problems arose, the impacts of these problems consistently being cited as an adverse affect on cash-flow. For those who used sub-contractors, they usually passed the security of payment problem on. However, for those that didn't, they used a variety of measures to counteract the impacts. The quantum of revenue affected varied widely, with some having significant security of payment problems, but others experiencing them to a lesser degree. These results are in line with *a priori* expectations, based on a review of the literature and discussions with policy makers and administrators associated with interstate security of payment legislation regimes.

3.2.4 Summary

It is clear from the all forms of consultation that the Tasmanian building and construction industry does experience security of payment problems of a non-trivial nature. While the predominate type of security of payment problem experienced was late payment, the incidence of partial and non-payment problems were significant.

These findings are realistic, as there is no real evidence or rationale to suggest that the Tasmanian building and construction industry is structurally or operationally significantly different from that in other jurisdictions, other than with respect to matters of industry scale. Further, it is in keeping with:

- The findings of the Cole Royal Commission generally regarding the existence of security of payment problems in the building and construction industry nationally; and
- The assessment of nearly all mainland jurisdictions that have introduced legislative measures to assist in resolving the problem.

It is not possible to say from the results whether the situation is any worse or better than was experienced in other jurisdictions prior to their introduction of legislative responses to the security of payment problem. This is due to an absence of directly comparable survey data from interstate.



Nevertheless, the results suggest that, *prima facie*, the security of payments problem that exists in the Tasmanian building and construction industry is of a scale that warrants the Government's consideration of potential remedies.

Table 3: Summary of payment issues and selected business characteristic

#	Core Business	Main Client	Industry Sector (percentage ranges)	Frequency of SoP Problems	Estimated Revenue Impacted by SoP	Severity of SoP Problems, compared to 4 years ago	Selected Characteristics of SoP Problems		
							Description of the Problem	Impacts	Resolution Strategies
98	Site Preparation	Another Building Contractor and the End Customer	none commercial 51-75% industrial 26-50% residential	6 Late 2 Partial 0 Non	\$4,000	Was not in business then	Contract Disputes There is not a suitable contract available for negotiating 'smaller jobs' or those less than \$5K. Variations to agreed work have lead to disputes with customers and late payments.	Cash Flow Delayed payments to suppliers for materials Takes on additional work to increase revenue and cash flow. Almost went bankrupt in 2003 due to cash flow restrictions associated with security of payment problems	Debt Recovery Initially tried Magistrate's Court and collection agencies, but they were too expensive and failed to recover sufficient funds. Then became a registered debt collector to help alleviate SoP problems. Delays payments to his subcontracts
76	Building Structure Services	End Customer	1-25% commercial 1-25% industrial 26-50% residential	4 Late 0 Partial 0 Non	\$25,000	About the same	Variations to Contracts, Planning Appeals Process Clients underestimate project costs and delay payment when true costs become apparent. Delays in planning approval processes can force contract milestone delays and hence delays in payments. Government payment practices misaligned with their contractual obligations. Government pays after 45 days, whereas contractual payment terms are 14 days. Project slippage by other contractors delays payments.	Cash flow Runs a bank overdraft to regulate cash flow. Government contracts provide main source of revenue, needs to keep undertaking these contracts.	Alterations to Contracting Arrangements Quantity Survey provides quotations. No longer project manages building projects. <ul style="list-style-type: none"> Client pays for own soil tests etc. Client or head contractor responsible for engaging sub-contractors. Negotiates staged payment schedule in contracts.
25	Building Construction	End Customer	none commercial none industrial 76+% residential	2 Late 3 Partial 2 Non	\$87,500	More	No Contracts No formal contracts for jobs less than \$5K. Leads to project scope and output quality disputes.	Cash Flow Delayed payments to subcontractors. Delays paying retailers/supplier accounts.	Legal Processes Uses collection agencies – if that fails, then takes action through Magistrates Court



#	Core Business	Main Client	Industry Sector (percentage ranges)	Frequency of SoP Problems	Estimated Revenue Impacted by SoP	Severity of SoP Problems, compared to 4 years ago	Selected Characteristics of SoP Problems		
							Description of the Problem	Impacts	Resolution Strategies
77	Site Preparation Building Structural Services	Another Building Contractor and the End Customer	1-25% commercial 1-25% industrial 76+% residential	1200 Late 60 Partial 10 Non	\$420,000	More	End Customer Delays Payments Business provides soil tests etc. to end customers. Although payment terms are 30 days, people rarely pay on time. The amount of money is not much on a job-to-job basis, but the prevalence of late payments is extensive.	Cash Flow Business partners have contributed working capital to 'smooth' out late payment problems.	Financial Plans and Legal Processes Identifies late payers, instigates follow-up phone calls to negotiate an agree payment data. If customer financial issues are identified then works out a payment plan. If people do not meet their payment plan schedules then uses collection agencies and recalls Council Certificates.
80	Building Construction	End Customer	51-75% commercial 1-25% industrial 1-25% residential	25 Late 10 Partial 1 Non	\$3,900,000	About the same	Business transaction delays Project slippage by other contractors delays payments. Delays in the customer paying accounts. Large amount of money are usually involved.	Cash Flow Delays paying subcontractors. These delays passed on to suppliers etc.	Legal Processes Employed an accountant to manage payment related matters. If issue is a contractual dispute by way of variation they use mediation, then solicitors and then Court action (writ) as a last resort.
9	Building Construction	Another Building Contractor	26-50% commercial 1-25% industrial 51-75% residential	3 Late 0 Partial 0 Non	\$19,200	About the same	Business to Business Processes Main contractors have become ISO accredited and require specific paperwork to be completed before accounts are paid. The responsibility for meeting ISO standards has also been passed on to subcontractors.	Cash Flow Main contractors pay accounts only on set dates. If a closing time is missed or paperwork incorrect, then payments are significantly delayed. Cannot pay suppliers accounts or subcontractors on timely basis.	Learning main contactors' business processes. Follow-up telephone calls to verify accuracy of submitted accounts/paperwork. Does not use collection agencies or Magistrates Court because effects repeat customer business. Delays paying suppliers accounts. Makes partial payments to their subcontractors



#	Core Business	Main Client	Industry Sector (percentage ranges)	Frequency of SoP Problems	Estimated Revenue Impacted by SoP	Severity of SoP Problems, compared to 4 years ago	Selected Characteristics of SoP Problems		
							Description of the Problem	Impacts	Resolution Strategies
78	Building Structural Services	Another Building Contractor and the End Customer	51-75% commercial 26-50% industrial 1-25% residential	1150 Late 100 Partial 25 Non	\$2,000,000	About the same	Late Payments in the Contracting Change Business does subcontract work, mainly in the commercial sector. Late payments to head contractors tend to lead to delays in payments to this business. Also many late payments arise in relation to residential work (usually involving smaller amounts of money).	Cash Flow and Business Profitability Difficulties growing the business	Business Systems and legal Action Has implemented a billing/tracking system. After two follow-ups late payments get referred to debt collection agencies

3.3 Relevant Legislative Developments in Tasmania

3.3.1 CAFT legislation Initiatives

It is understood from discussions with the Director, Consumer Affairs and Fair Trading (CAFT) in the Department of Justice that they are undertaking a review of the *Housing Indemnity Act 1992*. As part of this review, they are examining two initiatives that are relevant to the security of payments issue:

Standard Form Building Contract

This would involve the introduction of a standard form contract as a means of ensuring consistency across all residential building contracts, as well as a way of avoiding questionable provisions in such contracts. Alternatively, a prescribed information statement (checklist) could be required to be provided to a consumer before they enter into a building contract.

Dispute Resolution Mechanism

This would involve establishing a compulsory system of dispute resolution for parties to a residential building contract. A two-stage system is envisaged, beginning with alternative dispute resolution (mediation), which, if unsuccessful, would be followed by second phase, a binding ruling (arbitration).

At the time of writing, the proposal arising from the Review as that CAFT investigate these initiatives. If the standard form of residential building contract is supported by CAFT's investigations, then this may be a vehicle to improve security of payment between customers and contractors in the residential building area.

Further, discussions with the Director, CAFT indicated that there might be potential for security of payments legislation to provide the basis for the dispute resolution mechanism that has been suggested for residential building contracts.

4 OPTIONS AND RECOMMENDATIONS

4.1 Options

The Cole Royal Commission identified a number of potential solutions to Security of Payment problems:

- Financial Performance controls aimed at reducing the risk of financial problems that lead to security of payment problems – including:
 - Ensuring government procurement processes utilise prequalification guidelines that result in greater scrutiny of the financial viability of contractors; and
 - Enhancing builders' licensing conditions to ensure improved scrutiny of their financial viability.
- Educative approaches aimed at improved training and information on subcontractors' rights and responsibilities.
- Payment recovery mechanisms aimed at improving the mechanisms that subcontractors can use in recovering payments that are owed to them contractually, or to provide some protection against insolvencies higher up the contractual chain – including:
 - Codes of practice that specify the industry standards for payments to subcontractors;
 - Trust funds;
 - Compulsory insurance schemes;
 - Legislatively based market infrastructure solutions that:
 - ▶ Require certain contract clauses and prohibit other contract clauses; and
 - ▶ Support the rapid adjudication of disputes.

The Commission's Final Report provides a considered analysis of the advantages and disadvantages associated with these various solutions.

An analysis of these options in the Tasmanian context is contained in Section 4.2.

4.2 Analysis of Options

Table 4 contains a broad analysis of the options identified in Section 4.1.

Table 4: Analysis of Options for Resolving Security of Payment Problems

Option	Pros and Cons	Comment
Financial performance controls		
Government Procurement	<p>Advantages</p> <ul style="list-style-type: none"> • Implemented through administrative means. <p>Disadvantages</p> <ul style="list-style-type: none"> • Limited to government projects. • No guarantee that it will change payment behaviour in non-government sector of industry. • Limited ability of government to dictate and monitor contractual arrangements between third parties. 	<p>The Tasmanian Government already has extensive and long-standing arrangements in place regarding government procurement practices and contractual standards. These arrangements include complying with the APCC's <i>National Code of Practice for the Construction Industry</i>, for which the Government has produced a Tasmanian Annexure.</p> <p>Despite these arrangements being in place, the Tasmanian building and construction industry is still experiencing security of payment problems. This is likely to be due to the inherent limitations in the arrangements, including:</p> <ul style="list-style-type: none"> • The fact that the arrangements only relate to public sector building and construction projects; and • The limited ability of Government Agencies, as clients, to dictate and monitor the business arrangements between head contractors and their sub-contractors. <p>It is noted that Tasmania has not adopted the 8 national principles²¹ of conduct applying to security of payment issues that were adopted by the APCMC in 1996. It is considered that the Tasmanian Government's approach to the security of payments issue may be strengthened by adopting these principles and ensuring their incorporation in current procurement policy responses.</p> <div data-bbox="981 1139 2020 1236" style="background-color: #cccccc; padding: 5px;"> <p>Recommendation 1</p> <p>That the Tasmanian Government:</p> </div>

²¹ *National Action on Security of Payment in the Construction Industry*, APCC, Adelaide 1996.

²² *National Action on Security of Payment in the Construction Industry*, APCC, Adelaide 1996.

Option	Pros and Cons	Comment
		<ul style="list-style-type: none"> Formally adopt the 8 national principles²² of conduct applying to security of payment issues agreed by the APCMC in 1996. Incorporate these principles into its current procurement policy responses.
Enhancing licensing requirements	<p>Advantages</p> <ul style="list-style-type: none"> Utilises existing policy mechanism. <p>Disadvantages</p> <ul style="list-style-type: none"> Would require extension to existing Building Practitioner controls. Point-in-time measure of financial viability does not directly address whether practitioner will practice prompt and ethical payment practices. 	<p>Tasmania has a legislatively based building practitioners accreditation scheme under the <i>Building Act 2000</i>. This scheme ensures that building practitioners (which is widely defined) are:</p> <ul style="list-style-type: none"> Competent; Up to date with technical requirements; Operate in a professional manner; Appropriately insured; and Required to comply with the relevant Code of Conduct. <p>These accreditation arrangements do not test the financial viability of building practitioners.</p> <p>It is doubtful if financial viability controls through accreditation would have any significant impact as, by necessity, they only provide a point-in-time assessment of viability. The dynamics of the business environment mean that this assessment can quickly become dated. Further, ensuring financial viability is no guarantee that prompt and ethical payment practices will be followed by accredited building practitioners.</p> <p>It would be possible, however, to develop links between accredited building practitioner requirements and security of payment practices if there was a clear mechanism that enabled assessing whether accredited building practitioners had an adverse security of payment history. This is the situation in Queensland, where licensed builders are subject to a demerit points system and where demerit points can be awarded against licensees if they have adjudications made against them under Queensland's security of payments legislation. Currently, this would not be possible in Tasmania as there is no security of payments legislation applying in the State.</p>
Educative approaches		
Improving	Advantages	Educative approaches are always an important tool in resolving policy problems. There is

Option	Pros and Cons	Comment
training and information	<ul style="list-style-type: none"> Can improve the management expertise of subcontractors and the ability of companies to assess commercial risk in contractual arrangements. <p>Disadvantages</p> <ul style="list-style-type: none"> Long-term strategy to influence change in industry payment culture. No guarantee of prompt and ethical payment practices. 	<p>significant potential for developing and implementing educative approaches in the Tasmanian industry. However, this is a long-term strategy. As noted by the Cole Royal Commission²³:</p> <p><i>In the long term education and training may reduce the need for specific legislation to deal with security of payments issues. Such change is a long-term goal. Given the severity of the problem in the building and construction industry and the industry's low take-up of training it is not possible to rely on education alone.</i></p> <div style="border: 1px solid black; padding: 5px;"> <p>Recommendation 2</p> <p>It is recommended that the Tasmanian Government, through the Building and Construction Industry Council, implement a training and information program to improve industry's understanding of how to properly manage contractual arrangements and hence how to deal with or avoid security of payment problems.</p> </div>
Payment recovery mechanisms		
Codes of Practice	<p>Advantages</p> <ul style="list-style-type: none"> Provides clear guidance to parties on prompt and ethical payment practices. <p>Disadvantages</p> <ul style="list-style-type: none"> Limited ability to enforce, particularly if code is voluntary. 	<p>This effectiveness of this option relies on parties observing good payment practices as a result of voluntary codes of industry practice or through quasi-mandatory codes imposed as a condition of funding and/or contracts. As noted earlier, the Tasmanian Government already complies with the APCC's <i>National Code of Practice for the Construction Industry</i>.</p> <p>Further, Workplace Safety Tasmania advised that it has sought to include some requirements on industry payment practices in the Code of Conduct for Accredited Building Practitioners. This Code has been developed by the Tasmanian Compliance Corporation in consultation with industry peak bodies. At present, the requirements in the Code are not transparent, simply requiring that industry members do not employ any "sharp practices" regarding payment of sub-contractors.</p> <p>The Cole Royal Commission was largely dismissive of this option, stating that²⁴:</p> <p><i>At present, there is little support for the view that codes of practice are likely to be an effective mechanism for bringing about security of payments reform.</i></p>

²³ *The Final Report of the Royal Commission into the Building and Construction Industry*, Volume Eight, Reform – National Issues Part 2, February 2003, page 252

²⁴ *Ibid*, page 248

Option	Pros and Cons	Comment
Trust Funds and Compulsory Insurance Schemes	<p>Advantages</p> <p><i>Trust Funds</i></p> <ul style="list-style-type: none"> • Market based mechanism (that would need to be supported by legislation). • Aligns with current industry practice regarding performance guarantees, securities and retention monies. <p><i>Compulsory Insurance</i></p> <ul style="list-style-type: none"> • Market based mechanism (that would need to be supported by legislation). • Provides financial incentives for parties to observe prompt and ethical payment practices. <p>Disadvantages</p> <p><i>Trust Funds</i></p> <ul style="list-style-type: none"> • Likely to be resisted significantly by sectors of the industry. • Likely to be most useful in insolvency situations – however, broader implications vis-à-vis insolvency principles, equity and practice are likely to require further investigations. <p><i>Compulsory Insurance</i></p> <ul style="list-style-type: none"> • Cost/benefit outcome not clear – 	<p>These options are both focussed on providing market-based solutions to security of payment problems. However, they are complex and an assessment of whether they can be effective involves significant legal, cost/benefit and commercial considerations. Such considerations, including industry consultation on these options, are beyond the scope of this report.</p> <p>Nevertheless, the Cole Royal Commission evaluated these options and its findings on these options were:</p> <ul style="list-style-type: none"> • The trust fund option was considered to have some merit by the Commission as a potential solution to alleviate security of payment problems. Nevertheless, the Commission did not pursue this option, stating that²⁵: <i>The fact is, however, that industry opposition to trusts is so entrenched that any recommendation in relation to them would very likely be vigorously opposed, and debate in relation to it would be likely to be protracted. The Commission has therefore chosen to focus upon reform recommendations to improve security of payment that have better prospects of being accepted and implemented.</i> • The Commission concluded that compulsory insolvency insurance may have some merit as a means of mitigating security of payment problems where insolvency is involved. The Commission, however, noted that both WA and Queensland had rejected the compulsory insolvency insurance option on the basis that they believed the costs would outweigh the benefits. The Commission observed that²⁶: <i>It must, however, be recognised that the cost of such a scheme will, ultimately, be borne by the client. Before any finalised position is adopted regarding compulsory insurance it is necessary that there be an assessment of the cost of any such scheme, its impact upon the building and construction industry, and a quantitative assessment of the likely benefits of such a scheme.</i> • The Commission recommended that the Commonwealth investigate the costs and benefits of this option. It is understood that this recommendation has not been implemented by the Commonwealth Government at this stage.

²⁵ Ibid, page 250

²⁶ Ibid, page 251.

Option	Pros and Cons	Comment
	<p>with some jurisdictions indicating their view that costs outweigh the benefits.</p> <ul style="list-style-type: none"> • May be most effective in terms of insolvency – not clear if it will be effective in relation to partial or late payment instances. • Insurance premium costs are likely to be passed onto clients. 	
Legislatively based market infrastructure solution		
<p>Mandatory and prohibited clauses</p> <p>Rapid adjudication</p>	<p>Advantages</p> <ul style="list-style-type: none"> • Market based mechanism (that would need to be supported by legislation). • Rapid adjudication option is non-intrusive – eg. only comes into play when required by contractual parties. • Is a tool that can be used by parties to assist with the prompt attention to payment issues. • Relatively quick and low cost compared to the use of the court system. <p>Disadvantages</p> <ul style="list-style-type: none"> • No single national model available – each jurisdiction has different approach, but with two main legislative models (see Section 5). 	<p>This option refers to the introduction of security of payment legislation along the lines of that existing in nearly all Australian jurisdictions (except Tasmania and South Australia). In essence, it is a legislatively based market infrastructure solution, that provides contracting parties with recourse to a relatively simple, quick and low cost option for resolving security of payment problems. Full details of the nature of the legislative responses in other jurisdictions are outlined in Section 5 of this paper.</p> <p>This option was the favoured solution of the Cole Royal Commission, however the Commission recommended that the Commonwealth Government implement this type of legislative solution. A key factor driving this recommendation was the desire to see greater consistency/harmonisation of the various jurisdictional legislative responses.</p> <p>Based on consultations with a range of stakeholders in the Tasmanian building and construction industry undertaken as part of the production of this report, this option is likely to be supported by the industry. Further, the Tasmanian Building and Construction Industry Council has already indicated that it supports this type of legislative response.</p> <p>In pursuing this option, there is a range of issues to be considered. These are detailed in Section 6 of this report. Some key principles that should be observed when developing the legislative response are that the legislation should be:</p> <ul style="list-style-type: none"> • Consistent with existing interstate legislative models; • Easy to administer and low cost to maintain;

Option	Pros and Cons	Comment
	<ul style="list-style-type: none"> • Can conflict with established dispute resolution processes specified in contractual arrangements between parties. 	<ul style="list-style-type: none"> • Fair and equitable to all contracting parties that are affected by the legislation; • To the extent possible, a sound basis for extending the concept of rapid adjudication to contractual issues other than those concerned with payment. <p>The opportunity should also be taken to investigate the best way of linking the security of payments legislation to Building Practitioner Accreditation under the <i>Building Act 2000</i>.</p> <p>These issues will need to be canvassed with industry and will play an important part in shaping the nature of the legislation developed under this option.</p> <div style="border: 1px solid black; padding: 5px;"> <p>Recommendation 3</p> <p>It is recommended that the Tasmanian Government:</p> <ul style="list-style-type: none"> • Agree in-principle to introduce security of payments legislation along the lines of which has been introduced in other jurisdictions. • Establish a consultative forum to assist in the development of the legislation. This forum should involve the Building and Construction Industry Council and the Office of Consumer Affairs and Fair Trading. • Agree that the key principles that should be observed when developing the legislative response are that is should be: <ul style="list-style-type: none"> - Consistent with existing interstate security of payment legislative models (this issue is discussed further in Section 5.3); - Easy to administer and low cost to maintain; - Fair and equitable to all contracting parties that are affected by the legislation; - To the extent possible, a sound basis for extending the concept of rapid adjudication to contractual issues other than those concerned with payment. • Agree in-principle that the security of payments legislation should be linked to Building Practitioner Accreditation under the <i>Building Act 2000</i>. <ul style="list-style-type: none"> - This agreement should be followed by investigations as to the best way of achieving this link. </div>

4.3 Summary

It is clear from the analysis of the possible reform options that, at a broad level, the introduction of security of payments legislation similar to that which exists in most other jurisdictions is the most practical way forward for the Tasmanian Government in light of industry concerns regarding security of payment problems. This analysis has resulted in three key recommendations regarding reform options:

Recommendation 1

That the Tasmanian Government:

- Formally adopt the 8 national principles²⁷ of conduct applying to security of payment issues agreed by the APCMC in 1996.
- Incorporate these principles into its current procurement policy responses.

Recommendation 2

It is recommended that the Tasmanian Government, through the Building and Construction Industry Council, implement a training and information program to improve industry's understanding of how to properly manage contractual arrangements and hence how to deal with or avoid security of payment problems.

Recommendation 3

It is recommended that the Tasmanian Government:

- Agree in-principle to introduce security of payments legislation along the lines of which has been introduced in other jurisdictions.
- Establish a consultative forum to assist in the development of the legislation. This forum should involve the Building and Construction Industry Council and the Office of Consumer Affairs and Fair Trading.
- Agree that the key principles that should be observed when developing the legislative response are that is should be:
 - Consistent with existing interstate security of payment legislative models;
 - Easy to administer and low cost to maintain;
 - Fair and equitable to all contracting parties that are affected by the legislation;
 - To the extent possible, a sound basis for extending the concept of rapid adjudication to contractual issues other than those concerned with payment.
- Agree in-principle that the security of payments legislation should be linked to Building Practitioner Accreditation under the *Building Act 2000*.
 - This agreement should be followed by investigations as to the best way of achieving this link.

A range of implementation issues will be involved in developing the legislation arising from Recommendation 3. These issues are discussed in Section 6 of this report.

²⁷ *National Action on Security of Payment in the Construction Industry*, APCC, Adelaide 1996.

5 LEGISLATIVE RESPONSES IN AUSTRALIA

5.1 Legislative Models

In Australian jurisdictions, the legislative responses to the security of payments issue for the building and construction industry can be divided into two distinct models.

- **East Coast Model** – employed by NSW, Victoria and Queensland
- **West Coast Model** – employed by Western Australia and the Northern Territory

Both these models are based on similar legislation established in the United Kingdom. Specifically, they are based on the *Housing Grants, Construction and Regeneration Act 1996* (applying to England, Wales and Scotland). That Act established a legislative basis to ensure security of payment in the building and construction industry, along with a dispute resolution method of statutory adjudication for contractual matters (including payment).

Both Models focus on providing a speedy dispute resolution mechanism for payment disputes. This is achieved through defining the rights of the parties and providing access to rapid adjudication for the resolution of payment disputes.

However, there are some significant differences in their operation that are outlined below:

5.1.1 East Coast Model

The East Coast Model has the following key features:

- It renders void any “Paid when paid” clauses in building and construction contracts.
- It defines that an entity (person or firm) that performs work under a construction contract has right to progress payments.
- It specifies that progress payments are due either on the date stated in the contract or, if no date is specified, 10 days after a payment claim is made.
- It establishes the concept of a payment schedule.
 - Under the payment schedule concept, a claimant serves a progress payment claim on a respondent – the respondent must then provide a payment schedule within a defined period of time, detailing how the claim will be met and/or any reasons for withholding payment of any amount of the claim.
- The payment schedule has 2 functions:
 - To provide the claimant with the respondent’s reasons NOT to pay any claimed amount; and
 - To provide a trigger for liability for adjudication & or debt-recovery if the respondent fails to act on a claim for a progress payment.
- If a respondent does not provide a payment schedule within the required time, it allows the claimant to:
 - Recover the amount claimed as a judgement for a debt in court or seek adjudication of the claim. In either case, the respondent forgoes the ability to bring any counter-claims against the claimant or raise any reasons for non-payment in their defence.
 - Serve notice on the respondent that they will suspend work or the supply of goods and services.
- The same consequences apply if the respondent issues a payment schedule, but then fails to pay claimant in accordance with the schedule.

- If the payment schedule issued by the respondent is for less than the amount claimed, the claimant can seek adjudication of the claim.
- The government appoints a number of Authorised Nominating Authority (ANAs). ANAs organise pools of adjudicators and are responsible for training adjudicators and ensuring they meet certain standards.
- To apply for adjudication, an application is made to an ANA, which then refers the application to an adjudicator.
- An adjudicator's decision is binding on the parties and is final within the operation of the security of payments legislation.
- The consequences of a respondent failing to pay according to a decision of an adjudicator are that the claimant can:
 - Recover the amount claimed (plus interest and any unpaid adjudication fees) as a judgement for a debt in court. In either case, the respondent forgoes the ability to bring any counter-claims against the claimant or raise any reasons for non-payment in their defence.
 - Serve notice on the respondent that they will suspend work or the supply of goods and services.
- Owner-builders are excluded from the coverage of the Act.
- The Act excludes construction contracts related to the drilling or extraction of oil and natural gas or the extraction of minerals.

Perhaps the most important feature of the East Coast Model is that it provides a tool to help ensure the cash-flow between contracting parties. Significantly, it **does not affect** the rights of the parties to a contract regarding the final contract sum – that is, it does not override the contract in terms of the final contractual outcome. Rather, it simply provides a mechanism for the recovery of progress payments during the course of a contract. It is, therefore, entirely possible (but not common) for a subcontractor to have to pay back a contractor due to the sum of the payment schedules being more than the contracted amount (after allowing for approved variations).

The legislation in NSW, Victoria and Queensland contains these broad features, however they have some variations, of which the key variations include:

- Victoria's process only allows for adjudication if a claimant lodges a payment schedule that indicates they will pay less than the amount claimed. Both Queensland and NSW allow the option of adjudication if a payment schedule is not lodged or if the respondent fails to comply with their payment schedule. As noted in a recent discussion paper issued by Victoria during its current review of its Act:

The key benefits of 'optional adjudication' are that the claimant can avoid the time and expense of court proceedings. To initiate debt recovery proceedings in court, the claimant needs to prepare a summons and may need to brief a lawyer. After filing a summons, the claimant must wait 28 days for the defendant to submit a defence. If the defendant lodges a defence, the claimant needs to apply to court to have it struck out, which significantly delays the judgement. During this time, the respondent may have paid off other creditors or become insolvent.²⁸

- Victoria allows a claimant who wants to appeal an adjudicator's determination in court to lodge security with the court by way of Bank Guarantee pending the outcome of the case.
- Both NSW and Queensland allow a claimant, in the case where a respondent fails to comply with a determination of an adjudicator, to recover the determined sum by way of a judgment debt – that is, a debt that is to be recognised by the court as payable as if that payment had been ordered by the court itself. However, in Victoria the claimant can only pursue the debt through the courts in the normal manner, - that is, the adjudicator's determination

²⁸ *Review of Victorian Security of Payment Act 2002 - Options Discussion Paper*, June 2004, Building Commission of Victoria, pp 31

“...may be subject to a subsequent full hearing in court, giving a respondent a second opportunity to avoid or deny liability for payment.”²⁹

- Queensland registers adjudicators, whilst NSW and Victoria do not.

5.1.2 West Coast Model

The West Coast Model more closely follows the United Kingdom model and does not involve the concept of a payment schedule. Rather, it focuses on:

“...enforcing the contract between the parties and does not introduce a separate, and possibly conflicting statutory right to payment.”³⁰

The model does this by:

- Prohibiting certain clauses in contracts. This includes:
 - “Paid when paid” and “Paid if paid” clauses. This is a stronger provision than contained in the East Coast Model, which merely voids these clauses if they appear in a construction contract.
 - Provisions requiring payment to be made after 50 days.
- “Reading into” a construction contract a range of clauses related to payment if the contract does not contain written provisions relating to certain matters. These matters include:
 - Variations of contract provisions.
 - Contractors entitlement to be paid.
 - Contractors right to make progress payments claims.
 - Process for making payment claims.
 - Process and timeframes for responding to payment claims.
 - Timing of payments.
 - Interest on overdue payments.
 - Ownership of goods.
 - Duties as to unfixed goods on insolvency.
 - Status of retention money.

In this way, the West Coast Model still provides a right to progress payments, but through the enforcement of contractual arrangements rather than a separate concept of a “payments schedule”.

Other key features of the West Coast Model that differentiate it from the East Coast Model include:

- It does not exclude owner-builder construction contracts.
- It includes payment claims by both sub-contractors against contractors and also vice-versa. The East Coast Model does not provide for payment claims by contractors against sub-contractors (eg, for non-performance of the sub-contractors contractual obligations).
- Any party may seek adjudication of a payment dispute under a contract. However, a dispute does not arise until a respondent fails to settle a payment claim either within a defined time period (eg, in WA it is 28 days, in the Northern Territory it is 10 business days for undisputed amounts where part of the claim is disputed or 20 business days if no part of the claim is disputed).
 - In this way, adjudication focuses on resolving breaches of the contract, rather than breaches of legislatively determined processes.

²⁹ Ibid, pp 43.

³⁰ 2nd Reading Speech on Construction Contracts Bill 2004, Ms A.J. MacTiernan, Minister for Planning and Infrastructure, WA Hansard – House of Assembly, Wednesday 3 March 2004, pp 274

- The exclusions from the definition of construction are more extensive – including:
 - Construction activity related to wholly artistic works and watercraft; and
 - In the case of WA, construction of plant used for extracting or processing oil and natural gas.

5.2 Performance of Models

Both the NSW and Victorian security of payment legislation has been subject to recent public reviews. The NSW review gave its legislation a relatively clean bill of health, with the Review Report stating:

*Overall the feedback has highlighted the beneficial effect that the Act has in bringing parties together early in a dispute, providing a relatively quick and inexpensive alternate dispute resolution process. A significant number of parties are settling their dispute without having to rely on the dispute resolution process or the court recovery remedies provided under the Act.*³¹

The Report went on to conclude that:

There is overall support for the Building and Construction Industry Security of Payment Act 1999, across all industry sectors and there continues to be widespread satisfaction with the Act.

*Adjudication statistics indicate a willingness from industry to participate in a system that provides a quick and effective dispute resolution process such as adjudication. It can be surmised that industry is seeking a payment regime that will assist cash flow. It appears that the Amendment Act has provided an effective tool for claimants to seek their entitlements and to be able to address delayed payment.*³²

Nevertheless, the Report identified a number of areas where changes could be effected to further improve and clarify certain aspects of the Act's operation.

The Victorian review resulted in the introduction of a new Bill into Parliament to improve the way in which the legislation operates and improve its consistency with similar legislation in NSW and Queensland. In introducing amending the Bill to the Victorian Parliament in 2006, Minister Hulls stated that:

The Building and Construction Industry Security of Payment Act 2002 has now been in operation for three years. The act has delivered on the government's commitments to improve protection of the rights of subcontractors and others in the industry to fair and prompt payment and assist them to recover legitimate payment claims against defaulting parties.

*The construction industry strongly supports the existing legislation, which has improved payment prospects and cash flow outcomes for many industry participants.*³³

He went on to say:

*The bill is modelled on the provisions and processes of the amended New South Wales act and the similar recently enacted legislation in Queensland. The changes will benefit building and construction firms with national or interstate operations by improving consistency between payment regimes across all three jurisdictions. The Productivity Commission and key industry associations across Australia strongly support national consistency in building industry legislation. – many of these changes bring the legislation into line with the NSW legislation.*³⁴

As part of its package of improvements, the Victorian bill proposes a major change to clarify the treatment of variations under the security of payment legislation by excluding disputed variations from the operation of the legislation.

³¹ *Building and Construction Industry Security of Payment Act, 1999 - Review Report*, NSW Department of Commerce, May 2004, page 14

³² *Ibid*, page 15.

³³ Minister Rob Hulls, 2nd Reading Speech, House of Assembly, Victorian Hansard, 9 February 2006.

³⁴ *Ibid*.

The Queensland legislation (BCIPA) is likewise being seen to be operating effectively after commencing on 1 July 2004. The Act is administered by the Building and Construction Industry Payments Agency and in its 2004-05 annual report the General Manager, Mr Ian Jennings, stated:

I am confident that the BCIPA directly addresses issues of non-payment and is already making a significant difference to the working and payment culture of the building and construction industry.³⁵

The Queensland legislation is currently due for review.

Both the Western Australian and Northern Territory Acts are more recent, commencing on 1 January 2005 and 1 July 2005 respectively. At this stage it is too early to pass judgement on the performance of the West Coast model that these Acts implement. However, anecdotal reports from the officers administering the legislation in these jurisdictions indicate that the legislation is performing satisfactorily.

In relation to security of payment legislation introduced in mainland jurisdictions, The Department of Treasury and Finance commented that they were aware of a:

... number of [interstate] government departments that have raised concerns with the rapid adjudication process, which would appear to be the main feature of SoP legislation. There have been a number of reports indicating that the rapid adjudication process is being used by unscrupulous contractors to receive rapid payment outside of the contract, leaving Government departments with little choice but to pay what could be an exaggerated variations payment, with little hope of quickly recovering these costs.

Given that any proposed legislative response would also impact on private sector works, it should be noted that, while the Government may be able to bear a high variation rapid adjudication claim, such a claim would be likely to have a significant impact on many smaller private sector main contractors, where they do not have a large cash flow available to deal with such claims.

These comments show a misunderstanding of the operation of security of payment legislation in the other jurisdictions and the nature of the rapid adjudication option. Further, perusal of the NSW 1994 review report of its security of payment legislation and discussions with the officer responsible for the recent review of the Victorian legislation do not support the contention that security of payment legislation has resulted in significant adverse policy outcomes.

Rather, they confirm that, whilst similar claims have been made by Government agencies in those jurisdictions, a close analysis of the issues has revealed that the concerns are misplaced and that the security of payment legislation is generally operating as intended and achieving the desired policy outcomes.

5.3 Recommended Model

Clearly, determining the best legislative model to adopt is an important issue when determining to proceed with security of payments legislation. Conceptually, the West Coast model has some advantages over the East Coast Model, these being:

- It focuses on ensuring that the building and construction contract is paramount. As such, it encourages best practice contract design and contract maintenance practices. This contrasts with the East Coast model, that uses the concept of a payments schedule, that is separate from the contract between the two parties. Despite this difference, the net result of the two models is very similar.
- It includes payment claims by both sub-contractors against contractors and also vice-versa. This is more equitable than the East Coast Model, which only assists payment claims by sub-contractors against contractors.
- It does not exclude owner-builder construction contracts. This is an advantage, as Tasmania does

³⁵ *Building and Construction Industry Payments Agency - Annual Report 2005*, Building and Construction Industry Payments Agency 2005

not have the separate legislative arrangements covering residential building contracts that exist in the mainland eastern jurisdictions. Such separate legislation in those jurisdictions enables owner-builders to be excluded from the operation of security of payment legislation without disadvantaging the sub-contractors that work for them.

However, there are likely to be significant disadvantages in Tasmania adopting a different security of payments legislation model to that of the eastern jurisdictions. This is because active migration of building industry participants between Tasmania and these jurisdictions (in both directions) makes having consistent legislation to Victoria, NSW and Queensland highly desirable to reduce business costs and improve compliance. As noted in the Cole Royal Commission report³⁶:

There is widespread support for a nationally consistent approach to security of payment reform. National consistency in this area is important because it reduces the cost of businesses moving between jurisdictions and operating in different jurisdictions. It minimises duplication and reduces the cost of education campaigns. It means that the costs of subcontractors and the cost of building are not inflated in those States and Territories where there is a higher risk that subcontractors will not get paid.

It is beyond the scope of this report to fully determine the legislative model that should be adopted for Tasmania. Rather, this should be done consultation with the Tasmanian Building and Construction Industry as indicated by Recommendation 3. However, when undertaking this consultation, to ensure cross-border consistency it is recommended that the Government should indicate an initial preference for the East Coast model.

Recommendation 4

It is recommended that, when consulting with industry on the form of security of payment legislation that may be introduced, the Tasmanian Government indicate an initial preference for legislation based on that used by NSW, Queensland and Victoria.

³⁶ *The Final Report of the Royal Commission into the Building and Construction Industry*, Volume Eight, Reform – National Issues Part 2, February 2003, page 255

6 IMPLEMENTATION ISSUES

The key implementation issues associated with the development of security of payments legislation for Tasmania are discussed below. These issues will need to be considered when determining the design of any legislation that the Government may decide to introduce.

6.1 Registration of Adjudicators

It will be important for the proper and efficient functioning of the proposed security of payment legislation that building and construction industry participants can easily identify and engage can appropriately skilled adjudicators.

Given the smaller size of the Tasmanian building and construction industry compared with the larger mainland states, it is likely that a proportionately smaller number of adjudications that would be heard in Tasmania. As a consequence, it could be expected that only a few specialist adjudicators would operate, or alternatively they would be involved in a range of alternative dispute resolution mechanisms (mediation, arbitration, conciliation etc). It is likely that skilled adjudicator services will be sourced from the larger states, particularly for larger claims, as the experience in those jurisdictions is that adjudications can be complex matters and hence require adjudicators that are knowledgeable in building and construction industry contractual relations matters.

In implementing security of payment legislation, some jurisdictions (Queensland, WA and the Northern Territory) have moved to register adjudicators in order to ensure adjudicators are properly skilled, whilst others have left this issue in the hands of Authorised Nominating Authorities or prescribed appointers. While it is important to ensure that adjudicators are appropriately skilled at their task, it is not necessarily the case that a formal registration scheme is required.

The cost of establishing an adjudicator registration system in Tasmania is unlikely to be cost-effective due to the small number of adjudicators that are likely to operate in the State. If it was considered that some formal controls are required to ensure appropriately skilled adjudicators or that active steps need to be taken to inform the industry on where they can obtain skilled adjudicators, avenues other than formal adjudicator registration should therefore be examined. For example, there are a number of professional bodies that exist that could potentially be used as quality “screens” – for example, Institute of Arbitrators and Mediators Australia (IAMA), Lawyers Engaged in Alternative Dispute Resolution (LEADR) and the Australian Dispute Resolution Association (ADRA).

Recommendation 5

It is recommended that, when developing security of payment legislation, alternative methods other than adjudicator registration be examined to determine mechanisms for ensuring that industry is able identify and engage appropriately skilled adjudicators.

6.2 Alignment With Other Proposed State Legislation

As mentioned in Section 3.3.1, CAFT is examining a number of initiatives relevant to the security of payments issue. Discussions with CAFT indicate that there is potential for security of payments legislation to provide the basis for a general alternative dispute resolution process for residential building contracts. Accordingly, discussions with CAFT need to be undertaken to determine the feasibility of this suggestion in light of Recommendation 3 of this report.

Recommendation 6

It is recommended that, when developing security of payment legislation, discussions be held with CAFT regarding the potential for security of payments legislation to provide the basis for a general alternative dispute resolution process for residential building contracts.

6.3 Administrative Arrangements

The brief for this report included a requirement to identify the appropriate administrative responsibility for any intervention or communication program relating to security of payments.

It is noted that the DIER – BSR Branch was responsible for commissioning this report, however this was mainly due to the fact that the report has been funded from the Building Administration Fund.

The administrative arrangements for security of payment legislation in mainland states and territories vary, as illustrated in Table 1.

These arrangements appear to be quite specific to the administrative circumstances in each jurisdiction. They are of limited use in determining the appropriate administrative arrangements for security of payment issues in Tasmania.

In determining the most appropriate administrative arrangements for security of payments legislative intervention and/or communication program, the following observations are relevant:

- Responsibility for the implementation of recommendation 1 of this report clearly lies with the Department of Treasury and Finance, given that it has whole-of-government responsibility for procurement and purchasing policy.
- From a functional perspective, security of payment legislation is essentially legislative market infrastructure in nature, in the same vein as the *Trade Practices Act 1974*. That is, it sets the “rules of the game” which industry participants can have recourse to when necessary.
- Security of payments legislation is significantly different in character from building control legislation (including building practitioner accreditation), being focussed on assisting with the resolution of commercial/contractual matters. The administration of that legislation, therefore, does not naturally fit with the administration of building control legislation generally, as the skills and knowledge (policy and operational) required to administer the legislation are quite different.
- It is sensible to have the same administrative arrangements for security of payment legislation (recommendation 3 of this report) and a communications program with industry regarding security of payments issues (recommendation 2 of this report).

Accordingly, from an administration perspective it is considered that the responsibility for the proposed security of payments legislation and the associated communications program lie with CAFT, which has responsibility for other market infrastructure type legislative interventions. Discussions with the Director, CAFT indicate that CAFT concurs with this assessment.

Recommendation 7

It is recommended that the administrative responsibility for security of payments legislation and the associated communications program should be given to Consumer Affairs and Fair Trading within the Department of Justice.

6.4 Performance Assessment

As with any government legislation or program, it will be important that appropriate metrics be in place to assess the performance of the proposed security of payment legislation and associated

communications activities. This will include requiring Authorised Nominating Authorities or prescribed appointers to provide data on issues such as:

- The number of adjudications held.
- The size of adjudication claims.
- The outcomes of adjudications (and proportions of claims determined).
- The fees charged for adjudications.

These types of metrics are collected by those mainland jurisdictions that have security of payment legislation. It is understood that those jurisdictions have recently commenced collaborating to establish a consistent dataset arrangements.

Recommendation 8

It is recommended, when developing security of payment legislation, that arrangements be put in place to enable the collection of relevant metrics relating to the performance of the legislation. These metrics should be consistent with those metrics collected by mainland jurisdictions that have security of payment legislation.

Further, it will be important to undertake periodic reviews of the operation of the legislation to ensure that it is still meeting its objectives. The experience in the development and implementation of security of payment legislation in mainland jurisdictions has been that regular reviews are an important way of ensuring continual improvement to the legislation. When determining the length of the initial review period, care must be taken to allow sufficient time for the legislation to be properly bedded in before reviewing its performance, but not leave such a review too long such that the operation of the legislation is hampered by unanticipated problems. Later review periods can be longer as the probability of major adjustments being required to the legislation should be low by that stage.

It is considered that an initial review of the proposed security of payments legislation should be completed by the end of the first three years of operation of the legislation. Later reviews should take place at 5-year intervals.

Recommendation 9

It is recommended that an initial review of the proposed security of payments legislation should be completed by the end of the first three years of operation of the legislation. Later reviews should take place at 5-year intervals.

6.5 Funding Support

It is understood from NSW and Victoria (neither of which register adjudicators) that the cost of administering the security of payments legislation is in the region of \$300 000 per annum. It is premature at this stage to be definitive on the recurrent costs of administering the proposed legislation given that the form of that legislation is yet to be finalised.

During the legislative/policy development stage, it is likely that a full time team of a policy manager (level 12, Administrative and Clerical – Public Sector Award) and a Policy officer (level 9-10), along with appropriate administrative support, will be required for approximately 6 months.

As decisions on the resourcing of legislation development processes is normally the prerogative of the relevant administering agency, this report makes no recommendations on this matter.

A further issue in relation to funding is how the government administration of the legislation will be funded. In the short term, it is unlikely to be practical to implement user-pays arrangements (eg, a levy on, say, adjudication applications), as the objective will be to keep the costs of using the legislation low to encourage its use as a dispute resolution tool in relation to security of payment issues³⁷. The imposition of user-pays charges in the short term are likely to result in a lower than optimal uptake in the use of the legislation.

In the longer term, as the legislation becomes an accepted tool within the building and construction industry, the question of the some form of user-pays mechanism may need to be investigated, as it is reasonable that the users contribute to the ongoing maintenance of the legislation by the government. The equity issues in determining a suitable payment mechanism may be difficult to resolve as the mere existence of the legislation will benefit all building and construction industry participants by providing strong disincentives for them to indulge in inappropriate payment practices.

An alternative funding source is the Building Administration Fund (BAF). The BAF is established under the *Building Act 2000* and is to be used for:

- a) The administration of the Act; and
- b) Any other purpose relating to building and plumbing matters the Minister determines.

Subject to industry consultation, the use of the BAF to support the proposed security of payments legislation may be appropriate. Importantly, the fund has a broad industry-based user-pays foundation, with revenue to the fund being raised through a percentage levy on any building permit.

Recommendation 10

It is recommended that:

- There be no user-pays funding mechanisms be imposed to fund the government administration of the proposed security of payments legislation for the initial three years of its operation.
- The potential be investigated for funding the development and ongoing operation of the legislation through the Building Administration Fund.

³⁷ These costs will be largely confined to the costs of adjudication.

7 BIBLIOGRAPHY

2nd Reading Speech on Construction Contracts Bill 2004, Ms A.J. MacTiernan, Minister for Planning and Infrastructure, WA Hansard – House of Assembly, Wednesday 3 March 2004

ABS Cat. 8752.0 – Building Activity Australia - Value of Non-Residential Building Approved – Tasmania

ABS Cat. 8762.0 Engineering Construction Activity Australia – Value of Work Done - Tasmania

AS 2124 –1992 General Conditions of Contract, Standards Australia

AS 2124-1992 General Conditions of Contract, Standards Australia

AS 4122–1994 - General Conditions of Contract for Engagement of Consultants, Standards Australia

AS 4122-2000 General Conditions of Contract for Engagement of Consultants, Standards Australia

AS 4300-1995 General Conditions of Contract for Design and Construct, Standards Australia

AS 4905-2002 – Minor Works Contract Conditions, Standards Australia

Building Act 2000, Tasmania.

National Action on Security of Payment in the Construction Industry, APCC, Adelaide 1996.

National Code of Practice for the Construction Industry – Towards Best Practice Guidelines, APCC, 1999

Public Works Tender Board Guidelines, Department Of Treasury And Finance, October 1997 (Update 10 - 09/03/2005)

Queensland Legislative Council Hansard, 18 May 2004, pages 71-72.

Review of Victorian Security of Payment Act 2002 - Options Discussion Paper, June 2004, Building Commission of Victoria

Tasmanian Contractor’s Debts Act 1939

Tasmanian Department of Treasury and Finance “Winning Government Business” website, www.purchasing.tas.gov.au/winninggovernmentbusiness, 17 Apr. 06

Tasmanian Department of Treasury and Finance website, www.treasury.tas.gov.au, 17 April 06

The Final Report of the Royal Commission into the Building and Construction Industry, Volume Eight, Reform – National Issues Part 2, February 2003

Various jurisdictional Security of Payment legislative schemes as detailed in Table 1

Websites of Security of Payment administering agencies as per Table 1

ATTACHMENT A – ANALYSIS OF JURISDICTIONAL SECURITY OF PAYMENT LEGISLATION

Key Legislative Characteristics	NSW	Victoria	Queensland	WA	NT
Objectives/Purpose	<p>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.</p> <p>The means by which the Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.</p> <p>This is ensured by establishing a procedure</p>	<p>The object of the Act is to ensure that any person who carries out construction work or who supplies related goods and services under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of that work and the supplying of those goods and services.</p> <p>The means by which the Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in circumstances where the relevant construction contract fails to do so.</p> <p>This is ensured by establishing a procedure that involves—</p> <p>(a) the making of a payment claim by</p>	<p>The object of the Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person—</p> <p>(a) undertakes to carry out construction work under a construction contract; or</p> <p>(b) undertakes to supply related goods and services under a construction contract.</p>	<p>An Act —</p> <ul style="list-style-type: none"> to prohibit or modify certain provisions in construction contracts; to imply provisions in construction contracts about certain matters if there are no written provisions about the matters in the contracts; to provide a means for adjudicating payment disputes arising under construction contracts, and for related purposes. 	<p>(1) The object of this Act is to promote security of payments under construction contracts.</p> <p>(2) The object of this Act is to be achieved by –</p> <p>(a) facilitating timely payments between the parties to construction contracts;</p> <p>(b) providing for the rapid resolution of payment disputes arising under construction contracts; and</p> <p>(c) providing mechanisms for the rapid recovery of payments under construction contracts.</p>

Key Legislative Characteristics	NSW	Victoria	Queensland	WA	NT
	<p>that involves—</p> <ul style="list-style-type: none"> (a) the making of a payment claim by the person claiming payment, and (b) the provision of a payment schedule by the person by whom the payment is payable, and (c) the referral of any disputed claim to an adjudicator for determination, and (d) the payment of the progress payment so determined. 	<ul style="list-style-type: none"> payment claim by the person claiming payment; and (b) the provision of a payment schedule by the person by whom the payment is payable; and (c) the referral of any disputed claim to an adjudicator for determination; and (d) the payment of the amount of the progress payment determined by the adjudicator or the setting aside of money as security for payment of the progress payment; and (e) the recovery of the progress payment in the event of a failure to pay. 			
Owner Builders included in scope of Act	No	No	No	Yes	Yes
Scope of exclusions from definition of construction	<p>Drilling or extraction of oil and natural gas</p> <p>Extraction of minerals</p>	<p>Drilling or extraction of oil and natural gas</p> <p>Extraction of minerals</p>	<p>Drilling or extraction of oil and natural gas</p> <p>Extraction of minerals</p>	<p>Drilling or extraction of oil and natural gas</p> <p>Construction of plant used for extracting or processing oil and</p>	<p>Drilling or extraction of oil and natural gas</p> <p>Extraction of minerals</p> <p>Construction activity related to wholly artistic</p>

Key Legislative Characteristics	NSW	Victoria	Queensland	WA	NT
				natural gas Extraction of minerals Construction activity related to wholly artistic works, including sculptures, installations and murals Construction activity related to watercraft	works, including sculptures, installations and murals Construction activity related to watercraft
Void or prohibited clauses in contracts	“Paid when paid” clauses are rendered void by the Act	“Paid when paid” clauses are rendered void by the Act	“Paid when paid” clauses are rendered void by the Act	“Paid when paid” and “Paid if paid” clauses are prohibited. Provisions requiring payment to be made after 50 days are prohibited	“Paid when paid” and “Paid if paid” clauses are prohibited. Provisions requiring payment to be made after 50 days are prohibited
Implied provisions that are “read into” contracts	-	-	-	If no written provisions for the following are provided in the contract, the Act implies provisions relating to these matters in contract: <ul style="list-style-type: none"> • Variations of contract provisions • Contractors entitlement to be paid • Contractors right to make progress payments claims 	If no written provisions for the following are provided in the contract, the Act implies provisions relating to these matters in contract: <ul style="list-style-type: none"> • Variations of contract provisions • Contractors entitlement to be paid • Contractors right to make progress payments claims

Key Legislative Characteristics	NSW	Victoria	Queensland	WA	NT
				<ul style="list-style-type: none"> • Process for making payment claims • Process and timeframes for responding to payment claims • Timing of payments • Interest on overdue payments • Ownership of goods • Duties as to unfixed goods on insolvency • Status of retention money 	<ul style="list-style-type: none"> • Process for making payment claims • Process and timeframes for responding to payment claims • Timing of payments • Interest on overdue payments • Ownership of goods • Duties as to unfixed goods on insolvency • Status of retention money
Defines right to progress payment	Yes	Yes	Yes	Yes (via implied provision)	Yes (via implied provision)
Definition of payment claim	Payment claims relate to claims submitted by contractors to their principal (client) for performance of their obligations under the contract	Payment claims relate to claims submitted by contractors to their principal (client) for performance of their obligations under the contract	Payment claims relate to claims submitted by contractors to their principal (client) for performance of their obligations under the contract	Payment claim means: <ul style="list-style-type: none"> • A claim by a contractor to their principal (Client) for payment for the performance of their obligations under the contract; or • A claim by a principal (client) to a contractor relating to non-performance of their obligations 	Payment claim means: <ul style="list-style-type: none"> • A claim by a contractor to their principal (Client) for payment for the performance of their obligations under the contract; or • A claim by a principal (client) to a contractor relating to non-performance of their obligations

Key Legislative Characteristics	NSW	Victoria	Queensland	WA	NT
				under the contract.	under the contract.
Due date for payment of progress claims	Date specified in contract; or If no date specified in contract, 10 business days after payment claim is made.	Date specified in contract; or If no date specified in contract, 10 business days after payment claim is made.	Date specified in contract; or If no date specified in contract, 10 business days after payment claim is made.	Respondent must pay the whole claim or the undisputed part of a claim within 28 days.	Respondent must: <ul style="list-style-type: none"> If a part of the claim is disputed – pay the undisputed amount within 10 business days. If no part of the claim is disputed – pay the claim within 20 business days.
Procedure for recovering progress payment	Claimant serves payment claim on respondent. Respondent must provide payment schedule detailing how claim will be met and/or reasons for withholding any amount.	Claimant serves payment claim on respondent. Respondent must provide payment schedule detailing how claim will be met and/or reasons for withholding any amount.	Claimant serves payment claim on respondent. Respondent must provide payment schedule detailing how claim will be met and/or reasons for withholding any amount.	Claimant serves payment claim on respondent. Respondent must provide payment of any amount that is not in dispute and/or provide “notice of dispute” detailing reasons for withholding any amount.	Claimant serves payment claim on respondent. Respondent must provide payment of any amount that is not in dispute and/or provide “notice of dispute” detailing reasons for withholding any amount.
Consequences of not paying claimant where no payment schedule is issued	Claimant may: <ul style="list-style-type: none"> Recover claimed amount as a debt in any court of competent jurisdiction; or Seek adjudication of the claim. Claimant may serve notice on respondent to	Claimant may recover claimed amount as a debt in any court of competent jurisdiction; and Claimant may serve notice on respondent to suspend work or supply.	Claimant may: <ul style="list-style-type: none"> Recover claimed amount as a debt in any court of competent jurisdiction; or See adjudication of the claim. Claimant may serve notice on respondent to	N/a	N/a

Key Legislative Characteristics	NSW	Victoria	Queensland	WA	NT
	suspend work or supply.		suspend work or supply.		
Consequences of not paying claimant in accordance with payment schedule	<p>Claimant may:</p> <ul style="list-style-type: none"> Recover claimed amount as a debt in any court of competent jurisdiction; or Seek adjudication of the claim. <p>Claimant may serve notice on respondent to suspend work or supply.</p>	<p>If respondent fails to pay or pays less than scheduled amount, then:</p> <ul style="list-style-type: none"> Claimant may recover claimed amount or unpaid portion as a debt in any court of competent jurisdiction. Claimant may serve notice on respondent to suspend work or supply. 	<p>Claimant may:</p> <ul style="list-style-type: none"> Recover claimed amount as a debt in any court of competent jurisdiction; or Seek adjudication of the claim. <p>Claimant may serve notice on respondent to suspend work or supply.</p>	N/a	N/a
Consequences if Payment Schedule issued is for less than claimed amount	Claimant may apply for adjudication.	Claimant may apply for adjudication.	Claimant may apply for adjudication.	N/a	N/a
Consequences of not paying claimant where progress payment claim has been lodged	N/a	N/a	N/a	Any party may seek adjudication of a payment dispute.	Any party may seek adjudication of a payment dispute.
Requirement to pay amount determined by an adjudicator	Respondent must pay amount to claimant.	<p>Respondent must either:</p> <ul style="list-style-type: none"> Pay amount to claimant; or Give security for payment of that amount to the claimant pending the final determination of the 	<p>Respondent must pay amount to claimant.</p> <p>If the respondent takes action to have the judgement debt set aside, they must pay the disputed amount to the court as security.</p>	Respondent must pay amount to claimant	Respondent must pay amount to claimant

Key Legislative Characteristics	NSW	Victoria	Queensland	WA	NT
		matters in dispute between them.			
Does adjudicator determinations affect rights by parties under a contract	No	No	No	No	No
Consequences of not paying claimant adjudicated amount	ANA issues adjudication certificate – which can be filed as a judgment for a debt in court of competent jurisdiction. If the respondent takes action to have the judgement debt set aside, they must pay the disputed amount to the court as security. Claimant may serve notice that they are going to suspend work or supply.	Claimant can recover amount from respondent as a debt in court of competent jurisdiction. Claimant may serve notice that they are going to suspend work or supply.	ANA issues adjudication certificate – which can be filed as a judgment for a debt in court of competent jurisdiction. If the respondent takes action to have the judgement debt set aside, they must pay the disputed amount to the court as security. Claimant may serve notice that they are going to suspend work or supply.	Claimant can recover amount from respondent as a debt in court of competent jurisdiction (determination must be certified by Registrar). Claimant may serve notice on respondent to suspend work or supply.	Claimant can recover amount from respondent as a debt in court of competent jurisdiction (determination must be certified by Registrar). Claimant may serve notice on respondent to suspend work or supply.
Is claimant able to recover claim from Principal (ie, the client of the respondent)?	No	Yes – if certain conditions have been complied with.	No	No	No
Method of engaging adjudicators	Through Authorised Nominating Authority	Currently there are two options: <ul style="list-style-type: none"> • Option for direct appointment by party; or • Through Authorised Nominating Authority. 	Through Authorised Nominating Authority	Through prescribed appointers	Through prescribed appointers

Key Legislative Characteristics	NSW	Victoria	Queensland	WA	NT
		It is noted that the current amending Bill provides that the method for engaging adjudicators will be changed to follow the NSW model.			
Registration of adjudicators	No	No	Yes	Yes	Yes
Adjudicator fees	Parties pay equal shares, but adjudicator may override and apportion costs between parties.	Parties pay equal shares, but adjudicator may override and apportion costs between parties.	Adjudicator determines apportionment of costs between parties.	Parties pay equal shares, but adjudicator may override and apportion costs between parties.	Parties pay equal shares, but adjudicator may override and apportion costs between parties.
Establishes Registrar for administrative matters	No	No	Yes	Yes	Yes
Integrated with Builders licensing/registration system	No	No	Yes – failure to pay can earn demerit points against building licence	No	No

ATTACHMENT B – SURVEY METHODOLOGY

The industry survey involved the distribution of a survey instrument to a randomly selected sample of the Tasmanian construction industry. The distribution of the survey took two forms:

1. Paper based, delivered via mail for return in a reply paid envelope.
2. Soft copy version for distribution via industry peak bodies.

In order to avoid the duplication of survey returns each mail survey was given a unique serial number to identify its source, and eliminate duplications. The soft copy varied in content to the paper based in its collection of the business name, its postcode and industry sector in which it operates. This data has been previously captured through the serialisation of survey forms and thus did not need to be collected twice.

The survey respondents were sourced from four different datasets, namely:

1. Registers created under the *Building Act 2000* (BA), the *Plumbers and Gas-fitters Registration Act 1951* (PGRA) and the *Electricity Industry Safety and Administration Act 1997* (EISA) which Workplace Standards Tasmania administer *and*
2. Yellow Pages (YP) for occupations not covered by the above database registers.

Respondents sourced from the Government registers were provided with a form letter from the appropriate registrar outlining the purpose of the survey and legislative issues relating the provision of their name. A similar introduction was developed by the consultants for the yellow pages respondents.

Electronic copies were forwarded to:

- Air-conditioning and Mechanical Contractors Association (AMCA) Tasmania
- Australian Council of Building Design Professionals – Tasmanian Division
- Housing Industry Association Ltd Tasmania
- Master Plumbers Association of Tasmania
- National Electrical and Communications Association
- Housing Industry Association
- Master Builders Association of Tasmania
- Civil Contractors Federation

Sampling Framework

The population number was derived from the Yellow Pages data set of construction businesses in Tasmania. The completeness of this data was cross-referenced with the three Government collections and an occupational listing of provided by the Tasmanian Building and Construction Industry Training Board.

A distribution of 300 mail outs together with electronic distribution was made to provide a target yield of 100 businesses. This provided a dataset with 95% confidence level and a 5% confidence interval. This means that when the results indicate that security of payment issues affects XX% of the industry, we are 95% confident that this is true within 5% of the percentage quoted.

To aim for breadth of coverage of the survey each industry ‘sub sector’ (listed below) randomly provided the numbers of addresses as shown in Table 5.

Table 5: Sampling Profile

Industry Activity	Population	weight	Sample (n)	Source
Add: Electrical contractor	333	0.07	21	EISA
Add: Plumber - Mechanical Services	38	0.01	2	PGRA
Add: Plumber - Roof	40	0.01	3	PGRA
Add: Plumber - Sanitary	260	0.06	17	PGRA
Add: Refrigeration/ Air Conditioning Mechanic	10	0.00	1	PGRA
Building Consultants	35	0.01	2	BA
Building Contractors	638	0.14	41	BA
...with Construction Service	54	0.01	3	BA
Building Surveyors	23	0.00	1	BA
Roof Construction	76	0.02	5	BA
Building Contractors--Alterations & Repairs	72	0.02	5	BA
Demolishers	27	0.01	2	BA
Architect	149	0.03	9	BA
Building Contractors--Alterations, Extensions & Renovati	154	0.03	10	BA
...with Construction Service	16	0.00	1	BA
Carpenters & Joiners	64	0.01	4	BA
...with Construction Service	1	0.00	0	BA
Kitchens, Renovations &/Or Equipment	181	0.04	12	BA
...with Construction Service	9	0.00	1	BA
Kit Homes	33	0.01	2	BA
...with Construction Service	4	0.00	0	BA
Drafting Services	101	0.02	6	BA
...with Construction Industry	2	0.00	0	BA
Building Inspection Services	30	0.01	2	BA
...with Structural Kind	4	0.00	0	BA
Engineers--Consulting	110	0.02	7	BA
...with Construction Service	3	0.00	0	BA
Surveyors--Engineering &/or Mining	23	0.00	1	BA
Quantity Surveyors	17	0.00	1	BA
Engineers--General	137	0.03	9	BA
Civil Engineers	27	0.01	2	BA
Landscape Architects	12	0.00	1	YP
Hire--Builders', Contractors' & Handyman's Equipment	83	0.02	5	YP
...with Construction Use	4	0.00	0	YP
Concrete Contractors	124	0.03	8	YP
...with Construction Service	5	0.00	0	YP
Paving--Brick	68	0.01	4	YP
Garage Builders &/or Prefabricators	54	0.01	3	YP
...with Construction Service	1	0.00	0	YP
Concrete Products	22	0.00	1	YP
...with Construction Service	2	0.00	0	YP
Paving--Asphalt &/or Bitumen	11	0.00	1	YP
Concrete Kerbs & Gutters	15	0.00	1	YP
Gardeners	147	0.03	9	YP
Bathroom Renovations	84	0.02	5	YP
...with Construction Service	2	0.00	0	YP

Insulation Contractors	45	0.01	3	YP
Spas, Hot Tubs &/or Equipment	29	0.01	2	YP
Doors & Door Fittings	45	0.01	3	YP
Rubbish Removers	56	0.01	4	YP
Painters & Decorators	323	0.07	21	YP
...with New Construction Properties	1	0.00	0	YP
Shade Structures & Sails	13	0.00	1	YP
...with Installation Service	2	0.00	0	YP
Carports &/or Pergolas	11	0.00	1	YP
Concrete--Pre-Mixed	32	0.01	2	YP
...with Construction Type	3	0.00	0	YP
Waterproofing Materials	5	0.00	0	YP
Employment--Labour Hire Contractors	33	0.01	2	YP
Boring &/or Drilling Contractors	35	0.01	2	YP
Excavating &/or Earth Moving Equipment	70	0.01	4	YP
Hoisting & Rigging Equipment	3	0.00	0	YP
Railway Construction, Equipment & Materials	2	0.00	0	YP
Construction &/or Project Management	46	0.01	3	YP
Shop & Office Fitting	33	0.01	2	YP
...with Fabrication Service	4	0.00	0	YP
Road Contractors	13	0.00	1	YP
Road Building Machinery	1	0.00	0	YP
Bridges &/or Bridge Contractors	6	0.00	0	YP
...with Construction Service	3	0.00	0	YP
Forklift Trucks	44	0.01	3	YP
Buildings--Prefabricated &/or Transportable	15	0.00	1	YP
...with Construction Service	4	0.00	0	YP
Acoustic Materials &/or Services	4	0.00	0	YP
Roof Trusses & Wall Frames	8	0.00	1	YP
Floors--Raised	2	0.00	0	YP
Signs--Neon &/or Illuminated	24	0.01	2	YP
Signs--Metal &/or Wood	8	0.00	1	YP
Rivets &/or Riveting Equipment	4	0.00	0	YP
Bricklayer	120	0.03	8	YP
Glazier	89	0.02	6	YP
Plasterer Fibrous	127	0.03	8	YP
Plasterer Solid	27	0.01	2	YP
Stonemason	31	0.01	2	YP
Scaffolder	16	0.00	1	YP
Ceramic Tiler	66	0.01	4	YP
Roof Tiler	2	0.00	0	YP
	4710		300	

Identification of Variables

The key variables for the industry survey were:

- The extent of the problem – how big is it in financial terms.
- The incidence of the problem – how often it occurs.
- The type of client/contractor that tends to cause the problem (and in what form).
- The level of building and construction effected.
- Current resolution practices.

The dependent variables identified were:

- The turnover of the business.
- The age of the business in terms of a being a new entrant (i.e. having been in business less than 3 years or more).
- The region of Tasmania in which the business operates.
- The area of activity of the business.
- The 'position' of the businesses activity within the construction chain.

It should be noted that, in designing a survey that focussed on these variables, a number of issues restricted the nature of the questions and length of the survey. Specifically:

- The survey instrument had to be designed to minimise the effort required by respondents to complete the form. This is always an important survey design feature for small and micro businesses in particular when trying to ensure appropriate response rates. For this reason, the survey was deliberately kept to one page so that respondents could quickly complete and fax their surveys.
- A balance had to be drawn in trying to determine the incidence and nature of any security of payment problem. It was decided to focus on the incidence in the last 12 months for the three types of security of payment problem and to contrast that against the situation 4 years previously (when building and construction activity was lower).
- A number of difficulties were encountered in trying to devise questions that could be easily answered by respondents and that would not provide ambiguous results. In particular, it would have been useful to determine if there was any difference in the incidence of security of payment problems between private and public sector projects. However, it was not practical to try and determine this as the ultimate client for the building and construction work might be many times removed from the respondent in terms of their place in the contract chain. Consequently, it was decided to focus on the immediate clients with whom the respondents dealt.

Data Analysis

The survey data was numerically coded and then analysed in SPSS.

Survey Form

The following survey form was used.



SECURITY OF PAYMENT CONSULTATION

The Government has commissioned Stenning & Associates and The Work Lab to prepare a report in relation to the extent of "security of payment" problems within the Tasmanian building and construction industry. Security of payment problems mean the **late** (eg beyond the contracted payment period), **partial** (eg payment withheld for any reason) or non-payment of building professionals for **any part of contracted building works** by end customers, developers or head contractors.

This brief survey is being distributed across the construction industry. Your business has been randomly selected to take part. All responses are **confidential** and no individual will be identified in our report



without prior written consent. We would welcome your input.

1. Who do you normally bill for your work?

The end customer

Another building professional (eg, head contractor, architect, sub-contractor etc.)

Other, specify

2. What percentage of your business is conducted on commercial, industrial or residential projects?

% Commercial % Industrial % Residential

3. Last financial year did your business have problems with late, partial or non-payment for your services?

Yes

No... go to question 7

4. Last financial year how many instances did your business have of the following?

Late payment for services → On average how many days late were the payments?

Partial payment for services

Non-payment for services



5. Last financial year, what percentage of your turnover was affected by late, partial or non-payment for your services? %

6. Please provide an estimate of your turnover last financial year. \$ 2004/2005

7. In terms of late, partial or non-payment for services, how did last financial year compare with four years ago?

Less than before

About the same

More than before

I wasn't in business then

8. Last time you experienced late, partial or non-payment for your services, what did you do?

Would you be willing to tell us about your experiences with late, partial or non-payment problems? If so, please provide your name and telephone number.

Name:

Phone:

Please fax your completed survey to (03) 6234 9423 or use the reply paid envelope enclosed by 28th Feb 2006

For queries relating to this survey call The Work Lab on (03) 6234 9422

Thank you for your participation in this survey

ATTACHMENT C – TABULATED SURVEY RESULTS

Sample Characteristics

One hundred completed questionnaires were received; however one was not included in the analyses because it was returned two weeks after the survey closing date. The overall survey response rate was 35 percent.

The frequency of response rates by Tasmanian geographic regions is presented in Table 6. The majority of surveyed respondents/businesses were located in Southern Tasmania and were involved building construction.

Table 6: The distribution of sample respondents across Tasmania

Region	Frequency	Percent
Southern Tasmania	39	39.39
Northern Tasmania	17	17.17
North Western Tasmania	16	16.16
Total	72	72.73
Missing data	27	27.27
Total	99	100.00

There are a multitude of approaches to classifying the various sub sectors of the building and construction industry. As outlined in the methodology the approach of this survey was to encapsulate the broadest spread of the industry, from architect to supplier. Responses against the Australian and New Zealand Standard Industry Classification (ANZSIC) codes are presented in Table 7.

Table 7: ANZSIC classifications of construction industries

ABS Classifications	Frequency	Percent
Building Construction	35	35.35
Non Building Construction	1	1.01
Site Preparation	4	4.04
Building Structure Services	19	19.19
Installation Trade Services	9	9.09
Building Completion Services	8	8.08
Other Construction Services	7	7.07
Total	83	83.84
Missing data	16	16.16
Total	99	100.00

Sixty-two percent of the sample worked directly for the end customer and 8.7 percent for another building professional. Twenty-two percent of the sample worked for both the end customer and another building professional (Table 8).

Table 8: Principal contractor

Response Category	Frequency	Percentage
-------------------	-----------	------------

End customer	64	62.1
Another building professional	9	8.7
Both	23	22.3
Total	96	93.2
Missing data/other	3	2.9

Table 9 shows business activity levels within the residential construction sector. Approximately 50 percent of the sample conducted the majority (more than 76%) of their business in the residential sector. Only three percent of the sample did not work in the residential sector.

Table 9: Percentages of business conducted in the residential sector

Response	Frequency	Percentage
None	3	3.0
1-25 percent	24	24.2
26 to 50 percent	12	12.1
51 to 75 percent	9	9.1
76 percent or more	49	49.5
Total	97	98.0
Missing data	2	2.0

Table 10 shows business activity levels within the commercial construction sector. Only 16 percent of the sample conducted the majority (more than 76%) of their business in the commercial sector. Twenty-five percent of the sample did undertake business within the commercial sector.

Table 10: Percentages of business conducted in the commercial sector

Response	Frequency	Percentages
None	25	25.3
1-25 percent	35	35.4
26 to 50 percent	11	11.1
51 to 75 percent	10	10.1
76 percent or more	16	16.2
Total	97	98.0
Missing data	2	2.0

Table 11 shows business activity levels within the industrial construction sector. Approximately three percent of the sample conducted the majority (more than 76%) of their business in the industrial sector. Sixty-two percent of the sample did not undertake business within the industrial building and construction sector.

Table 11: Percentages of business conducted in the industrial sector

Response	Frequency	Percentages
None	62	62.6
1-25 percent	28	28.3
26 to 50 percent	2	2.0
51 to 75 percent	2	2.0
76 percent or more	3	3.0
Total	97	98.0
Missing data	2	2.0

The relationship between the sector where a business mostly works and who they normally bill for work is presented in Table 12. Across the commercial and residential sectors, the surveyed respondents worked mainly for the end customer.

Table 12: Relationship between building and construction industry sectors and who is billed for work

Billing	Commercial	Industrial	Residential	Other	Total
End customer	17	2	42	1	62
Another building professional	2	1	6	0	9
Both	9	2	10	1	22
Total	28	5	58	2	93

The Impact of Payment Issues

Over the past financial year, about 43 percent (n=42) of survey respondents reported problems with non-payments, late payments and/or partial payments. The instances of late, partial and non-payments of these 42 businesses are presented in Table 13. The *median* number of late payments was 6 per business that were on average 41 days overdue. The *average* numbers of partial and non-payments were 5 and 1.6 respectively.

Table 13: Reported incidences of late, partial and non payment problems

Last financial year did you have problems with payment?	Last financial year how many instances did you have with late payment for services?	On average how many days late were the payments?	Last financial year how many instances did you have with partial payment for services?	Last financial year how many instances did you have with non-payment for services?
yes	50	42	0	0
yes	not reported	not reported	not reported	not reported
yes	4	45	4	6
yes	0	35	0	0
yes	1	60	1	0
yes	0	0	1	0
yes	3	60	0	0
yes	6	30	0	0
yes	2	120	0	0
yes	1	90	0	0

Last financial year did you have problems with payment?	Last financial year how many instances did you have with late payment for services?	On average how many days late were the payments?	Last financial year how many instances did you have with partial payment for services?	Last financial year how many instances did you have with non-payment for services?
yes	not reported	not reported	not reported	2
yes	not reported	not reported	not reported	1
yes	3	30	3	1
yes	6	100	2	0
yes	not reported	30	not reported	0
yes	4	7	1	0
yes	3	30	1	0
yes	4	90	0	0
yes	5	60	0	0
yes	20	90	2	1
yes	2	60	3	2
yes	7	60	0	0
yes	5	180	2	1
yes	10	20	1	0
yes	30	10	0	0
yes	10	20	0	0
yes	3	20	0	0
yes	12	7	2	2
yes	30	21	6	3
yes	10	30	0	0
yes	84	10	0	0
yes	1,200	15	60	10
yes	100	15	0	1
yes	25	56	10	1
yes	20	21	0	2
yes	6	30	6	1
yes	20	90	0	0
yes	1,150	40	100	25
yes	not reported	23	1	1
yes	10	14	2	0
yes	0	30	0	5
yes	25	30	10	2
42 business (43%)	34 businesses (81 %)	Mean 41 days	20 business (47.6%)	18 businesses (42.9%)

For the businesses surveyed, last financial year over \$37 million of cash flow was impacted by late, partial or non-payments. This estimated proportion of business turnover affected by late, partial or non-payment for services over the last financial year is presented in Table 14.

On average, security of payment problems impacted on around 25 percent of their revenue (mean 24.8%, standard deviation, 24.41%). There was considerable variation however, with one business, for example, reporting that 70 percent of its revenue (\$14 million dollars) was effected by payment issues last financial year. Extrapolated across the industry these findings would suggest that in excess of \$153 million dollars is impacted by security of payment issues in Tasmania per annum. However, such extrapolation should be treated with caution given the large standard deviation (24.41%).

Table 14: Percentage wise, the amount of business turnover affected by security of payment problems over the last financial year

Percentage Categories	Frequency	Percent
1-25 percent	26	65.0
26 to 50 percent	7	17.5
51 to 75 percent	6	15.0
76 percent or more	1	2.5
Total	40	100.0

Of those businesses reporting payment issues last financial year, 63 percent were engaged by the end customer and 12 percent with another building professional (Table 15).

Table 15: The frequency of security of payment problems by who is normally billed for work

		Commercial	Industrial	Residential	Total
End customer	Frequency	9	2	15	26
	Percentage	56.25%	66.67%	68.18%	63.41%
Another building professional	Frequency	2	0	3	5
	Percentage	12.50%	0%	13.64	12.20%
Both	Frequency	5	1	4	10
	Percentage	31.25%	33.33%	18.18%	24.39%
Total	Frequency	16	3	22	41
	Percentage	100.00%	100.00%	100.00%	100.00%

While not all business experienced payment issues last financial year, 81 percent reported they experienced payment issues at some stage. The types of actions or solutions respondents reported using to recover outstanding payments is presented in Table 16. Respondents most often tried to recover monies themselves. Legal action, mediation and collection agencies were also utilised, but to a far lesser degree, with court action the least favoured action.

Table 16: Summary of the types of action taken to recover monies owing

Response Category	Frequency
Self-initiated	56
Legal professional	10
Collection agency	9
Court action	6

Payment Issues and Business Characteristics

Whether or not a business experienced late, non or partial payment problems in the last financial year was found to be related to the percentage of work (i.e. 1-25%, 26-50%, 51-75%, 76% or more) undertaken in the residential sector [chi-squared=10.42, df=3, p=.015]. Two trends were apparent.

- Businesses that conducted between 26-50 percent of their work in the residential sector were **more likely** to report payment issues.
- Business working almost exclusively in the residential sector (76% or more of their business) were **less likely** to report payment issues.

Businesses who experienced security of payment issues in the last financial year reported that, compared to four years ago, the problem was increasing [chi-squared=10.49, df=3, p=.015].

Whether or not a business experienced late, non or partial payment problems in the last financial year was unrelated to any of the following business factors:

- Whether the contractor was the end customer and/or another building professional [chi-squared=.91, df=2, p=.63].
- The region in which the business is based (i.e. Southern, Northern or North West Tasmania) [chi-squared=2.89, df=2, p=.23].
- Whether the business was operating in building construction, non-building construction, site preparation, building structural services, installation and trades services, building completion services or other construction services [chi-squared=10.10, df=6, p=.12].
- The percentage of work (i.e. 1-25%, 26-50%, 51-75%, 76% or more) undertaken in the commercial sector [chi-squared=3.18, df=3, p=.28].
- The percentage of work (i.e. 1-25%, 26-50%, 51-75%, 76% or more) undertaken in the industrial sector [chi-squared=2.23, df=3, p=.52].