

Building and Construction Industry Adjudication – The Registrar’s View

Michael Chesterman¹

Introduction

The *Building and Construction Industry Payments Act 2004* (the Act) was passed by the Queensland Parliament on 11 May, 2004, with its provisions introduced over two stages.

On 1 July 2004, the Act introduced administration provisions which established a Registry and an Adjudication Registrar with the following functions:

- register of Authorised Nominating Authorities (ANA’s);
- register of qualified Adjudicators;
- provide a public register of Adjudication Decisions;
- monitor relevant payment and contractual developments;
- review and analysis of effectiveness of legislation;
- provide ongoing education and awareness.

The principal role of the Adjudication Registrar is to monitor the operations of ANAS’s and Adjudicators to ensure the effectiveness of the Act and to provide education and awareness of the Act.

The contractual provisions of the Act commenced on 1 October 2004 and therefore have now been operational for over 18 months. Significantly, the Act is increasingly being seen as an alternative to the courts to resolve contractual and payment disputes in the building and construction industry.

Detailed below are initiatives undertaken by the Building and Construction Industry Payments Agency (the Agency) since the introduction of the Act.

April 2006 Statistics

The Agency has developed a series of reports which highlight all key aspects of the Act. Attached is a summary of all adjudication activity for the 2005/2006 financial year as at 30 April 2006.

Year to date, a total of 223 adjudication applications, representing payment claims totaling \$26,367,852.85, have been lodged. A steady increase of applications has been received this financial year, indicating that the Act is increasingly being seen as a quicker and cheaper alternative than the courts to resolve payment disputes.

On average, in all decided matters, claimants are receiving approximately 56% of what they were claiming. The success of claimants in this regard varies according to size of the payment claim (See Attachment 6 – Decided Matters Statistics).

1 Michael Chesterman is the Adjudication Registrar for the Building and Construction Industry Payment Agency and has been in this position for the last two years. Prior to this appointment he spent two years researching security of payment in Australia and gave drafting instructions for the *Building and Construction Industry Payments Act 2004*. Michael was previously employed by the Building Services Authority for seven years as the Compliance Manager and has also held roles with Department of Fair Trading in NSW prior to relocating to Queensland.

Although the Act is relatively new the following trends in adjudication are emerging:

- Subcontractors are the largest category of claimants
- Head contractors are the largest category of respondents
- Average adjudication fees in relation to the size of the payment claim, vary considerably. The larger the payment claim, the more complex the issues, resulting in higher adjudication fees. However in relation to the size of the payment claim, the larger the claim the lower the average adjudication fee.
- Significantly, respondents in the smaller type disputes are largely funding the adjudication process because in the majority of matters they are being found to have failed to substantiate an entitlement to withhold progress payments.
- However the larger the payments claim the greater the likelihood the adjudication fees will be split on a 50/50 basis between the claimant and respondent as both parties have provided substantial responses.

The following breakdown of statistics is attached:

- Building and Construction Industry Payment Act 2004 – Attachment 1 – Application Statistics;
- Building and Construction Industry Payment Act 2004 – Attachment 2 – Applications by Region;
- Building and Construction Industry Payment Act 2004 – Attachment 3 – Claimant and Respondent Statistics;
- Building and Construction Industry Payment Act 2004 – Attachment 4 – Claimed Amount Statistics;
- Building and Construction Industry Payment Act 2004 – Attachment 5 – Year to Date;
- Building and Construction Industry Payment Act 2004 – Attachment 6 – Decided Matter Statistics;
- Building and Construction Industry Payment Act 2004 – Attachment 7 – Adjudication Fee Statistics YTD.

Conditions of Registration – Dealing with Conflict of Interest

One of the duties of the Adjudication Registrar is to monitor the operation of ANA's and Adjudicators. In this regard potential conflict of interest issues emerged relating to the operation of ANA's.

The Act operates in such a manner whereby only persons who carry out construction work or supply related goods or services can lodge an adjudication application (claimant). Furthermore, it is a matter for the claimant to select the ANA they wish to lodge an adjudication application with.

The responsibility then lies with the selected ANA to nominate an appropriately qualified and registered adjudicator to decide the adjudication application lodged by the claimant. In turn, on accepting an adjudication application the adjudicator is empowered to decide the amount of a progress payment, if any is to be paid by the respondent to the claimant. Significantly, only a claimant can have decided in their favour, an amount of a progress payment.

To resolve potential conflict of interest issues a condition of registration was imposed on the registration of all ANA's on 8 May 2006.

The proposed condition is designed to ensure that it will not be possible for any individual

involved in the day-to-day operations of an ANA to be involved in the referral of an adjudication application to any registered adjudicator where that individual has knowingly, either directly or indirectly, provided advice, information or assistance in the preparation of the construction contract being the subject of the adjudication application, to any of the parties involved in the contract.

Failure to comply with any condition of registration, either by ANA's or Adjudicators, can result in the suspension or cancellation of their registration.

Judicial Review Act 1991

On 23 August 2005 an adjudicator decided that in a progress payment dispute referred to him, JJ McDonald and Sons Engineering Pty Ltd (McDonald) was obliged to pay CEPM Pty Ltd an amount of \$144,082.18 for the performance of construction work.

Rather than paying the interim decided amount and then looking to the contract to effectively "re argue" the matter on a final contractual basis, or in the alternative seeking to have judgement for the debt set aside in the event that CEPM sought to enforce the adjudicator's decision in a court of competent jurisdiction (section 31 of the Act), McDonald elected to apply to the Supreme Court for the adjudicator's decision to be reviewed pursuant to section 20 of the *Judicial Review Act 1991* (JRA).

On 12 October 2005 Justice Dutney dismissed the application and ordered McDonald to pay the costs CEPM incurred in defending the matter.

However Justice Dutney found that the provisions of the JRA do apply to an adjudicator's decision under the Act because it is authorised by statute and in his opinion, has the effect of conferring, altering or affecting legal rights.

In so finding, Justice Dutney stated in his reasons "that unless decisions under this legislation are excluded from the operations of the JRA the benefit of prompt periodic payments to contractors, which is the stated purpose of the Act, is likely to be defeated by applications for review ...".

Applications to the Supreme Court for the review of decisions of adjudicators under the JRA on the grounds that the decision involved an error of law or the decision was contrary to law would almost certainly render the Act useless in quickly resolving on an interim basis, payment disputes that gave rise to these applications being made because of the time it would take for the court to resolve these matters.

Such a broad ability for the Supreme Court to review the decisions of adjudicators was never contemplated in the drafting of the Act. If no action is taken to address this development, eventually an adjudicator's decision will be overturned on JRA grounds because amongst other things, an error of law on the record or otherwise is a ground for an application. This is even a broader "appeal option" on judicial review grounds than is the case under the Commercial Arbitration Act where an error of law must appear on the face of the award.

In summary, a cheap, quick, interim adjudication decision can be overturned on broader grounds than an expensive, process driven final arbitration decision.

The McDonald/CEPM application is a case in point when looking at the likely delay successful adjudication claimants may incur if a "losing" adjudication respondent attempts to delay meeting their interim payment obligations by seeking to rely on the provisions of the JRA. In this particular matter, a total of 7 weeks expired between the adjudicator's decision and the decision by Justice Dutney to dismiss the application by McDonald.

While CEPM was the successful party in this particular matter brought before the Supreme Court, the fact that they had to wait a considerable period of time to receive a significant interim progress payment for construction work carried out, their entitlement to which had been assessed by an independent adjudicator, may well have caused them to incur short-term financial hardship.

As such the Registrar has recommended that the *Building and Construction Industry Payments Act 2004* be exempt from the provisions of the JRA if it is to meet its objectives.

Based on this recommendation, the Minister wrote to the Attorney-General seeking the above exemption. In a reply to the Minister the Attorney-General committed to exempting decisions of adjudicators from the JRA.

Review of the Building and Construction Industry Payments Act 2004

In introducing the Act into Parliament on 11 May 2004, the Minister committed to reviewing the Act after 12 months of operation.

The Building and Construction Industry Payments Agency has reviewed the Act from an administration basis. From an administrative perspective, the Agency has for the past several months undertaken various enquiries and investigations with a view to identifying any relevant issues relating to the adjudication process. The review process has involved:

- contacting all registered ANA's to provide comment on how they believe the Act is operating;
- contacting all registered Adjudicators who had decided matters to date, to provide comment on how they believe the Act is operating;
- contacting claimants who have had Adjudication Certificates issued to obtain feedback on the adjudication and enforcement process;
- monitoring and reviewing current cases before the Supreme court based on reviews under the JRA; and
- reviewing statistical reports to identify early adjudication trends.

The findings of this review are currently being presented to the Building Services Authority Board and will be released once the recommendations have been approved.

Australasian Construction Payments Forum

Since 1999 Security of Payment legislation of a largely harmonised nature has been adopted by a number of Australian and overseas jurisdictions. Adjudication is increasingly being seen as a valid alternative to the courts to resolve payment disputes in the building and construction industry.

Over this period of time a number of regulators in those jurisdictions have established a close, informal working relationship. However, due to the increased acceptance of adjudication as a quick and cost effective means to resolve payment disputes, it was considered that liaison between the various regulators in these jurisdictions needed to be put on a more formal basis.

As such, on 20-21 February 2006 representatives from New South Wales, Victoria, Western Australia, Northern Territory, Tasmania and Queensland held a forum in Brisbane. The forum discussed various issues faced by each jurisdiction such as changes to legislation, Mutual Recognition, Registration of Adjudicators and Nominating Authorities, and Reporting Requirements.

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The outcome of the forum in Brisbane was the formation of the Australasian Construction Payments Forum which consists of members from New South Wales, Victoria, Western Australia, Northern Territory and Queensland.

The forum appointed Michael Chesterman, Queensland Adjudication Registrar as the Chairman for the first twelve months. Meetings will be held bi-annually with the next meeting proposed for August 2006. The forum has the following objectives:

- achieve, as much as possible national harmonisation of security of payment legislation;
- increase the exchange of information of an adjudication nature to promote consistent administration; and
- ensure integrity of adjudication legislation nationally.

Education and Awareness

Throughout the review of the Act many issues were identified in relation to education and awareness of the legislation and specifically in relation to the enforcement process associated with the Adjudication Certificate.

Over the next 18 months the Agency proposes the following education and awareness strategy to identify issues raised throughout the review:

- distribution of a fact book that details the Act and the adjudication process;
- production and distribution of a DVD/CD Rom that provides a guide to adjudication and other payment initiatives outlined in the Act;
- work in partnership with Justice and Attorney-General to ensure adequate education and awareness of the Adjudication Certificate and enforcement process;
- development of a “Discussion Board” on the BCIPA website that provides a forum for adjudication stakeholders to discuss relevant issues relating to interpretation of the Act; and
- development and distribution of a commercial newsletter that will identify issues.

Conclusion

In conclusion, the Act has had a very positive impact in resolving payment disputes and is increasingly being seen as a quick, cheaper alternative to the courts.

The initiatives of the Agency over the next 18 months will see increased awareness and usage of the Act.

For further information on any of the above issues please visit our website at www.bcipa.qld.gov.au.

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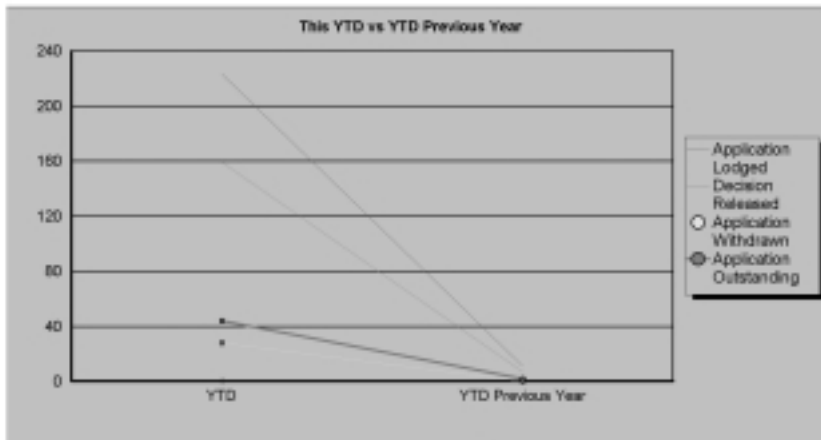
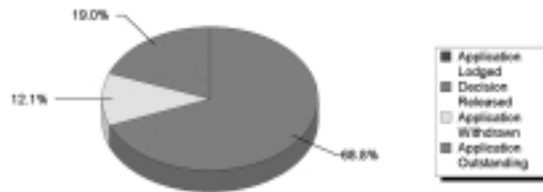
Application Statistics

YTD is the financial year ending 2006

Application Outstanding is any application that has not been released or withdrawn.

| Adjudication Applications | MTD | YTD | MTD Prev Year | YTD Prev Year |
|---------------------------|-----|-----|---------------|---------------|
| Application Lodged | 21 | 225 | 2 | 11 |
| Decision Released | 12 | 150 | 2 | 7 |
| Application Withdrawn | 3 | 26 | 0 | 0 |
| Application Outstanding | 17 | 44 | 0 | 2 |

Application Status YTD



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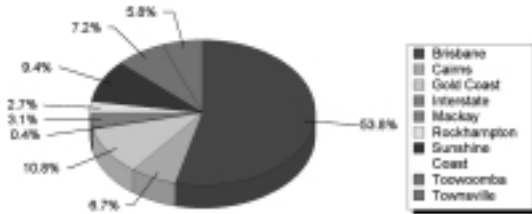
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Applications by Region

YTD is financial year ended 2006

Region is determined by the postcode of the site address for which the application is made.

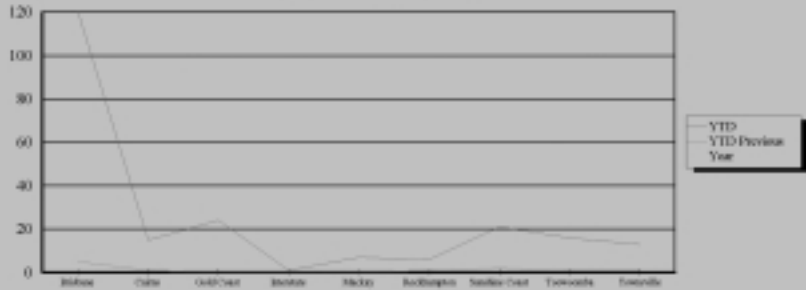
% of Applications for each Region YTD



| Region | MTD | YTD | MTD Prev Year | YTD Prev Year |
|----------------|-----|-----|---------------|---------------|
| Brisbane | 13 | 120 | 0 | 0 |
| Cairns | 3 | 15 | 0 | 1 |
| Gold Coast | 2 | 24 | 0 | 0 |
| Interstate | 0 | 1 | 0 | 0 |
| Mackay | 0 | 7 | 0 | 0 |
| Rockhampton | 0 | 0 | 0 | 1 |
| Sunshine Coast | 2 | 21 | 2 | 2 |
| Toowoomba | 0 | 18 | 0 | 1 |
| Townsville | 1 | 13 | 0 | 1 |

Total Applications MTD 21
Total Applications YTD 223

This YTD vs YTD Previous Year



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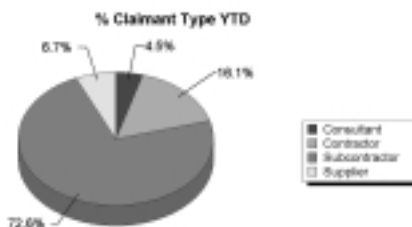
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Claimant and Respondent Statistics

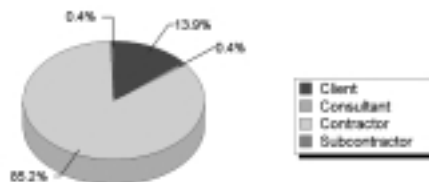
YTD is financial year ended 2006

Periods are derived from the application lodged date.

| Claimant Statistics | MTD | YTD | MTD Prev Year | YTD Prev Year |
|---------------------|-----|-----|---------------|---------------|
| Consultant | 1 | 18 | 1 | 1 |
| Contractor | 4 | 38 | 8 | 1 |
| Subcontractor | 15 | 152 | 1 | 8 |
| Supplier | 1 | 15 | 8 | 1 |



% Respondent Type YTD



| Respondent Statistics | MTD | YTD | MTD Prev Year | YTD Prev Year |
|-----------------------|-----|-----|---------------|---------------|
| Client | 2 | 31 | 1 | 1 |
| Consultant | 0 | 1 | 8 | 0 |
| Contractor | 18 | 108 | 1 | 10 |
| Subcontractor | 0 | 1 | 8 | 0 |

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Claimed Amount Statistics

YTD is financial year ended 2006

| Amount | MTD | YTD |
|--|----------------|-----------------|
| Total Value of Payment Claims | \$1,411,724.22 | \$20,307,652.85 |
| Total Value of Payment Claims - Decisions Released | \$1,793,722.28 | \$20,875,604.00 |
| Total Value of Adjudicated Amount - Decisions Released | \$1,620,064.64 | \$11,651,728.64 |

Decisions Released are reported at the date the adjudication decision was released.



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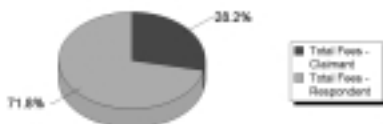
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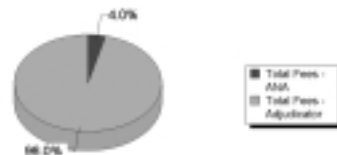
Year to Date

| | |
|-----------------------------------|----|
| Number of Adjudicators Registered | 89 |
| Number of ANAs Registered | 5 |

% of Fees Paid Claimant vs Respondent



% of Fees Adjudicator vs ANA



Fees are reported at the date of decision release

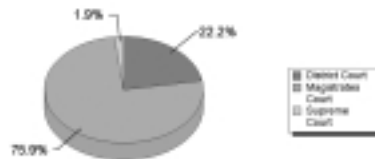
| Fees | YTD |
|--------------------|--------------|
| Total Fees | \$646,891.31 |
| Maximum Total Fees | \$100,704.10 |
| Minimum Total Fees | \$0.00 |
| Average Total Fees | \$4,803.47 |

223 Applications Lodged YTD
54 Adjudication Certificates Issued

Claims amounts are reported at the application lodgement date.

| Claimed Amounts | YTD |
|---|-----------------|
| Total Value of Claims | \$25,587,582.85 |
| Maximum Claim | \$4,711,811.83 |
| Minimum Claim | \$677.60 |
| Average Claim | \$115,240.28 |
| Total Value of Claims - Decision Released | \$20,670,694.00 |
| Maximum Claim - Decision Released | \$4,711,811.83 |
| Minimum Claim - Decision Released | \$680.00 |
| Average Claim - Decision Released | \$120,383.74 |

Adjudication Certificates Issued YTD



| Certificates Issued For | YTD |
|-------------------------|-----|
| District Court | 12 |
| Magistrates Court | 41 |
| Supreme Court | 1 |

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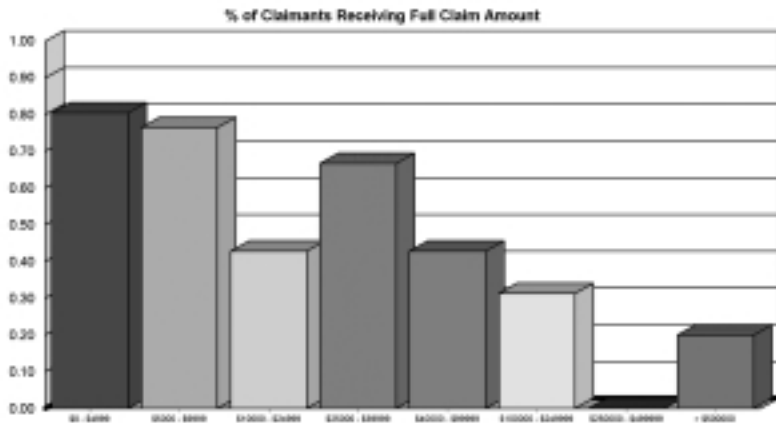
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Decided Matters Statistics

Figures are current financial
TTC and are reported by the
decision release date.

| Range of Claims | Total | Average Claim Amount | Average Scheduled Amount | Average Decided Amount | % of Claimants Receiving Full Claim Amount |
|---------------------|-------|----------------------|--------------------------|------------------------|--|
| \$0 - \$4999 | 41 | \$3,095.57 | \$367.43 | \$2,822.00 | 80.49% |
| \$5000 - \$9999 | 17 | \$7,699.88 | \$2,284.07 | \$8,818.30 | 76.47% |
| \$10000 - \$24999 | 28 | \$10,181.34 | \$3,770.21 | \$12,526.01 | 42.80% |
| \$25000 - \$39999 | 18 | \$31,276.68 | \$4,539.30 | \$23,161.98 | 66.87% |
| \$40000 - \$99999 | 21 | \$62,782.31 | \$6,562.12 | \$42,645.25 | 42.80% |
| \$100000 - \$249999 | 16 | \$181,076.27 | \$28,987.48 | \$108,990.64 | 31.25% |
| \$250000 - \$499999 | 13 | \$361,380.81 | \$1,519.08 | \$145,106.05 | 0.00% |
| > \$500000 | 6 | \$2,173,689.75 | \$975,290.62 | \$1,214,299.57 | 20.00% |



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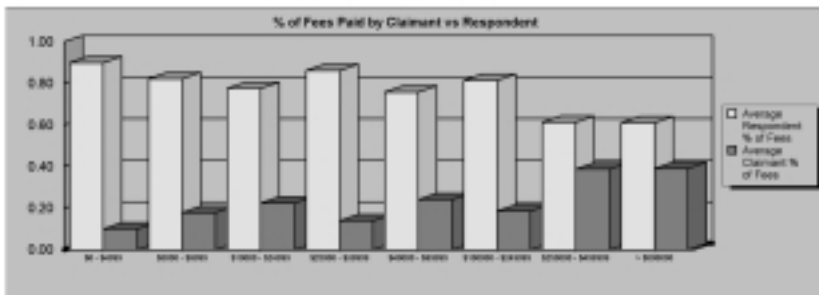
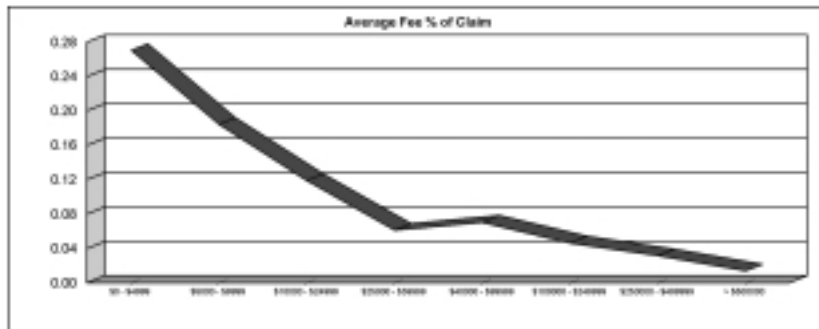
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Adjudication Fee Statistics YTD

Financial year ending 2006

Fees are reported at the date the adjudication decision is released.

| Range of Claims | YTD | Average Total Fee | Average Respondent Fee | Average Claimant Fee | Average Fee % of Claims | Average Respondent % of Fees | Average Claimant % of Fees |
|---------------------|-----|-------------------|------------------------|----------------------|-------------------------|------------------------------|----------------------------|
| \$0 - \$4999 | 41 | \$836.31 | \$762.94 | \$83.18 | 27.02% | 89.80% | 10.82% |
| \$5000 - \$9999 | 17 | \$1,486.39 | \$1,398.34 | \$298.01 | 18.48% | 82.36% | 17.84% |
| \$10000 - \$24999 | 28 | \$1,911.83 | \$1,463.06 | \$429.87 | 11.87% | 77.57% | 22.42% |
| \$25000 - \$39999 | 18 | \$1,911.57 | \$1,947.57 | \$294.00 | 6.11% | 86.10% | 13.81% |
| \$40000 - \$99999 | 21 | \$4,435.35 | \$3,341.94 | \$1,083.40 | 7.03% | 75.90% | 24.14% |
| \$100000 - \$249999 | 18 | \$6,958.29 | \$6,905.75 | \$1,282.54 | 4.61% | 81.42% | 18.58% |
| \$250000 - \$499999 | 13 | \$11,291.40 | \$8,908.32 | \$4,381.08 | 3.12% | 81.27% | 38.73% |
| > \$500000 | 5 | \$20,835.82 | \$18,178.41 | \$11,630.41 | 1.37% | 60.88% | 39.82% |



Date: 20/04/08

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